Exploring the Possibility of Establishing Global Constitutionalism and Multi-layered Protection of Human Rights

- Exploring the Possibility of Establishing a Regional Human Rights Mechanism in Asia -
Global Constitutionalism
and
Multi-layered Protection of Human Rights
Global Constitutionalism and Multi-layered Protection of Human Rights

- Exploring the Possibility of Establishing a Regional Human Rights Mechanism in Asia -

edited by SNU Asia-Pacific Law Institute
Preface

It is my great pleasure to publish this book, titled “Global Constitutionalism and Prospects for Multi-layered Protection of Human Rights”, which contains contributions of 37 dignitaries from 31 countries and four international human rights courts and organizations.

This publication covers the common interest of those involved in constitutional justice, namely human rights, rule of law, providing an introduction to different constitutional adjudication systems and observations to explore the possibility of creating a regional human rights mechanism in Asia. This book, hopefully, will offer readers the opportunity to gain an overview of and learn from the insights of constitutional law experts around the world.

In particular, the multidimensional perspectives on the recent trend of emerging global constitutionalism and the genuine suggestions for establishing a human rights court in the Asian region present a clear vision to many, including myself, who believe in the necessity of a regional system to reinforce the protection of human rights in Asia.

In this connection, it should be noted that the Association of Asian Constitutional Courts and Equivalent Institutions, or AACC, of which the Constitutional Court of Korea is a member, has recently taken a meaningful step towards the development of constitutional justice and advancement of human rights and democracy in the Asian region. At the 3rd Congress of the AACC held in Bali, Indonesia last August, the Association's members, following an intense discussion, unanimously agreed to set up a permanent platform of cooperation in the form of the Permanent Secretariat.

The AACC Permanent Secretariat for Research and Development located in Seoul was born out of this decision, and I believe it will make a huge contribution to taking the research
on constitutional justice to a higher level in Asia assist by regular meetings of the Joint Research Commission on Constitutional Justice and in-depth research and studies on the constitutional adjudication systems of Asian countries. As the Secretariat for Research and Development begins its activities in earnest, this publication will serve as an excellent reference for its work.

I would like to take this opportunity to express my sincerest appreciation to all the authors who have kindly sent us the insightful contributions, and hope that this publication will create a momentum for our efforts to promote human rights and democracy.
I welcome the timely publication of this important book, which intends to fathom various ways to establish an Asian Court of Human Rights, and I hope that such a Court can develop along the lines of the European Court of Human Rights, which celebrated its 60th anniversary not so long ago.

Regional courts of human rights exist not only in Europe but also in the Americas, in Africa and there is also a project to establish an Arab court. Asia however does not have such a court and citizens of most Asian countries are deprived of the possibility to appeal against a final judgment of national courts to a regional court.

The European Convention on Human Rights and our case-law have not only led to a harmonization of human rights standards in Europe, we also helped the parties to the Convention in substantially raising the level of human rights protection in their national jurisdictions.

From the outset, we were supportive of the initiative of the President of the Constitutional Court of the Republic of Korea, Mr. Park, to establish a Court of Human Rights in Asia, announced during the 3rd Congress of the World Conference on Constitutional Justice in Seoul in September 2014. Therefore, our judge Mark Villiger presented the experience in establishing and operating the European Court at the seminar on ‘A New Perspective for Multi-Layered Human Rights Protection in Asia’ in Seoul in June 2015.

I hope that the Asian countries which do not yet benefit from such a court will be able to establish an effective human rights mechanism enabling their citizens to appeal to a regional body which can provide this essential subsidiary relief.
I am confident that the publication of this book will contribute to raising the necessary awareness in like-minded states that wish to improve the level of human rights protection for the benefit of each individual under their jurisdiction.
Foreword

I would like to extend my sincerest congratulations to the Constitutional Court of Korea on its publication of a special volume of contributions on the occasion of its 28th anniversary, which will greatly contribute to the discussions on establishing a human rights court in the Asian region.

By reason of your direct request and special invitation I would like to take this valuable opportunity to offer a few suggestions for the creation of an Asian court of human rights based on the numerous experiences and difficulties faced by the Inter-American Court of Human Rights over the past 37 years, and send my support and encouragement for this bold initiative taken by the Korean Constitutional Court.

Above all, in order for a new initiative that seeks to create an international Court of Human Rights in Asia to be successful, it is imperative to ensure its independence, impartiality and autonomy. The Inter-American Court was an example of independence and impartiality from the beginning of their work. Being a Court of Law, it has been governed by fairness and transparency, and endeavored to be as fair as possible. The budgetary autonomy is necessary in order to effectively implement these guarantees.

Secondly, having a clear regulatory framework is essential to guarantee effective operation of the Court. The American Convention on Human Rights is the international instrument that gave life to the Inter-American Court and includes the rights that states have undertaken to respect. In addition, the American Convention allows the Court to have jurisdiction over other treaties such as the Inter-American Convention on Forced Disappearance. A future Asian Court should expressly establish what rights and freedoms it
has competence over. If a new international instrument is adopted, it must be sufficiently considered to allow the ever-increasing incorporation of the development of international human rights law, as well as the experience developed by other courts and human rights protection agencies.

Last but not the least, a new initiative that seeks to create an international Court of Human Rights in Asia involving jurisdiction over several states must have, from the beginning, with very clear budgetary basis. Historically, the Court started with a budget of $100,000 in 1979. This amount, even then, was negligible and insufficient to properly carry out their work. In this sense, the future Court of Human Rights for Asia should be established with a clear and effective mechanism to provide the sufficient budget for the Court. Material resources and an adequate institutional framework are also fundamental in this context.

Our task is the protection of human rights. Let’s make it the best possible way with the best possible structure with greater independence and transparency so that people who are under our jurisdiction receive the international treatment for the violations they suffered in a prompt and just manner similarly to the national.

I hope that, one day, Asia will also have a strong human rights court that will bring up the level of protection of fundamental rights of the entire Asian people.
I warmly welcome the publication of this book on the establishment of an Asian Court of Human Rights. The Venice Commission and I personally have strongly supported this initiative since the 3rd Congress of the World Conference on Constitutional Justice in Seoul in September 2014, when President Park Han-Chul presented this idea to Constitutional Courts and equivalent bodies in Asia and all over the world.

While other world regions have established such bodies – Africa, the Americas, Europe – or are currently doing so (Arab countries), Asia has not yet moved to establish a regional human rights protection system.

Human rights protection has to be a focus for every country and human rights must be protected at the national level but we have seen in other regions, which have such a Court for a long time already, that a regional Court of Human Rights is an essential subsidiary complement to the protection of human rights by the national States. In Europe for instance, the level of human rights protection has increased dramatically since the establishment of the European Court of Human Rights, which became such success story that there was a danger that it would implode under the number of applications. Happily enough, the Court managed to streamline its procedures to avert that danger.

While many will support the idea of an Asian Court of Human Rights, some have asked why it should be Constitutional Courts that take the initiative to set it up; treaty making should be left to Governments.

Of course, a treaty will be necessary and this is the competence of Governments and
Parliaments. However, such an important issue for the lives of many should be discussed by all stakeholders, by civil society, by the media, by academia, by Members of Parliament, by Governments but of course also by Constitutional Courts. Constitutional Courts are the guardians of human rights and it is only natural that they promote the establishment on the regional level of a body that pursues that same goal.

In order to achieve the necessary impetus in like-minded countries, it is essential to ‘weave’ an effective multi-level network for the promotion of the establishment of an Asian human rights mechanism or court. Open discussion in various fora is necessary and I am confident that this book will contribute to a discussion on this cause in Asian countries. The Venice Commission of the Council of Europe stands ready to actively participate in this discussion.

Let me conclude by thanking President Park and the Constitutional Court of the Republic of Korea for publishing this timely book which pursues a highly meaningful objective. The establishment of an Asian Court of Human Rights is not about institutional issues; this initiative is for individuals, for ordinary people in Asia who will benefit from a higher level of human rights protection.
Contents

Preface
PARK Han-Chul / President of the Constitutional Court of Korea 4

Foreword
G. Raimondi / President of the European Court of Human Rights 6
Roberto F. Caldas / President of Inter-American Court of Human Rights 8
Gianni Buquicchio / President of the Venice Commission of the Council of Europe 10
Introduction
Song Seog-yun / Professor, Seoul National University School of Law ........................................ 17

Chapter 1
Functioning and Practices of Constitutional Justice

The Nordic Supreme Courts as Constitutional Courts .......................................................... 33
Constitutional Complaint System, the Korean Experiences and Comparative Studies ........... 43
The Role of the Constitutional Court of Romania in Safeguarding
the Fundamental Rights .......................................................................................................... 51
The Impact of the Case-law of the European Court of Human Rights on
the Jurisprudence of the Constitutional Court of the Republic of Lithuania ...................... 65
The Role of the Constitutional Court of the Republic of Macedonia
in the Promotion of Human Rights and the Like ................................................................. 93
The Role of the Constitutional Court of the Republic of Albania
in the Protection of Human Rights and the Impact of ECHR on its Case Law .................... 101
The Role of Constitutional Courts in Protecting Human Rights ........................................ 119
The Jurisprudence of the Constitutional Court of Ukraine on the Protection of
Human Rights Recognised by the Ukrainian Legislation and Acts of International Law ...... 133
An Essay on the Origin and Purpose of Constitutional Justice ............................................. 169
Protection of Human and Minority Rights in the Constitutional Court of
the Republic of Kosovo ........................................................................................................... 181
The Role of the Constitutional Court in the Protection and Promotion of Human Rights .... 193

* Above titles are listed in the Korean alphabetical order of countries.
Chapter 2
Deepening of Global Constitutionalism

Judical Protection of Human Rights in the Netherlands ........................................... 217
The Constitutional Globalization in Korea ................................................................. 241
The Status of International Treaties in the Constitutions of Arab Countries ........ 253
The Guaranteeing of Direct Application of Human Rights ...................................... 275
Limitations of a National Human Rights System and Ways to Overcome Them
through the Establishment of a Regional Human Rights Court ............................ 287
The Role of the Israeli Supreme Court in Promoting Human Rights .................... 301
Human Dignity in Chilean Law and Constitutional Jurisprudence .......................... 309
The Influence of International Norms in Canada ..................................................... 329
A Study on European Constitutional Courts as the Courts of Human Rights .... 339
The Role of the Supreme Administrative Court of Finland
in the Protection of Basic Rights and Human Rights ............................................ 419
Chapter 3
Prospect for Future Court of Human Rights for Asia

The Role of Constitutional Courts in Promoting Human Rights ........................................439
International Cooperation for the Promotion of Fundamental Rights and Peace in Asia ..........453
Die Janus-Köpfigkeit des Menschenrechtsschutzes .................................................................473
Challenges of social Intergration in the Globalized World .....................................................495
Toward an International Human Rights Court for Asia? .......................................................503
Sugestões para uma futura Corte de Direitos Humanos para a Ásia baseadas na experiência da Corte Interamericana .................................................................509
The Establishment of a Human Rights Court in Asia ..............................................................521
Partners in Justice? .....................................................................................................................541
Some Issues of Establishing an International Court of Human Rights in Asia ......................563
The Experience of Establishing and Operating the ECHR .....................................................571
A Possible Cornerstone for an Asian Human Rights Court ..................................................583
Systemic and Entrenched : Human Rights Abuse In need of Regional Intervention in Asia .....................................................................................................................603
The Protection of Human Rights in the Process of the Central American Regional Integration ..................................................................................................................623
Le rôle de la Cour Constitutionnelle dans la Promotion des Droits de l’Homme en République du Congo ..............................................................................................................629
The Development of Regional Human Rights Institutions in Asia .........................................635
Prospects for an Asian Human Rights Court and the Role of Constitutional Courts .............651

Introduction of Authors .............................................................................................................660
Introduction

As human rights increasingly becomes a global issue, regional human rights conventions have been established in Europe, the Americas, Africa and the Arab world. The activities of regional courts contribute significantly to the promotion and protection of fundamental rights. The establishment of these regional human rights courts were premised on increasing international communication and attention to constitutional rulings at the individual state level. In turn, such human rights courts operating on the basic notion of universal human rights play pivotal role to further promote the protection of human rights at the individual state level.

Due to the cultural, religious, political and economic differences in the region, Asia does not have an international organization to ensure an effective protection of human rights. Greater cooperation among constitutional courts in the region, however, signals the possibility of a regional human rights court to be established in the future. Against this background, with the rule of law becoming a global norm, I hereby present the papers contributed by many authors who introduce the constitutional court system of each country and endeavor to build a regional human rights protection mechanism in Asia. They are the honorable judges of the highest courts from various countries and experts on international organizations responsible for human rights protection or other relevant organizations. Their papers are categorized in three chapters. First of all, in Chapter 1, the functions and roles of each country’s constitutional adjudication system are reviewed from the perspective of human rights protection. In Chapter 2, the
development of human rights protection in each country is investigated with the rule of law becoming a global norm taken into consideration. Lastly, Chapter 3 addresses the prospect of building a regional human rights mechanism in Asia.

Chapter 1 consists of 11 papers describing the status of constitutional adjudication respectively in Norway, the Republic of Korea, Romania, Lithuania, Macedonia, Albania, Jordan, Ukraine, the Czech Republic, Kosovo, and Thailand. They were all prepared by the heads or judges of supreme courts acting as constitutional courts, which thus giving invaluable insight from the practitioner’s point of view. Among them, Romania, Albania and the Czech Republic are countries that experienced a political transition from socialism, while Lithuania, Macedonia, Ukraine and Kosovo are countries that had to build a new and independent country at the same time as their political system underwent significant change. On the other hand, Norway is a Northern European country with a tradition of independent democracy based on the rule of law and Jordan represents a rare case of democracy based on the rule of law as an Arab country. In addition, Thailand demonstrates the operation of constitutional adjudication as a leading country of Southeast Asia.

Chapter 2 presents, under the overall theme of “Global Emergence of Constitutionalism”, how international conventions relating to human rights are applied by judicial institutions in various countries around the world such as the Netherlands in Western Europe, Finland in Northern Europe, Austria in Central Europe, Croatia in Eastern Europe, Morocco as an Arab country in North Africa, Armenia as a CIS member country, Canada in North America, Chile in South America, and the Republic of Korea in Northeast Asia.

Chapter 3 deals with issues over the potential establishment of a regional human rights court in Asia. To this end, the manuscripts are from constitutional courts in New Zealand, the Republic of Korea, Uzbekistan, Congo and Turkey, and scholars who are professors at universities in Germany, the USA, Singapore, Japan, Hong Kong and Taiwan as well as experts from regional human rights organizations such as the Inter-American Commission on Human Rights, the Venice Commission, the European Court of Human Rights (ECtHR) and the Central American Court of Justice, who have made suggestions based on their own experiences. They are all valuable insights in our pursuit of founding a regional human rights court in Asia.
Chapter 1 starts with the constitutional adjudication system of Norway. Hon. Båardsen is a Supreme Court Justice and introduces the constitutional adjudication system in Northern Europe, covering Norway, Sweden, Finland, Denmark and Iceland with a focus on Norway, where no independent constitutional court exists and instead a supreme court rules on the application of legal provisions against the constitution. The Constitution of Norway was first adopted in 1814, and then the Supreme Court of Norway began its judicial review with the case law in 1866, which was later codified by the amendment of the Constitution in 2015. His article sheds light on the constitutional adjudication system in Northern Europe, which hitherto is relatively less well known.

Hon. Lee Jinsung, a Justice at the Constitutional Court of Korea, introduces Korea’s experience with the constitutional appeal system as a comparative law study. His paper depicts in a convincing manner how the Constitutional Court of Korea contributes to securing human rights by positively interpreting the relevant laws under the circumstances where filing a constitutional petition is impossible.

Hon. Zegrean is the President at the Constitutional Court of Romania. He introduces the Constitutional Court’s authorities and explains its milestone rulings in connection with international human rights norms, thereby illustrating the formation and development of the constitutional adjudication system in a new constitutional democracy after a political upheaval.

Hon. Žalimas, Head of the Lithuanian Constitutional Court, analyzes the impact of the European Court of Human Rights’ decisions on the legal principles upheld by the Constitutional Court of Lithuania and presents the respect for international law and the principle of geopolitical orientation as core elements in the Lithuanian Constitution. In his paper, geopolitical orientation represents the international duties placed upon Lithuania as it breaks its old ties with the former Soviet Union and joins the EU and NATO, which is quite interesting in that its effort to move closer to the West matters even in terms of the Constitution, reaching beyond the diplomatic front.

Hon. Gosheva, President of the Constitutional Court of Macedonia, gives us an illustration of the long journey of Macedonia separating from Yugoslavia, declaring independence and introducing the constitutional adjudication system with the adoption of a new Constitution in 1991, and ratifying the European Convention on Human Rights (ECHR) in an effort to secure human rights protection.

Albania is a state that went through a similar change in the regime, and Hon.
Dedja is Head of its Constitutional Court. His paper introduces the impact that the ECHR has on constitutional hearings in Albania, which indicates the effort of Albania to become a member of the EU by putting in place a system that guarantees human rights protection as much as any other Western state would, despite the fact that Albania has a majority Muslim population.

Jordan is a constitutional monarchy and Hon. Himkat is President of its Constitutional Court. His paper informs us that the amendment of the Constitution in 2011 brought about a new Constitutional Court. It is interesting in that he points out the limited roles a constitutional adjudication system can have amidst spreading terrorism and extremism and that he advocates the need for a new international consensus on human rights from the perspective of national security and social peace.

Hon. Professor Baulin, Chairman of the Constitutional Court of Ukraine, elaborates on the authorities of the Constitutional Court and major cases dealt with. In addition, he touches upon the effort that Ukraine made to set up a judicial system that can live up to the European standards after a brief overview of the formation and development of the ECHR and the ECtHR. He criticizes Russia’s reservations about the ECHR and mentions the annexation of the Crimea as the underlying cause, which illustrates a legal issue arising from a military or diplomatic issue at the European level.

The paper of Hon. Rychetský, President of the Constitutional Court of the Czech Republic is about the origin and objectives of constitutional adjudication against the backdrop of its long-standing constitutionalism and regime change from socialism. He explains the development of its constitutional adjudication system since the 20th century based on the premises that only the values that have withstood the test of time can secure a stable footing in history and that the constitutional adjudication system is now held responsible for guarding such values in the secular world where traditional value structures are falling apart. However, he also points out that the Constitution stemmed from fear of past experiences, such as war, totalitarianism, socioeconomic crisis and a paralyzed parliament, despite its pursuit of universality and perpetuity, and that the authorities of the Constitutional Court is charged with the final interpretation of the Constitution, not the exclusive right of interpretation. Furthermore, he boldly admits the reality that a constitutional court is not just part of constitutionalism but the state of society under the current mandate of moving beyond the 1st generation toward the 2nd generation and on to the 3rd generation of human rights protection. As such he shares his deep insights over the authorities of the
Hon. Ivan Čukalović, Vice President of the Constitutional Court of Kosovo, introduces the independence of Kosovo from Serbia in 2008 and the authorities and milestone rulings of the Constitutional Court of Kosovo that was established in 2009.

Hon. Marpraneet, President of the Constitutional Court of Thailand, explains that Thailand has entered into a variety of international treaties to secure human rights protection and the Constitutional Tribunal set up under the Constitution of 1946 has transformed into the Constitutional Court by the Constitution of 1997. His article also introduces the important decisions made by the Constitutional Court of Thailand. In particular, he argues, the ASEAN Human Rights Declaration, signed by the ASEAN nations including Thailand in 2012, will serve as a critical step towards the future establishment of a human rights protection mechanism across Asia.

Chapter 2 begins with a paper co-written by the three highest court judges, incumbent and former, on the application of international conventions on human rights in the Netherlands. It explains how the national courts interpret and apply human rights-related international conventions and adopt the rulings and opinions of the ECtHR, the Court of Justice of the EU (CJEU) or other international organizations concerning human rights, in the absence of an independent constitutional court and with a monistic view to the relationship between international law and domestic law prevailing in the nation. It also expresses concerns over the recent expansion and reinforcement of the ECtHR’s right of interpretation that is deemed excessive even from the perspective of the Netherlands, which has been active in adopting international conventions on human rights.

Hon. Kang Ilwon, a Justice at the Constitutional Court of Korea, gives an overview of the development of Korea’s constitutional adjudication system since 1948 and the workings thereof under the current Constitution, and introduces some cases where the Korean Constitutional Court applied international conventions on human rights. Against this backdrop, he shows the contributions that the Constitutional Court of Korea has made to the expansion of constitutional adjudication in the Asian region.

Hon. Dr. Achargui, President of the Constitutional Council of the Kingdom of Constitutional Court and its desirable roles. Lastly, he highlights the need for mutual communication-based democratic constitutional adjudication and judicial dialogue among national constitutional courts in the era of deconstitutionalization where constitutional supremacy is weakening at the national state level.
Morocco, testifies on the status of international conventions by stating that most Arab countries put international law before national law, and explains in detail how the constitutionality of international conventions are reviewed. In the meantime, the creation of an Arab Court of Human Rights was decided in 2014 to implement the Arab Charter on Human Rights and thus it is estimated now that the status of the Arab Charter on Human Rights will improve in the future.

Hon. Harutyunyan, President of the Constitutional Court, who also serves as a member of the Venice Commission, focuses on the direct protection of human rights. He analyzes the various ways human rights are guaranteed under the Constitution and international norms. Moreover, he pays attention to the practicality of human rights protection by quoting the World Justice Project’s rule of law index 2015.

Hon. Dr. Holzinger, President of the Constitutional Court of Austria and Hon. Frank, Deputy Chief Executive Director thereof, are the co-authors of the next paper, which analyzes the impact of the interpretation and application of the ECHR via the ECtHR on the human rights protection system in the signatories from the viewpoint of securing effective human rights protection. In particular, it shows examples of the ECtHR decisions made on the basis of the principle of proportionality or the legal principle of the duty to protect human rights that have influenced Austria, and explains them as a sign of the ECtHR and the Austrian Constitutional Court’s jurisprudence converging. The ECHR and the ECtHR are the most outstanding mechanisms that provide a common means of legal remedies at the European level, and the Constitutional Courts of the Member States can reach beyond the interpretation of their own Constitution and function as an intermediary between the ECHR and the respective national Constitution.

Hon. Danziger, a Justice of the Supreme Court of Israel, explains the development of human rights protection around 1992 when two Basic Laws on human rights protection were enacted for Israel with neither a uniform code of constitution nor an independent constitutional court. The Supreme Court of Israel has secured grounds for adjudication on the constitutionality of statutes by interpreting such Basic Laws as having a constitutional or supra-constitutional status. This article shows the cases that the Supreme Court ruled as unconstitutional such as the case regarding the construction of private correction facilities.

Hon. Pino, a Justice of the Constitutional Court of Chile, which democratized and overcame military dictatorship, considers human dignity as an effective right, not
merely as a metaphor, and looks at how it is applied in reality. First of all, he introduces the legislation of Chile on human dignity in terms of the relationship between the state and the citizen and between citizens. Moving on, he analyzes the areas where problems arise such as the freedom of expression, non-discrimination and equality, privacy, self-determination, etc. He also refers to the theory of case law applied by the Constitutional Court of Chile with regard to human dignity.

Canada adopted the Canadian Charter of Rights and Freedoms in 1982, which has a constitutional status. Hon. Wagner, a Justice of the Supreme Court of Canada, presents the approach that the Supreme Court of Canada takes in conflicts or competition between domestic law and international norms with major decisions made after the advent of the Canadian Charter of Rights and Freedoms. Canada follows the British model in that international norms are automatically integrated into domestic law, but treaties are entered into force through legislation to be legally binding in effect within the nation. Nevertheless, it is well illustrated in his article that the Supreme Court of Canada makes every effort for judicial prudence under the principle of conformity with international law to the maximum extent.

Croatia declared its independence from the former Socialist Federal Republic of Yugoslavia in 1991 and ratified the ECHR in 1997, thereafter becoming a member of the EU. Hon. Professor Omejec, President of the Constitutional Court of the Republic of Croatia, describes the human rights protection mechanism of Europe and the EU from the viewpoint of Croatia, which experienced the democratization of domestic law in the process of independence and a regime change, with the ECHR and EU Directives being applied with overlap within a short period of time. Her paper elaborates on judicial dialogue that thrives under the concept “constitutional pluralism” where national constitutional courts, the ECtHR and the CJEU work in parallel, in terms of institutional dialogue and judicial or jurisprudential dialogue through judgments. Despite the pluralistic and overlapping structure, the Constitution of an individual state, the ECHR, and the Charter of Fundamental Rights of the European Union (CFREU) pursue common values such as democracy, rule of law and human rights, and thus the human rights protection mechanism in Europe is in the process of forming a “Constitutional Court of Europe,” according to her estimation. This paper is remarkable in its volume and quality as it orderly explains in minute detail how the human rights protection mechanism has been developed in Europe.

Hon. Pellonpää, Justice of the Supreme Administrative Court of Finland and
formerly Judge of the European Court of Human Rights, briefs you on the experience of Finland, which has no independent constitutional court and whose Parliament has determined, by tradition, the constitutionality of statutes over basic rights under the Constitution and the international human rights conventions, for all the changes it went through with the ECHR ratified in 1990 and entry into the EU in 1995. After the ECHR was signed, a series of constitutional amendments resulted in the modernization of the categories of rights and the reinforcement of the roles of courts to protect basic rights and human rights. The author introduces the cases judged by the Supreme Administrative Court where basic rights and international human rights conventions were applied. By doing so, he shows what it is like in Finland with the primacy of the Constitution being secured gradually as well as the ECHR and other international human rights conventions becoming a judicial review standard for domestic courts. Lastly, he heralds a new era of dialogue to begin with Protocol Number 16 when it enters into force as it enables inquiries on the interpretation and application of the ECHR to the ECtHR.

Chapter 3 contains a multitude of papers seeking the creation of a regional human rights court for effective protection of human rights in Asia, and begins with one written by Hon. Elias, Chief Justice of New Zealand. Her paper explains the background to the enactment of the New Zealand Bill of Rights Act in 1990 for the implementation of international conventions on civil and political rights, and shares the examples in which the Bill of Rights and the international conventions on human rights are applied in courts. Afterwards, she introduces the discussion on the creation of a human rights defense mechanism in the Pacific region in relation to concerns over the involvement of politics in the legal process, the diminution in state sovereignty, debates between universalists and cultural relativists, and so on. On the one hand, she is realistic about the challenges for future national and regional safeguards of human rights, but, on the other hand, optimistic about the possibility of overcoming such challenges.

Hon. Park Han-Chul, President of the Constitutional Court of Korea, introduces the constitutional review on the Korean government’s fulfillment of its duties to protect the victims who were forced to work as sex slaves for the Japanese army and emphasizes the need for international solidarity to protect human rights. Furthermore, he suggests that a regional human rights protection mechanism be created for effective
protection of human rights in the Asian region. Solidarity organizations among constitutional courts at the regional level include the Conference of European Constitutional Courts, the Association of Constitutional Courts using the French Language (ACCPFU) and the Federation of Arab Constitutional Councils and Courts. In Asia, the Constitutional Court of Korea led the effort to create the Association of Asian Constitutional Courts and Equivalent Institutions (AACC) which has 16 Member States at the moment. However, such associations or federations are not human rights protection organizations with binding power, and thus it becomes necessary to have an effective human rights defense mechanism in the Asian region just like the ECtHR, the Inter-American Court of Human Rights, and the African Court on Human and Peoples’ Rights. Therefore, at the 3rd Congress of the World Conference on Constitutional Justice (WCCJ) held in Seoul, 2014, the Constitutional Court of Korea proposed that a regional human rights court be established in Asia. Hon. Park Han-Chul, President of the Constitutional Court of Korea, suggests a limited authority in the beginning to respect the diversity of Asian countries and a gradual expansion thereof to secure an effective human rights defense mechanism going forward.

Prof. Nettesheim of Universität Tübingen emphasizes the coexistence of the political side that gives grounds for review and judgment and the legal side that controls all discussion in the discourse on human rights, despite the sanctification of human rights in the secular world through the human rights revolution after the 2nd World War. Therefore, he argues that to dismantle the tension between these two sides by unilaterally politicizing or legalizing the discourse on human rights can undermine the unique structure of the discourse on human rights. The institutionalization of human rights to a significant degree ruins the political process of its own. This needs to be taken into account when a human rights convention is signed and an office is set up for enforcement in the Asian region as well. He also advises caution against any hasty attempt to secure a powerful external control system as in the ECHR when human rights culture and political, social or economic integration are not expected within the region.

Prof. Ginsburg at University of Chicago Law School presents the discussion on the reasons for not having a regional human rights court or commission only in East Asia of all the major regions, from the cultural and historical dimensions, and suggests a gradual approach to the establishment of a human rights defense mechanism in Asia.
Hon. Caldas, President of the Inter-American Court of Human Rights, explains the process of its organization and the roles it plays for effective protection of human rights. Moving on, he opens up to share the challenges, in particular budget and staffing problems facing the Inter-American Court of Human Rights. In order to create an Asian Court of Human Rights (ACtHR) as an international organization, it will be necessary to secure competent translators, for example, to cover the Asian region where a variety of languages are spoken. As such, there are administrative matters to be addressed in advance and a solid financing plan for all that as well, which is very important and practical advice to consider.

Buquicchio, President of the Venice Commission of the Council of Europe, and Schnutz Dürr, Head of the Constitutional Justice Division at the Venice Commission of the Council of Europe and Secretary General of the World Conference on Constitutional Justice, are the co-authors of the next paper, which introduces at a glance the experience related to human rights protection mechanisms in the regions of Europe, America, Africa, and Asia Pacific. This paper briefs us on current issues such as the EU’s participation in the ECHR, the tension between the ECtHR and other countries such as Russia, the UK, and Switzerland, and Venezuela’s denouncement of the American Convention, and provides us with the latest update on the establishment of a human rights defense mechanism in Africa and the League of Arab States. It then gives us advice worth considering by going over the main issues to address in the establishment of an ACtHR: an intergovernmental organization to set up as a basis, the scope of the participating countries (some of which may overlap with the ECHR), where to locate, the matter of individual access to the Court, how to take into account Asian values, networking at international, governmental and non-government levels, and so on.

Dr. Visser, Associate Professor at the School of Law of Singapore Management University, plans for the creation of an ACtHR based on the assumptions that the Asian Convention of Human Rights (ACHR) in the making will be a treaty under international law and the ACtHR a judicial organization that individual victims can access and directly appeal to. This paper mainly refers to the practices of the ECHR; in particular, Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms under which direct inquiries and procedural links between national courts and the ECtHR will be institutionalized. Its argument for the institutionalization of such direct inquiries and procedural links from the onset of the
ACtHR is debatable. The author also expects that the Association of Asian Constitutional Courts and Equivalent Institutions (AACC) can be a useful mediator in the process of the ACtHR’s solid landing. She argues that the AACC can help create and buttress a knowledge community through personal contacts of judges from the Member States, disseminating human rights related information and building a database.

Hon. Mirbabev, Chairman of the Constitutional Court of Uzbekistan, basically welcomes the proposition to create an ACtHR and presents the matters to be tackled to that end. First of all, he points out the factors that drove the success of the incumbent regional courts of human rights such as the similarity in the political system and historical experience of the countries within the respective region, their stable political and legal systems, and a similar level of socioeconomic development, and explains what is behind the successful operation of the ECtHR. His argument implies that it will be difficult to create a human rights protection mechanism in Asia due to a significant degree of dissimilarity among the countries within the region. He also expresses his views on the creation of an international organization at the government level as a pre-step toward the ACtHR, the ratification of the ACHR, and the measures to resolve any conflict, if it arises, between the ACHR and domestic law. Lastly, he addresses the qualifications for judges and the roles of the AACC.

Hon. Villiger as Judge of the European Court of Human Rights (ECtHR) expresses his views on the establishment of a mechanism to protect human rights in Asia based on the experience of creating and operating the ECtHR. His paper provides us with valuable information on the nature of the ECHR as a binding international convention, the necessity of a supervisory organization, the process of the supervisory organization of the ECHR leaving the dualistic structure of the human rights commission and the human rights court to be unified as the human rights court since 1998, the possibility of direct billing by individuals and states, the upsurge of appeals, the introduction of a single judge panel, the degree of specificity in the Convention and judicial activism, the principle of subsidiarity and the discretionary power of the authorities, and his experience with the implementation of the decisions made by the ECtHR. Lastly, he makes suggestions on the design of the Asian human rights protection mechanism to start with a Convention that consists of fundamental human rights and then to add new protocols to it going forward, thereby replenishing substantive and procedural provisions. As such, he insists that the focus be on the effective defense of human
Global Constitutionalism and Multi-layered Protection of Human Rights

Prof. Ejima of Meiji University in Japan, first of all, looks at the limitations with regard to the performance and implementation of the UN Human Rights Conventions as a stepping stone for the creation of an ACtHR. And then, she goes over the current status and the driving forces behind the gradual development of the ECtHR, which is lauded as successful. With such discussions in the background, this paper reveals its view on the creation of a human rights court in Asia. Prof. Ejima makes a cautious but optimistic projection based on the fact that most Asian countries, despite many practical difficulties, won their independence after WWII and uphold the rule of law and protection of human rights, even if in name only. Further important observations include the fact that Korea and Taiwan have made great progress in their respective constitutional adjudication systems, and that national courts across Asia are open to international human rights conventions, and that the overall globalization trends prevail in the region.

Prof. Chopra of Chinese University of Hong Kong, brings to our attention specific cases of human rights violation against women due to the deeply rooted gender discrimination and authoritarian practice of India. This paper admits that it will be difficult to set up a supra-national human rights mechanism that of a judicial nature or being legally binding in Asia, which covers a vast area with such a great variety of countries that it is even hard to define its members. Also, between their respective levels of human rights protection there are wide gaps. But still, it is expected that "soft" supra-national intervention via a regional human rights mechanism can contribute to improving human rights protection.

Alias, Judge at the Central American Court of Justice, presents the legal principles that the Court has developed, with the integration of Central America progressing, to determine the jurisdiction of human rights protection in relations with the Inter-American Court of Human Rights. Appeals under the American Convention on Human Rights are limited to the violation by states. The paper mainly deals with the process and the rationale for the Central American Court of Justice’s securing the authorities to control its legitimacy in case the agent of the violation is an organization in Central America, and the associative rights under the Protocol at the Central American level are violated by other Member States. It shows an example of jurisdiction problems that arise when the human rights protection mechanism of a broader range is overlapped with that of a smaller one in the same region.
According to the response from Congo Republic, the 2002 Constitution of Congo not only guarantees basic rights but also upholds the main principles of key international human rights conventions. The constitutionality of statutes, treaties, and international conventions with regard to basic rights is determined by the Constitutional Court of Congo. There are other organizations in charge of promoting human rights and they include the National Human Rights Commission which is a constitutional institution as well, the Human Rights Office with the Ministry of Law, and various NGOs. The roles of government organizations to protect basic rights and human rights can be complemented by the establishment of a supra-national court. This response comes up with the requirements for such a court’s establishment and functions.

Prof. Yeh of National Taiwan University, stresses that the future does not look grim for the development of a regional human rights organization in Asia, however insufficient compared to Europe, America and Africa. A majority of Asian states are joining core human rights conventions and integrating them with their domestic laws. There are an increasing number of judicial references to international human rights laws and foreign national laws, followed by the establishment of one national human rights institution after another pursuant to international standards, which signals that the time is ripe for a regional human rights protection organization to emerge in Asia. He cites the ASEAN Intergovernmental Commission on Human Rights (AICHR) as a potential basis for a regional human rights council, the Asia Pacific Forum of NHRCs as the starting point of a regional human rights commission, and the AACC as the matrix of a regional human rights court.

Aydin, Researcher at the Constitutional Court of Turkey, agrees on the necessity of a regional human rights protection mechanism in Asia. To that end, it seems desirable to approach step by step to prepare an inter-governmental organization, a human rights convention, and a human rights supervisory system. Furthermore, he states that the AACC can function as a mediator in the preparation of an Asian human rights protection mechanism, and the Constitutional Court of Turkey, which has been a leading force in the AACC, will support and participate in earnest in the establishment of a regional human rights protection mechanism.

The greatest virtue of this book is the provision of a range of information from different sources with regard to the constitutional adjudication system of each country
in the world over and the human rights protection mechanism of each region. It shares the knowledge of constitutional rulings and human rights protection mechanisms in states or regions that have not been easily accessible. Moreover, most of the papers are authored by the representatives of national institutions and international organizations so that they are reliable as well as practical. Readers with some prior knowledge may be able to read between the lines. For example, to understand the constitutional adjudication system of Eastern European countries, their EU membership is an important background factor.

In today’s international relations, judicial dialogue is becoming more important. Especially when looking back at the history of Asian countries, what they experienced in the process of modernization, it signifies a great deal for the global community if judicial diplomacy based on constitutional rationality can stand on a solid footing in Asia. Securing a universal value of human rights protection despite the political, economic, social, and cultural differences of each nation, is a challenge that cannot easily be overcome in the creation of an ACtHR. With the universality of human rights protection considered as a prerequisite, an in-depth discussion on the degree of Asian individuality to accommodate is needed as well. Other matters that require careful thought are how to adjust the authorities of the Court and the scope of participating countries. Many of the papers printed in this book suggest that we start on a small scale when it comes to authority and membership but aim for a gradual progress and explore with caution in order to secure the effectiveness of human rights protection.

It is clear that we are headed for a formidable challenge. However, by starting, we are already halfway there and have learned a lot from the process, which is something. This book is a testament to the dedication of the many people participating in and rooting for our great journey toward the establishment of an ACtHR.
Chapter 1

Functioning and Practices of Constitutional Justice
1. The Nordic countries do not have particular constitutional courts reviewing proposed legislation, deciding in conflicts of competence between different levels of government, determining election disputes, emitting responsa in constitutional issues or dealing with constitutional complaints. However, the Nordic Supreme Courts have features denoting that they in certain respects should be considered as constitutional courts, or as Supreme Courts with certain functions similar to those of constitutional courts. The core is the obligation to set aside or to interpret narrowly a law provision that proves to be contrary to the Constitution, in particular as to the constitutionally protected fundamental rights and freedoms of individuals.

2. Within the framework of this “Nordic model”, we are not talking of quashing the law or the particular provision, declaring it null and void in any formal or technical manner. By setting the provision aside, the Nordic Supreme Courts limit themselves to cutting of the provision’s normative power in the particular case before the court. Due to the Supreme Courts’ judgments’ function as precedents, the poor provision will, however, loose its authority also in any other case. Accordingly, at this point the Supreme Courts’ functions as constitutional courts and as courts of precedents are two sides of the same coin.

3. The Norwegian Constitution was adopted in 1814. Accordingly, it is one of the oldest constitutions in the world still in function. It came into being in the aftermaths of the French revolution, a period of time characterised by a strong belief in declining the royal and clerical powers, and of establishing democracy through a written constitution that prescribes the allocation of powers to several branches of the State, and a Bill of Rights — in Norway’s case in particular connected to guarantees against arbitrary arrest, torture, conviction

* Supreme Court Justice, the Supreme Court of Norway
without the foundation in law, certain fair trial guarantees in criminal cases, a ban on retroactive legislation, free-speech guarantees and the protection of property rights. Compared to other constitutions, the text of the Norwegian Constitution from 1814 is, relatively brief and down-to-earth, in line with a Norwegian mentality that is more concerned with the practical implications than the ideologies as such. The text complied of just more than 100 articles, that were organised somewhat arbitrarily, most of them rather short, and many of them quite poorly drafted.

4. The Norwegian Constitution had of course a strong *symbolic* function, founding the Norwegian State after 400 years as the underdog in a union with the Kingdom of Denmark. Although Norway in the following years, from 1814 until 1905, shared the King and the foreign policy with Sweden, the Constitution of 1814 paved the way for Norwegian sovereignty and independence. It is even today deeply connected to Norway’s position as a sovereign State, its identity as a nation, and with core democratic and humanitarian values that can be traced through Norwegian history, culture and politics. The bicentennial anniversary for the Constitution in 2014 was celebrated accordingly – a point to which I will return.

5. A fundamental question in constitutional law is whether the courts of law can review a statute or a particular provision within it, in order to decide whether or not it is in conflict with the Constitution. Shall the elected representatives have the final say as to how the Constitution is to be interpreted, or are the courts empowered to review the Parliament’s opinion on the matter? The Norwegian Constitution of 1814 was silent on that point. The question was therefore left to the Supreme Court to answer.

6. The ground breaking judgment in Norwegian constitutional law is *Grev Wedel Jarlsberg v. Marinedepartementet* from 1866. The particularities of the case are of little bearing. However, in that judgment the Norwegian Supreme Court for the first time publicly – and without any particular references in the written Constitution itself – declared that the Court would not apply any law as far as the law was found to be in conflict with the Constitution. One perceived the Constitution’s provisions as legally operative norms with a binding effect also on the other branches of government. Moreover, the Constitution was – and still is – *lex superior* – with precedence over any other governmental decisions. In effect, the judgment established the Norwegian Supreme Court to be the first constitutional
court apart from the US Supreme Court. The ruling has been characterised as a major breakthrough for Nordic and European judicial formation.

7. The Norwegian Supreme Court’s motivation for its approach in the judgment from 1866 is amazingly parallel to that given by the US Supreme Court some 60 years previously, in the landmark case of Marbury v. Madison from 1803, forming the legal basis for the US Supreme Court’s position as a constitutional court. The Norwegian Supreme Court made no explicit reference to *Marbury v. Madison*. But it is beyond doubt that at least some of the justices in the Norwegian Supreme Court were familiar with it.

8. The development initiated by the Supreme Court was backed by the legal doctrine and followed up in subsequent case law, so that the Supreme Court’s role even as a constitutional court gradually became accepted by both the Parliament and the Government, as an operative – and important – part of the Norwegian Constitution. However, it goes without saying that there have always been critical voices, partly connected to the very idea that the Supreme Court should carry out a constitutional review, and – of course – partly connected to how this has been carried out in particular cases. In the 1920’s and early 1930’s, the question of abandoning the Supreme Court’s powers was discussed in the Parliament on several occasions. In the 1960’s and 1970’s many perceived the Supreme Court’s power to set aside parliamentary legislation as “a stick willingly thrown into the wheels of democracy”.

9. Also in Denmark and in Iceland the Supreme Courts themselves developed their function as constitutional courts through their own case law. In Sweden and Finland, on the other hand, this was introduced through a constitutional amendment. Over time the actual impact of this function has, indeed, varied largely among the Nordic countries. My impression is that the Supreme Court’s role as constitutional courts is the strongest in Norway, on to Iceland and Sweden, and the weakest in Denmark and Finland. I shall not try to explain why – there are obviously a multitude of historic, societal, systemic and legal causes.

10. I will now make a large step forward in the Norwegian history of constitutional review of legislation, from the judgment in the case *Wedel-Jarlsberg* in 1866 to the judgment in the *Kløfta case* in 1976 (reported in Rt. 1976 page 1), which indeed confirmed
and revitalized the Norwegian Supreme Court as a constitutional court. The judgment concerned the level of compensation to be paid to a landowner in the case of expropriation of his land, in particular whether the level of compensation prescribed for by the legislation could be considered to provide “full compensation”, as required by Article 105 to the Constitution. In 1976 the Supreme Court had not used its power to set a law aside for many years. Several leading commentators had at that point concluded that constitutional review by the Supreme Court was more of a theory than a practical reality. However, the Supreme Court saw it differently. The majority stated:

“… if the application of a law leads to results which are contrary to the Constitution, the courts will have to base its decision on the rule imposed by the Constitution, not on the provision in the law … This principle is part of customary constitutional law … Moreover, it must be assumed that this power is also a duty, so that the courts, when the question arises, will have to decide whether the Constitution is passed too close.”

11. The core in this ruling is the same as in the case of Wedel-Jarlsberg from 1866. Moreover, what was said in the Kløfta case in 1976 has later been confirmed through the Supreme Courts’ own case law, apparently even with an increased clarity and confidence. The year of 2010 is particularly striking. That year the Supreme Court set aside the contested legislation in three cases, which was all time high for one year, apart from the year of 1910. Thus, it became very clear to everybody, and indeed to Government and the Parliament, that the Norwegian Supreme Court’s powers and duties as to performing constitutional review, represent a legal reality that must be taken into account.

12. The first case in 2010 was about the taxation of ship owners – a highly tensed political issue that also involved tremendous economical values (reported in Rt. 2010 page 143): By an amendment to the tonnage tax scheme that was introduced in 1996, shipping income was “exempt from tax”, in order to make the ship owners stay in Norway. Untaxed profits were, however, taxed upon distribution to shareholders or exit of the company from the special tax system. By transitional rules given in 2007 – as a result of an intense political battle – the shipping income was, however, taxed even if not distributed to the shareholders or taken out from the special tax system. The Supreme Court held – by a majority of six to five – that the transitional rules violated the prohibition against retroactive legislation in Article 97 of the Norwegian Constitution. The Court emphasised that there were no strong
public policy reasons why the legislation should be given retroactive effect — and the legislation could thus not be accepted as within the framework of Article 97. The Supreme Court did not attach decisive weight to the fact that both the Government and the Parliament had concluded otherwise — as both had misinterpreted Article 97 of the Constitution. Two lessons may be learned. Firstly: The protection against retroactive legislation was given a wide effect, even regarding economic positions established by public law. Secondly: The legislators own appreciation of the law’s constitutionality has even on highly political areas rather limited impact, in particular if the legislator — according to the Supreme Court — has misinterpreted the Constitution.

13. The second case is concerned with retroactive law on crimes against humanity and on war crimes (reported in Rt. 2010 page 1445). The question was whether provisions on such acts in the Norwegian Penal Code from 2005, which entered into force in 2008, could be applied to acts that took place in Bosnia-Herzegovina (former Yugoslavia) in 1992. The crucial constitutional issue was whether the application of the new provisions to these acts would represent a violation of Article 97 of the Constitution, which prohibits laws being given retroactive effect. The Supreme Court — a majority of eleven against six justices — held that the application of these new provisions on prior crimes would violate Article 97 of the Constitution, even if the acts as such were punishable under ordinary criminal provisions at the time they where committed, and even if the courts could not impose any heavier penalty than what could have been imposed at the time the crimes were committed: The labels “crimes against humanity” and “war crimes” were new, and indicated criminal activity of a more severe character than the labels under the former provisions. The developments in International law, and Norway’s interest in assisting international criminal courts, could not — according to the majority of the Supreme Court — undermine the fundamental requirement that a criminal conviction must have an authority in Norwegian law. This was so, even if the decision to give these provisions retroactive effect was taken by a unanimous vote in the Parliament, and despite the fact that the Parliament found that the Constitution allowed such retroactivity. The accused was, however, found guilty according to other articles in the criminal code and in the end also sentenced to 8 years imprisonment for those offences. The judgment overturned a much-criticised ruling from 1946 (reported in Rt. 1946 page 198), where the Supreme Court accepted the death penalty for war crimes, albeit the Norwegian legislation at the time when the crimes were committed did not allow such a penalty.
14. Later the same year the Supreme Court had the third case. It concerned land and property taken over from the church in connection with the reformation 500 years ago. We have a special rule for this property in the Constitution, stating that this clerical property should only be used to the benefit of the church or for educational purposes. A law made it possible for people renting clerical land as ground for their houses to pay a yearly fee for the land far below market price for renting such property. So, parts of the properties’ economical value were actually transferred to the renters. The Supreme Court set the act aside as not being in conformity to the Constitution’s limitations on the possible uses of the clerical property.

15. As I emphasised initially, the Supreme Courts power to set aside a legislative provision that is not in conformity with the Constitution, does not go so far as to allowing the Court to quash the law or the contested provision. Technically speaking it will be up to the Parliament to make the necessary alterations. Moreover, the Norwegian Supreme Court must perform constitutional review within the general procedural framework in which the court operates as a general court of last resort. Accordingly, the question of constitutionality will not be a case as such — it will always have to be connected to a specific case that is already before the Court — penal, civil or administrative. And the Court’s review is limited accordingly, to the particularities of the concrete case before the court. It is not concerned with the law’s constitutionality in the abstract.

16. Leave to appeal will be granted by the Supreme Court’s appeal selection committee if the case involves a substantiated question of constitutionality that needs to be solved. The committee may limit the permission to the question of constitutionality only, in order to concentrate the case before the Supreme Court. In cases where the outcome might be that the law has to be set aside for being unconstitutional, the Supreme Court shall hear the case in a plenary session with all 20 justices present. This composition of the court — as opposed to the ordinary composition of five — secures that the decision of setting a law aside has as solid a base as possible in the court as such.

17. It is established that the Supreme Court, when interpreting and applying the Constitution, must adopt its own view based on a contemporary perspective on the Constitution, in accordance with the present day situation. So the textual, historic approach to Constitutional law advanced, inter alia by some of the justices in the US Supreme Court
– often referred to as originalism – has little bearing within the Norwegian Supreme Court. On the other hand, the Supreme Court is indeed aware of the need for stability and the importance of making democracy work, and the limits these factors represent as to a dynamic approach to the Constitution.

18. Moreover, when the constitutionality of a statute is in question, the Supreme Court will take into account the Parliament’s own considerations as to the provisions constitutionality. Hence, there is a margin of appreciation. Moreover, the intensity of the review varies according to what kind of constitutional right that is challenged. When a provision of the Constitution deals with personal freedom and security of individuals, the review will be more far reaching and thorough, while the Parliament’s view will be given some weight when the provision of the Constitution deals with the safeguarding of economic interests, and even more so if it relates to the allocation of powers between the Parliament and the Government. This is basically the Norwegian edition of the preferred position principle, which was developed by the US Supreme Court from the late 1930’s and onwards.

19. Currently, the Supreme Court attaches great weight to constitutional rights, even in cases where the legislation is a result of a political battle, or expresses a clear and strong political will. The more recent development of the Norwegian Supreme Court as a rather strong defender of the rule of law is connected to a general development within European law, in particular as to the increased impact of the European Convention on Human Rights, through the case law of the European Court of Human Rights.

20. The former Article 110c of the Norwegian Constitution as amended in 1994, said that all governmental bodies should respect and secure human rights, and that the provisions as to the implementation of human rights treaties should be prescribed for by parliamentary legislation. An imperative step in this regard was taken when the Norwegian Parliament in May 1999 adopted the Human Rights Act, thereby giving certain conventions the position of Norwegian statutory law. These are:

- The European Convention on Human Rights (1950)
- The UN Covenant on Civil and Political Rights (1966)
- The UN Covenant on Economic, Social and Cultural Rights (1966)
Article 3 of the Human Rights act establishes that if there is a conflict between a provision in one of the enumerated conventions and any statutory provision adopted by Parliament or any other domestic law, the treaty provision shall prevail.

21. More than anything else, the human rights conventions and the international legal material attached to them, has characterized the Norwegian Supreme Court’s work – and the evolution of the Norwegian Supreme Court’s constitutional function – in the first 15 years of our millennium. The international legal development has in itself been powerful, with, in particular, the European Court of Human Rights as a strong guardian of the European Convention on Human Rights as a living instrument.

22. The Norwegian Supreme Court has followed up, in an extensive case law regarding, inter alia detention, fair trial, the presumption of innocence, legality, the right to private and family life, home and correspondence, freedom of religion and freedom of conscience, freedom of expression, the protection of private property, the right to appeal in criminal matters and the prohibition against repeated prosecutions, to mention the most important issues. In particular after 2009 there is also a clear tendency that the UN Convention on the Rights of the Child is being invoked by the parties more often than before and discussed more frequently by the Norwegian Supreme Court in its rulings, by the majority or by one or more dissenting justices. The Supreme Court’s deliberations related to “the best interests” of the child in conflicts with other rights and interests, is nowadays regularly quite thorough – demonstrating that the Norwegian Supreme Court carries out at rather strict scrutiny, in order to secure that the best interests of a child are actually given due weight.

23. From the outset in 1814 the Norwegian Constitution contained only selected human rights provisions. Few later amendments were made. Accordingly, the Norwegian constitutional human rights protection fell more and more short of the international development. As part of the Norwegian Constitution’s bicentennial anniversary in May 2014 the Constitution went through a considerable modernisation and expansion as to the protection of fundamental rights. Numerous of the classic civil and political rights as prescribed by the major human rights conventions where taken into the Constitution itself in
a new Part E, in addition to certain economic, social and cultural rights and the core rights of the child as prescribed in the UN Convention on the rights of the child (Article 93 to Article 113). Moreover, the new Article 92 prescribes that every governmental body, including of course the Norwegian Supreme Court, is obliged to respect and ensure both the new constitutional rights and the rights and freedoms enshrined in human right treaties to which Norway is a party.

24. The constitutional and the international context for these rights and freedoms run more or less parallel and can hardly be separated. Accordingly, the Norwegian Supreme Court has, in its case law after the reform, stressed that the new constitutional rights and freedoms are to be understood “in the light of” their international background and parallels. Obviously, this is not an original approach. But it is, nonetheless, an important clarification as to the nature and function of these constitutional rights and as to the interpretation an application of the Constitution.

25. The method followed by the Supreme Court is in line with the Parliament’s view when it amended the Constitution; the level of protection according to the Constitution shall not run short to that of the parallel convention rights. So, as to the interpretation and application of these new constitutional provisions, any applicable case law from the relevant international courts or tribunals should — according to the Parliament — be taken into account. Case law from the European Court of Human Rights will have a key position, but also material on any other relevant human rights treaty is relevant. Although not formally bound by the international case law when interpreting the Norwegian Constitution, the Supreme Court should not deviate from it without good cause.

26. The Norwegian Supreme Court has, so far, not had the opportunity to deal extensively with every recommendation given by the Parliament as to the methodological approach to the new constitutional provisions. But there can be no doubt that the Supreme Court has followed the transnational avenue recommended by the Parliament, to the extent that established case law from the European Court of Human Rights has been applied in a similar manner when interpreting the Constitution as it would have been in the parallel interpretation of the European Convention on Human Rights. Although the technical approach may vary slightly from case to case, there is no doubt that a goal is to achieve coherence: When a judge is faced with the dynamic forces of legal fragmentation and of
overlapping jurisdictions, maintaining coherency within the law is of the very essence of judicial duty.

27. Expanding the Constitution’s catalogue of protected rights and freedoms have inevitably also broadened the Supreme Court’s repertoire as a constitutional court and as a partner in the European dialogue of courts. It represents a boost for Norwegian constitutionalism. This brings me back on track as to the legal status of constitutional review in the Norwegian Constitution — and also to my short final: As I have said, the Supreme Court’s power and duty to perform constitutional review achieved at some point in time the status of customary constitutional law. Connected to the constitutional reform in 2014 and the Supreme Court’s 200 years anniversary in 2015, the Parliament decided on the 1st of June 2015 to make an amendment to the Constitution. The new Article 89 states:

“In cases brought before the courts, the courts have the power and the duty to review whether laws and other decisions by the State authorities are contrary to the Constitution.”

28. During the preparation of this amendment, the Parliament emphasised that this provision refers to what was already established through customary constitutional law, no more and no less. Accordingly, Article 89 is a pure codification. However, this new Article expresses — for the first time ever through a constitutional provision, based on 160 years of experience, including the Supreme Court’s more intense constitutional scrutiny in recent cases — the Parliament’s solemn recognition of the Norwegian Supreme Court’s functioning as a constitutional court, and an up-to-date acceptance of the court’s role as a guardian of the rule of law. In this respect, the codification is indeed important.
I. Grounds and types of constitutional complaint system in Korea

Many countries have designed and developed a constitutional complaint system suited to their own needs and situations. And the type and scope of constitutional complaints may differ from one country to another depending on the country’s political, social situation, as well as on whether they are defined in constitutions and laws or determined by the interpretation of such constitutions and laws.

The Constitutional Court of Korea has jurisdiction over the constitutional review of statutes, impeachment, dissolution of political parties, competence disputes, and constitutional complaints. The Korean Constitution provides that the Constitutional Court shall have jurisdiction over “constitutional complaint as prescribed by Act.” Since the Constitution does not provide for any specific ideas or concepts of constitutional complaints, the legislature has been granted broad discretion in formulating the constitutional complaint system.

The Constitutional Court Act of Korea stipulates two types of constitutional complaints. First, any person who claims that his or her constitutional fundamental right is violated by an exercise or non-exercise of governmental power may file a constitutional complaint (Article 68 Section 1, Constitutional Court Act, known as the “constitutional complaint as a remedy of rights”). This type of constitutional complaints is most commonly adopted and witnessed in many other countries around the world. Second, when an individual files a motion with an ordinary court requesting review of a statute by the Constitutional Court and this motion is denied, the individual may directly file a constitutional complaint with the Constitutional Court (Article 68 Section 2, Constitutional Court Act, known as the “constitutional
complaint as constitutional review of statutes”). Constitutional complaint as constitutional review of statutes is peculiar to the Korean judicial system and was, in fact, rarely found in other countries at time of its adoption. Although it is named “constitutional complaint,” it is in nature similar to the constitutional review of statutes.

These two types of constitutional complaints mentioned above have been very actively used by the Korean people. Since its establishment on September 1, 1988, the Constitutional Court of Korea has received 22,968 constitutional complaints challenging acts or omissions to act by governmental power. As of April 30, 2016, the Constitutional Court disposed of a total of 22,556 cases, out of which the complaints were upheld in 722 cases. Meanwhile, the Constitutional Court received 5,596 constitutional complaints challenging the constitutionality of statutes. Among them, 5,310 cases were disposed of, and the complaints were upheld in 316 cases.

Ⅱ. Constitutional complaint as a means of constitutional review of statutes

Although ordinary courts of Korea had the constitutional review power before the birth of the Constitutional Court of Korea, they had not been willing to exercise their constitutional review power. Most of the requests for constitutional review of laws had not been admitted by ordinary courts. Consequently, the parties had little chances of reviewing the constitutionality of statutes related to pending trial. As will be addressed in detail later in this presentation, the Constitutional Court Act does not acknowledge the power of the Constitutional Court to review judgments of ordinary courts. Hence, this kind of constitutional complaint is needed to enable the party to request constitutional review of statutes related to pending trial directly with the Constitutional court.

The constitutional complaint used as a means of constitutional review of statutes allows a party to a case whose request for constitutional review was denied by any level of ordinary courts to file a constitutional complaint directly with the Constitutional Court, which provides a counterbalance to the passive approach of ordinary courts towards constitutional review. The party needs not to wait for the ruling of a higher court in order to file a constitutional complaint. In this context, the constitutional complaint procedure challenging the constitutionality of statutes is widely acclaimed as an original and wise method for
complementing the limitations of the Constitutional Court’s power of norm control.

This type of constitutional complaints as a means of constitutional review of statutes can be compared with the posteriori constitutional review adopted in 2008 by the French Constitution under the name of question prioritaire de constitutionnalité, or QPC. According to the QPC, a claim challenging the constitutionality of a legislative provision may be ruled by the Constitutional Council upon referral by the highest courts (Conseil d’État, Cour de Cassation) requested by a party to the underlying case (Article 61-1, French Constitution), but there are no means of appeal when this request by the individual is denied by the highest courts. This system differs from Korea, where individuals can directly file a constitutional complaint to challenge the constitutionality of a statute with the Constitutional Court.

The Federal Constitution of Austria adopted Gesetzesbeschwerde, or complaint against decrees, in 2015. A person who, as a party to the case that has been decided by a court of justice of first instance, alleges infringement of his rights because of the application of an unconstitutional law, can file an application challenging the constitutionality of laws on the occasion of an appeal filed against that decision (Article 140(1)(1)(d), Austrian Federal Constitution). This system of Austria is considerably similar to the Korean constitutional complaints challenging the constitutionality of statutes. However, the Korean system differs in that a party of a case in an ordinary court need not undergo an appeals process against court judgments, and that the process of filing for referral by an ordinary court requesting constitutional review and getting the request denied should be preceded before the party can directly go to the Constitutional Court.

### III. Constitutional complaint as a remedy of rights: limitations of law and resolution through interpretation

The constitutional complaint procedure as a remedy of rights faces a few impediments related to the admissibility requirements for review by the Constitutional Court. The first obstacle is the principle of subsidiarity. In other words, if any remedy is provided by other laws, no one may file a constitutional complaint without having exhausted all such processes (Proviso of Article 68 Section 1, Constitutional Court Act). Second, constitutional complaints cannot be filed against judgments of ordinary courts (Article 68 Section 1,
A combination of the said two requirements results in the complexity of issues. For example, actions of administrative authorities, which are subject to administrative litigation procedures, should be initially reviewed by ordinary courts due to the principle of subsidiarity, but because the judgments of ordinary courts cannot be appealed against through the constitutional complaint procedure (Constitutional Court says, in this case, even the original administrative actions cannot be appealed against by constitutional complaints), it is mostly impossible to file a constitutional complaint against such administrative actions.

The reason why, despite the circumstances, constitutional complaints are being actively filed with the Constitutional Court is because the Court has broadened the applicable scope of constitutional complaints through its interpretation. First, the Constitutional Court widely recognized exceptions to subsidiarity. The Constitutional Court has stated that individuals can bring constitutional complaints directly before it without the exhaustion of other legal processes in such cases as a) when the rights of the complainant can hardly be restored through other legal procedures, b) when it is uncertain whether such legal procedures are applicable from an objective perspective, and c) when such procedures to obtain legal remedies have no prospect of implementation. As a result, the constitutional complaints against a number of actions by public authorities, such as material acts by governmental power or non-prosecution disposition, have satisfied the admissibility requirements and thus been reviewed on their merits by the Constitutional Court.

Second, the Constitutional Court has specified that the “governmental power” provided in Article 68 Section 1 of the Constitutional Court Act refers to all actions by public authorities that exercise legislative and administrative powers, which means constitutional complaints can be filed against the laws enacted by the National Assembly or legal orders adopted by the Executive if they directly violate the fundamental rights of individuals. These may not be a typical type of claims anticipated from the Constitution or the Constitutional Court Act, but these kinds of claims have been established as one of the main types of constitutional complaints through the interpretation of the Constitutional Court.

Third, the Constitutional Court has proclaimed that the ordinary court judgments that have violated the fundamental rights of individuals by applying unconstitutional laws can be appealed against by constitutional complaints. This way, ordinary court judgments can also be appealed to the Constitutional Court in the form of constitutional complaints on certain conditions.

For such reasons mentioned above, the Constitutional Court has contributed a valuable
share to activate constitutional complaint system through the positive interpretation of the Constitution and statutes under such statutory limitations.

### IV. Implications to newcomers

There are some newcomers which are deliberating to introduce the constitutional complaint system to their countries and they confront a couple of obstacles in adopting the system. There might be three main reasons why the constitutional complaint system failed to be adopted. First of all, the most significant problem is taken place in case there is no explicit provision on constitutional complaint in their Constitution and a constitutional amendment as a way to introduce constitutional complaint is not a practical solution.

The second one is a fear of unmanageable caseload for the Constitutional Court. The third one is a concern that the introduction of such a new mechanism might trigger the overlapping of competence with the jurisdiction of ordinary courts.

Let’s think about the first problem. Even though there are no explicit provisions on constitutional complaint in Constitution and a constitutional amendment to introduce constitutional complaint is not easy, it is not entirely impossible to introduce a general form of constitutional complaint without a constitutional amendment; it can be done through amendment to the Constitutional Court Act. This appears, basically, to be a matter that depends on the will of the legislature. Still, the Constitutional Court should have considerable room to contribute to such a legislative process.

On the other hand, the introduction of constitutional complaint can be done through constitutional interpretation. In fact, there may be a controversy over the constitutionality of introducing constitutional complaints without a constitutional amendment. As every Constitutional Court has the power to review the constitutionality of laws, it would be somewhat difficult, but not entirely impossible to interpret that the power to review the “constitutionality of laws” may include the power to review the “constitutionality of execution of laws.” No matter how constitutional a law may be, if an unconstitutional execution of that law cannot be revoked by the Constitutional Court, a vacuum will be generated in terms of the protection of fundamental rights.

The problem stemming from the overlapping of competence or jurisdiction with other courts can be partly resolved by the principle of subsidiarity. On the ground of the principle
of subsidiarity, the three-justice panel shall dismiss a constitutional complaint when a constitutional complaint is filed, without having exhausted all the relief processes provided by other laws.

V. A solution for concerns over heavy caseload

Once the constitutional complaint system is adopted, the increase in caseload is inevitable. We have seen the dramatic increase of the numbers of constitutional complaints in Turkey during last 3 years.

As far as the Korean constitutional court’s caseload is concerned in terms of constitutional complaint, in 2015 the Korean constitutional court received about 1,859 cases and more than 98% of the cases are constitutional complaints, and around 70% of constitutional complaints have no pending cases before “ordinary courts.” These cases are “constitutional complaint as a remedy of rights”. Among these type complaints, around 80% of cases were dismissed by three-justice panels in the Court without decision upon the merits, but still over 500 cases were decided by the full bench of the Court in 2015, for there were other types of the cases in the Court.

I think that most of the Constitutional or Supreme Courts of the world have the same concern as ours in terms of dealing with its heavy caseloads, and the U.S. Supreme Court normally receives about 10,000 petitions for certiorari, and only some 1% of them are granted per year. The review on the writ of certiorari is not a matter of right, but of judicial discretion, and a petition for a writ of certiorari will be granted only for compelling reasons.

In comparison, the German constitutional justice system has a mechanism, called “admission procedure (“Annahmeverfahren” in German),” which was introduced under the influence of the U.S. certiorari system.

Article 93a(2) of the Law on Federal Constitutional Court of Germany, which defines Annahmeverfahren of the Court, provides that complaints shall be admitted when the case has general constitutional significance; when the complainant’s fundamental rights or one of his or her rights under the Basic Law are appropriately claimed; and if the complainant would suffer a particular grave disadvantage if the Court refused to decide on the complaint. This authority to decide on the admissibility of a case allows for discretion, and so the caseload can be reduced to a certain extent. Under the system, the refusal to admit the
constitutional complaint for decision may be decided by the three-justice chamber, and that decision does not require reasons to be given, and no appeal may be made against it. Even though “admission procedure” is not a matter of judicial discretion unlike the U.S. certiorari system, it has contributed greatly to lessen the caseload of the German Federal Constitutional Court, and I’ve heard that more than 95% of cases were dismissed through admission procedure. But I also know that some German scholars call it “lottery of Karlsruhe” since it is difficult to predict which case will be admitted.

As far as the Korean Constitutional Court is concerned, we do not have a similar discretionary system. The Korean Constitutional Court Act provides that all constitutional complaints that meet the admissibility requirement should be reviewed by the full bench, which means there is no discretion in the process of preliminary review, but in Korea it could be noted that the caseload is still within the manageable level.

The major difference between the U.S., German and Korea is that while the decision for admission is discretionary in U.S. and German, being issued as a simple statement without explanation, the Korean system is not discretionary, and its dismissal of cases comes with reasons why the Court views the case as inadmissible.

VI. Conclusion

The Korean constitutional complaint system is very actively resorted to and used by the Korean people, and this is largely due to the fact that the Korean Constitutional Court has lowered the threshold of constitutional complaints through its proactive interpretation. It is true that the newcomers might face more legal obstacles to the introduction of constitutional complaints, but I believe that the newcomers will be able to play an important role in overcoming such setbacks by applying active legal interpretation which gives top priority to the protection of people’s fundamental rights.
The Role of the Constitutional Court of Romania in Safeguarding the Fundamental Rights

Augustin Zegrean*

I. Enshrining of the fundamental rights and freedoms in the Constitution

Countless studies have outlined that what is nowadays specific to the legislative enshrining of the human rights is legal pluralism, namely the multitude of sources at national, supranational and international levels. We can also notice a trend in terms of development and standardization of the “register” of fundamental rights and freedoms, similar in form and structure with the regulation of these rights at national and international level.

The change in the political regime in Romania, 25 years ago, has determined a substantial regulation of the fundamental rights and freedoms done by the Romanian framers in 1991 and the subsequent revision of the Constitution in 2003 has enriched their number and significance. Thus, by their content and the way in which the fundamental rights are enshrined in the Constitution, we distinguish between: inviolabilities: the right to life and to physical and mental integrity (Article 22); individual freedom (Article 23), the right to defence (Article 24); the freedom of movement (Article 25); the right to personal, family and private life (Article 26); inviolability of the domicile (Article 27); social, economic and cultural rights and freedoms: the right to education (Article 32); access to culture (Article 33); the right to health protection (Article 34); the right to a healthy environment (Article 35); the right to labour and social protection of labour, respectively the prohibition of forced labour (Articles 41-42); the right to strike (Article 43); the right to private property (Article 44); the right of inheritance (Article 46); the right to a decent standard of living (Article 47); the right to family (Article 48); the right of children and young people to

* President of the Constitutional Court of Romania
protection and assistance (Article 49); the right of disabled persons to special protection (Article 50); exclusively political rights: the right to vote (Article 36); the right to be elected (Article 37); the right to be elected to the European Parliament (Article 38); political and social freedoms and rights: freedom of conscience (Article 29); freedom of expression (Article 30); right to information (Article 31); freedom of assembly (Article 39); freedom of association (Article 40); secrecy of correspondence (Article 28); rights-guarantees: the right to petition (Article 51); the right of a person aggrieved by a public authority (Article 52).

This constitutional regulation was done in accordance with the international regulations in the field of human rights\(^1\). Thus, the provisions of Article 20 of the Romanian Constitution expressly establish the supremacy of the international treaties on human rights to which Romania is a party and their constitutional interpretative value. Romania’s accession to the European Union raised the issue of the legal effects ratio between the internal rules and those of the European Union and, in this context, to those contained in the Charter of Fundamental Rights of the European Union, respectively their interpretation by the Court of Justice of the European Union. In this respect, the provisions of Article 148 of the Constitution apply, and, according to paragraph (2) thereof, the provisions of the founding treaties of European Union and of the other binding Community rules have priority over contrary provisions of the national laws.

The constitutional enshrinement of the fundamental rights and freedoms is accompanied by the regulation of certain guarantees of their implementation, the constitutional review conducted by a special and specialized authority - the Constitutional Court, being one of those guarantees. As noted in the case-law and repeated in the specialised doctrine, European judges have never been just the “bouche qui prononce les paroles de la loi”, which underlines the active role of constitutional judges, who give form and life to the letter of the Basic Law.\(^2\) The Constitutional Court of Romania falls under this characterization, which is even more visible when it comes to matters related to the fundamental rights and freedoms, characterized, as shown before, by a high mobility. Next, we will highlight some landmarks likely to illustrate the role of the Romanian Constitutional Court in promoting the

---


2) T. PAPUC, Ieşirea din “semi-constituţionalism” (Exiting “Semi-constitutionalism” – tr.n.), in Noua revistă de drepturile omului, pp.20-34.
fundamental rights.

II. Regulation and status of the Romanian Constitutional Court

The Romanian Constitution dedicates Title V (Articles 142 to 147) to the Constitutional Court, which contains the following provisions on: the Court’s role, structure, term of office of its members, appointment of the judges and election of the President of the Court, the conditions for becoming a judge, the incompatibilities, independence and tenure of the judges, the powers of the Constitutional Court, as well as the effects of its decisions. The constitutional provisions are developed in Law no. 47/1992 on the organization and operation of the Constitutional Court.

The Constitutional Court of Romania consists of nine judges appointed for a nine-year term of office that cannot be extended or renewed. Three judges are appointed by the Chamber of Deputies, three by the Senate and three by the President of Romania. In order to be appointed judge with the Constitutional Court, the following conditions are to be met: high legal education, high professional competence and at least 18 years of experience in the legal field or legal academic professorial activity. Both the Constitution and the Law on the organisation and operation of the Constitutional Court regulate important principles and guarantees of the independence and neutrality of the judges of the Constitutional Court, likely to enable them to administer justice objectively. According to Law no. 47/1992, the Court is “independent from any other public authority” and is subject only to the Constitution and the provisions of the law on its organization and operation.

The powers of the Constitutional Court are governed by Article 146 of the Constitution (12 powers) and the provisions of Law no. 47/1992 (two powers, under Article 146 (l) of the Constitution, according to which the Constitutional Court “also fulfils other prerogatives as provided by the Court’s organic law”). Thus, the Constitutional Court conducts the constitutional review of organic or ordinary laws – before promulgation or after their entry into force, of international treaties or other agreements prior to their ratification by the


Parliament or after their ratification, of the Standing Orders of the Parliament in force, and of Government ordinances. As for the procedure of the revision of the Constitution (implicitly the constitutional laws), the Constitutional Court rules *ex officio*, both on the initiatives to revise the Constitution and on the law for its revision, after its adoption by the Parliament. Also, the Romanian Constitutional Court decides on the legal disputes of a constitutional nature between public authorities; it sees to the observance of the procedure for the election of the President of Romania and confirms the results of the ballot; it ascertains the circumstances justifying the interim in the exercise of office of President of Romania and it reports its findings to the Parliament and the Government; it gives advisory opinions on the proposals to suspend the President of Romania from office, it sees to the observance of the procedure for the organization and holding of the referendum and it confirms its returns; it verifies whether or not the conditions are met for the exercise of the legislative initiative by the citizens; it decides on complaints concerning the constitutionality of a political party; it conducts the constitutional review of the by-laws of the Plenum of the Chamber of Deputies, of the Senate and of the Plenum of the two joint Chambers of Parliament. Except for the powers concerning the revision of the Constitution, exercised *ex officio*, the Constitutional Court decides only upon referral by the subjects expressly and limitatively provided by the provisions of the Constitution, respectively of the Law no. 47/1992, and referrals must be in writing and motivated.

The substance of the Constitutional Court’s activity is given by the settlement of the exceptions of unconstitutionality of laws and ordinances, therefore by cases in which violations of the fundamental rights and freedoms are usually alleged. Thus, from its establishment until today\(^5\), the Court has adjudicated on 33,649 referrals, of which 32,820 exceptions of unconstitutionality, respectively 32,763 exceptions raised before the courts of law [under Article 144 (c) of the Constitution, respectively the first sentence of Article 146 (d) of the Constitution, republished] and 57 exceptions raised directly by the Ombudsman [according to the second sentence of Article 146 (d) of the Constitution, republished\(^6\)]. While settling these cases, the Court had to decide, on numerous occasions, on issues of great complexity, which have led to its assertion in the public consciousness as an institution fully involved in the legal life.

In this study we will present some examples that we consider particularly significant,

---

\(^5\) On 31 August 2015.

including by the fact that they represent a transposition of the international documents, respectively of the practice of the European and constitutional courts in this matter.

III. Landmark case-law in the field of safeguarding fundamental rights and freedom

1. Human dignity

Human dignity is expressly enshrined as a supreme value of the rule of law by Article 1 (3) of the Constitution of Romania. Concerning these provisions, the case-law of the Constitutional Court has enshrined the inviolability of human dignity, also in compliance with Article 1 of the Charter of Fundamental Rights of the European Union. Consequently, the establishment by law of the content and limits of the constitutional rights, freedoms and duties, as well as the restriction, by law, of their exercise, must be carried out without affecting human dignity.7)

As recent developments of the interpretation of this constitutional text, we mention the case-law by which the Court has identified two dimensions inherent to human dignity, respectively human relationships, which implies the right and obligation of people to have their fundamental rights and freedoms respected and, correlative, their obligation to respect the fundamental rights and freedoms of others, as well as man’s relationship with the environment, including with the animal world, which implies, in what concerns animals, man’s moral responsibility to take care of these beings in a manner that illustrates the level of civilization attained.8) Regarding the case-law of the Constitutional Court in this matter, the legal doctrine noted that the Constitutional Court’s solution had a noble origin, reminiscent of Albert Camus’s philosophical argumentation concerning the death penalty, which was subsequently promoted by the famous French legal specialist Robert Badinter,

the decision of the Constitutional Court of Romania having a special significance for the other constitutional courts or constitutional bodies in the world.9)


Remaining in the same sphere of the principles characterizing the rule of law, and examining how the concept of rule of law is enshrined in international documents and in State legislation, we note that, beyond the various definitions that can be given to it, inherent in view of the variety of existing legal systems, it is unanimously accepted10) that one of its essential elements is the free access to justice.11)

Given the importance of free access to justice, which is both a principle and a fundamental right, we emphasize the consistent case-law of the Constitutional Court in this matter. We consider particularly relevant the case-law concerning the ensuring of full access to constitutional justice. Thus, the Constitutional Court of Romania proceeded to the interpretation of the provisions of its own law of organization and operation in accordance with Article 21 of the Constitution – Free access to justice, noting that the phrase “in force” in the provisions of Article 29 (1) and Article 31 (1) of Law no. 47/1992 on the organization and operation of the Constitutional Court, republished, is constitutional insofar as it is interpreted that laws or ordinances or provisions thereof that continue to produce legal effects even after they are no longer in force are also submitted to constitutional review.12) The Court held that, according to the Romanian system of the concrete control of the constitutionality of laws, the a posteriori review starts only incidentally, through the exception of unconstitutionality raised before the courts of law or of commercial arbitration, and not by an “actio popularis”, based on the direct referral by any person. Therefore, the constitutional review can be requested only for those legal provisions that, in specific situations, are applicable for the settlement of the disputes pending before the courts, laws

10) Idem.
11) Other elements identified in the above-mentioned report are as follows: legality, including a transparent, responsible and democratic process, for the adoption of the law, legal certainty, prohibition of arbitrary, observance of human rights, non-discrimination and equality before the law.
The Role of the Constitutional Court of Romania in Safeguarding the Fundamental Rights

and ordinances as a whole, or only certain provisions therein. The establishment of this procedure of review of the constitutionality of the law applicable in the case examined on its merits, as a means of access to the courts, necessarily involves ensuring the possibility to be used by all those having a right, a legitimate interest and procedural standing. The condition according to which the legal provision impugned for unconstitutionality should be related to the settlement of the case is, obviously, necessary, but also sufficient. Adding an additional condition hereto – that the legal provision should also be formally in force, whose failure to comply with has the drastic significance of a real dismissal of the referral addressed to the constitutional court concerning the respective exception of unconstitutionality, represents a restriction of the free access to the constitutional court, thus violating the provisions of Article 21 (1), (2) and (3), combined with those of Article 146 (d) of the Constitution. All the more so as the repeal or the formal lapsing of a legal standard does not necessarily suppose its inapplicability in all situations. Even if the law is alive, so that, at the same time as the society, it must also adapt to the changes, all legislative events (laws are repealed, they expire, are amended, supplemented, suspended or they just fall into disuse, depending on the new social relations, on requirements and opportunities) and the normative solutions that they enshrine must comply with the principles of the Basic Law. Once referred to, the Constitutional Court must examine them, without rendering this control conditional upon the discard, under any form, from the active fund of the legislation, of the act impugned for unconstitutionality.

This decision gives expression to a certain evolution in the approach of the Constitutional Court of Romania, towards ensuring an effective and full access to constitutional justice, aspect also stressed by the Court in the recitals of the same decision: “there were cases in the case-law of the Court where it sanctioned for unconstitutionality the legal provisions that were no longer in force (for example, referrals concerning normative acts on salaries in the education system). The reasons behind the analysis on the merits of the pleas of unconstitutionality on those occasions consist of the fact that the constitutional court found the intervention of certain legislative events that have alternated frequently, which would have led to avoiding the constitutional review of the amended provisions. In such a situation, the rejection of the exception as inadmissible would have made it impossible for the parties to benefit from the effects of the Court’s decision, therefore of the review that they had initiated, which would have represented a real sanction against them”.
3. Protection of personal, family and private life

We consider as references, in this respect, the decisions by which the Constitutional Court held the unconstitutionality of the regulations on the retention of data generated or processed by the providers of publicly available electronic communications services or of public communications networks, which have transposed into national law Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC.

This case-law\(^\text{13}\) constitutes a development in constitutional law in the field of safeguarding the fundamental rights related to personal, family and private life and to the secrecy of correspondence, as well as in relation to the protection of personal data. By sanctioning the law that does not provide objective criteria for restricting to a minimum the number of people who have access and can then use the personal data of citizens, and the access of national authorities to stored data being not subject to prior review by a court to limit such access and use to what is strictly necessary for achieving the objective set, the Court has set the protection standard concerning the legal guarantees regarding the concrete use of the data held and used within computer systems. There is a consistency of the constitutional court in exercising its role as a guarantor of the fundamental rights and freedoms enshrined in the Constitution, the Court ensuring a fair balance between the national interests of national security, the fight against crime and terrorism and the individual interest of the citizen, the main recipient of the guarantees inherent to a democratic state governed by the rule of law. The delivered decision and its grounds can also be found in the case-law of other European constitutional courts, as well as that of the Court of Justice of the European Union. We are considering the Judgement of 8 April 2014 of the Court of Justice of the European Union, given in Joined Cases C-293/12 – Digital Rights Ireland Ltd v. Minister for Communications, Marine and Natural Resources and

and C-594/12 Kärntner Landesregierung and others, where it was held that the data covered by Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending the invalidated Directive 2002/58/EC allowed very precise conclusions concerning the private lives of the persons whose data have been retained, such as the habits of their everyday life, their permanent or temporary places of residence, their daily or other movements, the activities carried out, the social relationships of those persons and the social environments frequented by them (recital 27) and that, in such circumstances, even though, according to Article 1 (2) and Article 5 (2) of Directive 2006/24/EC, it was prohibited to retain the content of the communication or information consulted when using an electronic communications network, the retention of the data in question might have an effect on the use, by subscribers or registered users of the means of communication covered by that directive and, consequently, on their freedom of expression, guaranteed by Article 11 of the Charter (recital 28).

4. Right to private property. Enshrinement of the test of proportionality

The period after 1990 was characterized by the adoption of numerous regulations aimed at repairing the injustices committed during the Communist period, the issue of the legislation on the restitution of confiscated property being well-known and still raising problems for the Romanian legal system. Given the significance of these regulations and the numerous decisions of the Constitutional Court in this matter, the issue of reference was one of the topics of the Conference organized by the Romanian Constitutional Court, with the support of the German Foundation for International Legal Cooperation (IRZ) “Constitutional jurisdiction 20 years after the fall of the Communist Curtain”. The Conference was attended by judges of constitutional courts in the countries of Central and South-Eastern Europe, members of the European Union, by representatives of the Romanian State authorities, and by outstanding personalities of the academia and civil society. The discussions focused on the restitution of property abusively confiscated by the authorities of the Communist state, access to personal files and disclosure of the Communist political police and political lustration laws. The meeting was also intended to be a review of
over 20 years of activity of the constitutional courts in the democratic legal order of post-communist countries and an opportunity to gather constitutional judges together for the purpose of sharing the common experiences that they have faced during this period. The materials presented during the meeting were included in a book edited in English and Romanian.

Among the numerous decisions pronounced on these regulations, we would like to mention those in which the Constitutional Court ruled on the conditions allowing the limitation of the exercise of the property right or the deprivation of property to be compliant with the Constitution. Thus, basing its considerations also on the case-law of the European Court of Human Rights, the Court held that “the legislator is competent to establish the legal framework for the exercise of the right to property, in the sense conferred by the Constitution, so as not to come into collision with the general interests or the legitimate private interests of other subjects of law, thus establishing reasonable limitations in using it as a guaranteed subjective right”. Deprivation of property must have a legitimate purpose and, to achieve this, the measure must keep a fair balance between the general interest of the community and the protection of the fundamental rights of the individual.\(^\text{14})\) The Court also held that the deprivation of property imposed on the State to compensate the owner: “in the absence of a restorative compensation, Article 1 of Protocol no. 1 would provide only an illusory and ineffective protection of the right to property”.\(^\text{15})\)

It is also noteworthy to mention the recent case-law\(^\text{16})\) by which, ruling on the compliance of an impugned regulation with the constitutional provisions regarding the right to property, the Constitutional Court took from the case-law of the German Federal Constitutional Court the proportionality test model”.\(^\text{17})\) In order to assess the constitutionality of the measures restricting the exercise of the right to property (of rights in general), the Court considers the following logical reasoning: determining the scope of the fundamental right protected; determining the existence of an effect on/limitation of the fundamental right protected by an intervention from the State or a third party; existence of a justification of the damage/limitation of fundamental rights protected. In order to analyse this requirement, the Court took into account two conditions, a special one, namely that the

\(^{17})\) The decision rendered on 11 June 1958 - BVerfG 7, 377 Apotheken.
justification of the measure to be based on a provision expressly provided by the Constitution and a general one, namely the principle of proportionality, according to which any limitation of a right should be appropriate, necessary and proportionate to the legitimate aim pursued.

5. Social rights

This field draws our attention given the case-law developed mainly in the years marked by the economic crisis, characterized by the adoption of certain normative acts that narrowed the exercise of certain fundamental rights such as the right to salary or pension.

We consider as a reference in the case-law of the Romanian Constitutional Court the decisions\(^{18}\) by which it declared unconstitutional the measure of reducing by 15% the contributory pensions and, in support of this solution, it mentioned some other decisions of other constitutional courts\(^{19}\), namely Decision no. 455/B/1995, Decision no. 277/B/1997 and Decision no. 39/1999 (XI 1.21.) of the Constitutional Court of Hungary\(^{20}\); Decision no. 2009-43-01 of 21 December 2009 of the Constitutional Court of Latvia. The same applies to the case-law on the pension rights of magistrates\(^{21}\), in which the Court held the recitals regarding the need to ensure the financial security of the judges, as a guarantee of their independence, ruled in the decision of the Constitutional Court of Latvia of 18 January 201


20) The Constitutional Court of Hungary, through Decision no. 455/B/1995, stated that the pension calculated under the rules of the social insurance system cannot be affected, and, by Decision no. 277/B/1997, it held that the unilateral amendment of the amount of the pensions was unconstitutional, with direct reference to the inability of the legislature to reduce high pensions in order to increase low pensions. At the same time, by Decision no. 39/1999 (XII.21), the same constitutional court ruled that pensions (contributory) were a right earned and bought to such a large extent that a change in its nominal amount was unconstitutional.

022), in that of the Constitutional Court of Lithuania of 12 July 200123) and in that of the Constitutional Court of the Czech Republic on 14 July 200524).

We should also note, as part of the jurisprudential developments in the field of social rights (this time in respect of the workers’ right to social protection measures), the valorisation of international documents made by the Constitutional Court in its decision that declared unconstitutional those legal provisions that removed, in the case of employers in insolvency, the workers’ right to information and consultation in the case of collective layoffs. By examining the exception of unconstitutionality, the Court proceeded to an analysis and configuration of the fundamental rights invoked in the respective case in compliance with the European/international reference norms, and, by doing so, to the jurisprudential constitutionalisation of the labour social protection measures regulated by international treaties. Thus, in order to configure the fundamental right to social protection of labour, in addition to its components specifically listed by the constitutional text, the Court also invoked the provisions of Article 11 (1) and Article 20 (1) of the Constitution, according to which “The Romanian State pledges to fulfil as such and in good faith its obligations as deriving from the treaties to which it is a party”, namely “Constitutional provisions concerning the citizens’ rights and liberties shall be interpreted and enforced in conformity with the Universal Declaration of Human Rights, with the covenants and other treaties to which Romania is a party”, as well as by points 21 and 29 of Part I of the

22) This decision declared as unconstitutional and inapplicable provisions of the Law on the judicial power, on the grounds that they were contrary to the principle of judicial independence, provided by Article 83 of the Latvian Constitution. The Parliament – by taking into account the financial situation of Latvia and the country’s foreign commitments – has decided to recalculate the judges’ salaries, which would have led to a decrease in the amount of their remuneration. The Constitutional Court found that the concept of independence of judges included appropriate remuneration, comparable to the prestige of the profession and the purpose of their responsibility. Given the status of judges, the purpose of the judges’ remuneration is both to ensure their independence and to partially compensate for the restrictions imposed by law.

23) It has been stated that democratic countries accepted that the judge, who has to solve the disputes in the society, including those between natural or legal persons and the State, must be not only a highly professional with a perfect reputation, but (s)he should also be materially independent and must have a sense of security in terms of his/her future. The State has the obligation to establish the remuneration of judges so as to compensate for their statute, position and responsibilities and maintaining the remuneration of the judges is one of the guarantees of judicial independence.

24) In democratic states, financial security is clearly recognized as one of the key elements that ensure the independence of the judges.
European Social Charter (revised) adopted in Strasbourg on 3 May 1996, ratified by Law no. 74/1999, published in the Official Gazette of Romania, Part I, no. 193 of 4 May 1999 whereby “Workers have the right to be informed and consulted within the enterprise”, respectively “all workers have the right to be informed and consulted in the case of collective layoff procedures”, which, in view of Article 11 (1), Article 20 (1) and of the first sentence of Article 41 (2) of the Constitution, can only lead to the interpretation of the right to social protection of labour in that it contains as its components the information and consulting of employees, which are thus integrated to the normative content of the previously mentioned fundamental right. By setting the obligation to interpret civil rights and freedoms in accordance with the international treaties to which Romania is a party, the framers have implicitly imposed a level of constitutional protection of the fundamental rights and freedoms at least equal to that set by the international documents.

In this context, the regulation of a social protection measure of labour in an international treaty, combined with its social importance and magnitude, results in granting the right or freedom provided for in the content of the Constitution an interpretation consistent with the international treaty, in other words an interpretation that develops in an evolving manner the constitutional concept.25) This decision illustrates the legal pluralism mentioned in the introduction of this study and the active attitude of the Constitutional Court in the sense of ensuring and developing the standards for the protection of fundamental rights.

IV. Conclusion

The case-law of the Constitutional Court in safeguarding the fundamental rights gives many more such examples. The selection made offers some of the most significant landmarks such as to demonstrate the development and importance of the constitutional review in Romania.

It is not less true that the path of the Constitutional Court has not been and is not an easy one, and decisions including approaches that “have broken” the classical patterns of constitutional courts as “negative legislator” have created doctrinal controversies, criticism, but also appraisals. A legitimate question was asked: “how is constitutional law imagined by

those who see a chained Constitutional Court?"

Undoubtedly, constitutional courts, regardless of the model that they belong to, are engaged in an evolutionary process, determined in its turn by an increase in the protection standards of human rights at international level and the need to identify appropriate tools to ensure/achieve these standards.

This role, this mentioned opening and development have to be known, to be correctly perceived and valued by the beneficiaries of such protection, which is why, since its establishment, and especially in the recent years, the Constitutional Court has developed its communication with the media and has consistently proceeded to the editing of case-law collections and of the Constitutional Court Bulletin, a genuine business card of this Court, which includes bigger and bigger sections dedicated to its decisions. We think that this promotion of constitutional justice also gives expression to the role of the Constitutional Court of Romania in safeguarding the fundamental rights, from a perspective that we would call preventive and educational.

26) T. PAPUC, op. cit., p. 34.
The Impact of the Case-law of the European Court of Human Rights on the Jurisprudence of the Constitutional Court of the Republic of Lithuania

Dainius Žalimas*

I. Introduction

Contemporary constitutionalism is inconceivable without the idea of the protection of human rights and freedoms. A Constitution, as ius supremum – supreme law, enshrines fundamental rights, which derive from human nature. The innate nature of human rights is given the fundamental constitutional status, i.e. the guarantee that this nature will not be denied by any authority.

A basic list of constitutional rights is enshrined in Section II of the Constitution of the Republic of Lithuania. The first article of this section, i.e. Article 18, states that “Human rights and freedoms shall be innate”. This provision, enshrining the inalienable nature of human rights, together with the provisions consolidating the independence of the state and democracy, should be understood as constitutional metanorms, constituting the essence of the Lithuanian Constitution. In its ruling of 11 July 2014 concerning organising and calling referendums, including referendums on amending the Constitution, the Constitutional Court emphasised that “the innate nature of human rights and freedoms, democracy, and the independence of the state are such constitutional values that constitute the foundation for the Constitution, as a social contract, as well as the foundation for the Nation’s common life, which is based on the Constitution, and the foundation for the State of Lithuania itself”. 1) Therefore, “no one may deny the provisions of the Constitution consolidating these fundamental constitutional values, since doing so would amount to the denial of the essence of the Constitution itself”. 2) Drawing on these arguments, the Constitutional Court declared

* President of the Constitutional Court of the Republic of Lithuania

that, even in cases where the established limits on the alteration of the Constitution are followed, 3) “no such amendments to the Constitution may be made that would destroy the innate nature of human rights and freedoms, democracy, or the independence of the state; if the Constitution were interpreted in a different way, it would be understood as creating preconditions for abolishing the restored “independent State of Lithuania, founded on democratic principles”, as proclaimed by the Act of Independence of Lithuania of 16 February 1918”. 4) In other words, the Constitutional Court ruled that the power of the constituent authority to revise the Constitution does not include the power to create a completely new Constitution, which would negate the universal values of democracy, innate human rights, and the independence of the state. Thus, the provision on the innate nature of human rights, as well as the provisions on other fundamental constitutional values, was accorded the status of an “eternal clause”, implying the unamendability of such clauses. The denial of the values entrenched by these provisions would mean a collapse of the collective identity of the Nation, as embodied in the Constitution, and the denunciation of the sovereignty of the Nation and the State of Lithuania.

Due to the overlapping regimes of human rights protection (national, regional, and universal), constitutional courts are faced with human rights norms enshrined not only in the respective national constitutions, but also in different international instruments. The international obligation to secure the rights and freedoms defined in the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the ECHR or the Convention) is of particular importance for the Member States of the Council

2) Ibid.

3) Under Paragraph 1 of Article 148 of the Constitution, the provision “The State of Lithuania shall be an independent democratic republic” of Article 1 of the Constitution may be altered only by referendum if not less than 3/4 of the citizens of Lithuania with the electoral right vote in favour thereof”; it should be noted that only the same procedure may be applied to altering the provision “The State of Lithuania shall be an independent democratic republic” of Article 1 of the Constitutional Law “On the State of Lithuania”, which is a constituent part of the Constitution (Article 2 of the Constitutional Law “On the State of Lithuania”). Article 18, enshrining the innate nature of human rights, belongs to the provisions of the Constitution, in respect of which the regular alteration procedure applies: amendments must be considered and voted at the Seimas twice. There must be a break of not less than three months between the votes. A draft law on the alteration of the Constitution is deemed adopted by the Seimas if, during each of the votes, not less than 2/3 of all the members of the Seimas vote in favour thereof.

of Europe when they adopt decisions that affect the exercise of human rights. As the European Court of Human Rights (hereinafter also referred to as the ECtHR) has stated, the Convention is a “constitutional instrument of European public order”.5)

At the same time, the subsidiary nature of the Convention mechanism, which means that contracting states “have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention”,6) implies that national courts, including constitutional courts, must take into account the requirements of the Convention. The European Court of Human Rights is recognised as the authoritative interpreter of the Convention, and its case-law is considered a guiding source for adjudicating on fundamental rights.

In this contribution, focus will be placed on the issue of the impact of the case-law of the European Court of Human Rights on the jurisprudence of the Constitutional Court of the Republic of Lithuania (hereinafter also referred to as the Constitutional Court). First of all, the constitutional grounds opening the way for the influence of the Convention law on the jurisprudence of the Constitutional Court will be discussed. Next, drawing on examples from the jurisprudence of the Constitutional Court, the methods of the internalisation of the Convention in the Lithuanian constitutional jurisprudence will be analysed. Finally, the possible limits of the impact of the Convention law on the Lithuanian Constitution will be considered.

II. Constitutional preconditions for the openness of the Constitution towards international law

Lithuanian constitutional provisions and the Lithuanian constitutional doctrine generally follow the monist model of relationship between national law and international treaties. When interpreting the provision “International treaties ratified by the Seimas of the Republic of Lithuania shall be a constituent part of the legal system of the Republic of Lithuania” of Article 138(3) of the Constitution, the Constitutional Court has held that this

5) Loizidou v. Turkey (preliminary objections), 23 March 1995, § 75.
provision means that international treaties ratified by the Seimas (Lithuanian Parliament) acquire the force of a law. Therefore, the Constitutional Court refuses to investigate the compliance of laws with the ratified international treaties, including with the Convention.

However, even though ratified international treaties and laws have comparable legal force, in view of the constitutional tradition of respect for international law as reflected in Article 135(1) of the Constitution, the Constitutional Court has held that the doctrinal provision under which international treaties ratified by the Seimas acquire the force of a law may not be interpreted as meaning that, purportedly, the Republic of Lithuania may disregard international treaties if its laws or constitutional laws contain a legal regulation that is different from the one established in international treaties. According to the interpretation of the Constitutional Court, the Constitution consolidates the principle that, in cases where a national legal act (with the exception of the Constitution itself) establishes a legal regulation that competes with the one established in an international treaty, the international treaty must be applied.

However, the monist model, which implies a hierarchical relationship of international law with respect to national law, may be applied inasmuch as it is related to domestic legal acts other than the Constitution of the Republic of Lithuania, i.e. international treaties take precedence over all Lithuanian national legal acts except the Constitution.


8) See, for example, the Constitutional Court’s decision of 7 April 2004, by which it refused to investigate the compliance of certain provisions of the Law on Courts with Article 6 of the Convention <http://www.lrkt.lt/en/court-acts/search/170/ta1265/content>.

9) Article 135(1) of the Constitution states that “In implementing its foreign policy, the Republic of Lithuania shall follow the universally recognised principles and norms of international law, shall seek to ensure national security and independence, the welfare of its citizens, and their basic rights and freedoms, and shall contribute to the creation of the international order based on law and justice”.

10) Among others, the Constitutional Court’s ruling of 14 March 2006 on the limitation on the rights of ownership to land in the areas of particular value and to forest land, <http://www.lrkt.lt/en/court-acts/search/170/ta1357/content>.

11) Ibid.
The constitution-centric concept of the Lithuanian legal system determines that no law or other legal act, including international treaties of the Republic of Lithuania, may be in conflict with the Constitution. The Constitutional Court, in its ruling of 5 September 2012,\(^\text{12)}\) emphasised that, in the course of implementing the international obligations of the Republic of Lithuania in domestic law, it is necessary to take account of the principle of the supremacy of the Constitution, which is consolidated in Article 7(1) of the Constitution and prescribes that “Any law or other act that contradicts the Constitution shall be invalid”. The Constitutional Court noted that, in itself, this constitutional provision cannot render any law or international treaty invalid, but it requires that the provisions of laws and international treaties be not in conflict with the provisions of the Constitution. With regard to the foregoing, the Constitutional Court concluded that, in cases where the legal regulation consolidated in an international treaty that has been ratified by the Seimas and has entered into force competes with the legal regulation established in the Constitution, the provisions of such an international treaty do not take precedence in terms of application.\(^\text{13)}\)

On the other hand, in the same ruling, the Constitutional Court recognised the existence of clear interaction between the international human rights protection system (the Convention law) and the national (constitutional) legal system, the subsidiarity of the international human rights protection system with respect to the Constitution, and the broad discretion (however, limited by the Constitution) of the state to choose the means of implementing the obligations related to international human rights protection. The Constitutional Court emphasised the necessity to harmonise national law in the field of human rights with the respective international obligations of the Republic of Lithuania, even where doing so would require amending the Constitution, so that the principle of its supremacy would not be denied.\(^\text{14)}\)

Such interaction between the Constitution and international law may be described as the parallel development of the Constitution (along with the official constitutional doctrine interpreting the Constitution) and international law. Irrespective of the necessity recognised by the Constitutional Court to harmonise national law with international law, this parallelism in the development of national and international law has not only advantages

---


\(^{13)}\) Ibid.

\(^{14)}\) Ibid.
(e.g., the possibility of transposing the most advanced international legal standards and the use of these standards in the interpretation of the Constitution) but also disadvantages: due to the parallel development of both legal systems, it may become clear that certain international legal norms are incompatible with the respective provisions of the Constitution as interpreted in the jurisprudence of the Constitutional Court.

However, the Lithuanian Constitution both explicitly and implicitly consolidates the principles that render it possible to minimise the potential tensions between national and international law and lead to the openness of the Constitution towards the influence of the international legal system. These principles – the principle of *pacta sunt servanda* and the principle of the geopolitical orientation of the state – provide the basis for the constitutional presumption of the compatibility of international law with the Constitution.

The said two principles, giving rise to the constitutional presumption of the compatibility of international law with the Constitution, have been from the outset closely connected with human rights-related contexts. As will be explained further, the constitutional principle of *pacta sunt servanda* implies, among other things, that the constitutional standards of human rights protection may not be lower than international standards. In other words, the international standards of human rights should be perceived as a minimum necessary standard for national law. At the same time, the principle of geopolitical orientation is grounded in the historical commitment of the state of Lithuania towards the principles of real democracy, including respect for human rights.

Concerning the principle of *pacta sunt servanda*, in its ruling of 24 January 2014, the Constitutional Court noted that respect for international law is a constitutional value and an inseparable part of the principle of the rule of law. The Constitutional Court held that the constitutional principle of respect for international law, i.e. the principle of *pacta sunt servanda*, is consolidated in Article 135(1) of the Constitution, according to which the Republic of Lithuania must follow the universally recognised principles and norms of international law. This ruling makes it clear that the core of the constitutional principle of *pacta sunt servanda* is the imperative to fulfil in good faith the obligations assumed by the Republic of Lithuania under international law, i.e. this principle implies the duty of the State of Lithuania to follow not only the norms of the treaties ratified by it, but also the norms of general international law.

---

In addition, the constitutional principle of pacta sunt servanda should be regarded as a legal tradition of the restored independent State of Lithuania, though not only for the reason, as noted by the Constitutional Court in its ruling of 14 March 2006,\(^{16}\) that the adherence of the State of Lithuania to the universally recognised principles of international law was declared in the Act “On the Re-establishment of the State of Lithuania”, adopted by the Supreme Council of the Republic of Lithuania on 11 March 1990. The beginnings of this legal tradition can be traced in another constitutionally significant act – the Declaration of the Council of the Lithuanian Freedom Fight Movement of 16 February 1949\(^ {17}\) (adopted in the circumstances of the occupation of Lithuania by the USSR), which is one of the documents that laid down the constitutional foundations for the independent democratic State of Lithuania. Paragraph 22 of this Declaration proclaimed the resolve of the State of Lithuania to contribute to the efforts of other nations to establish global peace founded on justice and freedom and based on the Atlantic Charter, the Universal Declaration of Human Rights, and other international legal acts.\(^{18}\)

In terms of the content of the constitutional principle of pacta sunt servanda, the Constitutional Court’s ruling of 9 December 1998 concerning the death penalty\(^ {19}\) is also significant. In this ruling, it was noted that, recognising the principles and norms of international law, the State of Lithuania may not apply to the people of this country any such standards that would virtually be different from international ones; holding that it is an equal member of the international community, the State of Lithuania, of its own free will, adopts and recognises these principles and norms, the customs of the international community, and naturally integrates itself into the world culture and becomes its intrinsic part. Thus, it is

---

\(^{16}\) Constitutional Court’s ruling of 14 March 2006 on the limitation on the rights of ownership to land in the areas of particular value and to forest land, <http://www.lrkt.lt/en/court-acts/search/170/ta1357/content>


possible to draw the conclusion that the constitutional principle of pacta sunt servanda gives rise to the requirement that international law should be a minimum necessary standard for national law; furthermore, the international standards of human rights protection are understood as compatible with constitutional standards, while the latter may not be lower (but can be higher) than international ones.

The second principle implying the openness of the Constitution towards international law, i.e. the principle of the geopolitical orientation of the State of Lithuania, may also be regarded as part of the constitutional tradition of the State of Lithuania deriving from the same Declaration of the Council of the Lithuanian Freedom Fight Movement of 16 February 1949. By expressing the allegiance of Lithuania to the Universal Declaration of Human Rights, adopted only two months before, the Declaration of the Lithuanian Freedom Fight Movement proclaimed the aspiration of integration into the community of Western democratic states. At the same time, it was implied that the State of Lithuania had chosen the way of geopolitical orientation that was different from that of the occupant Soviet Union, which, as is known, rejected the provisions of the Universal Declaration of Human Rights.

As the Constitutional Court noted in its ruling of 7 July 2011, the geopolitical orientation of the State of Lithuania means the membership of the Republic of Lithuania in the EU and NATO, as well as the necessity to fulfil the related international commitments. Obviously, this also gives rise to the need to interpret the provisions of the Constitution and other norms of national law in the corresponding manner.

The content of the principle of the geopolitical orientation of the State of Lithuania was most comprehensively revealed in the Constitutional Court’s ruling of 24 January 2014. The Constitutional Court noted that the geopolitical orientation of the State of Lithuania, which is entrenched in the Constitution and implies European and transatlantic integration pursued by the Republic of Lithuania, is closely interrelated with the fundamental constitutional values consolidated in Article 1 of the Constitution – the independence of the state, democracy, and the republic; such geopolitical orientation of the State of Lithuania is based upon the recognised and protected universal democratic constitutional values, shared by other European and North American states.

Thus, the common democratic values of the community of European and transatlantic

---


states form the basis of the principle of the geopolitical orientation of the State of Lithuania. This commonness of values, such as respect for human rights, democracy, the rule of law, and pluralism, allows presuming that international legal norms based on the mentioned common values are compatible with the Constitution.

The constitutional presumption of the compatibility of international law with the Constitution is indirectly confirmed by the doctrine developed in the above-mentioned Constitutional Court’s ruling of 24 January 2014. The Constitutional Court noted that it is not permitted to make any such amendments to the Constitution that would deny the international obligations of the Republic of Lithuania and, at the same time, the constitutional principle of *pacta sunt servanda*, as long as the said international obligations have not been renounced in accordance with the norms of international law. Thus, the norms of international law are presumed to be compatible with the Constitution, and the prohibition is formulated against the violation of this harmony by means of any amendments to the Constitution.

The presumption of the compatibility of international law with the Constitution leads to the assertion that the Constitution gives rise to the duty of the Constitutional Court, when interpreting the provisions of the Constitution, to pay regard to the international legal context. Taking into account that the presumption of the compatibility of international law with the Constitution rests on the principles embodying the duty to respect human rights, this presumption, in particular, presupposes the constitutional imperative to respect international standards of human rights, including those emerging from the Convention law (the Convention, its Protocols, and related case-law of the ECtHR).

In general, the duty, in interpreting the provisions of the Constitution, to pay regard to the international legal context specifically implies the necessity to interpret the provisions of the Constitution in such a manner that: 1) their content would not deny any corresponding international legal norms; 2) on the first instance of interpreting a certain provision of the Constitution (in the absence of the relevant official constitutional doctrinal provisions), the interpretation would be guided by the international legal standards in the corresponding area, unless it is aimed at forming a higher level of protection with regard to particular constitutional values; 3) where several versions of interpretation are possible, the choice would be made of the one that is in the greatest accord with the relevant international legal provisions; 4) favourable regard would be given to international judicial case-law (including that of the ECtHR) (i.e., the so-called principle of favourable treatment); 5) the constitutional notions of the international legal nature would not be given any other content
than that they have under international law; any refusal to have regard to international law must be properly constitutionally justified (for example, on the grounds of a higher standard implied by the Constitution for the protection of certain rights).22)

III. Methods of the internalisation of the Convention in the constitutional jurisprudence

The positive approach of the Constitutional Court towards the Convention was obvious from the very outset of its activity. Even prior to the entry into force of the Convention with respect to Lithuania on 20 June 1995, its provisions were taken into account by the Constitutional Court when interpreting national constitutional rights.23)

In this context, particular importance should be attached to the conclusion of 24 January 1995 concerning the compliance of Articles 4, 5, 9, 14 as well as Article 2 of Protocol No. 4 of the Convention with the Constitution.24) In this conclusion, the Constitutional Court described the Convention as a special source of international law, the purpose of which is different from that of many other acts of international law. This purpose is universal; it conveys the striving for the universal and effective recognition of the rights declared in the Universal Declaration of Human Rights in order to achieve that these rights are observed in the areas of the protection and further implementation of human rights and fundamental freedoms. In view of the special purpose of the Convention, the function fulfilled by the Convention was equated to constitutional human rights guarantees, which are nationally consolidated in the Constitution and internationally – in the Convention. The lists of human


rights and freedoms as entrenched in each of these documents were defined as non-exhaustive. The Constitutional Court held that the provisions of the Convention must be actually implemented, and, as long as they are not incompatible, they can be applied along with the provisions of the Constitution.

Besides, in this conclusion, the Constitutional Court ruled that “a mere literal interpretation of human rights is not acceptable for the nature of the protection of human rights”.25) This was one of the first instances when the Constitutional Court emphasised that, in cases where the Constitution is interpreted, it is important to take into account the constitutional regulation in its entirety, and to be guided not only by the letter but also by the spirit of the Constitution, thus paving the way to the perception of the “living Constitution”, which implies that, by employing dynamic interpretation, the Constitutional Court reveals the “living” content of the Constitution, i.e. the content of the Constitution that evolves together with the development of the state itself.

Following the ratification of the Convention and its integration in the Lithuanian legal system, the Constitutional Court, seeking to reveal the content of the norms consolidated in the Convention, increasingly invoked the provisions consolidated in the Convention and the case-law of the ECtHR interpreting these provisions. Nevertheless, the relevance of the case-law of the ECtHR in interpreting national law was explicitly acknowledged only in 2000. In its ruling of 8 May 2000, the Constitutional Court formulated the wording that “the jurisprudence of the European Court of Human Rights, as a source for the interpretation of law, is also important for the interpretation and application of Lithuanian law”.26) So far, while referring to the case-law of the ECtHR, the Constitutional Court has consistently employed this wording.

At first view, in the light of the constitution-centric concept of the Lithuanian legal system, which implies that the interpretation of the Constitution cannot be based on any lower-ranking legal acts,27) certain reservations may be raised as to the relevance of the

25) Ibid.
27) The Constitutional Court has consistently held that it is impermissible to interpret constitutional norms and principles on the basis of lower-ranking legal acts adopted by the legislature or other law-making entities, since otherwise the supremacy of the Constitution in the legal system would be denied (see, among others, the Constitutional Court’s decision of 23 February 2011 on the interpretation of the provisions of the Constitutional Court’s ruling of 1 July 2004 dealing with the activities incompatible with the status of a member of the Seimas,
Convention (which, similarly to other ratified international treaties, formally has the legal force of a law) to the interpretation of the Constitution. However, in view of the openness of the Constitution towards international law, the presumption of the compatibility of international law with the Constitution, as well as the special nature of the Convention, the Convention should be perceived as one of the sources of Lithuanian constitutional law. Furthermore, it is reasonable to argue that the duty stems from the Constitution for the Constitutional Court, when interpreting the Constitution, to take into account the international and European legal context, including the Convention law.

The jurisprudence of the Constitutional Court testifies to special importance given to the Convention law in cases where the Constitutional Court interprets constitutional provisions related to human rights. In fact, a considerable number of cases concerning human rights issues decided by the Constitutional Court contain references to the case-law of the ECtHR (see Annex to this contribution). Even where references to the case-law of the ECtHR are not directly included in the reasoning of the Constitutional Court, this does not mean that the Constitutional Court did not take into account the related case-law of the ECtHR. Though not explicitly visible in the final acts, relevant case-law is usually analysed in the course of preparing rulings and decisions.

In constitutional justice cases, depending on the approach taken by the Constitutional Court to the provisions of the Convention and the consequently varying extent of the influence of the Convention on the constitutional jurisprudence, different methods of internalising the Convention in the constitutional jurisprudence can be identified.28) These methods – orienting (referential), reinforcing, and harmonising – reveal the extent to which the provisions of the Convention have an impact on the constitutional jurisprudence and, subsequently, on the outcome of particular constitutional justice cases. Obviously, these methods are not clear-cut and may overlap.

1. The orienting (referential) internalisation of the Convention

At its minimum extent, the internalisation of the Convention occurs where the Constitutional Court makes a bare mention of the existence of a particular legal regulation in the Convention – such cases account for the orienting (referential) internalisation of the Convention.

This method was used for the first time even before the ratification of the Convention, i.e. at the time when it was not yet binding for Lithuania. In its ruling of 18 November 1994 concerning the constitutionality of the legal regulation on limiting the confidentiality of contacts between a suspect and the lawyer, the Constitutional Court merely quoted the relevant provisions of the Convention and the jurisprudence of the ECtHR (a reference was made to Article 6(3) of the Convention and the case Campbell and Fell v. the United Kingdom) and did not give any wider explanations as regards their significance to the case under consideration.

After the Convention became part of the Lithuanian legal system, the orienting method has been typically applied in cases where the Constitution consolidates a higher standard for the protection of certain rights, or where the relevant official constitutional doctrine has already been sufficiently developed.

For example, in its ruling of 27 February 2012 concerning limitations on granting and paying maternity (paternity) benefits, the Constitutional Court noted that, in the decision of 30 September 2010 as to the admissibility of the case Hasani v. Croatia (application No. 20844/09), the ECtHR held that, after an administrative body adopts a decision on the right of the person to a maternity allowance according to the respective laws, such a decision gives rise to the right of the person to claim this allowance, and the allowance is considered to be property within the meaning of Article 1 of Protocol No. 1. This reference had only an orienting meaning; according to the official constitutional doctrine, working mothers are provided with higher guarantees under the Constitution: the consolidated constitutional guarantee that working mothers are granted paid leave before and after childbirth implies

30) Constitutional Court’s ruling of 27 February 2012 on awarding maternity, paternity, maternity (paternity) benefits and limitation upon payment thereof, as well as on the limitation on the right of customs officials to hold another job, <http://www.lrkt.lt/en/court-acts/search/170/ta1072/content>.
that the legislature must establish the conditions for granting such leave, a reasonable (minimum and maximum) length of this leave, as well as a legal regulation to secure such amount of the granted payments that corresponds to the average remuneration received during a reasonable time period prior to this leave.

In its ruling of 17 February 2016\(^{31}\) concerning the temporary removal of directly elected state politicians from office (during the investigation of criminal charges brought against them), the Constitutional Court noted that, “when interpreting the content of the right to a fair trial as consolidated in Article 6 of the Convention, the ECtHR has, among other things, noted that the right to a fair trial comprises not only the duty of a court to comprehensively and exhaustively examine all the circumstances of the case that would enable an independent and impartial court in each case to make a just and reasoned decision, but also the duty to make such a decision within the shortest possible time; courts are under the duty to strike a fair balance between these different constituent aspects of the right to a fair trial”.

This reference to the general principles unfolding the content of the right to a fair trial served as the general context, inter alia, for revealing the necessity to balance competing interests. However, as the principle of proportionality is a well-established constitutional principle, the case-law of the ECtHR did not have a tangible impact on the outcome of this particular constitutional justice case.

Similarly, in the ruling of 26 February 2015\(^{32}\) concerning the prohibition on correspondence between convicts who are not related by marriage or close family ties, the Constitutional Court summarised the relevant case-law of the ECtHR by noting that, in principle, the states are not precluded from exercising control over or, in certain cases, even are not precluded from prohibiting the right of convicts to correspondence; however, any measures taken (e.g., occasional screening or censorship of the letters of convicts, or prohibition on their correspondence with certain persons, etc.) must be provided for by law, must pursue the legitimate aims referred to in Article 8(2) of the Convention, and, in each particular case, a decision must be made as to their necessity and proportionality in terms of the pursued legitimate aims. These requirements, along with the official constitutional doctrine concerning the right of a person to the inviolability of correspondence, constituted part of the theoretical background leading to the conclusion that the absolute prohibition on

\(^{31}\) Constitutional Court’s ruling of 17 February 2016 on the temporary removal of directly elected state politicians from office.

\(^{32}\) Constitutional Court’s ruling of 26 February 2015 on the prohibition on correspondence between convicts, \(<http://www.lrkt.lt/en/court-acts/search/170/ta1444/content>\).
correspondence between convicts not related by marriage or close family ties did not create preconditions for the sufficient individualisation of limitations on the right to correspondence, since such a prohibition was applied regardless of any circumstances (e.g. regardless of whether any threat to the security of society or to the internal order of the respective detention facility was caused, or whether any rights and freedoms of other persons were undermined); therefore, the impugned prohibition on correspondence between convicts not related by marriage or close family ties was found disproportionate and was ruled to have been in conflict with the Constitution.

The orienting (referential) method has also been widely used where it is clear from the case-law of the ECtHR that the Convention leaves broad discretion to national authorities in a particular sphere. References to the Convention law have been widely used in the constitutional justice cases concerning elections,33) the right to private property,34) etc. However, as these are the areas where, as a rule, the states have sufficiently wide discretion (margin of appreciation), the requirements of the Convention, as interpreted by the ECtHR, acquire only an orienting meaning, i.e. basically, they serve as an acknowledgment of the importance of the relevant European human rights standards. At the same time, the invoked provisions of the Convention law remain harmoniously intertwined with the constitutional jurisprudence.

2. The reinforcing internalisation of the Convention

The reinforcing internalisation of the Convention occurs where, in order to reinforce its argumentation, the Constitutional Court draws attention to similarities between a constitutional regulation and a legal regulation consolidated in the Convention. This method is evident in cases where, despite the existence of certain elements of the official constitutional doctrine on a particular issue, the doctrine is not sufficiently developed.

33) See, for example, the Constitutional Court’s ruling of 13 October 2014 on the names of public election committees, <http://www.lrkt.lt/en/court-acts/search/170/ta860/content>.
34) See, for example, the Constitutional Court’s ruling of 30 October 2014 on the restoration of the rights of ownership to the urban land necessary for the exploitation of the structures owned by other persons, <http://www.lrkt.lt/en/court-acts/search/170/ta861/content>; Constitutional Court’s ruling of 11 September 2013 on the establishment of the value of urban land to be purchased by the state in the course of the restoration of the rights of ownership, <http://www.lrkt.lt/en/court-acts/search/170/ta897/content>.
The most significant case revealing the reinforcing internalisation of the Convention law was decided in 1998 and concerned the constitutionality of the death penalty. At that time, Lithuania was not yet a party to Protocol No. 6 to the Convention, which demands that the death penalty be abolished without reservations. First of all, the Constitutional Court observed that Article 2 of the Convention was orienting the Member States of the Council of Europe towards the abolition of the death penalty; furthermore, based on the analysis of the documents of the Council of Europe and the European Union, the Constitutional Court came to the conclusion that the abolition of the death penalty was increasingly regarded as a universally recognised norm. The Constitutional Court noted that, at that time, Lithuania was one of the five states that had not yet signed Protocol No. 6, and took into account the “evident trend” in criminal law of European countries towards criminal punishment combining the preservation of humaneness and respect for an individual and human dignity. Finally, the Constitutional Court, after referring to the types of treatment prohibited under Article 3 of the Convention, concentrated on the aspect of human dignity and ruled that “the degradation of the dignity of the convict essentially derives from the cruelty of the death penalty itself. This cruelty manifests itself by the fact that, after the death sentence is carried out, the human essence of the criminal is negated: the criminal is deprived of human dignity and treated by the state as a mere object to be eliminated from the human community”. The Constitutional Court took into account that the execution of the death penalty ends the human life, and that the innate right to life, which is protected under the Constitution, is denied. The entirety of the invoked arguments led the Constitutional Court to the conclusion that the Constitution contains no prerequisites for establishing the death penalty by means of a law.

In this constitutional justice case, the European standard concerning the abolition of the death penalty made a strong reinforcing influence on the formulation of the official constitutional doctrine concerning the right to life and the prohibition on torture, degrading treatment, or punishments.

The elements of the reinforcing internalisation of the Convention can be observed in other constitutional justice cases as well, including those not concerned with human rights as a central issue.

For example, in its ruling of 5 March 2015 concerning competition in the area of waste management.

36) Constitutional Court’s ruling of 5 March 2015 on competition in the area of waste management.
management services, the Constitutional Court invoked the judgment of the ECtHR of 10 January 2012 in the case *Di Sarno and Others v. Italy*. The Constitutional Court held that this judgment of the ECtHR makes it clear that, regardless of the broad margin of appreciation left to the states in the regulation of waste management, under Article 8 of the Convention, the states are obliged to fulfil their positive duty to appropriately regulate and organise the activities in question in order to protect human health and welfare. When elaborating the official constitutional doctrine on this issue, the Constitutional Court included the constitutional imperative for the protection of human health among the elements that must be accounted for in the regulation of legal relations connected with waste management: “the legislature must take into account not only the constitutional requirements for ensuring freedom of individual economic activity and economic initiative, as well as those for protecting fair competition and consumer rights, but also the constitutional imperative for the protection of human health and the environment”.

Though the existing official constitutional doctrine encompassed the constitutional imperative for the protection of human health, in this constitutional justice case, the Constitutional Court for the first time invoked this imperative while interpreting the constitutional provision under which “The State shall regulate economic activity so that it serves the general welfare of the Nation”.

Thus, the relevant judgment of the ECtHR provided the reinforcing argument for including human rights-related requirements in the area of the national regulation governing the economic activity of waste management.

As the last two examples show, in the case of reinforcing internalisation, the requirements of the Convention serve as a strong supportive argument for developing the official constitutional doctrine on particular issues.

3. The harmonising internalisation of the Convention

The harmonising internalisation of the Convention is the highest level of internalisation, which means that the law of the Convention serves as a direct source of inspiration to the Constitutional Court for developing the official constitutional doctrine (i.e. the content of constitutional provisions is interpreted within the meaning consolidated in the Convention).

37) Ibid.

38) Article 46(3) of the Constitution of the Republic of Lithuania.
The first two methods of internalising the Convention are associated with mostly ancillary impact of the Convention; whereas, in the event of harmonising internalisation, the Convention has an impact on the outcome of particular constitutional justice cases. As the argumentation provided in the rulings of the Constitutional Court makes it clear, in certain cases, based on the interpretation of the Constitution in the light of the requirements laid down in the Convention, the requirements established by the Convention become virtually the decisive precondition for declaring the existence of contradiction between the particular national regulation and the Constitution, as, e.g., in the constitutional justice cases concerning: the provisions of the Code of Criminal Procedure on questioning anonymous witnesses; the right of journalists not to disclose the source of information; the censorship of the correspondence of convicts; the state pensions of officials and servicemen; and the State Family Policy Concept.39) In other cases, the interpretation consistent with the Convention led to declaring the national legal norm to be not in conflict with the Constitution, as, e.g. in the constitutional justice cases concerning: the right of municipalities to set permanent places for the assembly of citizens; the use of conduct simulating criminal activities; the status, management, and rights of the national broadcaster; and civil written procedure.40)

The constitutional justice case concerning the State Family Policy Concept may serve as an example of harmonising internalisation. According to this Concept, family was defined as deriving exclusively from marriage. Consequently, only marriage-based families were ensured more favourable conditions for gaining access to housing, social assistance, or other support. When interpreting the constitutional concept of the family, the Constitutional Court, in its ruling of 28 September 2011,41) explicitly acknowledged that the constitutional concept of the family must be interpreted in view of the international commitments of the State of Lithuania under the Convention. After giving an overview of the relevant case-law of the ECtHR, the Constitutional Court noted that the concept of the family in the jurisprudence of the ECtHR is not confined to the notion of the traditional family founded on the basis of marriage; other types of the relationship of living together (e.g. characterised by the permanence of the relationship between persons, the character of assumed obligations, common children, etc.) are equally defended in the sense of Article 8 of the Convention; the jurisprudence of the ECtHR does not provide any comprehensive list of the

40) *Ibid*.
criteria defining the family. These findings are closely linked to the finding of the Constitutional Court that “the constitutional concept of the family is based on mutual responsibility between family members, understanding, emotional affection, assistance, and similar relations, as well as on the voluntary determination to take on certain rights and responsibilities, i.e. the content of relationship, whereas the form of the expression of relationship has no essential significance for the constitutional concept of the family”. Thus, the jurisprudence of the ECtHR in this case made a significant impact on the constitutional conception of the family, and inspired the Constitutional Court to give priority to the content of family relationship rather than its form. The Constitutional Court emphasised the necessity to avoid discrimination and ensure equal guarantees for all families.

Another case in which international law, including the Convention, had a weighty significance for interpreting the Constitution was the constitutional justice case concerning responsibility for genocide. In its ruling of 18 March 2014, the Constitutional Court had to decide on the constitutionality of retroactive criminal responsibility for genocide. The Constitutional Court noted that, “As it is clear from the travaux préparatoires of the International Covenant on Civil and Political Rights and the Convention for the Protection of Human Rights and Fundamental Freedoms, the references to international law in Article 15 of the International Covenant on Civil and Political Rights and Article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms were consolidated in order to create an exception to the general rule of nullum crimen, nulla poena sine lege, by establishing that liability for an act or omission constituting a crime under international agreements and customs or the general principles of law at the time when the act or omission was committed may also be imposed in the cases where the act or omission did not constitute a crime under the national law valid at the time when the act or omission was committed”. Concerning the requirements of the Constitution, the Constitutional Court pointed out that, under the Constitution, criminal laws may provide for an exception to the principle of nullum crimen, nulla poena sine lege and prescribe that such an exception applies, inter alia, to the crime of genocide as defined under the universally

42) Ibid.
43) Ibid.
45) Ibid.
recognised norms of international law (i.e. the crime of genocide directed exclusively against national, ethnical, racial, or religious groups). However, the principle of nullum crimen, nulla poena sine lege, which is consolidated in Paragraph Article 31(4) of the Constitution and stems from the constitutional principle of a state under the rule of law, would be disregarded if criminal laws prescribed that they have a retroactive effect on the crimes established exclusively under national law. Therefore, the provisions of the Criminal Code under which a person could be retroactively brought to trial for genocide directed against persons belonging to any social or political group (i.e. groups not covered by the definition of genocide under the universally recognised norms of international law) were ruled to have been in conflict with the Constitution.

It is noteworthy that the harmonising internalisation of the Convention prevails in the constitutional jurisprudence: this method of the internalisation of the Convention marks the most intensive process of the “conventionalisation” of the national Constitution, and de facto means both the review of the compliance of a particular national legal regulation with the Convention and a direct impact of the Convention on the outcome of decided constitutional justice cases.46)

Due to harmonising internalisation, the particular elements of a number of constitutional rights and freedoms, including the right to life, the right of ownership, the right to respect for private and family life, the freedom to seek, obtain and impart information and freedom of assembly and association, have been adjusted to the requirements of the Convention. The Convention law made a substantial impact on the interpretation of the content of the right to a fair trial.47) The interpretation of this constitutional right was developed on the basis of the Convention law in such contexts as the independence of courts,48) the use of conduct simulating criminal activities as a method to investigate crimes,49) the use of the testimony of anonymous witnesses in a court,50) the right of persons charged with a criminal offence to

---

50) Constitutional Court’s ruling of 19 September 2000 on the provisions of the Code of Criminal
have an advocate,\textsuperscript{51}) the use of classified information as evidence in court,\textsuperscript{52}) the application of the requirements of criminal procedure in the consideration of cases concerning administrative violations of law,\textsuperscript{53}) etc.

By way of concluding, it should be noted that, though the Convention formally might be understood as an ancillary source for the interpretation of the Constitution, the presumption of the compatibility of international law with the Constitution and the perception of international human rights standards as constituting the necessary minimum standard for the protection of human rights determine the implicit recognition of the imperative of the harmonising interpretation of the Constitution and the Convention. The sole fact that the harmonising internalisation of the Convention is dominant in the constitutional jurisprudence concerning human rights implies that national constitutional law is continually supplemented with the elements consistent with the requirements of the Convention. In the constitutional jurisprudence, the process of internalising the Convention takes place on a case-by-case basis. It is not and cannot be a finite process, since human rights are regarded as part of the constantly evolving international and national legal realities. In this respect, attention should be paid to the fact that, once the Constitutional Court provides the harmonising interpretation of the norms of the Convention and the Constitution, the internalised provisions of the Convention become a constitutional standard for the protection of human rights and freedoms.

\textsuperscript{51}) Constitutional Court’s ruling of 12 February 2001 on limitations for advocates on acting as representatives or counsel for defence in a court, <http://www.lrkt.lt/en/court-acts/search/170/ta1173/content>.


IV. Limits on the impact of the case-law of the European Court of Human Rights on the jurisprudence of the Constitutional Court of the Republic of Lithuania

While internalising the norms of the Convention, the Constitutional Court has an exceptional task: to find a balance between the principle of the supremacy of the Constitution, under which no lower-ranking legal act (including international treaties ratified by the Seimas) may be in conflict with the Constitution, on the one hand, and respect for international law as a constitutional value per se, on the other.

A different interpretation of human rights may lead to the direct incompatibility of an explicit or implicit provision of the Constitution with an explicit or implicit provision of the Convention, or to the indirect incompatibility of such provisions; indirect incompatibility results not from a particular provision of the Constitution, but rather due to a certain lower-ranking legal regulation ruled by the Constitutional Court to be in compliance with the Constitution but judged by the ECtHR as failing to meet the requirements of the Convention.54)

Indirect incompatibility was encountered in the case concerning the process of lustration. In the ruling of 4 March 199955), the Constitutional Court recognised the constitutionality of the limitations established on the employment of former regular employees of the KGB in the private sector, as consolidated in Article 2 of the Law on the Assessment of the USSR Committee of State Security (NKVD, NKGB, MGB, KGB) and the Present Activities of the Regular Employees of This Organisation. However, in the cases Rainys and Gasparavičius v. Lithuania56) and Sidabras and Džiautas v. Lithuania57), the ECtHR found that such limitations amounted to a violation of Article 14 of the Convention taken in conjunction with Article 8. It should be noted that, in cases where the Constitution does not explicitly demand the establishment of a legal regulation different from the one that, according to the ECtHR, is required under the Convention, indirect incompatibilities between the positions of the

56) Rainys and Gasparavičius v. Lithuania, applications no. 70665/01 and 74345/01, Judgment of 7 April 2005.
57) Sidabras and Džiautas v. Lithuania, applications nos. 55480/00 and 59330/00, Judgment of 27 July 2004, ECHR 2004-VIII.
Constitutional Court and the ECtHR can be removed either by the courts of general jurisdiction or administrative courts. These courts can apply the respective judgment of the ECtHR directly, since the principles of the direct application of the Convention and the priority of its application are valid with respect to all laws, including those found not in conflict with the Constitution. The fact that the Constitutional Court ruled a certain legal regulation to be in compliance with the Constitution does not mean that a different legal regulation harmonised with the requirements of the Convention will be unconstitutional.

However, the situation is different when incompatibility is direct, i.e. incompatibility arises between an implicit or explicit provision of the Constitution and the requirements of the Convention. So far, there has been only one instance of direct incompatibility between the Constitution and the Convention. This case concerned a former President of Lithuania, Rolandas Paksas, who was removed from office after impeachment proceedings in 2004. On 25 May 2004\(^{58}\), the Constitutional Court adopted the ruling in which it was held that a person who grossly violated the Constitution and breached his oath and, as a result of this, was removed from office could never again stand in elections for an office requiring a person to take an oath to the State of Lithuania. On 6 January 2011, in the case \textit{Paksas v. Lithuania}, the Grand Chamber of the ECtHR held that such a permanent disqualification from standing in parliamentary elections was disproportionate and constituted a violation of Article 3 of Protocol No. 1 to the Convention\(^{59}\).

Thus, a divergence occurred between the interpretation of the Constitution as provided by the Constitutional Court and the position of the ECtHR, as these courts stroke a different balance of legal values: the Constitutional Court placed more weight on such constitutional values as the security of the state and the loyalty of members of the Parliament and other high-ranking officials to the state and to its constitutional order, and emphasised the significance of the constitutional institute of an oath; whereas the ECtHR gave priority to the passive electoral right of a person and the free expression of the opinion of people in the choice of the legislature.

Incompatibilities of a similar character between international legal norms and the national constitutional norms may arise and, to a certain extent, are objectively unavoidable due to the fact that the Constitution, as the foundation of the national legal system, on the one hand, and international law, on the other hand, are inherently autonomous and have


superiority in their respective spheres.

In this context, it should be noted that the Constitutional Court did not define the limits of the permissible impact of the Convention on national constitutional law for rather a long time. The entire jurisprudence of the ECtHR was deemed to have the status of an ancillary instrument for the interpretation of the Constitution insofar as this jurisprudence was not in conflict with the requirements of the Constitution.

It was only after the emergence of this direct incompatibility between the Constitution and the Convention that the Constitutional Court, in its ruling of 5 September 2012, defined the limits of the permissible impact of the Convention law on the constitutional jurisprudence. The Constitutional Court emphasized that even though the jurisprudence of the ECtHR, as a source for is important for the interpretation and application of Lithuanian law, the jurisdiction of the ECtHR does not replace the powers of the Constitutional Court to officially interpret the Constitution. Afterwards, the Constitutional Court determined the conditions limiting the grounds for the reinterpretation (correction) of the official constitutional doctrine. The Constitutional Court held that a judgment of the ECtHR in itself may not serve as a constitutional basis for the reinterpretation (correction) of the official constitutional doctrine in cases where such reinterpretation, in the absence of the appropriate amendments to the Constitution, would substantially change the overall constitutional regulation (inter alia, the integrity of the constitutional institutes—impeachment, the oath, and the electoral right) and would distort the system of the values entrenched in the Constitution or undermine the guarantees for the protection of the supremacy of the Constitution in the legal system.

However, the case Paksas v. Lithuania should be regarded as an exceptional situation in which there was a direct statement about the existence of the incompatibility between the Convention and the national Constitution.

Furthermore, in this situation, emphasis should not be placed on the limits precluding the transposition of the Convention law into the constitutional jurisprudence. Rather, consideration should be given to the recognition that a judgment of the ECtHR may give rise (although not automatically) to the issue concerning the reinterpretation of the constitutional doctrine. In particular, the Constitutional Court has coherently acknowledged that the

---


61) Ibid.
necessity to reinterpret certain official constitutional doctrinal provisions may be
determined, inter alia, by the need to enhance possibilities for the implementation of the
innate and acquired rights of persons and their legitimate interests.62)

Emphasis should also be placed on the fact that, taking account of the constitutional
principle of respect for international law as consolidated in Paragraph 1 of Article 135 of the
Constitution, the Constitutional Court held that the duty derives from this paragraph of the
Constitution for the Republic of Lithuania to remove the existing incompatibility between
the provisions of the Convention and the Constitution by adopting the appropriate
amendments to the Constitution. Thus, although the Constitutional Court in this case did not
formulate expressis verbis the principle of the interpretation of the Constitution of Lithuania
“in a friendly (favourable) way” to international law, this does not mean that this principle is
not implicitly reflected in the ruling of 5 September 2012. Consequently, the constitutional
jurisprudence developed by the Constitutional Court regarding these issues may be viewed
as the beginning of a search for more dynamic limits of the principle of the supremacy of the
Constitution.

Moreover, with the entry into force of Protocol No. 16 of the Convention, the
Constitutional Court will gain the possibility, in the context of a case pending before it, to
request the ECtHR to give advisory opinions on questions of principle relating to the
interpretation or application of the rights and freedoms defined in the Convention; thus,
additional preconditions for avoiding conflicts between the jurisprudences of the two courts
will be created. The Constitutional Court of Lithuania may find requesting advisory
opinions as a helpful way to receive guidance on the requirements of the Convention in
order to adopt those requirements in its jurisprudence. In other words, this mechanism
would be a supplementary means of protecting the guaranteed rights through direct dialogue
between the ECtHR and the Constitutional Court of Lithuania. Advisory opinions would be
particularly helpful in cases where the case-law of the Strasbourg Court concerning the
requirements of the Convention applicable to a specific issue is not developed or is not

62) Among others, Constitutional Court’s ruling of 28 March 2006 on the powers of the Constitutional
Court to review its own decision and dismiss the instituted legal proceedings as well as on
Constitutional Court’s ruling of 24 October 2007 on court precedents and on lodging complaints
against court rulings whereby one applies to the Constitutional Court or an administrative court,
<http://www.lrkt.lt/en/court-acts/search/170/ta1381/content>; Constitutional Court’s ruling of 5
September 2012 on the prohibition for a person removed from office under impeachment procedure
V. Conclusion

The innate nature of human rights is one of the fundamental constitutional provisions comprising the inviolable core of the Constitution as the supreme law and a social contract. Nevertheless, the recognition of an unamendable nature of this provision is not in itself a sufficient guarantee for the protection of human rights. In defending human rights, a huge responsibility falls on the Constitutional Court, while exercising the powers conferred on it, to ensure due regard for fundamental constitutional values, to promote the viability of these values in various realms of legal regulation, and to secure a genuine, rather than a declaratory, implementation of the principle of the supremacy of the Constitution. The international context plays an important role in this process, since international requirements for human rights protection are considered a minimum standard that cannot be undermined by a national, including constitutional, regulation.

The Lithuanian Constitution gives rise to the principle of respect for international law and the principle of geopolitical orientation as an indivisible part of the Lithuanian constitutional tradition. These principles determine the openness of the Constitution towards international law, including the Convention law evolving from the jurisprudence of the European Court of Human Rights. The influence of the Convention on the constitutional jurisprudence cannot be overestimated. The case-law of the European Court of Human Rights performs a guiding, supporting, and harmonising role, leading to a coherent development of such legal realities as the Constitution and the Convention. The standards defined at the level of the Council of Europe have provided a solid reference point in humanising the national criminal law, in solving sensitive matters related to respect for private and family life, as well as in adjusting the contents of a number of constitutional rights to the requirements of the Convention. The analysis provided in this contribution serves as an illustrative example of how the jurisprudence of a regional international court can be helpful in developing the constitutional human rights standards, in particular, in those areas where such standards are insufficiently developed or new challenges arise.

Notwithstanding the fact that the constitution-centric concept of Lithuanian law may lead to certain divergences between the case-law of the European Court of Human Rights
and that of the Constitutional Court, such instances are exceptional. In most cases, the constitutional presumption of the compatibility of international law with the Constitution implies that the Constitutional Court has the duty to interpret the Constitution in favour of the corresponding norms of the Convention as closely as possible, thus, integrating Lithuanian constitutional law into a democratic European legal space based on common values and founded on respect for democracy, human rights, and the rule of law.
Annex


The Constitutional Court of the Republic of Lithuania mainly invoked the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and (or) the case-law of the European Court of Human Rights (ECtHR) in constitutional justice cases concerning the right to a fair trial (18 rulings), the right of ownership (10 rulings), freedom of expression and information (7 rulings), social rights (6 rulings and 1 decision), the inviolability of private life (5 rulings), and electoral rights (4 rulings).

During 1994–2015, the Constitutional Court adopted 218 rulings dealing with human rights issues; out of this number, the reasoning part of 61 (~28%) rulings contain references to the ECHR and (or) the jurisprudence of the ECtHR.63)

<table>
<thead>
<tr>
<th>Year</th>
<th>Out of Total (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1994-2</td>
<td>2 out of 9 (~22%)</td>
</tr>
<tr>
<td>1995-3</td>
<td>2 out of 7 (~29%)</td>
</tr>
<tr>
<td>1996-3</td>
<td>3 out of 7 (42%)</td>
</tr>
<tr>
<td>1997-5</td>
<td>5 out of 9 (~56%)</td>
</tr>
<tr>
<td>1998-3</td>
<td>3 out of 9 (~33%)</td>
</tr>
<tr>
<td>1999-3</td>
<td>3 out of 6 (~50%)</td>
</tr>
<tr>
<td>2000-3</td>
<td>3 out of 9 (~33%)</td>
</tr>
<tr>
<td>2001-2</td>
<td>2 out of 9 (~22%)</td>
</tr>
<tr>
<td>2002-2</td>
<td>2 out of 8 (25%)</td>
</tr>
<tr>
<td>2003-2</td>
<td>2 out of 8 (25%)</td>
</tr>
<tr>
<td>2004-2</td>
<td>2 out of 7 (~29%)</td>
</tr>
<tr>
<td>2005-1</td>
<td>1 out of 8 (~13%)</td>
</tr>
<tr>
<td>2006-2</td>
<td>2 out of 12 (~17%)</td>
</tr>
<tr>
<td>2007-2</td>
<td>2 out of 11 (~18%)</td>
</tr>
<tr>
<td>2008-2</td>
<td>2 out of 11 (~18%)</td>
</tr>
<tr>
<td>2009-0</td>
<td>0 out of 5 (0%)</td>
</tr>
<tr>
<td>2010-1</td>
<td>1 out of 10 (10%)</td>
</tr>
<tr>
<td>2011-3</td>
<td>0 out of 5 (0%)</td>
</tr>
<tr>
<td>2012-5</td>
<td>5 out of 14 (~36%)</td>
</tr>
<tr>
<td>2013-4</td>
<td>4 out of 21 (~19%)</td>
</tr>
<tr>
<td>2014-6</td>
<td>6 out of 13 (~46%)</td>
</tr>
<tr>
<td>2015-6</td>
<td>6 out of 15 (40%)</td>
</tr>
</tbody>
</table>

63) As of 1 April 2016, of 6 rulings adopted by the Constitutional Court this year, 1 ruling contains references to the jurisprudence of the ECtHR.
The Role of the Constitutional Court of the Republic of Macedonia in the Promotion of Human Rights and the Like

Elena Gosheva*

The Constitutional Court of Macedonia, thanks to its long-standing existence, has managed without major difficulties to overcome the problems and needs of transition. Based on the experience gained it has not been difficult for it to continuously keep on performing its primary role of protecting the constitutionality and legality also in the newly emerged conditions in which Macedonia has been established and built as a sovereign and independent state.

According to its constitutional position, the Constitutional Court of the Republic of Macedonia does not belong to the system of organisation of state powers, but is a separate and independent constitutional body with position, composition, organisation and competences specifically defined by the Constitution itself. The Constitutional Court organisationally and functionally does not derive from the legislative body, nor is it held answerable before it. Hence, it is not dependent on the laws, because it can repeal or annul them if it finds them not be in accordance with the Constitution. It is not dependent on its Rules either, because it is responsible for its adoption. From the above reasons, the Constitutional Court cannot be placed within the three-partite division of powers. The protection of constitutionality and legality is beyond the functions of the government and hence out of the realisation of the mutual relations between the legislative and executive powers. The Constitutional Court is actually a new power that is superior to the other three powers. Such superiority of the Constitutional Court stems from the effects of the Constitution in relation to the powers. Accordingly, the Constitutional Court depends on the Constitution only, its full review or amendments giving it the character of relative permanence: relative, only because it depends on the durability of the Constitution itself as the highest legal act of the country. The Constitutional Court is an institution of the Constitution that draws the basis and limits of the exercise of its functions on the Constitution only and is in the function of its implementation. Such a position of the

* President of the Constitutional Court of the Republic of Macedonia
Constitutional Court provides it with guarantees that the conditions for ensuring its function are protected in advance from changes by the current holders of political power. In other words, this position provides it with a real basis to distance itself from any political authority, not only from that of the current government, but also from the changes with the direct power holders in the enforcement of the Constitution and the exercise of arbitrariness in the interpretation and implementation of the Constitution and laws.

In constitutional law theory it is most commonly said that the constitutional judiciary appears as the protector, guard or guarantee of the enforcement of the Constitution and the principles of the rule of law. Constitutional judiciary ensures the principle of constitutionality, supremacy of the Constitution over the law and other acts. What is aimed for with the constitutional judiciary is to ensure with legal means that the carrying out of state functions take place in accordance with the Constitution. Judicial control of the rule of law, that is, of the constitutionality and legality should ensure supremacy of the Constitution over all other acts in order to enforce the legal system with consistent application of the Constitution and law. Constitutional judiciary appears as a counterbalance of the possible arbitrary will of the holders of the functions of public authority. More specifically, the role of the Constitutional Court is to provide objective application of the Constitution and law and thus contribute to building a state governed by the rule of law.

The Constitutional Court is a specialised institution to control the constitutionality of laws and other regulations and general acts and hence a guarantor of the rule of law. All state bodies are required in their proceedings to apply the Constitution and laws, to control the Constitution and the law within their constitutionally and legally defined competences. This covers certain elements of the well developed mechanism of legal protection of the constitutionality and legality. However, the control of the constitutionality of the law is the exclusive right of the Constitutional Court and no other body may appear in that role. The Constitutional Court may decide meritoriously whether certain acts are constitutional.

From the analysis of the powers of the constitutional courts in European states and in the world it can be concluded that they, as a specific judicial constitutional law and political institution, are autonomous and independent state bodies, guardians of constitutionality and legality and protectors of the freedom and rights of the individual and citizen. These are the core competencies of constitutional courts and constitute a basic condition for the realisation a state of law and the rule of law, thus guaranteeing freedoms and rights of the individual and citizen specified in the Constitution and the same to be the basis, direction and limit for the exercise of authority by the state and other bodies and organisations with public
mandates.

Constitutional courts basically carry out their role through several types of competences. They decide on the conformity of laws with the Constitution, the conformity of other regulations and collective agreements with the Constitution and laws; the conformity of ratified international treaties with the Constitution; protect all the rights and freedoms of man and citizen violated by an individual act or action of state authorities, authorities and organisations exercising public mandates; decide on conflicts of competences between the holders of legislative, executive and judicial powers; the conflict of jurisdiction between bodies of state and local self-government; responsibilities of heads of state and other top state officials; on the constitutionality of the programmes and statutes of political parties and associations of citizens, and other issues defined by the Constitution.

The 1991 Constitution of the Republic of Macedonia inspired by the tradition of European constitutional law also basically contains these competences. In this respect it can be seriously noted that directly and unambiguously establishes protection only of three of the 24 fundamental civil and political freedoms and rights, and does not establish any protection of any of the anticipated economic, social and cultural rights of man and citizen violated by an individual act or action of state authorities (legislative, executive and judicial powers), bodies and organisations exercising public mandates, provided that previously remedies for such protection are exhausted or not provided. Considering the restrictive jurisdiction - just three constitutionally guaranteed freedoms and rights (civil and political) - of the Constitutional Court of the Republic of Macedonia, in the previous period in average citizens have submitted about 15 applications for the protection of their freedoms and rights provided for in Article 110 line 3 of the Constitution of the Republic of Macedonia.

The need for a new jurisdiction of the Constitutional Court of the Republic of Macedonia to protect the fundamental freedoms and rights of man and citizen violated by an individual act or action was recognised as early as in 1990 by the group for the drafting of the proposal for changes to the Constitution of then Socialist Republic of Macedonia, with the adoption of a new Constitution, regarding the constitutionality and legality, the judicial system and constitutional judiciary. The drafting group, governed “by the general intention of reaffirming the individual and citizen as the main subject of socio-economic and political system, concluded that a priority in the protection of constitutionality and legality should have the freedoms and rights of the individual and citizen” and suggested “extension of the jurisdiction of the Constitutional Court of the Republic of Macedonia to protect constitutionally guaranteed fundamental rights and freedoms of the individual and citizen
violated by an individual act or action in the exercise of public mandates, when these have not been provided other judicial protection or protection by other bodies.”

In the 1991 draft Constitution of the Republic of Macedonia this important and well-argued proposal was not accepted. Therefore, in the public debate on the subject of the 1991 Constitution, the Constitutional Court of the Republic of Macedonia proposed to the Commission for Constitutional Affairs of the Assembly that a new competence of the Constitutional Court be defined in the Constitution to protect the rights and freedoms of the individual and citizen, which was fully accepted by the Commission on Constitutional Affairs of the Assembly and the Assembly of the Republic of Macedonia in the adoption of the new Constitution of 1991. The new competence to protect the rights and freedoms of the individual and citizen violated by an individual act or action was defined in Article 110 line 3 of the Constitution of 1991 in the following way: “The Constitutional Court of the Republic of Macedonia shall protect the freedoms and rights of the individual and citizen relating to the freedom of belief, conscience, thought and public expression of thought, political association and activities and the prohibition of discrimination on grounds of sex, race, religion or national, social or political affiliation.”

Unlike European constitutions and constitutions of the former SFR of Yugoslavia (which govern the proceedings before the constitutional courts and the legal effect of their decisions by law) under Article 113 of the Constitution of the Republic of Macedonia these issues are regulated by an act of the Constitutional Court and such act was adopted by the Constitutional Court on 7 October 1992, in the form of Rules of the Constitutional Court of the Republic of Macedonia (“Official Gazette of RM”, no.70/1992).

Under these Rules of Procedure, any citizen who believes that an individual act or action has violated his right or freedom set out in Article 110 line 3 of the Constitution of the Republic of Macedonia may seek protection from the Constitutional Court within 2 months from the date of submission of a final or effective individual act, that is, from the date of finding out about the taking of an action with which a violation was made, but no later than five years from the date of its taking.

In the application it is necessary to state the reasons for which protection is sought, the acts or actions with which they are violated, the facts and evidence on which the application is based, and other data required for decision-making of the Constitutional Court. Then the application for protection of freedoms and rights is submitted, within 3 days from the date of its filing, to the adopter of the individual act, that is, the body that took an action with which they are violated for a reply. The deadline for reply is 15 days, whereby a report is prepared
for a session or the Court is informed of the course of the proceedings, no later than 30 days from the date the case was given for handling.

The Constitutional Court decides on the protection of freedoms and rights, as a rule, based on the public debate held. The participants in the proceedings and the Ombudsman are summoned for the public debate, and if necessary other persons, bodies or organisations may also be summoned. A public debate may also be held if any of the participants in the proceedings or the Ombudsman is not present, if duly summoned. During the proceedings, the Constitutional Court may decide to stop the execution of the individual act or action until a final decision is taken. From the decision on protection of the freedoms and rights, the Constitutional Court will determine whether there is their violation and depending on it it annuls the individual act, prohibits the action by which the violation was made, or rejects the request.

Professional and scholarly community in the Republic of Macedonia is unanimous that there are several reasons that lead to insufficient and ineffective results in the protection of freedoms and rights of the individual and citizen, violated by an individual act or action of state authorities (legislative, executive and judicial powers), bodies and organisations with public mandates when the remedies are exhausted or when no other remedies for their protection are stipulated.

- The first and most important reason is the restrictive jurisdiction of the Constitutional Court of the Republic of Macedonia provided for in Article 110 line 3 of the Constitution of the Republic of Macedonia, under which only some civil and political rights and freedoms of the individual and citizen are protected, by ignoring such protection of economic, social and cultural rights.

- Another reason is that the applications lodged by citizens to the Constitutional Court for the protection of their freedoms and rights under Article 110 line 3 of the Constitution of the Republic of Macedonia by their quality are not at the required level (due to the lack of constitutional and legal knowledge of the citizens).

- Also an important reason for the results in the protection of freedoms and rights of the individual and citizens is (the need) the lack of greater creativity and courage of the judges at the Constitutional Court of the Republic of Macedonia in the interpretation of the principles and values of fundamental rights and freedoms under Article 110 line 3 of the Constitution of the Republic of Macedonia in any specific case, thus increasing the opportunities for recognition of their constitutional authentic content, depth, value and meaning in finding violations by state authorities and other bodies and organisations with
public mandates in adjudicating upon the application of citizens for protection of their freedoms and rights.

- Finally, the restrictive interpretation of the norms of international law and international agreements ratified in accordance with the Constitution of the Republic of Macedonia, in particular the European Convention on Human Rights and Fundamental Freedoms and the decisions of the European Court of Human Rights in Strasbourg or the decision-making of the Constitutional Court of the Republic of Macedonia for the protection of the freedoms and rights under Article 110 line 3 of the Constitution of the Republic of Macedonia.

The need to extend the jurisdiction of the Constitutional Court of the Republic of Macedonia in the protection of the rights and freedoms of the individual and citizen, under Article 110 line 3 of the Constitution of the Republic of Macedonia, has long been confirmed by the professional and scholarly community in the Republic of Macedonia, and above all because with the ratification of the European Convention on Human Rights and Freedoms in 1997, the Republic of Macedonia has been obliged to ensure its citizens and all persons on its territory the protection of all rights and freedoms set out in the European Convention. Thus, the Constitutional Court of the Republic of Macedonia shall perform the role of a filter for the European Court of Human Rights in Strasbourg, protecting it against grievances and complaints from the citizens of the Republic of Macedonia.

In order to achieve the desired results, the professional and scholarly community, among which former judges at the Constitutional Court, have proposed three alternatives to extend the jurisdiction of the Constitutional Court:

- extension of competence with amendment intervention, whereby the formulation to protect all rights and freedoms of the individual and citizen guaranteed by the Constitution the Republic of Macedonia shall replace the provision of Article 110 line 3 of the Constitution;

- extension of competence with the adoption of a Constitutional Law, and the Constitutional Court of the Republic of Macedonia to appear as an informal proposer, whereby it shall also regulate the foundations of proceedings before the Constitutional Court of the Republic of Macedonia, the types of decisions, their legal effects and execution, which is the dominant solution in European constitutions, and the Rules of the Constitutional Court of the Republic of Macedonia shall regulate only the internal organisation and manner of work of the Constitutional Court of the Republic of Macedonia; and

- extension of competence with a constitutional reform by adopting a new Constitution of
The Role of the Constitutional Court of the Republic of Macedonia in the Promotion of Human Rights and the Like

The Republic of Macedonia which will incorporate the protection of all rights and freedoms of the individual and citizen guaranteed by the Constitution of the Republic of Macedonia, whereby what should also be taken into account is the extension of the jurisdiction of the Constitutional Court to preventive assessment of the conformity of international treaties with the Constitution of the Republic of Macedonia.

In the opinion of the majority, the most acceptable and reasonable is the first alternative, whereby in the fastest possible way the gap in the jurisdiction of the Constitutional Court of the Republic of Macedonia will be filled in terms of protecting the rights and freedoms of the individual and citizen violated by an individual act and action by the state bodies (legislative, executive and judicial powers), bodies (administrations, agencies, directorates, etc.) and organisations (public enterprises, chambers, regulatory commissions, etc.) carrying out public mandates, if remedies for their protection are exhausted or not provided for.

As a result of the aforementioned, the legislative branch in the Republic of Macedonia has realised that there is no effective protection of constitutionally guaranteed rights and freedoms of the individual and citizen violated by an individual act or action by state authorities (legislative, executive and judicial powers) and other bodies (administrations, agencies, directorates, etc.) and organisations (public enterprises, chambers, regulatory commissions, etc.) carrying out public mandates, when the Constitutional Court of the Republic of Macedonia, under Article 110 line 3 of the Constitution of the Republic of Macedonia protects only three out of 41 freedoms and rights (civil, political, economic, social and cultural), and all other rights and freedoms are protected by regular and administrative courts.

Taking into account the jurisdiction of the constitutional courts of the former SFR of Yugoslavia and most European countries, which basically protects all constitutionally guaranteed rights and freedoms, if remedies are previously exhausted or not provided to be protected by regular and administrative courts, it has been concluded that it is necessary to extend the restrictive jurisdiction of the Constitutional Court of the Republic of Macedonia.

Taking into account the opinion of the majority, including the Constitutional Court of the Republic of Macedonia, the Government of the Republic of Macedonia has proposed extending the jurisdiction of the Constitutional Court with amendment intervention, by deleting the provision under Article 110 line 3 of the Constitution of the Republic of Macedonia, and embeding in its place the formulation for protection of all rights and freedoms of the individual and citizen guaranteed by the Constitution of the Republic of
Macedonia. The proceedings for adoption of the proposed amendments is in a parliamentary procedure.

Given the foregoing, the Constitutional Court of the Republic of Macedonia with its efforts has greatly contributed to the Government of the Republic of Macedonia’s taking of this important step, which will increase the promotion and realisation of the fundamental principles on which the constitutional order of the Republic of Macedonia rests.
The Role of the Constitutional Court of the Republic of Albania in the Protection of Human Rights and the Impact of ECHR on its Case Law

Bashkim Dedja*

I. Introduction

The constitutional tradition in Albania belongs to an earlier time, taking into consideration all the constitutions that have been in vigour in different periods in Albania. The current Constitution of the Republic of Albania has been adopted by the Assembly of Albania, after having been subject to a popular referenda, and came into force on 28 November 1998, with the proclamation by the President of the Republic. Although it has been in force for a relatively short period of time, it has played a crucial role not only as the most important and high act in the normative system of legal acts, but also in the system of state institutions, of social and political practices.

According to the Constitution, the duty to guarantee the respect for the Constitution has been assigned to the Constitutional Court (hereinafter the CC). This Court is the last instance assigned to review the acts issued by the organs of state power, being mainly focused on the aspect of their compatibility with the Constitution. The main function of the Constitutional Court, otherwise known as the “watchdog of the Constitution”, is to protect the Constitution from the eventual violations of state power and to realize the constitutional justice.1)

Through this paper, I would like to draw the readers’ attention on four aspects and their related problematic in the Albanian context: (i) The human rights according to the Constitution; (ii) European Convention on Human Rights (hereinafter ECHR) in relation to

* President Constitutional Court of Albania

Albanian Constitution; (iii) Role of the CC in the protection of human rights; (iv) Impact of the case law of the European Court of Human Rights (hereinafter ECtHR) on the case law of the CC with regard to the protection of human rights; (v) Conclusions.

II. The human rights according to the Constitution of Albania

There is no doubt that the Constitution of Albania promotes the democratic values generally accepted by the western European countries and developed democracies. It has sanctioned the principles of constitutional democracy as: the rule of law, democracy, pluralism, separation of powers, human rights, human dignity, etc. The spirit and attitudes of this Constitution can be identified since the very beginning, in its Preamble:

“We, the people of Albania,
… with determination to build a social and democratic state based on the rule of law, and to guarantee the human rights and freedoms …”… establish this Constitution.”

As it has been explicitly foreseen by article 15/2 of the Constitution, the organs of public power, in fulfilment of their duties, shall respect the fundamental rights and freedoms, as well as contribute to their realization.

Furthermore, the organs of public power shall respect the constitutional values and principles, in order to subject their whole activity to the establishment and respect for the rule of law and social state.

The second chapter of the Constitution has sanctioned the personal rights and freedoms as: the right to life, freedom of expression, the right to information, the freedom of conscience and of religion, right to human treatment and respect for dignity, taking away of liberty in conformity with the law, not being accused without reasonable doubt, not being declared guilty for a criminal offence that was not provided for by law at the time of its commission, the freedom and secrecy of correspondence, inviolability of residence, the right of property, etc.

Then, the Constitution continues with the rights of procedural character as: the right to fair trial, the right to appeal a judicial decision to a higher court etc. Whereas, the third chapter has provided for the political rights and freedoms as: the right to vote, the right to
organize collectively, freedom of association, the right to protest, the right to complain to the public organs, etc.

The fourth chapter of the Constitution has stipulated the economic, social and cultural rights and freedoms as: the right to work, the right to unite freely in labour organizations, the right to social protection of labour, the right to strike in connection with labour interests, the right to family life, the right to special protection of children, pregnant women and new mothers, the right to health care, the right to education, artistic creation and scientific research.

The drafters of Albanian Constitution have been very prudent when determining a separation line between social rights and social objectives, since the constitutional definition of these rights depends on the economic situation, the social and cultural development of the respective state.

More specifically, it has been established a separate provision with regard to the so called “social objectives”, which represent the positive action of the state in favour of employment of all the persons who are able to work, fulfilment of the housing needs of citizens, the highest possible standards of physical and mental health, education and qualification of unemployed persons, a healthy and ecologically adequate environment for the present and future generations, care and help for the aged, orphans and persons with disabilities, etc. Their realization is closely related with the conditions, available budgetary means and possibilities of the state. The fulfilment of social objectives cannot be directly claimed in court. The law defines under what conditions and to what extent the realization of these objectives can be claimed.

It is worth mentioning that the Constitution has given to international agreements ratified by Albania the status of being integral part of the internal legal system, what implies that the provisions of these agreements have the same effect as the country law, and their violation can be pretended by the individuals in the same manner as for the internal laws.

### III. ECHR and its position in the Albanian Constitution

The international system of human rights in Europe mainly acts under the shield of the

---

2) Article 59 of the Constitution.

3) Article 122 of the Constitution.
Council of Europe, a member of which is also the Albanian state since 1995. The international act stating the obligations of the member states of the CoE to respect the fundamental human rights is the European Convention on Human Rights or ECHR, adopted by all the members of the Council of Europe 4).

ECHR has 16 added protocols 5), not all of them ratified by each member states. The purpose of adoption of ECHR is to offer an international guarantee following the national protection system, as well as the evolution of fundamental human rights and freedoms in conformity with the obligations undertaken by the member states, imposing on them the obligation to refer more and more to the standards and principles provided for in the ECHR when taking decisions on cases related to human rights.

The main purpose of ECHR is to protect the individual from the arbitrary actions of public authorities. It requests to the member states that, in the framework of negative obligations, not to interfere with human rights and not to violate them. Besides this element, ECHR imposes important positive obligations for the effective “respect” of human rights. In both contexts, it should be a fair balance between concurring interests of the individual and the interest of the community as a whole; the states enjoy a certain margin of appreciation. 6)

According to the doctrines of “living instrument” and “effectiveness and practice”, revealed and elaborated by the European Court of Human Rights, ECHR should be seen as a living instrument to be interpreted in the light of current situation, what means that it should be able to respond to the recent developments and maintain the balance between judicial creativity and the purpose of rights foreseen by it 7).

The individuals can file an application with the ECtHR for violations of their rights.

4) There are some other regional/European documents to be mentioned: European Social Charter (1961) reviewed (1996 and 1998). The full list of Treaties and Conventions of Council of Europe may be consulted in website: http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?CM=8&CL=ENG
5) Prot.1, article 1 - protection of property; Prot. 1, article 2 - right to education; Prot. 1, article 3 - right to free elections; Prot. 4 - prohibition of imprisonment for debt, freedom of movement, expulsion; Prot. 6 - limitations imposed on death penalty; Prot. 7 - crime and family; Prot. 12 - Discrimination; Prot. 13 - abolition of death penalty; Protocol 11 (Protocols 2, 3, 5, 8, 9 and 10 have been exceeded by Protocol 11); Protocol 14 follows Protocol 11, focusing on the further improvement of efficiency of ECHR. Protocols 15 and 16 are ready to be signed and ratified by the member states of the Convention. Albania has ratified Protocol no.15 on November 4th, 2015 and Protocol no.16 on July 22nd, 2015.
6) See articles 8, 9, 10, 11 of ECHR.
provided for in the ECHR. The ECtHR could impose fines on the member states of Convention for certain violations, what gives to this Court a very significant weight and role.

However, in order to exercise their right to file an application with the ECtHR, the individuals must have exhausted all the instances of effective remedies within their respective states and the application must be filed within a period of six months from the date of final court decision.\(^8\)

The protection system of ECHR puts in balance the national and international protection of human rights and makes the system as a whole functional. ECtHR should be seen by the national organs as the last instance. It is always preferable that rights be reinstated (restored) within domestic systems, saving time and money to the victims of infringements.

When ascertaining a violation of the fundamental human rights, ECtHR penalizes the respective state and not the public administration organs that have commissioned the stated violation. A concrete case from Albania is the Bajrami case.\(^9\) The applicant claimed that the competent local organs were not making the expected efforts to guarantee his right to a family life, since they had not undertaken the necessary and concrete measures for the execution of the final court decision that gave him the child custody. According to ECtHR, under the circumstances of this case, despite the margin of appreciation normally allowed to the sued state, the endeavours of Albanian authorities were not sufficient and efficient to realize the applicant’s right to have the final court decision executed, deciding on his right to have the child custody after the divorce. The authorities had neglected to take the necessary measures to find the location of his daughter, in pursuance of the child custody decision in his favour. As a consequence, the article 8 of the Convention was infringed and Albania got a fine.

ECHR has a special status, “more privileged” than Albanian Constitution, as the limitations imposed by this convention regarding the human rights can in no case be

---

\(^8\) Article 35 of the ECHR (admissibility criteria), added by Protocol 14, with a third paragraph according to which: The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that: (a) the application is incompatible with the provisions of the Convention or the Protocols thereto, manifestly unfounded, or an abuse of the right of individual application; or (b) The applicant has not suffered a significant disadvantage, unless when the respect of human rights as defined in the Convention and the Protocols thereto requires an examination of the ground application and provided that no case may be rejected if it has not been duly considered by a national court.

\(^9\) Case Bajrami against Albania, application nr. 35853/04, decision dated 12 December 2006.
exceeded by the internal legal system.

The second part of the Albanian Constitution “Fundamental Human Rights and Freedoms” is almost identical with the Universal Declaration of Human Rights and the European Convention on Human Rights. Furthermore, Convention has been placed in the same position with our Constitution, regarding the limitations that can be imposed on the human rights that in no case may exceed the limitations provided for in the ECHR.\textsuperscript{10}

In the framework of protection of fundamental human rights and freedoms, Constitutional Court has been guided by the standards established by the ECtHR. The protection of human rights is a common objective of these courts, and that is the reason why referring to the decision-makings of the ECtHR has been an indispensable and essential guideline for the activity of our Constitutional Court. In its decisions, the Constitutional Court has stated that ECHR, as an instrument for the protection of human rights, offers only the minimal standards for the protection of these rights, and the states shall not be hindered to go beyond this limit.\textsuperscript{11}

\textbf{IV. The role of Constitutional Court in the protection of human rights}

One of the important tasks of constitutional justice is to protect the constitutional standards of human rights and fundamental freedoms, no matter what kind of protection system is implemented. According to the Albanian legal system, the body that makes the final interpretation of the Constitution is the Constitutional Court.\textsuperscript{12}

\textsuperscript{10} Article 17/2 of Constitution

\textsuperscript{11} See decision nr.38, dated 23 December 2003. In this decision a prosecutor addressed the Constitutional Court to repeal a decision of the Supreme Court. By decree of the President of the Republic the applicant has been transferred from one prosecutor institution to another. This decree was appealed in the Court. Supreme Court nullified the judgment with the argument that the President’s decrees, including those for the removal or transfer of prosecutors, cannot be challenged in court because they are constitutional acts and not administrative acts. This restriction was based even on the jurisprudence of the ECHR that had justified the restriction of access to the court to a certain category of public functionaries. Constitutional Court repealed the decision of the Supreme Court, stating that the applicant was denied the right to appeal pursuant the Article 42 of the Constitution. ECHR stipulates a minimum of rights that shall be respected by countries member, but these countries are not prevented to provide a greater protection than the ECHR.
Constitutional jurisdiction, pursuant to the Constitution, includes many important aspects, the control of the constitutionality of laws and regulations, settlement of jurisdictional disputes, constitutionality of political parties, constitutionality of referendum, control of election procedures and incompatibility in exercising the functions the President of the Republic, final adjudication on the protection of human rights and fundamental freedoms. A correct interpretation of Constitution reveals the real content of the principles, norms and constitutional provisions. The Constitutional Court gives substantial contribution to the creation and development of constitutional doctrine.

The mission of the constitutional protection may be realized by the Constitutional Court only when the implementation of the Constitution and of legal acts by the public administration is controllable. Constitutional control of administrative activities derives from the obligation of public administration to act according to the principle of constitutionality and the principle of rule of law, according to which protection against violation of everyone rights by interference of public authorities must be inclusive.

The Constitutional Court in its jurisprudence, especially when it comes to human rights, has highlighted that the final interpretation of the constitutional norm is the competence of the Constitutional Court.

Some of the standards elaborated by the Albanian Constitutional Court concerning the human rights and fundamental freedoms can be listed, as follows:

Article 11 of Constitution (Freedom of economic activity) – In the Decision No. 10/2008, the Constitutional Court dealt with the claim that the establishment of additional legal criteria for the gambling, creates a monopoly situation, because currently, only one subject with the quality of the casino operates in Albania. The Constitutional Court upheld that The freedom of economic activity is one of the most innovative concepts in modern constitutions. This freedom means primarily the right of citizens to conclude on his free will individual or collective contracts, the right of citizens to choose activities they want to

---

12) Article 124 of Constitution.
13) Traja K. “Constitutional Justice”, 2000, pg.84
14) Sadushi. S. Constitutional Justice in progress, Editions Toena, Tirana 2012, chapter “The Constitutional Court, the institution that render constitutional justice”, pg.103.
exercise, the right to have a job in compliance with the preference, etc … An individual who can fully control his work or his property is economically free. (…) 

**Article 21 of the Constitution (Right to life)** – In the Decision No. 6/1999 the Constitutional Court dealt with the repeal of the criminal provisions on the death penalty. The Constitutional Court held: “The concept of life and human dignity is represented in the Constitution as a very important value and the source from which derive all other rights as fundamental absolute rights”. “The essence of the constitutional provisions is to highlight those basic guidelines that have as primary orientation the respect for human life and human dignity. The man and his life are the highest values for the state. This right is at the basement of all rights and its denial shall bring elimination of other human rights. Having been considered as such since its conception, Human life becomes a value superior to all other value protected by the Constitution. This is the purpose of our Constitution, which comes out in its Preamble, as well as in many other provisions.”

**Article 22 of the Constitution (Freedom of expression)** – In the Decision No.16 / 2004 Constitutional Court dealt with the legal obligation to publish financial assets and obligations of elected officials and certain public officials. The Constitutional Court held: “The freedom of expression constitutes one of the pillars of a democratic state. Without guaranteeing this right we cannot talk of pluralism and tolerance and free political will, which are indispensable to a democratic society. Exchange of ideas and free information are some of the most important and efficient tools to control democracy as a form of government. Through them, the state power becomes more transparent, more efficient and closer to the citizen. The freedom of expression is also the basis and prerequisite for ensuring a prior range of other rights and fundamental freedoms. For this reason, the implementation of this right in every case requires an understanding and an ample interpretation”.

**Article 41 of the Constitution (Right to property)** – In the Decision no.30 / 2005, examined allegation about some restrictions in the law on property restitution and compensation. The Constitutional Court held: “The Constitution in Articles 41 and 181 accepted the criteria of ‘just regulation’ and ‘just satisfaction’. From these constitutional criteria it results that the award or compensation in favour of the former owner shall be not entire, but just. This constitutional regulation is due not only to the double function (personal and social) of the right to property, but also to historical, political, economic, social and legal circumstances, which have affected the created situation and, as such, the legislator should have considered. ‘As long as the function of property is a means for the
preservation of individual freedom, the property enjoys special protection. On the other
hand, the legislator may impose restrictions on the property as large as its social function.’
However, the constitutional guarantee of property cannot accept disproportional
restrictions, i.e., restrictions that are not justified by social considerations.”

**Article 43 of the Constitution (Right to appeal)** - In the Decision No. 14/2005, the
Constitutional Court examined the applicant’s claim for a violation of the right to a due
process of law. The Supreme Court had denied his right to appeal by non-acceptance of the
recourse. The Constitutional Court upheld: “The right to appeal pursuant to Article 43 of
the Constitution of the Republic of Albania must be understood as an opportunity for every
individual to have procedural means to complain to a higher court a decision given against
him by a lower court. So, according to the Constitution, everyone has the right to appeal, at
least once, a judicial decision rendered against him. This important constitutional
guarantee is a positive exceeding compared with the standards offered by the European
Convention on Human Rights in this regard. Article 6 of the ECHR does not provide the
right to remedies against judicial decisions, and consequently, nor obligation of state
parties to set up courts of appeal or review (Cassation Courts or Supreme Courts).”

**Article 45 of the Constitution (Right to vote)** - In the Decision no.40 / 2007, the
Constitutional Court examined the claim on the incompatibility of the word “residence”,
provided by the Electoral Code, because this word conditions the right to vote with the fact
that prisoners or detainees shall be residents in the penitentiary area (where they serve the
prison sentence). In this way, the prisoners with a residence different than that of their
penitentiary cannot exercise their right to vote. The Constitutional Court upheld: “The right
to vote is a fundamental political right of the individual. This right is exercised through the
establishment of an electoral system that guarantees privacy, freedom and equality of the
vote. This right provides to citizens their political active involvement and creates the basis of
the role they must have in a democratic system. The right to vote is a central element of
democracy and rule of law.”

**Article 46 of the Constitution (Freedom of association)** - In the Decision No 3/2010,
Constitutional Court examined the allegation about a violation of the right of all other
persons who are not members of the Institute of Chartered Accountants, to be organized in
other groups, except the organization created by law. The Constitutional Court upheld:
“Freedom of association, as a negative freedom guaranteed by the Constitution is intended
to provide an opportunity for citizens to gather and organize freely and preferably for
common goals and objectives, which are not necessarily related to the profession
exercising. There are also other organizations that have on their basis the right to defend the professional interests, as syndicates, whose establishment and operation is guaranteed in Article 50 of the Constitution”.

Article 49 of the Constitution (Right to work) – In the Decision No.20 / 2006, the Constitutional Court examined the allegation related to the violation of the right to work caused by some decrees of the Council of Ministers which provided removal from office of some categories of public servants because of their family relations. The Constitutional Court held: “The right to work includes the choice of profession, the place of work and the vocational training system in order to earn the own living legally. The choice of profession, as provided by the constitutional provision, is a right of the individual that means he is dedicated to an activity to ensure livelihoods. This right of the individual to obtain benefits from a legal work assumes significance also socially, because the work as a profession is a value even for the contribution it makes to the entire society”.

Article 49 of the Constitution (Right to an old age pension) – In the Decision No.33 / 2010 the Constitutional Court examined the allegation that the modification of the existing legal framework on supplementary social security of militaries and employees of the State Police on duty or retired, has deteriorated the financial condition of the affected category; has violated the principle of legal certainty as it reduces the rights acquired by the military; has violated the final court decisions. The Constitutional Court held: “The right to a pension is included in the group of social and economic rights that are positive rights. Therefore, their content must be interpreted in strict connection with the obligation of the state to become active and to provide citizens appropriate tools for vital needs in case of calamity, sickness, invalidity, old age and unwanted unemployment.”

In respect of the protection of human rights, the Constitutional Court has also focused the constitutional principle of the equality of individuals before the law17). According to the Constitutional Court, “Equality in law and equality before the law does not mean to have the same solutions for individuals or categories of persons who are objectively in different conditions. Equality in law and equality before the law presumes equality of individuals who are on equal conditions.” Further, the Constitutional Court held → the difference in treatment shall be considered discriminatory when there is no a reasonable and objective justification, when there is no a “legitimate aim” or if there is no “→ a reasonable and proportional relationship between the means employed and the aim sought to be achieved.”18)
In a great number of decisions the Constitutional Court has interpreted the constitutional standards regarding the restriction of rights; 19) (restriction of rights only by the law approved by the Assembly; 20) restrictions of the rights in order to protect the public interest or to protect the rights of others); 21) the respect of the principle of proportionality 22); the preservation of the essence of right and, in any case, the Court has not exceeded the restrictions stated in the ECHR 23).

V. The impact of the ECtHR case-law on the Albanian Constitutional Court case-law with regard to the protection of human rights

The principle of subsidiarity requires that “effective remedy” ensures respect of fundamental human rights stipulated in the ECHR at national level. According to ECtHR, submission of applications to the court, in compliance with the criteria provided in the domestic law, must be done before the proper local body and addressed by appropriate and effective means.

According to Recommendation No. 6/2004 “On the enhancement of internal remedies”, the Committee of Ministers of the Council of Europe, states were obliged to modify their domestic law in order to end violations of the Convention and to execute the decisions of the ECtHR. Modifying the domestic law implies the creation of a new jurisprudence or its evolution in the light of standards of Strasbourg and principles of the rule of law, in order to provide an effective justice, translated even in economic or financial terms for Albanian citizens. The Constitutional Court of Albania over the years has expanded the concept of individual rights and the right to appeal in accordance with the ECtHR standards, trying to fit the content and requirements of the ECHR with its jurisprudence.

As far as the due process of law is concerned, Albanian Constitutional Court has limited

18) Decision nr. 9/2007
19) Ibid
20) Decision nr.20/2006
21) Decision nr.30/2005
22) Decision nr.16/2004
23) Decision nr.65/1999
powers related to the right to examine applications submitted by individuals. The Constitutional Court decides on the final adjudication of the individual complaints for violation of their constitutional rights to *due process of law*, after all legal remedies for their protection have been exhausted.24)

Article 42 of the Constitution that corresponds (partially) to Article 6 of the ECHR provides that freedom, property, and rights recognized by the Constitution and by law may not be violated without *due process of law*. Everyone has the right to a fair and public trial, within a reasonable time, by an independent and impartial court specified by law, in order to protect his constitutional and legal rights, freedoms, and interests, or in case of charges against him.

ECtHR stated that, although a judicial practice that at first glance does not appear to constitute an effective remedy, with the time and the accumulation of jurisprudence in the end may be considered an effective remedy, which in principle must be exhausted.25) The ECtHR has estimated that, since there was nothing in the wording of the relevant article in the Constitution that would deprive the action of the applicant by the opportunity to be successful, she (the applicant) must submit a constitutional application despite the fact that the domestic jurisprudence, the doctrine and tradition complicate the achieving of successful results26).

In this context, although the case-law of the Constitutional Court to a certain period seemed to hamper the access of individuals before the court in connection with due process of law, the Court should interpret in the most the ample way the legitimacy of the individual to address the court pursuant to article 131 / f of the Constitution. This access to court should be given to individuals as long as the constitutional provisions had no barrier and jurisprudence should be compatible with the decision of the ECtHR, as far the position of the Constitutional Court as a national effective remedy.27)

Specifically;

---

24) Article 131/f of Constitution.
25) Gorou v. Greece, decision of 20 March 2009, prg.32 and 34
26) D. v. Ireland, nr. 26499/02, prg. 102
1. The access to the Constitutional Court

The Constitutional Court has amplified possibilities of access to court for individuals, by interpreting their legitimacy strongly in favour of access to court. Individual may apply to the court not only when all instances are exhausted, but even when the appeal procedures would result in excessive length or a further aggravation of the situation. In the case whose applicant is K. Kryekurti (2011), the Court held that the Constitution must be interpreted in such a way to have the most reasonable and fruitful sense. Given that constitutional protection has a subsidiary function; it may only be required for a final decision, of any form, which closes the proceedings. Violation of the right to a due process of law guaranteed by Article 42 of the Constitution may be claimed in Court only after they exhausted all possibilities offered by the system of appeals and this applies even in cases where preliminary judicial proceedings lead to an aggravation or to the length of a violation of that right. Given that the applicant has exhausted the remedies for “prison custody” and he appeals against a decision of the Supreme Court, the character of this intermediate decision requires, as an exception, to be considered final pursuant to Article 131 / f of the Constitution and Article 30/2 of law no. 8577, dated 10.02.2000 “On the organization and functioning of the Constitutional Court of the Republic of Albania”. 28)

2. Duration of the proceedings beyond the reasonable time

In the case submitted by A. Koliqi (2012) the Constitutional Court held that this Court may be examine also applications of individuals for violation of the right to a trial within a reasonable time, regardless of the fact that the trial for protection of their rights, freedoms, and legal and constitutional interests may not be completed in all instances by the courts of ordinary jurisdiction. In this regard, the Constitutional Court held that, in such cases the individual must submit to the Court, because there are no others effective tools available to speed up the process29).

Whereas in the case submitted by O. Shyti (2011) the Constitutional Court admitted that: … the complexity of the case, the attitude of the proceeding body and of the applicant caused the extension of the trial beyond the reasonable time limit. Despite the fact that delays,
attributable to the court occurred due to objective reasons and legislative areas have allowed the review, the Court held that the delay of the process by the state authorities is unjustified. Although in absence of a specific legal remedy related to compensation of damage caused by disrespect of the constitutional standard of a reasonable time, the Court underlines that it is the duty of the competent authorities, including the Prosecutor General’s Office, the courts, the Ministry of Justice and the High Council of Justice, to take measures to ensure the administration of the proceedings and avoidance of their unreasonable delays.\(^{13}\)

In this case the Constitutional Court states that there is no specific remedy for compensation of damages caused by disrespect of the constitutional standard of a reasonable time, but anyway this Court has found a violation\(^ {30}\).

3. Effect of ECtHR judgments to the Albanian judiciary system (reopening of proceedings)

In relation to the effect of ECtHR judgments in the domestic legal system, the Constitutional Court of Albania has repealed the Supreme Court’s decision by reasoning that although Albanian criminal legal system does not allow (in formal terms) a review of final criminal decisions through the reopening of the process, after ascertainment by the ECtHR of serious violations of fair trial, the Supreme Court shall apply directly to the Constitution and ECHR, reopening the criminal proceedings concluded with a final judgment, after the judgement of ECtHR.

Specifically in the case submitted by A. Xheraj (2011) the Constitutional Court has repealed the Supreme Court’s decision by reasoning that although the Albanian criminal legal system does not allow (in formal terms) a review of final criminal decisions through the reopening of the process, after ascertainment by the ECtHR of serious violations of fair trial, the Supreme Court must directly apply the Constitution and the ECHR, by reopening the criminal trials concluded with a final decision, after the decision given by the ECtHR.\(^ {31}\)

The lack of the procedural provisions in the CPC related to the reopening of trial after the judgement of ECtHR (when ECtHR had found violations of the right by the courts) did not stop the Constitutional Court to bind (by its practice) the Supreme Court to review the case.

\(^{30}\) Decision nr.47/2011

\(^{31}\) Decision nr. 20/2011
4. The re-establishment of the prescribed time limit and the trial in absentia

In the case Shkalla against Albania, ECtHR mentioned that “the calculation of the time-limit to lodge should have started from the date on which the applicant had been really informed of his conviction and not from the date of the decision of the Supreme Court. Consequently, the rejection of the request by the Constitutional Court violated his right to access to court.” In the preliminary session the Constitutional Court College decided not to pass the request of the applicant against the sentence in absentia for examination in plenary session because the request lodged had exceeded the two year term to appeal to the Constitutional Court, which it is understandable because of his absentia and being notified beyond the time-limit of two years from the date of the final decision. The panel selection of the Constitutional Court refused to review the application against the decisions of ordinary courts that had rejected the request to re-settle the time-limit of the right to lodge an appeal, saying that the applicant does not have standing because the question of acceptance or rejection of the request for re-settlement of time-limit is a matter of ordinary jurisdiction and not of constitutional jurisdiction.

This practice has been revised and corrected. E.g. by the decision no. 31/2015, the Constitutional Court held that based on constitutional jurisprudence and the case-law of ECtHR on effective means for restoring rights alleged as violated by the defendant in absentia, lodging by the applicant of a request to reset the time-limit to appeal is not an obstacle for a constitutional review of individual complaints, because it is precisely the effective tool that provides reasonable options for restoring the rights claimed, contradicting sentence in absentia. About the legitimacy ratione temporis, the Court assessed as beginning of the time-limit the date when the applicant is been informed of his conviction and not the final decision of the Supreme Court.

5. Failure of giving a final decision

In the case Marini v Albania, ECtHR stated that, the cessation of the trial without giving a decision, because the voting process couldn’t reach a majority of votes, constitutes a violation of the right of access to court and “court established by law”. Current case-law of the Constitutional Court in this regard still appears problematic.
6. Constitutional Court – ineffective remedy for unreasonable long time to process

In the case Gjyli v. Albania (2009), the ECtHR stated that the issue of exhaustion of domestic remedies is closely and mainly related to the question of the effectiveness of the constitutional complaint about the non-enforcement of a final court decision, which has been examined by Article 13. (Paragraph 39). ECtHR noticed that the decisions of the Constitutional Court ascertained a violation of the right to access to court over non-enforcement of domestic court decisions. However their findings were declaratory so that the Constitutional Court did not provide any adequate reparation. Particularly the Court did not give any compensation for material and immaterial damage, nor could it offer a clear perspective to prevent the alleged violation or its continuation. (Paragraph 58).

In the case whose applicant was E. Memishaj (2006), it was the decision Qufaj & Co. that brought changes in the jurisprudence of the Court: the execution of final court decision is considered part of the due process of law in accordance with Article 42 of the Constitution and Article 6 of the ECHR; this attitude is already consolidated with some consecutive decisions.

All the above-mentioned cases show the attitude of the Court related to the violations of the Convention as constitutional violations and the remedy of the situation within the domestic legal framework. Moreover, the ECtHR case-law regarding the fair trial still remain in the attention of the Constitutional Court of Albania, in order to render justice to the individuals whose rights have been violated, and to allow as well a greater dimension of the implementation of effective protection within the domestic legal system.

Although the ECHR, as a source of binding, comes second after the Albanian Constitution, principles and standards of the ECtHR are more and more source of reference for the Constitutional Court of Albania, but also the other Albanian courts in their decision-making process. Moreover, the competence of the ECtHR to impose sanctions on countries that have violated the rights and freedoms provided for in the ECHR, makes the appeal to this court a powerful instrument in the hands of citizens, whose rights may be violated by the public administration.
VI. Conclusion

The Constitutional Court has two fundamental functions: the promoter-evolutionary function, which is often a consequence of the value of the ECHR decisions, and the fact that the Court can use the attitudes of other homologues European or international Courts to support its own decisions reasoning; and the protective - conservative function, that guarantees immutability of constitutional protection for those values that are seen as essential by the people of the Republic of Albania, whose will the Court interprets. These functions are both important and equivalent.

By providing constitutional justice the Constitutional Court ensures the primacy / supremacy of the Constitution in the legal system. The justice is even above the Constitution itself. The interpretation of the Constitution by the Constitutional Court in a spirit of justice still remains a challenge; and as a matter of fact, for every society the enhancement of the standard of respect of human rights, fundamental freedoms and constitutional principles remains a challenge.
Bibliography

· Legislation

Constitution of the Republic of Albania with the respective amendments.
European Convention on Human Rights
Law no.8577, dated 10 February 2000 “On the organization and functioning of the Constitutional Court of the Republic of Albania”.
Case - Law of the Constitutional Court of Albania
V.nr.12/2012 / V nr.1/2013

· Case – Law of the European Court of Human Rights

Qufaj CO Ltd. v. Albania / Beshiri and others v. Albania / Gjyli v. Albania
Ramadhi and others v. Albania / Hamzaraj v. Albania / Nuri v. Albania
Gjonbocari v. Albania / Marini v. Albania / Behari v. Albania / Jakupi v. Albania
Balliu v. Albania / Dauti v. Albania / Mishgjoni v. Albania

· Doctrine

Dedja B. “Some elements of the constitutional review according to the Albanian jurisprudence” 28-30 October 2011, St. Petersburg – Russia
Dedja B. “The Constitutional Court according to the Albanian legal system”, 21-23 September 2011, Caracas – Venezuela
Toska E. “Control of the administrative activity – the case law of the Constitutional Court of Albania”,
The Role of Constitutional Courts in Protecting Human Rights
- Jordan as a case study

Taher Himkat*

I. Introduction

It is constitutionally approved that according to the doctrine of judicial review all actions and decisions by the legislative and executive are brought under review, with a high possibility of invalidation if proved to be in contradiction with the Constitution. In Marbury v. Madison, a landmark case that was resolved before the establishment of the United States Supreme Court, Chief Justice John Marshall ruled that “it is emphatically the province of the judicial department to say what the law is.” 1) and that “the Supreme Court’s responsibility to overturn unconstitutional legislation is a necessary consequence of its sworn duty to uphold the Constitution”. 1)

The constitutional review is critical to ensuring that judges effectively discharge their internationally commended duties to “promote […] the observance and the attainment of human rights” and “ensure that all peoples are able to live securely under the rule of law.” 2) It also gives judges the power to maintain a “living constitution” whose broad provisions can be continually applied to complicated new situations.

---

* President of the Constitutional Court of Jordan

1) President of the Constitutional Court of Jordan Marbury v. Madison, 5 U.S. 137 (1803).

2) The Montreal Universal Declaration on the Independence of Justice, para. 2.01. This declaration was unanimously adopted at the final plenary session of the first world conference on the independence of justice held at Montreal on June 10th, 1983. For further information see Shimon Shetreet & Jules Deschênes, Judicial Independence: The Contemporary Debate (The Netherlands: Martinus Nijhoff Publishers, 1985) 447.
II. The importance of constitutional judicial review

In a modern constitution, the principle of separation of powers indicates the existence of three independent branches of government; the Legislative, Executive and the Judiciary. While the legislative authority is empowered to enact laws, and the Executive to implement them, the Judiciary is assigned with the judicial review which, in essence, allows the judiciary to take the initiative in ensuring that the other branches of government abide by the constitution. The ability of judicial bodies to exercise judicial review is also widely accepted as a key reason to guarantee judicial independence. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary, and the judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.3)

Judicial Review is the reassessment of the legality of actions or decisions made by those in position of public authority or bodies. The action or decision in question is brought before a Judge in court proceedings where the lawfulness of the decision is tested. The main purpose of Judicial Review is to ensure that public authorities do not act in excess of their powers; thus, the subject matter of every judicial review is a decision made by a person in power, or, the failure of that person to make a decision.4)

The importance of constitutional review also stems from the fact that it includes both procedural and substantive elements, and thus is probably best described as reflecting a version of the ‘thick’ understanding of the rule of law.5) Despite there being no established definition among the judiciary of the rule of law, there may be thought to be sufficient judicial dicta to show that the rule of law does have a core meaning for the judiciary.6) The judiciary’s view about the meaning of the rule of law in relation to judicial review matters,

because it falls to the judiciary to apply any relevant legislation passed by Parliament, and if there is a difference of view about the meaning of the rule of law, as it applies to judicial review, as between Parliament on the one hand, and the judiciary on the other hand, this might give rise to a disagreement between those two branches of state. 7)

As a result, constitutional review has been widely inserted in constitutions around the world, and successfully used by public interest lawyers and civil society organizations to challenge laws for being unconstitutional, and to protest against abusive actions of the government, requesting remedies, including compensation and declaring such laws and actions void.

As far as the models of constitutional review are concerned, it should be noted that the procedures and scope of such review differ from country to country. However, the constitutional law recognizes two types of constitutional review: the centralized system and the decentralized system of constitutional review. In countries following the centralized system of constitutional review (for example Egypt, France, Germany, and Jordan), the function is performed by a specialized constitutional court or tribunal composed of judges appointed for a limited tenure by political branches of government, exercising abstract, ex post, and final review of the constitutionality of statutes and other infra-constitutional acts. 8)

Whereas in countries applying the decentralized system (for example USA), constitutional review is performed by ordinary courts of general jurisdiction. 9) In the decentralized or American system, all the judicial organs are given the power to determine the constitutionality of legislation, and the judicial review is performed by state and federal courts. 10)

---

III. Constitutional judicial review in Jordan

As part of the constitutional revision of 2011, a new chapter was added to the Constitution of Jordan, Chapter 8, which created the Jordanian Constitutional Court to work as an independent and separate judicial body with headquarters in the capital.\(^{11}\) The core purpose behind the establishment of the Court is to provide access to justice and to define the relationship between individuals and the state authorities.

The main jurisdiction of the Constitutional Court of Jordan is to decide on the constitutionality of laws and regulations. With the establishment of the Court, an independent judicial body was constitutionally assigned with the power to strike down laws and regulations for being unconstitutional, and to issue its judgments that are deemed final and binding on all authorities and individuals of the state.\(^{12}\)

1. Structure of the Court

All rules relating to the composition of the Jordanian Constitutional Court, its internal rules of proceedings and the method of undertaking its judicial work aim at advancing the protection of human rights. The Constitutional Court comprises nine members (judges), including the president, who are appointed by the King through a Royal Decree for a non-renewable term of 6 years.\(^{13}\)

Each judge of the Constitutional Court must meet the following conditions:

1. To be Jordanian and does not hold the nationality of another state.
2. To have reached fifty years of age.
3. To be of those who served as judges in the Court of Cassation or the High Court of Justice, or of the professors of law in universities who hold the rank of professor, or of the lawyers who spent a period of not less than fifteen years in the practice of law; and of the specialists to whom the conditions of membership in the Senate apply.

Such a variation in the backgrounds of judges appointed to the Constitutional Court shall

\(^{11}\) Article 58 of the Jordanian Constitution as amended in 2011.
\(^{12}\) Article 59/1 of the Jordanian Constitution.
\(^{13}\) Articles 58 & 60 of the Jordanian Constitution, and Articles 5 & 6 of the Constitutional Court Law.
have a positive impact on the issuance of its judgments, in which the Court examines the constitutionality of laws that regulate how individuals can exercise their fundamental human rights.

One safeguard for the independence of judges in the Constitutional Court is that they enjoy immunity for actions taken in their official capacity. They cannot be prosecuted in respect of any criminal complaint during the period of their membership at the Court or for any criminal complaint relating to the duties and activities entrusted to them in accordance with the provisions of the Constitution, except with the authorization of the General Board.\(^{14}\)

To enhance their independence during office, judges at the Constitutional Court are appointed for a fixed term of six years. They can only be removed from office in certain circumstances clearly specified by the law, which include death or loss of civil capacity, resignation, and by the King upon the recommendation of six other members of the Court.\(^{15}\)

And to ensure integrity and transparency, judges are subject to the Financial Disclosure Law and cannot engage in any extrajudicial activities that might imply improper influence or reflect adversely on the judge’s impartiality. Prohibited activities include, for example, performing services for other governmental bodies, occupying a position in either public or private sector, and being a member of a political party.

2. Proceedings before the Court

Beside the structure of the Court that serves the independence of judges during office, the method of undertaking judicial work at the Court and the decision-making process also advance the perception that no other authority in the state shall have the power to intervene in the way the Court conducts its business both administratively and judicially. The Constitutional Court has legal personality, a separate budget, its own administrative staff, and enjoys financial and administrative independence.\(^{16}\) In such capacity, it may own movable and immovable assets and make all such legal dispositions as are required to perform its functions.

The Constitutional Court shall decide on the challenge of unconstitutionality referred to it by the courts within a period of not more than one hundred and twenty days from the date

---

14) Articles 23 of the Constitutional Court Law.
15) Articles 21 of the Constitutional Court Law.
16) Articles 3/b, 30 & 32 of the Constitutional Court Law.
the referral decision reaches it. The Court has sole discretion to decide whether to hold an oral hearing or render a judgment merely on the basis of desk review of case documents. Parties can request an oral hearing but the Court’s deliberations are always confident; however, the Court can seek any details or information it deems necessary to decide on the challenge put to it and in such manner as it shall consider appropriate, and can always issue its judgment at a public hearing upon its own discretion.

Decisions of the Court are made by the majority vote of all members which must comprise at least five judges, and in case of a tie, the president’s vote prevails. Judgments of the Constitutional Court are final, binding on all authorities and persons, and effective immediately unless otherwise specified. The Court is mandated to publish its decisions in the Official Gazette within 15 days of the date of their issuance. If the decision responds to a request for an interpretation of a constitutional provision, it enters into force upon publication in the Official Gazette.

All the above rules and work method of the court aim at asserting the independence of constitutional judges, and shed the lights on the essence of their duties in the field of promoting human rights. This was clearly stated in the Royal Decree appointing first judges to the Court of 2011, in which the King expressed trust in the Court’s ability to serve as “a key guarantor and reference to bolster the principles of respect of the constitution and separation of authorities, protector of citizens’ rights and basic freedoms and booster of confidence between the people and state.”

3. Overseeing the constitutionality of laws

To ensure effectiveness in the work of the Constitutional Court which is deemed as an additional safeguards to the rights of individuals, and to avoid stressing the judges with ill-founded claims of unconstitutionality, the Constitution and the Constitutional Court Law envision access to the Constitutional Court through two main avenues:

---

17) Articles 12/c of the Constitutional Court Law.
18) Articles 14 of the Constitutional Court Law.
19) Articles 13 of the Constitutional Court Law.
20) Articles 19 of the Constitutional Court Law.
21) Article 59 of the Jordanian Constitution, and Articles 4, 15 & 19 of the Constitutional Court Law.
22) Article 59/1 of the Jordanian Constitution, and Articles 16 & 17 of the Constitutional Court Law.
23) This Royal Decree was issued on 6 October 2011, and was published in the Official Gazette No.
1. The House of Representatives, the Senate, and the Council of Ministers, can request the Court to determine constitutionality of laws and regulations.24)

2. A litigant in any court in Jordan can claim unconstitutionality of a law or regulation applicable in the case, and the court examining the case has to decide on the merit of the submission, so that if it finds that the constitutionality challenge is serious, it must suspend the proceedings and send the challenge up to the Court of Cassation for an additional review of seriousness.25) The trial court’s decision not to refer an unconstitutionality claim to the Cassation Court can be appealed along with the rest of the case, provided that the subject matter is appealable.

Rather than adopting the system of a direct challenge, the Constitutional Court of Jordan applies a “multi-court referral” model. A party to a case pending before any Jordanian court has the right to challenge the constitutionality of any law or regulation applicable to the case. To do so, the party must present the court with a memorandum including information about the law or regulation in question, the scope of the challenge, and any additional materials that may shed light on how the provision contradicts the Constitution.26) If the court finds the claim of unconstitutionality serious and substantial, it must suspend the proceedings and refer the challenge to the Court of Cassation.

The Court of Cassation makes a final determination on whether the unconstitutionality claim should reach the Constitutional Court. The Cassation Court must convene a three-judge panel and reach its majority decision within one month from the date of submission of the claim by the lower-level court. Each party to the case has 15 days to file memoranda to the Cassation Court in support of or opposing the claim. The underlying case must remain suspended until the constitutionality claim is either rejected by the Cassation Court or resolved by the Constitutional Court.27)

The vetting process aims at determining which cases warrant judicial review should be as streamlined and efficient as possible. On the other side, the direct complaints procedure serves as a fallback mechanism to protect victims of unconstitutional behavior when the rest of the legal system fails them. Laws of some countries prescribe penalties for submitting clearly unsubstantiated claims. For example, persons who file frivolous claims before the German Constitutional Court may be punished with a fine of up to 2,600 Euros. German

24) Article 9 of the Constitutional Court Law.
25) Article 11 of the Constitutional Court Law.
27) Article 11/3 of the Constitutional Court Law.
experience shows that the caseload of direct petitions can be kept manageable in a well-staffed court if the system of filtering claims of unconstitutionality is put in place, and if petitioners are required to exhaust other legal remedies before approaching the constitutional court.

**IV. Future role of constitutional courts**

The traditional argument with respect to the main function of judicial review is that a constitutional court is set up to bring certain actions and decisions by the legislative and executive under review, with a high possibility of invalidation if proved to be in contradiction with the constitution. This role by a constitutional court should, however, be reviewed in favour of extending it over providing a comprehensive judicial system that protects individuals’ human rights, and that responds positively to the significant alterations in the relationship between people and the state as a result to the economic, social and political circumstances both on national and international levels. The description and characteristics of the social contract signed between the ruler and citizens, which pushed for the setting up of written constitutions to define aspects of powers delegated by the people to the ruler to practice them on their behalf and in their names, have been dramatically changed. As such, constitutional judicial review should act as a nice and efficient constitutional safeguard that citizens could refer to in the event that there is a severe and intentional breach to the contractual relationship with the governing authority.

Following the recent uprising in many of the Arab countries by youth protesting against ruling regimes, many constitutions have either been repealed and replaced by new ones or largely reviewed and amended to meet the public demands for more freedoms and democracy. All constitutional reforms remain in theory, unless there are sufficient constitutional mechanisms that force their full application on the ground. On top of these mechanisms are constitutional courts, which should act as independent and powerful judicial institutions that enjoy ultimate powers by the constitution over all other authorities in the state. They should also be empowered to monitor actions and decisions by public officials, and to uphold them if they are found within the letter and spirit of the constitution, or to overturn them if they are found in breach of its provisions.

Another new role anticipated from constitutional courts is to encounter contemporary
and universal threats that are standing in the way of achieving a decent enjoyment of human rights. People all over the world are dealing with new types of violations and trespasses on their fundamental rights and liberties, which were never known to the founders of the constitutional judicial review. And despite them being more visible and taking place on a regular basis, the role of constitutional courts has remained the same, traditionally overseeing the constitutionality of laws and regulations against provisions of the constitutions. They have been unable to respond sharply to the increasing threats that people in the world are suffering from, both in their judgments of unconstitutionality of laws issued to that effect, and in scrutinizing governmental decisions enforcing unjustifiable limitations on the exercise of human rights based of such threats.

It is well-known that the most contemporary threats facing the worlds these days are terrorism and extremism. However, and despite many terrorist attacks taking places in various countries around the world, the method of constitutional judicial review remains unchanged in the way the process is conducted firstly, and the nature of judgments issued with respect to providing an ultimate protection to the basic humanitarian rights of living peacefully and unharmed.

Even newly established constitutional courts, in countries which have experienced terrorist attacks and public uprising, have failed to promote new ways to undertake judicial review, and to increase their jurisdictions over all sorts of actions and decisions issued by government officials; there are still classes of official decisions directly affecting people’s human rights, that remain immune from judicial scrutiny by constitutional courts on the ground of national security.

This situation has led to a gap being made between the most recent dilemmas the public is facing nowadays, and the work of constitutional courts. Even the outcomes of judicial review of declaring certain acts of Parliament or resolutions by government null and void for breaching the constitutions have lost their excessive impact in political life on the ground of protecting the public order; a wide term that has been heavily used recently against enforcing decisions of constitutional courts.

Also, a gap could be noticed between human rights incorporated in modern constitutions issued in the wake of revolutions, and the safeguards provided on the state level. This could be referred to the lack of independence and efficiency of constitutional means that were supposed to preserve the implementation of human rights, or to the lack of a serious political will to put them in force. Subsequently, the system of a regional protection for human rights was pushed ahead, at the expense of the national protection, promoting calls to establish an
international constitutional court, and human rights courts in regions where these courts do not exist yet.

It should be noted, in this regard, that the rationale behind regional and international systems of protecting human rights should never be seen as a replacement to the national protection, but only to support and supplement it. Otherwise, the states measures with respect to promoting human rights should be abolished in favour of regional and global mechanisms, and this should never be the case. Certain human rights have their own characteristics on a national level, which are different to those on the international level. Therefore, any judicial protection that should be provided for such rights must take into account their own definitions and implementation locally, which, in its turn, would be reflected on their protection on an international level.

Moreover, and even on the international level, the definition of human rights has dramatically changed towards a more liberal approach to what individuals should be entitled for as part of being humans. The classical definition of human rights even in international treaties and conventions should be brought under review, and the international mechanisms for enforcing such rights are not constantly capable of providing sufficient protection, due to various political, economic and social limitations.

At this point, the constitutional judicial review at a national level should deliver the alternative, especially with the double standards powerful states are imposing on their relationships with other states. Also, judicial definitions of human rights by constitutional courts at a national level could serve on a wider international level to draw lines on recent developments concerning the concept of human rights and their best ways to enforce them.

Therefore, judicial review should provide a valuable asset for advancing human rights and enhancing access to justice on a national level. Its scope should be widened, depending on how constitutional adjudication is structured in a given country, to include not only the power to nullify or amend laws and regulations in the event they are ruled to be incompatible with individual rights and freedoms enshrined in constitutions and international treaties, but also to monitor acts and decisions by the state authorities that can have severe implication on the protection system of human rights, such as the declaration of war, and the cases of emergency.

The ability of constitutional courts to exercise judicial review in this regard should be widely asserted to reassess the legality of actions or decisions made by those in position of public authorities or bodies. It is not enough to assign to constitutional courts the power to decide on challenges against presidential elections and to trial them in case of impeachment,
but they should also be empowered to monitor to what extent all public authorities act in excess of their constitutional powers, which might have a negative impact of hindering the protection of human rights.

However, there are serious challenges in the definition of any future role for constitutional courts. The major challenge is where to draw the line between the duty of constitutional courts towards the people and its responsibility towards the states. There are no clear criteria that one could apply; it varies depending on the legal and political system in each country. While some constitutional courts may find the balance in their relationships with states and people peacefully, others could be faced with severe attacks from opposition and politicians. They prefer a minimum role for constitutional courts in public life, and that the ruling party must be given full powers to regulate all aspects of people’s life in ordinary and exceptional circumstances through legislation and resolutions that anyone could challenge their constitutionality to constitutional courts. So, there should be no interference by constitutional courts unless they are called to scrutinize the constitutionality of an act of parliament or a governmental decision issued to deal with exceptional circumstances.

Another challenge that arises with regard to the future of constitutional judicial review is the way constitutional courts should act to compromise the speedy alterations in the concept and characteristics of human rights globally, as a result of the international developments, and the duty of individuals towards their states of preserving national security and maintaining public orders. Peoples’ attitudes and the way they are looking at governments nowadays have changed entirely if compared with the time the judicial review was established in the United States, and then spread world-wide. The pressure is inevitably mounted on constitutional courts to accommodate the increasing public hostility against any attempt by officials to come across their rights and freedoms, even in cases of emergency and force majeure which necessitate exceptional approaches.

The current mechanisms adopted by constitutional courts of striking down legislations for being unconstitutional cannot by themselves provide full reassurance to the public that their fundamental human rights are preserved, and shall not be undermined at any circumstances. Therefore, it is time for the constitutional judicial review to adopt new methods of working and jurisdictions that aim at confronting new trends in human rights from one side and protecting the sovereignty of the states from the other, and that can respond positively to the changing principles of government and the increasing public expectations from their officials.
These concerns regarding the future roles of constitutional courts with respect to the new definition of the relationship between individuals and the state should never be overlooked. It is believed that regular meetings for representatives of constitutional courts should be conducted with the aim of trying to agree on a new formula that shall govern the process of constitutional judicial review which meets the contemporary challenges to all elements of the state; the people claiming violation of their rights and the political authority seeking preservation of national security and the rule of law.

As a response to the contemporary risks to the principles of legitimacy and the rule of law, there is an urgent need to reconsider the legal mechanisms provided for drawing boundaries between protecting individuals’ rights and the existence of modern states. The main challenge that states face these days is their abilities to move in two parallel lines; preserving the rights of individuals as stated in national constitutions from one side, and maintaining the structure of the state and its institutions on the other.

This challenge is inevitable, and extends to all countries of the world, even those advanced in the field of human rights. As a way of confronting it, it is necessary that national institutions and bodies set up for devoting human rights, such as constitutional courts and councils, should take the initiatives of establishing new common understandings to the most prominent global threats to the human rights, and the capability of modern states to combine a high level of protection for human rights at the best possible manner, and on the same time securing the fundamental principles necessary for each state to protect its security, sovereignty and the rights of the society. It is not only the individuals who are worth protection of their rights and freedoms, there are also the rights of the community, which stand as duties on the individuals, that deserve maintenance against infringements by people whether acted intentionally or unintentionally.

The role of constitutional courts in this regard is immense. They are independent judicial bodies that are empowered to oversee laws and regulations, and scrutinize governmental resolutions issued for their implementation against provisions of the constitutions. In this capacity, they are held in direct contact with the two parties involved of the states and individuals more than any other national institutions, and, thus, they should work on striking a balance between the rights of individuals and the rights of communities.

Constitutional Courts are invited to set up a principle that law has only been found for the sake of the state and individuals together, and that although people are the corner stone of the state, they are not the whole state. The individual is to serve the state, as is the state to serve the individual. This should be a legitimate ground for constitutional courts to
recognize that the law which imposes restrictions on the rights of individuals aims at providing greater protection to the principles of national security and stability of the state. It is beyond doubts that individuals have a major interest that the state survives, so that they retain enjoyment of their constitutional rights. Therefore, they should not object restrictions provided by laws in certain exceptional situations for the sake of protecting an ultimate goal, which is the existence of the state.

Finally, it is important to question to what extent the current international conventions of human rights can make a real coexistence between the concepts of absolute human rights within the concept of the UN Charter, and the increasing risks to humanity that appeared on the surface in the last decade. Critics are now mounting that the international establishments and formulas in power relating to the protection of human rights are not working efficiently enough to confront the radical threats to the relationship between states and their citizens. Terrorism and extremism are widely spreading to the extent that they turned into worldwide global phenomenon, not only to the living of ordinary individuals, but also to the security and social peace of the states.

This new situation presents a great incentive to the international community to work as one team in order to reconstruct current standards and principles of human rights in favour of creating new mechanisms that can reconcile the protection of individuals’ rights and their freedom of movement, thought and belief on one hand, and the existence of the state and its security and stability. States of different ideologies and political doctrines are now more vulnerable to terrorism attacks than at any other time, and this threat is spreading over countries with good records of human rights as well as those that deny them. The traditional and classic international standards of human rights in power are no longer efficient to deal with the risk of intellectual and ideological terrorism that is threatening all countries of the world with no exceptions.

The world is witnessing an unprecedented bloodshed period that was never known before in the history of humanity, so the needs are growing for all legal institutions working in the field of human rights, headed by courts and constitutional councils, to agree on new international versions for the concept of human rights and the rights of states, which shall aim at replacing current conventions aged more than seventy years old, that are no longer suitable for application in the present day.
V. Conclusion

The establishment of the Constitutional Court in Jordan in 2012 should be seen as great achievement towards the implementation of principles of parliamentary democracy and that the nation is the source of all powers. It should also be seen as an effective legal tool and an additional judicial safeguard for protecting human rights, enhancing access to justice, and advancing the rule of law in Jordan.

However, the ability of Constitutional Courts to develop a progressive and human rights oriented jurisprudence on an international level depends on many factors, including the extent to which judges feel independent in deciding constitutional matters, the degree to which ordinary judges and lawyers understand the constitutional process, and the level of public knowledge of and trust in the courts and the justice system at large.

The contribution of constitutional courts towards the contemporary challenges that most states of the world are facing remain minimum. The scope of constitutional judicial review remains traditional, strictly striking down legislation for being unconstitutional, without thoughts of extending their remits to include scrutinizing the public policy of government, and the way the state is administered, so that if any violation of the constitutions or any breach to individuals human rights is possible, the constitutional judicial review works at preventing its incurrence at an earlier stage.
The Jurisprudence of the Constitutional Court of Ukraine on the Protection of Human Rights Recognised by the Ukrainian Legislation and Acts of International Law

Yurii Baulin*

I. The constitutional principles of domestic and foreign policy of Ukraine in the field of the protection of human and citizen’s rights and freedoms

The constitutional regulation in Ukraine is based on the principles of primacy of human values, including guaranteeing human and citizen’s rights and freedoms, ensuring the person worthy conditions of human life.

The Constitution of Ukraine was adopted with the aspiration, in particular, to “develop and strengthen a democratic, social, law-based state”, defining the general purpose of adopting the Fundamental Law of Ukraine to provide for the guarantee of human rights and freedoms and the worthy conditions of his/her life, to strengthen civil harmony (Preamble).

Thus, the constitutional norms prescribe that Ukraine is a democratic, social, law-based state (Article 1), in which a human being, his or her life and health, honour and dignity, inviolability and security are recognised as the highest social value; human rights and freedoms and their guarantees determine the essence and orientation of the State. The state is answerable to the individual for its activity. To affirm and ensure human rights and freedoms is the main duty of the State (Article 3).

Ensuring and protecting these values are based on the constitutional provisions, which, in particular, determine the system of human and citizen’s rights and freedoms (which corresponds to the generally accepted principles of law) and guarantee the right to judicial protection of the constitutional human and citizen’s rights and freedoms, including directly under the Constitution of Ukraine, the norms of which are the norms of direct effect (Article 8.3).

* Chairman of the Constitutional Court of Ukraine
Human rights and freedoms are inalienable and inviolable (Article 21); human and citizen’s rights and freedoms affirmed by this Constitution are not exhaustive; constitutional rights and freedoms are guaranteed and shall not be abolished; the content and scope of existing rights and freedoms shall not be diminished in the adoption of new laws or in the amendment of laws that are in force (Article 22); citizens have equal constitutional rights and freedoms and are equal before the law (Article 24.1).

As it was noted in this context by the Constitutional Court of Ukraine in its Decision dated April 12, 2012: “the provisions of Article 24 of the Constitution of Ukraine concerning the equality of citizens in their constitutional rights, freedoms and before the law ... shall be understood as reading that every person, i.e. citizen of Ukraine, foreigner, stateless person, has equal rights guaranteed by the state for the protection of his or her rights and freedoms in judicial order and participation in consideration of his or her case in the order established by the procedural law in courts of all jurisdictions, specialisation and instance, including a condemned person who serves a sentence in correction facilities.”

The Constitution of Ukraine guarantees judicial protection of human and citizen’s rights and freedoms, including the right to challenge in court the decisions, actions or omission of bodies of state power, bodies of local self-government, officials and officers (Article 55.1, 55.2).

In this respect the Constitutional Court of Ukraine interpreted that “the court can not refuse in justice if a citizen of Ukraine, foreigner or stateless person believes that their rights and freedoms are violated or are being violated, the obstacles to their implementation are established or are being established, or there are other infringement of rights and freedoms.” The Court also emphasised that “the constitutional right to challenge in court any decision, omission of bodies of state power, bodies of local self-government, officials and officers is guaranteed to everyone. Implementation of this right is ensured in relevant type of proceedings in the order prescribed by procedural law.”

II. Constitutional Court of Ukraine

As Former Judge of the Constitutional Court of Ukraine V. Skomorokha stresses, constitutional justice is the most effective institution of judicial protection of human rights in a democratic state. The competence of the Constitutional Court in protecting human and citizen’s rights and freedoms is determined, as a rule, by the principle of division of powers, the peculiarities of the legal system, the distribution of competences among courts, traditions and the legal culture etc.4)

The Constitutional Court of Ukraine (hereinafter referred to as the Constitutional Court, the Court) is the sole body of constitutional jurisdiction in Ukraine, composed of eighteen judges, appointed by the President, the Verkhovna Rada of Ukraine and the Congress of Judges of Ukraine by equal quota. The powers of the Constitutional Court are determined by the Constitution of Ukraine and the Law of Ukraine “On the Constitutional Court of Ukraine” (hereinafter referred to as the Law on the Constitutional Court).

In particular, the Court shall adopt decisions and provide opinions in cases concerning:

- constitutionality of laws and other legal acts of the Verkhovna Rada of Ukraine, acts of the President of Ukraine, acts of the Cabinet of Ministers of Ukraine, legal acts of the Verkhovna Rada of the Autonomous Republic of Crimea;
- conformity of international treaties of Ukraine that are in force or international treaties which are submitted to the Verkhovna Rada of Ukraine for granting consent to their binding nature with the Constitution of Ukraine;
- observance of the constitutional procedure for investigation and consideration of a case on removal of the President of Ukraine from office through impeachment within the limits established by Articles 111 and 151 of the Constitution of Ukraine;
- official interpretation of the Constitution and laws of Ukraine;
- conformity of the draft laws on introducing amendments to the Constitution of Ukraine with the requirements, according to which:

The Constitution of Ukraine shall not be amended, if the amendments foresee the abolition or restriction of human and citizens’ rights and freedoms, or if they are oriented

toward the liquidation of the independence or violation of the territorial indivisibility of Ukraine;

The Constitution of Ukraine shall not be amended in conditions of martial law or a state of emergency.

The draft law on introducing amendments to the Constitution of Ukraine, considered by the Verkhovna Rada of Ukraine and not adopted, may be submitted to the Verkhovna Rada of Ukraine no sooner than one year from the day of the adoption of the decision on this draft law.

Within the term of its authority, the Verkhovna Rada of Ukraine shall not amend twice the same provisions of the Constitution (Articles 157, 158).

According to the legal position of the Constitutional Court, this means, in particular, that “when introducing amendments to the draft law during the process of consideration at the Verkhovna Rada of Ukraine it shall be adopted by the Verkhovna Rada of Ukraine upon the availability of the opinion of the Constitutional Court of Ukraine that the amended draft law conforms with the requirements of Articles 157 and 158 of the Constitution of Ukraine. The subject of the constitutional appeal on these issues is the Verkhovna Rada of Ukraine.”

The authorities of the Court include the provision of opinions on violation of the Constitution and laws of Ukraine by the Verkhovna Rada of the Autonomous Republic of Crimea.

However, the authorities of the Constitutional Court of Ukraine shall not include issues concerning the legality of acts of bodies of state power, bodies of the Autonomous Republic of Crimea and bodies of local self-government as well as other issues pertaining to the authorities of courts of general jurisdiction.

The procedure of consideration of cases by the Court is determined by the Law on the Constitutional Court and its Rules of Procedure. In this context, it should be noted that in scientific circles a proposal for the adoption of a separate law on constitutional proceedings has been discussed for a long time. The fact is that despite some procedural similarities of the proceedings in the courts of general jurisdiction and the constitutional proceedings there are significant differences between them, which, in particular, shall be the following:

- The Court does not establish the actual circumstances of the case, but decides the issues of law

only in accordance with the principles and norms of the Constitution of Ukraine;
∙ The purpose of the constitutional proceedings is to ensure the supremacy and direct action of the Constitution of Ukraine throughout the state.

The forms of application to the Constitutional Court shall be a constitutional petition and a constitutional appeal.

The constitutional petition shall be a written application to the Constitutional Court of Ukraine on recognition of a legal act (separate provisions thereof) as unconstitutional, on determination of the constitutionality of an international treaty or on the necessity of the official interpretation of the Constitution of Ukraine and laws of Ukraine. The constitutional petition shall be also an application of the Verkhovna Rada of Ukraine on providing an opinion concerning observance of the constitutional procedure for investigation and consideration of the case on removal of the President of Ukraine from office through impeachment.

Subjects of the right to constitutional petition for adopting decisions by the Constitutional Court of Ukraine in cases provided for by item 1 Article 13 of this Law shall be: a) the President of Ukraine, b) no less than forty-five People’s Deputies of Ukraine (a People’s Deputy’s signature may not be recalled), c) the Supreme Court of Ukraine, d) the Authorised Human Rights Representative of the Verkhovna Rada of Ukraine; e) the Verkhovna Rada of the Autonomous Republic of Crimea.

Subjects of the right to constitutional petition for providing opinions by the Constitutional Court of Ukraine on the conformity of international treaties of Ukraine that are in force or international treaties which are submitted to the Verkhovna Rada of Ukraine for granting consent to their binding nature with the Constitution of Ukraine, are: a) the President of Ukraine; b) The Cabinet of Ministers of Ukraine, and on the observance of the constitutional procedure of investigation and consideration of a case on removal of the President of Ukraine from office through impeachment - the Verkhovna Rada of Ukraine.

Subjects of the right to constitutional petition for providing opinions by the Constitutional Court of Ukraine on the official interpretation of the Constitution and laws of Ukraine are: a) the President of Ukraine; b) no less than forty-five People’s Deputies of Ukraine (a People’s Deputy’s signature may not be recalled); c) the Authorised Human Rights Representative of the Verkhovna Rada of Ukraine; d) the Supreme Court of Ukraine; e) the Cabinet of Ministers of Ukraine; e) other bodies of state power; g) The Verkhovna Rada of the Autonomous Republic of Crimea; g) bodies of local self-government.
The constitutional appeal shall be a written application to the Constitutional Court of Ukraine on the necessity of official interpretation of the Constitution of Ukraine and laws of Ukraine in order to ensure implementation or protection of the constitutional human and citizen’s rights and freedoms as well as the rights of a legal entity.

Subjects of the right to constitutional appeal for providing opinions by the Constitutional Court of Ukraine shall be a) citizens of Ukraine, b) foreigners, c) stateless persons, d) legal entities. Thus, individuals and legal entities in Ukraine have the right to a personal appeal to the Constitutional Court, but only on the official interpretation of the Constitution and laws of Ukraine.

A well-known Ukrainian lawyer, Professor Yu. Todyka (1942-2007) singled out the authorities of the Constitutional Court to interpret the Constitution and laws of Ukraine, which, in his opinion, plays a special role in understanding and implementation of the legal policy of a state in the area of human and citizen’s rights since any interpreted legal act concerns these rights to some extent. This conclusion is indirectly confirmed by the fact that, according to Article 95.2 of the Law on the Constitutional Court, if during interpretation of a law of Ukraine (separate provisions thereof) non-conformity of this law of Ukraine (separate provisions thereof) with the Constitution of Ukraine is established, the Constitutional Court of Ukraine shall decide on the issue concerning the unconstitutionality of such a law in the same proceedings.

Thus, when submitting the request for an official interpretation of the law or its separate provisions, the subject of the right to constitutional petition (appeal), de facto, simultaneously initiates implementation of constitutional judicial review of those provisions or the law in general. This stems primarily from the fact that the Constitutional Court as a guarantor of the supremacy of the Constitution in the state by its constitutional status can not interpret unconstitutional legislative norms.

President of the Constitutional Court of the Republic of Armenia, member of the Venice Commission, Professor G. Harutyunyan, having analysed the norms of national legislation which regulate the procedure for granting official interpretation of laws of Ukraine, concluded that “the current constitutional institution of citizen’s constitutional appeal in Ukraine is de facto a form of constitutional complaint because, in fact, serves as a normative constitutional complaint.”

---

For example, in October 1997 the Constitutional Court considered the case on the provision of an official interpretation of certain provisions of the laws of Ukraine “On Information” and “On Prosecutor’s Office” at the request of citizen Ustymenko. However, the Court found that the provisions of Article 12.4 of the Law of Ukraine “On Prosecution”, which limited the possibility of challenging in court the decision taken by the prosecutor by cases, envisaged by this law, are unconstitutional. The Court proceeds from the fact that exceptions from the constitutional norms, particularly in respect to everyone’s right to judicial protection, envisaged by Article 55 of the Constitution of Ukraine, are established exclusively by the Constitution itself and not by other normative acts.

Similarly, having considered the case upon the constitutional appeal of citizen Z.Halkina on the official interpretation of the provisions of Article 3.4 of the Law of Ukraine “On prevention of the global financial crisis on the construction industry and housing,” the Court found unconstitutional the provisions of the law, according to which “it is prohibited for natural or legal persons to cancel any contracts that result in the transfer of completed housing facility (part of object) by property developers, provided that under such contracts payment of 100 percent of the value of the object (of object) housing was made.”

According to Article 61.1 of the Law on the Constitutional Court, if in the course of consideration of a case upon a constitutional petition or constitutional appeal there has been revealed non-conformity of other legal acts (separate provisions thereof) with the Constitution of Ukraine, other than those in which constitutional proceedings are initiated, the Constitutional Court shall recognise such legal acts (separate provisions thereof) as unconstitutional.

Thus, in the case on pensions and monthly lifetime allowance the Court, following this prescription, held on the unconstitutionality of other than the disputed provisions of the Law of Ukraine “On pension provision of servicemen, officers of higher and other ranks of the Interior and some other persons” as they as the Court established, have impact on adopting objective and fair decision.

---


9) Decision of the Constitutional Court of Ukraine dated March 13, 2012 No.5-rp / 2012 in the case on prohibition of termination of contracts of investment of residential construction// Bulletin of the Constitutional Court of Ukraine. - 2012. - No.2. - p. 74

10) Decision of the Constitutional Court of Ukraine dated October 11, 2005 No.8-rp / 2005 in the case
In turn, majority of domestic scholars in constitutional law and representatives of the institutes of civil society hold the opinion, according to which the absence of the institute of constitutional complaint in our legal system restricts access to constitutional justice, including on challenging laws for reasons of their unconstitutionality.

Yet, it should be noted that absence of the said institution is partially compensated through the powers of the Authorised Human Rights Representative of the Verkhovna Rada of Ukraine (hereinafter referred to as the Representative of Parliament) to apply to the Constitutional Court with appeals on the constitutionality of laws and other legal acts and official interpretation of the Constitution and laws of Ukraine in case of violations of human rights and freedoms.

For example, the letters of citizen N. Povpa, who could not adopt a two-month girl, abandoned by her mother in the lying-in hospital, and the Ambassador of the Federal Republic of Germany to Ukraine Mr. R. Schäfers that reported on obstacles for citizens of Germany Frederik and Christian Hüssel to adopt a disabled child were the grounds for the appeal of the Representative of the Parliament to the Court on the constitutionality of Article 211.2 of the Family Code of Ukraine. 11)

In another case, the Representative of the Parliament appealed to the Court to recognise the provisions of the Law of Ukraine “On Militia”, according to which militia was granted the right to detain and hold persons, suspected in vagrancy, to 30 days in special rooms, unconstitutional.

Considering the case on the merits, the Court proceeded from the fact that, in particular, Article 29 of the Constitution of Ukraine “determines detention, arrest and custody as coercive measures that restrict the right to freedom and personal inviolability and can be used only on the grounds and in accordance with the procedure established by law. Therefore, detention in any case can not be considered reasonable if the acts which are incriminated to the detained at the time they were committed, could not be regarded or recognised by law as an offense.” 12)


11) The constitutional appeal of the Authorised Human Rights Representative in the case of the age difference between the adopter and the child No. 109347 / http://upiter/pls/wccu/get_pdf?Pf5921=9009&rej=1

Since at the time of the proceedings the effective legislation did not attribute vagrancy to the category of offenses, the Court adopted a decision on the unconstitutionality of the above provisions of the Law of Ukraine “On Militia”.

Thus, the constitutional appeals of the Authorised Human Rights Representative of the Verkhovna Rada of Ukraine is one of the ways of the protection the rights, freedoms and interests of individuals and legal entities by means of constitutional jurisdiction in Ukraine.

### III. Ukraine’s accession to regional - European - treaties in the field of human and citizen’s rights and fundamental freedoms

Constitution of Ukraine stipulates that everyone has the right, after exhausting all domestic legal remedies, to appeal for the protection of his or her rights and freedoms to the relevant international judicial institutions or to the relevant bodies of international organisations, of which Ukraine is a member or participant (Article 55.4). International remedies of the protection of violated rights and freedoms may be used by a person in case of the conclusion of the relevant international treaties and the consent of the Verkhovna Rada of Ukraine on their binding nature.

Under such circumstances the relevant international treaties become part of national legislation of Ukraine (Article 9 of the Constitution of Ukraine), in particular, they become binding and, in accordance with Article 19 of the Law of Ukraine “On international treaties of Ukraine”, they are applied in the manner prescribed for the norms of national legislation. According to Article 15 of the above Law, the international treaties of Ukraine that are in force are subject to bona fide observance by Ukraine in accordance with international law. In accordance with the principle of bona fide observance of international agreements Ukraine stands for that the other parties to international treaties of Ukraine should strictly fulfil their commitments under these treaties.13)

In such a way the implementation of international agreements is consolidated in accordance with the principle of law - pacta sunt servanda - treaties should be implemented in good faith. It is secured, in particular in Article 26 of Vienna Convention on the Law of

---

Treaties of 1969: “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”

1. The legal positions of the Constitutional Court of Ukraine, formulated with reference to the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950

Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 and the Protocols thereto (hereinafter referred to as the Convention of 1950) are fundamental European conventions and charters in the field of human and citizen’s rights and fundamental freedoms. Ukraine, which is a member of the Council of Europe, acceded to the Convention of 1950 in July 1997.

The Constitutional Court in its jurisprudence has repeatedly referred to its provisions while formulating the legal positions in cases which are as follows:

- According to Convention of 1950 among the remedies of the protection of human and citizen’s rights and freedoms special role belongs to an independent and impartial court;

- Interpretation of the provisions of the Constitution of Ukraine as a single integrated document gives reason to believe that they do not involve the death penalty as punishment. Trend of the practice of application of the Convention of 1950 proves this conclusion;

- The principle of inadmissibility of retroactive effect of laws and regulations, enshrined in the Constitution of Ukraine is consistent with the Convention of 1950;

---


The proposed amendments to the Constitution of Ukraine are not consistent with Article 6 of Convention of 1950, according to which “In the determination of his/her civil rights and obligations or of any criminal charge against him/her, everyone is entitled to a fair and public hearing: by an independent and impartial tribunal established by law” and with a number of judgments of the European Court of Human Rights on the need for consistent respect for the principle of distinction between prosecution and justice\(^\text{19}\)

According to Article 6.1 of Convention of 1950 in the determination of his/her civil rights and obligations or of any criminal charge against him/her, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law\(^\text{20}\)

The provisions of the Constitution of Ukraine concerning property correspond to Article 1 of Protocol 1 to the Convention of 1950, according to which any natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law, which in no way restricts the right of a State to enforce such laws as are necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties\(^\text{21}\)

Guaranteeing everyone the right to legal assistance is not only a constitutional and legal duty of the State, but also a compliance with international legal commitments, taken by Ukraine under Convention of 1950\(^\text{22}\).

Pursuant to Article 6 of the Convention of 1950, everyone has the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, which will resolve the dispute on his civil rights and obligations or of his civil rights and obligations or of any criminal charge against him/her, everyone is entitled to a fair and public hearing: by an independent and impartial tribunal established by law and with a number of judgments of the European Court of Human Rights on the need for consistent respect for the principle of distinction between prosecution and justice\(^\text{19}\);

Pursuant to Article 6 of the Convention of 1950 in the determination of his/her civil rights and obligations or of any criminal charge against him/her, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

---


obligations or of any criminal charge against him\textsuperscript{23}) and so on.

2. European Court of Human Rights

1) Historical background of the establishment of the European Court of Human Rights

The events that took place during the Second World War prompted the European Community to the activity to prevent their reoccurrence, both through the national system of protection of fundamental rights, and closer political cooperation between states. The first step in this direction was the adoption of the Universal Declaration of Human Rights, which was developed within the framework of the United Nations General Assembly in 1948.

In this regard, one of the important initiatives was to adopt a proposal of “European Movement”\textsuperscript{24}) at the “Congress of Europe”, held in May 1948 in the Hague, on the establishment of the European Court of Human Rights (hereinafter referred to as the ECHR, the Court) with powers to control respect for human rights and fundamental freedoms by states.

Reflecting on the creation of the ECHR, the Committee of Ministers of the Council of Europe concluded on the feasibility of transferring the solution of this issue to the Conference of Senior Officials, held in June 1950. A compromise was reached on the ECHR, the role of which was to be optional, namely the state would have an opportunity to decide to accept or reject its jurisdiction at their sole discretion\textsuperscript{25}).

On August 7 the Committee of Ministers decided to adopt the draft Convention of 1950 and send it to the Consultative Assembly for providing the opinion. It is at this stage the right to file complaints with the ECHR, in which people can state on the violation of their guaranteed rights, was introduced. On September 3, 1953 the Convention of 1950 entered

\textsuperscript{23}) Decision of the Constitutional Court of Ukraine dated March 11, 2010 No. 8-rp/2010 in the case upon the constitutional petition of 46 People’s Deputies of Ukraine concerning official interpretation of the notions “the highest judicial body”, “superior judicial body”, “casation challenging” contained in Articles 125, 129 of the Constitution of Ukraine // Bulletin of the Constitutional Court of Ukraine. – 2010. – No. 3. – p. 7

\textsuperscript{24}) International European Movement.
http://legant.com.ua/partneri/5-mzhnarodniy-yevropeyskiy-ruh-european-movement-international.html

into force as it was signed by the tenth state – Luxembourg.

During the years 1959-1998 justice was carried out by sufficiently complex two-level procedure. All applications, received by the ECHR, initially were considered by the European Commission of Human Rights, which acted as a particular filter.

Some cases, not covered by the Convention, or had been filed in violation of the procedure, were declared inadmissible.

The rest cases, in which “friendly” regulations had not been achieved, were sent to the Committee of Ministers or directly to the Court. This system had two key disadvantages: first, the lack of direct access of applicants directly to the Court; second, unnecessarily long terms of proceedings. As a result, the Court accumulated a growing number of applications, and the credibility of the jurisdiction was gradually decreasing.

To improve this situation in October 1993 in Vienna during the first Summit of the member states of the Council of Europe (hereinafter referred to as the CoE) a decision was adopted in which, in particular, it was noted that “since the entry into force of the Convention, the number of participants nearly tripled, and even more countries will join it on its accession to the Council of Europe. The purpose of the reform is to strengthen the effectiveness of the remedies of protection, shorten procedures and to maintain the existing quality of the protection of human rights.” The following year, for the implementation of the announced reform Protocol 11, which included restructuring of the control machinery established by the Convention of 1950, was adopted26)

On November 3, 1998, after the official inauguration of the new in fact ECHR, it has been operating on a continuous basis and applicants are applying directly to it.

2) The powers of the ECHR

The ECHR is an international authority, supranational international judicial institution, which under the conditions specified by the Convention of 1950, may consider applications submitted by persons who complain on violations of their rights by states - parties to this Convention.

Convention of 1950 is an international treaty under which the majority of the European

countries have pledged to respect human rights and fundamental freedoms. These rights are guaranteed by both the Convention and its protocols (Protocols 1, 4, 6, 7, 12 and 13), consent to be bound of which was provided for by the states - parties. The court may consider only those applications that are directed against States which have ratified the Convention of 1950 and the relevant protocols and that are related to the events occurring after the date of ratification27).

According to Article 19 of the Convention of 1950, the ECHR is established to provide for the observance by the High Contracting Parties of their commitments under the Convention and its Protocols. According to Article 32 of the Convention of 1950, the jurisdiction of the ECHR applies to all matters relating to its interpretation and application.

Herewith the Court considers all the cases related to the protection of only those rights and freedoms, contained in 1950 Convention and the Protocols thereto, including the right to life (Article 2); prohibition of torture (Article 3); prohibition of slavery and forced labour (Article 4); the right to liberty and security (Article 5); the right to a fair trial (Article 6); no punishment without law (Article 7); the right to respect for private and family life (Article 8); freedom of thought, conscience and religion (Article 9); freedom of expression (Article 10); freedom of assembly and association (Article 11); the right to marry (Article 12); the right to an effective remedy (Article 13); prohibition of discrimination (Article 14).

According to Article 35.1 of 1950 Convention, ECHR accepts applications for consideration only after all internal remedies being used and only within six months from the date of the final decision. The Court does not consider an application that does not meet the above conditions of admissibility.

The course of the six months term stops at the time when the Court receives the first letter, in which the applicant clearly states - at least in summary form - the subject of the application, the person that intends to submit, or a completed application form. Ordinary request to provide information is not sufficient to stop the course of six months.

ECHR’s official languages are English and French but upon the request one can address the Secretariat of the Court in the official language of one of the States that have ratified 1950 Convention. The proceedings of the Court are free. The proceedings are written that does not require the personal presence of the applicant before the Court. The applicant must be informed of any judgement rendered by the Court in his case28).

28) http://www.echr.coe.int/ECHR/EN/Header/Applicants/Information+for+applicants
3) The impact of the ECHR on the policy of European states in the field of human rights protection

Modern European international law considers the issue of the rights and freedoms enshrined in the Convention of 1950 and assigned to the jurisdiction of the ECHR, not as a business that has exclusively internal nature, but as an issue that concerns the entire community and requires joint efforts.

For more than half a century the ECHR adopted over 12,000 judgements that are binding for the execution by the Member States of the Council of Europe to which they relate. These judgments were in many cases the impetus to change national legislation and administrative practice in various areas of the European countries.

Today ECHR acts as a “common denominator” of democracy of the united Europe, and has become, in the words of the Court, “an instrument establishing European public order” and a real “conscience of Europe.” Gradually the Court in its judgments increasingly applies the principle of evolutionary and dynamic interpretation of the 1950 Convention and thus expands the scope of social issues discussed.

The Court’s judgments are binding on states-parties; the CoE Committee of Ministers oversees their implementation. The states have a legal obligation to remedy the identified violations, but enjoy a certain freedom in the choice of methods of such corrections.

However, in assessing the legality of national judgments, the ECHR encourages States to review current legislation and practice of its application. Therefore, any country, joining the Council of Europe, not only accedes to the Convention of 1950, but also makes the necessary amendments to its legislation.

Thus, it is due to the ECHR case law and its progressive approaches, the Convention of 1950 remains a powerful and dynamic tool that is able to meet the new challenges and to strengthen the rule of law and democracy in Europe.

IV. Implementation of international obligations by Ukraine in the field of human rights and freedoms

1. Domestic legislation on implementation of the ECHR judgments

With the entry into force of the 1950 Convention for Ukraine after its ratification by the Verkhovna Rada on July 17, 1997[^30], our government recognised the jurisdiction of the ECHR as mandatory.

Yet, according to the Law of Ukraine “On the Ratification of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms, First Protocol and Protocols 2, 4, 7 and 11 of the Convention” not any jurisdictional acts of ECHR are involved to the legal system of Ukraine, but only those that meet certain criteria.

Firstly, a judicial act should be adopted in respect of Ukraine, i.e. Ukraine should be a defendant in the case.

Secondly, a judicial act should establish the fact of violation of the 1950 Convention. Judgments adopted by the ECHR in respect of Ukraine on inadmissibility of a complaint are not binding and therefore are not a part of its legal system.

Thirdly, a ECHR judgment on the merits should come into force.

At the legislative level the relations arising in connection with the State’s obligation to implement the ECHR judgments in cases against Ukraine are regulated by the Law of Ukraine “On execution of judgements and application of the European Court of Human Rights case-law” № 3477-IV, dated February 23, 2006.[^31]

In pursuance of the said Law there was adopted the Resolution of the Cabinet of Ministers of Ukraine On measures for implementing the Law of Ukraine “On execution of judgements and application of the European Court of Human Rights case-law” № 784, dated May 1, 2006[^32], which entitled the Ministry of Justice of Ukraine with the functions of a


body responsible for representing Ukraine in the European Court of Human Rights and for execution of its judgments.

This law contains a very important provision on the binding nature of the Court’s judgments for their implementation in Ukraine (para 1 Art. 2), providing for the procedure of such implementation, financing the costs of the implementation of a Court’s judgment, access and notification on appropriate judgment; regulates issues related to the payment to the applicant of the fair satisfaction; indicates which measures of general and individual nature may be taken by Ukraine in regard of the applicant to restore his/her violated rights; establishes the competence of the relevant government authorities during the implementation of the ECHR judgments.

According to Article 17 of this law, courts apply the 1950 Convention and the Court’s case-law as a source of law when considering cases. This provision indicates a new approach to understanding the sources of law, not typical for Ukraine as a country of “continental system of law”, giving de facto the preference to the “case-law system”. Execution of the Court’s judgements is implemented as prescribed by the Law of Ukraine “On Enforcement Proceedings” and at the expense of the State Budget of Ukraine.

2. Analysis of the state of cases with regard to applications of Ukrainian citizens to the ECHR

According to the data of the Ministry of Justice of Ukraine as of October 28, 2015 764 ECHR judgments have been registered in cases upon appeals of citizens of Ukraine, in addition, there are 107 judgments where the Court stated the fact that the parties reached friendly settlement33), and 3 judgments on fair satisfaction.34)

In particular, in 2014 the Court examined 92 cases in respect of Ukraine. After the proceedings the Court ruled;

- 40 judgments on the merits, of which in seven judgments the ECHR found no evidence of one or more alleged violations and/or recognised the complaints partly inadmissible;
- 8 judgments on friendly settlement with regard to 32 applications;
- 21 judgments of approval conditions of unilateral declarations of the Government regarding 58 applications;
- 23 decisions on terminating proceedings in cases in connection with inadmissibility of complaints or in cases when the applicants stopped supporting their applications after the Government had provided the relevant positions on the applicants’ complaints.

In 40 judgments in which the Court found violations of the provisions of the Convention by Ukraine, the applicants claimed compensation amounting 870737232,19 EUR. After the proceedings, with account of the Government’s position, the ECHR obliged Ukraine to pay 46738812,53 EUR. Thus, the Court rejected the applicants’ claims in the amount of 819598025.66 EUR, which is 95.3%.35)

3. The ECHR’s legal positions in the acts of the Constitutional Court of Ukraine

Recently concrete steps have been finally taken towards judicial reform in Ukraine. In particular, a draft law “On Amendments to the Constitution of Ukraine(on judiciary)”, developed by the Constitutional Commission created at the initiative of the President of our country, is under consideration of the Parliament. One of the provisions of this draft law is to provide for the introduction of constitutional complaint as a form of individual access to constitutional justice, including reducing the number of complaints of Ukrainian citizens to the ECHR.

In this context, it should be noted that the Constitutional Court of Ukraine during the implementation of its core functions to control the constitutionality of legal acts of our country, giving the official interpretation of the Constitution and laws of Ukraine, has repeatedly referred to the international courts’ decisions, including the judgements of the ECHR36), in particular, in the following cases:

35) V. Kovaliova European Court of Human Rights against Ukraine
The Jurisprudence of the Constitutional Court of Ukraine on the Protection of Human Rights Recognised by the Ukrainian Legislation and Acts of International Law

- 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”;
- 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 paragraph 8 of Article 11.1.5 of the Law of Ukraine “On Militia”;
- upon the constitutional petition of the Supreme Court of Ukraine on conformity with the Constitution of Ukraine (constitutionality) of the provisions of the Law of Ukraine “On Introducing Amendments to Some Legislative Acts of Ukraine concerning Jurisdiction of Cases on Social Benefits”;
- upon the constitutional petition of 53 People’s Deputies of Ukraine concerning conformity with the Constitution of Ukraine (constitutionality) of several provisions of the Law of Ukraine “On the High Council of Justice”;
- upon the constitutional petition of the Security Service of Ukraine concerning official interpretation of the provision of Article 62.3 of the Constitution of Ukraine and so on;

36) N. Serhiienko The application of the norms of international law by the bodies of the constitutional jurisdiction (European experience) [Text]: candidate of legal sciences: 12.00.11 / N. Serhiienko. - K., Kyiv. Taras Shevchenko National University of Kyiv, 2004-p. 168 (389 pp.)

37) Decision of the Constitutional Court of Ukraine No. 8-rp/2010 dated 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 // Bulletin of the Constitutional Court of Ukraine. – 2010. – № 3. – p. 7


41) Decision of the Constitutional Court of Ukraine No. 12-rp/2011 dated October 20, 2011 upon the constitutional petition of the Security Service of Ukraine concerning official interpretation of the provision of Article
In these and other decisions the Constitutional Court of Ukraine (there have been more than 20 of them) referred to the legal positions of the ECHR on the following issues:

- Application of a preventive measure in the form of detention at the stage of judicial investigation;
- Rights of an individual to legal assistance; employer-emptive right to purchase the leased property;
- The priority of interests of a child at the time of adoption; social security of citizens;
- The principle of independence of judges or in decisions regarding social security of citizens, and others.

So, based on the experience of the ECHR, the Constitutional Court of Ukraine by adopting decisions, giving opinions with appropriate substantiation, directs government bodies, local government bodies and their officials and officers in their activities to respect human and citizens rights and freedoms.

It should be noted that for the first time in the history of constitutional jurisdiction in Ukraine the effect of the ECHR case law was recognised in the Decision of the Constitutional Court of Ukraine dated December 29, 1999, which, was obviously influenced by the ECHR judgement dated July 7, 1989 in the case “Soering v. United Kingdom.” In this judgement the ECHR stated its doctrinal legal position according to which each person that is under the jurisdiction of any State Party (including Ukraine), enjoys a right to respect for his dignity on the part of public authorities, securing in this way one of the fundamental values of a democratic society.42)

This example indicates that the common traits of case law of these two courts is to use the approach towards legal understanding, in which both natural and legal and positivist and legal opinions as well as humanistic principle (orientation towards human rights, dignity and interests) are presented.43)

Thus, the actual impact of the ECHR case law on that of the Constitutional Court of Ukraine is manifested through direct references to the judgements of the ECHR and through similarity of approaches to solving problems and adopting decisions of the Constitutional Court of Ukraine to the earlier formulated legal positions of ECHR without reference to such source.

V. Problematic issues in the activities of a regional judicial human rights institution— the ECHR — and the implementation of its judgements

1. Workload of the ECHR resulting in the violation of reasonable time spans of consideration of cases

According to the Government Authorised representative in cases of ECHR, by the end of 2013 there were 13,600 applications pending before the ECHR filed against Ukraine, which is 13.3% of the total number of applications to the ECHR (102,750 applications). During 2013 the Court considered 10330 applications.\(^{44}\) Only 2% of these applications were deemed admissible, i.e. may be considered on the merits. Accordingly, 98% of applications were deemed inadmissible or removed from the list of cases.\(^{45}\)

However, in 2014 the Court received 13,600 new applications in respect of Ukraine. Low productivity of the ECHR decision-making regarding Ukrainian cases is explained primarily by certain procedures (there are very strict rules for filing complaints) and extreme workload of the Court, which is addressed by citizens from all over Europe. Sometimes a large Court’s workload by applications (complaints) affects the terms of their consideration, the duration of which can reach several years.

In this respect, it should be recalled that on February 8-19, 2010 in Interlaken (Switzerland), at the meeting of Ministers of Justice of the Council of Europe there was


officially adopted the Interlaken Declaration (hereinafter – the Declaration) to reform the ECHR.

Fundamentally important in this document is an integrated action plan, the implementation of which should resolve the problems of the Court workload, listed in the Declaration, in particular:

- Clear and predictable standards of the Court for making “pilot decisions”;
- Providing the flexibility and effectiveness of the Court, overpassing the long and restrictive way of the procedure of amendments and additions to the European Convention on Human Rights.

The main elements of Interlaken Process are the implementation of the Convention at the national level, the review and strengthening of the ECHR procedures and effective supervision by the Committee of Ministers of the CoE over implementation of its decisions. The cornerstone conceptual principle of this reform was the acknowledgment of the right to individual appeal of citizens of European countries to the Court with the effective implementation of the principle of its subsidiarity by national judicial institutions.

Three concrete steps to implement the Interlaken decisions have already been made:

- a new system of supervision of the execution of the judgements of ECHR was created and entered into force on January 1, 2011;
- Committee of Ministers of the Council of Europe set up an advisory committee to review the candidates for judges of the ECHR;
- Committee of Ministers of the Council of Europe adopted a recommendation on legal means of protection of human rights in the case of the excessive length of the proceedings.

Among further steps to reform the ECHR a set of measures to reduce the number of repetitive applications filed with the Court is determined, strengthening its capacity by providing additional judges to states, a possibility to introduce a court fees for filing applications to the ECHR, and the development of a set of indicators to achieve the objectives of Interlaken and Izmir declarations.

During negotiations on the Izmir Declaration the Ukrainian side advocated for the inexpediency of introduction of legal fees for the application to the European Court of
Human Rights, did not object against creating a mechanism of filtering applications on condition of clearly defined criteria for such a mechanism.46)

The practical contribution of Ukraine in the process of reforming the ECHR was approval of the decision to introduce a new system of supervision of the execution of the ECHR judgements (so-called twin track) at the session of the Committee of Ministers of the Council of Europe in the format of DH, which took place in December 2010 under the chairmanship of the Permanent Representative of Ukraine. This system entered into force from January 1, 2011.

The main function of this system involves the introduction of two parallel supervisions by the Committee of Ministers of the Council of Europe for the implementation of the Court’s judgements by the countries, namely under standard and advanced procedures.

Standard procedure is a written communication of the Secretariat of the Council of Europe with the authorities of the countries-respondents to implement the recent judgements of the ECHR. This communication is made by sending by the government of the country of the main action plans and reports on the implementation of these judgements to the Secretariat of the Council of Europe. In most cases this process is made through the Secretariats of the Government Agents at ECHR.

Extended procedure applies to the ECHR’s judgements in inter-state affairs (when one member state of the Council of Europe applies to the Court against another state, as an example ECHR judgement in the cases of Cyprus v. Turkey) in cases, that require urgent actions to be taken by the states to eliminate the structural legislative problems and therefore to avoid the recurrence of violations of the Convention or in cases where the State failed to present to the Committee of Ministers of the Council of Europe its action plan or report on the implementation the Court’s judgements.

Thus, Ukraine contributed to the advancement of the basic element of Interlaken process of the Court reform, which is the implementation of the Convention at the national level that will ensure sustainable operation of the ECHR in the long term.

2. Significant budgetary expenses for compensation to the applicants in case of the ECHR judgement in their favour

According to Article 46 of the Convention, the High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.

Pursuant to Article 8 of the Law of Ukraine “On execution of judgments and application of the European Court of Human Rights case-law” the compensation payment must be made within three months after the judgement gains its final status. In case of non-enforcement of the judgement in terms of payment awarded to the applicant, the Court sets the term to charge the penalty on the entire amount. Since 2002 the ECHR determines the amounts of fair satisfaction in euro and sets the penalty, the amount of which is connected with the annual lending rate of the European Central Bank.

State Executive Service sends the documents on execution proceedings for the implementation to the State Treasury of Ukraine, the Treasury debited the appropriate amount on a particular article of the State Budget of Ukraine. Regarding financial ensuring of the enforcement of the Court’s judgements, the Final Provisions of the Law of Ukraine “On execution of judgements and application of the European Court of Human Rights case-law” indicate the need to provide annually in the draft of the State Budget of Ukraine the funds as a separate budget program for the implementation of the Court’s judgements.

Since the State Budget of Ukraine is adopted for each year, there are no guarantees that the required sum will be provided in the required amount for each year. That is this issue is problematic and remains open and it is not known how the ECHR judgements will be executed if there are no necessary funds in the state budget.

It should be noted that fair satisfaction is assigned by the Court in the case where the domestic law of the respondent State does not provide compensation or provides only partial compensation for the violation.

However, the timely development and adoption of a relevant legal act could prevent significant payments from the State Budget of Ukraine, especially in case when one can anticipate a judgement of the Court by analogy, not only to the cases in respect of Ukraine, but also in respect of other countries.

It is also important that the concept of the implementation of the judgement of the ECHR
is not limited to the question of payment of compensation to the applicant for pecuniary and non-pecuniary damage. A judgement with a statement of a violation of the Convention requires measures of individual and universal character.

Individual measures are those taken by the state to stop the violations established by the Court and to restore the legal status of the applicant, as far as possible, to the same state in which they were before the breach of the Convention.

Depending on the circumstances of the case, the implementation of the judgement in part of taking the individual measures in favour of the applicant can be done through reinitiation of proceedings, destruction of information obtained in violation of the right to private property, repayment of a criminal record, cancelation of the judgement on deportation taken without regard to the risk of ill-treatment in the destination country or introducing the legislation that did not exist before and which would provide a right to access to the court.

Renewal of the proceedings before the national courts can be an effective redress of the consequences of violation of the Convention caused by unfair proceedings at the national level. Renewal of the proceedings may also provide the opportunity to correct the judgement taken at the national level and found as such that contradicts the essence of the Convention (for example, the prohibition to publish certain information). Similarly, when the Court finds that the applicant’s expulsion from a country is or may be inconsistent with the Convention, the judgement may request review of a judgement of national authorities to ensure that the applicant could return to the country or remain there if deportation has not yet been implemented.47)

General measures are developed and used by the respondent State to prevent the new violations, similar to those recognised by the Court. Such measures may be aimed at changing relevant practice, and at amending the legislation.

In some cases the circumstances of the case clearly show that the violation is caused by national legislation. In such cases, the State is required to change national laws or to introduce a new legislation intended to ensure the Court’s judgment or to publish the Court’s judgment in the respondent State’s language and to distribute it among public bodies and the public.48)

Yet, in many cases the violations are ascertained not as a result of incompatibility of

48) Ibid.
national legislation and the Convention, but in view of the problems in the judicial and administrative practice, for example, in view of the way in which the national courts usually interpret domestic legislation and the Convention. In such cases with the purpose of the implementation of the judgements it is necessary to change judicial and administrative practice according to the requirements of the Court.

Thus, a less expensive measure for our state to implement the ECHR judgements, from a financial point of view, is to take premature actions aimed at improving the legal regulation of relations in the country and to bring national legislation into conformity with the Convention and its Protocols, as well as to take measures under which the ECHR judgements regarding other countries would be available for their study by the law enforcement bodies. The above would prevent further similar violations at the stage of using domestic legal means of protection of the rights of individuals and save funds of our state.

Recently, Minister of Justice Pavlo Petrenko said that Ukraine intends to issue securities in favour of citizens of Ukraine as its obligation under the Court’s judgements. The point is that the government will issue relevant government debt securities that individuals would have the right to receive for repayment of their claims. According to Pavlo Petrenko, some countries have used such a mechanism of repayment of debts to their citizens under the judgements of the ECHR. An appropriate mechanism is now being developed in Ukraine.49)

3. Some parties to the Convention consider it possible in violation of the international principle of “pacta sunt servanda” not to implement the judgements of the ECHR and even provide legal basis for its substantiation

Indicative of this context is the Decision of the Constitutional Court of Russian Federation № 21-P, in the case on the petition of the Russian parliamentarians.50)


In this petition the Deputies of the State Duma of the Russian Federation claimed that the judgement of the ECHR should be executed solely with account of the supremacy of the Constitution of the Russian Federation. Therefore, the provisions of Article 1 of the Federal Law on Ratification of the Convention 1950 run contrary to the Constitution of the Russian Federation since they require the courts to implement the judgements of the ECHR, even if they do not comply with the fundamental law of the country. According to the parliamentarians, this situation creates a collision, which cannot be overcome by those who apply law. As an example of such collision, the authors of the petition indicated the judgment in case YUKOS, according to which Russia is obliged to pay 1.9 billion euros as compensation to shareholders of the company of Mykhailo Khodorovskyi.

In response to this petition the Constitutional Court of Russian Federation ruled that the Convention for the Protection of Human Rights and Fundamental Freedoms and legal positions of the ECHR based thereon can not repeal the priority of the Constitution. “The basis of the Constitution of the Russian Federation and the European Convention for the Protection of Human Rights and Fundamental Freedoms are basic common values. Therefore, in most cases, no collisions between the two documents arise at all. Yet, such conflict is possible if the ECHR provides interpretation of the Convention, contrary to the Constitution of Russian Federation. In such a situation, given the supremacy of the Basic Law, Russian Federation will be obliged to abandon the literal implementation of a judgement of the European Court of Human Rights”, decided the Constitutional Court of the Russian Federation.

The Constitutional Court of Russian Federation noted in its decision that the State Duma may create other legal mechanisms to ensure the “supremacy of the Constitution during the implementation of the ECHR judgements.”

Also it was not a secret in the State Duma that the Constitutional Court of Russian Federation will not allow Strasbourg “to overcome the effect of Russian courts” and “intervene directly in our sovereignty.” Thus, Russian Federation created a legal basis for non-enforcement of the ECHR judgements. Russian Federation had also previously stated that they did not see the need to implement the judgements of the ECHR, which have a “political component”.52)

Later a relevant law was adopted by the State Duma on December 4, 2015 and approved by the Federation Council on December 9, 2015. The text of the law signed by the President on December 14 is posted on the official Internet portal of legal information. Under the law, the Constitutional Court of the Russian Federation when adopting a decision about this kind of judgements is guided by the supremacy of the Constitution of Russian Federation. A special legal mechanism is established to resolve the question on the possibility or impossibility “in terms of the principles of the supremacy and the supreme legal force of the Constitution of the Russian Federation to implement the judgement on the appeal against Russian Federation.”

It should be emphasised that the legal position of the Constitutional Court of Russian Federation that ECHR judgements are not mandatory for execution is contrary to the international obligations assumed by Russian Federation when it became a member of the Council of Europe.54) As it was stressed by a senior researcher of the V. M. Koretsky Institute of State and Law of the National Academy of Ukraine, PhD M. Siryi: “it appears that the Russian government will ignore the European Convention on Human Rights and Fundamental Freedoms, which is the basis of democratic, post-war international order.”

In addition, the decision on non-mandatory execution of the ECHR judgements upon the claims of other countries is discriminatory in relation to their citizens, including the citizens

52) The Council of Europe will discuss how to make Russiacarryoutthejudgementof theECHR//[Electronic resource].-Access:http://www.theinsider.ua/politics/55a51168bf8b11/.
53) Putin signed a law allowing the ConstitutionalCourtoftheRussianFederation not to recognize the ECHR judgement//[Electronic resource]. - Access mode:
54) Rapporteur of PACE, the EuropeanCourtbinding//[Electronicresource].-Access:
http://www.dw.com/uk
http://m.day.kiev.ua/uk/article/den-planety/yevropeyskyy-sud-z-prav-lyudyny-ne-ukaz
of Ukraine, as they are unlikely to be executed, even if they are be adopted in their favour. This is despite the fact that applications of the Russians satisfied by the ECHR in respect to other member countries of the Council of Europe must be implemented.

Obviously, the Kremlin and Russian Themis prepares grounds for future non-execution of the ECHR judgments in the cases of the illegal annexation of the Crimea, massive violations of human and citizen’s rights on the occupied territories of Crimea and Donbas.

VI. Measures taken by Ukraine to reduce the number of complaints from its citizens to the ECHR

The human right to judicial protection is a fundamental, constitutional right. And it is the state that has the duty to provide for its citizens an effective remedy and the right to a fair trial under the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Currently the Ukrainian justice system in general and the judicial system in particular are facing serious challenges. The public is actively criticising the judges and the courts given the lack of independence, impartiality and transparency in their activities. The above indicates the existence of demand for the restoration of public confidence to the judiciary.

The reform of the judicial system, which is now on the way in Ukraine is determined by the President of Ukraine as one of the priorities of the state policy in the sphere of human rights protection. The judicial reform is intended to resolve three key issues: elimination of political influence on the judiciary corps, improvement of the professional requirements for judges and simplification of the procedure of bringing judges to responsibility.

The foundation for building an effective judiciary in Ukraine should be incorporated in the Constitution of Ukraine, without changes to which the judicial reform will be ineffective. The key to ensuring the effective justice should be the reformation of related institutions (advocacy, prosecution, enforcement service), the government institutions and management, as well as making systemic changes to substantive and procedural law of Ukraine.

It appears that the process of reform of the judicial system should apply to all courts operating in the country, both general and constitutional jurisdictions. This reform should be a decisive step towards the transformation of the Basic Law of Ukraine from the
“constitution of public administration” into the “constitution of civil society.”

With the purpose of elaboration of the coordinated proposals for amendments to the Constitution of Ukraine with the involvement of the representatives of different political forces, public, domestic and international expert community, the promotion of the achievement of social and political consensus for improving the constitutional regulation of social relations in Ukraine the Constitutional Commission was created by the Decree of the President of Ukraine № 119 dated March 3, 2015.

Its composition includes deputies of the parliamentary factions, the Chairman of the Verkhovna Rada of Ukraine, the Deputy Chairman of the Verkhovna Rada of Ukraine, three Former Presidents of Ukraine, Minister of Justice of Ukraine, the representative of Presidential Administration, prominent Ukrainian law scholars, practicing advocates, judges, former judges of the Constitutional Court of Ukraine, former judge of the ECHR, Chairman of the Board of Judges of Ukraine, representatives of local government associations, representative of the Crimean Tatar Mejlis, representatives of public organisations, etc.

In the framework of the constitutional reform, the Working Group of the Commission on Justice developed a draft Law of Ukraine “On Amendments to the Constitution of Ukraine (on judiciary)” (hereinafter – the draft law). This October the European Commission for Democracy through Law (Venice Commission), which is an advisory body of the Council of Europe on constitutional law, which provides opinions on the conformity of draft legislation with European standards and values, examined the draft law and, in particular, noted that “this version is very positive and well designed, and deserves to be fully supported”.

ts%29/75FEC96BAA89DA8CC2257E1400508020?
Currently the draft law, which was previously approved by the Parliament, is pending before the Constitutional Court of Ukraine and the constitutional proceedings were initiated to provide an opinion on compliance with Articles 157 and 158 of the Constitution of Ukraine.

The draft law intends to resolve a number of problems that currently affecting in a negative way on the activity of the judiciary of Ukraine, in particular;

- The component of political influence is excluded from the procedure of formation of the judicial corps, in this manner the parliament is removed both from the process of selection and dismissal of judges and from giving the consent to the detention and arrest of judges. To perform these functions an independent judicial authority is involved, which is the High Council of Justice;
- Rising the age limit and professional qualifications for candidates for the position of a judge: age limit – up to 30 years, professional – up to 5 years in the field of law.

Of particular note is the fact that the draft law includes a proposal for the introduction of a constitutional complaint. This institution is important for national practice of constitutional justice, because it gives the citizens the right to directly apply to the Constitutional Court of Ukraine for the protection of violated rights and freedoms enshrined in the Constitution of Ukraine.

It is a special and very important institution of democracy associated with the operation of Constitutional Court of Ukraine which administers justice by law, and not by facts, and therefore public access to the constitutional justice must be a reliable guarantee of respect for the individual’s constitutional rights.

Thus, the long-awaited judicial reform in the domestic society finally entered its active phase, which involves a complete reset of the judicial system in order to enhance the credibility of the judiciary, to bring its operations into compliance with recognised international standards. The implementation of these plans is a decisive step towards the improvement of the domestic national mechanism to guarantee and protect the human and citizen’s rights and freedoms in the independent, democratic and legal Ukrainian state.

References


5. PACE speaker: Judgments of the European Court are obligatory [electronic resource] // Link: http://www.dw.com/uk


11. V. Kovaliova, European Court of Human Rights against Ukraine: how to overcome the shameful statistics [electronic resource] / V. Kovaliova - // Link: https://ukurier.gov.ua/uk/articles/yevropejskij-sud-z-prav_lyudini_protiv_ukrayini-yak


17. I. Pitulov, Moscow against Strasbourg, Russia refused to comply with the ECHR judgment on the


26. Decision of the Constitutional Court of Ukraine No, 8-rp/2010 dated 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 // Bulletin of the Constitutional Court of Ukraine, - 2010, - No.3, - p. 7


28. Decision of the Constitutional Court of Ukraine No, 8-rp / 2005 dated October 11, 2005 in the case on the pension level and perpetual monthly monetary allowance // Official bulletin of Ukraine,


44. N, Serhiienko, the application of international law norms by bodies of the constitutional jurisdiction (European experience) [Text]: Dissertation of the candidate of Legal Sciences: 12.00.11 / N. Serhiienko, - K., Taras Shevchenko National University of Kyiv, 2004. - p. 389


50. The European Council will discuss how to make Russia carry out the ECHR judgments [electronic resource] // Link: http://www.theinsider.ua/politics/55a51168bfb11


An Essay on the Origin and Purpose of Constitutional Justice*

Pavel Rychetský**

I. Some thoughts in Lieu of an introduction

The year 2020 will mark one hundred years since the adoption of the Constitutional Bill, the first of its kind worldwide, which established the Constitutional Court of then Czechoslovakia as a concerted and specialized body to protect the Constitution. Although the first of its kind, it was a hastily put together construct whose philosophical roots were firmly rooted in Austrian positivism and which did not do much good for the practical protection of constitutionality. In spite of that, or perhaps precisely because of that, it is pertinent to ask ourselves about the development of constitutional justice over the last century. Did its values and the system as such change and how? We should ask ourselves whether constitutional courts continue to be pioneers exploring new legal horizons or whether they have become dinosaurs of legal prehistory.

I have served as the President of the Czech Constitutional Court for more than twelve years, which makes me one of the longest serving functionaries in all of Europe. My professional life, however, has been much longer than that and has led me through many paths. I had the experience of being forced out of an academic career by the totalitarian regime. I know that consistent promoting of human rights and freedoms can help one endure the uncertain life of a dissident. I witnessed the stellar moments of my nation. Twenty-six years ago, the rule of one political party, one dogma of what is right or wrong, was overthrown in my country and in most of Central and Eastern Europe. I had the privilege of contributing to the complicated search for a renewed democracy and freedom as attorney general, deputy prime minister, minister of justice, and senator. It made me realize one key

---

* This essay was written in close cooperation with Mr Vlastimil Göttinger, whom I would like to indicate as co-author of the text

** President of the Constitutional Court of the Czech Republic
fact: one cannot unconditionally trust the infallibility of the legislator and the infallibility of
the law. It cannot be taken for granted that the ways of law are also the ways of justice.

Being aware of human erring, weakness, and imperfection, I came to be convinced that
yet another authority is needed to stand above the common corrective mechanism of social
life. An authority which is not influenced by periodical political changes, which is not
accountable to public opinion, and which acts as a guardian of the highest principle – the
preservation of a democratic rule of law. In modern states, constitutional courts have
become such an institution. Modern history teaches us that there exists no permanent order
or point in history to be accomplished whereby good will prevail forever. History is
turbulent and only time-tested values may become islands of stability in the torrents of wild
changes. The immanent truthfulness of such values must flow from the very essence of the
social order and not only from its normative manifestations. But who guards and protects
them? Constitutional courts.

To become a judge of a constitutional court is a great honor and the ultimate height of
any lawyer’s career, but it’s also an immeasurable burden of responsibility and solitude.
Yes, solitude lies at the very heart of constitutional courts and their judges. They cannot
consult those whose acts they wish to abolish, and they cannot consult any higher authority,
since the constitutional court is in its jurisdiction the supreme authority. In recent years, the
shells of solitude have been cracked. Constitutional courts have started a dialogue. Not on
the vertical axis of subordination and superiority but horizontally. Constitutional courts
communicate with one another. In this dialogue I see the hope and future of constitutional
justice as a global legal phenomenon.

II. Theoretical invariables of constitutional adjudication

1. The purpose of constitutions and preconditions for
constitutional justice

It is only natural that the purpose and public perception of constitutions has evolved
differently in different territories as well as over time. At the beginning, there was the Greek
Polis, whose Constitution (known as Politeia) was first and foremost an organizational and
legitimizing tool rather than, or less so, a moral or protective one. It was not until the 18th
century when the new type of constitutions appeared. Not those which merely describe and conserve the *status quo*, but such constitutions which are statutes de constitutione ferenda, i.e. which determine the scope of the state powers, thus limiting them. Karl Loewenstein calls these limiting principles "ontological constitution" and describes the basic elements of constitutions: division of powers in the state, mechanisms of cooperation among and between those who carry out the state powers, protection of this mechanism, and protection of fundamental rights.¹)

It is, however, opportune to ask the following question: is a constitution an act of constituting (establishing), or is it an act of arranging of what has already been established? And we have to go on asking: is the adoption of a constitution a product of the one-time decision of a sovereign power or is it a social contract which establishes such sovereign power? This seemingly unimportant question lays out the very important scope of power of constitutional courts, as the former approach views the constitution as hierarchical, i.e. a negotiable legal document, whereas the latter puts the constitution on the absolute pedestal and makes any changes to it very difficult, if not impossible.

If today’s constitutional courts are able to answer the above questions, they will better understand the limitations on their scope of powers and purpose. It’s imperative not to lose sight of the fact that constitutional law, due to its close link with the political sphere, stands outside the typology of other legal disciplines. If we identify with the idea that constitutional law both stems from politics and restricts it²), then constitutional law (i.e. the constitution in the broader sense of the word) is a transmission mechanism of political will into legal will. Constitutions take certain questions out of the ordinary political discourse by codifying their essence and by subjecting any changes thereto to a rigid procedure. Some of these questions are excluded from any change as they are subsumed into the eternity clause as is the case of the French constitution which perpetuates the republic as a form of establishment. These constitutional limitations remove some of the key issues from the reach of the executive and legislative powers since the immanent property of constitutions is their generality. While common legal regulations contain standards, case prototypes of legal relations, and structured lists, constitutions are built on principles, i.e. generally formulated values and ideals.Unlike other types of legislation, constitutions need to be concretized to become a living source of law both on the interpretation and application level. To interpret the

²) For historical details see e.g. Hattenhauer, H. *Europäische Rechtsgeschichte*, Heidelberg, 1992; 4. Auflage, 2004, p. 71
constitution and to assess its due application is the sole discretion of constitutional judges.

Constitutional courts are endowed with the task of searching for the intent and meaning behind the “thin” language of the constitution. But what exact meaning? Are they looking for the historical intent of the original legislators? Are they looking for the teleological vector of the constitutional regulation? Are they looking for a systemic solution within the positive legal norms? The task of constitutional judges is not to opt for one single method but rather to convincingly justify the choice of a particular method of interpretation. The authority of the constitutional court does not flow from its monopoly on the interpretation of the constitution but from the fact that its arguments are the most conclusive. That places huge demands on the court as a whole as well as on its individual judges. Due to its oblique and general character, constitutional law cannot be applied merely mechanically and constitutional courts cannot be viewed as a tool of subsumption for logical interpretation. On the other hand, it must not be allowed for the interpretation of constitutional law to be done in a kind of alchemist’s laboratory in which constitutional judges create and recreate constitutional law without any oversight by “unchosen mortals.” In order not to be lured down the path of subsumption or the path of arbitrary interpretation, the constitutional court has to sail between Scylla and Charybdis, between textuality and fantasy.

Although constitutional courts are often placed on the same level as vox dei, we must not lose sight of the fact that they are indeed a human creation. As in other human activities, the drafting of constitutions cannot avoid mistakes, omissions, and slips. In spite of attempts at universality and timelessness, constitutions are products of their time, and invest most effort to regulate past conflicts, frequently motivated by fears – fear of new wars, renewed totality, the return of social crises or paralyzed parliaments. After several decades, or even hundreds of years, once urgent problems become history and instead we search constitutions for hints to solve problems of which the fathers of texts had not the slightest idea. What are the solutions, then? First of all, it is very questionable who is „pater constitucionis“, the father of the constitution. Is it the legal expert who drafted parts of the text? Is it the renowned professor of constitutional law who provided expert opinions? Is it the members of the parliaments who voted in favor of the text? Is it the people? And who should we ask about the intent and will of the legislator fifty or one hundred years later? The key to these questions lies in the constitutions themselves. Some of them have petrified in their

invariability and inflexibility and are looked up at and polished as monuments of law but, in practice, ignored and circumvented. Monuments cannot be interpreted, no matter how much we may want to do so. Alternatively, you can have light constitutions which do not aspire to eternity and identify with the idea that every era and its people adopt a constitution which suits them most (for instance, the constitutions of the 2nd and 4th French Republics). Finally, there exist dynamic constitutions which are easy to change when the social or legal conditions for their application change. Such constitutions, however, cannot carry a homogenous and singular message since they reflect a generational or, in the less desirable case, momentary view on the issues of constitutionality.

In fact, there exist two possible ways to protect the original ideas of a dynamic constitution. The first possibility is to include an eternity clause in the text, i.e. a provision which will protect the highest values from the legislators themselves. The people’s right to protest, the people being a sovereign entity and source of state power, may serve as a safeguard. The second possibility is restrained – this I want to stress – very restrained activity of constitutional judges in assessing constitutional changes. Is this to say that constitutional courts stand above the legislator, in other words, that they spiraled out of the traditional division of power? Just to the contrary! Constitutional courts are guardians of constitutionality, which is to say constitutions in the broader sense of the word. They protect them from the despotism of the present legislator as nothing does more harm than ill-considered, populism-driven radical changes. If there is no other state institution to intervene for the good of the constitution, then this task is left to constitutional courts. Naturally, constitutional oversight first and foremost lies in reviewing whether a certain act can be considered a constitutional act or amendment, in terms of the procedure of its adoption and its legislative form. Under the rule of law, it would appear unacceptable for such oversight to be exercised by the legislators themselves. Substantive review of constitutional changes is thus, in fact, the system’s emergency brake and is justifiable only when the excessive change of the core constitutional principles stands completely outside the constitutional consensus. Such interventions, however, do happen. Let me mention, for instance, the awards by the Supreme Court of India, Constitutional Court of Austria, Constitutional Court of Italy or the derogation award of the Constitutional Court of the Czech Republic.  

To offer at least a partial conclusion, let me note that the relation between constitutional
courts and constitutions is that of mutual conditionality. Constitutions create constitutional
courts for their own protection, and constitutional courts protect constitutionality but not the
legislators. Without constitutions, constitutional courts would lose their raison d’être, whereas
constitutions can exist without constitutional courts. One of the founding fathers of the
constitutional justice, Prague-born Hans Kelsen remarked: “A constitution which does not
give rise to a constitutional court is like a light that doesn’t shine…”

2. Dynamic competencies and multiple judicial protection

The world has never been a harmonious place and today – perhaps more than ever before –
conflicts, disagreements, and intolerances surface. As lawyers, we are not pleased by that
but we cannot be surprised either, as law is a way to resolve conflicts5). If there were no
conflicts, if the invoked harmony and peace were attained, then social regulation in the form
of law wouldn’t be needed and nor would courts to apply that law. However, such a state is
an unattainable utopia.

Human efforts to limit conflicts, violence, and human egotism have never produced
security, lasting peace, and stability. Therefore, we have to work with the art of the possible,
since all attempts at creating utopian societies have drowned in blood and the fight for peace
only led to more wars. The situation is made more difficult by the fact that in modern
societies, we do not encounter traditional collisions between obvious unconstitutionality
with obvious constitutionality, i.e. conflicts between constitutional good and evil. More
often than not, we witness tension between legal certainty and justice, between protecting
dignity and freedom of speech. We are not protagonists in the fight between good and evil
but in the fight between multiple “goods,” multiple high ideals.

The first constitutional courts functioned as “deconstructers” of the sovereignty of law.
The whole of 19th century law was deemed to be based on normative rules, extracted from
the political discussions of parliaments which, as representatives of the people, fulfilled the
task of protecting the will of the sovereign people. In the first half of the 20th century the
sovereignty of law eroded due to the establishment of constitutional courts endowed with
the competence of derogation which put the legislature into a conditional light and restricted
pro futuro the sovereignty of the legislative power by the condition of constitutionality.

After three more decades and the horrors of World War II, constitutional justice experienced another expansion of sovereignty, which this time concerned the individual.

In 1949, the Federal Constitutional Court of Germany became the first to directly protect individual fundamental rights and freedoms. Europe had witnessed an appalling abuse of law which led to the distinction between formal and material rule of law. The formal rule of law is satisfied when the power of the state is tied to the law, whatever that law may be, whereas the material rule of law asks an additional question: “What kind of law is it? What values is it based on?” The modern rule of law, to which all today’s constitutional courts subscribe, is the material rule of law and treatment of human rights is one of the criteria of its legitimacy. Whereas under the formal rule of law, human rights play the critiquing role as they are a mirror of the declared state against the objective reality and stimulate societal improvement, the material rule of law has its legitimacy in human rights as it harbors them and protection of human rights is one of its roles. Material rule of law is not identical with the notion of democracy⁶), such as the notions of „people“ and „citizens“ are not synonyms, but both notions are going in the same, right direction.

However, it is not only the oversight of law and protection of individual rights which preoccupy constitutional courts; their scope is much broader. Many constitutional courts have jurisdiction over competence conflicts (horizontal, vertical, positive and negative), hand down binding interpretation of constitutional notions, carry out a priori review of constitutional-law issues, handle impeachment procedures, often have a final say when it comes to constitutional amendments, protect the principle of local governance, give opinions on international agreements etc. Along with the expansion of constitutional justice, we witness the expansion of the protective function of the state in more general terms and these two go hand in hand and create mutual synergies. It was Georg Jellinek who first described the evolution of generations of human rights, which the state protects, endorses and ensures⁷). Starting with simple protection (of life, freedom, property, ownership) in the first generation, the state shares the process of governance and organization of power with citizens in the second generation of human (political) rights, only to commit itself to provide, care, and pay (social rights) in the third generation. Thus the once-worshipped autonomy of the individual becomes more and more limited by the caring function of the

---

⁷) Jellinek, G.: Allgemeine Staatslehre, Springer Verlag, 1900
state, which in its attempt to secure and protect the rights of all gradually reduces the freedom and responsibility of the individual. And what role do the constitutional courts play in this process?

It is twofold. On the one hand, constitutional courts are a part of the state establishment and contribute to ever greater judicialisation of life as they protect all fundamental rights (albeit structured and hierarchical as is apparent from their adjudications). In other words, they are not only a part of the rule of law but also of the social state, they are bearers and executors of the state’s will. On the other hand, they were not established to protect the state from other entities but to protect constitutionality or to protect individuals from the state itself; this places them in opposition to other components of the state power. In such a dichotomy, the trust placed in constitutional courts is a Gordian knot of future societal life. Expanding the scope of issues to be covered by law often leads to political and socio-economic demands masquerading as legal demands and any problem is thus moved up to the courts with the key problems left to be decided by constitutional courts. Hence the speculations about the greed for power among constitutional judges, about judiciocracy, about illegitimate “parallel parliaments.” Constitutional courts, however, do not open political issues because they want to put themselves above legislatures and governments but because they are concerned about denial of justice. Nor do they handpick issues they would like to hear, since they have to review any submission subject to fulfillment of certain preconditions. Constitutional courts, therefore, are not to blame, when they are used by the parties to the proceedings who want to circumvent the legislators, nor are they to be blamed for the fact that they are not accountable to the electorate. Labelling anything a legal problem (i.e. a problem which can be solved by application of legal rules) results in judicialisation of anything which cannot be solved otherwise. The more rights, claims, and regulations, the greater the influence of, but also burden placed on, constitutional courts.

The above is coupled with the authority of the judiciary which replaced other historical authorities in society. People no longer trust normative systems other than law, which is the only one enforceable. Questions which were decided by the head of the family, a priest, or the mayor only one hundred years ago, are now referred to courts in a crisis of confidence. This is pointless and ineffective. The authority of judicial power is no longer occupied with improving itself but is, rather, increasingly overburdened, forced to divide its attention between various marginal problems, which results in a longer decision process. In a time characterized by a crisis of values and trust in authorities, constitutional courts are promoted above other public institutions of power and above private-law relations. With an ever
increasing number of disputes, the power of courts grows as well, and with increasing power grows their authority; with more authority the system is more burdened and consequently criticized by the discontent. The spiral pushes the constitutional courts to the very limits of their possibilities…

3. What are the outlooks of constitutional justice: in search for supraconstitutionalism

Having mentioned a number of difficulties constitutional justice is faced with and affected by, I need to proceed to outline solutions I see in the long run. Not only the general public and legal experts but also renowned legal theoreticians have noted that the concept of the state, law and justice, as we have come to know them, are unsustainable in the long term. After all, Ernst W. Böckenförde famous dilemma says that: „The liberal, secularized state lives by prerequisites which it cannot guarantee itself.“.

Another distinguished legal philosopher and my former colleague from the Czech Constitutional Court, prof. Pavel Holländer, goes even further and identifies erosion of the present rule of law in seven key areas: „We are faced with the absence of generally shared grounds for legitimacy of power, absence of rationale for individual’s status, profound shifts in the categories of inner and outer sovereignty, the loss of state functionalities and departure from the organizing principles of the legal order“.

4. Is the situation really that critical?

It may seem so. Apart from what has been mentioned hitherto, constitutional courts are chronically overloaded and do not possess the energy to fight with politicians over the steering wheel of the rule of law. Perhaps, time has come to come to terms – at least in Europe – with a certain degree of deconstitutionalization. Constitutionalism was led by the desire to restrict absolute power, and is characterized by both horizontal and vertical division of power, time-limited terms of ruling, control mechanisms and guarantees for individual

10) For instance, judges of the Constitutional Court of the Czech Republic receive annually some 280 files to hear, twice the average number of cases handled by judges of the Supreme Court.
autonomy with strictly protected human rights. But modern states are unable to guarantee all this on their own, they go by way of outsourcing power, services and activities both within the government (government agencies, state enterprises, subsidized organizations), and from outside by transferring competencies to international organizations. This process weakens national constitutionalism as the state loses its former monopoly on power in its territory. Along with that, the position of constitutional courts as guardians of domestic constitutions diminishes. Deconstitutionalization is a process in which more and more power is moved outside the constitutional framework. Constitutions cease to be an absolute measure but become only partial normative rules in the broader context of supranational, European or global rules.

Constitutional courts cannot pretend that the process of deconstitutionalization does not concern them. At least on the European level, deepening integration and international cooperation lead to weakening of national sovereignties11), which in turn weakens the sovereign position of national constitutions and domestic constitutional courts. The scope of application of European aquis limits the scope of review by constitutional courts. One of the possibilities is to conserve the rival relationship between the domestic constitutional law and European law and ask the question: „Who has the final say – constitutional courts or the European Court of Justice“? Such approach cannot produce positive results as each party only defends its own position. European constitutionalization and constitutional plurality become a theme of legal and political discourse in Europe.

European constitutionalism offers an answer to the dilemma the constitutional courts have: on the basis of what normative standards they should make decisions. On the level of creation of norms, plurality is obvious, less so on the level of interpretation where the primacy of the European Court of Justice prevails. If European constitutionalism is born out of the case law of the European Court of Justice and from the resonating domestic case law, then the core of constitutional pluralism lies in the dialogue between its interpreters not in the autonomy of individual normative orders. The ability of the national constitutional system to spread and absorb normative input into and from its environment is one of the key roles of the state in the era when the deconstitutionalized national state cannot independently and effectively carry out all of its constitutional functions. Until a pan-European integration structure is created, which could impose binding normative inputs

of any legal force on the member states, then communication, dialogue and shared value platforms are the only possibility how to secure future of constitutional justice in the European framework.

Although the absorption capacity of individual member states for European acquis as well as the willingness of national constitutional courts to abide by the rulings of the ECJ differ, the obvious tendency towards European constitutionalization based on the partnership between general national courts and the ECJ in the form of posing questions to ECJ and accepting answers, cannot be denied. As much as it may seem that this development somehow passes constitutional courts, it has a positive effect. Domestic courts cannot disregard (nor substitute) the European Court of Justice and assume the complete agenda of reviewing the accordance of domestic legislation with the EU standards of fundamental rights protection. This is not possible because of the European justice system’s architecture but also due to the heavy load of cases constitutional courts have.

In this context, Jiří Zemánek, a judge of the Czech Constitutional Court, rightly comments

that part of the „European mandate“ of constitutional courts is their mutual communication which adds legitimacy to European justice system. Cogency, outcomes and the overall milieu of this communication is what we call European constitutional-justice democracy.

That is why I see the future of constitutional courts in a dialogue. The times when constitutional courts pled duality of law and lived in perfect national isolation are over. European integration and global internationalization of human rights’ protection forces all judicial bodies to communicate. And it matters very little whether this communication is domestic or international, hierarchical, preliminary or subsequent. What is important that it exists!

### III. Conclusion

I am not aware of any constitutional court which would call into question the idea of human rights’ universality, although the level of protection may differ in the second or third generation depending on cultural or historical context of a country. When it comes to the organizational aspects of constitutionalism which are very individually designed, Europe

---

12) Zemánek, J.: České ústavní soudnictví v evropském ústavním prostoru in: Evropský konstitucionalismus v kontextu soudního dialogu, Brno, 2016, p. 95
has produced remarkable results. For instance, the question of judicial independence and its material side is often discussed in our bilateral talks with other constitutional courts, and it turns out that the case law of European constitutional courts is unequivocal in this regard. Identification of risks, comparison of problems, discussions and mutual inspiration serve as informal unifiers of case law. Such a system, if extrapolated to include all constitutional courts worldwide, may bear fruits in particular in the area of protection of human rights and fundamental freedoms.

Once again, I cannot emphasize enough the importance of dialogue.

On the European level, it was namely the Conference of European Constitutional Courts which led the courts to share their practice, experience and doctrines. Today, we are witness to constitutional communication becoming global. With the World Conference on Constitutional Justice, constitutional courts have become even closer globally. The Conference has shown that the ideals of supraconstitutionalism, in other words, the pillars of constitutional justice, are perceived in similar manner worldwide. The Congress of World Conference on Constitutional Justice held in Seoul in 2014 became a turning point in this supranational cooperation. It managed to introduce unifying ideas into the fragmented concepts of human rights. It will certainly go into history as a milestone of global justice cooperation. A product of the Congress is this book to which I had the honor to contribute. This book is an excellent opportunity to lift judiciary dialogue to another level, and the Constitutional Court of the Republic of Korea deserves my appreciation and thanks for it.
As to the role of constitutional justice in developing constitutional and political systems, I may give you a brief historical overview of the emergence of the concept of constitutional control.

The nature and function of constitutional courts in the world have undergone constant transformation during the last centuries. Although initially established according to the Kelsenian constitutional review model, the constitutional courts -especially in Europe-were subject to a process of continuous transformation.

This process of transformation combined the constitutional court’s generic Kelsenian role with a more judicial role in the protection of individual rights. Broadly speaking, the Kelsenian model of constitutional courts is no more a key model, as the current constitutional courts in Europe are modeled after a smooth combination of the Kelsenian model and the more American model of constitutional justice.

The key feature allowing one to consider a combination of the Kelsenian and American model of constitutional justice rests with the fact that nowadays the European constitutional courts have been entrusted with the competence to adjudicate human rights cases brought by individuals as opposed to handing down abstract rulings, which concern the introduction of the in concreto jurisdiction as a common facet of almost every European constitutional court.

Thus, besides the abstract ruling jurisdiction, constitutional courts may also be authorized to control individual acts by public authorities as to their conformity with the constitution, for instance, the conformity of acts of public authorities with the constitutional catalogue of human rights.

This remains probably the most important responsibility of constitutional courts and the only opportunity to control the constitutionality of acts of public authorities, where in

* Judge of the Constitutional Court of Kosovo
individual cases normally filed before the regular courts, a possible violation of human rights is at stake.

This “in concreto review” of many European constitutional courts is the characteristic that makes constitutional courts mix their quasi-judicial nature with a more judicial role in the polity.

It goes without saying that the nature and scope of the “in concreto review” mechanism -as part of the jurisdiction of a constitutional court- influences the relationship between the constitutional court and the regular courts, building upon some of the key issues that either question or support their legitimacy.

In general, it is submitted that as long as constitutional courts remain merely abstract rulers -ruling on whether legislation is constitutional- they cannot be considered judicial mechanisms.

However, with the increase of powers that the constitutional courts have assumed in dealing with the in concreto adjudication of individual human rights violations, they are being transformed into more judicial bodies, as they play the role of a high pure-judicial body.

This role, as many would say, proves the increasing powers of the constitutional courts not simply vis-a-vis the executive and legislative branches as traditionally maintained, but also vis-a-vis the judiciary.

In this connection, one should mention the incidental jurisdiction of constitutional courts, namely, the regular courts could file questions about the constitutional compatibility of a law with the constitutional court when it is raised in a judicial proceeding and the referring court is uncertain as to the compatibility of the contested law with the constitution and provided that the referring court’s decision on that case depends on the compatibility of the law at issue.

Let me now shortly turn to the role of constitutional courts in contributing to the development of the constitutional and political system. Of course, the effectiveness of constitutional courts in this respect is limited, since they cannot act ex officio, but must wait until they are seized by constitutional bodies alleging a violation of the constitution.

So, the activities of the courts to that effect are somehow dependent on the existing political situation. However, constitutional bodies may try to influence the courts and disrespect their independence.

Moreover, the risk also exist that such constitutional bodies, instead of exercising their constitutional powers, may frequently turn to the constitutional court seeking interpretation
of their constitutional jurisdiction, because they are afraid to take their constitutional responsibilities upon themselves. So in fact, they pass the responsibility of the interpretation on to the constitutional court. Otherwise, it could happen that the constitutional court would be overburdened.

Therefore, constitutional courts should avoid deciding unnecessary and frivolous complaints by such constitutional bodies. Such form of "judicial activism" should be avoided and instead the responsibility for such issues should be left to the constitutional bodies concerned.

The Constitutional Court of the Republic of Kosovo, since its establishment in 2009, has been a major success of the new constitutional order of the independent Kosovo. The value of the Court as the arbiter of constitutional functions and the division of state powers in Kosovo has been demonstrated on numerous occasions at the request of the President of the Republic, Deputies of the Assembly and the Ombudsperson when they have asked the Court to clarify the meaning of constitutional provisions. The Constitutional Court has also proven its value to the citizens of Kosovo by adjudicating complaints alleging a violation of their fundamental rights and freedoms. As the final authority on the interpretation of the Constitution and the protection of basic rights the Court has exercised its powers to safeguard the rule of law, on numerous occasions.

The Constitutional Court of the Republic of Kosovo started to function on 2 February 2009 and the first Referral was registered on 9 February 2009. The number of registered Referrals during 2009 was 79.

As a result of its efficient and effective work and its impartiality in adjudication, the trust of citizens in the Constitutional Court of the Republic of Kosovo has significantly increased which can be ascertained by the increase in the number of individual Referrals by citizens year by year. During 2010, 132 Referrals were registered. This increase in numbers continued year after year. In 2011, 164 Referrals were registered; in 2012, 139 Referrals were registered; in 2013, 233 Referrals were registered and in 2014, 187 Referrals were registered.

The Constitutional Court has also contributed actively in working together with constitutional courts of other countries to exchange experiences in order to develop the depth and range of understanding of the theory and practice of constitutional law. Through these experiences, the Court has been able to develop its capacities and to establish its reputation within the international legal community. The benefit of the presence of international judges and legal advisors at the Court is further strengthened through these
international cooperation projects.

Please, find below examples of some of the relevant case law that the Constitutional Court has dealt with during the last six years, which shows the importance the Court has had in the promotion of human rights.

Examples

1. Qemajl Kurteshi vs. the Municipal Assembly of Prizren

- Case KO 01/09, Judgment of 18 March 2010
- Key words: referral by the Deputy Chairperson of the Municipal Assembly for Communities, Equality before Law, local self–government, logo, community rights,

The applicant, the Deputy Chairperson of the Municipal Assembly for Communities in the Municipality of Prizren, filed a referral challenging Article 7 of the Municipal Statute on the Municipal Emblem containing the house of the League of Prizren, the year 1878 and the inscription “Prizren”, thereby alleging that proceedings foreseen under the law have not been respected, and that requests and remarks of communities related to the emblem were not taken into account, and that this emblem did not reflect the multi-ethnicity of the Municipality. He claimed that the constitutional rights of other non-majority communities in the Municipality were violated because of the adoption of this emblem. He specifically alleged that the adoption of this emblem denied non-majority community members equal treatment and protection under the law. He also alleged that this action failed to allow non-majority community members to preserve and develop their separate community.

The Constitutional Court decided that, when the Municipality decided to proclaim the emblem with the house of the Prizren League associated with the year 1878, they promoted Albanian heritage and tradition, without due regard to other communities, thereby violating the rights of non-majority communities in Prizren to protect, maintain and promote their identity. Further, the Court decided that Article 7 of the Statute of the Municipality is not compatible with the Constitution, and ordered the Municipality of Prizren to amend it in order to ensure compliance with the Constitution.
2. Imer Ibrahimi and 48 other former employees of the Kosovo Energy Corporation vs. 49 individual judgments of the Supreme Court of Kosovo

- Case KI 40/09, Judgment of 23 June 2010
- Keywords: individual/group referral, right to pension, right to property, right to fair and impartial trial.

The applicants filed a referral against 49 judgments of the Supreme Court, which annulled decisions of the Municipal Court and District Court in Pristina, on allowing monetary compensation by the Kosovo Energy Corporation (KEK) on behalf of their pension rights.

The applicants alleged that the right to fair and impartial trial and the right to property were violated.

The Constitutional Court decided to reject referrals of twelve applicants as inadmissible, reasoning that such referrals are premature, since their cases were still being reviewed in regular courts. Further, the Court found as partially admissible the referrals of five applicants who had already reached the age of 65, and were entitled to pension from the Ministry of Labour and Social Welfare. Therefore, the Court decided to review their referrals for the period before they reached such age. On the other hand, in reviewing the admissibility of the referrals of other applicants, the Court, referring to case law of the European Court of Human Rights, considered that the legal deadline of four months would not be taken into account, since the case in hand was a "continuing situation", which would exclude the legal deadlines for filing referrals. On these grounds, the Court found referrals of thirty-seven other applicants to be admissible.

The Court decided that KEK had violated the property rights of applicants, because it terminated their contracts before establishing and funding a pension and insurance fund for the applicants as specifically agreed in its contract with the applicants. Furthermore, the Court also decided that there was a violation of the right to a fair and impartial trial, as guaranteed by the Constitution and the European Convention on Human Rights, because the regular national courts in reaching their decision failed to address the non-existence of the Pension and Invalidity Insurance Fund, which was the central fact and issue in the case.

Note: Following this case there have been in total 134 more KEK cases.
3. Valon Bislimi vs. Ministry of Internal Affairs, Judicial Council of Kosovo and Ministry of Justice

- Case KI 06/10, Judgment of 30 October 2010
- Keywords: Individual referral, interim measure, assessment of constitutionality, freedom of movement, judicial protection

The applicant filed a referral before the Constitutional Court, requesting an assessment of Constitutionality of alleged violation of his freedom of movement by restriction of the Ministry of Internal Affairs, and the Municipal Court in Pristina. He claimed that such a restriction was imposed on him due to the fact that he was not issued a “Certificate that he is not under criminal investigation” which is a document requested by the Ministry of Internal Affairs in order to issue a passport. Such certificate is issued by municipal courts in the area where citizens reside. According to the applicant, the Municipal Court in Pristina had in an incorrect and erroneous manner interpreted legal provisions which foresaw that such a restriction for non-issuance of passport can only be applied by a court decision to ban the non-issuance. He further maintained that his freedom of movement continued to be restricted by the Ministry of Internal Affairs which, without legal basis, deprived citizens from obtaining passports in case they do not present a “Certificate that they are not under criminal investigation”, when in fact pursuant to the Criminal Code this can be done only if the competent court have taken a decision to prohibit the issuance of a travel document.

The Constitutional Court decided to find the referral admissible by concluding that the applicant did not have an effective legal remedy through which he could challenge the actions of the opposing parties. Furthermore, the Court found that there was a violation of applicant’s freedom of movement, because the decision for restrictions imposed on him in the procedure for obtaining the passport were not in line with the Law on Travel Documents which explicitly foresees that the passport may be restricted only in cases when the competent court imposes the measure for non- issuance of the passport. Furthermore, the Court held that such a measure, although it had a legitimate aim, came as a result of an erroneous practice applied by the respective institutions against which the applicant had no effective legal remedy.

- Case KI 108/2010, Judgment of 5 December 2011
- Keywords: administrative dispute, exhaustion of legal remedies (exception), individual referral, interested party, right to access to a court, right to fair and impartial trial, right to judicial protection, service of process, termination of employment

The applicant, a dismissed municipal employee who was reinstated by the Independent Oversight Board, filed a Referral pursuant to Article 113.7 of the Constitution, asserting that he should have been included as an interested party in his former employer’s appeal of the favorable disposition in his employment case to the Supreme Court. The Applicant asserted that his right to a fair trial, which the Court construed as falling under Articles 31 and 53 of the Constitution and Article 6.1 of the European Convention on Human Rights and Fundamental Freedoms (ECHR), was infringed because neither the employer nor the Supreme Court notified him of the appeal or its disposition.

The Court held that the Referral was admissible pursuant to Article 113.7 because prescribed remedies were unavailable to the Applicant in view of the failure of the Supreme Court to serve him with a copy of the judgment as an interested party, citing Articles 52.6 and 53 of the 1977 Law on Administrative Disputes, AAB-RIINVEST University L.L.C. vs. Government of Kosovo, Cinar v. Turkey, Colozza v. Italy, Sejdovic v. Italy, and because the Court found that there was no evidence that the Applicant was informed about either the potential for reopening the Supreme Court case or initiating a new matter.

On the merits, the Court held that the Applicant should have been summoned to the court proceedings, which would have given him notice of the appeal and an opportunity to present arguments and evidence, noting that the Supreme Court initiated the proceedings and reached a conclusion without notice to the Applicant. The Court noted that under Article 31 of the Constitution everyone is entitled to equal protection of rights in court proceedings, as well as a fair and impartial public hearing, and that it is bound under Article 53 of the Constitution to resolve disputes consistently with the European Court of Human Rights (ECtHR), which implicates similar guarantees under Article 6.1 of the ECHR. It reasoned that, although the right to take part in civil or criminal proceedings is not expressly mentioned in Article 6.1, the ECtHR recognized that the right is implicit, citing Colozza v. Italy and Ziliberg v. Moldova. The Court reasoned that Article 31 and Article 6.1 were
therefore applicable in the Applicant’s case.

The Court noted that the right to a fair trial is derived from the right to judicial protection under Article 54 of the Constitution, which includes a right to court access, citing Golder v. the United Kingdom, and the right to court resolution of a dispute, as well as an opportunity to prepare a case and attend hearings, citing Gusak v. Russia. The Court highlighted that a party’s right to court access would be abrogated if the party was kept ignorant about court proceedings and decisions, especially when court decisions may bar further examination of the claim, citing Sukhorubchenko v. Russia. The Court determined that the Applicant’s employer submitted an appeal regarding a case in which the Applicant was the prevailing party, and that the appellate outcome could have had a substantial impact on the Applicant’s civil rights. It also noted that although Article 16 of the Law on Administrative Disputes deems any person potentially affected by the disposition of a dispute to be a necessary party, the Applicant was not included.

For the reasons stated, the Court issued a Judgment establishing a breach of Article 31 of the Constitution and Article 6.1 of the ECHR, declaring that the disputed Supreme Court judgment was invalid, remanding the case to the Supreme Court for reconsideration in conformity with the Court’s Judgment, and retaining jurisdiction over the case pending compliance with its Judgment.

5. Arsi. Dra.a vs. Decision G. No. 78/2010 of the District Court of Gjilan, dated 7 June 2010

- Case KI 104/10, Judgment of 13 December 2011
- Keywords: individual Referral, right to property, protection of property, res judicata, duality of court and administrative decisions, competence of court

The Applicant requested the Constitutional Court to confirm Decisions no. HPCC/D/194/2005/C of 18 June 2005 and no. HPCC/REC/66/2006 of 15 July 2006 rendered by HABITAT by which it was ordered that the property at issue be returned into his possession. The Applicant considered that the decisions of Habitat were final and binding and therefore should be recognized. He alleged that the abovementioned Judgments violated his right to enjoy the personal property and the right to legal certainty.

The Constitutional Court, after reviewing the proceedings in their entirety, found that the Applicant’s Referral was admissible.

The Court was of the view that Decision HPCC/REC/66/2006 of 15 July 2006 was final in accordance with Article 2 paragraph 7 of UNMIK/Regulation/1999/23, and consequently it could not be subject to review by any other judicial or administrative authority in Kosovo.

Since the HPCC Decision of 15 July 2006 became res judicata on 4 September 2006, the Applicant enjoyed the right to possess the property, guaranteed by Article 46 of the Constitution and Article 1 of Protocol 1 of ECHR and the Court concluded that any interference with this right by any court or any administrative body would have to be considered as a violation of that right.

Based on all the foregoing, the Court held that there had been a violation of the Applicant’s rights that Decision HPCC/REC/66/2006 of 15 July 2006 had become res judicata on 4 September 2006 and therefore there had been a violation of the right to property, provided for by Article 1 Protocol 1 of the ECHR. The Court finally concluded that the courts as well as the administrative authorities concerned were held to take due account of the proceedings under UNMIK Regulation 1999/23 before the HPD and HPCC, in which the Applicant was involved, and to enforce their decisions.


- Case KI 55/11, Judgment dated 9 July 2012
- Keywords: execution, final and executable decision, independent oversight board, individual referral, right to fair and impartial trial, right to legal remedies, right to work, violation of individual rights and freedoms

The applicant, Mr. Fatmir Pireci, filed a Referral pursuant to Article 113.7 of the
Constitution of Kosovo challenging Decision Ac. no. 518/2010 of the District Court of Prizren, as being taken in violation of his rights guaranteed by Article 21 [General Principles] and Article 49 [Right to Work and Exercise Profession] of the Constitution, since the District Court rejected the Applicant’s proposal for execution of the decision of the Independent Oversight Board.

The decision of the IOB was a decision taken by an administrative body which had nothing to do with a monetary claim as foreseen by the Law on Execution Procedure. Hence, the decision of the IOB was not a title for execution which the District Court should execute, but it was within the competences of the IOB, pursuant to UNMIK Regulation 2008/12, to execute its own decisions.

On the issue of the admissibility of the Referral, the Court held, based upon the plain language of Article 113.7 that the referral was admissible because in the present Referral Mr. Fatmir Pireci contested the constitutionality of Decision Ac. no. 518/2010 of the District Court in Prizren, dated 26 November 2010. Therefore, the Applicant must be considered as an authorized party, entitled to refer the case to the Court and to have exhausted all legal remedies as provided by law, pursuant to Article 113.7 of the Constitution. As to the requirement of Article 49 of the Law that the Applicant must have submitted the Referral within a period of four (4) months, the Court determined from the submissions of the Applicant that the Applicant was served with the above Decision of the District Court on 17 December 2010, while the Applicant submitted the Referral to the Court on 22 April 2011, i.e. within the four months time limit as provided by Article 49 of the Law. Further, the Applicant set out in detail what rights under the Constitution and the ECHR had allegedly been violated and by what public authority. Hence, the Court also found that the Applicant had fulfilled the requirement of Article 48 of the Law.

On the merits of the Referral, the Court held that, since the IOB had found a violation of the Applicant’s right to work, which decision had become final and executable, the Applicant had the right to an effective legal remedy, since the Municipality of Prizren refused to execute the IOB decision. However, as mentioned above, instead of executing the IOB decision, as was their legal duty, both the Municipal Court and District Court refused to do so. By failing to enforce the IOB Decision of 25 June 2008, the appropriate authorities had deprived the provisions of Article 54 of the Constitution and Article 13 of the ECHR of all useful effect. In these circumstances, the Court held that the right to a fair and effective trial, as guaranteed by the Articles of the Constitution and ECHR, had been violated and that the
Protection of Human and Minority Rights
in the Constitutional Court of the Republic of Kosovo _ 191

final and executable decision of IOB, Decision No. 49/08 of 25 June 2008, must be executed.

In reaching its decision, the Court also relied on the decisions of the Constitutional Court and the European Court of Human Rights addressing the same or similar issues.

The Court declared null and void the decision of the District Court and remanded the decision to the District Court for reconsideration in conformity with the Court’s judgment.

7. Gezim and Makfire Kastrati vs. Municipal Court in Prishtina and Kosovo Judicial Council

Case KI 41/12, Judgment of 25 January 2013
Keywords: Municipal Court in Prishtina, Kosovo Judicial Council, Individual Referral, judgment, right to life, right to legal remedies, judicial protection of human rights,

The Applicants were the parents of the deceased D.K., who after some misunderstandings followed by threats to life from her former partner, had requested an emergency protection order from the Municipal Court in Prishtina. The Municipal Court in Prishtina did not respond to D.K. neither for approval or disapproval of her request. After a few days, D.K tragically lost her life as a result of the wounds received by gunshots from her former partner.

The Applicants filed the Referral based on Article 113.7 of the Constitution of Kosovo, alleging that the Municipal Court did not act according to Law No. 03/L-182 on Protection against Domestic Violence. According to the Applicants, the violation was not a consequence of a court decision, but of inaction of the Municipal Court in Prishtina, consequently by its inaction it violated Articles 25 [Right to Life], 31 [Right to Fair and Impartial Trial], 32 [Right to Legal Remedies] and 54 [Judicial Protection of Rights] of the Constitution of the Republic of Kosovo. The Applicants also alleged that the Kosovo Judicial Council, not only did not address the issue of D.K. and the violation of her rights, but it did not even offer legal remedies for future cases of domestic violence when a victim requests action from a municipal court.
The Court found that the Referral of the Applicants was admissible since it met all the requirements of admissibility foreseen by the Rules of Procedure. In assessing the merits of the Applicants’ Referral, the Court concluded that the Municipal Court in Prishtina was responsible for taking actions foreseen by the Law on Protection against Domestic Violence and that its inaction represented a violation of constitutional obligations that derive from Article 25 of the Constitution and Article 2 ECHR. Further, the Court concluded that the inaction of the Municipal Court in Prishtina regarding the request of the deceased D.K. for issuing an emergency protection order, as well as the practice developed by KJC in not addressing the inaction of regular courts, when they should, ad obstructed the victim and the Applicants in exercising their rights to effective legal remedies, as foreseen by Articles 32 and 54 of the Constitution and Article 13 ECHR.

The Constitutional Court of the Republic of Kosovo certainly welcomes further mutual cooperation in the area of rule of law.

I wish to convey to you my warmest regards and thank you for your consideration.
The Role of the Constitutional Court in the Protection and Promotion of Human Rights

Nurak Marpraneet*

After the United Nations approved and adopted the Universal Declaration on 10th December 1948 (B.E. 2491). Thailand has been a party to many international Covenant, conventions and international agreements to protect human rights, such as the Convention on the Elimination of All Forms of Discrimination against Women (participated in 1995 (B.E. 2526)), the Convention on the Rights of the Child (participated in 1992 (B.E. 2535)) the International Covenant on Civil and Political Rights (participated in 1996 (B.E. 2539)) the International Covenant on Economic, Social and Cultural Rights (participated in 1999 (2542)), the International Convention on the Elimination of All forms of Racial Discrimination (participated in 2003 (B.E. 2546)), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (participated in 2007 (B.E. 2550)), the Convention on the Rights of Persons with Disabilities (participated in 2008 (B.E.2551)). In 2012 (B.E. 2555), the ASEAN leaders signed the Declaration of ASEAN on human rights, therefore, the Constitution of Thailand was developed clear and concrete in terms of protecting the rights and liberties of individuals based on rights at international level, for example, the rights to political participation, the protection of democratic regime, the rights in person, property rights, and liberties of expression. In addition, the chapter of Directive Principles of Fundamental State Policies in the Constitution of the Kingdom of Thailand 2007 (B.E. 2550) provides that State shall respect the treaties on human rights which Thailand is a party, including the commitment which Thailand has done with other countries and international organizations. Moreover, the National Human Rights Commission is entitled to file a complaint to the Constitutional Court if the Commission found that the provisions of law are against the Constitution or human rights. The Constitution of the Kingdom of Thailand (Interim) 2014 (B.E. 2557), which is the current version, is always identified that the people of Thailand must be protected in accordance

* President of the Constitutional Court of the Kingdom of Thailand
with international obligations to which Thailand is a party.

In Thailand, the rights of human were protected by the organ in various forms, before the creation of the Constitutional Court of Thailand in 1997 (B.E. 2540) with the main function to promote and protect human rights, the rights and liberties of Thai citizens, and to protect the Thai political system which is a democratic government with the king as Head of State. Finally, the protection of human rights has currently become the main functions of the Constitutional Court. And the key development of the role and work of the Constitutional Court in the protection and promotion of human rights will be explained below.

I. The evolution and development of the Constitutional Court

Since the first edition of the Constitution of the Kingdom of Thailand 1932 (B.E.2475) was recognized as the principle of the supremacy of the Constitution. It stated that the provision of law that was inconsistent with or contrary to Constitutional provisions was null. However, there was no provision for the organization which could interpret whether the provisions of law was contrary to or inconsistent with the Constitution or not. It stated that only the House of Representatives could interpret the Constitutional provision.

After the end of the Second World War, the “War Crimes Act 1945” (B.E. 2488) was applied to prosecute the person conducting Thailand to join the Second World War. At this point, the Supreme Court ruled if the Constitution has not determined which organ could take the decisions on the constitutionality of law, the Court of Justice was competent to consider whether the law was inconsistent with the Constitution or not. Moreover, the judgment in this case, the Supreme Court has recognized the right of persons that would be protected against the law which applied retroactively for criminal penalties. Nevertheless, the House of Representatives did not agree with the judgment of the Supreme Court, in which the Court of Justice has jurisdiction to rule on the constitutionality of law in place of the role of the House of Representatives. Accordingly, the House of Representatives appointed a commission to study the issue. The decision of the Commission was that the power to interpret the Constitution, including the power to determine whether the law was inconsistent with the Constitution or not, should be the role of the House of Representatives. The Constitution of the Kingdom of Thailand 1946 (B.E. 2489) was amended for an organ
that has been able to review the constitutionality of law. This organ was called “the Constitutional Tribunal”. Member of the Constitutional Tribunal are a highly qualified group of people, who was appointed by the National Assembly. The Constitutional Tribunal is composed of a president judge and fourteen other judges. In addition, the member of the Constitutional Tribunal would be appointed whenever the expiration of the term or dissolution of the House of Representatives. In other words, the National Assembly, the legislature has the power to enactment of law, has no power to review the constitutionality of law.

The Constitution of the Kingdom of Thailand 1949 (B.E. 2492) was amended by requiring an “ex officio member of Constitutional Tribunal” which were served by President of the Senate, President of the House of Representatives, President of Supreme Court, President of Appeal Court, Attorney General, and the four judges appointed from the experts in law by members of the National Assembly, these experts in law would be selected each time whenever the expiration of the term or dissolution of the House of Representatives. President of the Senate serve ex officio as President of Constitutional Tribunal. Afterwards, there was the ex officio member of Constitutional Tribunal which has been similar structured, specifically the ex officio member of Constitutional Tribunal which were served (but some Constitution specified that President of Supreme Court or President of the National Assembly, instead of President of the Senate would be President of Constitutional Tribunal). In addition, there were always ex officio members of Constitutional Tribunal who were the experts appointed by the House of Representatives each time whenever the expiration of the term or dissolution of the House of Representatives except the Constitutional Tribunal under the Constitution of the Kingdom of Thailand B.E. 1974 (2517). It required the National Assembly as the legislative power, the Council of Ministers as the executive power and the Supreme Court as the judiciary power may appoint the member of the Constitutional Tribunal from the experts, three members from each party, and the ex officio member no longer existed. During the coup and the interim Constitution was adopted if an organization does not allow considering the problem of unconstitutional law, it would be the role of the Court of Justice. Until the Constitution of the Kingdom of Thailand 1997 (B.E. 2540), “Constitutional Court” was created. It established a clear term for the judge and the judge can only play one role. The Constitutional Court has its own judicial proceedings. Therefore, this form of court has been pursued so far (Constitution of the Kingdom of Thailand (Interim) 2014 (B.E. 2557)). During the period of the Constitution of the Kingdom of Thailand (Interim) 2006 (B.E. 2549) after the coup on 19 September
2006 (B.E.2549), although there was an organization called the “Constitutional Tribunal”,
which was formerly known, in a short time, but the whole member of Constitutional
Tribunal were a judge of the Court of Justice and its development was not associated or
affiliated with Constitutional Tribunal in earlier sequence.

When studied in terms of authority, the authority of the Constitutional Court of Thailand
has been developed since 1946 (B.E. 2489) in the form of the Constitutional Tribunal. That
is to say from the beginning, the Constitutional Tribunal was set up with a single duty which
is the duty of interpreting the provisions of law applicable to the case if it is contrary to or
inconsistent with the Constitution or not. Then, it became the authority of the Constitutional
Tribunal and the Constitutional Court today. This authority becomes the main authority to
use to protect the rights of citizens. In the first phase of the exercise of citizen’s right to raise
an objection of the provision of law that the court applies in the case contrary to the
Constitution, it is considered as discretionary power of the Court of Justice which decides by
itself to refer the question of unconstitutional law to the Constitutional Court. That is to say
that the Court should recognize by itself that the provisions of law are unconstitutional.
Then the Constitution of the Kingdom of Thailand 1991 (B.E. 2534) enabled the parties
concerned to submit the dispute about the unconstitutional law applied to their case before
the Constitutional Court. But the court, which examined the case, also has the discretionary
power to consider whether such a request was justified or not. With such restrictive
conditions set out in the Constitution, there were only a small number of cases where the
Constitutional Court receives the issue of the unconstitutional law; only five petitions. As
the Constitution of the Kingdom of Thailand 1997 (B.E. 2540), which established, for the
first time, the Constitutional Court, states that the parties in the case could argue that the
provisions of law that the court applies in their case against the Constitution. And the Court
which was able to send the petition to the Constitutional Court was the Court of Justice, the
Administrative Courts or the Military Courts. These courts can not consider whether the
provisions of law argued by the parties are unconstitutional or not, they can only consider
whether the provisions of law argued by the parties are a provision that the court will apply
to the case or not. Therefore, the number of this matter has been increasing in the procedure
of the Constitutional Court and it becomes a majority of the petition submitted to the
Constitutional Court. Thereafter, the Constitution of the Kingdom of Thailand 2007 (B.E.
2550) stipulates that citizens find the provisions of law contrary to the Constitution and
cannot be solved by other means; they can file a complaint directly to the Constitutional
Court. At present, in addition to the authority to determine the constitutionality of provisions
of law already in force, the Constitutional Court also has the power to review the
constitutionality and validity of the bill, the constitutionality of organic law and the
constitutionality of the standing orders of the National Assembly.

In addition to controlling the constitutionality of the provision of law, the Constitutional
Court also has the duty and power for other functions, for example the duty to “protector of
the Constitution” and the duty to “protector of democratic regime”, the power to prohibit a
person or political party has exercised the rights and liberties provided by the Constitution to
overthrow the democratic regime of government with the King as head of State or to acquire
the power to rule the country by means other than is provided in this Constitution, the power
to determine the qualifications and disqualifications of the positions set out in the
Constitution, the power to examine whether the National Assembly, the Council of
Ministers and constitutional body exercise their power according to the constitutional
provision or not, the power to consider whether the actions of Member of the House of
Representatives, senators and member of a committee which results in direct or indirect
involvement in the use of appropriations or not, the power to control in some case whether
the Council of Ministers exercise its power under the National Assembly’s examination or
the National Assembly must give its approval before or after the exercise of this power or
not, the power to review the constitutionality of conditions for issuing an Emergency
Decree, the power to determine whether a treaty that the Council of Ministers has agreed
with other countries or international organizations needed the approval of the National
Assembly or not, the power to resolve disputes on the conflict between or among the
National assembly, the Council of Ministers or any organ under the Constitution, the power
to solve problems between political parties and members of political parties which is in
accordance with the organic Act on political parties and the Constitution, the power to
control whether the political parties resolution or regulation on any matter is in conflict with
the status and performance of duties of a Member of the House of Representatives or not, the
power to consider an appeal by the Member of the House of Representatives whose parties
have terminated his or her membership of the political party.

In the annex, there is a statistic of the decision of the Constitutional Court during the
period of the Constitution of the Kingdom of Thailand 2007 (B.E. 2550) and the
Constitution of the Kingdom of Thailand (Interim) 2014 (B.E. 2557).

In addition to the role of the Constitutional Court of Thailand considering the case that
resulted in the protection of human rights and liberties of the people, as mentioned above,
the Constitutional Court of Thailand also played a role in the promotion of human rights and
citizens’ rights in different ways, such as organizing the Rule of Law for Democracy Training Course which aims to strengthen the awareness and conduct, both in the public and private sectors with the principle of rule of law in democratic regime with the King as Head of State. In this course, many experts are selected from different sectors to be trained together with a focus on improving the knowledge and understanding of the democratic principle, the principle of the supremacy of the Constitution, the principle of protection of rights and liberties, the principle of the rule of law and the principle of exercising of State power’s control and monitor. The course is to create a network of people who have been trained to apply the knowledge gained from the training for the benefit of the public, people, society, and the country. In addition, the Constitutional Court and the office of the Constitutional Court also held annual seminars meet the public and the media in the province to promote understanding and disseminating of knowledge related to the Constitutional Court, the principle of rule of law, the principle of democracy, and the rights and liberties of individuals.

As for international relations, the Constitutional Court of Thailand has joined the World Conference on Constitutional Justice, was first time held in Cape Town, South Africa in 2009 with cooperation between the Venice Commission and the Constitutional Court of the Republic of South Africa. It was considered as a starting and important point for members that met altogether for the first time and such meeting, they agreed in principle to cooperate in the organization of meetings continuously, requiring a major conference every three years, the second meeting held in 2011 which considered the draft of Constitution for establishment of cooperation of the Constitutional Court. The third meeting was held in 2014, when the Constitutional Court of the Republic of Korea proposed the issue of promoting cooperation on human rights. The cooperation initiative was to establish the Court of Human Rights in Asia based on the principle of human rights at the international level to strengthen the protection of human rights in the region as in the case of successful implementation of the founding of the Human Rights Court in Europe, the Americas and Africa to protect human rights in the region and lead to a better standards of human rights in practice. In addition, the fourth meeting will be held in January 2017 in the Republic of Lithuania.

In addition, the Constitutional Court of Thailand has an academic development of international constitution law by joining as a founding member of the Association of Asian Constitutional Courts and Equivalent Institutions: AACC), which was established on 12th July 2010 (B.E. 2553) in Jakarta, Indonesia. The founding members of this association
consists of 7 countries such as the Constitutional Court of the Kingdom of Thailand, the Constitutional Court of the Republic of Indonesia, the Constitutional Court of the Republic of Korea, the Supreme Court of Malaysia, the Constitutional Court of Mongolia, the Constitutional Court of Uzbekistan and, the Supreme Court of the Philippines. The Constitutional Court of Thailand has also given a support to the role of the Constitutional Court of the Republic of Indonesia by management of signing in the Jakarta Declaration, a support to the role of the Constitutional Court of the Republic of Korea to be a host of Association Congress in the first time which is a crucial factor for the success of the Association of Asian Constitutional Courts and Equivalent Institutions. Moreover, this led to a strong and sustainable cooperation between the Constitutional Court and the Association of Asian Constitutional Courts and Equivalent Institutions in present. Currently, the number of members of this Association is 16 countries. The Association of Asian Constitutional Courts and Equivalent Institutions have already managed 2 congresses which the Constitutional Court of the Republic of Korea is the host at the first congress and the Constitutional Court of the Republic of Turkey is the host at the second congress. And the third congress will be held by the Constitutional Court of the Republic of Indonesia in May 2016. At the congress of the Association of Asian Constitutional Courts and Equivalent Institutions in August 2015 (B.E. 2558) in Jakarta, Indonesia, there is an idea of establishing a permanent secretariat of the Association to continuingly and integrally manage the policies and the conference of the Association. However, it is currently being studied the possibility of establishing such office.

II. The Constitutional Court and the protection of the rights and liberties of civil

The first Constitution of Thailand dated on 24 June 1932 (B.E. 2475), which is an interim, was used after the transitional period from absolute monarchy to democratic regime. There was no provision guarantees the rights and liberties of the people of Thailand because almost sections was to establish the political organizations and forms the way to use of sovereignty, only section 1 stipulated that “The highest authority of the country belongs to all people”. Consequently, a permanent Constitution was adopted on 10th December of the same year. The rights and liberties of the Thai people were guaranteed in 3 Sections
which is Section 12 guaranteed principle of equality of the Thai people, Section 13 guaranteed liberties of belief in religion, Section 14 guaranteed liberties of body, of homestead, of property, of speech, of writing, of advertising, of education, of assembly, and of professional association but exercising such liberties was subject to the law.

The Supreme Court rendered its judgment in the case of war crimes, the decision of Supreme Court no. 1/2489 (1946), in this case, the Court interpreted “liberties” under this section more largely which included the law cannot be retroactively forced in criminal case.

The later Constitution which was permanent Constitution adopted in 1946 (B.E. 2489). It was the first Constitution to establish the Constitutional Tribunal in Thai legal system. Some provision guarantees the right and liberties in the same way as before. In addition, it also approved the founding of political parties and public assemblies.

At that time, the United Nations Universal Declaration of Human Rights was adopted in 1948. Consequently, the rights and liberties of citizens are obviously guaranteed by the Constitution of the Kingdom of Thailand 1949 (B.E 2492) that mentioned the rights and liberties of the people in 19 Sections, from Section 26 to Section 45, however, such Constitution did not mention directly or used a word “human rights”. In Section 26 stated that “Regardless of their origin or religion of any person, everyone is equal under the constitutional protection”. The word “Regardless of their origin” means all people together. This means not only original Thai or Thai nationality. As a result, it could be considered that the Constitution of the Kingdom of Thailand 1949 (B.E. 2492) was the first Constitution of Thailand that guaranteed human rights. Furthermore, many Sections of Constitution guaranteed the rights and liberties of people in the same way as the Universal Declaration of the United Nation.

Afterward, The Constitution of Thailand, which was followed, approved the rights and liberties of the people and stated more detail on rights and liberties, for example the Constitution 1974 (B.E.2517) determined the principle of equality in the form of a phase “men and women have equal rights” as well as the principles that individuals have the right not to testify against themselves which they may be filed in criminal case and the Court shall not receive the words of the person who was tortured, threatened or coerced. Then the Constitution of the Kingdom of Thailand 1997 (B.E. 2540) was the Constitution that guaranteed, as fully as possible, the human rights and liberties of the people of Thailand. In addition to the rights and liberties recognized by this Constitution more than any other Constitution which ever has been in Thailand, it is also the first Constitution that guaranteed the rights and liberties of people of Thailand both, explicitly and implicitly, provided in the
Constitution and ruled by the Constitutional Court’s decision. Those rights and liberties shall be protected and directly binding on the National Assembly, the Council of Ministers, Courts and other State organs in enacting, applying, and interpreting laws which is provided by Section 27 of the Constitution.

The latest of permanent Constitution of the Kingdom of Thailand was the Constitution of the Kingdom of Thailand 2007 (B.E. 2550). It guaranteed the rights and liberties of the people of Thailand as well as the Constitution of the Kingdom of Thailand 1997 (B.E. 2540) but it was clearly classified in many groups such as the group on the basis of State policy, which stipulates that State must comply with human rights treaties in which Thailand is a party, including the commitments that Thailand has done with other countries or with other international organizations. It also stipulates that the National Human Rights Commission can file a complaint to the Constitutional Court if such Commission considers that the provisions of law that affect human rights and are inconsistent with the provisions of the Constitution. The Constitution of Thailand which is in force today is the Constitution of the Kingdom of Thailand (Interim) 2014 (B.E. 2557). Although there is no provision guaranteed the rights and liberties in detail, Section 4 of this Constitution guarantees the rights and liberties related to human dignity, rights, liberties and equality which the people of Thailand have traditionally been protected by democratic regime with the King as Head of State and international obligations that Thailand already respected and shall be protected by this Constitution.

III. The decisions of the Constitutional Court of Thailand to protect of human rights and liberties of citizens

The Constitutional Court of Thailand has experience in deciding the case over 18 years. There have been many important decisions on the protection of human rights and liberties of the people. The Constitutional Court has directly taken the Convention and the International Covenant on Human Rights to interpret in the decisions and some decisions guarantee the right and liberties under the Constitution which promote and protect the human rights. They will be shown as follows.
1. The decision of the Constitutional Court to protect the principle of equality

1) Equality between men and women

The Constitutional Court ruled in decision no. 21/2546 (2003) which guarantees equality of women in the subject of choosing to use family name after married. According to Section 12 of the Personal Name Act 1962 (B.E. 2505), wife is obliged to use her husband’s family name after marrying. It is a deprivation of the right to choose using the family name of wife after marrying which makes men and women have unequal rights. Consequently, it is inequality, under law, regarding sex and status of the person. The right to use family name is the right of individuals to express their ancestry which all people have their equal right. This also results in unfair discrimination because wife is obliged to use her husband’s family name by marital status. It is considered differently discriminating without reasonable on the basis of the difference of sex and status of the person.

In addition, the Constitutional Court ruled in decision no. 17/2555 (2012) that Section 57 (ter) and Section 57 (quinque) of the Revenue Code allow to collect income tax from the husband and wife if their marital status exists throughout the preceding tax year, the assessable income of the wife shall be treated as income of the husband, and the husband shall be liable to file a tax return and pay tax. According to these Sections, in some case, it makes a married woman pay more tax than a single woman. Consequently, these provisions do not support the stability of the family unit. In addition, it is to discourage men and women to marry because they have to bear a higher tax rate. Married couples have to do a tax plan by divorce in order not to acquire the assessable income of both parties to be taxed at a higher rate. These two provisions are therefore contrary to the principle of equality and unfair discrimination on the basis of the difference in the status of the person. In addition, it is not State measures aimed at removing barriers or encouraging the couples to exercise their rights and liberties as other people under the Constitution. Accordingly, Section 30 and Section 57 (ter) and Section 57 (quinque) of the Revenue Code are inconsistent with Section 30 of the Constitution and is unenforceable.

2) Equality of disabled people

The Constitutional Court ruled in decision no. 15/2555 (2012) that the part of the
qualifications of a judge in the Judicial Service of the Courts of Justice Act 2000 (B.E. 2543), in particular a phase in Section 26 (10) that “...having inappropriate physical or psychological conditions...”. This phase defines the qualifications and disqualifications of candidates of a judge’s examination to be a judge-trainee in the recruitment process. It deprives the rights of disabled people from the beginning by not allowing disable people to equally take the examination. And they had no opportunity to express their knowledge and job-related skills. Then, such Section deprives the right and the opportunity of people to be a judge in regard only to physical or psychological conditions and allows the Commission to examine with a wide discretion of candidates’ qualifications. In fact, the main task of the judge is to adjudicate fairly in a conflict in accordance with the law and Constitution and taking a full review by judge panel. Disability is not an obstacle to perform the duties of judge, especially, it is not a barrier to ensure fairness for the parties in the case. As a result, such provisions is contrary to the principle of non-discrimination on the basis of disability provided by the Constitution of the Kingdom of Thailand 2007 (B.E. 2550) and contrary to the rights of disabled people to work on an equal basis with others in accordance with UN Convention on the Rights of Persons with Disabilities. Therefore, the phase “...inappropriate physical or mental...” as provided by Section 26 (10) of the Judicial Service of the Courts of Justice Act 2000 (B.E. 2543) is not in accordance with the Constitution.

2. Decision of the Constitutional Court to protect the rights and liberties in the property

1) The rights of individuals which are not confiscated their properties if they are not delinquent

The Constitutional Court ruled in decision no. 30/2548 (2005) guarantees the rights and liberties in property related to the criminal case. The Court must hear the person who owns that property whether he/she is a part of a criminal offense before confiscation or not. The Optical Disc Production Bill allows the confiscation of a machine used in the optical disc production for non-notification the competent official before starting the production, non-notification of the name and address of the factory, non-notification of any relocation of the factory, or non-display the source identification code and the copyright code, to use, to forge or to imitate the source identification code and the copyright code, non-notification of acquisition or possession of a machine or non-notification of sales, distribution or transfer a
machine or is out of the possession of the person. Such bill obliges the court to decide the confiscation of the machine without using the discretionary power, regardless of whether the machine’s owner is an accomplice to the offense of infringement of copyright or not. It is contrary to the principles of asset confiscation in criminal law and it takes a severe punishment than necessary and excessively restricts the property rights of individuals. Thus, it is contrary to the Constitution.

This decision is considered as a case that guarantees the property rights of individuals. State may confiscate one’s property if permitted by law and consistent with the Constitution. The rights and liberties of persons may be restricted by law, which is a general principle of law. It is to say that the law could strictly limit of rights and liberties when it is necessary and do not affect the essence of Rights and Liberties. This decision ruled that the principles of asset confiscation should be considered under the Criminal Code. The asset confiscation which is unnecessary and unreasonably severe than procedures provided in the Criminal Code, is to limit the property rights of individuals. It is contrary to the rights and liberties protected by the Constitution. It shall not be applied.

2) The right of individuals to receive State compensation in the case of deprivation of their property by State, although there is no law specified the right to receive State compensation

The Constitutional Court ruled in decision no. 13/2556 (AD 2013) which guarantees the right of individuals in the case that their property rights were deprived by State. According to this case, Section 30 of the Provincial Waterworks Authority Act determines that the Provincial Waterworks Authority have to pay compensation for using the others’ land in laying water supply pipeline only in the case of its diameter ranging over eighty centimeters. In other words, the compensation provided in case of a water supply pipeline with a diameter less than eighty centimeters are not expressly stated by this Act. This law was interpreted if water supply pipeline has a diameter of less than eighty centimeters, the Provincial Waterworks Authority does not have to compensate the owner or occupier of the land. The Constitutional Court considered it is unfair to the owner or occupier of the land. Although State use the individual’s land for the public interest, the property rights of individuals has been devalued. In addition, laying the water supply pipeline and installation of equipment would have to determine the part of land that the owner or occupier cannot use. As a result, it is an unfair deprivation of the rights and liberties of citizens. Section 30 of
The Provincial Waterworks Authority Act 1979 (B.E.2522), is not determine the Provincial Waterworks Authority to pay the compensation for land use to the owner or occupier of land in case of laying water supply pipeline with a diameter less than eighty centimeters. It is the provisions that limit or deprive the property rights of the owner or occupier of land. Consequently, it is not in accordance with Section 41 of the Constitution because it restricts, unnecessarily, the property rights of the individual which is protected by the Constitution and affects to the essence of those rights and causes an undue burden on the individual.

There are many interesting points of this decision, the first point, it is the first decision of the Constitutional Court which its decision approve the rights and liberties. This is one of the sources of rights and liberties of Thai people under the Constitution which is stipulated in Section 27 of Constitution of the Kingdom of Thailand 2007 (B.E. 2550) that “Rights and liberties recognized, expressly or impliedly, by this Constitution and by the decisions of the Constitutional Court shall be protected and directly binding on the National Assembly, the Council or Ministers, Courts, and other State organs in legislating, applying, and interpreting laws”. This Section is allowed the Constitutional Court ensures the rights and liberties to the public, even though they are not expressly or implicitly determined in the text of Constitution. Moreover, the rights and liberties guaranteed by the Constitution Court, which are not expressly or implicitly stated in the text of the Constitution, they shall be respected by the National Assembly, the Council or Ministers, Courts, and organ under Constitution, and other State organs in legislating, applying, and interpreting laws.

Considering the issue of property rights protected by the Constitution, each Constitution of Thailand provides that State have to pay a fair compensation within a reasonable time for the owners or occupiers only if those rights have been damaged in an expropriation case. However, for the use of individual’s immovable property or property by means other than expropriation, the Constitution stipulates unclear whether State have to pay compensation for the use of these assets or not. The Constitutional Court cited “The rule of law” as provided in paragraph two of Section 3 in which this principle has recently been defined for the first time in the Constitution of the Kingdom of Thailand 2007 (B.E. 2550) as the source of rights of individuals that should be protected when State use individual’s property by means other than expropriation. If State may only deprive his/her property right, even though the individual is still the owner of such property, State also has a duty to pay appropriately the compensation.

It is to say that the decision of the Constitutional Court no. 13/2556 (B.E 2013) guarantees the property rights of individuals, in addition to the right to receive
compensation for the expropriation case “States must protect and guarantee the property rights of people. If there are an exceptional cases that State have to deprive the individual’s property rights, State must be responsible for compensation at a fair and appropriate remedies to the case.”

3. Decision of the Constitutional Court to protect the rights of individuals in criminal cases

1) To protect a suspect or an accused in criminal cases, it must be on the principle of presumption of innocence

In 2012 (B.E. 2555), the Constitutional Court ruled in the decision no. 12/2555 (2012). It is “a series of decisions” which has a significant impact on the model of legislation on criminal sanction in Thailand. Section 54 of the Direct Selling and Direct Marketing Act 2002 (B.E. 2545) stipulates that “In the case where the offender who is liable to punishment under this Act is a juristic person, the managing director or manager or the person responsible for the operation of such juristic person shall be liable to the punishment imposed by law for such offence, unless he is able to prove that he was not involved in the commission of the offence by such juristic person.” According to this Section, it is a legal presumption that the accused is presumed guilty without plaintiff’s proving of action or intention of the accused. Thus, it is contrary to the Constitution. In fact, the Constitution guarantees the general principle in criminal law that called the presumption of innocence which the suspect or the accused must be presumed not guilty in criminal cases. It is derived from the Latin legal maxim “Ei incumbit probatio qui dicit, non qui negat” which is an important principle of trial proceedings, especially in the criminal trial procedure, must be strictly adhered to this principle. Furthermore, this principle has been recognized by both Article 11 of the Universal Declaration and paragraph two of Article 39 of the Constitution of the Kingdom of Thailand 2007 (B.E. 2550), which state that “the suspect or the accused in a criminal case is presumed innocent.”

The Constitutional Court ruled that Section 54 of the Direct Selling and Direct Marketing Act 2002 (B.E. 2545), it is a legal presumption that the accused is presumed guilty without proof of action or intention of the accused. In other words, the offense of another person is interpreted as a condition of presumption of the accused’s guilt and the accused may be punished criminally. If the offender is a juristic person, it is presumed that
the managing director or manager or the person responsible for the operation of such juristic person shall be liable to the penalty prescribed by law for the offence, unless he is able to prove that he was not involved in the commission of the offence by such juristic person. The plaintiffs need not to prove whether the action or the intention of managing director, manager or person responsible for the operations, therefore, the plaintiffs prove only that the juristic person has committed an offense under this Act and the accused is a managing director, manager or person responsible for the operations of such juristic person. It could be said that from the beginning the managing director, manager or other person responsible for the operation of the juristic person are presumed to have committed the offense with the juristic person and it is an undue burden for them to prove their innocence. After, the plaintiff has proven the actions related to the offense of juristic person in accordance with the accused’s charges. This provision is presumed guilty of the suspect and the accused in criminal cases regarding to status of person. It is not presumed from the fact which is an important element of the offense. It is also contrary to the principle of the rule of law which requires, in criminal trial procedure, the plaintiffs must prove the charges of the accused in accordance with the elements of the offense. Moreover, such provision brings people into the criminal trial procedures as an accused in criminal case. And the accused may be deprived of his/her rights and liberties by being arrested or detained without the proof of the sufficiency evidence that person intended or had committed the alleged offense. These provisions related to the presumption of guilty of the suspected or the accused without proving their action or intention on the offence. It is, thus, contrary to the principle of the rule of law and the second paragraph of Section 39 of the Constitution.

There are many decisions of the Constitutional Court which are similar to this decision. The provisions of law have the legal presumption that suspected or accused are presumed guilty without proving the evidence by the plaintiff. In addition, it is contrary to the Constitution; Section 74 of the Copyright Act 1994 (B.E. 2537), (decision no. 5/2556) (2013), Section 78 of the Telecommunications Business Act 2001 (B.E. 2544), (decision no. 10/2556) (2013), Section 28/4 of the Public Entertainment Place 1966 (B.E. 2509), (decision 11/2556) (2013) and Section 72/5 of the Fertilizer Act 1975 (B.E. 2518), (decision 19-20 / 2556) (2013).
2) The protection of the principle of an accused to be tried in his/her presence in the criminal trial proceeding

The Constitutional Court ruled on the protection of the rights in a criminal trial procedure when an individual was filed and become an accused in criminal Court. Decision of the Constitutional Court no. 4/2556 (January 2013), the Constitutional Court ruled that Section 41 of the Mutual Assistance in Criminal Matters Act 1992 (B.E. 2535) is contrary to or inconsistent with second paragraph of Section 3, Section 29, Section 40 (2) (3) (4) (7) of the Constitution. The Court has given a reason that Section 41 of the Mutual Assistance in Criminal Matters Act 1992 (B.E. 2535) stipulates that all evidence and documents derived under this Act shall be deemed as admissible for hearing. This provision does not define detailed procedures or processes to obtain the evidence. But this provision shall determine the accused to be bound by evidences and documents obtained from plaintiff proving abroad in which the accused is unable to challenge or recognize adequately for such evidence or documents. Therefore, it is contrary to Section 40 (2) (3) (4) (7) which guarantee and protect the rights in the judicial process as the right to be considered in public, the right to receive adequately the facts and document, the right to present arguments, facts and evidence in the case, the right to request his/her case to be considered legitimate, quick and fair trial, the right to be treated appropriately in the judicial process, the right to defend adequately in the judicial process, the right to request an legal assistance from a lawyer in the judicial process. It is also inconsistent with Article 14.3 of the International Covenant on Civil and Political Rights (ICCPR) relating to the right of accused to be tried in his/her presence, the right to defend himself/herself in person or through a legal assistance, the right to examine, or have examined, the witnesses against him, the right to obtain the attendance and examination of witnesses on his/her behalf under the same conditions as witnesses against him. As a result, Section 41 of the Mutual Assistance in Criminal Matters Act 1992 (B.E. 2535) is a provision that limit the rights and liberties of individuals and affects the essence of the rights in judicial process protected by the Constitution. Moreover, it is inconsistent with the rule of law according to second paragraph of Section 3 and Section 40 (2) (3) (4) (7) of the Constitution.

This decision is remarked that the Constitutional Court held the “International Covenant” in the Constitution. It is explained that the provisions of law in question is contrary to the Constitution which is the norm hold by the Constitutional Court for Constitutionality review and inconsistent with the International Covenant as well. It is to say
that the International Covenant is used as a secondary reason or a supportive reason because the Constitutional Court has already explained that this provision of law is unconstitutional as it is shown in the decision of the Constitutional Court no.15/2555 (2012) in the case that Section 26 of the Act on Judicial Service of the Courts of Justice 2000 (B.E. 2543) is unconstitutional. In addition, the decision of the Constitutional Court no. 12/2555 (2012) in the case that Section 54 of the Direct Selling and Direct Marketing Act 2002 (B.E. 2545) is contrary to the Constitution, as described at the beginning.

3) The protection of the principles of the judgment shall be made by the judge who has heard the case

One of principles related to a judgment or a decision which is important is the judge or jury who has not heard during the court proceedings, he/she cannot make a final judgment or decision unless there is a force majeure or other compelling reason. This principle has been recognized in Section 236 of the Constitution of Thailand 1997 (B.E. 2540) as well.

There is a case in question related to the trial procedure of military court which is inconsistent with Section 236 of the Constitution. The Constitutional Court ruled in decision no. 24/2546 (2003) that paragraph three of Section 19 of the Court Martial Act 1955 (B.E. 2498) states that some of the provincial military court has no authority to adjudicate the cases, it was required to submit the case to the county military court or a military court of Bangkok in order to render the judgment or decision instead. It is to say that the provincial military court which was the trial court did not make the judgment by itself but the county military court or a military court of Bangkok, which was not the trial court, shall render the judgment or decision instead of the provincial military court, that proceed the case from the beginning. Then, these provisions of law are inconsistent with Section 236 of the Constitution of the Kingdom of Thailand 1997 (B.E. 2540) which guarantees the rights of parties in the Court proceedings. The judgment or decision shall be rendered by a judge or a panel who have heard the case. A judge who has not heard the case cannot render a judgment or decision unless there is a force majeure condition or other compelling reason specified by law. For this exceptional clause, in addition to rendering a judgment or decision by a judge who has not heard the case, the judge must be in a court which is competent and either a force majeure or other compelling reason stated by law are needed. But in the case of a provincial military court, a county military court, a military court of Bangkok, and other military Court adhered to military unit are all the Court of First Instance. Nevertheless,
when a provincial military court has taken criminal proceedings under the authority provided by law, the court has no power to punish over the law provided. The case must be submitted to the court, which is in the same rank, including the county military court or a military court of Bangkok to render a judgment or decision according to paragraph three of Section 19 in which the county military court or a military court of Bangkok are not the trial court where proceed the case from the beginning. In addition, the Court Martial Act 1955 (B.E. 2498) does not provide for exceptional clause such as force majeure or other compelling reason. As a result, paragraph three of Section 19 is contrary to the Constitution and not applicable.

4) The decision of the Constitutional Court to protect of liberties of occupation

The decision of the Constitutional Court no. 12/2552 (AD 2009), the Constitutional Court ruled on the “Declaration of the Revolutionary Council”, it was equivalent status of a legislative law. The Declaration of the Revolutionary Council No. 45, as amended by the Declaration of the Revolutionary Council No. 252, which prohibits the sale of food or beverages during 1:00 am. to 5:00 am. It limited the opportunities for occupations in good faith of many people without necessary reason. The Constitutional Court reasoned that, during the time that the military seized power, the Revolution Council, as a government, needed the public to remain calm, no disturbances and affecting to the stability of the country, therefore the rights and liberties of citizens was restrained. In particular, the Declaration of the Revolutionary Council in this case restrains to the rights and liberties of food or drink entrepreneurs. It also restrains the rights and liberties of citizens as consumers because the Military does not want people to leave the house at night, which is difficult to control, monitoring and may cause the disturbance that is affecting the security of State and peace of the country. As a result, this measure is necessary during the Coup for the country, as shown in the preface to the both Declarations of the Revolutionary Council. However, in a common situation, daily lives of individuals are different from the period of the Coup. In addition, due to the influence of globalization, society has changed dramatically, the country’s economic situation is progressing, and the convenience of transportations and people can go to various locations all day and every day. It is to say that people’s lives are changed from the period of Coup and time schedule cannot be fixed the working time and the resting time at home. These changes make the government cannot control the people stay at home, especially at night. In addition, individuals need to do business or contact with
others with different purposes, including entrepreneur, especially food or drink entrepreneur, during that time. To restrain the liberties to sell food or beverages during 1:00 am. to 5:00 am. in every day, it unnecessarily limits the opportunities to many entrepreneurs. In addition, it also creates an undue burden on people without necessary reason. Even the entrepreneur may ask the permission from the Police Commissioner or the governor, it is even unnecessary conditions and causes an undue burden on exercising of liberties of occupation for the people. The Constitutional Court founded that both the Declarations of the Revolutionary Council are unconstitutional because they are contrary to the first paragraph of Section 29 and Section 43 of the Constitution of the Kingdom of Thailand 2007 (B.E. 2550), and they are unenforceable.

In short, the Constitutional Court recognized the Declarations of the Revolutionary Council in question are necessary to maintain peace during the period governing by the military. Once the country returned to the common situation and the liberties must be completely returned as well, then, the Declarations of the Revolutionary Council are inconsistent with the society’s situation. They are unconstitutional and unenforceable.

IV. Conclusion

Since the Constitution of the Kingdom of Thailand 1997 (B.E. 2540) has established a Constitutional Court, the Constitutional Court has grown up and play an important role of protecting the human rights and liberties of the people in many ways. In respect of the direct authority of the Constitutional Court, it examines whether the provisions of law are inconsistent with the Constitution and protects human rights and liberties of people protected by the Constitution or not. The decision of the Constitutional Court is very important because the Constitution requires that National assembly, Ministry Council, Courts and other state organ are abided by the decision of the Constitutional Court. In addition, if the provisions of law are inconsistent with the Constitution, they shall not be enforceable. The Constitutional Court has placed the principle of protection of human rights and liberties of individual in many judgments/decisions. Some decisions are related to the legislative process of the National Assembly and law enforcement of the executive. It results for the better changes in governing in Thailand and to be recognized by society as a whole. In addition, the Constitutional Court also has a role in promoting the human rights
and liberties of citizens in other ways, such as a training course of rule of law for democratic regime which aims to build a network among leaders and to improve knowledge and understanding of democratic regime and the rule of law to government agencies. As a result, they can apply for a better changing in the policy and operational levels of their organizations. Finally, The Constitutional Court has given significantly an attention in improving the performance of its duty to meet international standards by following the academic of the international Constitution. The Constitutional Court has also been a member of the Association of Asian Constitutional Court and has attended in the World Conference on Constitutional Justice. Moreover, the Constitutional Court applied and distributed an academic doctrine of the principles of the Constitution in many judgments/decisions in order to improve the performance of its duty in accordance with the principles and standards for the protection of human rights and liberties of people at international level.

According to the above reasons, people can have confidence in the Constitutional Court that has recognized and potentially played its role to protect the human rights and liberties of people which was very successful. In addition, the Constitutional Court continues to effectively and efficiently perform its duty to promote and protect human rights and liberties of individual.
The Role of the Constitutional Court in the Protection and Promotion of Human Rights

The Statistics of the Constitutional Court’s judgment (197 judgments) according to the Constitution of the Kingdom of Thailand B.E. 2550 and the Constitution of the Kingdom of Thailand (interim) B.E. 2558 (the current version).

<table>
<thead>
<tr>
<th>No.</th>
<th>The authority of the Constitutional Court provided by the Constitution, classified by Section.</th>
<th>2550</th>
<th>2551</th>
<th>2552</th>
<th>2553</th>
<th>2554</th>
<th>2555</th>
<th>2556</th>
<th>2557</th>
<th>2558</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Resolution or regulation of political party is contrary to the status and performance duties of a member of the House of Representatives or the fundamental principles of the democratic regime (Section 65, paragraph three).</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>1</td>
<td>-</td>
<td>1</td>
</tr>
<tr>
<td>2.</td>
<td>Person or political party exercises the rights and liberties to overthrow the democratic regime or to acquire the power to rule the country by any means which is not in accordance with the modes provided in this Constitution (Section 68).</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>5</td>
<td>4</td>
<td>1</td>
<td>-</td>
<td>-</td>
<td>10</td>
</tr>
<tr>
<td>3.</td>
<td>The termination of membership of any member the House of Representatives or any Senators (Section 91).</td>
<td>-</td>
<td>-</td>
<td>1</td>
<td>4</td>
<td>2</td>
<td>1</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>8</td>
</tr>
<tr>
<td>4.</td>
<td>Resolutions of political party that terminates his/her membership of any political party’s member are against to membership and performance duties of member of the House of Representatives or the fundamental principles of democratic regime (Section 106 (7)).</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>2</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>2</td>
</tr>
<tr>
<td>5.</td>
<td>The constitutionality of organic law bill (Section 141).</td>
<td>-</td>
<td>3</td>
<td>2</td>
<td>-</td>
<td>4</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>9</td>
</tr>
<tr>
<td>6.</td>
<td>Bill of organic law or bill of law which are the same or similar principles as that of the bill that had been withheld (Section 140 and Section 149).</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td></td>
</tr>
<tr>
<td>7.</td>
<td>Bill of law which is incorrectly enacted, contrary to or inconsistent with the provision of the Constitution (Section 154).</td>
<td>-</td>
<td>3</td>
<td>1</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>1</td>
<td>2</td>
<td>-</td>
<td>7</td>
</tr>
<tr>
<td>8.</td>
<td>Draft of standing orders of the House of Representatives, Senate and national assembly are incorrectly enacted, contrary to or inconsistent with the provision of the Constitution (Section 155).</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td></td>
</tr>
<tr>
<td>9.</td>
<td>In the consideration an annual appropriations bill which results in direct or indirect involvement by members of the House of Representatives, senators or members of a committee in the use of the appropriations (Section 168, paragraph seven).</td>
<td>-</td>
<td>1</td>
<td>1</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>2</td>
</tr>
<tr>
<td>10.</td>
<td>The termination of Minister (Section 182).</td>
<td>-</td>
<td>3</td>
<td>-</td>
<td>1</td>
<td>1</td>
<td>-</td>
<td>1</td>
<td>1</td>
<td>-</td>
<td>7</td>
</tr>
<tr>
<td>No.</td>
<td>The authority of the Constitutional Court provided by the Constitution, classified by Section.</td>
<td>2550</td>
<td>2551</td>
<td>2552</td>
<td>2553</td>
<td>2554</td>
<td>2555</td>
<td>2556</td>
<td>2557</td>
<td>2558</td>
<td>Total</td>
</tr>
<tr>
<td>-----</td>
<td>--------------------------------------------------------------------------------------------------------------------------</td>
<td>------</td>
<td>------</td>
<td>------</td>
<td>------</td>
<td>------</td>
<td>------</td>
<td>------</td>
<td>------</td>
<td>------</td>
<td>-------</td>
</tr>
<tr>
<td>11.</td>
<td>The constitutionality review of the issuance of an Emergency (Section 184 and Section 185).</td>
<td>-</td>
<td>-</td>
<td>1</td>
<td>-</td>
<td>-</td>
<td>3</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>4</td>
</tr>
<tr>
<td>12.</td>
<td>To review the signing of the treaty by executive authority whether it is approved by National Assembly or enacted before signing (Section 190).</td>
<td>-</td>
<td>2</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>2</td>
</tr>
<tr>
<td>13.</td>
<td>To ensure that the provisions of the law applied to the case whether it is contrary to the Constitution (Section 211).</td>
<td>2</td>
<td>11</td>
<td>14</td>
<td>5</td>
<td>37</td>
<td>15</td>
<td>8</td>
<td>1</td>
<td>-</td>
<td>93</td>
</tr>
<tr>
<td>14.</td>
<td>To ensure that the provisions of the law applied to the case whether it is contrary to the Constitution according that a person exercises the right to file a motion to the Constitutional Court (Section 212).</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>1</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>1</td>
</tr>
<tr>
<td>15.</td>
<td>In the case where there occurs a conflict as to the powers and duties between the National Assembly, the Council of Ministers or constitutional organs that are not Courts (Section 214).</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>16.</td>
<td>To review whether the Election Commissioners are disqualified, or is under any of the prohibitions or has acted in contravention of any of the prohibitions (Section 233).</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>17.</td>
<td>To dissolve the political party and revoke the right to vote of the Leader of such political party and members of its executive committee which is deemed that such political party has committed an act with a view to acquiring the power to rule the country by any means which is not in accordance with the modes provided under Section 68 in the Constitution (Section 237).</td>
<td>-</td>
<td>3</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>3</td>
</tr>
<tr>
<td>18.</td>
<td>An Ombudsman refers the question of constitutionality of law to the Constitutional Court (Section 245 (1)).</td>
<td>-</td>
<td>1</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>4</td>
<td>1</td>
<td>1</td>
<td>-</td>
<td>7</td>
</tr>
<tr>
<td>19.</td>
<td>National Human Rights Commission asked to determine the constitutionality of the law or human rights (Section 257 (2)).</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>2</td>
<td>-</td>
<td>1</td>
<td>-</td>
<td>-</td>
<td>3</td>
</tr>
<tr>
<td>20.</td>
<td>Authorities and duties provided by the Organic Act on Counter Corruption,</td>
<td>8</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>8</td>
</tr>
<tr>
<td></td>
<td>Authorities and duties provided by the Organic Act on Political Parties,</td>
<td>7</td>
<td>-</td>
<td>-</td>
<td>6</td>
<td>2</td>
<td>5</td>
<td>4</td>
<td>4</td>
<td>1</td>
<td>20</td>
</tr>
<tr>
<td></td>
<td>Total</td>
<td>17</td>
<td>27</td>
<td>20</td>
<td>16</td>
<td>51</td>
<td>33</td>
<td>21</td>
<td>11</td>
<td>1</td>
<td>197</td>
</tr>
</tbody>
</table>
Chapter 2

Deepening of Global Constitutionalism
Judicial Protection of Human Rights in the Netherlands
- National and international legal framework

Pieter van Dijk, Marjolein van Roosmalen and Ben Vermeulen*

I. Preliminary note on the Netherlands

The Kingdom of the Netherlands consists of four autonomous component States: (1) the Netherlands, which, in addition to the territory in Europe, includes the Caribbean islands of Bonaire, Sint Eustatius (Eustace) and Saba; (2) Aruba; (3) Curaçao; and (4) Sint Maarten (Saint Martin). The Charter for the Kingdom of the Netherlands functions as a constitution

* Pieter van Dijk: former member of the Netherlands Council of State, former member of the European Court of Human Rights
Marjolein van Roosmalen: acting secretary of the Constitutional Law Committee of the Netherlands Council of State
Ben Vermeulen: member of the Netherlands Council of State, professor of constitutional and administrative law, in particular education law, at Nijmegen University

1) The Kingdom of the Netherlands has several characteristics of a federation. Thus, the four constituent States (the Netherlands and the islands Aruba, Curaçao and Sint Maarten) are constitutionally autonomous, and the powers of both the Kingdom and the component States are vested in the Charter of the Kingdom of the Netherlands. However, the Organs of the Kingdom to a large extent overlap with the Organs of the largest component State, the Netherlands. Article 53 of the Charter of the Kingdom of the Netherlands provides for independent supervision of the expenditure of funds that are made according to the budgets of Aruba, Curaçao or Sint Maarten, by the Court of Audit (at the request of the State to whom it concerns). On the other hand, there is (yet) no constitutional procedure for the settlement of disputes between the Kingdom on the one hand and the component States on the other hand. See: C. Borman, Het Statuut voor het Koninkrijk [The Charter for the Kingdom], Deventer: Kluwer 2012, p. 26. See also: Janneke Gerards and Joseph Fleuren, "The Netherlands", in: Janneke Gerards and Joseph Fleuren (eds), Implementation of the European Convention on Human Rights and of the judgments of the ECHHR in national case-law, Cambridge/Antwerp/Portland: Intersentia 2014, pp. 217-260, p. 217. Although the authors are of the opinion that the Kingdom has a federal structure, they recognize its atypical structure.
for the Kingdom. However, the Constitution of the Netherlands as a component State, in several respects, also entails provisions of constitutional law for the Kingdom.  

While the four constituent States are autonomous with respect to most of their internal affairs, their external relations are a matter of the Kingdom. Consequently, treaties and binding decisions of international organisations to which the Netherlands is a party, bind all four constituent States, unless it is expressly provided for that they only concern one or some of them. This also implies that the international legal obligations by which the Kingdom of the Netherlands is bound, are binding for the four constituent States. Moreover, Article 43, paragraph 2, of the Charter of the Kingdom of the Netherlands declares that guaranteeing fundamental rights and freedoms is a concern of the Kingdom.

The foregoing means that, although in what follows reference is made exclusively to the Netherlands, the same applies to the three other constituent States of the Kingdom.

### II. Introduction

One can no longer imagine an international legal order without human rights standards being part of it. These standards constitute legal obligations for all States; if not obligations ensuing from treaties to which the States have become parties, then as obligations *erga omnes*, in some cases even *jus cogens*, as general principles of international law, and as customary international law.  

2) Article 5 of the Charter of the Kingdom of the Netherlands. The first paragraph reads as follows: “The Monarchy and the succession to the Throne, the Organs of the Kingdom referred to in the Charter, and the exercise of royal and legislative power in Kingdom affairs shall be governed, if not provided for by the Charter, by the Constitution of the Kingdom.”

3) Article 3(b) of the Charter of the Kingdom of the Netherlands.

4) Articles 11, paragraph 3, and 24-28 of the Charter of the Kingdom of the Netherlands.

The codification of human rights in international treaties was mainly a reaction to the atrocities of National Socialism in the years before and during the Second World War. In 1941, Churchill and Roosevelt launched the “four freedoms” in the Atlantic Charter: freedom of life, freedom of religion, freedom from want and freedom from fear. After the war had ended, the Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations on 10 December 1948, was a significant first step towards codification of most of the then generally recognised human rights, inspired by famous national “bill of rights” as the *Magna Charta* of 1215, the Bill of Rights integrated as amendments in the American Constitution of 1787, and the *Déclaration des droits de l’homme et du citoyen* of 1789.6)

The nucleus of the Universal Declaration was soon incorporated in the legally binding European Convention for the Protection of Human Rights and Fundamental Freedoms, drafted within the Council of Europe and signed in Rome on 4 November 1950.7) A little more than a decade later member States of the Council of Europe signed the European Social Charter, on 18 October 1961.8) In the framework of the United Nations, the rights formulated in the Universal Declaration were elaborated and laid down in two legally binding documents: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, both adopted by the General Assembly of the United Nations on 16 December 1966. Many human rights treaties followed, both in the framework of these two and in that of other international organisations, at the universal and at different regional levels.9) At present, Asia is the only region that does

---

6) For these texts, see <www.legislation.gov.uk> and Ph. Kiiver (ed.), *Sources of constitutional law: constitutions and fundamental legal provisions from the United States, France, Germany, the Netherlands, the United Kingdom, the ECHR and the EU*, Groningen: Europa law publishing 2010.
7) *Council of Europe Treaty Series*, No. 5.
8) *Council of Europe Treaty Series*, No. 35.
not have a regional legal instrument for the protection of human rights.10)

The international codification and integration of human rights brought about a fundamental change in the character of international law: (1) individuals and private legal persons have become legal subjects of international law next to the sovereign States; (2) the States have a primary duty to implement their international human rights obligations towards the individuals and legal persons under their jurisdiction and only an additional one vis-à-vis other States; and (3) implementation is in many cases subject to subsidiary international supervision.11)

III. Protection of human rights by Dutch courts

The judicial system in the Netherlands is a rather complex one. Civil and criminal jurisdiction lies in the hands of the District Courts of first instance, the Courts of Appeal and the Court of Cassation. Administrative disputes are, in the first instance, dealt with for the larger part by the administrative sections of the District Courts, unless the law designates a special administrative court of first instance. The main such special administrative court is the Administrative Jurisdiction Division of the Council of State, especially for disputes concerning rural (spatial) planning and election law. In addition to being an administrative court of first and final instance, the Administrative Jurisdiction Division of the Council of State has also general competence to decide on appeals lodged against decisions of the administrative sections of the District Courts. However, the Central Appeals Board for Social Security hears appeals in cases involving social security law, public service law, pensions and student grants and loans, while appeals against decisions made under certain statutes in the socio-economic field, in particular in the field of competition law, come


within the ambit of the Trade and Industry Appeals Tribunal. Finally, the taxation chambers of the Courts of Appeal have jurisdiction to hear appeals in tax cases. Only in the latter cases, with regard to tax actions, does an appeal for cassation lie with the Court of Cassation. This means that, in the field of administrative jurisdiction, there are several courts of highest instance. To promote unity in the interpretation and application of the law and in the development of the law, each of the three highest administrative courts may refer a case to a “grand chamber”, which is composed of five judges and in which members from the other highest courts may participate.

The Netherlands is a party to most of the universal and European treaties in the field of human rights. The most relevant of these treaties for Dutch legal practice are the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter (ECHR))\(^{13}\), the European Social Charter (hereafter ESC), \(^{14}\) and the Charter of Fundamental Rights of the European Union (hereafter EU Charter), \(^{15}\) but also the two International Covenants of the United Nations (hereafter the ICCPR and the ICESCR), \(^{16}\) the International Convention on the Elimination of All Forms of Racial Discrimination, \(^{17}\) the Convention on the Elimination of All Forms of Discrimination against Women, \(^{18}\) the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, \(^{19}\) the Convention on the Rights of the Child, \(^{20}\) and the main Conventions of the International Labour Organisation. \(^{21}\) In fact, especially the ECHR functioned for many

\(^{12}\) And some small categories of other cases, which are not mentioned here.


years as the factual written bill of rights for the Netherlands. However, since 1983, when social and economic rights were added, most human rights have been incorporated in the Netherlands Constitution.\(^{22}\)

For specific reasons, so far, the human rights treaties to which the Netherlands is a party play a more important role in Dutch legal practice, and especially in the case-law, than the human rights provisions of the Constitution. Since 1953, the Netherlands Constitution regulates the relationship between international and national law in a way that has been of determinant importance for this matter and has put the Netherlands in a rather exceptional position in Europe for a long time. Article 120 of the Constitution (in the version of the Constitution as it reads since the revision of 1983) stipulates that the courts shall not review the constitutionality of statutes (Acts of Parliament) and treaties, while Articles 93 and 94 of the Constitution contain an obligation for the courts to apply self-executing provisions of treaties and of binding decisions of international organisations and give them priority over conflicting domestic law.\(^{23}\) The latter two provisions, which for the larger part were a codification of a legal practice that had developed as customary law, make clear that the Netherlands adhere to the monist view, considering international and domestic law as belonging to one and the same legal order in which both sets of law are to be applied according to a certain hierarchy.\(^{24}\) This is in contrast with the dualist view, according to which the two sets of law constitute separate legal orders, which has as a consequence that international law may be applied at the national level only after it has been incorporated into domestic law through transformation or adaption.\(^{25}\) These views, although subject to all kinds of hybrid variations at the moment, have traditionally been used as prototype systems

---

\(^{22}\) For the English translation of the Netherlands Constitution, see Kiiiver, supra note 7 and the CODICES Database of the Venice Commission of the Council of Europe, <www.venice.coe.int/webforms/events>.

\(^{23}\) The priority rule does, however, not apply in relation to unwritten international law such as customary international law: Court of Cassation, judgment of 6 March 1959, Nyugat II, 10 Netherlands International Law Review 1963, p. 82.


\(^{25}\) For the long tradition of the terminology, see, e.g., J.G., Starke, “Monism and Dualism in the Theory of International Law”, 17 British Yearbook of International Law (1936), pp. 66-81.
for the constitutional regulation of the relationship between international and national law.²⁶)

From these provisions it follows that the courts in the Netherlands may not review statutory provisions²⁷) for their conformity with human rights provisions in the Constitution, whereas they have the obligation to review them for their conformity with human rights provisions in treaties to which the Netherlands is a party, provided they are of a self-executing character.²⁸) On the other hand, since practically all human rights provisions in the Netherlands Constitution have their equivalent in one or more treaties to which the Netherlands is a party, it is not difficult for Dutch courts to circumvent de facto the prohibition of constitutional review of statutes by reviewing their conformity with an identical or comparable self-executing treaty provision.

One of the consequences of this review system may have been that the Netherlands (still) does not have a special constitutional court, while the trend in the recent legal history of Europe and beyond²⁹) has been to introduce such special constitutional jurisdiction. In actual fact, in the Netherlands all courts act as constitutional courts, with the Court of Cassation and the Administrative Jurisdiction Division of the Council of State as the highest constitutional jurisdictions. They do act as constitutional courts in the strict sense in all those cases where not the constitutionality of a statutory provision but of a provision of “lower” legislation is at issue, while they act as constitutional courts in a substantive sense when they review both statutory law and other legislative acts, as well as administrative acts, for their conformity with self-executing provisions of treaties and of decisions of international organisations. In the context of constitutional review, to a large extent international law supplements, if not substitutes for, the Constitution.

The fact that, in virtue of the Netherlands Constitution, human rights provisions of treaties have a stronger position in the Dutch legal order than domestic law, including the Constitution itself,³⁰) did not automatically and immediately result in a practice in which

²⁷) The prohibition of Article 120 applies to statutes only, not to legal regulations that have been adopted by other authorities than Parliament, such as royal decrees, orders in council, ministerial regulations and municipal regulations.
²⁸) For the reason of the restriction to provisions of a self-executing character, see Gerards and Fleuren, supra note 2, pp. 223-225.
²⁹) For the Republic of Korea, see: Constitutional Court of Korea, Twenty Years of the Constitutional Court of Korea, Seoul: The Constitutional Court 2008; Rodrigo González Quintero, Judicial review in the Republic of Korea: an introduction, 34 Revista de Derecho 2010, pp. 1-17.
full legal force was, and is, given to human rights treaties in all cases and in all respects. This depends to a large extent on the attitude of the national authority concerned. Although the relevant provisions were included in the Constitution in 1953, one year before the ECHR entered into force for the Netherlands, that fact did not lead to full attention being given to the ECHR right away. Even almost thirty years later Alkema made the following observation:

“In spite of its direct applicability, the courts, especially the Supreme Court [i.e. the Court of Cassation], are apparently accustomed to treating the ECHR as a subsidiary source of law. The courts avoid, if possible, any reference to the ECHR. Where a comparable constitutional provision is available, an interpretation, sometimes a wider interpretation, of the latter is preferred to an (express) application of the ECHR.”

However, in the eighties that attitude changed remarkably, thanks to influential doctrine, commentaries and annotations by experts in the field of human rights, discussions in and publications by organisations like the Netherlands Jurists Committee for Human Rights, and specific training in the field of human rights at the law schools and as part of the éducation permanente of judges, prosecutors and the bar. Was it, at first, sometimes seen as a sign of lack of convincing arguments if a lawyer referred to a treaty provision before a court, nowadays, courts will sometimes even supplement the arguments of the applicant by applicable provisions of human rights treaties as part of their duty to supplement the law (“jus curia novit”). The actual picture, therefore, is that the human rights treaties to which the Netherlands is a party, are regarded as a fully integrated part of the Dutch legal order, with a very high, if not the highest status. Of course, this does not always result in a correct interpretation and application of these treaties by the competent authorities, as is shown, inter alia, by the judgments or views, as the case may be, of the international

30) See: Gerards and Fleuren, supra note 2, p. 222.
supervisory bodies in cases in which complaints against the Netherlands are examined.34)

In fact, the way in which the courts in the Netherlands interpret and apply human rights provisions in treaties in the framework of their “constitutional review” indirectly also influences the interpretation and application of the equivalent human rights provisions of the Constitution. This the more so since the latter provisions lack, in several respects, the specificity and clarity in which the international human rights standards have been formulated and have been interpreted by the respective international courts and supervisory bodies.35) Consequently, the international human rights provisions and relevant jurisprudence have their impact on the legislative, administrative and judicial practice in the Netherlands in cases where such provisions are (also) at issue. In actual practice, in those cases the legislature, administration or court, as the case may be, will - or at least should - also take into consideration the comparable treaty provision, in virtue of their obligation under Articles 93 and 94 of the Constitution to apply and give priority to self-executing provisions of treaties. Since, according to the prevailing doctrine,36) the obligation to give priority to a treaty provision over a conflicting provision of domestic law also applies to conflicting provisions of the Constitution, that obligation may even lead the courts to not applying a constitutional provision, if and to the extent that it is found not to be in conformity with a self-executing treaty provision. Practice shows, however, that the courts in the Netherlands

34) The ECtHR, for instance, so far has found violations by the Netherlands in 85 judgments: some cases on Articles 10 (freedom of expression), 13 (right to an effective remedy) and 14 (prohibition of discrimination), as well as the procedural limbs of the rights enshrined in Articles 2 (right to life) and 3 (prohibition of torture). The majority of convictions related to Articles 6 (right to a fair hearing), 8 (right to respect for private and family life) and 5 (right to liberty and security). However, only a very small amount of cases is decided by judgment. See: Country Press Report the Netherlands, <www.echr.coe.int>. In 2014, for instance, 798 applications against the Netherlands were decided, of which 795 were declared inadmissible or struck out. Only three out of the 798 cases were decided by judgment (in which cases the Court found violations of Articles 5, 2 and 8 respectively; see: ECtHR 9 December 2014, Geisterfer v. the Netherlands, No. 15911/08; ECtHR (Grand Chamber) 20 November 2014, Jaloud v. the Netherlands, No. 47708/08; ECtHR (Grand Chamber) 3 October 2014, Jeunesse v. the Netherlands, No. 12738/10; for all three, see: <hudoc.echr.coe.int>).

35) Thus, for instance, several fundamental rights may only be restricted by Act of Parliament, while no substantive requirements are set for the legislator.

are rather inclined to interpret both applicable provisions in such a way that a conflict
between them may be avoided; the so-called “embracing interpretation” or “treaty-conform
interpretation”, which sometimes even amount to “treaty-conform supplementation of the
law”. Its justification is, expressly or impliedly, found in the so-called “presumption
theory”: the legislator may be supposed to have had the intention to keep or bring domestic
law in conformity with the state’s international legal obligations. Examples derived from
the case-law of the Administrative Jurisdiction Division of the Council of State, are cases in
which the Division read provisions of the General Administrative Law Act in conformity
with Article 6 ECHR.

IV. Protection of human rights in the Netherlands by the European
Court of Human Rights

The protection of human rights in the Netherlands is not exclusively a matter of the
competent Dutch authorities. As from 31 August 1954, the Netherlands is a party to the
Subsequently, the Netherlands also ratified all additional and amending Protocols, with the
exception of Protocol No. 7. The binding force of the ECHR and its Protocols – with the
exception of Protocol No. 7 – extends to all parts of the Kingdom.

Under the ECHR, a European Court of Human Rights (hereafter: ECtHR) has been
established which, according to Article 19 of ECHR, is endowed with the function to ensure
the observance of the engagements undertaken by the High Contracting Parties. Until the
entry into force of Protocol No. 11 to the ECHR on 1 November 1998, the right to lodge an

application as a private party and the jurisdiction of the ECtHR were optional: the then still existing European Commission of Human Rights could receive such applications and the Court could give judgment only in cases against States that had accepted those competences. The Netherlands had made a declaration of acceptance to that effect on 5 July 1960.\(^{40}\) However, as from 1 November 1998, under Protocol No. 11 to the ECHR, the right of individual complaint and the jurisdiction of the ECtHR are compulsory for all the Contracting Parties.\(^{41}\)

Initially, the expectation in the Netherlands was that the entry into force of the ECHR and the binding jurisdiction of the ECtHR would hardly have consequences for the authorities in the Netherlands and for the individuals and legal persons under its jurisdiction. The prevailing opinion was that the level of protection of human rights in Dutch law and legal practice was such that the guarantees and supervisory mechanisms laid down in the ECHR would have little or no relevance for the Dutch legal order.\(^{42}\) In any case it was thought to be sufficient that the provisions of the ECHR could be relied upon before and applied by the Dutch courts. The international supervisory procedure, established by the ECHR, would serve to enable the Netherlands to watch the behaviour of their fellow-Contracting Parties and bring complaints against them if needed.\(^{43}\) And indeed, among the very few applications which the ECtHR dealt with during the first decade of its functioning, none was directed against the Netherlands. So, it came somewhat as an unpleasant surprise when the ECtHR found the Netherlands military disciplinary and criminal law as well as the Insane Persons Act to be in violation of Article 5 of ECHR.\(^{44}\) Were this still rather specific cases, a real wake-up call came from a judgment against

\(^{40}\) For the Netherlands Antilles the declaration took effect as from 31 August 1974.

\(^{41}\) Under the same Protocol No. 11 the Commission and the Court have merged into a new Court.

\(^{42}\) See Egbert Myjer, “Dutch interpretation of the European Convention: a double system?”, in: Matscher and Petzold (eds), supra note 12, pp. 421-430 at pp. 421-425, who enumerates five main reasons for this slow recognition of the relevance of the ECHR for Dutch legal practice: a) national arrogance; b) unfamiliarity with the ECHR; c) slow development of Strasbourg case-law; d) lack of tradition of constitutional review; and e) the spirit of the time.

\(^{43}\) The original Article 24 already created the possibility of inter-State applications. The present Article 33 reads as follows: “Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the Protocols thereto by another High Contracting Party.”

\(^{44}\) ECtHR 8 June 1976, Engel a.o. v. the Netherlands, Nos. 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72, <hudoc.echr.coe.int>; ECtHR 24 October 1979, Winterwerp v. the Netherlands, No. 6301/73, <hudoc.echr.coe.int>.
another State, Belgium, in 1979. The *Marckx Case*45) made it clear that also in the Netherlands inheritance law was discriminatory with respect to children born out of wedlock and had to be revised. A number of cases followed, in which the Netherlands law or practice was found to be in violation of one of the guarantees of the ECHR, such as that of fair trial and protection of family life.46)

As was said before, in the eighties the attitude, first of the judiciary and the bar, but ultimately also of the other authorities, changed in the sense that more attention was being paid to the ECHR and the Strasbourg case-law.

In conclusion it may be said that the existence of the ECHR and the functioning of its supervisory system, especially the case-law of the ECtHR,47) have had their impact on the interpretation and application of both national and international human rights standards by the legislature, the administration and the courts in the Netherlands as in the other Contracting Parties.48) In combination, the ECHR and the case-law relating thereto have created a jus commune in the field of human rights for the European society, in which the engagements undertaken by the High Contracting Parties are not governed by the traditional treaty law principle of reciprocity.49)

---

47) Originally, there was also the European Commission of Human Rights, which made a first examination of applications lodged by private parties and drafted a report with its (non-binding) conclusions. See: P van Dijk a.o. (eds), *Theory and Practice of the European Convention on Human Rights*, 4th ed., Antwerp/Oxford: Intersentia 2006, pp. 32-35. A supervisory role is also played by the Committee of Ministers of the Council of Europe which, according to Article 46 ECHR, supervises the execution of the judgments of the ECtHR; see *idem*, pp. 44-46. Finally, the Secretary-General of the Council of Europe, according to Article 52 ECHR, may make inquiries of the manner in which the individual States ensure the effective implementation of the provisions of the ECHR in their internal law. See also: the Human Rights and Rule of Law section of the Council of Europe’s website: <www.coe.int/t/dghl/monitoring/execution/default_en.asp>.
49) ECtHR 18 January 1978, *Ireland v. the United Kingdom*, No. 5310/71, para. 239: “Unlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between Contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a ‘collective’ enforcement”. See also
The ECtHR has designed the separate human rights provisions into broad European standards, against which national law and practice may be reviewed, and has developed interpretative mechanisms and techniques for that review. This way, the ECtHR has made the ECHR a living legal instrument. In fact, gradually the system of the ECHR has developed into a European constitutional order. For the victim of a violation of one or more provisions of the ECHR the supervisory mechanism may result in recognition of the violation, and in conviction of the Netherlands. As the ECtHR has stated, “a judgment in which the Court finds a breach 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.” It should be pointed out that not only the decisions and judgments of the ECtHR in cases against the Netherlands are relevant for the immediate practice and future legislation. In general, the interpretations given by the ECtHR of the provisions of the ECHR (the so-called “res interpretata”) determine the meaning thereof, and the scope of the obligations of all Contracting Parties. And, indeed, in the Interlaken Declaration of 2010, the Contracting Parties committed themselves to “taking into account the Court’s developing case-law, also with a view to considering the conclusions drawn from a judgment finding a violation of the Convention by another State, where the same problem exists within their own legal system”.

However, the way to this result is a very long one, and the outcome may not always be satisfactory. First of all, according to Article 35, paragraph 1, previously all available national procedures must have been exhausted, while, thereafter, the procedure before the

---

50) The ECtHR refers to the ECHR as “a constitutional instrument of European public order”. See, e.g., ECtHR 23 March 1995, Loizidou v. Turkey, No. 15318/89, para. 75.
51) ECtHR 31 October 1995, Papamichalopoulos a.o. v. Greece (Article 50), No. 14556/89, <hudoc.echr.coe.int>, para. 34.
54) See Tom Barkhuysen and Michiel van Emmerik, “Improving the implementation of Strasbourg and Geneva decisions in the Dutch legal order: reopening of closed cases or claims of damages against the state”, in: Barkhuysen a. o. (eds), supra note 47, pp. 3-27.
ECtHR may last for several years. Even if at the end the ECtHR finds a violation and decides that damages have to be paid to the victim, the amount fixed may not cover all damages suffered, while some of the most important material or immaterial damages, such as unjustified deprivation of liberty, cannot be undone or even shortened after such a long time, not even if the criminal case against the victim will be re-opened.55) This may imply that, while Article 13 of ECHR guarantees to everyone an effective legal remedy in case any of the rights and freedoms laid down therein has been violated, the Court procedure itself does not keep up with that guarantee.

A preliminary-rule procedure like the one that exists in EU law might partly remedy that situation, as it would enable the national courts to seek, in an early stage of the proceedings, an interpretation by the ECtHR of applicable provisions of the ECHR. Meanwhile, such a procedure has been proposed in Protocol No. 16 to the ECHR.56)

All this makes it clear that the most important and effective impact the ECHR and the case-law of the ECtHR bring about is that the same violations may be prevented in the future or, if they occur, may be remedied in domestic procedures without there being a need for a new way to Strasbourg. In this respect it is also important to note that a judgment of the ECtHR finding a violation may also imply that the State concerned will have to take preventive measures, in the legislative and/or administrative field,57) to the benefit of the applicant but also of potential other victims and under the supervision of the Committee of Ministers.58) Moreover, although the Court’s reasoning will be attuned to the case before it,

55) For criminal cases, the way for re-opening is provided by law: Article 457 of the Code of Criminal Procedure. See: Roeland Böcker and Herman von Hebel, “The enforcement of Strasbourg and Geneva decisions: the international law context”, in: Barkhuysen a.o., supra note 47, pp. 235-241 at p. 235: “Litigants may often be left feeling that Strasbourg and Geneva judgments are Pyrrhic victories”. See also: idem, p. 239.

56) Protocol of 2 October 2013, Council of Europe Treaty Series 214. Once this protocol will have entered into force, the national highest courts and tribunals may request the ECtHR to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the Protocols thereto; the requesting court or tribunal may seek an advisory opinion only in the context of a case pending before it. The Netherlands has signed, but not yet ratified Protocol No. 16. On the moment of writing (8 December 2015) only 5 countries – Albania, Georgia, Lithuania, San Marino and Slovenia – have ratified it, whereas, pursuant to Article 8 of Protocol No. 16, at least 10 ratifications are needed.

57) For a judgment in which the ECtHR indicated the necessity of legislative measures, see: ECtHR 26 March 1985, X. and Y. v. the Netherlands, No. 8978/80, <hudoc. echr.coe.int>, para. 27.

58) Article 46, paragraph 2, ECHR.
the interpretations of provisions of the ECHR laid down in its judgments, will have a general character and may, consequently, also have a remedying and preventive effect in other High Contracting Parties.\textsuperscript{59}) In general, it may be stated that the Court’s case-law, be it in cases where the complaint is directed against the Netherlands or in other cases, is carefully followed and analysed in Dutch legal practice and applied by Dutch courts, as long as the courts do not meet with what they consider to be the boundaries of their competences.\textsuperscript{60}) For an example of the latter case, in relation to the exclusion of the right to vote of detained persons under guardianship, the Administrative Jurisdiction Division of the Council of State held that, in general, it could not be said that such exclusion amounted to an unreasonable limitation of Article 25 of the International Covenant on Civil and Political Rights, but that this might be different in the present case. However, answering the question of how a possible infringement should be solved would require the court to overstep the strict boundaries of its ‘law-making powers’.\textsuperscript{61}) This judgment led to the initiative on the part of the Government to amend Article 54 of the Constitution.

V. Protection of human rights in the Netherlands by the Court of Justice of the European Union

Originally the European Union (hereafter: EU), under the previous name of European Economic Community (hereafter: EEC), was primarily an institution of cooperation in the fields of trade, economics, finances and taxation. Gradually it has entered into other domains which traditionally belonged to the sovereignty of the member States, such as social and cultural matters, criminal law and also the protection of human rights. For a long

\textsuperscript{59}) In many cases, the Court summarizes and analyses its own case-law. See, e.g., with regard to positive obligations to take all appropriate steps to safeguard life for the purposes of Article 2: ECHR 24 July 2014, \textit{Brincat a.o. v. Malta}, Nos 60908/11, 62110/11, 62129/11, 62312/11 and 62338/11, \url{<hudoc.echr.coe.int>}, paras 101-102. For another example, see also, in relation to the criteria for the applicability of the principle of \textit{non bis in idem} under Article 4, paragraph 1, of Protocol No. 7 to the ECHR: ECHR (Grand Chamber) 10 February 2009, \textit{Zolotukhin v. Russia}, No. 14939/03, paras 52-53.

\textsuperscript{60}) See Gerards and Fleuren, \textit{supra note} 2, pp. 237-250.

\textsuperscript{61}) Administrative Jurisdiction Division of the Council of State, judgment of 29 October 2003, No. 2003 00512/1, \url{<www.raadvanstate.nl>}, CODICES Database NED-2013-3- 007, \textit{N.N. v. Mayor and Aldermen of Bloemendaal}. 
time, the Treaty establishing the EEC did not contain a catalogue of human rights. Proposals for insertion of a reference to fundamental rights were rejected when the Treaty was drafted. However, step by step, the Court of Justice (hereafter: CoJ) of the EEC developed its own human rights case-law in which it drew inspiration from both the constitutional traditions common to the member States and the human rights treaties on which the member States had collaborated or of which they were signatories.

The situation changed when the European Council, at its meeting of 3 and 4 June 1999 in Cologne, decided to draw up a Charter of Fundamental Rights of the European Union. In the amended text of the Treaty on European Union, Article 6 refers to the Charter of Fundamental Rights of the European Union. Originally the Charter merely had the character of a solemn proclamation of the European Parliament, the Council and the Commission, but as from the 1st of December 2009 it has the same legal force as the Treaty on European Union itself. Moreover, Article 6, paragraph 2, stipulates that the EU shall accede to the ECHR, a development that is still in the process of preparation.

In the present situation, the CoJ EU applies the Charter of Fundamental Rights as part of written EU law, and, in addition, applies supplementary provisions of other international human rights instruments as well as human rights standards that are common to the legal systems of the member States. It does so, inter alia, in cases brought before it by the EU Commission against a member State and by a member State against another member State. Moreover, if in a case before a court in a member State a human rights issue is at stake that finds (also) regulation in EU law and the court concerned considers that a decision on the question is necessary to enable it to give judgment, it may, and if it is a court of final instance in the case, it is obliged to bring the matter before the CoJ EU, who will give a preliminary ruling on the issue that is binding for the national court concerned.

64) Conclusions of the Presidency, point I.64, 6 EU *Bulletin* 1999, p. 35.
66) Article 258 Treaty on the Functioning of the EU.
67) Article 259 Treaty on the Functioning of the EU.
68) Article 267 Treaty on the Functioning of the EU.
The above description makes it clear that, nowadays, the CoJ EU has also an important role to play in supervising the way in which the authorities in the Netherlands interpret and apply human rights provisions laid down in the Constitution and in treaties like the ECHR, which have also been incorporated into the EU Charter. And, indeed, practice shows that nowadays the case-law of the CoJ EU has a substantial impact on Dutch human rights case-law and legal practice, especially in asylum and immigration cases. This was illustrated, for instance, by the cases of X, Y and Z, three applicants who were third country nationals seeking refugee status. They claimed that they had a well-founded fear of persecution based on their sexual orientation. The Administrative Jurisdiction Division of the Council of State requested the CoJ EU to answer questions concerning the assessment of applications for refugee status under the provisions of the Qualification Directive. The Division wished to know whether third country nationals who are homosexuals, form a particular social group in the meaning of the Directive, how national authorities should assess what constitutes an act of persecution concerning homosexual activities and whether the criminalisation of those activities in the applicant’s country of origin with the possibility of imprisonment amounted to persecution. The CoJ EU ruled, inter alia, that the national authorities, when assessing an application for refugee status, may not reasonably expect the applicant, in order to avoid the risk of persecution, to conceal his homosexuality in his country of origin or to exercise reserve in the expression of his sexual orientation. In the light of the CoJ EU’s judgment, the Administrative Jurisdiction Division of the Council of State then found for the asylum seekers.

69) That is: from outside the European Union.
72) CoJ EU 7 November 2013, Joined Cases C199/12 to C201/12, X, Y and Z, <curia.europa.eu>.
73) Administrative Jurisdiction Division of the Council of State, inter alia judgment of 18 December 2013, No. 201109928/1/1/V2, <www.raadvanstate.nl>. See also: CoJ EU (Grand Chamber) 5 September 2012, Joined Cases C71/11 and C99/11, X and Y, <curia.europa.eu> on freedom of religion in relation to asylum applications. Many cases pending before the Administrative Jurisdiction Division of the Council of State had been stayed until the CoJ EU gave judgment. See, e.g.: Administrative Jurisdiction Division of the Council of State, judgment of 13 April 2012, No. 201009779/2/V2, <www.raadvanstate.nl>, N.N. v. the Minister of Justice.
VI. Protection of human rights in the Netherlands by other international supervisory bodies

In addition, the Netherlands is subject to periodical and incidental supervision of other international supervisory bodies, which, however, do not have the power to make legally binding decisions but only give “views” and recommendations. Mention may be made of the periodical reporting procedures and examination of individual complaints by the European Committee of Social Rights under the European Social Charter. A case which recently received considerable publicity and political attention, was the complaint submitted by the Conference of European Churches (CEC). CEC alleged that, in the Netherlands, the relevant legislation and practice concerning illegal migrants were in violation of the right to social and medical emergency assistance and the right to housing under the European Social Charter. The Committee held that it had taken note of the rationale of the Dutch restrictive immigration policy and recognized that pursuant to international law States are indeed entitled to control the entry, residence and expulsion of aliens in their territory. It did not wish to call into question the legitimacy of this aim. Nevertheless, the Committee was unable to consider that the denial of emergency shelter to the individuals concerned, who continued to find themselves in the territory of the Netherlands, was an absolutely necessary measure to achieve the aims of immigration policy. Moreover, the Committee ruled that, in the light of its established case-law, shelter must be provided to illegal migrants, even when they are requested to leave the country and even though they may not claim that long-term accommodation in a more permanent housing be offered to them. The Committee recalled that the right to shelter was closely connected to the human dignity of every person regardless of his or her residence status. At a later stage, the Administrative Jurisdiction Division of the Council of State held that the requirement that the aliens concerned cooperate with a view to their repatriation, as a precondition for shelter (‘a bed, a bath and bread’), was lawful.

There is also a periodic reporting procedure and a system of examination of individual complaints before the Human Rights Committee under the International Covenant on Civil


75) Judgment of 26 November 2015, No. 201500577/1, N.N. v. the Secretary of State, <www.raadvanstate.nl>, forthcoming in the CODICES Database.
Judicial Protection of Human Rights in the Netherlands

and Political Rights and a periodic reporting procedure under the International Covenant on Economic Social and Cultural Rights.\textsuperscript{76} Furthermore, there are several other supervisory procedures, in relation to the Conventions of the International Labour Organisation, 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 against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Convention on the Rights of the Child.\textsuperscript{77}

All these instruments and supervisory mechanisms have a certain impact on the case-law and legal practice in the Netherlands in the field of human rights.\textsuperscript{78} However, the fact that the views expressed by the supervisory bodies concerned are not legally binding, may influence their effectiveness.

As a recent example, reference may be made to the SGP Case.\textsuperscript{79} The Reformed Political Party (Dutch abbreviation: SGP) is based on strict Calvinism and aims at a government based on strict biblical teachings. At the time, it did not allow women to represent the party in political bodies. Civil law proceedings against the SGP led to a judgment of the District Court in The Hague,\textsuperscript{80} declaring that the State, by granting the usual annual subsidy to the


77) On the 31st of December 2014, the Dutch government had been faced with fourteen complaints against the Netherlands before UN Committees: nine before the UN Human Rights Committee, two before the UN Committee on the Elimination of Discrimination against Women and, finally, three before the UN Committee Against Torture. See: \textit{Rapport 2014} [Report 2014] by the International Law Department of the Ministry of Foreign Affairs, <www.rijksoverheid.nl>, pp. 60-61.


SGP, had acted in breach of Article 7 of the United Nations Convention on the Elimination of All Forms of Discrimination against Women.\textsuperscript{81)} And, indeed, the Committee, set up under the Convention to supervise its implementation by the Contracting States, after examining a periodical report of the Netherlands, had found the Netherlands in violation of this provision. Later on, administrative proceedings were introduced to challenge the legality of the government decision to grant the subsidy. On appeal, the Administrative Jurisdiction Division of the Council of State held that the most relevant parts of Article 7 of the Convention were directly applicable in terms of Article 94 of the Constitution, but that this provision did not rule out a balancing between the equality norm, on the one hand, and other fundamental rights, including the freedom of religion and association, on the other. In the opinion of the Administrative Jurisdiction Division, this followed from the legislative history of the Convention and of the Act of Parliament approving the Convention. Further, the Administrative Jurisdiction Division held that the legislative history of the Political Parties (Subsidies) Act 1999, on which the granting of the subsidy was based, showed that the Act was aimed at the maintenance of the variety of political parties in the Dutch democratic system as a vital element of that system. In view of Article 7 of the Convention, the legislator had included Article 16 in the Political Parties (Subsidies) Act 1999, with the intention to leave the judgment on the functioning and accountability of political parties to the (criminal) court, rather than subjecting them to decision-making by the administration. In the opinion of the Administrative Jurisdiction Division, the legislator had not been unreasonable in the weighing of the interests involved. Women could obtain full membership of the SGP, and could, if they did not agree with certain restrictions applied to them as members, join another party or found their own party. Parties, such as the SGP, which had a tradition regarding equality between the sexes which differed from prevailing opinions and legal developments, should be able to conduct debates unhampered, within the boundaries set by criminal law. This was thought to be in line with the case-law of the European Court of Human Rights regarding the banning of political parties.\textsuperscript{82)} Thus, the Administrative Jurisdiction Division took account of the applicable international law and of the views expressed by the international supervisory body concerned, but introduced its own system of weighing fundamental rights and interests.\textsuperscript{83)}

\textsuperscript{81)} See supra note 19.

\textsuperscript{82)} See: ECtHR (Grand Chamber) 8 December 1999, Freedom and Democracy Party (ÖZDEP) v. Turkey, No. 23885/94, para. 44, and ECtHR (Grand Chamber) 13 February 2002, Refah Partisi v. Turkey, Nos 41340/98 and 41342/98-41344/98, para. 102.
VII. Implementation and execution in the Netherlands of decisions or views of international bodies

From the above chapters it becomes clear that both the domestic courts and the international courts and other supervisory bodies play a role in the interpretation and application of human rights standards in the Netherlands. While the Dutch courts interpret and apply the human rights provisions of both their Constitution and international treaties to which the Netherlands is a party, the international bodies have to restrict themselves to the provisions of the treaty under which they have been established. However, in actual practice this distinction is not as absolute as it may seem at first sight. First of all, international supervisory bodies have shown many times that they consider themselves competent, when interpreting and applying a provision of a particular treaty, to take into account similar provisions of other treaties and the way they have been interpreted by the respective competent bodies. Moreover, judgments and “views” of international supervisory bodies, although relating to applicable international law, may have a direct impact on the way Dutch courts interpret and apply human rights provisions of their national law, especially the Constitution. And, vice versa, the way in which Dutch courts interpret and apply these provisions of national law, may influence the interpretation by international bodies of comparable treaty provisions. In this way, one may really speak of a common responsibility and a common effort. If this functions well, as it should but not always does, it may lead to “a dialogue of judges”, the need for which has often been emphasised by the ECtHR.

In the Netherlands it has become common opinion that interpretations given by the

83) See, however: ECtHR 10 July 2012, Staatkundig Gereformeerd Partij v. the Netherlands, No. 58369/10, where the Court, on its turn, emphasised the importance of the equality norm.


ECtHR of the ECHR constitute part and parcel of the provisions concerned and, consequently, have to be taken into consideration by the national courts in future cases when interpreting these provisions and comparable provisions of their national law. The same holds good, a fortiori, for the interpretations given by the CoJ EU, since a Dutch court which does not wish to follow a previous interpretation by the Court in a judgment or preliminary ruling, will have to submit the issue of compatibility of a human rights provision of national law with EU law to the CoJ EU, at least if it judges in final instance. This means that the “dialogue of judges” in fact still appears to be largely a one-way street.

The “views” of the other supervisory bodies also have to be taken into account, but since they are not legally binding, the Dutch courts appear less inclined to follow them straight forward, in particular if the interpretation of the scope of a certain treaty obligation by those bodies sometimes seems to them to be rather far-fetched and following that interpretation would create a certain tension between the judicial domain and that of the other State powers.

VIII. Concluding observation:
international (quasi-)judicial review in the field of human right; positive evaluation and some cause for concern

The “favourable” status which the Netherlands Constitution and Dutch doctrine have granted to international treaties in general and human rights treaties in particular, and the resulting rather high authority of the international courts and supervisory bodies, have had a fertilising effect on the protection of human rights in the Netherlands, especially since the human rights provisions in the Constitution have played a modest role so far and the Netherlands have only a restricted tradition of constitutional review stricto sensu.

However, in the last decennium there have been signs that this high status is considered


87) See, e.g.: Administrative Jurisdiction Division of the Council of State, judgment of 26 November 2015, supra note 76, where the Division set a limitation to the obligation construed by the European Committee of Social Rights to provide shelter, in view of the Government policy to promote repatriation of aliens who had not obtained a residence permit.
by some to also have certain undesirable side-effects. Especially in relation to the ECtHR concern has been raised that this court has given the scope of its competences such a breath and at the same time has followed such an intrusive way of interpreting the obligations laid down therein, that the Contracting Parties are no longer the masters of the ECHR and are faced with several new and unforeseen obligations that constitute an intrusion on their sovereignty by an institution that has no democratic legitimacy.\textsuperscript{88}) And, indeed, it cannot be denied that the “evolutive” interpretation given by the ECtHR to certain provisions of the ECHR, has stretched these provisions in some cases beyond the original intention of its drafters.\textsuperscript{89}) It would seem, therefore, that in order to preserve the authority of the ECtHR and the fruitful interaction between its case-law and that of the courts of the Contracting Parties, a balance has to be kept – and where necessary restored – between, on the one hand, honouring the fact that the Contracting Parties are “the masters of the treaty” and, on the other hand, recognising that, in that same treaty, the Contracting Parties have endowed the ECtHR with the power to, in a binding way, give the final interpretation of its provisions.

\textsuperscript{88}) See: Gerards and Fleuren, \textit{supra} note 2, pp. 251-256.

\textsuperscript{89}) \textit{Idem}, \textit{supra} note 2, pp. 1-6.
I. Introduction

The Korean legal system is unique. It is a mixture of the American and the Continental legal system. Korea adopted the civil law system during the period of Japanese colonial rule which extended from 1910 to 1945. Korea also experienced the common law system during the period of American military government from 1945 to 1948. The Founding Constitution of Korea was established on July 17, 1948.

Koreans suffered the Korean War from 1950 to 1953. After the War, Korea was one of the poorest countries in the world. Since then Koreans have experienced a rapid social change and economic growth. Now, Korea is a member of the Organization for Economic Cooperation and Development and the G-20 major economies.

As society changed dramatically, Korea has adopted nine constitutional amendments. With these amendments, Koreans experienced presidential and parliamentary system. Also, Korea has adopted various kinds of constitutional adjudication system. Since Koreans had little experience in the western legal culture, Korea has consulted the experience of the western countries for judicial reforms. It became a kind of tradition to consult the international and foreign law for the adjudication of cases in the Korean courts including the Constitutional Court.

In this paper the Korean experience of the constitutional adjudication system will be overviewed. And the practice of judicial citation of international and foreign law will be analyzed. It will show the current situation of constitutional globalization in Korea.
II. Constitutional adjudication system in Korea

1. The Founding Constitution

In Korea, when the Founding Constitutional Bill was drafted, there was a dispute over the constitutional adjudication system. The nominee for the first Chief Justice of the Korean Supreme Court argued that the power of judicial review should belong to the ordinary courts. But scholars who were in charge of drafting the Bill insisted it would be improper to adopt the American system since many judges’ credibility suffered in their collaborating with the Japanese government during the colonial period. So the final version adopted the European style of constitutional adjudication.

The Founding Constitution created the Constitutional Committee which had a power of judicial review over Acts passed by the National Assembly. The Article 81 of the Founding Constitution stated, when the judgment in any case was premised on the constitutionality of law, the court should refer such question to the Constitutional Committee and should render judgment in accordance with the decision thereof. However, the Supreme Court had the jurisdiction to finally decide whether administrative orders, regulations, and administrative acts were consistent with the Constitution. This arrangement is an example of a mixture of the American and the Continental legal system.

The Chairperson of the Constitutional Committee should be the Vice President. Five justices of the Supreme Court and five members of the National Assembly should serve as Members of the Committee. At that time the Supreme Court consisted of a Chief Justice and five Justices. A decision holding unconstitutionality should require a two thirds majority vote of the Committee.

From 1948 to 1961, there were six cases referred to the Constitutional Committee for judicial review. The Committee rendered a decision of unconstitutionality in two cases in 1952. Considering the fact that constitutional adjudication was entirely new to Korea, it was remarkable that the Committee found the Acts of the National Assembly unconstitutional in the middle of the Korean War.

The first case the Committee found a pending law unconstitutional was about the Agricultural Land Reform Act. According to this Act the government could sue a farmer who failed to pay the price of the allotted land, and the appeal to the decision of the court of first instance could be made only to the Appellate Court. The Committee declared that the
right to have his/her case heard by the Supreme Court is a basic right of the people. Therefore the Act which made the Appellate Court the court of last resort deprived the people of their right to appeal to the Supreme Court.

The second case was also related to the right to trial. When the Korean War broke out, the government issued the Special Decree on Punishment of Crimes under National Emergency. The Decree provided that adjudication of crimes which committed during the state of emergency was limited to the district court and no appeal allowed. The Constitutional Committee found that the presidential Decree which prohibited appeal to emergency criminal trials was unconstitutional.

2. The Second Republic

The Student Revolution of April 19, 1960 overthrew the first President Rhee’s regime. The Constitution of the Second Republic went into effect on June 15, 1960. The new Constitution adopted a parliamentary system. This was the first and the only instance Korea turned to a parliamentary cabinet system instead of a presidential system.

The Constitution of the Second Republic introduced the Constitutional Court. This Court had jurisdiction over (1) review as to the constitutionality of law, (2) final interpretation on the Constitution, (3) dispute as to jurisdiction among the State authorities, (4) dissolution of political party, (5) impeachment trial, (6) litigation on the election of the President, Chief Justice and Justices of the Supreme Court.

The Constitutional Court would be composed of nine Judges. The President, the Supreme Court, and the House of Councilors should designate three Judges respectively. The tenure of the Judge should be six years and three of the Judges should be replaced every two years.

The Constitutional Court Act was passed on April 17, 1961. However, before the Constitutional Court was organized, May 16 coup led by General Park broke out and the Constitutional Court Act became nullified. Although the Constitutional Court of the Second Republic could not be formed, it played an important role of reference in the formation of the current Constitutional Court.
3. The Third Republic

After 2 year military rule, a new Constitution was adopted and Korea returned to a presidential system. The Constitution of the Third Republic introduced the American style judicial review. The ordinary courts were authorized to review the constitutionality of statutes. The Supreme Court had the power to decide with finality the constitutionality of a law when this was prerequisite to a trial.

During the Third Republic, economic development was placed a higher priority on protection of civil rights. The executive branch led by the strong President was much more powerful than the judicial branch. The Supreme Court failed to exercise its new power of judicial review.

However there was an important case the Supreme Court exercised its power of judicial review. According to the State Tort Liability Act, members of the armed forces who died in action or injured in the performance of their official duties were barred from seeking damages from the government in the event that they or their family had received indemnity in the form of accident compensation or annuity as determined by other codes. In 1971 the Supreme Court held this law unconstitutional on the grounds that the purposes of accident compensation and tort remedies were totally different.

This judgment invoked fury of the President and the executive branch since the Korean government was suffering fiscal pressure. Korea entered the Vietnamese War from 1964 to 1973 and thousands of military personnel died or injured in action. At that time Korean economy was too weak to guarantee full compensation for persons killed or injured in battle. In 1972 the Constitution was amended and the limitation of state tort liability was stipulated in the Constitution. The paragraph 2 of Article 26 of the 1972 Constitution read “in case a person on active military service, or an employee of the military forces, a public official of the police, and others as defined by law, suffers damages in connection with the execution of official duties such as combat action and training, he or she shall not be entitled to claim against the State or public entity for compensation on grounds of unlawful acts of public officials done in the exercise of official duties, except for compensation as determined by law.” With this amendment of the Constitution the State Tort Liability Act survived the judgment of unconstitutionality.
4. The Fourth and Fifth Republic

According to the Constitution of 1962 the presidency was limited to two terms. In 1969 the constitutional amendment was forced through the National Assembly to allow President Park to seek a third term. President Park was re-elected in the 1971 presidential election. But the ruling party was defeated in the parliamentary elections and the opposition party had a power to pass constitutional amendments. President Park declared a state of national emergency in December of that year. The National Assembly was dissolved and the Constitution was suspended. A draft prepared by the Emergency State Council submitted to a national referendum and the Constitution was amended in December 1972.

The 1972 Constitution reintroduced the Constitutional Committee. This was a decision made in reaction to the experience during the third republic when some members of the judiciary had rendered decisions finding statutes unconstitutional in opposition to the will of the executive. Reintroduction of the Constitutional Committee was designed to reduce the adjudication of constitutional issues to a nominal agency, and thereby hollow out the power of constitutional justice. The Constitutional Committee was composed of 9 members appointed by the President, 3 of whom were nominated by the National Assembly, and another 3 designated by the Chief Justice of the Supreme Court. No review of the constitutionality of a statute has been made in this Committee.

The economy continued to flourish under the authoritarian rule. However students and activists for democracy continued demonstrations and protests for the abolition of the 1972 Constitution. In the midst of political turmoil, President Park was assassinated in 1979. After the assassination of President Park, General Chun took a power and declared martial law in May 1980. In September of that year, Chun was elected president by indirect election. The amendments to the Constitution were established by national referendum in October 1980. The new Constitution maintained the presidential system and the Constitutional Committee. President Chun succeeded in economic and foreign policies. However, because of lack of legitimacy, the public trust in the government was low.
5. The current Constitution

In June 1987, more than a million students and citizens participated in the nation-wide anti-government protests. As a result both ruling party and the opposition announced their own drafts for a new Constitution. For the first time in Korean history, a proposal for constitutional revision was prepared through negotiations and cooperation between the government and the opposition parties. After passing the National Assembly, the proposal was put to a national referendum. The proposal was consented and promulgated in October 1987.

It was the first time that the revision took place as a result of the people’s demand for a system in which they could freely choose their own government. Under this current Constitution democracy in Korea has been fully realized. During the revision process, different political factions expressed different views on how to structure the system of constitutional adjudication. As negotiations progressed, the ruling party and the opposition eventually agreed to establish an independent Constitutional Court.

The Constitutional Court is composed of 9 justices appointed by the President. Among the justices, 3 shall be appointed from persons selected by the National Assembly and 3 appointed from persons nominated by the Chief Justice of the Supreme Court. The Constitutional Court has jurisdiction over (1) the constitutionality of a law upon the request of the ordinary courts, (2) impeachment, (3) dissolution of a political party, (4) competence disputes between State agencies, between State agencies and local governments, and between local governments, (5) constitutional complaint.

According to the Constitution and the Constitutional Court Act, any person may file a constitutional complaint when any of his or her fundamental rights has been violated by an action or omission from the public power. A constitutional complaint was unfamiliar to Koreans and the people expected the new Constitutional Court to be a relatively quiescent institution. However, the Court has become the embodiment of the new democratic constitutional order of Korea. The Constitutional Court is routinely called on to resolve major political conflicts and issues of social policy. Since its establishment in 1988, the Court has rendered about 30,000 decisions among them more than 95% of cases were constitutional complaints. The Constitutional Court is consistently rated one of the most trusted and influential institutions in Korea by public.
Ⅲ. The constitutional globalization in Korea

1. The adoption of constitutionalism in Korea

All states have constitutions which consist of a set of rules structuring government and limiting its power. All democratic states have constitutions which declare the rule of law, a separation of power, and protection of human rights. All human beings shall be assured of inherent dignity and have fundamental and inviolable human rights. Constitutions of democratic states share same idea of constitutionalism.

The globalization of constitution develops the concept of global constitutionalism. The construction of some international organizations, such as the European Union and the World Trade Organization not to mention the United Nation, strengthens the idea of global constitutionalism. The United Nations Charter is called as a constitution of the international community.

Until the late nineteenth century Korea insisted the policy of seclusion under the influence of China. The defeat of China in the first Sino-Japanese War forced Korea to open its border under the influence of Japan. The Japanese government wanted to separate the Korean dynasty from China. So Japanese urged Koreans to accept the idea of constitutionalism. In 1895 the Korean dynasty declared the 14 Guiding Principles of the Nation which may be viewed as the first modern constitution of Korea. However the system of government was an absolute monarchy.

After the Japanese occupation in 1910, a military and diplomatic campaign for independence started. During this campaign many Korean activists learned the western democracy and global constitutionalism. In 1919 the Provisional Government of Korea established in Shanghai, China, and the Provisional Constitution of the Republic of Korea was promulgated. The Provisional Constitution declared the sovereignty of the people, parliamentary representation, separation of power, guarantee of basic rights, and the rule of law. This Constitution was a provisional one but a very modern written constitution. The members of the Provisional Government were deeply influenced by the Paris Peace Conference and the Fourteen Points of Woodrow Wilson.
2. Constitutional globalization in Korea

Global constitutionalism has exerted a deep impact on the Korean constitutional justice. Korea had no sooner accepted the constitutional adjudication system than independence was achieved. Korea was one of the earliest adopters of the judicial review in the world. During the Japanese colonial rule there was no rule of law but rule by law. Since Koreans had no experience in the constitutional adjudication, the Constitutional Committee of the first Republic heavily relied on the foreign and international jurisprudence. Judicial citation of foreign and international law became a tradition in Korean constitutional justice.

There are 74 rapporteur judges who are doing research for the nine Justices. One of their main roles is to explore the foreign and international law. As a result the decisions of Korean Constitutional Court contain more citation of foreign and international law than any other decisions of the Constitutional Courts or equivalent bodies of other countries. The important decisions valuable to mention are as follows.

1) Judicial citation of international law

(1) The United Nations

Korea became a full member of the United Nations in 1991. Since then Korea has ratified many important multilateral treaties proclaimed by the UN, such as International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, Convention on the Elimination of All Forms of Discrimination against Women, Convention on the Rights of the Child and so on. The Constitutional Court of Korea has applied these treaties to protect basic rights of people.


The Constitutional Court confirmed the unconstitutionality of the Regulation of the Ministry of Labor for Foreign Industrial Trainees which allowed employers not to apply the important articles of the Labor Standards Act to foreign industrial trainees. In this decision the Court invoked International Covenant on Economic, Social and Cultural Rights. According to Article 7 of the Covenant the Sates Parties to the Covenant should recognize the right of everyone to the enjoyment of just and favorable conditions of work.

② 2001 Hun-Ma 728, May 26, 2005

The Constitutional Court held unconstitutional the act of a prison officer who kept defendants handcuffed during the investigation procedure by public prosecutors. In this case
the Court cited Standard Minimum Rules for the Treatment of Prisoners. The Article 84 of the Rules says unconvicted prisoners are presumed to be innocent and shall be treated as such.

③ 2001 Hun-Ba 96, July 24, 2003

The Promotion Act for Employment of the Disabled made it a duty of business owners to employ the disabled more than one percent of total employees. The Constitutional Court found this Act constitutional mentioning the Vocational Rehabilitation (Disabled) Recommendation (No. 99) of the International Labour Organization.

④ 98 Hun-Ma 363, Dec. 23, 1999

The Act for Supporting Veterans created a system of mandatory additional points for veterans that gave veterans, mostly men, great favor in employment examinations for both public and private sectors. The Constitutional Court held the additional points for veterans were so high that this system discriminated against women and in favor of men. The Court consulted Convention on the Elimination of All Forms of Discrimination against Women and the other international treaties on abolition of various forms of discrimination.

(2) The Venice Commission

Korea became a full member of the European Commission for Democracy through Law (better known as the Venice Commission) in 2006. With this membership the Constitutional Court of Korea has been able to enhance its understanding of the international trend in the rule of law and the constitutional protection of basic rights. Main reference documents of the Venice Commission are very important resources for decision making of the Court.

The Ministry of Justice of Korea requested adjudication on dissolution of the United Progressive Party in 2013, alleging that the objectives and activities of the Party were against the basic democratic order of the Republic of Korea. Article 8 of the Constitution states that if the purposes or activities of a political party are contrary to the fundamental democratic order, the Government may bring an action against it in the Constitutional Court for its dissolution, and the political party shall be dissolved in accordance with the decision of the Constitutional Court. In dealing with this case, the Constitutional Court consulted the Guidelines of the Venice Commission on prohibition and dissolution of political parties and analogous measures (CDL-INF(2000) 1). The Court ordered dissolution of the United Progressive Party according to Article 8 of the Constitution (2013 Hun-Da 1, Dec 19, 2014).
(3) Others

The Wildlife Protection Act allowed the import of endangered species with official authorization but prohibited the use of endangered species against the condition for permission. The owner of black bears argued this Act violated his property right. The Constitutional Court held this Act constitutional. The Court cited the Convention on International Trade in Endangered Species of Wild Fauna and Flora as one of the reasons for its decision (2012 Hun-Ba 431, Oct. 24, 2013).

The Utility Model Act stipulated that if a holder of utility model right did not pay a registration fee within a certain period of time the utility model right would be extinguished. The Constitutional Court found this Act constitutional citing the Paris Convention for the Protection of Industrial Property (2001 Hun-Ma 200, Apr. 25, 2002).

2) Judicial citation of foreign law

It is a custom of the Korean Constitutional Court to research relevant foreign law in all important cases. The results of this research are often cited in decisions. A judicial citation of foreign law is a common practice in Korea. Especially the decisions of the European Court of Human Rights are very important reference material for the Korean Court. Since there is no regional court for protecting human rights in Asia, the Korean Court often consult to the case law of the European Court of Human Rights.

Korea is a leading country in a field of constitutional justice in Asia. The Korean constitutional adjudication system has had a decisive effect on the adoption of judicial review system in many Asian countries. The culture, social structure, and economic situation of Asia are significantly different from those of Europe and the U.S.A. The Korean experience in constitutional globalization is a valuable asset for the Asian people.

The Constitutional Court of Korea has been very active in securing meaningful ways of assisting newly democratized countries in their efforts to implement a constitutional adjudication system. With the leading role of the Korean Court, the Association of Asian Constitutional Courts and Equivalent Institutions as a regional forum for constitutional adjudicative Institutions in Asia has come into existence in 2012. Now there are sixteen member states in the AACC.

Also, participation in the Venice Commission has enabled the Korean Court to take its responsibility more seriously as the constitutional court of a country with a thriving constitutional system. The third World Congress of the World Conference on Constitutional Justice which was held in Seoul in 2014 marked a turning point of development of the Constitutional Courts of Korea and Asian neighbors. President Park Han-Chul of the Korean Court proposed to promote discussions on international cooperation in human rights including the possibility of establishing a human rights court in Asia. The World Congress adopted the Seoul Communiqué which contains the proposal of President Park.

A human rights court in Asia will be a historical monument to enhancement of protection of human rights in Asia. To achieve this goal the Constitutional Court of Korea shall play an important role. The constitutional globalization in Asia is very crucial for the establishment of durable peace and rule of law in this region.
The Status of International Treaties in the Constitutions of Arab Countries

Mohamed Achargui*

Introduction

It seems clear that the issue of Constitutional Law is no longer just an internal affair that has to do with the sovereignty of States which try to organize their powers and their relationships with their citizens through this Law according to regulations and rules based on the nature of their national political systems, but it has become now a matter with an international dimension due to the intellectual, political, economic and social transitions that the world has ever known through several historical stages. This has led to the strengthening of the relationship between the two distinct knowledge fields: Constitutional and International Laws, which have many common points as both of the mare branches of Public Law and share the study of the State, either as Subjects of International Law or as an institution where several internal elements interact.

This issue has triggered a considerable debate in the past between the supporters of the classical theory, which upholds the voluntary doctrine that has given rise to the theory of “the duality of law,” which says that the Domestic Law is completely independent of the International Law, and the supporters of the substantive doctrine who holds the “monistic theory” about which there are two positions: the first one maintains “the monistic theory” with the Supremacy of the International Law over the Domestic Law, while the second one considers that the Domestic Law comes before the International Law.

However, the debate between the two mentioned theories has become out of date, especially from the practical point of view, because most countries take into account their own interests, rather than adopting definitely one of the those theories1). However, they tend.

* President of the Constitutional Council of the Kingdom of Morocco
1) S. Belaid, International Law and Constitutional Law, in “International Law and Domestic Laws
most of the time to make the International Law come before the Domestic one, and this can be explained by the evolution of events that took place and is still happening in the field of International Law, and which was described by one of the researchers as the law of coordination or unification of the actions of various states. 2)

In parallel, the provisions of the Constitutional Law have also been considerably developed, resulting in the emergence of the idea of “the internationalization of national constitutions” 3) which has in turn been affected by international rules, namely human rights provisions. Nowadays, most constitutions contain chapters or clauses on the respect of human rights and public freedoms and also contain provisions or clauses on the relationship between the International Law, especially the international treaties, and the Domestic Law. This applies to the majority of Arab countries whose constitutions clearly provide that they are committed to international conventions and treaties.

Accordingly, this presentation is intended to determine the status of international treaties in the constitutional system of Arab States (Section I) and to learn how Constitutional Judicial Bodies deal with the legal status of international treaties in the Domestic Law (Section II).

Section I

The legal force of international treaties in the constitutional system of Arab States

Undoubtedly, the evolution of international relations from the end of World War II until the New World Order stage, and the political, economic and social transitions that resulted from that, have pushed all States to expand their international cooperation and to avoid narrow regional seclusion.

So, International Law has started to have a special status not only in academic studies,

---


but also in daily life, and this has led to its development and expansion as well its interaction with domestic laws which come within the jurisdiction of States.

Arab countries are no exception to this international openness as their constitutions have started to include a lot of the principles that are derived from international conventions and charters and also include provisions on the status of international conventions in constitutions or laws and the terms of their ratification and the way they are included in their domestic legal system.

1. The status of international treaties in constitutions and laws

1) The status of international treaties in constitutions

Many Arab States have made great strides towards the inclusion of international legal provisions in their constitutions, and most of them affirm their commitment to their international obligations.

Even if Arab States do not give a similar or better status to international conventions than to their constitutions, this does not detract from the status of these conventions in their legal system. Apart from the Dutch Constitution, which prohibits judges from controlling the constitutionality of laws and international conventions and allows the Parliament under Article 91 (Clause 3) to ratify an international convention whose provisions are contrary to the constitution provided that there should be a two-third vote, most of the constitutions of the developed countries do not provide for the supremacy of international conventions over their provisions.

As for Arab countries in general, we note that they all affirm that constitutions come before international conventions either explicitly or implicitly.

For example, the Tunisian Constitution recently promulgated (in 2014) explicitly states that international treaties have a status which is inferior to its provisions but superior to laws. In article 20 of this constitution, we find the following statement: “treaties approved and ratified by the Chamber of Deputies shall be superior to laws and inferior to the Constitution.”

The constitutions of other Arab countries, in general, refer to their supremacy over international conventions. In this context, we can take the example of the Moroccan

4) www.tunisie-constitution.org/
Constitution which stipulates in its preamble that the Kingdom of Morocco “is committed to giving international conventions, duly ratified by Morocco and according to the Constitution, a status that is superior to national legislation upon their publication ...”5) This means that even if international conventions are superior to laws, they are inferior to the Constitution and not similar to it.

2) The Impact of the Constitutional Review on International Treaties

The constitutional review is one of the obvious and necessary matters imposed by the evolution of political and social lives. And here we shall quote Napoleon Bonaparte who once said: “No constitution remains as it is, but it is related to people and circumstances.”6) However, the constitutional review has many impacts not only at the internal level, but also at the external level as it can concern the relationship of the State with the rest of international actors.

Therefore, we would like to know the impact of the review of the constitutions of Arab countries on their past and future international commitments.

1. Concerning the past international treaties: the majority of Arab countries’ constitutions have not dealt with the issue of international conventions which have become in conflict with the provisions of the Constitution after it has been reviewed, with the exception of Bahrain, Oman and the United Arab Emirates whose constitutions explicitly indicate that they continue to be committed to their past international obligations. For example, Article 72 of the Omani Constitution of 1996 stipulates that “the application of this Statute shall not prejudice treaties and conventions the Sultanate of Oman has entered into with other countries, international bodies and organizations”.7) This also applies to the Kingdom of Bahrain whose constitution, promulgated in 2002, stipulates in paragraph(a) of Article 121 that “the application of this Constitution does not breach the treaties and conventions which Bahrain has concluded with States and international organizations”.8)

8) www.shura.bh/LegislativeResource/Constitution/Pages/default.aspx
The Constitution of the United Arab Emirates, issued in 1971, has been more accurate in this regard in the sense that it clearly provides that its application does not prejudice the former international commitments of the UAE, as long as it was not agreed upon with the parties concerned. This is what we understand from Article 147 of the said Constitution which stipulates that “nothing in the application of this Constitution shall affect treaties or agreements concluded by member Emirates with States and international organizations unless such treaties or agreements are amended or abrogated by agreement between the parties concerned.”

Those examples are in line with what is provided for in Vienna Convention related to international treaties of 1969, which stipulates in Article 27, entitled “Internal Law and observance of treaties,” that “a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”

2. For subsequent treaties: Many Arab countries entitle their constitutional councils or courts to rule on the constitutionality of international treaties concluded with other parties. In fact, this approach is logical and it is opted for by many developed countries.

But the question which should be asked is: What if those Judicial Bodies consider that an international commitment is unconstitutional?

The ratification of an unconstitutional international convention is prohibited by some countries’ constitutions, like the Algerian constitution for example, which has taken a negative attitude in this area, as it does not expressly provide for the possibility of amending the Constitution to bring it into line with a conflicting international convention. Article 168 of the 1996 Constitution stipulates that “a treaty, an agreement or a convention shall not be ratified if it is deemed unconstitutional by the Constitutional Council.”

While many other Arab countries’ constitutions have considered that in case there is an international commitment which contravenes their provisions, it is ratified only after these constitutions are reviewed. Therefore, we find that paragraph 4 of Article 55 of the Moroccan constitution stipulates that “if the Constitutional Court states that an international commitment contains a clause which does not conform to the Constitution, this commitment shall not be ratified unless the Constitution is reviewed.” This is the same approach adopted by the Mauritanian Constitution of 1991 in (Article 79) and the Constitution of Djibouti

---

10) www1.umn.edu/~viennaLawTreatyCONV.ht
12) www mauritania mr/index php?niveau=5&cderub=4&codsoussous=74&codesousrub=11
issued in 1992 (the third paragraph of Article 37)\(^{13}\) as well as the constitution of the Comoros promulgated in 2001 (the second paragraph of Article 10).\(^ {14}\)

So, these countries have followed the example of many European countries such as France whose Constitution of October 4, 1958, namely Article 54, stipulates that “if the Constitutional Council...decides that an international commitment violates the Constitution, this commitment shall not be ratified or approved unless the Constitution is reviewed.”\(^{15}\)

The same thing applies to Spain as its Constitution of 1978 specifies in paragraph 1 of Article 95 that “the conclusion of an international treaty containing stipulations contrary to the Constitution shall require prior constitutional amendment.”\(^{16}\)

2. The relationship between international treaties and law

If there are some Arab countries whose constitutions do not determine the relationship between international treaties and the law, such as Jordan, Sudan, Iraq, Qatar, Lebanon and Yemen, there are others who have opted for one of the two following positions: either to grant treaties the force of law or to make them superior to the law.

a. Treaties having the force of law: some Arab countries have granted international treaties only the force of law, like Somalia (Article 6 of the constitution promulgated in 1960)\(^ {17}\) and Kuwait whose Constitution issued on November 11, 1962 states in the first paragraph of Article 70 that “the treaty shall have force of law after its conclusion, ratification and publication in the Official Gazette...”\(^ {18}\)

The same thing can be said about the Sultanate of Oman (Article 76 of the Constitution referred to earlier) and Bahrain (the first paragraph of Article 37 of the Constitution previously referred to) and finally Egypt (article 151 of its constitution promulgated in 2014).

b. Treaties which are superior to the law: It should be noted here that the countries that have adopted the principle of the unity of law like Morocco, Tunisia, Algeria, Djibouti... have given international conventions a status which is superior to that of national legislation,
but under specific conditions. The Moroccan constitution, which has made comprehensive, in-depth and advanced reforms to the Moroccan constitutional system, stipulates in its preamble that the Kingdom of Morocco is committed to “… making international conventions, duly ratified by Morocco in accordance with the provisions of the constitution and the laws of the kingdom as well as the immutable national identity, superior to national legislation once published and to harmonize in consequence the pertinent provisions of national legislation.” This has been adopted by the Tunisian constitutional legislator in Article 20 of the Constitution referred to earlier.19)

It should also be noted that some States require reciprocity to make international conventions superior to their national legislation. For example, the Mauritanian constitution stipulates in Article 80 that “treaties or conventions regularly ratified or approved shall have, upon their publication, an authority superior to that of the laws, subject, for each convention or treaty, to their application by the other party.” The same thing applies to the Constitution of Djibouti (Article 37) and the constitution of Comoros (Article 10).

The same position has been taken by other non-Arab countries such as France whose constitution stipulates in Article 55 that “international treaties or conventions duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each convention or treaty, to its application by the other party.”

Arab countries not only do not agree on the legal force of international treaties, but they also run counter to each other with regard to the modalities of the ratification of these treaties and their inclusion in their domestic laws?

3. The ratification of international treaties and their inclusion in domestic laws

The ratification of international treaties is a fundamental procedure through which the State expresses or reflects, according to the provisions of its Constitution, its official consent to be bound by the treaty. And without this procedure the treaty shall not enter into force.

After having had a look at the constitutions of many countries, we have found out that the authorities in charge of the ratification of treaties differ from one country to another. There are countries in which the ratification can be made by the Head of State only or in conjunction with the legislative authority, while there are other countries where the

legislative authority is the only authority entitled to ratify treaties. Likewise, the inclusion of treaties in domestic laws varies from one country to another.

1) The constitutional status of international treaties in terms of how they are ratified

Most Arab countries’ constitutions have vested Heads of State with the authority to ratify international treaties. For example, the Moroccan Constitution stipulates in Article 55 that the King shall sign and ratify the treaties, and also the Tunisian Constitution stipulates in Article 77 that the President of the Republic “… shall ratify treaties and order their publication.” Moreover, the Mauritanian Constitution also provides in Article 36 that “the President of the Republic shall sign and ratify the treaties.” The same thing applies to many other Arab countries like Algeria, Djibouti, Kuwait … etc.

However, it must be pointed out that the authority delegated to some of the Heads of State in many Arab countries with regard to the ratification of international treaties is not absolute. For example, when it comes to treaties of particular importance, namely those which affect the sovereignty of the State, the rights and freedoms of citizens, the legislative competence of the Parliament or Public Finance, etc, the Head of State cannot ratify them unless the parliament approves this ratification under the law.

Accordingly, the Moroccan Constitution stipulates in the second paragraph of Article 55 that “the King shall sign and ratify the treaties. However, the treaties of peace or union, or those related to the delimitation of the frontiers, the trade treaties or those which engage the State finances or the application of which necessitates legislative measures, as well as those treaties relative to the individual or collective rights and freedoms of citizens, shall only be ratified after having been previously approved by the law…”

Furthermore, it should be underlined that the King can also submit to the Parliament treaties and conventions, on subjects other than those referred to above, before ratification. This is referred to in the third paragraph of Article 55 of the Constitution: “the King can submit to the Parliament any other treaty or convention before its ratification.”

We find the same thing in many other Arab countries’ constitutions like the Mauritanian Constitution (Article 78), the Djiboutian Constitution (Article 63) and the Kuwaiti Constitution (Article 70).

It is noteworthy that the Egyptian Constitution is quite particular in this regard in the sense that it requires that peace and alliance treaties and those related to the rights of
sovereignty should be put to a referendum before ratification in accordance with its Article 151 which stipulates that “the President of the Republic shall represent the State in its foreign relations and conclude treaties and ratify them after the approval of the House of Representatives. Such treaties shall acquire the force of law upon their publication in accordance with the provisions of the Constitution. Voters must be called for referendum on peace and alliance treaties and those related to the rights of sovereignty. Such treaties shall only be ratified after the announcement of their approval in the referendum. In all cases, treaties that are contrary to the provisions of the Constitution or which results in ceding any part of State territories may not be concluded.”

2) The constitutional status of international treaties in terms of how they are included in domestic laws

It seems that there is no standardized way of how to incorporate a treaty into a domestic law.20) We can distinguish between two methods: there is Automatic Insertion by which the treaty enters into force upon ratification and publication in the Official Gazette. This method has been adopted by many countries21) such as Germany (Article 25), Netherlands (Article 93), Spain (Article 96) and Switzerland (Article 190). The second method is Legislative Insertion in which the ratified treaty does not come into force unless it is included in the domestic legal system under a law or a decree or any other appropriate means in accordance with the legal procedures applicable in the countries concerned. Among the countries that have followed this option, we find both England in which the treaty turns into a legislative text issued by the Parliament, and the United States of America in which the treaty is included into the domestic law by a presidential statement, knowing that Clause 2 of Article 6 of the American Constitution stipulates that all treaties concluded, or which shall be concluded, under the Authority of the United States, shall be the supreme Law of the Land.

Most Arab countries have opted for Automatic Insertion in the sense that once the treaty is ratified and published in the Official Gazette, it automatically comes into force, hence no need for a law to that effect. This is stipulated in constitutions which expressly provide for the supremacy of international conventions over laws.

In this regard, the Moroccan Constitution also stipulates that the Kingdom is committed to making international conventions, duly ratified by Morocco, superior to national legislation upon their publication, and it is also committed to harmonizing in consequence the pertinent provisions of national legislation. We should note here that many of the national legislation issued before the current Constitution had included provisions providing for the supremacy of international conventions over domestic laws. For example, the Moroccan Citizenship Law, issued in 1958, has granted international treaties and conventions, ratified and published in the Official Gazette, a status which is superior to that of domestic law. The first article of this Law stipulates that “the provisions of international ratified treaties and conventions, whose publication is approved, shall prevail over the provisions of domestic law.”

In addition, Article 68 of the Law No. 2.00 on Copyright and Related Rights promulgated on 15 February 2000 stipulates that “in the case of a discrepancy between the provisions of this Law and those of an international treaty ratified by the Kingdom of Morocco, the provisions of the international treaty shall apply.”

So, since Arab States’ constitutions seem not to be in line with each other with regard to the legal force of international treaties, as we have seen above, it is useful to have an idea about the position of their Constitutional Judiciary in this regard to draw a complete conclusion. This is what we are going to discuss in Section II.

Section II

The control of the constitutionality of international treaties in Arab countries

The control of the constitutionality of international treaties is an important subject within the academic studies because it raises many issues, particularly the issue of how to harmonize the principle of the supremacy of the Constitution over all national legislation, which is a fundamental guarantee for the sovereignty of the modern State, and the possibility of States concluding treaties that may result in making reciprocal concessions.


23) www.portal.unesco.org...copyright
between contractors in order to achieve common interests.

In addition, globalization requires more communication and interdependence among countries all over the world, which is evident in the conclusion of many international treaties. However, the real application of international commitments may sometimes result in conflicts with domestic laws, including constitutions, which means that competent bodies should be designated to control the constitutionality of treaties, in addition to the jurisdiction given to other courts with regard to the conformity of laws with international conventions.

Accordingly, we will deal with three topics in this Section: first, the bodies in charge of controlling the constitutionality of international treaties, second, the types of control over the constitutionality of international treaties, and third, some examples of decisions rendered by some Judicial Bodies in charge of controlling the constitutionality of international treaties.

1. Bodies in charge of controlling the constitutionality of international treaties

Judicial control of the constitutionality of treaties provides a fundamental guarantee for the preservation of the constitutional-supremacy principle, as well as for the protection of the higher interests of the state parties. While the process of establishing, signing, and ratifying international commitments involves several stages, sometimes engaging several authorities (the Head of State, the executive authority, and the legislative authority) – taking into account the political dimension of the process – it is ultimately the purview of the judicial authority to decide on the degree of alignment between international commitments and the constitutional provisions of the concerned countries.24)

The constitutions of some Arab countries explicitly stipulate that their respective courts or constitutional councils shall control the constitutionality of international treaties, whereas other Arab countries refer only to controlling the constitutionality of laws in general.

1) Explicit control

The constitutions of many Arab countries, including Morocco, Tunisia, Algeria,
Mauritania, the Comoros, and Palestine, explicitly delegate the control of the constitutionality of international treaties to an independent constitutional judicial body, thus adopting the same approach as many European countries – like France, for instance – which assign such a competence to a constitutional council.

The Moroccan Constitution, for example, stipulates under Article 55 that, “Should the Constitutional Court – upon a case referral by the King, the Head of Government, the Speaker of the House of Representatives (or a sixth of its members), or the Speaker of the House of Councilors (or a quarter of its members) – rule that a given international commitment includes a clause that is inconsistent with the Constitution, the ratification of the said commitment may not proceed before a constitutional review is undertaken.” This means that the Moroccan Constitution has granted some specific authorities the right to refer a treaty to the Constitutional Court, which is exclusively mandated to assess the degree of treaty alignment with the Constitution. The Mauritanian Constitution adopts the same approach (Article 79), as does the constitution of the Comoros (Article 10), while the Tunisian Constitution confers the power to refer a treaty to the Constitutional Court on the President of the Republic exclusively (Article 120).

2) Implicit control

The constitutions of some Arab countries do not explicitly provide for controlling the constitutionality of international treaties, but they do provide for controlling the constitutionality of laws in general, as is the case with the Kuwaiti Constitution (Article 173), the Bahraini Constitution (Article 106), and the Egyptian Constitution (192).

Real-life practice shows that constitutional courts or supreme courts have had the opportunity to evaluate, in one way or another, the constitutionality of international treaties. This applies to the three countries mentioned in the paragraph above, which have given their international treaties the same force as laws, as well as to the countries that refrained from defining the legal weight of treaties, like Sudan whose Article 121 of the Constitution states, indeed, that the Constitutional Court is in charge of deciding on the constitutionality of laws and texts, but without explicitly granting it the power to control the constitutionality of

25) Article 182 of the revised third draft of the Palestinian Constitution, including all amendments until May 4, 2003, Arab Countries’ Constitutions, ibid, p. 454.
treaties. So, what are the types of control exercised by constitutional judicial bodies in Arab countries with respect to the constitutionality of international treaties?

2. Types of control over the constitutionality of treaties

We can distinguish between two types of control here: prior control and subsequent control.

1) Prior control

Controlling the constitutionality of treaties does not represent an issue for Arab states whose constitutions stipulate prior control—that is, the examination of a treaty before it is ratified and published in the Official Gazette. This procedure creates a collaborative platform for all the authorities that oversaw the entire process of treaty negotiation, signing, and ratification. Most Arab countries adhere to this process.

Under Article 55(2) of the Moroccan Constitution, international treaties are referred to the Constitutional Court before ratification. The same approach is adopted by the Tunisian Constitution, which stipulates under Article 120 that “the Constitutional Court has the exclusive prerogative to control the constitutionality of the treaties referred to it by the President of the Republic, before the approval bill is sealed.” The same can be found in the constitutions of Mauritania and the Comoros, under Articles 79 and 39, respectively.

Prior control of the constitutionality of international treaties is considered more consistent with legal logic, and many countries apply it, including France (Article 54 of its 1958 constitution).

2) Subsequent control

Surely, the countries whose constitutions stipulate both prior and subsequent control of international treaties may face complications. While, as established above, prior control does not cause any issues, subsequent control may lead to ambivalence, especially for countries that do not define in their constitutions the legal merit of a treaty in relation to the law of the land, particularly the constitution. The complication lies in that subsequent control might affect a country’s commitments to nations it has existing agreements with, as
would be the case if a decision rules that these agreements are unconstitutional.

For instance, an Algerian scholar observes that the Algerian Constitution, besides providing for the prior control of the constitutionality of international agreements, also implies subsequent control. The scholar bases his observation on Article 165 of the Algerian Constitution, which stipulates that “the Constitutional Council, besides other exclusive responsibilities explicitly conferred to it by other constitutional provisions, shall rule on the constitutionality of treaties, laws, and regulations, either through an opinion expressed before these become enforceable, or through a decision if the situation is reversed (sic).”

Decidedly, we do not adhere to this opinion, given that the Algerian Constitution contains one article dedicated to treaties (Article 168), which stipulates that a treaty shall not be ratified if the Constitutional Council deems it unconstitutional, and another article devoted to legislative and regulatory texts (Article 169), which provides that these texts lose their effect the very day the Constitutional Council rules them unconstitutional.

Mindful of the issues linked to the subsequent control of the constitutionality of treaties, some countries have made their constitutions specific, explicitly preventing subsequent control in order to ensure that their loyalty to international commitments remains unbroken.

The Turkish Constitution of 1982, for example, states in the last paragraph of Article 90 that “the international agreements that have duly acquired legal force may not be challenged before the Constitutional Court over unconstitutionality. In case of a discrepancy between international agreements and effective laws related to fundamental rights and freedoms – as a result of differences in provisions related to similar matters – the international agreement shall prevail.”

Controlling the constitutionality of treaties may entail other legal issues, which constitutional justice helps to clear.

3. Examples of decisions rendered by judicial bodies in charge of controlling the constitutionality of international treaties

Based on a review of decisions rendered by several constitutional and conventional judicial bodies with regard to the status of international conventions, it appears that some


Arab constitutional courts have had the opportunity to express their opinion about the question, while in other countries, including Morocco, the matter has only been presented before conventional courts.

1) Decisions rendered by some constitutional courts

Interestingly, even some of the Arab nations whose constitutions stipulate the control of the constitutionality of laws in general – that is, without specifying the constitutionality of treaties per se – have repeatedly seen their constitutional judiciaries decide on the constitutional merit of international treaties.

In Bahrain, for example, the Constitutional Court rejected a case filed by the Bahraini Lawyers Association against the Prime Minister, which requested a decision of unconstitutionality of a decree amending some provisions of the lawyer-practice law, No. 27 of 1980, which regulates the work of foreign law consulting firms in the Kingdom of Bahrain. The amended decree granted the said firms licenses to provide legal advisory services in the country.

The Constitutional Court relied in its decision on international agreements Bahrain has signed and ratified, either with GCC countries, or with the United States (a free-trade agreement), as well as on Bahrain’s ratification of the treaty establishing the World Trade Organization. All these agreements grant foreigners the right to practice law and provide legal consulting.29)

Thus, the constitutional judiciary in Bahrain decided that international treaties prevail over domestic law.

In Sudan, the Constitutional Court, which states that an international treaty becomes part of domestic law, decided that the Charter Against Torture and Article 29 of the International Criminal Court’s Statute, both excluding torture from being subject to the statute of limitations, shall not prevail over the Sudanese Code of Criminal Procedure, as long as Sudan did not ratify these laws, despite signing on them.30)

In Jordan, the cabinet made a request for an interpretation of Article 117 of the Jordanian Constitution in order to verify whether this article allows the cabinet to amend an agreement

29) Text of the ruling in the Constitutional Control magazine, issued by the UACCC, Issue No. 4, 2012, p.p. 36-44.

30) Excerpt of the decision text in the Constitutional Control magazine, issued by the UACCC, Issue No. 5, 2014, p. 124.
between the Kingdom of Jordan and an international oil company, without requiring the passing of a new law, considering that Article 41(3) of the said agreement permits the possibility of making amendments by virtue of a written agreement.

The Constitutional Court issued an interpretive decision, No. 1 of 2013, in which it unanimously stated that “The Cabinet does not have the authority to offer any concessions related to investments in mines, minerals, or public amenities, regardless of the value of such a concession, unless it is backed by a law issued specifically for this matter, and regardless of whether this concession is total or partial, or whether the two parties agree on the amendment or modification.”

This decision shows that the Jordanian Constitutional Court favored the stipulations of the constitution regarding competence over the provisions of contractual agreements.

It should be noted that the Jordanian judiciary, as shown through some decisions of the Court of Cassation, also states that international conventions prevail over domestic law.

Decision No. 3965/2003, issued on February 29, 2004 by the Court of Cassation, states that, “Fiqh and justice all over the world, including in Jordan, agree that international conventions and treaties prevail over domestic laws, and it is not permissible to apply the provisions of any domestic law if they are inconsistent with these international conventions and treaties … and that has been our justice system’s approach without divergence.”

For its part, the Egyptian Constitution has granted the force of law to international treaties once they are published, and has absolutely prohibited the signing of any treaty that contradicts constitutional provisions. The Supreme Constitutional Court has previously had the opportunity to confirm the binding nature of international treaties vis-à-vis the state parties, and to demonstrate that the withdrawal of any state from a treaty releases it from complying to the treaty’s provisions, except in the case of a mandatory norm of general international law from which there can be no derogation (jus cogens) and to which the state remain bound.

Accordingly, the Court found that the core provisions of the treaty signed by Egypt, Syria, and Libya, as part of what used to be known as the Federation of Arab Republics, have a particular status specific to each of the three countries, and may not be inserted in the

Egyptian Constitution, and thus are not part of it.33)

2) Decisions rendered by the Moroccan judiciary regarding the status of international treaties

Research into the judiciary’s stance on the status of international treaties in the Moroccan legal system requires a distinction between two phases:

1. Before the 2011 constitution: Moroccan constitutions did not explicitly define the status of international treaties and conventions with regard to domestic law, while Morocco still met its international obligations. The first Moroccan Constitution of 1962 highlighted that Morocco vows to comply with the principles, rights, and duties of the international conventions. The 1992 Constitution went even further to confirm Morocco’s commitment to internationally recognized human rights.

Some constitutional scholars believe that this approach is consistent with the general principle of pactas unservanda, a key principle in all legal systems which dictates that the respect of treaties overrides the individual will of the state parties.34)

Indeed, a look into the provisions of Morocco’s administrative judiciary during this phase reveals that many of these provisions have highlighted that international conventions have supremacy over domestic law.

The Supreme Council (Morocco’s supreme court) confirmed in a decision issued on May 19, 1999, that Morocco’s accession to the UN Convention on the Carriage of Goods by Sea, signed in Hamburg on March 31, 1978, means it has become in force and legally binding on a national scale.35)

Another example would be the cases of two French lawyers who were denied admission to the Casablanca Bar because they did not speak Arabic, the official language in Moroccan courts by virtue of the legislation of January 26, 1965. Nonetheless, the appeal court annulled the two decisions, based on the judicial convention signed by the Kingdom of

35) File No. 4356/90.
Morocco and the Republic of France on October 2, 1957, and its additional protocol of May 20, 1965 regarding the domestic laws governing law practice. Along similar lines, the Supreme Council considered in its decision of October 1, 1976, that not speaking the official languages in the two countries (Arabic and French) does not preclude the admission of a French or a Moroccan lawyer to the Bar in either country. The French lawyer would just need to appoint a representative on his/her behalf in all the stages of the unwritten procedure.36)

In another important decision, and based on the fact that Morocco signed and approved the International Covenant on Civil and Political Rights of December 16, 1966, which came into force in 1976, the Supreme Council rejected the Dahir of February 8, 1961, relating to physical coercion. The decision was based on Article 11 of the aforementioned covenant, which states that “no one shall be imprisoned on the basis of inability to fulfill a contractual obligation.”37)

Therefore, it is clear from the instances described above that the Moroccan judiciary gave international conventions priority over domestic law, although, in some particular cases, domestic laws prevailed.

2. After the constitution of July 29, 2011: In addition to emphasizing Morocco’s compliance with the principles, rights, and duties of international conventions, and its commitment to internationally recognized human rights, the Moroccan Constitution states in its preamble that the Kingdom of Morocco commits to the protection and development of human rights and international human-rights law, taking into account the universal nature of these rights and their indivisibility. Morocco is also committed to making international agreements, as ratified by Morocco and in accordance with its constitutional provisions, its laws, and entrenched national identity, prevail, once published, over national legislation, and to working towards aligning this national legislation with the requirements emanating from the aforesaid ratification.

It is worth noting that up to this moment, no case relating to the status of international conventions in the Moroccan legal system has been presented to the Constitutional Court.

36) A. el OuazzaniChahdi, p.16.
Conclusion

From the examination of the status of international treaties in the constitutions of Arab countries, and through the study of a number of these constitutions, provisions, and decisions by competent constitutional courts, we have come to a number of conclusions:

1. Most Arab constitutions have given great value to international treaties, giving them supremacy over domestic laws. This shows that these nations have made important strides in opening up to the world, and have responded positively to the developments and transformations happening around the world, especially through the establishment of systems in which law and the respect of human rights prevail.

2. The fact that Arab constitutions prevail, either explicitly or implicitly, over international treaties does not undermine the constitutionality of these international conventions in these countries, as it is the international norm to give supremacy to the constitution over international treaties, not only in terms of the content of basic laws, but also with regard to the countries’ constitutional judicial bodies.38)

3. Control of the constitutionality of international treaties is exercised by judicial bodies even in Arab countries whose constitutions do not explicitly specify this authority, which confirms the increasing importance of constitutional courts in these countries.

4. Most rulings and decisions issued by the constitutional judiciaries in Arab countries aim to highlight the fact that international treaties prevail over the law, whether these nations have stated it in their constitutions, whether they have simply granted these treaties the force of law, or whether they have remained silent regarding this matter.

5. Finally, it is worth mentioning that the creation of an Arab Court of Human Rights by virtue of the decision issued on September 7, 2014 by the League of Arab States at the foreign ministers’ level – a court that will be required to implement the Arab Charter on Human Rights – will transform the status of this Charter in the human rights paradigm within the Arab nations that will ratify the statute of this Court.39)

38) Decision issued by the Russian Constitutional Court on July 14, 2015, that gives priority to the Russian constitution over all international conventions signed by Russia. For further information, visit the website www.arabic.rt.com/news/788551-%25D8%2584%25D9%2582%25D8%25A7%25D8%2584%25D8%25B2%25D8%25A7%25D9%2584%25D9%2582%25D8%25B2%25D9%2584%25D9%2582

References

4. www.tunisie-constitution.org/
8. www.shura.bl/LegislativeResource/Constitution/Pages/default.aspx
10. www1.umn.edu/…/viennaLawTreatyCONV.htm
18. www.kna.kw/ch/run.asp?id=i=hash_X2f1wKp4idpbs
23. www.portal.unesco.org--copyright
24. A. Youssef Choukri, "Controlling the Constitutionality of International Treaties – A Comparative Study
in Arab Constitutions,” p. 33, accessed at www.iasj.net/iasj%3Ffunc%3Dfulltext%26aid%3D29349
25. Article 182 of the revised third draft of the Palestinian Constitution, including all amendments until May 4, 2003, Arab Countries’ Constitutions, ibid, p. 454.
29. Text of the ruling in the Constitutional Control magazine, issued by the UACCC, Issue No. 4, 2012, p.p. 36-44.
35. File No. 4356/90.
36. A. el OuazzaniChahdi, p.16.
38. Decision issued by the Russian Constitutional Court on July 14, 2015, that gives priority to the Russian constitution over all international conventions signed by Russia. For further information, visit the website www.arabic.rt.com/news/788551-%25D8%25A8%25D9%2584%25D9%2588
39. Tarek Majzoub, “De l’utilité de la future Cour arabe des droits de l’homme,” Revue trimestrielle des droits de l’homme (103/2013) p.p. 645-671. Tribunal has rejected the inapplicability since it is plausible an interpretation according to the Constitution that allows implore the actions of filiation which guarantees the Civil Code itself.
The Guaranteeing of Direct Application of Human Rights

Gagik Harutyunyan*

Constitutional law and international constitutional practice gives special importance to assurance of direct application of human rights. Only with this approach it is possible to safeguard the rule of law, from which arises the social behavior of the individual, political behavior of political institutions of the state and the public behavior of authorities. The human being, their dignity, fundamental rights and freedoms, recognized by the State as the highest value, must ensure the strict implementation of the principle of rule of law and guarantee the restriction of State power by law.

The issue of direct application of human rights demands a precise scientific position regarding the following questions:

First, what is the constitutional legal nature and content of the concept of “direct application”?

Second, what are the guarantees for direct applicability of human rights?

Third, what role do constitutional courts have in the process of assuring the direct application of human rights?

At first, we will try to make a short reference to international constitutional practice. As a fundamental constitutional provision in constitutions of various countries, in particular the following is established:

- “The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law” / Constitution of Federal Republic of Germany, article 1, part 3.
- “The constitutional principles regarding fundamental rights, freedoms and guarantees are directly applicable to, and binding upon, all public and private entities” / Constitution of Angola, article 28, part 1.

* President of the Constitutional Court of Republic of Armenia
"All the rights recognized in the Constitution are directly applicable and enjoy equal guarantees of their protection"/ Constitution of Bolivia, article 109, part 1.

"While exercising authority, the people and the State shall be bound by these rights and freedoms as directly applicable law"/ Constitution of Georgia, article 7.

"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."/ Constitution of Portugal, article 18, part 1.

"Human and civil rights and freedoms shall have direct force."/ Constitution of Russian Federation, article 18.

"The state shall be limited by fundamental human and civil rights as a directly applicable right."/ Constitution of Armenia, article 3.

et cetera. The above mentioned and similar other constitutional provisions imply:

First, the absence of a unified approach regarding the nature of directly applicable rights, as well as its content. If in one section of countries, human and civil fundamental rights are considered directly applicable (Germany, Angola, Portugal, Armenia), in other cases all rights are considered that way (Bolivia, Russian Federation etc.)

Second, if one case specifically emphasises the condition of direct applicability of rights and to issues regarding its assurance (i.e. Bolivia, Russian Federation), in the other case the main emphasis is given to the issues on states limitation by those rights (i.e. Federal Republic of Germany, Angola, Georgia, Armenia etc.)

In both of those cases, we deal with such an organically interlinked legal reality, in which attempts to clarify the aim and main guarantee for its implementation on constitutional level. The aim is the assurance of direct applicability of rights. The main guarantee is the fixation of its binding and restrictive nature for state authorities. This is one of the main achievements of contemporary science of constitutional law.

One of the main characteristics of democratic, rule of law state’s constitutional systems is that even the people, who are bearers and sources of the power, cannot adopt a Constitution, which doesn’t guarantee the rule of law. Otherwise, the direct applicability of human rights is restrictive factor also for the people, during realization of its own power.

This condition has methodological significance in the aspect of assurance of the rule of law.

Constitutional norms should not only declare constitutional right, but should most clearly define, its implementation guarantees, states obligations, the permissible scope of
limitation of separate rights. Human rights have to be considered as practicable rights, while its limitations should arise from norms of international law, have to be proportional, should not distort the content and meaning of the right, be clearly prescribed by law, combined with equivalent responsibilities of public authorities.

Regardless of the peculiarities of constitutional provisions (formulations), the direct applicability of human rights at least implies the following:

1. A person can refer to the direct applicability of his/her rights, and expect equivalent protection in court,
2. Functional and structural guarantees should be established on constitutional level for the judicial protection of directly applicable rights. The establishment of the full constitutional complaint is considered as one of the most effective type for the realization of the above stated aim\(^1\).

What is the situation from the aspect of international legal regulations.

International legal documents relating to human rights conditionally can be divided into two groups.

a) Which require from the state parties to refrain from interfering with those rights (negative duty)
b) Which require from the state parties affirmative actions for fulfillment of those human rights (positive duty)

However, it should be noted that in general the rights stipulated in those documents, are not given the force of direct applicability. In theory of international law, it is accepted that the issue of direct applicability of rights enshrined in international legal documents, is decided based on the type of duties undertaken by state parties regarding them.

So, in the International Covenant on Civil and Political Rights, adopted in 1966, the classical, basic human rights are presented, however, none of the 53 articles of the covenant

\(^1\) See: Study on Individual Access to Constitutional Justice. Adopted by the Venice Commission at its 85th Plenary Session (Venice, 17-18 December 2010). On the basis of comments by Mr. Gagik Harutyunyan (Member, Armenia), Ms. Angelika Nussberger (Substitute Member, Germany), Mr. Peter Paczolay (Member, Hungary). Published by the Center of the Constitutional Law RA, 2012, p. 268.
regulates the question of direct applicability of those rights. Furthermore, while stating the
duties of state parties to the covenant regarding human rights, the terms “undertake to
ensure” “undertake to respect” are used.

In the International Covenant on Economic, Social, and Cultural Rights, the social human rights are
presented, and none of the 31 articles of the covenant directly regulate its direct applicability. State
parties’ duties concerning the rights enshrined in the covenant the terms “undertake to ensure”
“undertake to take steps to the maximum of its available resources” are used.

Similar regulations are provided in the Revised European Social Charter, Convention
against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and
other prominent international documents.

From the aspect of defining state duties, the 1950 Convention for the Protection of
Human Rights and Fundamental Freedoms differs from the mentioned documents relating
to human rights.

Prima facie the mentioned international document also doesn’t directly specify the direct
applicability of the rights enshrined in it, however the first article of the Convention states
“The High Contracting Parties shall secure to everyone within their jurisdiction the rights
and freedoms defined in Section I of this Convention”. It is noteworthy that while defining
the duties of state parties, the term “shall secure” is used in place of “undertake to ensure” or
“undertake to respect”. In theory of international law regarding the implementation of
international documents relating to human rights, it is accepted that when the state duties are
defined with the term “undertake to ensure” or “undertake to respect”, it implies that the
respective rights would be fixed in the level of national legislation, after which they become
fully operative, while the terms “shall secure”, “guarantee” imply the direct applicability
of the respective norms. Thus, from the moment of its ratification the norms of the
agreement apply directly, without even being fixed in the national legislation.

In the context of the above stated, it should be noted, that the European Court of Human
Rights in its decisions has not directly refer to the question on direct applicability of human
rights, however it referred to the direct applicability of the rights stipulated in the
Convention for the Protection of Human Rights and Fundamental Freedoms. For example,
in its judgment adopted on January 28, 1978 concerning the Ireland v. the United Kingdom
case, the Court explicitly specified that by substituting the words “shall secure” for the
words “undertake to secure” in the text of Article 1 (art. 1), the drafters of the Convention also intended to make it clear that the rights and freedoms set out in Section I would be directly secured to anyone within the jurisdiction of the Contracting States (Ireland v. United Kingdom, (5310/71), 18 January 1978, para. 239). From the stated judgment of the Court, we can imply that the rights and freedoms enshrined in Section I of the Convention have the force of direct applicability among the Council of Europe member states.

The agreements and relevant documents of the European Union are noteworthy as well. In 1963 Luxemburg’s Court of Justice adopted a decision concerning Van Gend en Loos, in which the Court specified that Article 12 of the Treaty Establishing the European Economic Community must be interpreted as producing direct effects. Later, this position was repeatedly reconfirmed by the Court of Justice and developed, and as a result of it the relevant Treaties of the European Union can be considered directly applicable. Thus, the EU Charter of Fundamental Rights can be considered in that list of documents as well. It should also be noted, that Article 288 of the 2007 Treaty on the Functioning of the European Union specifies, that the regulations of EU shall have general application and they are binding in their entirety and directly applicable in all Member States. So, the rights enshrined in EU treaties (agreements), as well as in the adopted regulations, are directly applicable for member states.

The general conclusion is, that in national law and in international law, the assurance of the direct applicability of human rights is considered as the most important condition for safeguarding the rule of law. The problem is, how to ensure it.

This issue was given specific importance, in the process of drafting the Concept Paper of Constitutional Reforms in Armenia. The thing is, that in all countries, where on constitutional level, the classical fundamental rights and the social, economic, cultural rights are not separated, the result of it is that the requirement of implementation of direct applicability of fundamental rights is put under question. As a rule, basic social rights and rights to freedom in terms of the structural nature are absolutely different from each other. Basic rights to freedom, first of all, require from the State to abstain from interference into these rights, while most of the social basic rights, just the contrary, require positive actions of the State for the fulfillment of those rights.

Constitutional solutions require the separation of social fundamental rights and the states aims, based on the requirements of the principle of legal certainty. All provisions which concern the social sphere, which oblige only the legislature and the executive should be
formulated as aims of the states policy, as these provisions are not direct legal requirements of a person, and include only aims, which the state has to fulfill (in the limits of its available resources). Unlike fundamental rights, the aims of the state are only objective-legal provisions and do not give rise to subjective rights.

At the same time it has to be noted, that there are numerous fundamental rights which are related to the social sphere which are directly applicable (i.e. right to freedom to choose his/her occupation, the right to strike of employees) and which can be protected by the way of constitutional justice as well.

The risk of enshrining “classical” and social basic rights without any distinction is, on the one hand, that the strictly binding nature of the “classical” basic rights may give rise to frustrated expectations also in the case of social basic rights, whereas, on the other hand - just the contrary - a less binding nature typical to social basic rights may mitigate the strict requirements set in respect of “classical” basic rights.

One of the main solutions to this issue is the demarcation of “classical” fundamental rights on one hand, and on the other, the legislative guarantees and aims of the state in social sphere on the other hand. Such demarcation gives the opportunity to specify all the fundamental rights based on the direct applicability of which a person will be able to protect his/her constitutional rights, including through individual constitutional complaint.

The above-mentioned clarifications are also important in the aspect of limitation of constitutional rights. Taking into account the multiplicity of legitimate interests, which can be necessary for limitation of fundamental rights, the list of those requirements cannot be exhaustive. However, the Constitution has to at least fix the requirements, which have universal recognition in contemporary constitutional law, and also in the first part of Article 51 of the EU Charter of Fundamental Rights. They include the precise fixation of the principles of proportionality, certainty and inviolability of rights. At the same, the constitution should specify special requirement for law regulating fundamental rights, the aim of which should be the creation of such prerequisites which would guarantee the effective operation of fundamental rights.

The next important issue is providing necessary guarantees for the implementation of the principle of rule of law. In democratic, rule of law states it is necessary, for the rule of law principle be a basis for:

a) At the core of the social behavior of an individual
b) At the core of political behavior of political institutions
c) At the core of the public behavior of authorities

Only in the presence of the stated necessary conditions, it is possible to assure the supremacy of the Constitution and direct application of human rights. The rule of law, being the essence of the rule of law state, implies that:

- Human rights must be constitutionally stipulated, guaranteed by law, as well as ensured and protected by adequate structural solutions;
- The principle of equality of everyone before the legal law must be respected and guaranteed;
- Laws and other legal acts must be in conformity with the principle of legal certainty, must be predictable, clear and free from gaps and ambiguities;
- The administration of power must be hinged on the guaranteeing the harmonization of functions and vested powers;
- The principle of legitimacy must underlie the administration of public authority;
- The principle of prohibition of arbitrariness must be guaranteed and the extent of discretion of the public authorities must be clarified;
- The State must bear a positive obligation in respect of guaranteeing, ensuring and protecting rights and must assume adequate public-legal responsibility;
- Any interference with fundamental rights and any action of the authorities must derive from the principle of proportionality;
- There must be necessary mechanisms for effective solution of legal disputes exclusively through legal measures;
- The justice must be independent and impartial.

Guaranteeing the principle of rule of law implies the simultaneous existence of all these interdependent and complementary legal conditions and the assurance of constitutional guarantees required therefore.

within the scope of the presidency of the United Kingdom in the Committee of Ministers of the Council of Europe and the forum on “European Standards of Rule of Law and the Limits of Discretion of National Authorities” (Yerevan, 3-4 July 2013) held within the scope of the presidency of the Republic of Armenia in the Committee of Ministers of the Council of Europe, are also taken into account.

In practical terms rule of law exists to the extent that the legitimacy of the authorities hinged on law is not at risk, laws are legitimate and derive from objective preconditions, and the judiciary is independent and impartial.

The Universal Declaration of Human Rights states, “the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”. It also stresses, that “all human beings are born free and equal in dignity and rights”.

Human dignity is the highest, self-sufficient value and submits proportionate claims towards manifestation of relevant public morality and humanism. A humane legal system does not imply only the existence of necessary subjective moral qualities of separate members of society. The most important thing is the existence of the adequate environment for their manifestation, formation of such background, in which every individual, authority, and the society as a whole will have the same axiological landmarks that build up upon the principle of the rule of law.

In real life, the Constitution should become the incarnation of social agreement regarding precisely those fundamental values which, in conditions of specific social reality are the moral foundation and the essence of the social behavior of an individual as well as the main characteristics of the social behavior of the authorities (defined by Kant, they are the moral law of their existence).

The history of constitutional development by itself is a history of self-knowledge of the society, history of conscious being, and meaningful existence in time.

The thousands year old words of Solon, the father of Athenian democracy, stated that Constitutions must be formulated taking into account the people and the time they are intended for: people with their perception of values, time given the level of its understanding.

In this context, what is the real situation regarding constitutional reality in our countries. The analysis shows that in most countries there is an underlined presence of crisis of constitutionalism, low level of constitutional and political ethics, deformation of constitutional development processes.
Typical features of social realities in many countries have become:

- High level of corruption
- General apathy and discontent
- Low level of political and electoral culture
- Not appropriate level of transparency of powers
- Absence of systemic integrity and safeguarding in the process of assuring protection of human rights
- Distrust among citizens regarding the judicial system etc.

All of the above leads to accumulation of public negative energy, which after collecting its critical mass, brings to social explosions. Such exact situation is formed in contemporary time in many regions of the world.

For avoiding such situations, social explosions and various “color revolutions”, it is necessary to objectively evaluate the situation and conduct equivalent preventive measures in order to overcome the deficit of constitutionalism.

In order to analyse the real situation, it is possible to refer to the results of the World Justice Project regarding the index of rule of law for the year 2015\(^2\).

Only several summarized results will be presented. First of all, the study covers 102 countries.

Second, in order to reveal general picture of evaluating the level of rule of law, 535 parameters were taken into account.

Third, all those parameters were grouped into the following eight groups:

- Level of separation of powers
- Level of corruption
- Protection of fundamental rights
- Transparency of administration
- Level of security
- Law-enforcement practice
- Criminal justice

\(^2\) See: Word Justice Project, Rule of Law Index 2015. The Index’s conceptual framework and methodology were developed by Mark D. Agrast, Juan Carlos Botero, and Alejandro Ponce. E-mail: aponce@worldjusticeproject.org
A short comparative analysis concerning some of the mentioned parameters will be presented.

Based on the conducted research in the year 2015, the summarizing index on rule of law had the highest level in Scandinavian countries – 85-87%.

In USA, the mentioned index constitutes 73% and the country is situated at the 19th place. Korean Republic is situated at the 11th place, among 102 countries, while the index of rule of law is evaluated at 79%. From 102 countries in 62 the mentioned index constitutes 50% and lower. It has to be taken into consideration, that such index is considered unsatisfactory result and is evidence of a dangerous deficit of constitutionalism.

What picture has been formed in relation to corruption? From 102 countries in 57 countries the situation is evaluated as unsatisfactory, that is to say the level of corruption is higher than 50%.

The most successful situation is in Denmark, Norway, Sweden, Finland and Singapore, where the level of corruption constitutes from 4 to 10%.

In the United States, the corruption rate is 25%, in the Republic of Korea 18%, (14th place out of 102 countries).

On the basis of what indicators is the following picture revealed? It is determined by taking into account 68 parameters, which are grouped into four generalized groups.

How much do state officials use their functions for personal gain?

- In the executive power;
- In the judicial system;
- In the army and police;
- In the legislative power.

The existing picture in 57 countries indicates the presence of social metastasis and deformation of constitutional values in real life.

Let us bring a number of other summarizations.

For example, regarding the rate of human rights protection the situation is the best in Finland, Denmark, Norway, Sweden as well as in Austria - 87-91%.

The United States holds the 26th place out of 102 countries and the degree of human rights protection is estimated at 73%. In the Republic of Korea, these indicators are assessed
at 25th place and 73% respectively. However, in 32 countries the level of the given indicator is estimated at 50% and below.

Not only the given numbers, but also the results of several other researches convincingly show that modern challenges of ensuring the real supremacy of the Constitution and establishing real constitutionalism in many countries are due to the low realization of the principle of supremacy of law and of providing the direct applicability of fundamental constitutional rights.

The importance of supranational institutions in protection of directly applicable rights also plays a major role in overcoming this alarming situation. For European countries the European Court of Human rights plays a crucial role. The precedential law of ECtHR became a component part of national law of Council of Europe state parties; it has a major role in the field development of law, and became an important factor for guaranteeing direct applicability of rights.

Throughout the last ten years, the regional and global collaboration among constitutional courts gained a new momentum.

The organization of Congresses of the World Conference on Constitutional Justice in Cape Town (2009), Rio de Janeiro (2011), Seoul (2014) and also the formation of more than ten regional cooperation bodies are eloquent examples, that the guaranteeing of supremacy of Constitution and direct applicability of human rights also gains a supranational character. In such circumstances the formation of regional bodies for protection of human rights becomes a pressing necessity, which would also be an important guarantee for the establishment of constitutionalism for countries of that region. In this aspect, the initiative of the Republic of Korea of establishing an Asian Human Rights Court is remarkable. Constitutional developments and contemporary international trends in cooperation of constitutional justice, the imperatives of overcoming deficit of constitutionalism and the guaranteeing of rule of law unequivocally indicate that the future Asian Human Rights Court will raise to a new qualitative level the protection of human rights and their direct applicability in this region.
Limitations of a National Human Rights System and ways to Overcome them through the Establishment of a Regional Human Rights Court
- The European Convention for the Protection of Human Rights and Fundamental Freedoms as seen from the Austrian perspective

Gerhart Holzinger* and Stefan Leo Frank**

I

Signed on 4 November 1950 in Rome, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) sets forth a number of fundamental rights and freedoms: right to life, prohibition of torture, prohibition of slavery and forced labour, right to liberty and security, right to a fair trial, no punishment without law, right to respect for private and family life, freedom of thought, conscience and religion, freedom of expression, freedom of assembly and association, right to marry, right to an effective remedy, prohibition of discrimination. More rights are granted by additional protocols to the Convention: Protocol No. 1 (1952): right to peaceful enjoyment of property, a right to education, right to free elections by secret ballot; Protocol No. 4 (1963): no deprivation of liberty for non-fulfilment of contractual obligations, right to liberty of movement and freedom to choose one’s residence, prohibition of a State’s expulsion of a national, prohibition of collective expulsion of aliens; Protocol No. 6 (1983): abolition of the death penalty; Protocol No. 7 (1984): right of aliens to procedural guarantees in the event of expulsion from the territory of a State, right of a person convicted of a criminal offence to have the conviction of sentence reviewed by a higher tribunal, right to compensation in the event of a miscarriage of justice, right not to be tried or punished in criminal proceedings for an offence for which one has already been acquitted or convicted (ne bis in idem), equality of rights and responsibilities as between spouses; Protocol No. 12 (2000): general prohibition of discrimination; Protocol No. 13 (2002): abolition of the death penalty in all circumstances, including for crimes committed in times of war and imminent threat of war.

* President of the Constitutional Court of the Republic of Austria.
** Deputy Chief Executive Director of the Constitutional Court of the Republic of Austria.
The Contracting States undertake to secure these rights and freedoms to everyone within their jurisdiction (Article 1 ECHR). This (limited) principle of non-discrimination is repeated in Article 14 ECHR, according to which the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as ... national ... origin ....

As concerns the relationship between the Convention and national human rights provisions, it is subject to the principle of favourability (Günstigkeitsprinzip): In accordance with Article 53 ECHR, nothing in the Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party.

In addition to the rights and freedoms protected by the Convention, this instrument also establishes an international enforcement machinery. To ensure the observance of the engagements undertaken by the Parties, the European Court of Human Rights has been set up. It deals with individual and inter-State petitions. At the request of the Committee of Ministers of the Council of Europe, the Court may also give advisory opinions concerning the interpretation of the Convention and the protocols thereto (Article 47 ECHR).

The Contracting Parties must abide by the judgments of the Court and take all necessary measures to comply with them (Article 46 § 1 ECHR). In particular, if the facts of an application reveal structural or systemic problems or other similar dysfunction giving rise to similar applications against the same Contracting State, the Court may initiate a pilot-judgment procedure; in its pilot-judgment, the Court shall identify both the nature of the structural or systemic problem or other dysfunction as established as well as the type of remedial measures which the Contracting Party concerned is required to take at the domestic level by virtue of the operative provisions of the judgment (Article 61 Rules of Court).

The Committee of Ministers supervises the execution of judgments (Article 46 § 2 ECHR). If the Committee finds that the supervision of the execution of a judgment is hindered by a problem of interpretation of the judgment, it may refer the matter to the Court for a ruling on the question of interpretation (Article 46 § 3 ECHR). Moreover, the Committee may refer to the Court the question whether the Party has failed to fulfil its obligation to comply with the judgment (Article 46 § 4 ECHR).

The Secretary General of the Council of Europe may request Parties to provide explanations on the manner in which their domestic law ensures the effective implementation of the Convention (Article 52 ECHR).
The human rights system established by the ECHR appears to be unparalleled all over the world. It provides a common legal redress mechanism available for any human being, any other legal entity, as well as any State of a whole continent.

Today, the ECHR extends to 47 European countries. In many cases, the European Court of Human Rights is regarded as the only source of hope to people who cannot expect an improvement of their living conditions in their country. In a historic address delivered at the European Parliament on 25 November 2014, His Holiness Pope Francis referred to the Court as “in some ways” representing “the conscience of Europe” with regard to the rights and freedoms enshrined in the Convention.¹)

Beyond providing redress in thousands of individual cases, however, the ECHR also had a remarkable impact on human rights protection at the level of the Contracting States, which was entirely unexpected at the beginning. This is also, and especially, true for Austria.

II

The Republic of Austria acceded to the ECHR in 1958; it has also ratified most of the additional protocols, in particular all protocols including substantive human rights provisions (except Protocol No. 12²)). In 1964, the ECHR was granted the rank of constitutional law by explicit constitutional order. Thus, the Convention – equal in status to other genuinely national fundamental rights – is directly applicable constitutional law. At the national level, the fundamental rights enshrined in the Convention have the same status and the same importance as other fundamental rights laid down in the Austrian Constitution. This unique form of incorporation of the Convention established a close link between the jurisprudence of the European Court of Human Rights and the national application and interpretation of the ECHR.

This is particularly true for the Constitutional Court of the Republic of Austria.

The main function of this institution is to safeguard the individual rights guaranteed by the Constitution, including the rights and freedoms enshrined in the ECHR. Before the

²) Protocol No. 12 provides for a general prohibition of 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, regardless of whether one or the other Convention right is affected. Austria has signed this protocol in 2000 but not yet ratified it.
Constitutional Court, human rights issues may arise either in proceedings relating to complaints for violation of constitutionally guaranteed rights (Article 144 Federal Constitutional Law, as amended in 2012), which can only be directed against decisions of administrative courts of first instance, or, less obviously, in proceedings regarding the constitutionality of general norms, especially statutes (Article 140 Federal Constitutional Law, as amended in 2013), given that fundamental rights form the most important yardstick for the constitutionality of such norms.

Since the 1960s, after a short period of hesitation, the Court has accepted the ECHR as a benchmark for judicial review of normative acts. Today, a large number of judgments of the Constitutional Court refer to the case-law of the European Court of Human Rights. In particular, in case of “parallel rights”, i.e., rights enshrined both in the national catalogue of fundamental rights, especially in the Basic Law of 1867, and in the ECHR (e.g., the freedom of expression), the Court primarily refers to the relevant provision of the ECHR alongside with the pertinent case-law of the European Court of Human Rights as a standard of review. If a certain human rights issue has already been dealt with by the European Court of Human Rights, its considerations are mostly adopted by the Constitutional Court – even if that means that the Constitutional Court has to revisit or change its own settled case-law.

This convergence of the human rights jurisprudence of the European Court of Human Rights and of the Constitutional Court may be demonstrated by the following few examples:

a) In 1996, the European Court of Human Rights had to deal with the Austrian system of emergency assistance (Notstandshilfe), a social benefit granted by the State to unemployed people in need who have exhausted their entitlement to unemployment benefit. Mr Gaygusuz, a Turkish national, complained of the Austrian authorities’ refusal to grant him emergency assistance on the ground that he did not have Austrian nationality, which was at that time one legal condition for entitlement to this allowance. The European Court of Human Rights decided that entitlement to that social benefit represented “pecuniary rights” within the meaning of Article 1 of Protocol No. 1, and that a difference in treatment between Austrians and non-Austrians was not based on any objective and reasonable justification. As a consequence, the Court found this nationality condition to be in breach of Article 14 ECHR.3)

As for the Constitutional Court, it had declined to accept the case of Mr Gaygusuz for adjudication for lack of sufficient prospects of success with regard to its previous case-law.

3) European Court of Human Rights, Gaygusuz v. Austria, no. 17371/90, 16 September 1996.
However, with a view to the judgment of the European Court of Human Rights, the Constitutional Court reconsidered its position. In another case similar to that of Mr Gaygusuz, the Constitutional Court, expressly turning away from its previous case-law, agreed with the European Court of Human Rights that entitlement to emergency assistance falls within the scope of the right to peaceful enjoyment of property within the meaning of Article 1 of Protocol No. 1, and repealed the relevant provision of the Austrian Unemployment Insurance Act as unconstitutional.4)

b) In a series of judgments, the European Court of Human Rights has stated that no right of an alien to enter or to reside in a particular country is as such guaranteed by the Convention. Nevertheless, the expulsion of a person from a country where close members of his family are living may amount to an infringement of the right to respect for family life guaranteed by Article 8 ECHR.5)

Although it is for the Contracting States to maintain public order, in particular by exercising their right to control the entry and residence of aliens, as a matter of well-established international law and subject to their treaty obligations, their decisions in this field must, in so far as they may interfere with a right protected under Article 8 ECHR, be necessary in a democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued.6)

Accordingly, when imposing any residence restrictions on foreign nationals, national authorities must strike a fair balance between the relevant interests, namely the person’s right to respect for his private and family life, on the one hand, and the prevention of disorder and crime, on the other.

The European Court of Human Rights has elaborated the relevant criteria for assessing whether an expulsion measure is necessary in a democratic society and proportionate to the legitimate aim pursued. These criteria are the following: the nature and seriousness of the offence committed by the applicant; the length of the applicant’s stay in the country from which he or she is to be expelled; the time elapsed since the offence was committed and the applicant’s conduct during that period; the nationalities of the various persons concerned; the applicant’s family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple’s family life; whether the spouse knew about the

offence at the time when he or she entered into a family relationship; whether there are
children of the marriage, and if so, their age; the seriousness of the difficulties which the
spouse is likely to encounter in the country to which the applicant is to be expelled; the best
interests and well-being of the children, in particular the seriousness of the difficulties
which any children of the applicant are likely to encounter in the country to which the
applicant is to be expelled; the solidity of social, cultural and family ties with the host
country and with the country of destination.\footnote{European Court of Human Rights, \textit{Üner v. the Netherlands}, no. 46410/99, 18 October 2006; \textit{Maslov v. Austria}, no. 1638/03, 23 June 2008.}

In 2007, the Constitutional Court decided to join the European Court of Human of Rights
in this approach. If, in a proceeding before the Constitutional Court, the question arises
whether an expulsion order is in conformity with the right to respect for private or family
life, the Court applies the very same criteria as those developed in the case-law of the
European Court of Human Rights.\footnote{See, e.g., Constitutional Court, no. B 328/07, 29 September 2007, Official Collection No. 18.223;

\begin{itemize}
\item[c)] As regards the right to freedom of expression, it shall include freedom to hold opinions
and to receive and impart information and ideas without interference by public authority and
regardless of frontiers. However, this freedom shall not prevent the States from requiring
the licensing of broadcasting, television or cinema enterprises (Article 10 § 1 ECHR).

In Austria, a specific constitutional law on broadcasting of 1974 had instituted a system
which made all activity of this type subject to the grant of a licence by legislation. This
system was intended to ensure objectivity and diversity of opinions. However, for decades
the right to broadcast was restricted to the Austrian Broadcasting Corporation, a
state-owned company, as no implementing legislation had been enacted in addition to the
law governing that organisation.

The European Court of Human Rights accepted that this monopoly system operated in
Austria was capable of contributing to the quality and balance of programmes, through the
supervisory powers over the media thereby conferred on the authorities.\footnote{European Court of Human Rights, \textit{Informationsverein Lentia et al. v. Austria}, no. 13914/88, 24 November 1993, § 33.}

However, this public monopoly did not prove to be “necessary in a democratic society”
within the meaning of Article 10 § 2 ECHR. As the European Court of Human Rights stressed, freedom of expression plays a fundamental role in a democratic society, in particular where, through the press, it serves to impart information and ideas of general interest, which the public is moreover entitled to receive. Such an undertaking cannot be successfully accomplished unless it is grounded in the principle of pluralism, of which the State is the ultimate guarantor. This observation is especially valid in relation to audio-visual media, whose programmes are often broadcast very widely.

Of all the means of ensuring that these values are respected, a public monopoly is the one which imposes the greatest restrictions on the freedom of expression, namely the total impossibility of broadcasting otherwise than through a national station and, in some cases, to a very limited extent through a local cable station. The far-reaching character of such restrictions means that they can only be justified where they correspond to a pressing need.

With a view to the Austrian system, the European Court of Human Rights held that justification for these restrictions could no longer today be found in considerations relating to the number of frequencies and channels available. Finally and above all, it could not be argued that there were no equivalent less restrictive solutions; it was sufficient by way of example to cite the practice of certain countries which either issued licences subject to specified conditions of variable content or made provision for forms of private participation in the activities of the national corporation.

In short, the Court considered that the interferences at issue were disproportionate to the aim pursued and were, accordingly, not necessary in a democratic society. There had therefore been a violation of Article 10 of the Convention.10)

Taking account of this judgment, and contrary to considerations made in a previous case, the Constitutional Court quashed a provision restricting cable broadcasting in Austria.11) As for terrestrial television, however, a similar proceeding before the Constitutional Court failed owing to the fact that there was no positive legal provision the repeal of which could have afforded access to this type of communication in conformity with Article 10 ECHR.12)

d) In several cases, the European Court of Human Rights has pointed out that, for the purposes of Article 14 ECHR (principle of non-discrimination with regard to the rights and

freedoms enshrined in the Convention), a difference in treatment is discriminatory if it has no objective and reasonable justification, that is, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. In case of difference in treatment based exclusively on the ground of sex, very weighty reasons would have to be put forward before the Court could regard it as compatible with the Convention. Just like differences based on sex, differences based on sexual orientation require particularly serious reasons by way of justification.\(^\text{13}\)  

However, as can be seen from Article 12 ECHR (right to marriage for men and women), the Convention does not impose an obligation on the Contracting States to grant same-sex couples access to marriage. Nor can a right to same-sex marriage be derived from Article 14 ECHR taken in conjunction with Article 8 (right to respect for private and family life). Where a State chooses to provide same-sex couples with an alternative means of legal recognition, it enjoys a certain margin of appreciation as regards the exact status conferred.\(^\text{14}\)  

In *Karner v. Austria*, the European Court of Human Rights had to deal with a statutory provision according to which on death of a tenant certain persons living in the same flat, including spouses and “life companions”, were entitled to succeed to the tenancy. The Court found that there were no convincing and weighty reasons justifying a narrow interpretation of this provision that prevented a surviving partner of a same-sex couple from relying on that provision.\(^\text{15}\)  

Taking the same view, the European Court of Human Rights did not find any particularly weighty and convincing reasons to show that excluding second-parent adoption in a same-sex couple, while allowing that possibility in an unmarried different-sex couple, was necessary for the protection of the family in the traditional sense or for the protection of the interests of the child. This distinction was therefore incompatible with Article 14 ECHR taken in conjunction with Article 8 ECHR.\(^\text{16}\)  

This judicial approach again prompted the Constitutional Court to re-examine its jurisprudence. In 2005, without expressly referring to the Convention or to the case-law of the European Court of Human Rights, it repealed statutory provisions excluding same-sex partners from entitlement to (free) co-insurance as running counter to the constitutional
principle of equality. Most recently, the Constitutional Court held that, if same-sex couples are excluded from adoption by law, this restriction cannot be justified on grounds relating to the protection of the interests of the child or to the protection of the family in the traditional sense, even if none of the partners is the biological parent of the child.

e) Finally, in a case concerning Malta, the European Court of Human Rights has held that very weighty reasons would have to be advanced before what appears to be an arbitrary difference in treatment on the ground of birth out of wedlock could be regarded as compatible with the Convention. In particular, if denial of nationality or citizenship is based on the only ground of birth out of wedlock, this cannot be justified by objective reasons.

In 2012, the Constitutional Court, referring to this case, repealed a provision of the Austrian Citizenship Act, according to which a person born out of wedlock shall become a citizen of Austria if at the date of such person’s birth his or her mother is a citizen of Austria, as unconstitutional.

It goes without saying that, in some cases, judgments of the European Court of Human Rights have met with some criticism in Austria. This does, however, not in any way change the fact that the jurisprudence of the European Court of Human Rights is recognised as the major source of interpretation of the Convention in Austria.

Ⅲ

It is worth mentioning that the case-law of the European Court of Human Rights has shaped the human rights jurisprudence of the Constitutional Court not only in individual cases, but also in terms of human rights doctrine.

First, the European Court of Human Rights has pointed out that the Convention is intended to guarantee rights that are not theoretical or illusory, but practical and effective; and that the Convention is a living instrument which must be interpreted in the light of the present-day conditions. This dynamic approach is not confined to substantive provisions,

but also applies to provisions governing the operation of the enforcement machinery. It follows that human rights provisions cannot be interpreted solely in accordance with the intentions of their authors as expressed long ago. 23)

Second, the rights and freedoms set out in the Convention are subject to an elaborate proportionality scheme: Specifically, to be in conformity with the Convention, any interference by public authorities must be prescribed by law, have an aim or aims that is or are legitimate under the relevant provision of the Convention and are “necessary in a democratic society” for the aforesaid aim or aims. An interference will be considered “necessary in a democratic society” for a legitimate aim if it answers a “pressing social need” and, in particular, if it is proportionate to the legitimate aim pursued and if the reasons adduced by the national authorities to justify it are “relevant and sufficient.” 24)

Third, owing to the case-law of the European Court of Human Rights, the understanding has come to light that the essential object of human rights is not only to protect individuals against arbitrary interference by public authorities, but also to impose on the Contracting Parties certain positive obligations to ensure effective respect for the rights and freedoms set out in the Convention. 25) Such obligations may also involve the adoption of measures in the sphere of the relations between individuals themselves, including not only non-interference by third parties, but also the obligation to require third parties to ensure the effective enjoyment of a right by other individuals. 26)

For example, in Plattform “Ärzte für das Leben” v. Austria, the European Court of Human Rights suggested that people must be able to hold a demonstration without having to fear that they will be subjected to physical violence by their opponents; such a fear would be liable to deter associations or other groups supporting common ideas or interests from openly expressing their opinions on highly controversial issues affecting the community. In a democracy the right to counter-demonstrate cannot extend to inhibiting the exercise of the right to demonstrate. Genuine, effective freedom of peaceful assembly cannot, therefore, be reduced to a mere duty on the part of the State not to interfere; it is rather the duty of the State to take reasonable and appropriate measures to enable lawful demonstrations to proceed.

22) European Court of Human Rights, Tyrer v. the United Kingdom, no. 5856/72, 25 April 1978, § 31.
23) European Court of Human Rights (Grand Chamber), Loizidou v. Turkey, no. 15318/89, 23 March 1995, § 71.
24) European Court of Human Rights (Plenary), Lingens v. Austria, no. 9815/82, 8 July 1986.
peacefully.\textsuperscript{27})

IV

As for the relationship between the international system of human rights protection established by the Convention and the national jurisdictions, it is subject to the principle of subsidiarity.\textsuperscript{28}) The subsidiary character of the machinery set up by the Convention reflects a kind of division of labour.

From a procedural point of view, this principle follows from various provisions of the Convention:

First, pursuant to Article 13 ECHR the Contracting States are required to provide an effective remedy for violations of the Convention rights and freedoms. Second, under Article 35 § 1 ECHR the European Court of Human Rights is prevented from dealing with an application before all domestic remedies have been exhausted. Third, according to Article 35 § 3 ECHR an application may be declared inadmissible where the applicant has not suffered a significant disadvantage, unless the case has not been duly considered by a domestic jurisdiction.

With respect to intensity of review, the principle of subsidiarity is expressed in two doctrines which the European Court of Human Rights has developed.

Under the “fourth-instance rule”, the Court considers that it has only limited jurisdiction to verify that domestic law has been correctly interpreted and applied and that it is not its function to take the place of the national courts, its role being rather to ensure that the decisions of those courts are not flawed by arbitrariness or otherwise manifestly unreasonable.\textsuperscript{29}) It is not, as the Court has repeatedly held, its function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention.\textsuperscript{30})

\textsuperscript{27} European Court of Human Rights, Plattform “Ärzte für das Leben” v. Austria, no. 10126/82, 21 June 1988, §§ 32, 34.

\textsuperscript{28} For a recent study of this aspect, see European Court of Human Rights, “Subsidiarity: a two-sided coin?” Paper presented at the seminar to mark the official opening of the judicial year on 30 January 2015, www.echr.coe.int.

\textsuperscript{29} European Court of Human Rights (Grand Chamber), Anheuser-Busch Inc. v. Portugal, no. 73049/01, 11 January 2007, § 83.
On the other hand in relation to situations where the assessment of facts and law by the national courts may itself be constitutive of a Convention breach, the Court’s review will extend into these areas. However, where the (superior) national courts have analysed in a comprehensive and convincing manner the precise nature of the impugned restriction, on the basis of the relevant Convention case-law and principles drawn therefrom, the European Court of Human Rights would need “strong reasons” to differ from the conclusion reached by those courts by substituting its own views for those of the national courts on a question of interpretation of domestic law.31)

In addition, the European Court of Human Rights recognises that both as a matter of principle and in practice the national authorities are better placed to make the assessment of the necessity and proportionality of measures restricting the Convention rights and freedoms. The Court accordingly exercises a degree of self-restraint which reflects the area of discretion or “margin of appreciation” which national authorities enjoy.

The breadth of this margin varies and depends on a number of factors including the nature of the Convention right in issue, its importance for the individual, the nature of the interference and the object pursued by the interference. The margin will tend to be narrower where the right at stake is crucial to the individual’s effective enjoyment of “intimate” or key rights.32) Where a particularly important facet of an individual’s existence or identity is at stake, the margin allowed to the State will be restricted.33) Finally, if the right at stake does not, by its very nature, allow for any exceptions, justifying factors or balancing of interests, as is the case with the absolute prohibition of torture and of inhuman or degrading treatment or punishment under Article 3 ECHR,34) there is no room for any margin of appreciation at all. Where, however, there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to how best to protect it, particularly where the case raises sensitive moral or ethical issues, the

31) European Court of Human Rights (Grand Chamber), Markovic v. Italy, no. 1398/03, 14 December 2006, § 95.
32) European Court of Human Rights, Connors v. the United Kingdom, no. 66746/01, 27 May 2004, § 82.
33) European Court of Human Rights (Grand Chamber), Evans v. the United Kingdom, no. 6339/05, 10 April 2007, § 77.
34) European Court of Human Rights (Grand Chamber), Gäfgen v. Germany, no. 22978/05, 1 June 2010, § 107.
margin will be wider. 35) There will also usually be a wide margin if the State is required to strike a balance between competing private and public interests or different Convention rights. 36)

V

In European history, the Convention was certainly a groundbreaking step towards European integration. This holds especially for the supranational system of protection of the rights and freedoms laid down in the Convention, overcoming the historical claim that the safeguard of human rights be a national matter only. The international machinery of collective enforcement established by the Convention is a fundamental element of European democratic stability and constitutes a fundamental element of the European public order. The general acceptance of the ECHR by all the European States and its compulsory supervisory mechanism in the 1990s has thus made an essential contribution to the development of the present confidence in the European relations through the development of a real common standard of governance in the whole of Europe, based on democracy, rule of law and respect for human rights. On several occasions, the existence of this common standard has also contributed to finding solutions to situations of international tension and developing responses to crisis situations.

The ECHR is also a fundamental element of European cooperation and integration. The evolving interpretation of the ECHR by the European Court of Human Rights and the effective supervision of the execution of its judgments, including the taking of all legislative and other actions necessary to remedy violations found, ensures a constant improvement of the legal systems of member States.

In this context, the role of constitutional courts is no longer restricted to the interpretation of national constitutional law in isolation. The national courts rather fulfil an intermediary function of constantly growing significance which ultimately results in a strengthening of the rule of law principle not only at national but also at European level. 37)

35) European Court of Human Rights (Grand Chamber), S.H. v. Austria, no. 57813/00, 3 November 2011, § 94.
36) European Court of Human Rights (Grand Chamber), Fernández Martínez v. Spain, no. 56030/07, 12 June 2014, § 125.
In this process, constitutional courts have a twin function of providing “translation” and “legitimacy”. The translation function means that constitutional courts transpose the rulings handed down by the European Court of Human Rights into national constitutional law and adapt them to fit national categories.

As regards the function of providing legitimacy, it arises from the interaction of national constitutional courts with the European Court of Human Rights. Where constitutional courts address Convention case-law and ultimately endorse European jurisprudence, they strengthen the jurisprudential role of the European Court of Human Rights and thus enhance its legitimacy. In turn, the more a constitutional court decision can be underpinned by the case-law of the European Court of Human Rights, the higher is its acceptance even if sensitive social or economic issues are concerned. This is all the more remarkable because if a constitutional court performs its functions properly, this may more or less inevitably give rise to tensions with other public institutions, especially with the government majority.

To provide answers to the challenges raised by the social, technological or political developments in Europe or by the increasing number of applications addressed to the Court, the control system set up by the Convention constantly evolves. In the framework of the recent reforms, Protocol No. 14, amending the Convention, was adopted and entered into force on 1 June 2010. Two other protocols, No. 15 and No. 16, have been drafted since, underlining in particular the national responsibility for the implementation of the Convention, the principle of subsidiarity, and authorising the domestic supreme courts to address the European Court with questions subject to preliminary ruling. The goal of these reforms are: at national level, to increase Contracting Parties’ awareness and respect of the ECHR standards through several recommendations adopted by the Committee of Ministers; at European level, to ensure the effectiveness of the supervision system by improving the consideration of applications and the rapid execution of judgments.

Situation and Perspectives”, 2015.
I. Introduction

Israel is a constitutional democracy, even though it has no formal constitution. Like every other modern democracy it recognizes all human rights that characterize modern democracies.

A real democracy cannot exist without the recognition and protection of human rights (rights that cannot be taken away by the majority). Real democracy is not just the law of rules and legislative supremacy. It requires recognition of the power of the majority alongside with limitations on such power. It is based both on legislative supremacy and the supremacy of values and principles based on human dignity and equality. Supreme Courts and Constitutional Courts must keep an open eye and guarantee that the above principles will always be guarded in their countries.

In the Declaration of the Establishment of the State of Israel, dated May 14th 1948 (which is the first official document of the State), it is clearly submitted that the State of Israel “will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex.”

In 1951 the Israeli Parliament (The Knesset) adopted a resolution according to which instead of drafting a constitution, the Parliament – acting as a constitutional assembly – will enact the constitution in a piecemeal fashion by a series of Basic Laws, each one of such laws will eventually become a chapter in Israel’s formal constitution. Although the Parliament enacted many basic laws covering virtually all aspects of Israel’s constitutional system, these basic laws did not include, until 1992, a basic law on human rights. A significant change in the status of human rights in Israel took place in 1992. In that year the

* Justice, The Supreme Court of Israel

This paper will review two major periods of Israel’s constitutional system. The first period is from the establishment of the State in 1948 until the enactment of the above two Basic Laws in 1992, and the second period is from 1992 until the present day.

Ⅱ. The first period (1948~1992)

It is noteworthy that during this period attempts were made to enact a bill of rights, although all such attempts have failed. Nevertheless, recognition of human rights was primarily in the form of Supreme Court judgments, which established the legal principle that human rights are part of the Israeli Law, and that every statute enacted by the Parliament will be interpreted on the presumption that its purpose is to advance human rights. Only clear and explicit language to the contrary can rebut this presumption. The Supreme Court has decided that when a statute of the Parliament creates the kind of authority that can infringe on human rights, the scope of that authority will be determined according to the proper balance between the power of the State and the human rights harmed. Such approach facilitated broad protection of human rights (including freedom of occupation, freedom of movement, freedom of conscience and religion and equality), without infringing on the supremacy of Parliament. However, this approach lacked the power to strike down a statute that infringed, in clear and explicit language, human rights beyond the level permitted by the balancing formula.

Two additional developments in Israel’s constitutional law facilitated a growth in the protection of human rights. The first of these developments was the liberalization of the rules of standing by recognizing the standing of certain entities and non-profitable associations whose role is to protect human rights. The second development was the adoption by the Supreme Court of an approach to arguments of non-justiciability, according to which such arguments shall not apply where a violation of human rights is alleged.
Ⅲ. The second period (from 1992 onwards)

In 1992 the Basic Law: Freedom of Occupation and the Basic Law: Human Dignity and Liberty (hereinafter: The Basic Law) were enacted by the Knesset, acting as a constitutional assembly. The Basic Law is not a general Bill of Right and it deals with a whole range of rights under the general rubric “human dignity and liberty.” These rights are: the right to life, body and dignity and to protection of these interests; the right to property; liberty of the individual; the right to leave and enter the country; and the right to privacy and personal confidentiality. Although the Basic Law does not include an explicit clause in respect of freedom of expression, equality, or the right to education, the Israeli Supreme Court accepted the position that the right to dignity includes the above rights.

All rights contained in the Basic Law are subject to the following limitation clause:

“There shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater then is required or by regulation enacted by virtue of express authorization in such law.”

The Basic Law also provides that:

This Basic Law shall not affect the validity of any law in force prior to the commencement of the Basic Law.

The Basic Law: Freedom of Occupation deals with a right titled “freedom of occupation”, which means the right of every citizen or resident of the State of Israel to engage in any occupation, profession or business. This Basic Law deals with a right that is not specifically mentioned in other Bills of Rights or constitutions.

According to both Basic Laws all governmental authorities must respect the human rights contained therein.

It should be noted that although basic laws in general and the above two basic laws are supposed to be chapters in Israel’s constitution, the Supreme Court has held that in the absence of express provisions granting them preferred status, basic laws are not inherently superior to ordinary legislation of the Knesset. Thus, in the case of a clash between a special provision in ordinary Knesset legislation and a general provision in a basic law, the former
prevails. Furthermore, the Knesset may amend a provision in a basic law by ordinary legislation passed with a simple majority. The only exception to this rule recognized so far has been the case of a provision in a basic law that is entrenched. Section 5 of the Basic Law: Freedom of Occupation states that the basic law may not be changed “except by a Basic Law enacted by a majority of Knesset members.” As opposed to the Basic Law: Freedom of Occupation, the Basic Law: Human Dignity and Liberty does not contain an express entrenchment clause. It is noteworthy that such a clause was included in the Basic Law but was dropped at the second reading stage at the Knesset.

However, the Israeli Supreme Court in one of its judgments decided that the two Basic Laws concerning human rights hold a constitutional, super-legislative status. The judgment added that an ordinary legislation of the Knesset which infringes on one of the human rights contained in these Basic Laws, which does not meet the conditions of the limitation clause, is an unconstitutional legislation and every court may declare it invalid.

It is argued that the above two Basic Laws have introduced a mini-revolution into Israeli constitutional law by providing a basis for judicial review of legislation on ground that it is inconsistent with human rights. According to others, this revolution had far-reaching implication. Israeli law was constitutionalized. It was also submitted that every branch of law and every legal norm had to conform to this new constitutional regime. Moreover, every branch of law had to change its fundamental concepts and its fundamental outlook, in order to conform to the new constitutional regime.

In the years following the constitutional revolution, the Israeli Supreme Court interpreted human rights broadly and focused judicial efforts on developing the limitation clause. For example, the Court accepted the position that the term “human dignity” in the Basic Law means recognizing a person as a free being who develops his or her body and mind as he or she sees fit. At the root of dignity is the autonomy of the private will and a person’s freedom of choice and of action. This is the background for the judicial ruling that human dignity includes the right to equality, the freedom of expression and a number of social rights, mainly the right to minimal conditions for human subsistence. It was argued that the State’s duty concerning human dignity is both “negative” and “positive.” The negative aspect imposes a duty on the State and government to refrain from harming human dignity. The positive aspect imposes a duty on the State and government authorities to protect human dignity, even by imposing on the Knesset a duty to legislate in a manner that provides the proper protection to human dignity.

In the next paragraph we will see what was the effect of the constitutional revolution in
fact, by referring to the Supreme Court’s main judgments according to which a judicial review of the Knesset’s legislation led to decisions striking down statutes of the Knesset.

**Ⅳ. Striking down statutes of the Knesset**

In total, the Supreme Court passed judgments that struck down statutes of the Knesset on 13 different occasions. All 13 of these judgments were based on the grounds that the legislation under review violated human rights that are embodied in and protected by Israel’s Basic Laws.

The first of these judgments was passed in 1997, in the case of HCJ 1715/97 The Office of Investment Managers in Israel v. The Minister of Finance 51(4) PD 367 (1997). In its petition to the High Court of Justice, the Office of Investment Managers in Israel—a professional association that represented investment managers—argued that certain aspects of the Knesset statute aimed at regulating the occupation of investment management – The Law for the Regulation of the Occupations of Investment Consultancy and Management, 5755-1995, SH No. 1539 p. 416 – violated the Basic Law: Freedom of Occupation. More specifically, the appeal targeted those regulations that required investment managers to operate via a company with significant equity; prohibited investment managers to manage their families’ portfolios, as well as their own; and required those seeking an investment management license to pass a long series of strenuous examinations. In a unanimous decision, 11 justices decided that all but one of the contested regulations did not violate the Basic Law: Freedom of Occupation. Namely, a specific regulation that required practicing investment managers with less than seven years of experience to pass a series of examinations if they wanted to keep their license was deemed unconstitutional. The court’s reasoning was that the distinction between investment managers with more than seven years of experience and those with less than seven years of experience disproportionately infringed the less experienced investment managers’ freedom of occupation.

The next occasion whereupon a Knesset statute was struck down due to judicial review took place two years later, in the 1999 ruling of HCJ 6055/96 Tzemach v. The Minister of Defense 53(5) PD (1999). In this case, the petitioner argued that a statute requiring soldiers to be brought before a judge no more than 96 hours after being detained by military police – The Military Judgment Law,5715-1955, SH No. 189 p. 171 – violated the right to liberty as
embodied in Basic Law: Human Dignity and Liberty. In a judgment of 10 justices against 1, the High Court of Justice decided that the above legislation disproportionately violated soldiers’ right to liberty. According to the majority opinion, this violation was especially noticeable when compared to civilians, who must be brought before a judge no later than 24 hours after being detained.

In 2004, the Knesset passed a statute allowing the construction in Israel of privately operated prisons: Amendment to the Prisons Ordinance (No. 28), 5764-2004, SH No. 1935 p. 348. In 2009, a petition to the High Court of Justice was filed, arguing that the privatization of prisons violated the human dignity of prisoners. In the case of HCJ 2605/05 The Academic Center for Law and Business v. The Minister of Finance (19.11.2009), the court ruled, by a majority of 7 justices against 2, that the transfer of the oppressive powers associated with operating a prison to private hands – powers traditionally vested solely with state authorities – did indeed constitute a violation of the Basic Law: Human Dignity and Liberty. As a result of this ruling the state decided to purchase the new private prison that was under construction at the time, and began operating it as a state prison.

In certain instances, judicial review did not lead simply to the striking down of Knesset statutes, but to a “dialog” between the Judiciary and the Legislature. Such was the case with regard to the Knesset’s Law for Prevention of Infiltration (Offenses and Judgment) (Amendment No. 4 and Temporary Provisions), 5775-2013, SH No. 2419 p. 74. The purpose of this law, as set forth by the Knesset, was to give Israeli migration authorities tools to deal with illegal migration and infiltration. In 2014, the High Court of Justice ruled that two aspects of the anti-infiltration law constituted a direct and severe violation of human rights. The first aspect was a provision that allowed authorities to detain infiltrators for up to one year, without need for a judicial decision. The second aspect was a set of provisions which ordered the construction of an open detention center, wherein infiltrators could be detained indefinitely. In response to this ruling, the Knesset passed an updated version of the anti-infiltration law – The Law for Prevention of Infiltration and Ensuring of Infiltrators’ Exit from Israel (Amendments and Temporary Provisions), 5775-2014, SH No. 2483 p. 84 – which was designed to be more compatible with the Basic Law: Human Dignity and Liberty as interpreted by the High Court of Justice. Inter alia, this new version set the maximum detention period allowed in the above detention center as 20 months. In the summer of 2015, this updated version was once again reviewed by the High Court of Justice. The court ruled that while detention of infiltrators at the detention center did not violate human rights as such, the new 20 months detention limit was still disproportionate. This is a
prime example of how judicial review in Israel may lead to changes in the legislation of the Knesset.

Finally, one of the most recent examples of judicial review resulting in the striking down of Knesset Statutes was that of HCJ 5239/11 Avnery v. The Knesset (15.4.2015). The subject of this ruling was the Law for Prevention of Damage to State of Israel through Boycott. This statute, passed in 2011, states that a civil tort suit, including a claim of punitive damages regardless of the harm caused by the defendant, can be filed against anyone who calls for a boycott on the State of Israel or an area under its control. Additionally, the above statute allowed authorities to deny certain benefits from individuals and organizations who call for such a boycott. According to the petitioners, this statute severely restricted freedom of speech, a basic human right protected under Israeli Law. The High Court of Justice ruled that most of the statute’s provisions were constitutional. However, the court did strike down the provision which allowed for punitive damages against those who call for a boycott. Such a provision, the court ruled, disproportionately limited the freedom of speech, potentially leading to a chilling effect that could hinder political expression.

These examples demonstrate that the Israeli Supreme Court, in its capacity as a High Court of Justice, has operated its authority to strike down Knesset Statutes which were found to be violating Human Rights. These rights include human dignity, liberty, freedom of occupation and freedom of speech. Furthermore, in several other rulings, the statutes that were struck down were found to be violating the right to equality, i.e., between Jews and Arabs and between Secular and Orthodox Jews. These include HCJ 8276/05 Adala v. The Minister of Defense (12.12.2006) regarding provision no. 5c of the Civil Tort Law (State Liability), 5712-1952, SH No. 109 p. 339; CrimA 8823/07 Ploni v. The State of Israel (11.2.2010) regarding provision no. 5 of the Law of Criminal Procedure (Detainee Suspected of Security Offenses) (Temporary Provision), 5766-2006, SH No. 2059 p. 364; and HCJ 6298/07 Rassler v. The Knesset (21.2.2012) regarding the Law for Deferral of Military Service for Yeshiva Students, 5762-2002, SH No. 1862 p. 521.
I. Human dignity as a trump card

The foundation of human dignity has had a widespread use by many different International Human and Constitutional Rights Courts, and the legislation of various countries. The analysis from the legal theory of fundamental rights will be the focus that allows us to enter this difficult concept, in order to apply it to the case-law of the Constitutional Court and Chilean law in cases and legislation that have had to review and promote. Clearly that is a «high value» that exceeds its configuration by mere rules. Therefore, the key will be bringing back its interpretive force into the service of a constitutional order that objectifies their mandates and does not admit its arbitrary use by operators.

What guiding thread or normative core does join such dissimilar cases which are understood as a violation of human dignity? The cases are innumerable but we can already see that many of these arguments are not apply to us or simply many people would disagree with them in our country.

The expression of human dignity is frequently invoked associated with fundamental rights or treatment requirements: housing, a job, a life, an existence and a dignified death, and even the dignity of victims once dead. Dignity has a powerful rhetorical and persuasive value and its very success blurs the normative contours of its application.

The notion of this treatment originates from the strong connotation and denotation of the very idea of human dignity. How to apply it beyond its rhetoric and discursive use? For that reason we will examine the Chilean legislation and the Chilean Constitutional Court jurisprudence.

* Constitutional Court of Chile
II. Chilean legislation on human dignity

An analysis of very different regulatory bodies leads to the first conclusion that the legislature limits the reference to human dignity to a specific set of issues. Among them, it must be admitted within the institutional framework of Human Rights in Chile there is no mention of the notion of human dignity, not as a duty to protect, promote or respect. 1)

Second, it is very rare to find that human dignity, as interpretative canon, is invoked isolated. Usually it comes with other references to values, principles or fundamental rights. Thus the interpretative effect is limited, or rather, allows inferring that the dimension of dignity operates in the substrates of all of these. Additionally, we can see this type of matters is particularly wide and not restricted to those issues that society considers morally charged as would be, for example, affairs related with public health -both the beginning and the end of life- or behaviors developed in the sexual sphere. It is much more the kind of issues that call the legislature to resort to the figure of the principle of human dignity as a value to be determined. This extends to issues covering a diverse legal nature. These are not matters where the state should withdraw and verify respect to autonomous decisions of individuals, because sometimes it is closely linked with social benefits or realization of rights. From these provisory conclusions, cases will be examined. We have classified the legislatives determinations according to the contexts in which they manifest and the purposes that the invocation of dignity intends to satisfy.

1. State’s interdiction of torture and inhuman and degrading treatment and the guarantee of corporal indemnity

One of the essential aspects of human dignity is the fulfillment of the State’s duty to respect, promote and protect fundamental rights (Article 5 paragraph 2 of the Chilean Constitution). This function is particularly pressing in cases where citizens are in a vulnerable position in relation to their rights against the State or under conditions subject to the authority, where the degree of state intervention materially extends to other conditions.

---

1) Specifically, we are referring to the law No. 20.405 which established the National Institute of Human Rights and law No. 20.885 which established the Human Rights Department under the Ministry of Justice, in which the omission of any mention of this value is particularly remarkable.
1) The conscript’s case

One of the examples of special subjection is the situation of conscription, where performing a civic duty (Article 22 of Chilean Constitution), as part of a subordinated, obedient, disciplined and hierarchical institution determines a position of particular weakness.

In Chile, a set of abuses were revealing the need to establish an independent and impartial proceedings in respect of the Armed Forces for admit claims. To do this, an Office of attention to the conscripts and their families was created, to enable them to make requests, petitions and verbal or written concerns. It is remarkable that these claims are based mostly on the value of human dignity. This Office, apart from the powers of the Commanders of unit in which conscripts are integrated, “may receive complaints from parents or guardians of a conscript soldier, referring to treatments against person’s dignity and honor, or do not comply with current regulations, according to the law.” And before them, the Office shall be the advisory body which may recommend measures conducive to “say regarding allegations of conflict with the dignity and honor of people or that do not comply with current regulations, according to the law.” With this, the Conscript’s Office became an auxiliary organism of claiming rights against abusive behaviors under performing compulsory military service.

2) The situation of persons deprived of liberty

In this case it has not stopped calling attention, the particularly feeble statute that organizes the life of prisoners by judicial decision. The existence of disciplinary powers established by infralegal regulations tends to increase the role of guarantor of the state and to make clear that ill-treatment and inhuman prison conditions is a decision that only the State can rebut. The burden of proof to refute these conditions rests solely on the authorities responsible for the prison system. The last Inspectorate Report of the Court of Appeals of Santiago realizes that “overcrowding of the prison population of Santiago Sur [a prison in Santiago] sometimes becomes incompatible with the most elementary standards required for human dignity.” It seems pretty obvious what issues may refer the requirements of

standards. Perhaps we should include it in the normative requirements of «Gendarmería de Chile».3)

However, the applicable infra-legal rules refers only to the intrusive powers of search on prisoners and on their visits. Thus, in order to detect possession of prohibited items becomes habitual this comprehensive search. In this context “in conducting body searches shall be prohibited the complete removal of inmates clothing, the execution of intrusive searches, physical exercises, and, in general, any other activity that undermines their dignity. To this goal, prison administration will tend to the use of technological devices.” 4) The low normative density of these rules and the absence of solid normative parameters determine that this will remain an area of particular manifestation of the principle of human dignity.

Just for comparison purposes, at European level, the European Court of Human Rights has enumerated through several decisions a set of conditions that must be kept in mind to verify inhuman or degrading treatment in prisons. These requirements are: the space available, “ventilation of the cells, the conditions of privacy of the toilets, the number of showers and toilets available, the existence of heating, the presence of insects or duration of periods outdoors.” 5)

Finally, regarding persons convicted of criminal penalties, the social rehabilitation and repair mechanisms may prove to be as effective as a minority policy. However, this does not exempt the possibility that they may generate damages to human dignity, in particular, as regards the fulfillment of the penalty provision of community service. This penalty is defined as “performing unpaid work for it [society] or for the benefit of people in precarious situations, coordinated by a delegate of Gendarmería of Chile.” In the coordination between public services and private organisms, “Gendarmería of Chile and their delegates, and public and private bodies involved in the execution of this section under agreements (…), should ensure that not undermine the dignity of the prisoner in implementing these services.” 6) It seems plausible the concern about the perception of humiliation and debasement which can carry a sentence of this nature, even if there aren’t reports of its dissociated use to legitimate constitutional goals.

3) Special police force in charge of prisons.
6) Article 49 bis Penal Code.
3. The case of juvenile offenders

This situation has a wide range of difficulties in their regulatory treatment. For now, we will approach only to review the legal situation of those known as juvenile law offenders. When their criminal behavior is particularly serious, becomes deprivation of liberty. The responsible agencies for child care have special facilities for the detention of these adolescents. For obvious reasons, within it should prevail a basic disciplinary sense, but its procedures and measures “will have as its main fundament to contribute to security and the maintenance of an orderly community life, and shall in any case be compatible with respect for the adolescent dignity.”

 Judicial sanctions are inherent to criminal proceedings. However adolescent’s criminal law prioritizes the interests of the child and enables the recognition of his/her rights within the framework of the implementation of sanctions. To do this, the adolescent has the right to “be treated in a way to strengthen its respect for the rights and freedoms of others, protecting their development, dignity and social integration.” Therefore, the prospect of compliance with the sanction is aimed to rehabilitate the minor, although there is no constitutionally recognized aim.

 III. Social interdiction of inhuman and degrading treatment and abuse within the physical and psychological integrity of individuals

Human dignity is not limited to the dyad person/state. The horizontal effect of fundamental rights applies fully in relations between individuals. “Dignity does not mean, therefore, only an inner space of man but also his openness to the social sphere, responsibility for the neighbor and the community he belongs, as well personal responsibility, self-determination. Interpersonal references of individual fundamental rights are also part of the human dignity.” This social dimension is what makes human dignity an essentially relational parameter. This is manifested, with lights and shadows, in the reality of human sociability. Our legislation displays some signs of concern for the

7) Article 46 Law No. 20.084 Adolescent Criminal Responsibility Act.
exercise of human dignity in certain cases. Let’s start with a simple case concerning the
security and surveillance systems of commercial establishments. These systems “are particularly obliged to respect the dignity and rights of individuals”.9) The power of
management of the company covers the economic sphere, but the respect for all
fundamental rights, specific or nonspecific is inserted into an employment relationship. It
can be a real risk the reification of employment relationship, which extends private power
over a subordinate relationship spanning more rights than those born of the employment
contract. Therefore, the principle of human dignity operates as a private power limit,
avoiding that work dependence transmutes in the existential dependence of the worker on
his employer, whether operating as mobbing or sexual harassment. Thus article 2 of the
Labor Code, while acknowledging the social function of work, requires that “labor
relations should always be based on a deal consistent with the dignity of the person.”
Mobbing and sexual harassment are contraries to this kind of treatment.

From employer’s disciplinary powers follows their full right to verify the progress of the
company, according to its criteria, being able to have sanctions and prohibitions that let run
the line of business compatible with their venture. To do this, it can have internal regulations
governing labor relations and attachments elements to individual and collective labor
contracts. However, this must be done by imposing measures of labor control which “can
only be carried out by qualified and consistent means with the nature of the employment
relationship and, in any case, its application shall be general, ensuring the impersonality of
the measure, to respect the dignity of the worker.”10)

In the same way, there are duties on other social organizations. Thus the legislation also
states that “associations may not perform acts contrary to the dignity and worth of the
individual, the rule of law and the general welfare of a democratic society.” Regulatory
powers of self-organization generate rights as far as fundamental rights of associates are
guaranteed, especially, their dignity.

IV. Human dignity as a limit to freedom of expression

Legislation on broadcast television, film classification, and domestic violence law

9) Law No. 19.946 rules of protection of consumers rights.
incorporates some clauses that are explainable from the logic of limits of freedom of expression. The Chilean Constitution guarantees everyone “freedom to express opinions and disseminate information, without prior censorship in any form and by any means, without prejudice to liability for crimes and abuses committed in the exercise of these freedoms, in accordance with the law, which must be one of qualified quorum.”

However, the examination of limits of freedom of expression is a matter of weighting of rights. It is likely that the constitutional clause which would provide degrees of complexity in their understanding refers to the “abuses” committed in the exercise of these freedoms.

We affirm that television and film legislation contains two identificatory clauses of this abuse in relation to human dignity, which are transformed, once violated, in administrative penalties. Under no aspect it can be understood that these rules constitute prior censorship, expressly prohibited by the Constitution.

1. The case of broadcast television

On the one hand, the constitutional role of the National Television Council (Consejo Nacional de Televisión) is to ensure “the proper functioning of television.” It is known that the Constitution states in Article 19, paragraph 12 of the Constitution the status of freedom of information and opinion, including the rule that the National Television Council has the power to control, ex post, the contents that violate a set of public purposes. The legislature has defined the set of references that fulfill the proper functioning of television; among them, a recent amendment provides that “mean proper functioning of these services is the permanent respect through their programming [...] to human dignity and its expression in equal rights and treatment for men and women.” The reference to human dignity is generic and one among a chapter of public purposes.

However, reviewing the administrative decisions of the National Television Council in a quantitative and not qualitative examination, the meaning of the causal called “attack on the dignity of persons” is described. It is the first or second cause that generates greater sanctions by National Television Council; however, it is not possible to determine the reasons that underlie this consideration by the sparseness of explanations. Nevertheless, it is common the imposition of fines on TV programs that show, no consideration or in any context, situations such as victims of homicide, sexual offenses, their relatives or the pain of

11) Article 19, paragraph 12, Chilean Constitution.
their relatives. Also, there are long scenes ridiculing a young drunk or manifesting the truculence of some extrajudicial executions performed by Islamic State.

2. The case of films

As for the films classification, the legislator provides that “for the purposes of this Act, following definitions shall apply […] e) excessively violent content: one in which is exercise unconscionable physical or psychological force and with viciousness on living beings or the use of torture or behavior that exalts violence or incites aggressive behavior that harms human dignity, finding no substantial basis in the context in which they occur or exceeding the causes which have given rise.”12) While it is not technically possible to compare all classifications, it seems that the legislator aims to considerations which restrict the exercise of conduct relating to gratuitous violence, dehumanization of behaviors that degrade and humiliate people.

3. The case of public campaigns

The legislator is aware of the negative or positive dimension of the media in the establishment, reproduction or repetition of cultural patterns. Beyond the limits of these strategies and technical capacity they have to focus their purposes, it has been a prevalent public interest to promote public campaigns to eradicate certain “public bads”.

In this sense, as a developer of a goal that cannot be understood as a limit to freedom of expression but as a public policy objective, the legislation on domestic violence confers the National women’s service (Servicio Nacional de la Mujer) the attribution “to promote the contribution of the media to eradicate violence against women and to enhance respect for their dignity.”13)

V. Equal dignity as non-discrimination and social integration

One of the traditional dimensions of human dignity is the recognition of the essential

12) Article 2 Law No. 19.846 about film classification.
13) Article 4 paragraph d) Law No. 20.066 about domestic violence.
quality of the human condition. Often several holders of these rights are in a social weakened position by their physical or mental disability, the environment of their school development. This condition of vulnerability puts them in a situation of increased susceptibility to be victims of violations of their dignity.

The legislature has promoted a type of policy that aims to expand its autonomy, increasing opportunities, social inclusion and flattening inequalities. To do this, he pointed to the development of anti-discrimination measures against persons with disabilities. In this regard, bullying behavior is understood as “any conduct related to a person’s disability which has the effect of violating their dignity or creating an intimidating, hostile, degrading, humiliating or offensive.”

Likewise, it has been highlighted the need of ban of any arbitrary discrimination or social segregation in the process of school admissions. “Under no circumstances may implement processes involving arbitrary discrimination and must ensure respect for the dignity of pupils, students and their families.” The Constitutional Court ruled on this article, in order to defend the constitutionality of this legal provision, since “cannot stand distinguishing criteria in the selection process for state-funded private schools, preferring direct factors that allow some children over others. Such factors normally constitute discrimination. Therefore, they have been circumvented by a series of habits and indirect cultural practices that allow establishments to select families in a manner inconsistent with the ‘full development of the person at different stages of his life’ (Article 19, paragraph 10 of the Constitution). The bill under consideration is inserted in constitutionally legitimate goals: equal in dignity and rights from birth, promoting the common good, equal opportunities, social inclusion, promotion of disadvantaged groups and democratic development.”

VI. Human dignity in intrusive procedures of people’s privacy

State Administration exercises legitimate intrusive measures and maintains information about them in records under certain precautions.

14) Article 8 Law No. 20.422 about equal opportunities and social inclusion of people with disabilities.
15) Article 13 Law No. 20.845 General Education Act amendment.
16) Constitutional Court Decision No. 2.787, paragraph 32.
1. Genetic identity

Obtaining DNA can be one of the most significant encroachments on the dignity of the human person and his privacy. Therefore, the general rule is the exclusion of these samples and records, and their uses reduce to the scope of scientific research as well as the dimension of the criminal investigation. In the latter area, the DNA record may be obtained only in the framework of a criminal investigation and the responsibility of their uprising, custody and registration is the Service Civil Registry and Identification.

In this institutional framework, the DNA registration system is confidential. “The information it contains may only be directly consulted by the prosecution and the courts. The police can access prior authorization of the Public Prosecutor, and public and private defenders prior authorization of the respective court. Under no circumstances may constitute the system basis or source of someone’s discrimination, stigma, violation of dignity, intimacy, privacy or honor.”

2. Drug control

The drug test has settled in the country as a mechanism to safeguard the exercise of public functions in the context of probity that is, always doing the public interest prevailing over individual interest. Thus the Constitution prescribes the loss of citizenship for conviction on crimes related to drug dealing, generating a complex form of rehabilitation in the Senate. If citizens have this risk of sanction, the perspective of consumption in public officials offers a new conflict of rights.

On the one hand, a general rule to all civil servants of the State Administration prescribes, that personal drug’s use is compatible with the exercise of public office, as long as no high public sensitivity charges are exercised or charges in audit agencies, investigative or judicial bodies.

This is how a select group of civil servants have a duty to submit drug testing. “Such method of monitoring shall include all members of a group or sector of civil servants, which will be determined randomly; it shall apply in confidence and will secure the dignity and privacy of them […].”

17) Article 2 Law No. 19.970 creates National DNA Register.
18) Article 81 bis Law No. 18.840.
equivalent rank at the Central Bank and civil servants of agencies related to money laundering and criminal investigations and judicial prosecution.

3. Intrusion into the human body (biological samples)

Finally, in the area of criminal investigation, a huge area of controversy has to do with the body as proof of the crime. To do this, performing tests on it, usually by legitimate or illegitimate coercion degrees, involves determining the validity of the test. Its realization and records can produce enormous indignities: obtaining body fluids, induction of vomiting, capturing blood, etc., it can be transformed into excessive means for purposes that may be obtained by other ways, under the criteria of proportionality and reasonableness.

The previous authorization of a supervising judge does not mean that will not be in danger the human dignity. Thus, “if necessary to ascertain relevant circumstances to the investigation, may be carried out physical examinations of the accused or offended by the offense, such as evidence of biological, blood draws or other similar fact, whenever is not of fear impairment to health or dignity of the person concerned.”

VII. Dignity as self-determining and free development of the personality

1. The formative principle of human dignity

This is one of the broadest categories of application of human dignity and is part of what German law calls the exercise of free development of personality. As we saw, and yet there is no such fundamental right expressly recognized in our legal system, the legislator has tended to link it widely. Thus, for example, one of the goals of the education system is conducive to human dignity. “The system should be directed to the full development of the human personality and the sense of its dignity, [...].” Therefore, as a general principle of autonomy the deployment of what the Constitution calls “free-dignity” is allowed.  

19) Article 3 paragraph h) Law No. 20.845, amending Law No. 20.370 General Education Act.  
20) “People are born free and equal in dignity and rights.” Article 1 paragraph 1 of the Constitution. Under this predicament there is free dignity and the equal dignity from birth.
2. Dignity as sexual indemnity

There is a development of the principle of dignity in its aspect of autonomy when the sexual inviolability or sexual indemnity is proposed. This is determined as an exercise of non-interference on people who are in a situation of dependence or subordination. On the one hand, there is the specific situation of workers and civil servants. Thus it is forbidden for public and municipal servants to “perform any act prejudicial to the dignity of other civil servants.” With this, the rules of harassment and arbitrary discrimination as undignified behavior under any type of employment relationship are extended.

Moreover, there is a type of significant subjection in the case of people with disabilities, especially those with mental disabilities. In this regard, abrogating a specific discrimination, the right to form and be part of a family -including their sexuality and reproductive health- is recognized. This is especially for women who suffered surgical procedures without consent (express or replaced), preventing the entire development of their sexual freedom.

Law No. 20.422, which lays down rules on equal opportunities and social inclusion of people with disabilities, provides that “in no case, the person with mental disabilities may be subjected, against his will, to practices or therapies that violate their dignity, rights or be part of medical or scientific experimentation.”21) However, it is not only to protect the invasion of privacy without consent but to safeguard, as far and good as possible, the exercise of reproductive rights of disabled persons and their realization in family and to assures them that “State shall take the necessary actions to ensure children with disabilities the full enjoyment and exercise of their rights, in particular the respect for their dignity, the right to be part of a family and maintain their fertility on an equal footing with other people. […] The rehabilitation of persons with mental disabilities, whether by mental or intellectual cause, will tend to the full development of their potential and skills.”22)

3. Free dignity in death or dying with dignity

Finally, one of the most emblematic manifestations of human dignity is to die with dignity, in the case of people who are in terminal condition. Under these circumstances, the patient has the right to give or withhold their willingness to undergo any treatment to the

21) Article 7 Law No. 20.422.
22) Articles 9 and 11 Law No. 20.422.
artificial prolongation of life. According to Chilean law, the refusal does not mean the implementation of procedures to expedite death. This right is exercised prior free and informed consent and always subject to compliance with public health rules, especially against inaction.

Under these criteria, “people who are in this state have the right to live with dignity until death. Consequently, they are entitled to palliative care to enable them to make more bearable the effects of the disease, the company of their families and persons in whose care they are receiving and, when requested, spiritual assistance.”

As for the therapeutic obstinacy, it is forbidden unless they are intended to obtain a compatible therapeutic target with the least possible damage, and using all possible human and material means. Accordingly, “the extraordinary use of isolation measures or physical and pharmacological restraint must be conducted with full respect for the dignity of the person.”

4. Equal dignity: basic benefits for decent living

The legislator brought together a set of social benefits that have been granted in the framework of subsidy and promotion policies for the most disadvantaged socio-economic segments. The designation as simple as clear: dignity’s subsidies.

Thus under this category are the benefits of “Subsidy Payment of Consumption of Drinking Water and Sewerage Service Sewage provided that [the applicants] satisfy the requirements of Law No. 18,778, under the conditions provided for in Article 8 of law No. 19,949; and will causes of Grant Educational Pro-Retention of Students, in accordance with the provisions of law No. 19,873.” Note that this law does not create these benefits, but has organized them under this modality.

23) Article 16 Law No. 20.584 which regulates the rights and duties that people have concerning actions related to their health care.

24) Article 16 Law No. 20.584 which regulates the rights and duties that people have concerning actions related to their health care.
VIII. Constitutional precedents on human dignity

The Constitutional Court’s case-law is not so extensive considering that human dignity has an important position within the constitutional order.

1. Human dignity in the treatment of the legal theory of fundamental rights

Analyzing Constitutional Court’s decisions allow us to examine its dogmatic approach to the various manifestations of human dignity in the examination of the legal theory of fundamental rights.

The first thing is to establish that dogmatic reflection is rather thin or medium density. Thus stands a definition of human dignity, understood as “that capital principle of our Supreme Code consisting of the human quality that makes it always worthy of a respectful treatment, because it is the source of the essential rights and the guarantees to be safeguarded.”25) The Court characterized human dignity as a capital principle, hyper valuing their function and specified a rule of treatment that admits its consideration as a source of substantiation of all essential rights.

Second, the Court attributed a double value to human dignity, “the dignity of the person is irradiated on the provisions of the Constitution in two dimensions: as a principle and as a positive rule.”26) Beyond that, principles are so positive rule as rules; dual configuration of human dignity recognizes one of the issues we have raised in this work, the lack of consideration of human dignity as a fundamental right.

Human dignity, considered as a principle, is recognized as the matrix of “current institutional system of which it follows that every human being, without distinction or exception, is endowed with that quality, source of fundamental rights that ensure the Article 19 of the Constitution. From dignity derives a cluster of attributes at birth and that retains throughout life. Among them are subjective public rights or powers that the law ensures as a matter of inalienable and inviolable at any time, place and circumstances.”27) We must start recognizing that to characterize the complexity of fundamental rights as subjective

27) Constitutional Court decision No. 1287/2009 paragraph 16 and 17.
public rights, in the rights matrix proposed by Jellinek, imports to associate the powers widely recognized only in a dependent link to the state.

In this perspective, the Court more strongly associated dignity as a founding principle of the rights to which it connects all Article 19 of the Constitution. However, it manifests a particular approach to certain fundamental rights such as privacy.

This does not mean that has no particular link with other fundamental rights, such as the right to social security.

Finally, in this theoretical dimension, the Constitutional Court recognizes that human dignity has a double bond with rights; both at national level and at the dimension of the essential rights emanating from human nature which are recognized in international treaties on Human Rights (Article 5 paragraph two of the Constitution). This double basis connected with rights will allow, in the field of human dignity, to recognize implicit rights such as the right to personal identity, and to ratify principles as the presumption of innocence that were embedded within the system.

2. The case law debate about human dignity in preventive reviews of constitutionality

The Constitutional Court has two types of preventive review of constitutionality of bills operating under very different formulas: mandatory and optional. Studying all those decisions, only twice the Tribunal has decided to declare unconstitutional certain provisions of a bill, regarding directly and indirectly the notion of human dignity and the application of Article 1, paragraph one of the Constitution.

In the case of the creation of the Financial Analysis Unit, organization of prevention of money laundering, the unconstitutionality of a legal rule was declared based on the lack of effective judicial controls for financial reporting. The argument focused on the right to private life and its ultimate foundation was that “dignity and rights of privacy and reserve communications of a similar nature flowing from that, are in a position to be affected in essence by the regulations of the bill examined without considering guards and heteronomous essential controls, especially those of a judicial nature, which prevent or rectify such eventuality.”

29) Constitutional Court decision No. 389/2003 paragraph 27.
The other example is the registration of costumers in Internet cafes. Under the improvement of the fight against child pornography, this legislation provided a rule that required a record of cybercafe’s users, where they had to be inscribed in order to be associated with the computer they would use. In this regard, such registration was declared unconstitutional. The basis for such declaration of unconstitutionality also appealed to the idea of human dignity, in the following terms: “The bill applies solely on customers of Internet cafes, whose mere attendance at one of these - lawful and open to the local public places - put unjustified and indiscriminately in a undeserved category of suspects, liable to be registered and included therefore in a potentially criminal record. As a result of this, an unwarranted inhibitory effect is produced on the exercise of personal freedom of users, dissuading them not to enter these shops, or the attendees are placed in a certain risk and opprobrium, so, injures the dignity and equality of persons and contravenes Article 1, first paragraph, of the Constitution.”

Remains relevant that these two cases are manifestations of indirect protection of this principle in its side of the autonomy of dignity, being both situations a reflection of the association of the notion of dignity with the free development of personality, one explicit (Decision No. 389) and other implicit (Decision No. 1894). The legally protected interest is the right to carry out activities that the law does not prohibit or impose conditions where no subordinating their exercise. This is particularly clear in the Financial Unit’s case, where the right’s essence was affected.

Of course, they were not the only discussions about the value of human dignity. It must be recognized the discussions that took place in dissenting opinions about the suspension of the right to vote as a violation of the presumption of innocence, which constitutes an early sanction similar to an accessory punishment; the case of intrusive powers of the Administration to close higher education’s institutions, and search of people’s clothing, bags and vehicles to control access to football stadiums.

31) Dissenting opinion of Decision No. 2152/2012.
32) Dissenting opinion of Decision No. 2731/2014.
33) Dissenting opinion of Decision No. 2831/2015.
3. Human dignity in cases of inapplicability

This paper concludes with a brief review of cases that have generated debate on this principle without delve deeply into them.

Civil law and the exercise of family rights has been an area of preferential controversy about the extent of the demands of human dignity. With the exception of the right to personal identity within the framework of the actions of filiation, in general, the Constitutional Court has not declared the inapplicability of the challenged legal precepts.

Controversial issues have been the exclusion of marriage for same-sex couples; the causes for guilty divorce based on homosexual conduct, and shared custody in case of divorce. In these cases, the argument that has sustained the inapplicability has tended to apply human dignity with an egalitarian approach and non-discriminatory to extend the area of marriage and the custody of children, as well as avoiding culprit breakups on the basis of sexual orientation. However, the focus of the debate is the right to equality in its substantive perspective and anti-discrimination rules, as it can be concluded after the briefly description given above.

From the criminal law it has been challenged Article 365 of the Penal Code, which punishes consensual relations between an adult and an adolescent of 14 years, both of the same sex. The decision held that “the legislature has acted within the orbit of its constitutional powers to refer child protection, in terms of self-determination and sexual inviolability, to sodomitic relations when playing a passive role, understanding, reasonably, that these types of relationships affect adversely their dignity as a person who lives in the immaturity of their psychic and sexual development.” The debate was very intense around this value and dissenting opinion credits him roundly; “To conduct punishment solely because of the sexual orientation of the participants this standard becomes homophobic and reflects an illegitimate criminal law in the light of the Constitution. This can only be understood as a manifestation of homophobia looking homosexuals as

34) Refers to the specific attribution to review the constitutionality of legal precepts (including executive decrees that are equivalent to statutes) subsequently (a posteriori) of being enacted.
36) “Whoever carnally access to under eighteen years person of the same sex, without the intervention of the circumstances of the crimes of rape or statutory rape, shall be punished with imprisonment in its minimum to medium degrees.”
abnormal, inferior and unworthy subjects.”

Third, two social rights have been partial manifestations concerning human dignity. The case of bus’s drivers of rural and intercity transport in middle and long distance; the accounting of working hours and waiting times have confronted the working model of public transport in relation to the rights of workers, where such significant issues as rest periods and reasonable arrangements for contractual compliance have turned partially about the dignity of workers. The other case, which marked a significant social overturn, concerns the unilateral and arbitrary increase in private health plans that generated a very large volume of cases.

Finally, there are cases related to the challenging of Article 206 of the Civil Code or Article 5 Transitory of Law No. 19.585. The Constitutional Court initially tended to recognize the unconstitutionality of these articles founded on a violation of an implicit fundamental right: the right to personal identity. “The right to personal identity is closely linked to human dignity, as value, from its recognition in Article 1, first paragraph, of the Constitution, is the cornerstone of all fundamental rights that the Constitution protects. Also, even though the Chilean Constitution does not recognize in its text the right to identity, it can not constitute an obstacle to the constitutional judge will provide adequate protection precisely because of its close link with human dignity and because it is expressly protected various international treaties ratified by Chile and in force in our country.” The position of the Constitutional Court has varied in the matter, first, recognizing the inapplicability due to unconstitutionality but as violation of equality before the law, arbitrarily distinguishing between two types of children. And, then, the Tribunal has rejected the inapplicability since

38) Dissenting opinion Decision No. 1583/2010 paragraph 42.
39) Constitutional Court Decision No. 2470/2013 paragraph 8: “by including the constitutional guarantee explicit recognition of freedom and protection of work, the Constitution extends protection to the work itself, in response to the inseparable commitment to respect the dignity of workers in the way it carries out its work and the key role that fulfills social work.”
40) For all, Constitutional Decision No. 1710/2010, that declares the unconstitutionality of Article 38 of the private health insurance act.
41) “If the child is posthumous, or if one parent dies within one hundred eighty days to birth, the action may be directed against the heirs of the father or the deceased mother, within three years from its death or if the child is unable, since he has reached full capacity.”
42) Essentially holds the following rule: you cannot claim parenthood regarding deceased prior to the entry into force of this law.
43) Constitutional Court Decision No. 834/2007 paragraph 22.
it is plausible an interpretation according to the Constitution that allows implore the actions of filiation which guarantees the Civil Code itself.
Bibliography


Precedents

Constitutional Court Decision No. 2831, May 22, 2015.
Constitutional Court Decision No. 2787, April 1, 2015.
Constitutional Court Decision No. 2731, November 26, 2014.
Constitutional Court Decision No. 2681, December 30, 2014.
Constitutional Court Decision No. 2435, May 14, 2013.
Constitutional Court Decision No. 2152, January 19, 2012.
Constitutional Court Decision No. 1894, July 12, 2011.
Constitutional Court Decision No. 1710, August 6, 2010.
Constitutional Court Decision No. 1583, January 1, 2010.
Constitutional Court Decision No. 1340, September 29, 2009.
Constitutional Court Decision No. 1287, September 8, 2009.
Constitutional Court Decision No. 834, May 13, 2008.
The Influence of International Norms in Canada
- The Supreme Court of Canada’s approach in cases of conflict or competition with domestic law*

Richard Wagner**

I. Introduction

(1) In Canada, as elsewhere, the question of conflict or competition between the Constitution and international norms *a priori* raises the more fundamental question of the relationship between domestic law and international law. The Supreme Court of Canada has been called upon to address this question on many occasions in a wide range of areas of the law, including immigration and human rights, but also labour law, commercial law and criminal law.

(2) The influence of international law in Canada is certainly undeniable. It has been particularly noteworthy since the advent of the *Canadian Charter of Rights and Freedoms* in 1982.¹) In fact, the *Canadian Charter*, which has constitutional status, draws extensively on a variety of international treaties, especially the *Universal Declaration of Human Rights*²) and the *International Covenant on Civil and Political Rights*.³) Federal statutes in Canada also incorporate many rules derived from international law, including in the fields of aeronautics, maritime law, the environment, taxation and international trade.⁴)

---

* This paper is based on remarks that were delivered in French at the June 2015 conference of the Association des Cours Constitutionnelles ayant en Partage l’Usage du Français (“ACCPUF”).
** Superior Court judge, Supreme Court of Canada

(3) Given the significant part played by international law in the Canadian legal context, it is not surprising that issues related to the extent of its application have come before the Supreme Court many times. In this essay, I will review some selected cases to explain the Canadian approach, including the Canadian approach to dealing with conflicts or competition between international law and Canadian domestic law.

II. Review of the principles for applying international law in Canada

(4) Although international law is important in Canada, it nonetheless operates within a sphere separate from that of Canadian domestic law. The incorporation of international law into domestic law depends on whether the source of the international law rule in question lies in custom or in a treaty. In the case of custom, incorporation into domestic law is automatic. As the Supreme Court of Canada recently noted, “[t]he automatic incorporation of such rules is justified on the basis that international custom, as the law of nations, is also the law of Canada unless, in a valid exercise of its sovereignty, Canada declares that its law is to the contrary.” 5)

(5) The same cannot be said for the incorporation of international rules derived from treaties or conventions signed by Canada, which is a country with a dualist tradition in this regard, in accordance with the British model. The Supreme Court of Canada has affirmed this in the following terms: “[U]nless a treaty provision expresses a rule of customary international law or a peremptory norm, that provision will only be binding in Canadian law if it is given effect through Canada’s domestic lawmaking process.” 6)

(6) However, regardless of whether an obligation flows from customary international law or from a treaty, the principle of conformity with international law is always the starting

point for the application of international law. This principle is a presumption of statutory interpretation whose purpose is precisely to minimize conflicts and competition between domestic law and international norms: “The presumption of conformity is based on the rule of judicial policy that, as a matter of law, courts will strive to avoid constructions of domestic law pursuant to which the state would be in violation of its international obligations, unless the wording of the statute clearly compels that result.”

This, then, is the framework resulting from the principles for applying international law in Canada. While those principles are essentially quite clear, the fact remains that international law is ever changing, and the Supreme Court of Canada, like any court, must exercise good judgment in dealing with the interaction between international law and its domestic law, especially its Constitution. It is from this perspective that I will share some examples that illustrate the Canadian approach.

III. Baker: the influence of international obligations on Canadian domestic law

My overview of Canadian cases that illustrate the influence of international law starts with an immigration law case dating back to 1999, Baker v. Canada (Minister of Citizenship and Immigration). The applicant in that case, a woman with Canadian-born children, sought an exemption from certain requirements imposed by Canada’s former Immigration Act on the basis of humanitarian and compassionate considerations, specifically the interests of her children. There were in fact provisions in the Immigration Act authorizing such exemptions based on humanitarian and compassionate considerations, but the Act was silent about the interests of children, despite the fact that Canada was a party to the Convention on the Rights of the Child.

7) Hape, supra note 6, at para. 53; see also B010 v. Canada (Citizenship and Immigration), 2015 SCC 58, [2015] 3 S.C.R. 704, at paras. 47 et seq.
8) Kazemi, supra note 7, at para. 150.
The question therefore became the following: “Given that the Immigration Act does not expressly incorporate the language of Canada’s international obligations with respect to the ... Convention on the Rights of the Child, must federal immigration authorities treat the best interests of the Canadian child as a primary consideration in assessing an applicant under ... the Immigration Act?”

(9) The majority of the Supreme Court answered that question in the affirmative. Madam Justice Claire L’Heureux-Dubé, writing for the Court, noted that the values reflected in international human rights law may help inform the contextual approach to the interpretation of Canadian statutes. In concrete terms, this meant that any decision made under the Immigration Act on humanitarian and compassionate grounds had to take into account the commitments made by Canada, in that case under the Convention on the Rights of the Child, even though that convention had not been implemented by Parliament. Any contrary decision, that is, any decision “inconsistent with Canada’s humanitarian and compassionate tradition”, could be overturned for being unreasonable. More than 15 years after it was decided, Baker remains an authority in this area and serves as an eloquent illustration of international law as a “relevant and persuasive source” in Canada, particularly with respect to human rights.

(10) Furthermore, the Supreme Court of Canada has long held that its interpretation of the Canadian Charter of Rights and Freedoms, Canada’s constitutional bill of rights, should be consistent with Canada’s international obligations and relevant international law principles. In other words, “the Charter should be presumed to provide at least

13) Ibid, at para. 70.
14) Ibid, at para. 75.
15) Cf. Canadian report, supra note 4, at pp. 3233. The expression “relevant and persuasive source” was used by Chief Justice Dickson in Reference Re Public Service Employee Relations Act (Alta.), [1987] 1 S.C.R. 313 (at para. 60): “In short, though I do not believe the judiciary is bound by the norms of international law in interpreting the Charter, these norms provide a relevant and persuasive source for interpretation of the provisions of the Charter, especially when they arise out of Canada’s international obligations under human rights conventions.”
16) Hape, supra note 6, at para. 55; Saskatchewan Federation of Labour v. Saskatchewan, 2015 SCC
as great a level of protection as is found in the international human rights documents that Canada has ratified.” A majority of the Court, for example, recently relied in part on Canada’s international human rights obligations to justify recognizing a right to strike under s. 2(d) of the Charter, which protects freedom of association.18)

(11) In the same vein, the Supreme Court does not hesitate, if need be, to compare Canadian values to the values of countries said to be “comparable” in order to assess international trends.

(12) Finally, it is worth noting that the Court recently undertook a similar exercise in the context of euthanasia, justifying a reversal of its case law – which until then did not recognize a right to euthanasia – in part on the basis that a growing number of countries now authorize some form of assisted dying.19)

IV. Kazemi: limits on the application of international law

(13) I turn now to a more recent judgment of the Supreme Court of Canada, Kazemi Estate v. Islamic Republic of Iran, which was decided in 2014. It is a case that is infamous because of its facts: Ms. Kazemi, a Canadian citizen who worked as a photographer and journalist, had gone to Iran and was arrested while taking photographs of individuals protesting outside a prison in Tehran. During her time in custody, she was beaten, sexually assaulted, and tortured, and she died of her injuries a few weeks later. Her son, who was unable to seek redress in Iran, initiated civil proceedings in Quebec against Iran, the Iranian head of state and two state officials in relation to the alleged torture of his mother and her death. The main issue raised by the proceedings concerned sovereign immunity, specifically whether international law requires an

18) Saskatchewan Federation of Labour, supra note 17, at para. 65.
interpretation of Canada’s State Immunity Act\textsuperscript{20} that recognizes an exception to the principle of immunity in cases involving torture.

\textbf{(14)} The Supreme Court answered that question in the negative. It first noted that state immunity has long been a general rule of customary international law. The Court also noted that this international norm has nonetheless evolved, particularly since the Second World War, and that a number of exceptions have been created, including in commercial and criminal matters and cases involving terrorist activity.\textsuperscript{21} Canada’s State Immunity Act does in fact contain such exceptions, but it does not contain an exception for actions similar to the one in Kazemi, that is, civil proceedings based on acts of torture committed abroad.

\textbf{(15)} Must the absence of an explicit exception in the Canadian legislation preclude the recognition of an exception to sovereign immunity even though torture is prohibited by international law? In this scenario, is there a conflict between Canadian law relating to immunity and the peremptory international norm that the prohibition against torture has become? The Court, while refuting the existence of such a conflict and thereby recognizing that sovereign immunity had to be upheld in that case, nonetheless qualified the discussion in the following terms:

Canada does not condone torture, nor are Canadian officials permitted to carry out acts of torture. However, the issue in the present case is not whether torture is abhorrent or illegal. That is incontestably true. The question before the Court is whether one can sue a foreign state in Canadian courts for torture committed abroad. The answer to that question lies in the interpretation of [Canada’s State Immunity Act], and its interaction with international law, the Charter and the [Canadian] Bill of Rights.\textsuperscript{22}

\textbf{(16)} Ultimately, the Court held that Canada’s State Immunity Act, as written, ousts international law as a source of potential exceptions, including in cases of torture.\textsuperscript{23}

The Court reached that conclusion while noting that “[t]he current state of


\textsuperscript{21} Kazemi, supra note 7, at paras. 38 \textit{et seq}.

\textsuperscript{22} Ibid, at paras. 52-53.

\textsuperscript{23} Ibid, at para. 58.
international law regarding redress for victims of torture does not alter the [statute], or make it ambiguous”\textsuperscript{24}) and that “[i]nternational law cannot be used to support an interpretation that is not permitted by the words of the statute”.\textsuperscript{25}) Having said that, the Court hastened to add that if the words of Canada’s \textit{State Immunity Act} had been ambiguous in this regard, it would have been open to the Court to look to international law for “guidance”.\textsuperscript{26})

\section*{V. Thibodeau: interpretation of a treaty in conflict with the broader protection conferred by Canadian domestic law}

(17) Whereas Kazemi illustrates the limits on the application of international law in Canada, specifically where one seeks to extend the scope of domestic law by applying international law, the reverse is illustrated by \textit{Thibodeau v. Air Canada},\textsuperscript{27}) a case decided in late 2014. That case concerned a treaty whose application was found to limit the protection given by Canadian domestic law to human rights, in that case language rights.

(18) The plaintiffs in the case, Mr. and Ms. Thibodeau, alleged that an airline, Air Canada, had infringed Canada’s \textit{Official Languages Act}\textsuperscript{28}) by failing to provide services in French on international flights. There was no dispute that the airline had indeed breached its obligations, but it defended against the claims for damages by relying on the limitation on damages liability set out in the \textit{Convention for the Unification of Certain Rules for International Carriage by Air} (the “\textit{Montreal Convention”)\textsuperscript{29}), which restricts what would otherwise be authorized by Canadian domestic law: “The issue of damages sits at the intersection of Canada’s domestic commitment to official

\begin{thebibliography}{9}
\bibitem{24} Ibid, at para. 60.
\bibitem{25} Ibid.
\bibitem{26} Ibid, at para. 63.
\bibitem{28} R.S.C. 1985, c. 31 (4th Supp.).
\end{thebibliography}
languages and its international commitment to an exclusive and uniform scheme of damages liability for international air carriers. The question thus implicates two important values.” 30)

(19) The majority of the Supreme Court ruled in the airline’s favour in the following terms: The Montreal Convention’s uniform and exclusive scheme of damages liability for international air carriers does not permit an award of damages for breach of language rights during international carriage by air. To hold otherwise would do violence to the text and purpose of the Montreal Convention, depart from Canada’s international obligations under it and put Canada offside a strong international consensus concerning its scope and effect. The general remedial power under [Canada’s Official Languages Act] to award appropriate and just remedies cannot — and should not — be read as authorizing Canadian courts to depart from Canada’s international obligations under the Montreal Convention. 31)

(20) In doing so, the majority in Thibodeau sought to reconcile the rules imposed in Canadian domestic law, that is, by the Official Languages Act, with rules derived from an international treaty, the Montreal Convention.

(21) This approach led the majority to conclude that the rules in question in that case did not conflict but, rather, overlapped, with the result that there was no need to determine whether one had to take precedence over the other. But the Court was divided on this point. The dissenting judges, of whom I was one, preferred an approach based on the intention of the state signatories to the Montreal Convention, noting as follows: The process of treaty interpretation is a process of discernment. The literal meaning of the words is rarely reliably able to yield a clear and unequivocal answer. The intention of state parties must therefore be discerned by using a good faith approach not only to the words at issue, but also to the context, history, object and purpose of the treaty as a whole. In my respectful view, this exercise leads to the conclusion that Article 29 of the Montreal Convention does not exclusively govern the universe of damages for which carriers are liable during international carriage by air. 32)

30) Thibodeau, supra note 28, at para. 3.
(22) I would add that the dissenting judges also wanted to state the following caveat: Finally, although it is not determinative, we cannot ignore the fact that we are dealing with a commercial treaty. This Court has often said that domestic law should be generously interpreted in alignment with international law and its human rights values. It has never said that international law should be interpreted in a way that diminishes human rights protected by domestic law. Just as Parliament is not presumed to legislate in breach of a treaty, it should not be presumed to implement treaties that extinguish fundamental rights protected by domestic legislation.33)

(23) This case clearly illustrates the difficulty, and even the tension, that can sometimes result from conflicts or competition between international law and domestic law. The question remains a topical one, to say the least.

VI. Conclusion

(24) This brief overview of the Supreme Court of Canada’s case law is not exhaustive. The number of Supreme Court of Canada cases raising international law issues has been constantly increasing, especially since the enactment of the Canadian Charter of Rights and Freedoms more than 30 years ago. In the age of internationalization in all its forms, this trend is unlikely to fade. While it is true that openness is needed in such a context, it is equally true that constitutional courts must exercise good judgment when such issues come before them.

A Study on European Constitutional Courts as the Courts of Human Rights
- Assessment, Challenges, Perspectives

Jasna Omejec*

I. Introduction

Croatian citizens, as well as citizens of many other European countries, today live at the same time in different legal areas: the national one, the one of the European Union (EU), and the legal area of the European Convention on Human Rights (ECHR).

The European human or fundamental rights catalogues, which join the national ones, promote the European idea: they consolidate a common European human rights standard. As a “European common law of human rights”, this standard is part of a developing European legal system. “In so far as these norms span across hierarchies and State boundaries, and to the extent that these norms are overarching and shared, they are constitutional – at the transnational level. Because multiple high courts assert final jurisdiction over these same norms, the wider, pan-European, system is pluralistic.”

Accordingly, as Judge Andreas Voßkuhle, President of the German Federal Constitutional Court (BVerfG), pointed out, there is no such thing as a single supreme guardian of the fundamental rights in Europe. What exist instead are European constitutional courts: national constitutional courts or other highest national courts that exercise constitutional jurisdiction (hereinafter: national constitutional courts), one of the

* President of the Constitutional Court of the Republic of Croatia

2) In Europe, Constitutional Courts exist in Albania, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Georgia, Germany, Hungary, Italy, Latvia, Lithuania, Luxembourg, Macedonia, Malta, Moldova, Montenegro, Portugal, Romania, Russian Federation, Serbia, Slovakia, Slovenia, Turkey and Ukraine while Andorra, Poland and Spain have
ECHRI, and one of the EU. All these courts perform similar tasks at different levels and have the function of pillars in the European human rights architecture. The European constitutional courts are part of a system of multilevel cooperation: they form a network of European constitutional courts, avoiding rigorous conceptions such as “equal footing” or “supremacy” to denote the relationship between them.3)

This study analyses the three existing levels of judicial protection of human rights in Europe and their relationship, including their institutional, normative, jurisdictional and jurisprudential aspects. Due to its typical characteristics, the model of constitutional judiciary that exists in the Republic of Croatia has been chosen as an example of the model of judicial protection of human rights at the national level.

This study on the judicial architecture of human rights protection in Europe attempts to contribute to the endeavours to open up a discussion within the Congress of the Association of Asian Constitutional Courts and Equivalent Institutions on the need of establishing an Asian court of human rights. It is also aimed at increasing awareness of the importance of the constitutional judiciary within Asia.

---

II. European judicial architecture of human rights protection

1. Human rights protection at the European level

1) Council of Europe and the European Court of Human Rights (Strasbourg)

Council of Europe (CoE) is an international organisation based in Strasbourg which comprises 47 countries of Europe, with an estimated population of 820 million. It was set up in 1949 to promote democracy and protect human rights and the rule of law in Europe.

The 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights - ECHR), together with its Protocols, is the most famous CoE’s treaty securing civil and political rights in Europe. The ECHR is the “constitutional instrument of European public order.” All 47 countries of the CoE are the State Parties of the ECHR.

European Court of Human Rights (ECtHR) is a judicial organ established by the ECHR. It is the creator of “European constitutional standards” for it oversees the implementation of the ECHR in the States Parties and ensures, in the last instance, that they observe their obligations under the ECHR. It is based in Strasbourg, France and since November 1998 has operated on a full-time basis. The ECtHR is composed of one judge for each State Party to the ECHR, elected for a non-renewable 9-year term by the Parliamentary Assembly of the CoE. The judges select its President, for a period of three years, provided that such period does not exceed the duration of the President’s term of office. Since its establishment in 1953, approximately 700,000 applications were forwarded to judicial bodies of the ECtHR. Until today, around 20,000 judgments and 600,000 decisions have been delivered by the ECtHR. Its judgments are binding on the countries concerned.

4) CoE Member States are Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Malta, Monaco, Montenegro, Netherlands, Norway, Poland, Portugal, Republic of Moldova, Romania, Russian Federation, San Marino, Serbia, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine and United Kingdom.

5) ECtHR, Loizidou v. Turkey, judgment (prethodni prigovori), 23 March 1995, no. 15318/89, § 75; Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland, judgment [GC], 30 June 2005, no. 45036/98, § 156.
Thus, “[w]hile it is true that the Council of Europe is an association of states without, apart from its Statute, a formal constitutional document, its core membership conditions nevertheless include a commitment to democracy and the rule of law, the limitation of the exercise of public power by a set of justiciable ‘constitutional’ rights found in the ECHR, a Court (ECtHR) to settle complaints about their alleged violation, and another institution (the Committee of Ministers) to supervise the execution of the Court’s judgments.”

2) European Union and the Court of Justice of the European Union (Luxembourg)

European Union (EU) currently has 28 Member States, with an estimated population of over 508 million. These States have delegated some of their sovereignty so that decisions on specific matters of joint interest can be made democratically at European level. The EU operates through a system of supranational institutions and intergovernmental-negotiated decisions by the Member States. The German BVerfG refers to the EU as a Staatenverbund (association of sovereign states).

Charter of Fundamental Rights of the European Union (CFREU) is the main document on human rights and fundamental freedoms in EU, adopted in 2000 and entered into force on 1 December 2009. It is applied only when the fundamental right issue involves the implementation of EU legislation by the national authorities. However, the interpretation of the rights guaranteed by the CFREU which correspond to rights guaranteed by the ECHR must correspond to the interpretation of the latter by the ECtHR.

Court of Justice of the European Union (CJEU) is based in Luxembourg and ensures compliance with the law in the interpretation and application of the European Treaties of the EU and the CFREU. The CJEU consists of three courts: the Court of Justice (CJ), the General Court (GC), created in 1988, and the Civil Service Tribunal (CST), created in 2004. Each judge and advocate general is appointed for a renewable 6-year term, jointly by

---

7) No country has ever joined the EU without first belonging to the CoE.
8) EU Member States are Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and United Kingdom.
national governments. In each Court, the judges select a President who serves a renewable term of 3 years. Since their establishment, approximately 28,000 judgments have been delivered by the three courts.

3) The EU’s accession to the ECHR

In 2010, the CoE issued a document in which it listed all the advantages of EU accession to the ECHR, emphasising that the following views were fully shared by members of the EU Convention that had prepared the text of the Constitutional Treaty:

- Accession will further strengthen the protection of human rights by submitting the Union’s legal system to independent external control. Any individual will be able to bring a complaint about infringement of ECHR rights by the EU before the European Court of Human Rights. The EU would thus be in the same situation as the member States.
- Accession is the best means of achieving a coherent system of fundamental rights’ protection across Europe. As the Union reaffirms its own values through its Charter of Fundamental Rights, its accession to the ECHR will give a strong political signal of coherence between the EU and ‘greater Europe.’
- Accession will close gaps in legal protection by giving European citizens the same protection vis-à-vis acts of the Union as they presently enjoy vis-à-vis all member States of the Union.
- Accession will result in all European legal systems being subject to the same supervision in relation to the protection of human rights. Given the increasingly broad competences of the EU, it is ever more difficult to accept that it should be the only ‘legal space’ left in Europe which is not subject in the same way as States parties to the Convention to external scrutiny by the European Court of Human Rights.

10) For purposes of clarity, the general acronym “CJEU” is used in this paper when referring to the whole EU judicial system, which is composed of three above mentioned courts. This is without prejudice to the fact that the focus is actually on the role and case law of the Court of Justice (CJ).
• Accession will reassure citizens that the EU, just like its member States, is not ‘above the law’ as far as human rights are concerned. This is a question of credibility, given that EU member States have transferred important competences to the Union and that ratification of the ECHR is a condition for EU membership.
• Accession of the EU to the ECHR is the best means of ensuring the harmonious development of the case-law of the European Court of Justice and the European Court of Human Rights in human rights matters. The ECJ will apply the EU Charter of Fundamental Rights, many provisions of which are based on, but not identical to, those of the ECHR. Combined with the increase in the EU’s powers, the Charter’s existence will inevitably mean that the ECJ will have to consider more cases involving fundamental rights than in the past. Without accession, this would increase the risk of contradictions in the case-law between the two Courts, in spite of all efforts to the contrary.
• Accession will resolve the problems resulting from the fact that currently the EU cannot be party to proceedings before the European Court of Human Rights. When the Court rules on alleged human rights violations resulting from the application or implementation of EU law by the member States, the EU is unable to defend itself properly before the Court. The EU is not bound by the Strasbourg judgment, even though the execution of the judgment may require the EU’s contribution.

However, it should be recalled that the European Commission asked the CJEU for an Opinion on the draft agreement reached in the negotiations. In its Opinion, the CJEU found a number of elements to criticise (as could already have been expected after the view delivered by Advocate General Kokott in June 2014). As regards the substance of the

---

request for an opinion, the CJEU, after recalling by way of preliminary point the fundamental elements of the constitutional framework of the EU, examined compliance with the specific characteristics and the autonomy of EU law, including in relation to the common foreign and security policy (the CFSP), and also compliance with the principle of the autonomy of the EU legal system, laid down in Article 344 TFEU. It also verified whether the specific characteristics of the EU were preserved in the light of the co-respondent mechanism and the procedure for the prior involvement of the Court of Justice (CJ). That examination led the CJEU to conclude that the draft agreement was not compatible with either Article 6(2) of the Treaty on European Union (TEU) or Protocol No 8, relating to that provision, annexed to the EU Treaty.

Accordingly, the Opinion of the CJEU “will generally render future accession highly difficult and delay it in addition, since already the negotiations of the draft agreement proved protracted and complex and since in the draft agreement suggestions by the CJEU which was represented in the relevant Council committee had already been taken into account.” 16)

The current situation (when it is clear that there will be no EU accession to the ECHR in the near future) places national judges in a very sensitive position.

For example, the CCRC closely follows the development of the case-law of the ECtHR and CJEU in relation to the interpretation and application of the ne bis in idem principle. Croatia is among the group of States Parties of the ECHR facing such problems due to the specific interpretation of this principle in the ECtHR’s case-law. This has been noted by the CJEU. Thus, Advocate General Cruz Villalón concluded that “a lack of agreement concerning a right in the system of the ECHR clashes with the widespread existence and well-established nature in the Member States of systems in which both an administrative and a criminal penalty may be imposed in respect of the same offence. That widespread existence and well-established nature could even be described as a common constitutional tradition of the Member States.” 17)


Namely, in its case Maresti v. Croatia, the ECtHR found that the applicant was prosecuted and tried for a second time for an offence of which he had already been convicted and for which he had served a term of detention (violation of Article 4 of Protocol no. 7). Similarly, in the case of Tomasović v. Croatia, the applicant’s constitutional complaint, alleging a violation of the ne bis in idem principle, was dismissed by the CCRC on 7 May 2009 (before the Maresti judgment was delivered). It was dismissed on the ground that the Croatian legal system did not exclude the possibility of punishing the same person twice for the same offence when the same act is prescribed both as a minor offence and a criminal offence. On the other hand, in the Tomasović judgment, the ECtHR found a violation of Article 4 of Protocol no. 7. It pointed out that the applicant was prosecuted and tried for a second time for an offence of which she had already been convicted. Moreover, in the Tomasović judgment, the ECtHR concluded for the first time that it is irrelevant if the first penalty has been discounted from the second in order to mitigate the double punishment.

19) The relevant part of the Maresti judgment reads, “63. As to the present case the Court notes that in respect of the minor offence and the criminal offence the applicant was found guilty of the same conduct on the part of the same defendant and within the same time frame. … The events described in the decisions adopted in both sets of proceedings took place at the Pazin coach terminal at about 7 p.m. on 15 June 2006. It is obvious that both decisions concerned exactly the same event and the same acts. 64. The Court cannot but conclude that the facts constituting the minor offence of which the applicant was convicted were essentially the same as those constituting the criminal offence of which he was also convicted.”
20) ECtHR, Tomasović v. Croatia, judgment, no. 53785/09, 18 October 2011.
21) The relevant part of the Tomasović judgment reads, “27. As to the present case the Court notes that in respect of the minor offence the applicant was found guilty of possessing 0.21 grams of heroin on 15 March 2004 at about 10.35 p.m. As regards the proceedings on indictment, she was found guilty of possessing 0.14 grams of heroin on 15 March 2004 at about 10.35 p.m. 28. The Court cannot but conclude that the facts constituting the minor offence of which the applicant was convicted were essentially the same as those constituting the criminal offence of which she was also convicted.” Moreover, the ECtHR noted “that in her constitutional complaint the applicant clearly complained of a violation of the non bis in idem principle. However, the Constitutional Court expressly held that double prosecution for the same offence was possible under the Croatian legal system. In these circumstances, the Court finds that the domestic authorities permitted the duplication of criminal proceedings in the full knowledge of the applicant’s previous conviction for the same offence.” (§ 31).
22) This legal stand is contrary to the original ECtHR ruling in Oliveira v. Switzerland (judgment of
In sum, the evolution of the case-law of the ECtHR shows that, at the moment, Article 4 of Protocol no. 7 to the ECHR precludes measures for the imposition of both administrative and criminal penalties in respect of the same acts, thereby preventing the commencement of a second set of proceedings, whether administrative or criminal. The current state of the case-law, particularly in the judgments of the ECtHR since the case of Zolotukhin v. Russia,\(^{23}\) is evidence of the existence of a conclusive statement of the law from Strasbourg.\(^{24}\)

On the other hand, in the Case C-617/10 Åkerberg Fransson,\(^{25}\) the CJEU delivered its judgment in the preliminary ruling procedure, upon a request from the Haparanda District Court in Sweden, concerning the principle of ne bis in idem in cases regarding administrative and criminal sanctions for tax evasion in the light of Article 50 of the CFREU.\(^{26}\)

The noted differences in the interpretation of Article 4 of Protocol no. 7 by the ECtHR and Article 50 of the CFREU by the CJEU put the CCRC in a very sensitive spot, since the interpretation supported by the CJEU is closer to the standpoint of the CCRC, but the decisions of the CCRC that are related to the *ne bis in idem* principle are under the direct supervision of the ECtHR.

To sum up, when it is clear that there will be no EU accession to the ECHR in the near future, in the coming period the existing structure of the institutional protection of human rights on the European and national level will remain in force, as it is shown on the following illustration from aspect of the application of the CFREU:

---

30 July 1998, Rep. 1998-V; fasc. 83), which received strong criticism and now appears to have been abandoned.  
23) ECtHR, *Zolotukhin v. Russia*, judgment, no. 14939/03, 10 February 2009.  
26) The CJ confirmed that the principle of *ne bis in idem* prevents the levying of two subsequent criminal sanctions for the same act, whilst the same principle permits an administrative sanction followed by a criminal sanction (§ 34). The CJ also confirmed that sanctions that are administrative by name may in fact be criminal, depending on their legal classification, the nature of the offence and the degree of severity of a potential penalty. However, instead of providing clear guidance on whether or not the administrative sanction was criminal, the CJ left it to the national court to decide, thereby still leaving the door open as to the applicability of the principle of *ne bis in idem* in taxation cases (§ 36).
Where individuals or businesses consider that an act of the EU institutions directly affecting them violates their fundamental rights as enshrined in the CFREU, they can bring their case before the CJEU, which, subject to certain conditions, has the power to annul the act in question.

The Commission cannot pursue complaints which concern situations outside the implementation of EU law. In those situations, it is for the Member States alone to ensure that their obligations regarding fundamental rights are respected. Member States have domestic guarantees of fundamental rights, normally at constitutional level. These guarantees are protected by national judges and, usually, constitutional courts. Accordingly, complaints in this context need to be directed to the national level.

In addition, all EU Member States are bound by the commitments they have made under the ECHR, independent of their obligations under EU law. Therefore, as a last resort and after having exhausted all legal remedies available at national level, individuals may bring an action before the ECtHR in Strasbourg for a violation by a Member State of a right guaranteed by the ECHR. Therefore, even where the CFREU is not applicable to a given
situation within an EU Member State, two other sources of protection for fundamental rights exist: Individuals may have recourse to national remedies and, after having exhausted them, they can lodge an application to the ECHR, in conformity with that convention.27)

2. Standard model of the human rights protection at a national level: the Republic of Croatia

1) Brief overview of the constitutional order of the Republic of Croatia

The Croatian Constitution was adopted on 22 December 1990, on the eve of Croatia’s disassociation from the previous state, i.e. the former SFRY.28) It has been amended five times since its adoption in 1990.29)

Croatia is today an independent unitary state. It is defined as a “democratic and social state” where “freedom, equal rights, national and gender equality, peace-making, social justice, respect for human rights, inviolability of ownership, conservation of nature and the environment, the rule of law and a democratic multiparty system are the highest values of its constitutional order and the basis for the interpretation of the Constitution.” It is founded on


28) Within the framework of the former SFRY, in February 1990 the Parliament of the former SRC adopted the Decision Proclaiming Amendments LXIV to LXXV to the Constitution of the Socialist Republic of Croatia (Official Gazette no. 31/90). Amendment LXIV required deleting the word “Socialist” before the words “Republic of Croatia” in the title of the Constitution and in its provisions, so that ever since 25 July 1990 the name of the State has been the Republic of Croatia. The Sabor – the Croatian Parliament – enacted the new Constitution on 22 December 1990 (Official Gazette no. 56/90). After a referendum on 22 May 1991, the Croatian Parliament on 25 June 1991 adopted the Constitutional Decision on the Sovereignty and Independence of the Republic of Croatia (Official Gazette no. 31/91), which was postponed for three months. Accordingly, at its session held on 8 October 1991 the Croatian Parliament adopted the Decision by which “as of 8 October 1991 the Republic of Croatia has severed state and legal relations on the basis of which it constituted the previous SFRY together with the other republics and autonomous provinces, and has terminated the legitimacy and legality of all the bodies of the previous federation – the SFRY” (Official Gazette no. 53/91).

29) In this Report, the author uses the official consolidated text of the Constitution, which is published in Official Gazette no. 85/10. In that text, the numbers of the original Articles of the Constitution have been changed.
the principle of the separation of powers into the legislative, executive and judicial branches, which encompasses forms of mutual cooperation and reciprocal checks and balances. State power is limited by the constitutionally guaranteed right to local and regional self-government.\(^{30}\)

A bill of rights, containing an extensive list of constitutional rights, is mainly included in Chapter III of the Constitution.\(^{31}\) It was inspired by international human rights instruments, including the UN General Declaration of Human Rights and the ECHR. From the very outset, the catalogue of constitutional rights has been considered a central constitutional achievement.

The CCRC defined the “constitutional identity” of the Republic of Croatia as follows:

“5. ... structural characteristics of the Croatian constitutional state, that is, its constitutional identity, including the highest values of the constitutional order of the Republic of Croatia (Articles 1 and 3 of the Constitution).”\(^{32}\)

**Articles 1 and 3 of the Croatian Constitution prescribe:**

“Article 1
The Republic of Croatia is a unitary and indivisible democratic and social state. Power in the Republic of Croatia derives from the people and belongs to the people as a community of free and equal citizens. The people shall exercise this power through the election of representatives and through direct decision-making.”

“Article 3
Freedom, equal rights, national equality and equality of genders, love of peace, social justice, respect for human rights, inviolability of ownership, conservation of nature and the environment, the rule of law, and a democratic multiparty system are the highest values of the constitutional order of the Republic of Croatia and the ground for interpretation of the Constitution.”

\(^{30}\) Articles 1, 3 and 4 of the Constitution.


Croatia has provided for a monistic approach to international treaties within its legal system. The first sentence of what is today Article 141 of the Constitution prescribes:

“Article 141
International treaties in force, which have been concluded and ratified in accordance with the Constitution and made public, shall be part of the internal legal order of the Republic of Croatia and shall have precedence in terms of their legal effects over the [domestic] statutes. …”

Since the Constitution prescribes that international treaties have higher legal force than the ordinary and organic acts of Parliament (“statutes”), in the case of the non-compliance of the national law with such an international treaty, courts and other bodies vested with state and public authority are obliged to apply the international treaty.

Further, according to what is today Article 118.3 of the Constitution, courts must administer justice in accordance with, *inter alia*, international treaties. This gives additional power to the courts to directly apply international treaties in the Croatian legal order.

Therefore, external sources of legality could be considered a part of the Croatian Constitution.

2) Constitutional judiciary in Croatia

As regards constitutional justice, Croatia has a long history of constitutional judiciary, reaching back to the pre-democratic era.33) It is considered a separate part of the constitutional structure, which reviews all three branches of power in constitutional matters and thus forms what may be termed the “fourth branch of power.”

The CCRC is basically designed according to the traditional Hans Kelsen’s (Austrian) or the European-Continental Model of Constitutional Review. In this model of constitutional review ordinary or regular courts cannot deal with constitutional matters. They are only courts of law or trial courts. And, if ordinary court in its proceedings determines that the law to be applied, or some of its provisions, are not in accordance with the Constitution, it shall stop the proceedings and present a request with the Constitutional Court to review the constitutionality of the law, or some of its provisions.34)

---

33) Constitutional judiciary was introduced in 1963 and the Constitutional Court of the former SRC began to work in 1964. On 25 July 1990, the earlier name of the Constitutional Court of the SRC was changed to the Constitutional Court of the Republic of Croatia (the CCRC).
Accordingly, the CCRC is the special supreme judicial institution established in view of special and exclusive decision-making powers just on constitutional matters. It protects the constitutionality of the whole legal system, the rule of law and human rights and fundamental freedoms guaranteed by the Croatian Constitution. The CCRC is placed outside the judicial system of regular courts and is fully independent of other branches of state and public authorities. It controls them all in constitutional matters.

The Croatian Constitution prescribes that the CCRC: - decides on the conformity of laws enacted by the Croatian Parliament with the Constitution (it may repeal a law if it finds it to be unconstitutional); - decides on the conformity of other regulations, passed by the President of the Republic, the Government, ministries and other state and public authorities, with the Constitution and law (it may repeal or annul any regulation if it finds it to be unconstitutional or illegal); - protects individual constitutional rights in proceedings instituted by a constitutional complaint (it may quash any judgment passed by any Croatian national court, including judgments of the Croatian Supreme Court as the highest national court, and any individual act passed by any other authorized body, if it finds that this individual act violates the constitutional right of the citizen in question); - decides on jurisdictional disputes among the legislative, executive and judicial branches of government; - supervises the constitutionality of the programmes and activities of political parties; - supervises the constitutionality and legality of elections and state referendums and decides on electoral disputes which do not fall within the jurisdiction of courts; - decides on the impeachment of the President of the Republic in proceedings instituted by the Croatian Parliament; - monitors the execution of constitutionality and legality and reports to the Croatian Parliament on any kind of unconstitutionality and illegality it has observed.

The CCRC bases its work exclusively on the provisions of the Constitution and the Constitutional Act on the CCRC, the only law in Croatia so far that has the force of constitutional law. By the force of the Constitution, the CCRC is obliged to implement international law (which is part of the internal legal order of the Republic of Croatia in accordance with provisions of what is today Article 141 of the Constitution) in the performance of its tasks, and does so in its everyday work. Accordingly, the impact of

34) The European-Continental Model of Constitutional Review is quite different from the “American” - Judicial Review Model based on the case of Marbury vs. Madison from 1803 and on John Marshall’s doctrine. Namely, under the American model, constitutional matters are dealt with by all ordinary courts. So, it is a decentralized or diffuse or dispersed review under ordinary court proceedings (incidenter).
external (European and international) law on the Croatian constitutional doctrine in legal science and on the jurisprudence of the CCRC is very strong. These sources of legality are common standards of constitutional review in Croatia.

Moreover, it is important for the CCRC to faithfully follow the external (European and international) law. “Faithfully following” this law should be understood primarily as the execution of an international obligation which the Republic of Croatia undertook by ratifying it. Respecting State obligations is a constitutional issue par excellence.

In Decision no. U-III-3304/2011 the CCRC in this sense stressed (concerning the obligations of courts towards the ECHR):

“32. ... the domestic case-law must be built so as to observe the international legal obligations that for the Republic of Croatia arise from the ECHR. It must be in conformity with the ... relevant legal positions and case-law of the ECtHR, because for the Republic of Croatia they represent binding standards of international law.”

3) Accession of the Republic of Croatia to the CoE and ratification of the ECHR

The CoE has worked to achieve greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage. Its core objective is to preserve and promote human rights (which are considered as universal, indivisible and inalienable rights of each and every individual), democracy and the rule of law in Europe. The ECtHR represents the judicial dimension of this action. It ensures the observance of the engagements undertaken by States Parties under the ECHR, an instrument which is the expression of a common European standard, i.e. a common foundation of human rights for the whole of Europe. All these aims of the CoE, as well as the values it promotes and the safeguards, are embodied in the Croatian Constitution, creating the structural characteristics of the Croatian constitutional state, that is, its constitutional identity.

Cooperation between the Republic of Croatia and the CoE started in 1991, when the PACE, at its session of 21 September 1991, based on the 1974 Constitution of the former SFRY, recognised the right of disassociation for the former Yugoslav republics that wished
to exercise this right.

Following its international recognition, Croatia submitted an application for full CoE membership on 11 September 1992. It became the 40th full member of the CoE on 6 November 1996, provided it fulfilled the 21 conditions the CoE had stipulated. 36)

(1) Status of the ECHR Law and the ECtHR in the Croatian Legal Order


The ECHR constitutes a self-executing international agreement in Croatia. Although it formally has sub-constitutional status (Article 141 of the Constitution), the ECHR is so far the only European law in Croatia which actually has a quasi-constitutional status. This status of the ECHR has been recognised by the CCRC in its case-law.

Namely, in Decision no. U-I-745/1999 of 8 November 2000, rendered in proceedings of the abstract control of the constitutionality of the Expropriation Act, 38) the CCRC for the first time reviewed the conformity of a domestic law directly with the ECHR, not with the Constitution, and it repealed some provisions, finding that they were not in conformity with Article 6 of the ECHR. In this decision, the CCRC held that any non-compliance of a national law with the ECHR simultaneously means the non-compliance of this law with the rule of law, the principle of constitutionality and legality, and the principle of legal monism (Articles 3 and 5 and what is today Article 141 of the Constitution).

In this way, the CCRC in fact replaced constitutional review with a review of the consistency of a domestic law with the ECHR and by doing so secured a quasi-constitutional status for the ECHR in the domestic legal order.

When it comes to the ECtHR, the CCRC in its case-law so far has highlighted the similarities between particular provisions of the Constitution and the ECHR, as well as the

role of the CCRC and the ECtHR in protecting individual (fundamental) rights. For example, in Decision no. U-III-3304/2011,\textsuperscript{39} with regard to Article 29 of the Constitution and Article 6 of the ECHR, it stressed the following:

“40.2. The Constitutional Court is obliged to point out the incorrect opinion of the first-instance disciplinary court that the applicant’s request should have been dismissed because the ECtHR in its decision had found ‘a violation of a right under the ECHR due to a violation of form, but does not call into question the content, namely the decision on the claimant’s responsibility and punishment.’ Such and similar opinions of courts undermine the rule of law in the Republic of Croatia, leading to the loss of public confidence in the national judicial system. In addition to this, they also indicate insufficient knowledge of the subject matter, aim and purpose of Article 6 of the ECHR.

In these terms, it must firstly be reiterated that ‘fairness’ in the meaning of Article 6 of the ECHR, similarly to ‘fairness’ in the meaning of Article 29 of the Constitution, must not be interpreted as being ‘substantive’, because its nature is exclusively ‘procedural’ or related to the ‘process.’ A procedural violation in the meaning of Article 6 of the ECHR made by the court during criminal proceedings has, therefore, an independent legal nature and does not depend on finding an individual guilty or innocent.

This means that the ECtHR, similarly to the Constitutional Court at the national level, is not a ‘court of fourth instance’ and does not decide on the merits about rights and obligations or about a criminal suspicion or charge in individual cases. This is the task of the ordinary national courts. In the case of \textit{Jalloh v. Germany} (judgment, Grand Chamber, 11 July 2006, application no. 54810/00) the ECtHR explicitly determined that Article 6 of the ECHR did not relate to the establishment of the applicant’s guilt or innocence:

“95. It is ... not the role of the Court to determine, as a matter of principle, whether ... the applicant was guilty or not. The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair. This involves an examination of the ‘unlawfulness’ in question and, where violation of another Convention right is concerned, the nature of the violation found.”

\textsuperscript{39} CCRC, Decision no. U-III-3304/2011 of 23 January 2013, Official Gazette no. 13/13 (Case of \textit{Vanjak}).
Therefore, similar to the task of the Constitutional Court at the national level when it comes to the Constitution, the primary task of the ECtHR at the international level is to ensure the observance of the ECHR and the international treaty obligations assumed by the Republic of Croatia by its ratification.”

(2) Subsidiarity of the ECHR Law in the Croatian Legal Order

The quasi-constitutional status of the ECHR in the Croatian legal order must always be observed in the light of the fact that the machinery for the protection of human rights and fundamental freedoms established by the ECHR is subsidiary to national systems safeguarding these rights and freedoms.40)

In the case of Srbić against Croatia,41) the ECtHR laid down clear rules concerning the subsidiarity of the ECHR’s control mechanism to the Croatian mechanism safeguarding human rights (i.e. the constitutional complaint before the CCRC):

“The Court reiterates that the machinery for the protection of fundamental rights established by the Convention is subsidiary to national systems safeguarding human rights. The Convention does not lay down for the Contracting States any given manner for ensuring within their internal law the effective implementation of the Convention. The choice as to the most appropriate means of achieving this is in principle a matter for the domestic authorities, who are in continuous contact with the functioning authorities of their countries and are better placed to assess the opportunities and resources afforded by their respective domestic legal systems (see Swedish Engine Drivers’ Union v. Sweden, 6 February 1976, § 50, Series A no. 20; Chapman v. the United Kingdom [GC], no. 27238/95, § 91, ECHR 2001-I; and Sisojeva and Others v. Latvia [GC], no. 60654/00, § 90,

40) The principle of subsidiarity (and the doctrine of the margin of appreciation) was debated in the lead-up to the 2012 Brighton Conference. According to the Brighton Declaration, Protocol no. 15 reads, “Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention.” While the addition of a new recital clearly stems from the agreement at Brighton, and will provide a further point of reference for the ECtHR, it is hardly likely to make a meaningful substantive impact on the ECtHR’s adjudication in practice. Namely, the ECtHR has already fully interpreted in its case law the subsidiarity of the ECHR’s control mechanism.

41) ECtHR, Decision as to the admissibility of application no. 4464/09 by Krešimir Srbić against Croatia of 21 June 2011.
As to the exhaustion of domestic remedies, the Court reiterates that, in accordance with Article 35.1 of the Convention, it may only deal with an issue after all domestic remedies have been exhausted. The purpose of Article 35 is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Court (see, for example, *Hentrich v. France*, 22 September 1994, § 33, Series A no. 296-A, and *Remli v. France*, 23 April 1996, § 33, Reports 1996-II). Thus, the complaint submitted to the Court must first have been made to the appropriate national courts, at least in substance, in accordance with the formal requirements of domestic law and within the prescribed time-limits. To hold otherwise would be to duplicate the domestic process with proceedings before the Court, which would hardly be compatible with the subsidiary character of the Convention (see *Gavril Yosifov v. Bulgaria*, no. 74012/01, § 42, 6 November 2008). Nevertheless, the obligation to exhaust domestic remedies requires only that an applicant make normal use of remedies which are effective, sufficient and accessible in respect of his Convention grievances (see *Balogh v. Hungary*, no. 47940/99, § 30, 20 July 2004, and *John Sammut and Visa Investments Limited v. Malta* (dec.), no. 27023/03, 28 June 2005).

(...) In order to comply with the principles of subsidiarity the applicants, before bringing their complaints to the Court, have first to afford the Croatian Constitutional Court, as the highest Court in Croatia, the opportunity of remedying their situation and addressing the issues they wish to bring before the Court.”

In conclusion, from the CCRC’s point of view, the most important effect of the subsidiarity of the ECHR’s control mechanism is that the CCRC has the opportunity of preventing and/or redressing by itself the alleged violations of the rights and freedoms defined in the ECHR and its Protocols before those allegations are submitted to the ECtHR.

(3) The ECtHR’s attitude toward the CCRC

The case-law of the ECtHR concerning Croatia indicates that, from the standpoint of the application of the ECHR, the ECtHR considers the CCRC as “the highest court of the Republic of Croatia”[^42^] not as the constitutional court (which is not part of the judicial

[^42^]: ECtHR, *Srbić against Croatia*. See *supra* note 41 and the accompanying quotation from this decision in the main text.
branch of Croatian government).

The special status of the CCRC could possibly be perceived only in the cases where the ECtHR examines alleged violations of Article 6.1 of the ECHR. With regard to this, we should first recall the well-known discussion on the applicability of Article 6.1 of the ECHR on constitutional courts, which was held concerning the case of *Ruiz-Mateos v. Spain*.43) In this judgment, the ECtHR concluded as follows:

“1. Applicability of Article 6 para. 1 (art. 6-1)

55. The Government denied that Article 6 para. 1 (art. 6-1) was applicable, pleading that the right in issue was not a ‘civil right.’ In support of this contention, they cited the specific nature of the Constitutional Court’s task and the features peculiar to questions of constitutionality. The Constitutional Court’s role was to ensure that the legislature, the executive and the judiciary respected the Constitution and not to rule on the rights and interests of individuals. This specificity of its functions appeared even more clearly in relation to proceedings of the type under review. Such proceedings were instituted by the ordinary courts and were intended to eliminate from the domestic legal system provisions contrary to the Constitution. In this instance, there were no ‘parties’ because Institutional Law no. 2/1979 provided that only the representatives of the State authorities and the Attorney General need be heard (⋯). In addition, the judgment was notified solely to the court which referred the question.

56. In their observations of 10 June and 27 August 1992 (⋯), the German and Portuguese Governments drew attention to the fact that the decision in the *Ruiz-Mateos* case would be of great significance to those other member States of the Council of Europe which have a constitutional court. The German Government, citing the above-mentioned Buchholz judgment, maintained that Article 6 para. 1 (art. 6-1) did not apply to proceedings conducted before such courts. That had been the Federal Republic’s understanding when it had ratified the Convention. They supported the respondent Government’s argument, giving a broad outline of the rules in force in Germany, which are moreover similar to the Spanish provisions. The Portuguese Government took the view that, by reason of their nature, structure and jurisdiction, constitutional courts fell outside the ambit of Article 6 para. 1 (art. 6-1).

57. The Court is not called upon to give an abstract ruling on the applicability of Article 6 para. 1 (art. 6-1) to constitutional courts in general or to the constitutional courts of Germany and Portugal or even of Spain. It must, however, determine whether any rights guaranteed to the applicants under

that provision were affected in the present case.

(…)

59. The Court observes that there was indeed a close link between the subject-matter of the two types of proceedings. The annulment, by the Constitutional Court, of the contested provisions would have led the civil courts to allow the claims of the Ruiz-Mateos family (…). In the present case, the civil and the constitutional proceedings even appeared so interrelated that to deal with them separately would be artificial and would considerably weaken the protection afforded in respect of the applicants’ rights. The Court notes that by raising questions of constitutionality, the applicants were using the sole - and indirect - means available to them of complaining of an interference with their right of property: an amparo appeal does not lie in connection with Article 33 of the Spanish Constitution (…).

60. Accordingly, Article 6 para. 1 (art. 6-1) applied to the contested proceedings.”

A summary of the general standpoints on the applicability of Article 6.1 of the ECHR also on constitutional court proceedings was provided by the ECtHR in the case of Süßmann v. Germany.⁴⁴)

“39. According to the its well-established case-law on this issue (see the Deumeland v. Germany judgment of 29 May 1986, Series A no. 100, p. 26, para. 77; the Bock v. Germany judgment of 29 March 1989, Series A no. 150, p. 18, para. 37; and the Ruiz-Mateos v. Spain judgment of 23 June 1993, Series A no. 262, p. 19, para. 35), the relevant test in determining whether Constitutional Court proceedings may be taken into account in assessing the reasonableness of the length of proceedings is whether the result of the Constitutional Court proceedings is capable of affecting the outcome of the dispute before the ordinary courts.

In the Ruiz-Mateos case the Court also found that Article 6 para. 1 (art. 6-1) applied to Constitutional Court proceedings from the point of view of fair trial (see the above-mentioned judgment, pp. 23-24, paras. 55-60). It held that, while it was not called upon to give an abstract ruling on the applicability of Article 6 para. 1 (art. 6-1) to Constitutional Courts in general, it had nevertheless to determine whether any rights guaranteed to the applicants under that provision (art. 6-1) were affected in the case before it (ibid., para. 57). It noted further that by raising questions of constitutionality, the applicants were using the sole - and indirect - means available to them of complaining of an

interference with their right of property (ibid., para. 59).

It follows that Constitutional Court proceedings do not in principle fall outside the scope of Article 6 para. 1 (art. 6-1).”

Moreover, in the *Süßmann v. Germany* judgment, the ECtHR extended the application of Article 6.1 of the ECHR to cases that concern the length only of proceedings in a Constitutional Court and not also that of proceedings conducted in ordinary courts:

“40. However, the present case differs from earlier cases in that it concerns the length only of proceedings in a Constitutional Court and not also that of proceedings conducted in ordinary courts. In this instance the proceedings in the Federal Constitutional Court were not an ‘extension’ of proceedings in the ordinary courts. The applicant had first contested the lawfulness of the reduction of his supplementary pension, following the amendment of the Fund’s rules, in the arbitration tribunals (…). As the Federal Court, in a series of test cases, had confirmed the validity of these amendments (…), the applicant could appeal directly to the Federal Constitutional Court, without first bringing proceedings in the ordinary civil courts (…).

41. The Court recalls that proceedings come within the scope of Article 6 para. 1 of the Convention (art. 6-1), even if they are conducted before a Constitutional Court, where their outcome is decisive for civil rights and obligations (see, inter alia, the *Kraska v. Switzerland* judgment of 19 April 1993, Series A no. 254-B, p. 48, para. 26).

42. The dispute as to the amount of the applicant’s pension entitlement was of a pecuniary nature and undeniably concerned a civil right within the meaning of Article 6 (art. 6) (see the *Schuler-Zgraggen v. Switzerland* judgment of 24 June 1993, Series A no. 263, p. 17, para. 46, and the *Massa v. Italy* judgment of 24 August 1993, Series A no. 265-B, p. 20, para. 26). Following the decisions of the Federal Court in the test cases, the only avenue through which Mr Süßmann could pursue further determination of that dispute was by means of an appeal whereby he alleged a breach of his constitutional right of property. The Federal Constitutional Court proceedings therefore concerned a dispute over a civil right.

43. In the event of a successful appeal, the Federal Constitutional Court does not confine itself to identifying the provision of the Basic Law that has been breached and indicating the public authority responsible; it quashes the impugned decision or declares void the legislation in question (section 95 of the Federal Constitutional Court Act—…).

In the present case, if the Federal Constitutional Court had found that the amendments to the civil
servants’ supplementary pension scheme infringed the constitutional right of property and had set aside the impugned decisions, Mr Süßmann would have been reinstated in his rights. Thus he would have received the full amount of his initial supplementary pension.

44. The Federal Constitutional Court proceedings were therefore directly decisive for a dispute over the applicant’s civil right.

45. Admittedly in this case the Second Section of the First Division, sitting as a panel of three judges, had declined to accept Mr Süßmann’s complaint in the course of preliminary proceedings (sections 93a and 93b of the Federal Constitutional Court Act as amended in 1985…). Nevertheless, in giving the reasons for its decision, it examined the submissions on the merits made by the applicant and, in particular, considered in detail whether the Federal Court, by confirming the validity of the amendments to the rules, had infringed the applicant’s constitutional right of property(…).

46. In these circumstances Article 6 para. 1 (art. 6-1) is applicable to the proceedings in issue.”

However, in the case of *Batinović and Point-Trade d.o.o against Croatia*, the ECtHR took a somewhat different approach because it examined primarily whether there was a “dispute” over civil rights or obligations within the meaning of Article 6.1 of the ECHR. In doing so, it focused on the discretionary nature of the legal remedy before the CCRC, and not on the question of whether the CCRC’s proceedings were directly decisive for a dispute over the applicant’s civil right:

“The Government contested this view, claiming that Article 6 was not applicable to the Constitutional Court proceedings in the present case. They submitted that a petition for review of constitutionality and legality concerned abstract proceedings rather than those for the protection of rights and interests of individuals. When filing such a petition, the person did not have to prove his or her standing or legal interest in the matter. Once the petition was lodged, it is for the Constitutional Court to decide whether or not it would institute proceedings for review of constitutionality and legality. In sum, based on the purpose and characteristics of proceedings following such a petition, the Government claimed that they did not concern a ‘dispute’ within the meaning of Article 6 § 1 of the Convention. The applicants disagreed.

45) ECtHR, Decision as to the admissibility of application no. 30426/03 by Joko Batinović and Point-trade d.o.o. against Croatia of 10 July 2007.
The Court recalls that Constitutional Court proceedings do not in principle fall outside the scope of Article 6 § 1 of the Convention (see Süßmann v. Germany, judgment of 16 September 1996, Reports of Judgments and Decisions 1996-IV, p. 1171, § 39). However, for Article 6 § 1 to be applicable, the impugned proceedings must involve a dispute over an individual’s civil rights or obligations.

In the present case, the Court has already concluded that the applicants had the opportunity to address the commercial courts with their claim for the return of their shares. Nonetheless, they never brought such an action. Instead, the applicants filed a petition for constitutional review, which did not automatically institute such proceedings, but required a separate discretionary decision of the Constitutional Court to that end. However, that court had never decided to institute the review proceedings following the applicants’ petition. In these circumstances, the Court considers that the proceedings before the Constitutional Court did not involve a ‘dispute’ over civil rights or obligations within the meaning of Article 6 § 1 of the Convention.

Having regard to this, the Court finds that Article 6 § 1 of the Convention does not apply to the present case.

It follows that this complaint is incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 and must be rejected in accordance with Article 35 § 4.”

It can be deduced from the stated standpoints of the ECtHR that Article 6.1 of the ECHR would not apply to proceedings of the abstract review of the conformity of laws with the Constitution, which in Croatia have the characteristics of actio popularis, and regarding which the CCRC has discretionary authority to decide whether or not to initiate proceedings. Nevertheless, this does not mean that the ECtHR could not also declare itself competent *ratione materiae* for such proceedings provided that the CCRC agrees to decide on the filed proposal and to render a decision about this on the merits, and such a decision would be directly decisive for a dispute over the applicant’s civil rights. Therefore, in this case the CCRC, from the ECtHR’s point of view, would also be “a court like the others.”

In sum, the CCRC’s position in respect of the law of ECHR is the position of the highest national court whose final decisions are reviewed (i.e. supervised) by the higher court (the ECtHR) regarding all issues for which the ECtHR – in interpreting the ECHR – has declared itself as the competent supervisory court.

4) Accession of the Republic of Croatia to the EU

The SAA was signed in Luxembourg on 29 October 2001. Croatia was the second
country to sign the SAA with the EU and that agreement represented the first formal step in institutionalising the relationship of Croatia with the EU. The SAA entered into force on 1 February 2005.\footnote{Law on Ratification of the Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Croatia, of the other part (Zakon o potvrđivanju Sporazuma o stabilizaciji i pridraživanju između Republike Hrvatske i Europskih zajednica i njihovih država članica), Official Gazette - International Agreements nos. 14/01, 1/05.}

Croatia formally applied for EU membership on 21 February 2003 in Athens, and the European Commission recommended making it an official candidate in early 2004. Candidate country status was granted to Croatia by the European Council on 18 June 2004. After the opening of accession negotiations on 3 October 2005, the process of screening 35 acquis chapters with Croatia was completed on 18 October 2006.

A year before finishing accession negotiations, on 16 June 2010, the Croatian Parliament amended the Constitution\footnote{Amendments to the Constitution of the Republic of Croatia (Promjena Ustava Republike Hrvatske), Official Gazette no. 76/10. It was the fourth amendment of the Constitution since 1990.}, aiming to create a constitutional basis for Croatia’s membership in the EU and to harmonise the Croatian legal system with that of the EU. A new chapter VII.A under the title “European Union” and new Articles 141.a (“Legal Grounds for Membership and Transfer of Constitutional Powers”), 141.b (“Participation in European Union Institutions”), 141.c (“European Union Law”) and 141.d (“Rights of European Union’s Citizens”) were added to the Constitution.\footnote{In the official consolidated text of the Constitution, which is published in Official Gazette no. 85/10, the chapter and articles are numbered as follows: Chapter VIII and Articles 143, 144, 145 and 146. See supra note 29.} These articles of the Constitution read:

\begin{quote}
\textbf{VIII. European Union}

1. Legal Grounds for Membership and Transfer of Constitutional Powers

\textbf{Article 143}

Pursuant to Article 142 of the Constitution, the Republic of Croatia shall, as a Member State of the European Union, participate in the creation of European unity in order to ensure, together with other European states, lasting peace, liberty, security and prosperity, and to attain other common objectives in keeping with the founding principles and values of the European Union.

Pursuant to Articles 140 and 141 of the Constitution, the Republic of Croatia shall confer upon the institutions of the European Union the powers necessary for the enjoyment of rights and fulfilment
of obligations ensuing from membership.

2. Participation in European Union Institutions

Article 144

The citizens of the Republic of Croatia shall be directly represented in the European Parliament where they shall, through their elected representatives, decide upon matters falling within their purview.

The Croatian Parliament shall participate in the European legislative process as regulated in the founding treaties of the European Union.

The Government of the Republic of Croatia shall report to the Croatian Parliament on the draft regulations and decisions in the adoption of which it participates in the institutions of the European Union. In respect of such draft regulations and decisions, the Croatian Parliament may adopt conclusions which shall provide the basis for the Government’s actions in European Union institutions.

Parliamentary oversight by the Croatian Parliament of the actions of the Government of the Republic of Croatia in European Union institutions shall be regulated by law.

The Republic of Croatia shall be represented in the Council and the European Council by the Government and the President of the Republic of Croatia in accordance with their respective constitutional powers.

3. European Union Law

Article 145

The exercise of the rights ensuing from the European Union acquis communautaire shall be made equal to the exercise of rights under Croatian law.

All the legal acts and decisions accepted by the Republic of Croatia in European Union institutions shall be applied in the Republic of Croatia in accordance with the European Union acquis communautaire.

Croatian courts shall protect subjective rights based on the European Union acquis communautaire. Governmental agencies, bodies of local and regional self-government and legal persons vested with public authority shall apply European Union law directly.

4. Rights of European Union Citizens

Article 146

Citizens of the Republic of Croatia shall be European Union citizens and shall enjoy the rights guaranteed by the European Union acquis communautaire, and in particular:

- freedom of movement and residence in the territory of all Member States,
- active and passive voting rights in European parliamentary elections and in local elections in
another Member State, in accordance with that Member State’s law,

- the right to the diplomatic and consular protection of any Member State which is equal to the
  protection provided to own citizens when present in a third country where the Republic of
  Croatia has no diplomatic-consular representation,
- the right to submit petitions to the European Parliament, complaints to the European
  Ombudsman and the right to apply to European Union institutions and advisory bodies in the
  Croatian language, as well as in all the other official languages of the European Union, and to
  receive a reply in the same language.

All rights shall be exercised in compliance with the conditions and limitations laid down in the
founding treaties of the European Union and the measures undertaken pursuant to such treaties.
In the Republic of Croatia, all rights guaranteed by the European Union acquis communautaire shall
be enjoyed by all citizens of the European Union.”

Croatia finished accession negotiations on 30 June 2011. It signed the Treaty of
Accession on 9 December 2011 in Brussels. On 23 December 2011, the Croatian Parliament
adopted the decision on calling a state referendum on the accession of the Republic of
Croatia to the EU. A referendum on EU accession was held on 22 January 2012, with
66.27% of participants voting in favour of joining the EU. With 136 “Yes” votes, Croatian
Parliament unanimously ratified on 9 March 2012 the Accession Treaty of the Republic of
Croatia to the European Union.

Croatia became the 28th full-fledged member of the EU on 1 July 2013.

The Act on Cooperation between the Parliament and the Government of the Republic of
Croatia in European Affairs was passed by the Croatian Parliament at its session on 28 June
2013 and it entered into force on 1 July 2013.49) It governs the cooperation of the Croatian
Parliament and the Government in European affairs, in line with the TEU and TFEU and in
line with the Constitution. It stipulates that the Parliament shall monitor the Government’s
work within the EU institutions, review EU documents and Croatia’s positions and reach
conclusions on them, participate in putting forward Croatian candidates for EU institutions
and bodies, take part in cooperation between national parliaments, cooperate with the
European Parliament, etc.

49) Act on Cooperation between the Parliament and the Government of the Republic of Croatia in
European Affairs (Zakon o suradnji Hrvatskoga sabora i Vlade Republike Hrvatske u europskim
poslovima), Official Gazette no. 81/13.
(1) Status of the EU Law and the CJEU in the Croatian Legal Order

The EU law has sub-constitutional status in the Republic of Croatia, not quasi-constitutional (as is the case with the ECHR law).

As to the Article 145 (“European Union Law”), the CCRC has had no opportunity in its jurisprudence so far to interpret these constitutional provisions. However, it is considered in legal theory that the “[s]tated principles create specific obligations for ordinary national courts and for the Constitutional Court.”\(^{50}\) The positions of Croatian legal theory concerning the significance and achievements of particular provisions of what is today Article 145 of the Constitution are as follows:\(^{51}\)

- Article 145.1 of the Constitution “constitutes a declaration of two principles formulated in the case-law of the ECtHR – the principle of equivalence and the principle of effectiveness. Both these principles are embedded in the very foundations of the EU legal order and are well established in the case-law of the ECtHR. These procedural principles are binding for ordinary and constitutional courts.”
- Article 145.2 of the Constitution “can be understood as a norm that implicitly allows for the direct effect and supremacy of EU law over Croatian law. These principles are embedded in the very foundation of EU law and constitute its original and autonomous legal order.” Therefore, Article 145.2 of the Constitution “must not be superficially understood as a mere conflict-of-law rule, but rather as the acceptance by constitutional law of the fundamental principles on which EU law is based. These principles permeate the national legal orders of the Member States, and without their acceptance, membership in the EU is not possible.” Article 145.2 of the Constitution “opens up the Croatian legal system to the legal order of the EU and, by doing so, differentiates it from the legal order of international law. Among other things, it constitutes the national legal expression of the principle of the direct effect and supremacy of EU law over national law, but also includes the other principles of EU law, which are crystallised in the jurisprudence of European law.”
- Article 145.3 of the Constitution “should be understood as a special expression and additional elaboration of Article 141 of the Constitution, which lays down that international treaties are a component of the domestic legal order and have primacy over domestic law.”
- Article 145.4 of the Constitution “prescribes the so-called direct administrative effect.” This means that the obligation to apply directly EU law binds not only Croatian courts, but also state

\(^{50}\) Ćapeta, Tamara; Rodin, Siniša (2011) Basics of EU Law (Osnove prava Europske unije), 2nd edition, Zagreb: Narodne novine d.d., p. 150.

\(^{51}\) Ćapeta; Rodin, ibid., pp. 151-153.
bodies, bodies of units of local and regional self-government, and legal persons vested with public authority.

When it comes to the CJEU, it is sufficient to find that the CJEU is not a court whose functions are exhausted with the protection of individual (fundamental) rights, as is the case with the ECtHR. Taking into consideration all its competences, it seems that the following definition of the CJEU, offered by Vassilios Skouris, the former President of the CJEU, comes the closest to what the CJEU actually is in the practical legal life of the EU and its Member States:

- Is the Court of Justice a Constitutional Court?
  In order to appreciate the exact nature of the European Court of Justice and whether it could be considered as a purely constitutional Court, we have to view the system of enforcement of EU law by the Court in its entirety. In doing so one cannot help but noticing a basic feature: duplicity. Indeed, it can be easily observed that the relevant provisions examined above, ensure the enforcement of Community law on two levels: the Community level (through direct actions) and the Member State level (through preliminary references). Furthermore, in both procedures the Court has jurisdiction to
  - interpret the Treaty provisions,
  - control Member State non-compliance with Treaty provisions and
  - control the legality of acts or failures to act by institutions of the Community.

It is interesting to examine briefly the function of this duplicity. First of all, the two levels of judicial enforcement by the Court of Justice complement each other in a unique way. The weaknesses of direct actions noted above are remedied to a great extent by the preliminary reference procedure. A European Court judgment in an Article 226 procedure remains declaratory and might not be complied with by a Member State until the Commission decides to bring an Article 228 action. After a preliminary ruling, it is the national court that renders the final judgment and national court judgments cannot be easily disregarded. Furthermore, the preliminary reference procedure lacks the political character of the decision to initiate an Article 226 procedure; important and minor violations can appear before the Court; the ‘centralized’ direct enforcement under an Article 226 procedure is coupled with the ‘decentralized’ indirect enforcement under Article 234, with private individuals monitoring compliance with EC law.

Secondly, the system of enforcement, and therefore the Court, enjoys far more credibility due to the fact that it includes judicial review of the legality of the acts or omissions by Community
institutions. Community law is not enforced selectively.
Finally, the dual character of the system enables enforcement of Community law by the Court of
Justice both in vertical relationships (between Community institutions and Member States,
between Community institutions and individuals and between Member States and individuals)
and in horizontal relationships among individuals.

In view of these considerations, I believe that the European Court of Justice cannot be
considered as a Constitutional Court in the sense this term is used in national legal orders. It
is certainly entrusted with the authoritative interpretation of the EU’s constitutional charter,
it does have jurisdiction to control the legality, with regard to this Charter, of all legislative
or administrative measures adopted within the sphere of EU law and lastly it is the only
judicial authority that can resolve conflicts of jurisdiction between the EU institutions.
However, the Court also has jurisdiction over appeals brought against judgments and orders
of the Court of First instance. It will soon have the option of reviewing appellate judgements
of the Court of First Instance. In preliminary references it frequently interprets EU law
provisions of minor importance. To illustrate this with an example I will only say that the
Court has rendered judgments on the customs classifications of pyjamas, female underwear
and integrated printer-fax machines. Moreover, an infringement action brought by the
Commission against a Member State for failure to comply with certain provisions of the
waste management directive can hardly be characterised of a constitutional nature.

Hence, if I were to seek the Court’s counterpart in national legal orders I would most
probably not look towards constitutional courts but towards supreme courts. I do believe
though that the most accurate characterisation of the European Court of Justice is that of a
hybrid court performing both the functions of a supreme and a constitutional court.52)

The CJEU serves as the guardian of EU law, including the CFREU. It adjudicates only
within the area of application of EU law, and in the area of fundamental rights when
implementing the law of the Union (Art. 51.1 of the CFREU). Thus, the CCRC generally
does not exercise its jurisdiction to protect fundamental rights in Croatia within the area of
mandatory Union law. It is the task of the CJEU, which is at the same time obligated under

---
52) Skouris, Vassilios. The Position of the European Court of Justice in the EU Legal Order and its
Relationship with National Constitutional Courts, Presentation at the Constitutional Court of the
the first sentence of Article 4.2 of the TEU, to give regard to national identity.

In other words, to determine definitively how primary and secondary law should be interpreted in respect of the whole of the EU is, and remains, the most important function of the CJEU. On the other hand, the interpretation and application of national law, even where this is derived from EU law, is and remains the exclusive domain of the national courts. In the words of Skouris, “The European Court of Justice confines itself to interpreting or ruling on the validity of the relevant Community law, and directs the referring court to determine the dispute pending before it on the basis of that preliminary ruling. National law thus remains the national courts’ very own domain, and the European Court of Justice concentrates on Community law, in order to ensure that this is interpreted and applied uniformly in all Member States. Thus, the concept underlying the preliminary ruling procedure is relatively straightforward and, so far as the national courts and tribunals are concerned, characterised by the fact that they may make a reference to the European Court of Justice if they are sitting at first instance or on appeal and are subject to appeal to a higher or supreme court, whereas they must bring the matter before the European Court of Justice if no appeal lies against their decision in a dispute. The absolute obligation to make a reference does not apply [according to the doctrine of ‘acte clair’ - Case 283/81 CILFIT and Others (1982) ECR 3415, §§ 14 and 16] if the interpretation of the relevant Community law is clear, that is where previous decisions of the Court of Justice have already clarified the point of law in question, or where the correct interpretation of Community law is so obvious as to leave no scope for any reasonable doubt.”

Accordingly, if in a specific case the CCRC established that EU law had been applied, and the interpretation of the relevant EU law was clear in the meaning of the doctrine of “acte clair”, the CCRC would remand the case to the competent ordinary court through an order, with the necessary reasons and instructions, to resolve the case in conformity with the relevant standpoints of the CJEU. Otherwise, the CCRC could also remand the case with an order, with the necessary reasons and instructions, for the competent ordinary court to make reference to the CJEU. At this time it is not possible to assess whether, and – if so – in which cases the CCRC itself would forward a reference to the CJEU.54)


54) See infra Part III (Judicial Dialogue), Section 2.3., Point a) “Referral by the CCRC to the CJEU.”
(2) Subsidiarity of the EU Law in the Croatian legal order

As to the subsidiarity of the EU law in the Croatian legal order, there is still no relevant case-law of the CCRC regarding this issue. However, it is reasonable to presume that the relevant legal standpoints of the German BVerfG will be carefully considered by the CCRC in the coming period. This is primarily related to the standpoints of the BVerfG that it is obliged to intervene if a measure under EU law were to represent a clear or structurally significant *ultra vires* act,\(^{55)}\) or if it were detrimental to Germany’s constitutional identity as protected under Article 79.3 of the Basic Law, including the minimum standard of protection of fundamental rights demanded by the Basic Law.\(^{56)}\)

These standpoints, if and when applied in the case of Croatia, could mean the following: the EU derives its democratic legitimacy in Croatia within the meaning of what are today Articles 143-146 in connection with Article 1 of the Constitution. Therefore, the CCRC could see itself as being obliged to monitor at least those actions that arbitrarily exceed the limits of the EU programme of integration, that is, the constitutional powers transferred to the EU, and, if necessary, to find such legal acts to be inapplicable in Croatia.

However, the CCRC is fully aware of the CJEU’s sharp criticism of the above-mentioned legal standpoints of the BVerfG. It is necessary to recall the following critique issued by Skouris: “First of all, the Federal Constitutional Court claims the right to review acts of the European institutions and bodies with a view to determining whether they remain within the limits of the sovereign rights conferred on them by virtue of the limited powers granted, while preserving the European Union principle of subsidiarity. This process, described by the Federal Constitutional Court as an *ultra vires* check, which presumably also encompasses scrutiny of the case-law of the European Court of Justice, is to be supplemented by an ‘identity check’ to determine whether the inviolable core content of the constitutional identity of the German Basic Law (*Grundgesetz*) has been preserved. In plain English this means that the acts of, and decisions taken by, Union institutions may be subject to double scrutiny by the Federal Constitutional Court: first, with regard to observance of the safeguards under the Basic Law, which are subject to the ‘immutability guarantee’; second, with regard to compliance with the principle of subsidiarity enshrined in the Union Treaties. Although this is not the first time that the Federal Constitutional Court has announced an

---

56) BVerfGE 37, 271 [278 et seq.] - Solange I; 73, 339 [375 et seq.] - Solange II; 89, 155 - Maastricht; 102, 147 - Banana market.
ultra vires check, there can be no doubt that the preservation of subsidiarity as a precondition for the validity of all legal acts of the European Union is a matter which falls to be assessed by the European Court of Justice and is covered by its monopoly on annulment, as evidenced not least by the fact that the Lisbon Treaty introduces a special claims procedure so that, with the substantial involvement of the national Parliaments of the Member States, the question of subsidiarity can be put to the European Court of Justice at the earliest possible stage. But carrying out an identity check relating exclusively to the national constitution when actually exercising powers which have been conferred on the European Union is also highly conflict-laden because it places legal acts of the European Union, all of which are subject to review by the European Court of Justice as to their legality, and which can only be annulled or declared invalid by that court, within the national constitutional courts’ powers of scrutiny, for the purposes of determining whether the integration-proof constitutional identity of the Member State concerned has been damaged. Both the ultra vires and identity checks mean, ultimately, that acts of the Union institutions may be open to review in 27 Member States in that they may be examined 27 times with regard to observance of the principle of subsidiarity under Union law and 27 times with regard to respect for the integration-proof identity of the Member State concerned. To describe the consequences as succinctly as possible and thereby paraphrasing the theory of a famous German-born physicist, this would mean the introduction of an absolute theory of relativity for acts of secondary legislation under European Union law.”\(^{57}\)

Consequently, the CCRC will, in the coming period, have to take into account all the above-mentioned arguments and, based on the requirements derived from Articles 143-146 together with Article 1 of the Constitution, define the fundamental meaning of the subsidiarity of EU law in the Croatian constitutional order. This has not been done to date. Namely, until now the CCRC has issued only one general legal standpoint concerning EU law. In the Decision of the CCRC no. U-VIIR-1158/2015 of 21 April 2015,\(^{58}\) the CCRC

\(^{57}\) Skouris, The Relationship of the European Court of Justice with the National Constitutional Courts. See supra note 53.

\(^{58}\) CCRC, Decision no. U-VIIR-1158/2015 of 21 April 2015, Official Gazette no. 46/15. With this decision, the CCRC did not allow the so-called “motorways monetisation” referendum to be called, since it established that the proposed referendum question was not in conformity with the Constitution. The referendum question read: “Do you agree that at the referendum the following Act on Amendments to the Roads Act be adopted”, followed by the text of the proposed act. Given that the referendum question was worded in this way, the CCRC, in the proceedings of reviewing the constitutionality of the proposed referendum question, in fact reviewed the constitutionality of
first established that the proposed Act on Amendments to the Roads Act was not in conformity with the Constitution. In this context, it subsequently concluded that it was not necessary to further review “the conformity of the referendum question with EU law in substance because the Constitution by its own legal force has supremacy over EU law.” (§ 60 of the decision)

(3) The CJEU’s attitude toward the CCRC

From the standpoint of the cooperation between the CJEU and CCRC, the CJEU considers the CCRC as the court with no special status in comparison with other Croatian courts. Skouris’ general view on the status of constitutional courts in the area covered by the EU Treaties is as follows:

“… I would say that the constitutional courts do not have a special status with regard to the cooperation between the European Court of Justice and the national courts and tribunals that is based on the founding Treaties. They may have a great deal of influence in individual Member States and carry out eminently important work. In relation to the interpretation and application of European Union law, however, their responsibility is no greater or smaller than that of other courts and tribunals; they are required, under the relevant Treaty provisions, to make a reference to the European Court of Justice if they have doubts as to the interpretation of Union law or the validity of Union legislation.”

59) Skouris, The Relationship of the European Court of Justice with the National Constitutional Courts. See supra note 53.
III. Judicial dialogue

The judicial dialogue can be either personal or institutional.

1. Personal dialogue

Personal dialogue arises from the fact that judges of national constitutional courts may be elected as judges of the ECtHR or CJEU, or that judges of the ECtHR or CJEU may be elected or appointed as judges at their respective national constitutional courts when their terms of office come to an end. These judges are able to bring into deliberations the wealth of experience acquired in their previous posts and make effective use in their new posts of the knowledge acquired during their previous term of office.

2. Institutional dialogue

1) Mutual institutional contacts between courts

The first area of institutional dialogue arises from the fact that judges of national constitutional courts actively seek and maintain contact with the ECtHR and CJEU, and *vice versa*. They regularly participate in national, European or international events organised by the national constitutional court, CoE, EU, Venice Commission or some other relevant European body or international organisation.

Forty national constitutional courts are members of the Conference of European Constitutional Courts, the most important institutional form of cooperation between the constitutional courts of all European states. As stated in the preamble to the Statute of the Conference, regular contacts between constitutional courts and the desire to share experience in constitutional practice and jurisprudence within the framework of specialised

---

60) It was in Croatia, in Dubrovnik in 1972, that the inaugural meeting was held at which Austria, Germany, Italy and the former SFRY founded the Conference of European Constitutional Courts. Over the past four decades, the Conference has evolved from a small and select discussion circle into a truly pan-European forum comprising forty full members. The most recent, XVI\textsuperscript{th}, Congress of the Conference was held in Vienna from 12-14 May 2014 under the Chairmanship of the Austrian Constitutional Court and the next will be held in Georgia in 2017 under the Chairmanship of the Georgian Constitutional Court.
conferences are at the core of the activities of the Conference, its aim being to enhance the independence of constitutional courts as essential factors in guaranteeing and implementing democracy and the rule of law, in particular with a view to securing the protection of human rights.

There is also the World Conference on Constitutional Justice. It unites 98 constitutional courts and councils and supreme courts in Africa, the Americas, Asia and Europe. It promotes constitutional justice – understood as constitutional review including human rights case-law – as a key element for democracy, the protection of human rights and the rule of law (Article 1.2 of the Statute). The World Conference pursues its objectives through the organisation of regular congresses, by participating in regional conferences and seminars, by promoting experiences and case-law and by offering good services to members on their request (Article 1.2 of the Statute). “The main purpose of the World Conference is to facilitate judicial dialogue between constitutional judges on a global scale. Due to the obligation of judicial restraint, constitutional judges sometimes have little occasion to conduct a constructive dialogue on constitutional principles in their countries. The exchanges that take place between judges from various parts of the world in the World Conference furthers reflection on arguments, which promote the basic goals inherent in the national constitutions. Even if these texts often differ substantially, discussion on the underlying constitutional concepts unites constitutional judges from various parts of the world who are committed to promote constitutionality in their own country. As these judges sometimes find themselves in situations of conflict with other state powers due to the decisions they had to hand down based on the Constitution, being part of the World Conference provides them with a forum that not only allows them to exchange information freely with their peers, but where judges from other countries can also offer moral support. This can be important in upholding constitutional principles, which the judges are called upon to defend in their line of work.”

Besides participation in institutionalised global and regional international forms of cooperation between constitutional courts, the CCRC’s cooperation includes study visits and other types of meetings with other constitutional courts on expert topics in the field of

61) The 3rd Congress of the World Conference on Constitutional Justice was hosted by the Constitutional Court of the Republic of Korea on 28 September – 1 October 2014. The Constitutional Court of Lithuania will host the 4th Congress in Vilnius in 2017.

constitutional court judicature.

Further, very successful cooperation with the constitutional courts of other European and non-European countries is achieved through the Venice Forum.\(^6\)

Finally, the ECtHR and CJEU regularly receive delegations from national constitutional courts in Strasbourg and Luxembourg. On the other hand, the CCRC hosted in Zagreb the former presidents of the ECtHR, Wildhaber and Costa, as well as Skouris, the former president of the CJEU. As Skouris said, “There really is no shortage of opportunities for bilateral or multilateral meetings, which are extremely useful for all who participate, in so far as they provide an appropriate forum for the exchange of information and ideas but also of concerns. Thanks to this lively exchange of information about the issues which concern us, we all know exactly what we are doing and which law we are applying.”\(^6\)

2) Dialogue “Through the judgments”

ECtHR judges also speak of dialogue “through the judgments of the ECtHR.” The best known example of judicial or jurisprudential dialogue through judgments is the one between the Supreme Court of the United Kingdom in the case of R. v. Horncastle & Others [2009] UKSC 14 (on appeal from: [2009] EWCA Crim 964) (in which the UK Supreme Court declined to follow the Chamber judgment of the Fourth Section of the ECtHR delivered on 20 January 2009 in the cases of Al-Khawaja and Tahery v. the United Kingdom 49 EHRR 1) and the responses of the ECtHR in the Grand Chamber’s cases Al-Khawaja and Tahiri v. the United Kingdom.\(^6\) The former president of the ECtHR, Sir Nicholas Bratza, described this type of judicial dialogue as follows:\(^6\)

---

63) For example, the CCRC established cooperation with other courts through the Venice Forum in case no. U-IP-3820/2009 et al of 17 November 2009 (Official Gazette no. 143/09), in which it refused the proposals to review the conformity with the Constitution of the 2009 Special Tax on Salaries, Pensions and Other Receipts Act.

64) Skouris, The Relationship of the European Court of Justice with the National Constitutional Courts. See supra note 53.

65) ECtHR, Al-Khawaja and Tahery v. United Kingdom, judgment [GC], nos. 26766/05, 22228/06, 15 December 2011.

66) Solemn hearing of the European Court of Human Rights on the occasion of the opening of the judicial year, address by Sir Nicolas Bratza, President of the European Court of Human Rights, European Court of Human Rights, Strasbourg, 27 January 2012, 4–5.
“But there is also scope for judicial dialogue through judgments and decided cases. I would cite one recent example in relation to my own country - the Grand Chamber’s judgment in the case of Al-Khawaja and Tahery. The Supreme Court of the United Kingdom conveyed to Strasbourg its misgivings over what it perceived as an inflexible application of the Court’s case-law on the fairness of relying on hearsay evidence, with no proper regard to the specific features of the country’s rules of criminal procedure. This view was considered carefully by our Court, and responded to at length in the Grand Chamber’s judgment. It was, in my view, a very valuable exchange, conducted in a constructive spirit on both sides.

There is, of course, as things stand, no formal, direct channel permitting such communication or exchange within the Convention system. Whether there should be a new, purpose-made procedure for dialogue between national courts and the European Court is a question now under consideration in the broader reflection on future reforms.”

3) Advisory jurisdiction of the ECtHR/CJEU

The most important area of institutional dialogue of the ECtHR/CJEU with the constitutional courts of the Member States of the CoE/EU is of a formal nature, because it is based on the ECHR/Treaties establishing the EU and places the dialogue with the national constitutional courts in relation to the interpretation and application of ECHR/EU law.

As to EU law, the most important method of collaboration is “via the unique mechanism of the reference to the European Court of Justice for a preliminary ruling.”

As to ECHR law, the most important method of collaboration is intended to be via the “Protocol on judicial dialogue” or “the dialogue Protocol”, as Protocol no. 16 to the ECHR is often called by Dean Spielmann, the former President of the E CtHR. In Spielmann’s

67) Skouris, The Relationship of the European Court of Justice with the National Constitutional Courts. See supra note 53.

68) “I regard it as the protocol of judicial dialogue.” In: Address of Dean Spielmann, President of the European Court of Human Rights, at the meeting with the Supreme Court and the Supreme Administrative Court, Stockholm, 19 May 2014. In his speech at the 78th meeting of the CDDH on 27 June 2013, President Spielmann also stated, “As I have already said many times, I have always been strongly in favour of giving the highest national courts the opportunity to engage in such dialogue with our Court and that is why I named Protocol No. 16 ‘the dialogue protocol’.” Further, in his keynote speech at the Göttingen Conference on Judgments of the ECtHR: Effects and Implementation, held on 20 September 2013, President Spielmann pointed out, “⋯there is an important place for dialogue within the system, among its multiple levels. I simply note in passing
view, “By providing our Court and national supreme courts with a partnership-based tool, Protocol no. 16 will fulfil what Professors Ost and van de Kerchove referred to as the transition from pyramid to network.”

(1) Referral by the CCRC to the CJEU

The reference for preliminary ruling forms part of the procedures which may be exercised before the CJEU. This procedure is open to all Member States’ national judges. They may refer a case already underway to the CJEU in order to question it on the interpretation or validity of EU law. In contrast to other judicial procedures, the reference of a preliminary ruling is therefore not a recourse taken against a European or national act, but a question presented on the application of EU law.

The following table shows the data on the number of references for a preliminary ruling by EU Member State and by court or tribunal from 1952 to 2014.

The data shows that so far only eight national courts submitted references for a preliminary ruling of the CJEU. Apart from the Belgian, the other seven constitutional courts have done so only once or up to five times. Ten national courts have made no request at all. The remaining ten EU Member States have no institutionalised constitutional courts.

Indeed, national constitutional courts tend to be, in the words of Skouris, “outsiders” in terms of the frequency of their references for a preliminary ruling to the CJEU, compared with the total number of references dealt with by the CJEU. Namely, unlike other courts, constitutional courts tend only rarely to be faced with questions of EU law. If a dispute concerns the law governing the organisation of the State, connections with EU law will rarely arise. The position may be different only if fundamental rights are at issue, and a constitutional court is called upon to determine whether measures adopted by the State bodies responsible for transposing or implementing EU law are compatible with the fundamental rights enshrined in the national Constitution or with the core values of the constitutional order in question.

At the moment, the general standpoint of the CCRC on whether this court is prepared to

---

69) Opening Speech of Dean Spielmann, President of the ECtHR, at the solemn hearing for the opening of the judicial year of the European Court of Human Rights, ECtHR, Strasbourg, 31 January 2014.

70) Cf. Skouris, The Relationship of the European Court of Justice with the National Constitutional Courts. See supra note 53.
make referrals to the CJEU is not yet known. At this time, it can only be said that the CCRC will probably consider the acceptability of the well-established jurisprudence of the BVerfG, which holds that an arbitrary violation of the duty incumbent upon the courts of last instance under Article 267.3 of the TFEU to refer matters, where no legal remedy is available under national law, for a preliminary ruling can at the same time be a violation of the guarantee of the lawful judge.71) Such an approach by the CCRC could reinforce the
willingness of the ordinary courts to refer matters concerning the validity and interpretation of the EU law to the CJEU.

(2) The CCRC’s Request for an Advisory Opinion of the ECtHR

The advisory jurisdiction of the ECtHR, set up by the 1950 ECHR, was envisaged for the first time in 1963, by Protocol no. 2 to the ECHR, conferring upon the ECtHR competence to give advisory opinions (CETS no. 44), which entered into force in 1970. Protocol No 11 to the ECHR, restructuring the control machinery established thereby (ETS no. 155), which was signed in 1994 and entered into force in 1998, did not significantly change the content of Protocol no. 2, but meant that the text of Protocol no. 2 was incorporated in the very text of the ECHR (Articles 47–49).

The new Protocol no. 16 to the ECHR (CETS no. 214) was opened for signature on 2 October 2013 but has not yet entered into force. This new, additional and optional, Protocol to the ECHR provides for an extension of the advisory jurisdiction of the ECtHR.

However, Protocol no. 16 to the ECHR raises certain questions and contains some uncertainties. One of the most sensitive is related to Article 1.1, which states that “highest national courts or tribunals” may seek an advisory opinion in the context of a case pending before it. In other words, it enables for the first time highest national court or tribunal, indicated by States Parties, to request, in the context of a case pending before it, a non-binding advisory opinion on questions of principle relating to the interpretation or application of the rights and freedoms defined in the ECHR or its Protocols. It is considered that this innovation would enhance the ECtHR’s “constitutional role” and expand and

71) The BVerfG overturns judgments by the ordinary courts as violations of the right to one’s lawful judge (second sentence of Article 101.1 of the German Basic Law), which is equivalent to a fundamental right, only in cases where the manner in which the ordinary courts deal with the duty of referral for a preliminary ruling is untenable, particularly in those cases in which the duty of referral is fundamentally disregarded, i.e. where there is a deliberate deviation from existing jurisprudence without any willingness for referral, or if no referral is made on an arbitrary ground, regardless of whether the European jurisprudence is incomplete in the matter. In: Huber, Peter M.; Paulus, Andreas L. (2014) National Report − Germany, XIXth Congress of the Conference of European Constitutional Courts “Cooperation of Constitutional Courts in Europe – Current Situation and Perspectives”, under the Chairmanship of the Constitutional Court of Austria, Vienna, 12-14 May 2014, p. 24. See also BVerfGE 75, 223 [234]; BVerfGE 82, 159 [192 and 193]; BVerfGE 128, 157 [187]; BVerfGE 129, 78 [105].
in institutionalise cooperation between the ECtHR and domestic courts, fostering dialogue between them.

However, the potential decisions of national authorities related to their obligation under Article 10 of Protocol no. 16 to indicate “highest court and tribunals” which have the right to seek advisory opinions raise concerns, especially in those States Parties which have both a specialised and concentrated type of constitutional judiciary, such as Slovenia, Croatia, the Czech Republic, etc. These States Parties have authorised their constitutional courts to decide upon constitutional complaints as a special legal remedy against the decisions of the highest ordinary courts, including the decisions of the highest national court. In these States Parties, highest courts, including the highest ordinary court, and the Constitutional Court, are directly mutually related as the supervised and the supervisors when it comes to constitutional issues: the Constitutional Court is authorised to quash a decision of the ordinary court (including that of the highest national court) if the court decision has violated individual fundamental rights. Therefore, in such a system, the mutual relations of the highest ordinary courts and the Constitutional Court are burdened with tensions that are
inherent in such a system because they are structural in nature. Consequently, any external impetus that affects their mutual relations can lead to structural disruptions within the settled system.

Accordingly, it appears that in these States Parties the implementation of Protocol no. 16, according to a model where both the Constitutional Court and the Supreme Court (or, if so indicated, the Constitutional Court, the Supreme Court and other of the highest ordinary courts) may seek an advisory opinion of the ECtHR in the context of a case pending before it, could in certain circumstances lead to the distortion of the position of the Constitutional Court established by the Constitution. The potential impact of applying Protocol no. 16 on the position of the CCRC when dealing with constitutional complaints can be schematically presented in the following way:

In this light, in systems such as, for instance, the Croatian, Slovenian or Czech ones, it should not happen that national authorities indicate any other court but the Constitutional Court to seek advisory opinions. Indicating other highest courts to seek advisory opinions could only be justified in those rare situations where a final decision of a highest ordinary court is not subject to a review of conformity with the Constitution (and the ECHR) by the Constitutional Court, if such a situation can be imagined at all (in Croatia, such a situation does not exist in practice). In any case, these situations would need to be precisely regulated in national legislation.

To conclude, Protocol no. 16 requires precise, clear and consistent elaboration in the national legislation of States Parties to prevent the intended enhancing of the ECtHR’s “constitutional role” from turning into a conflict of jurisdictions between the ECtHR and national constitutional courts, and “the dialogue Protocol” turning into a “strife-ridden Protocol.” Having regard to all the open issues, the solution referred to in Article 10 of Protocol no. 16 that a State Party may at any time change its specification of those of its highest courts or tribunals that may request an advisory opinion appears both correct and justified.

72) However, it seems that the Slovenian authorities did just that. The Republic of Slovenia ratified Protocol no. 16 on 26 March 2015. The instrument of ratification contains a declaration that reads, “Pursuant to Article 10 of the Protocol, the Republic of Slovenia declares that the national courts for the purposes of Article 1, paragraph 1, of the Protocol, to address the requests for advisory opinions to the European Court of Human Rights, are the Supreme Court of the Republic of Slovenia and the Constitutional Court of the Republic of Slovenia.”

73) For more detail, see in Omejec, Jasna (2015) Dialogue on the Advisory Jurisdiction of the European
V. Judicial techniques for integrating the case-law of European and other national constitutional courts, as well as international law instruments in the CCRC’s decisions

1. The CCRC’s techniques for referring to the jurisprudence of the ECHR

The CCRC in its decisions regularly refers to the jurisprudence of the ECtHR. With regard to the jurisprudence of the ECtHR, there are no specific provisions of constitutional law imposing explicitly a legal obligation on the CCRC to consider judgments and decisions rendered by the ECtHR (as, for example, in the Kosovo Constitution). The CCRC derives the legal obligation to consider the ECtHR’s judgments and decisions by interpreting the text of the Constitution in its entirety. In addition, the CCRC considers that the ECtHR is in itself a direct legal basis giving rise to the legal obligation to consider judgments and decisions rendered by the ECtHR. Namely, according to Article 46 of the ECHR, the States Parties are obliged to respect the ECtHR and the judgments of the ECtHR.

Among the decisions and judgments of the ECtHR to which the CCRC has referred in its decisions and rulings, there are incomparably more of those that the ECtHR passed in relation to other States Parties to the ECHR than those that it passed in relation to Croatia. In other words, the CCRC accepts the binding interpretative authority of all the judgments and decisions of the ECtHR, irrespective of the States Parties in relation to which the judgments and decisions were passed. Further, the CCRC does not differentiate between fields of law when referring to the jurisprudence of the ECtHR related to other countries. What is important is that specific ECtHR jurisprudence is regarded as applicable in the

---

74) The CCRC has not regularly referred to the jurisprudence of the CJEU until now because the Republic of Croatia joined the EU only on 1 July 2013. Consequently, the following considerations concern only the law of the ECHR.

75) Article 53 [Interpretation of Human Rights Provisions] of the Kosovo Constitution reads, “Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights.”

76) See in this regard the CCRC’s Decision no. U-III-3304/2011 of 23 January 2013, Official Gazette no. 13/13 (Case of Vanjak).
constitutional order of the Republic of Croatia and relevant for the case in question.

Starting from the conception of legal monism, the effectively quasi-constitutional status of the ECHR in the Croatian legal order and the constitutional demand for the direct application of the ECHR, the CCRC has so far referred to the case-law of the ECtHR in more than 1,800 of its decisions and rulings. In its case-law to date, the CCRC has adopted several ways of integrating in its decisions the legal opinions of the ECtHR. It applies them in the abstract review of the constitutionality of laws, in individual constitutional complaints and in other proceedings that the CCRC implements within its jurisdiction. Most often the CCRC integrates the ECtHR’s case-law into its decisions in the following ways (we refer to the examples of CCRC decisions contained in Section 1.1. infra “Excerpts from Decisions of the CCRC”):

a) describing the principle adopted by the ECtHR in its approach to a specific ECHR rule or institute (e.g. taxation) and referring to the relevant case-law – see examples 3, 4, 7, 9, 13 and 14 in Section 1.1. infra;
b) directly citing in their entirety the legal opinions of the ECtHR from a particular judgment or decision – see examples 1 and 10 in Section 1.1. infra;
c) describing in detail the whole case before the ECtHR and directly citing the relevant legal opinions of the ECtHR in the respective judgment or decision – see example 2 in Section 1.1. infra;
d) showing the development of a particular legal institute in the case-law of the ECtHR as the ECtHR itself showed it (for example, the development of “legitimate expectations” in the light of Article 1 of Protocol no. 1 to the ECHR) – see example 11 in Section 1.1. infra; showing a legal opinion of the ECtHR with a listing of several cases from its case-law in which it applied that opinion – see example 5 in Section 1.1. infra;
e) showing the legal opinions of the ECtHR in connection with the positive obligations of the States Parties – see examples 7 and 10 in Section 1.1. infra;
f) expressing a legal opinion of the CCRC and at the same time referring to a relevant judgment or decision of the ECtHR expressing an identical opinion – see example 6 in Section 1.1. infra;
g) interpreting the structure of the relevant provisions of the Constitution in keeping with the interpretation of the structure of comparable ECHR provisions given by the ECtHR – see example 12 in Section 1.1. infra.

When the CCRC integrates the ECtHR’s case-law in its decisions in the various ways
shown above, this case-law is shown in Croatian. However, in many of its decisions the CCRC also uses the following techniques:

a) besides the ECtHR’s legal opinion given in Croatian, the original text of the opinion is also given in parentheses in English - see example 13 in Section 1.1. infra;
b) besides the ECtHR’s legal opinion given in Croatian, the key concept or some sentences or its most important part is given in parentheses in English – see examples 6, 10 and 11 in Section 1.1. infra;
c) besides the ECtHR’s legal standpoint given in Croatian, the key concept is given in parentheses in English and in French – see example 15 in Section 1.1. infra. 77)

1) Excerpts from decisions of the CCRC

The following examples from the CCRC’s case-law are classified in the order of the articles of the ECHR. In addition to the acronym “ECHR”, the following abbreviations are also used: “Convention” or “European Convention.” Furthermore, instead of the acronym “ECtHR”, the abbreviation European Court is also used in the examples.

(1) Article 3 of the ECHR

Article 3 of the ECHR prescribes:

“Article 3
Prohibition of Torture
No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”


concerning refusal of the applicant’s request for asylum in the Republic of Croatia (exposure to the risk of ill-treatment in Bosnia and Herzegovina after extradition - the principle of “non-refoulement”).

“7. The Constitutional Court also had the legal opinion of the European Court of Human Rights in mind. The European Court states, in the reasons for the judgment in the case of Saadi v. Italy, no. 37201/06 of 28 February 2008, that Article 3, which prohibits in absolute terms torture and inhuman or degrading treatment or punishment, enshrines one of the fundamental values of democratic societies... As regards the general situation in a particular country, the Court has often attached importance to the information contained in recent reports from independent international human-rights-protection associations such as Amnesty International, or governmental sources, including the US State Department ... At the same time, it has held that the mere possibility of ill-treatment on account of an unsettled situation in the receiving country does not in itself give rise to a breach of Article 3 (Fatgan Katani and Others v. Germany, no. 67679/01 of 31 May 2001), ... and that, where the sources available to it describe a general situation, an applicant’s specific allegations in a particular case require corroboration by other evidence. In order for a punishment or treatment associated with it to be ‘inhuman’ or ‘degrading’, the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment (Labita v. Italy, no. 26772/95).”


“14.5. In this light we must answer the following question: ... is there a general minimum of pension benefits which, if exceeded, would entail a violation of human rights enshrined in the Constitution? The Constitutional Court did not address this issue in its previous case-law. On the other hand, the European Court has a developed case-law on this subject. It has adopted the principle that the total amount of an individual’s pension, together with all the State and public benefits and discounts that the potential victim of the violation of the Convention enjoys, may - because they are not sufficient - under some circumstances, in a specific case, open the question of inhuman or degrading treatment by the State within the meaning of Article 3 of the Convention, if that amount, accessible to the individual, is not sufficient protection from ‘impairing physical or mental health’ or from ‘degradation incompatible with human dignity’ to a measure that would be serious enough to fall within the framework of Article 3 of the Convention (compare the decision on application
admissibility in the case of Antonina Dmitriyevna Budina v. Russia, 18 June 2009, application no. 45603/05, pp. 6-7; decision in the case Aleksandra Larioshina v. Russia, 23 April 2002, application no. 56869/00, p. 4, and the judgment in the case of Kutepov and Anikeyenko v. Russia, 25 October 2005, application no. 68029/01, §§ 61-63).

Thus in the decision on application admissibility in the case of Antonina Dmitriyevna Budina v. Russia the European Court examined the admissibility of the applicant’s allegation that the amount of her pension is below subsistence level, which constitutes a threat to her right to life within the meaning of Article 2 of the Convention. The Court found that the authorities did not mistreat the applicant in any way. The essence of the applicant’s objection was that the State pension on which she depended for survival was insufficient for her basic human needs.

Examining the application’s admissibility, the European Court took into account, besides the amount of the pension itself, also the sum of the applicant’s other monthly receipts (in Russian roubles - RUB): - her pension (RUB 1,460), - social aid (RUB 590) and - compensation for limited ability to work (RUB 410), but also the following privileges that the applicant enjoyed: - 50% discount on utility bills; - free public urban and suburban transport; - 50% discount on interurban rail and air transport; 50% discount on telephone and radio bills; free medical assistance; free dental prosthetics (except precious metals and cermets); - 50% discount on medical prescriptions; - free sanatorium treatment and - free suburban and interurban transport to the place of the treatment. The European Court further took into consideration that the applicant had received one sum of RUB 500 indigence aid, and that her family also benefited from the discount on utility bills. Finally, the European Court also took into consideration that part of the applicant’s benefits, on her request, was monetised (pp. 2-3 of the decision).

Although the European Court found that the applicant’s monthly income ‘was not high in absolute terms’, it declared inadmissible the applicant’s objection that her rights were violated because her income was below subsistence level, with the explanation that the applicant had not proved that ‘the lack of funds translated itself into concrete suffering.’

In the Kutepov and Anikeyenko v. Russia the European Court pointed out the following:

“61. The second applicant further relied on Article 2 of the Convention in that the present amount of his old-age pension was insufficient to maintain a proper living standard.
62. The Court recalls that the Convention does not guarantee, as such, the right to a certain living standard. It further notes that a complaint about a wholly insufficient amount of pension and the other social benefits may, in principle, raise an issue under Article 3 of the Convention which prohibits inhuman or degrading treatment. However, on the basis of the material in its possession, the Court finds no indication that the amount of the second applicant’s pension has caused such damage to his physical or mental health capable of attaining the minimum level of severity falling within the ambit of Article 3 of the Convention, or that he faces any ‘real and immediate risk’ either to his physical integrity or his life, which would warrant the application of Article 2 of the Convention in the present case ….”

(2) Article 5 Paragraph 1c of the ECHR

Article 5 para. 1c of the ECHR prescribes:

“Article 5
Right to liberty and security
1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(...) c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; …”


“5.4. With reference to the second part of Article 102 paragraph 1 indent 3 of the Criminal Procedure Act, under which if detention is ordered for reasonable suspicion that a person has committed an offence ‘special circumstances’ justifying such suspicion must be shown, it is necessary to recall the opinions of the European Court of Human Rights in the application of Article 5 para. 1c of the European Convention on Human Rights. According to these opinions, detention cannot be grounded only on reference to an equal offence and danger of reoffending, or only on reference to the defendant’s past history and personality or only on previous conviction, but all the circumstances of a particular case must be taken into account, including the defendant’s personal
circumstances and character, the amount of the damage, his perseverance and the frequency of his offences and the like (judgments of the European Court of Human Rights in the cases Clooth v. Belgium, § 40; Muller v. France, § 44; Matzner v. Austria, § 9), because only thus can the public interest for depriving a person of freedom be seen to prevail over his right to freedom. This is especially important when detention is extended on the grounds on which it had originally been ordered, because in such cases the reasons for the continuation of detention, as the measure that interferes most deeply with the fundamental right to personal freedom, must be qualitatively stronger.”

(3) Article 5 Paragraph 3 of the ECHR

Article 5 para. 3 of the ECHR prescribes:

“Article 5

Right to liberty and security

(…)

3. Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.”


“8 … The Constitutional Court also points out the legal opinion taken by the European Court in the application of Article 5/3 of the European Convention, whereby reasonable suspicion, however grave the criminal offence, is after a lapse of time in itself not sufficient legal ground for continued detention on remand. The case of Kemmache v. France of 21 October 1991 contains the following legal stand: where an arrest is based on reasonable suspicion that the person concerned has committed an offence, persistence of that suspicion is a condition sine qua non for the validity of the continued detention, but, after a certain lapse of time, it no longer suffices; the Court must then establish whether the other grounds cited by the judicial authorities continue to justify the deprivation of liberty. Where such grounds are ‘relevant’ and ‘sufficient’, the Court must also ascertain whether the competent national authorities displayed ‘special diligence’ in the conduct of the proceedings. The above legal opinions of the European Court were repeated in the case of
A Study on European Constitutional Courts as the Courts of Human Rights _ 389

Nikolova v. Bulgaria, of 5 March 1999, and in many other judgments.”

(4) Article 6 paragraph 1 of the ECHR
Article 6 para. 1 of the ECHR prescribes:

“Article 6
Right to a Fair Trial
1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. …”

Judicial Impartiality

“6.1. … The European Court of Human Rights deems that a judge is presumed impartial until proved otherwise. However, in a particular case the facts may give rise to objective negative appearances of a judge’s (im)partiality which justify legitimate expectations that the judge will excuse himself from the trial. Such facts exist, for example: a) when a judge taking part in the trial decided, in prior proceedings, about issues that are closely connected with the issue he will have to settle when giving judgment (judgment in the case of Hauschildt v. Denmark of 24 May 1989, § 51-52); b) if he, after participation in passing the first-instance judgment, participates in deciding on appeal (judgment in the case of De Haan v. Netherlands of 26 August 1997, § 51, 54); c) if he was on the out-of-trial panel of judges that confirmed the grounds for indictment and was after that a member of the chamber of judges at the trial (judgment in the case of Castillo Algar v. Spain of 28 October 1998, § 47-49). In the case of Piersack v. Belgium (judgment of 1 October 1982, § 30-31), the fact that the judge who presided over the panel at the trial had earlier been at the head of the public attorney’s office competent for prosecution in the case was also found as a negative indicator of the criminal court’s impartiality.”

“6. … A judge’s impartiality in criminal proceedings is not ascertained, but to exclude (Article 36 para. 1 CPA) or excuse (Article 35 para. 2 CPA) him from the trial circumstances that indicate bias must be found (judgement of the European Court of Human Rights in the case of Kyprianou v. Cyprus of 15 November 2005, § 122).

The existence of these circumstances is established by a subjective test, where it is necessary to examine the judge’s personal beliefs and behaviour indicating whether he has personal bias (Engl. ‘personal bias’) against the party in the case (judgment of the European Court in the case of Hauschildt v. Denmark of 24 May 1989, § 47), and by an objective test, where it is necessary to examine whether there are objectively ascertainable facts that may raise doubts as to a judge’s impartiality (so-called negative indicators of the ‘appearance of impartiality’, judgment of the European Court in the case of Sramek v. Austria of 22 October 1984, § 42). In this examination the misgivings of the party in the proceedings that he was the victim of a judge’s bias is ‘important but not decisive’; what is decisive is whether these misgivings can be objectively justified (judgement of the European Court in the case of Hauschildt v. Denmark of 24 May 1989, § 48). If this is possible, there is legitimate doubt as to the judge’s impartiality and he must be excused from the trial in that case, regardless of the level of the proceedings at which this was discovered.”

② Reasonable Length of Proceedings

“5.5. … It must be said that in several of its judgments the European Court of Human Rights explicitly found that the States Parties are bound to organise their legal orders in a way that enables courts to comply with the requirements provided for in Article 6 para. 1 of the European Convention, reiterating the especial importance of this requirement for the proper and regular conduct of judicial proceedings (see for Example judgments of the European Court in the cases of Bucholoz v. Germany of 6 May 1981, Guincho v. Portugal of 10 July 1984, Unión Alimentaria Sanders SA v. Spain of 7 July 1989, Brigandi v. Italy of 19 February 1991 etc.).”

③ Right of Access to Court
Example 8 — Decision no. U-III-443/2009, 30 April 2009 – constitutional complaint (the
right to judicial protection against a parliamentary decision on the election or
appointment of the highest state officials).

“8.1.a) The Constitutional Court notes that neither the Constitution nor the relevant laws explicitly
provide for a legal remedy against the election or appointment of the highest state and judicial
officials nor provide for a circle of people empowered to submit a legal remedy against these. On the
other hand, they do not explicitly exclude this. In this sense the new legal view of the European
Court of Human Rights must be mentioned, expressed for the first time in the Grand Chamber
judgment in the case of *Vilho Eskelinen and Others v. Finland* of 19 April 2007 (application no.
63235/00), which reads:

61. The Court recognises the State’s interest in controlling access to a court when it comes to certain
categories of staff. However, it is primarily for the States Parties, in particular the competent
national legislature, not the Court, to identify expressly those areas of public service involving the
exercise of the discretionary powers intrinsic to State sovereignty where the interests of the
individual must give way ….

62. To recapitulate, in order for the respondent State to be able to rely before the Court on the
applicant’s status as a civil servant in excluding the protection embodied in Article 6, two conditions
must be fulfilled. Firstly, the State in its national law must have expressly excluded access to a court
for the post or category of staff in question. Secondly, the exclusion must be justified on objective
grounds in the State’s interest… It will be for the respondent Government to demonstrate, first, that
a civil-servant applicant does not have a right of access to a court under national law and, second,
that the exclusion of the rights under Article 6 for the civil servant is justified.”

(5) Article 8 of the ECHR

*Article 8 of the ECHR prescribes:*

“Article 8

Right to Respect for Private and Family Life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as
   is in accordance with the law and is necessary in a democratic society in the interests of national
   security, public safety or the economic wellbeing of the country, for the prevention of disorder or
   crime, for the protection of health or morals, or for the protection of the rights and freedoms of
   others.”

“5. The Constitutional Court notes that the European Court of Human Rights, when it applies the relevant provisions of the Convention (…) in its decisions that refer to the right to family life, which, among other things, also includes parental rights and the right to care, pointed out the state’s obligation for the parents to be involved in the decision-making process to a degree sufficient to provide them with the requisite protection of their interests in proceedings involving child care (mutatis mutandis, W. v. the United Kingdom, judgment of 8 July 1987, §§ 63-65, and Elsholz v. Germany, judgment of 13 July 2000, § 52). Also, in deciding on the execution of parental rights the state must establish a fair balance between the interests of the child and of the parents, where special importance must be given to the best interests of the child, which, depending on their nature and gravity, may prevail over the interest of the parents (mutatis mutandis, Sahin v. Germany, application no. 30943/96, judgment of 8 July 2003, § 65, § 66, and Elsholz v. Germany, § 50, ibid.).”


“7. … Furthermore, the European Court found that the positive obligations Article 8 of the Convention imposes on the States Parties with respect to reuniting parents with their children that have been abducted, they must be interpreted in the light of the Hague Abduction Convention (§ 1 Karadžić v. Croatia, judgment of 15 November 2005, § 75; H.N. v. Poland, judgment of 13 September 2005). The national bodies’ incorrect interpretation of some provisions of the Hague Abduction Convention does not free the state from the responsibility for the violation of the provision of Article 8 of the Convention (§ 80 and 81 Monory v. Romania and Hungary, Judgment of 5 July 2005).”

(6) Article 1 of Protocol No. 1 to the ECHR

Article 1 of Protocol no. 1 of the ECHR prescribes:

“Article 1
Protection of Property

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall
be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”


“7. ... The Constitutional Court also brings to notice the accepted legal opinion of the European Court of Human Rights (hereinafter: European Court) which recognises that the legitimate expectations of the parties must under certain conditions be considered ‘property’ under the protection of Article 1 of Protocol no. 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms (‘…’, hereinafter: Convention), which regulates the protection of ownership. The European Court first mentioned the concept of ‘legitimate expectation’ in the context of Article 1 of Protocol no. 1 to the Convention in the judgment in the case of Pine Valley Developments LTD and Others v. Ireland of 29 November 1991 (application no. 12742/87). In this case the applicants were entrepreneurs whose principal business was the purchase and development of land; in 1978 they bought land on the site in reliance on an outline planning permission for industrial warehouse and office development, which the Irish Supreme Court later found ultra vires and therefore ab initio a nullity because it contravened relevant laws. In that case, the Court found that a ‘legitimate expectation’ arose when outline planning permission had been granted, in reliance on which the applicant companies had purchased land with a view to its development. The planning permission, which could not be revoked by the planning authority, was ‘a component part of the applicant companies’ property’ (§ 51 of the Pine Valley judgment and § 45 of the judgment of the Grand Chamber in the case Kopecký v. Slovakia of 28 September 2004, application no. 44912/98, 2004-IX).

In the Kopecký v. Slovakia judgment the Grand Chamber of the European Court condensed the views explained in the Pine Valley judgment and in the newer Stretch v. the United Kingdom judgment of 24 June 2003 (application no. 44277/98, § 35). It explicitly stated that in the above cases, the persons concerned were entitled to rely on the fact that the legal act on the basis of which they had incurred financial obligations would not be retrospectively invalidated to their detriment. In this class of case, the ‘legitimate expectation’ is thus based on a reasonably justified reliance on a legal act which has a sound legal basis and which bears on property rights (§ 47 of the Kopecký
Furthermore, the European Court of Human Rights in many of its decisions reiterated that the applicants do not have a ‘legitimate expectation’ if it cannot be found that they have a ‘currently enforceable claim that was sufficiently established.’ Thus in the Grand Chamber Decision on the admissibility of the application in the case of Gratzinger and Gratzingerova v. the Czech Republic of 10 July 2002 (application no. 39794/98, 2002-VII), in which the applicants failed to meet one of the essential statutory conditions for realising their claim, the Grand Chamber of the European Court found that their application was not sufficiently established for the purposes of Article 1 of Protocol no. 1 to the Convention. ‘The belief that the law then in force would be changed to the applicants’ advantage cannot be regarded as a form of legitimate expectation for the purposes of Article 1 of Protocol no. 1. The Court considers that there is a difference between a mere hope of restitution, however understandable that hope may be, and a legitimate expectation, which must be of a nature more concrete than a mere hope and be based on a legal provision or a legal act such as a judicial decision. The Court accordingly concludes that the applicants have not shown that they had a claim which was sufficiently established to be enforceable, and they therefore cannot argue that they had a ‘possession’ within the meaning of Article 1 of Protocol no. 1 (§§ 73 and 74 of the Gratzinger decision and § 49 of the Kopecký judgment).

The Constitutional Court already referred to the above legal opinions of the European Court in its decision no. U-I-2921/2003 et al of 19 November 2008 (Official Gazette no. 137/08), so it remains here to again find them in conformity with Article 48 para. 1 of the Constitution, and thus also applicable in the constitutional order of the Republic of Croatia.

The Constitutional Court additionally notes that conditional claims or applications that were refused because the party did not meet statutory conditions, or a relevant legal act, are not considered property that would constitute ownership rights for the purposes of Article 48 para. 1 of the Constitution. The European Court takes the identical stand (see summary of relevant stands in the cases: Mario de Napoles Pacheco v. Belgium, decision of the European Commission of 5 October 1978, application no. 7775/77, DR 15, p. 151 in the English edition; Malhous v. the Czech Republic, Grand Chamber decision of 13 December 2000, application no. 33071/96, ECHR 2000-XII; Prince Hans-Adam II v. Germany, Grand Chamber decision, application no. 42527/98, ECHR 2001-VIII, § 85; Nerva v. the United Kingdom, judgment of 24 September 2002, application no. 42295/98, Report on Judgments and Decisions 2002-VIII, § 43).

In the case under examination here the applicants’ request for a building permit was not refused for not meeting the statutory conditions. On the contrary, in this case the applicants’ request for a building permit was well founded so they were issued with one; in this way their right of
construction was recognised in a final and legally effective document and they began to build. For
the needs of construction they partly invested their own money and partly took a bank loan with set
deadlines for returning the loan during several years.
Starting from the above legal opinions of the European Court, which it too had accepted in its
previous practice, the Constitutional Court finds that in this case the applicants had a ‘legitimate
expectation’ that the conditions in the building permit, on the grounds of which they assumed a
financial burden, would be met, considering that it was based on reasonably justified confidence in
a final and legally effective administrative act which had a valid statutory foundation. Thus there is
no doubt that their claim was sufficiently well established and thus also ‘enforceable’, which
qualifies it as ‘property’ for the purpose of Article 1 Protocol no. 1 to the Convention.
The Constitutional Court therefore concludes that the above legitimate expectation in itself
constitutes the applicants’ ownership interest so the legally effective building permit is in this case
a component part of the applicants’ property that falls under the guarantee of Article 48 para. 1 of
the Constitution and Article 1 of Protocol no. 1 to the Convention.”

(three rules of Article 1 of Protocol no. 1 to the Convention).

“15.3. Like Article 48 of the Constitution, so Article 1 of Protocol no. 1 to the Convention contains
three clearly defined rules. The European Court analysed and applied them for the first time in the
7151/75 and 7152/75.” (Further in the statement of reasons, an explanation of the “three rules of
P1-1” is given - note of the author.)

the constitutionality of the 1998 Pension Insurance Act.

“14.3. … The right to a social benefit from the pension insurance sub-system based on generation
solidarity is also protected under Protocol no. 1 to the Convention …
The European Court of Human Rights in Strasbourg (hereinafter: the European Court) has in many
of its decisions and judgments pointed out that the Convention ‘does not as such guarantee a right to
a State pension or to a similar State-funded benefit’ (decision on admissibility in the case of Neill
and Others v. the United Kingdom, 29 January 2002, application no. 56721/00).
However, … where a right to such benefits based on a contributory scheme is provided for in
domestic legislation, such right may be treated as a pecuniary right for the purposes of Article 1 of Protocol no. 1 so as to render applicable that provision (decision on admissibility in the case of Neill and Others v. the United Kingdom, 29 January 2002, application no. 56721/00; judgment in the case of Gaygusuz v. Austria, 16 September 1996, application no. 17371/90, Reports 1996-IV, §§ 39-41).”


“14.1. The European Court starts from the principle that every taxation is prima facie interference in the right to the peaceful enjoyment of possessions guaranteed in Article 1 of Protocol no. 1 to the Convention – ‘since it deprives the person concerned of a possession, namely the amount of money which must be paid’ (judgement of the Grand Chamber of the European Court in the case of Burden v. the United Kingdom, 20 April 2008, application no. 13378/05, § 59).

However, the Convention does not deprive the state of its taxation powers: the state has the right to apply laws to ensure the payment of tax. This interference of the state in the property of people is in general justified under Article 1 para. 2 of Protocol no. 1 to the Convention, which explicitly provides for the ‘right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.’ From the aspect of the supervision carried out by the European Court ‘states, in principle, remain free to devise different rules in the field of taxation policy’ (judgement Burden, § 65).

Nevertheless, the European Court, similarly to the Constitutional Court in proceedings instituted by constitutional complaints, in specific cases reserves the right of judicial control over state interference into the private property sphere of individuals through taxes, ‘since the proper application of Article 1 of Protocol no. 1 is subject to its supervision’ (judgment Burden, § 59).

This means that taxation should be regulated so that it satisfies the general requirements of the Convention: it must be prescribed by law, must be in the public or common interest, and tax regulations or measures of tax policy must be ‘reasonable’ and ‘proportional’ to the goal that they are intended to achieve. In other words, the regulation of tax rights and liabilities shall be considered contrary to the principles of the Convention if there is no objective and reasonable justification for them, that is, if they do not have a legitimate goal and there is no reasonable proportionality between the measure applied and the goal that it is intended to achieve.”
(7) The Meaning of the Convention Term “Prescribed by Law” (Articles 8 to 11 of the ECHR)


“19.5. Since the Republic of Croatia is one of the signatories of the Convention on the Protection of Human Rights and Fundamental Freedoms of the Council of Europe (hereinafter: the European Convention), the Court deems important to point out that no law shall be considered ‘law’ in terms of the European Convention for the mere fact of its existence. The European Court of Human Rights provides for much more stringent criteria which must be complied with for a ‘law’ to be considered ‘law’ in the syntagm ‘prescribed by law’, or in French ‘prevues par la loi’.” (Further in the statement of reasons, the views of the European Court in the judgments Sunday Times, Silver and Others and Malone v. the United Kingdom are given - note of the author).”

2. The CCRC’s techniques for referring to the international law instruments

The CCRC is in its everyday practice lesser influenced by international law than by European law. Namely, the CCRC implements the law of the ECHR in nearly every case on which it deliberates since the objections of the applicants of constitutional complaints on alleged violations of their constitutional rights may almost always be subsumed under the appropriate Article of the ECHR or its Protocol. This is also generally true of objections that are lodged by proponents who require an abstract review of the constitutionality of laws and other legislation. As opposed to this, the CCRC implements international law instruments only provided that the applicants of constitutional complaints or proponents of the review of laws and other legislation invoke them, and that they are relevant for the case considered by the CCRC. Several examples from the CCRC’s jurisprudence are mentioned below.

“International Law

1) UN Convention against Corruption


12. The CaC/05 clearly states the difference between the criminal sphere of combating corruption and preventive (ethical and administrative law) measures that serve the purpose of promptly preventing the occurrence of conflict of interest, or of effectively addressing existing or newly occurred conflict of interest.

The relevant provisions for these Constitutional Court proceedings can be found in Chapter II of the CaC/05 entitled ‘Preventive measures.’ The Government also referred to them in the Proposal of the APCI (…). These provisions are quoted in the appropriate places in the statement of reasons of this decision and ruling.

Chapter III of CaC/05 titled ‘Criminalisation and law enforcement’ does not apply in the area of preventing conflict of interest. It regulates criminal liability for corruptive criminal offences that are not subject to regulation by the APCI.”


“B. International Treaties and Other International Instruments

19. Relevant in the review of the grounds for the proposals is … Article 21 of the International Covenant on Civil and Political Rights which reads:

Article 21

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public),
the protection of public health or morals or the protection of the rights and freedoms of others.”

Finally, also relevant is Article 20 paragraph 1 of the Universal Declaration of Human Rights which reads:

“Article 20
1. Everyone has the right to freedom of peaceful assembly and association...”


“5. The Constitutional Court rendered the decision and ruling in the pronouncement on the grounds of the provisions... of the relevant international documents, which are part of the internal legal order of the Republic of Croatia (… Article 141 of the consolidated wording of the Constitution, Official Gazette no. 85/10). These are... the UN Convention on the Rights of Persons with Disabilities (Official Gazette - International Agreements, nos. 6/07, 3/08 and 5/08). ...”

Article 5 of the Convention on the Rights of Persons with Disabilities reads:

“Article 5
Equality and non-discrimination
1. States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.
2. States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.
3. In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.
4. Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention.”

“The Constitutional Court recalls the fundamental principles of judicial office, having in mind the relevant provisions of the Judiciary Act (Official Gazette, nos. 150/05, 16/07 and 113/08), relevant international documents (UN Universal Declaration of Human Rights included in Resolution no. 217A (III) of 10 November 1948; UN Resolution ‘Basic Principles on the Independence of the Judiciary’ of 1985; UN Resolution ‘Human Rights and Judiciary’ of 22 October 1993 no. 50/181, and 20 November 1993 no. 48/137; Declaration on the rights and responsibilities of individuals, groups and national bodies for promoting and protecting of the accepted human rights and freedoms, entailed in the Resolution of the UN General Assembly no. 53/44 of 8 March 1999; the Council of Europe Recommendation no. R(94)12 of 13 October 1994 on the independence, efficiency and role of judges; The Bangalore Principles of Judicial Conduct; the principles in the 1998 European Charter on the statute for judges and the like) and guidelines of the Code of Ethics for judges passed by the Supreme Court of the Republic of Croatia on 26 October 2006 (Official Gazette no. 131/06).”


“Substantiating the allegations in the constitutional complaint, the applicants maintain that the above rulings violated the Hague Convention on the Civil Aspects of International Child Abduction (Official Gazette - International Agreements, no 4/94; hereinafter: The Hague Convention). Article 11 of the Hague Convention stipulates that the judicial or administrative authorities of the Contracting States (including also the Republic of Croatia) shall act expeditiously in proceedings for the return of children.

The Hague Convention binds the Republic of Croatia within the meaning of Article 134 [141] of the Constitution. The provision of Article 6 of the Hague Convention stipulates that one or more central authorities shall be designated to discharge the duties which are imposed by the Convention upon such authorities.

Pursuant to the provision of Article 7 paragraph 2 of the Hague Convention the central authority shall, either directly or through any intermediary, take all appropriate measures: a) to discover the
whereabouts of a child who has been wrongfully removed or retained; (…) c) to secure the voluntary return of the child or to bring about an amicable resolution of the issues; (…) f) to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organising or securing the effective exercise of rights of access; g) where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers; (…)’”

Article 8 paragraph 1 of the Hague Convention reads:

“Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child’s habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child.”

Articles 29 and 30 of the Hague Convention read:

“This Convention shall not preclude any person, institution or body who claims that there has been a breach of custody or access rights within the meaning of Article 3 or 21 from applying directly to the judicial or administrative authorities of a Contracting State, whether or not under the provisions of this Convention.

Any application submitted to the Central Authorities or directly to the judicial or administrative authorities of a Contracting State in accordance with the terms of this Convention, together with documents and any other information appended thereto or provided by a Central Authority, shall be admissible in the courts or administrative authorities of the Contracting States. (…)”

The provisions of the Hague Convention requiring the designation of a Central Authority for discharging the duties which are imposed upon it by the Convention does not influence the competence of the courts, because this authority is established only with the purpose of providing help to persons the Convention is intended to protect.

Therefore, the Vukovar County and Municipal Courts were not right saying that the applicant could not directly approach the court with her proposal for the return of the wrongfully removed child. If all other requirements were met in order for the court’s jurisdiction to be established in the specific case, the court proceedings should have been conducted.
By declining the jurisdiction to proceed, the above Courts violated the applicant’s right of access to a court guaranteed in Article 29 paragraph 1 of the Constitution ….


“4. For the purposes of the present proceedings, the Constitutional Court … examined the relevant provisions of the International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 (Službeni list SFRJ no. 9/91 and item 32 of the Decision on the publication of multilateral treaties to which the Republic of Croatia is a party on the basis of notifications of succession, Official Gazette - International Agreements no. 12/93), the Convention on the Rights of the Child, … which are international agreements ratified in the Republic of Croatia, so they are part of the internal legal order of the Republic of Croatia and are above law in terms of legal effects (Article 140 of the Constitution).”

3. The CCRC’s techniques for referring to the jurisprudence of other national constitutional courts

The CCRC, when deciding on cases, also takes into account the available jurisprudence of other European or non-European constitutional courts, and it refers in its decisions to jurisprudence that is applicable in the constitutional order of the Republic of Croatia if it finds this relevant for the particular case.

Techniques that the CCRC uses when it integrates in its decisions the case-law of other national constitutional courts are the same as those used to referring to the ECtHR case-law.

In its case-law so far, the CCRC has most frequently referred to the jurisprudence of the German BVerfG. Besides the BVerfG’s legal opinion given in Croatian, the CCRC also quotes in its decisions in parentheses the original text of the opinion in German.
1) Special CCRC’s techniques

(1) Comparative overview of the case-law of constitutional courts of the CoE member states

In some cases, when it is important to establish the existence of common ground in the legal orders of the States Parties of the ECHR, the CCRC uses a comparative overview of the case-law of their constitutional courts. Following examples are classified in chronological order.


32. ... every judgment against the Republic of Croatia in which the ECHR found a violation of the ECHR – for the competent domestic bodies – constitutes a new fact. The force of such a new fact was best described by the German Federal Constitutional Court when on the occasion of the judgment of the ECHR in M. v. Germany (17 December 2009, application no. 19359/04) and several similar judgments that followed in its judgment in Security Prison I of 4 May 2011, it found as follows:

“1 The decisions of the European Court of Human Rights, which contain new aspects for the interpretation of the Basic Law are equivalent to legally relevant changes that might lead to the prevailing effects of the final and binding decisions of the Federal Constitutional Court itself.”


The Constitutional Court finally recalls Article 31.3 of the Constitution, which explicitly allows for the possibility of reopening criminal proceedings if this is prescribed by the law ‘in accordance with international treaties.”

44.4. ... In its interpretation of constitutional values, the Constitutional Court accepts the legal position of the German Federal Constitutional Court that human dignity is a central point that must be used as a starting point for balancing all other constitutional values. This position was expressed in the judgment Lebach (BVerfGE 35, 202 /Lebach/ - Urteil des Ersten Senats vom 5. Juni 1973 auf die mündliche Verhandlung vom 2. und 3. Mai 1973 - 1 BvR 536/72):

“In the case of conflict, both constitutional values must be balanced, as far as possible; if this cannot be achieved, then it must be decided, on the basis of the special characteristics and circumstances of the individual case, which of the interests must be abandoned. In such a case, both constitutional values must be observed in relation to their relationship towards human dignity as a central point in the value structure of the Constitution.”

(‘Beide Verfassungswerte müssen daher im Konfliktsfall nach Möglichkeit zum Ausgleich gebracht werden; läßt sich dies nicht erreichen, so ist unter Berücksichtigung der falltypischen Gestaltung und der besonderen Umstände des Einzelfalles zu entscheiden, welches Interesse zurückzutreten hat. Hierbei sind beide Verfassungswerte in ihrer Beziehung zur Menschenwürde als dem Mittelpunkt des Wertesystems der Verfassung zu sehen.’)


“E. National Law and Practice of the Council of Europe Member States

22. Present national legislations in the Council of Europe member states lack clear and firm ‘common ground’, and therefore there is no common European approach and clear European consensus with regard to restricting the right to freedom of public assembly in the proximity of premises holding seats of the highest bodies of public power.

The relevant data are presented in Enclosure 1 to this decision. (…)”

Enclosure 1

National Legislation and Practice Regarding The Right to Freedom of Public Assembly in the Council of Europe Member States

(…)
2) Case-law of constitutional courts of the Council of Europe member states
6. The Constitutional Courts of the Council of Europe member states dealt with the right to freedom of public assembly from different aspects.
7. The well-established view of the Federal Constitutional Court of Germany is that mere suspicion or presumption that there will be disorders is not a sufficient reason for imposing a ban on a public assembly. In decision no. BVerfG, 1 BvQ 22/01, 5. 1. 2001 (1-22) this Court reviewed the proposal to order a temporary measure and to repeal the order of the Higher Administrative Court of the Nordrhein-Westfalen Land relating to the ban on a specific public assembly. The German Constitutional Court refused the proposal stating that the freedom of assembly is one of the guarantees that goes along with the principle of the rule of law, including also the limitations imposed on that freedom listed in Article 8 paragraph 2 of the Basic Law. In accordance with the case-law of the Federal Constitutional Court bans may only be imposed with the purpose of protecting the fundamental legal values: the mere threat to public order could not be considered sufficient. ('18. Zu den rechtsstaatlichen Garantien gehört die Versammlungsfreiheit einschließlich ihrer in Art. 8 Abs. 2 GG aufgeführten Grenzen. Nach der Rechtsprechung des Bundesverfassungsgerichts kommen Versammlungsverbote nur zum Schutz elementarer Rechtsgüter in Betracht, während die bloße Gefährdung der öffentlichen Ordnung im Allgemeinen nicht genügt (vgl. BVerfGE 69, 315 ‹353›. Zur Abwehr von Gefahren für die öffentliche Ordnung können aber Auflagen erlassen werden.’)
7.1. In the latest decision of 22 February 2011 the German Constitutional Court extended the obligation to protect the right to freedom of public assembly and expression also onto some legal subjects whose work is grounded on the rules of civil (private) law. This relates to the impact of the fundamental rights on third persons (Dritwirkung), which in the specific case the Court substantiated by the fact that not only public companies, which are entirely publicly owned, are bound by the fundamental rights but also companies that are in public-private ownership, if they are controlled by the public sector. This case concerns the ban on access to Frankfurt Airport, which was imposed on the applicant of the constitutional complaint – an activist of the ‘Anti-Deportation Initiatives’ – by the Fraport AG Company (a joint-stock company that manages Frankfurt Airport, and is in public-private ownership). The applicant’s appeal against the Fraport AG Company was rejected before all civil courts at all instances.
The Federal Constitutional Court repealed all the judgments with the explanation that the disputed ban is in breach of the freedom of assembly, because it prohibits the applicant, with no concrete risk estimation and for an unlimited time, from holding any kind of gatherings in the premises of the entire Frankfurt Airport. Such a civil ban is disproportionate. In principle, civil-law authorisations,
to which category the prior authorisation of Fraport AG to hold assemblies belongs, and which it renders pursuant to a discretionary assessment, cannot be interpreted in a manner that exceeds the constitutional boundaries imposed on the government authorities competent to ban assemblies. Accordingly, a ban on assemblies is acceptable only if there is imminent and foreseeable danger to the legal values that are equivalent to the freedom of assembly. This, however, does not prevent the separate treatment of the potential danger of assembling in an airport – which is organised as a place for the general communication traffic – and also taking into account the rights of other holders of fundamental rights. In so doing, the particular vulnerability of an airport in its primary role of a location where air traffic takes place can justify the limitations which – starting from the principle of proportionality – might not be taken into consideration in an open street.

Furthermore, the German Federal Constitutional Court also found that the applicant’s rights to expression were violated, because the use of airport premises to express one’s opinion cannot be restricted for the protection of legal values in a manner different than in a public street. These restrictions must be in accordance with the principle of proportionality. This excludes a general ban on distributing fliers in the public premises of the airport, as well as access to spaces that are arranged as public forums, and a general ban making general access to these spaces conditional on issuing a licence.

The above judgment of the German Federal Constitutional Court is also important because it directly connects the freedom of public assembly with all the places of the ‘usual communication traffic’ of people. Such gatherings cannot today be limited only to public traffic spaces, but holding an assembly must also be guaranteed in other areas that are increasingly supplementing these spaces, such as shopping centres or other places where people meet. This rule applies regardless if whether there are autonomous areas or are connected to infrastructural objects, or if they are indoor or outdoor places.

8. The Constitutional Courts of the majority of the Council of Europe member states that imposed the measure of an absolute legal ban on the freedom of public assembly in the proximity of buildings holding seats of the highest bodies of state power have so far not reviewed the compliance of these legal solutions with the national constitutions.

According to available data, the only exception is the Constitutional Court of Latvia. It reviewed the constitutionality of Article 9 paragraph 1 of the Assemblies, Processions and Demonstrations Act at the request of 20 representatives of the 8th sitting of the Latvian Parliament (the Saeimas). Article 9 paragraph 1 of the Act stipulated that it is prohibited to organise meetings and demonstrations closer than 50 metres from the residence of the President and the buildings of the Saeima, Cabinet, Council of Local Authorities, courts, public prosecutor, police, prison and foreign diplomatic and consular
offices. In the organisation of meetings and demonstrations close to these buildings, the relevant institutions, except foreign diplomatic and consular offices, may also indicate special places closer than 50 metres. In decision no. 2006-03-0106 of 23 November 2006 the Latvian Constitutional Court accepted the request. Despite the finding that the disputed legal ban has a legitimate aim (securing the undisturbed work of the above institutions and preventing the threat to public security), the Latvian Constitutional Court repealed this provision for non-compliance with the Constitution because it found it not proportional with the aim it was sought to achieve (point 29 of the judgment)."


“German Federal Constitutional Court dealt with the issue of a constitutional complaint related to the search of premises in decision BVerfGE 103,142 (151) and concluded that these presumptions are violated if there are no real, plausible reasons for the search. A decision must show that the investigating judge carefully examined the presumption of the violation of a fundamental right.”


“19. The Constitutional Court deems it beyond doubt that the addressees of a legal norm cannot truly and distinctively know their rights and obligations and foresee the consequences of their behaviour if the legal norm is not sufficiently definite and precise. The requirement for the definiteness and precision of a legal norm ‘constitutes one of the fundamental elements of the rule of law’ (judgment of the ECtHR in the case of Beian v. Rumania, 6 December 2007, application no. 30658/05, § 39: ‘... constitue l’un des éléments fondamentaux de l’Etat de droit’) and is crucial for the development and preservation of the legitimacy of a legal order. It ensures that the democratically legitimate legislator can independently and by law elaborate the fundamental rights and freedoms, that the executive and administrative powers can resort to clear standards in laws and subordinate legislation on which to base their decisions, and that the judicial power and courts can control the legality of the legal order (judgment of the German Federal Constitutional Court 1 BvR 370/07 of 27 February 2008, § 209). When this requirement is not respected indefinite and imprecise laws delegate, in a constitutionally impermissible manner, part of the legislator’s
authority to the subjective resolution (discretion) of the administrative and judicial powers.”


“3.1. During the consideration of the case the Court also examined the relevant case-law of the European Court of Human Rights (…) in relation to the Republic of Croatia (…), of the Federal Constitutional Court of the Federal Republic of Germany (…) and of the Supreme Court of the USA, which are referred to in the relevant parts of the reasons of the Decision and Ruling.”


“8. … In the view of the Constitutional Court, the Special Tax Act may be approached using the legal opinion of the Federal Constitutional Court of the Federal Republic of Germany (BVerfGE 21, 12, judgment of the First Senate of 20 December 1966 - 1 BvR 320/57, 70/63) that it is in practice impossible, in the case of a tax that is all-encompassing, to find a formulation delimiting the unchallenged part from the challenged part of the act, i.e. that delimitation is possible ‘only on the theoretical level.’

(…)

13.3. The above principles of the social state and social justice are expressed in a special way in the control of legislative activities by constitutional courts. This hinges on the following fundamental problem: how to determine the borderline on which the constitutionalisation of social rights clashes with democracy? This is a problem located on the very crossroads of two basic questions of political philosophy that are also important for contemporary constitutional policy: at the crossroads of the question of democracy and of the question of distributive justice.

In the work of constitutional courts this problem is particularly present in the control of the constitutionality of laws that deal with public policies, especially social policy. The borderline mentioned above is also the line up to which constitutional courts may control the work of the legislature from the aspect of the social state (Article 1 of the Constitution) and social justice (Article 3 of the Constitution).

The standards for determining this borderline in constitutional court’s case-law, formulated by the Federal Constitutional Court of the Federal Republic of Germany, are today considered the ruling
guidelines for the work of European constitutional courts:

‘This principle of the social State may certainly be of importance for the interpretation of basic rights, as well as for the interpretation and constitutional evaluation of laws that restrict basic rights pursuant to a proviso of law. It is, however, not capable of limiting basic rights in the absence of specification by the legislature, i.e., directly. It places a duty on the State to provide for a just social order (cf., e.g., BVerfGE 5, 85 [198]; BVerfGE 22, 180 [204]; BVerfGE 27, 253 [283]; BVerfGE 35, 202 [235 f.]); in fulfilling this duty, the legislature is endowed with a broad margin of discretion (BVerfGE 18, 257 [273]; BVerfGE 29, 221 [235]). In other words, the principle of the social State sets a task for the State but does not say anything as to how this task is to be accomplished in detail - in any other case, the principle would come into conflict with the principle of democracy: the democratic order established by the Basic Law would, as the system of a free, political process, be decisively restricted and curtailed if political decision making were to be made subject to a constitutional obligation that could only be met in a specific, stipulated manner. Due to this openness, the principle of the social State cannot erect any direct limitations on basic rights.’ (BVerfGE 59, 231 /Freie Mitarbeit/ - ruling of the First Senate of 13 January 1982 - 1 BvR 848, 1047/77 916, 1307/78, 350/79 und 475, 902, 965, 1177, 1238, 1461/80).

(‘Dem Sozialstaatsprinzip kann Bedeutung für die Auslegung von Grundrechten sowie für die Auslegung und verfassungsrechtliche Beurteilung von - nach Maßgabe eines Gesetzesvorbehalts - grundrechtseinschränkenden Gesetzen zukommen. Es ist jedoch nicht geeignet, Grundrechte ohne nähere Konkretisierung durch den Gesetzgeber, also unmittelbar, zu beschränken. Es begründet die Pflicht des Staates, für eine gerechte Sozialordnung zu sorgen (vgl. etwa BVerfGE 5, 85 [198]; 22, 180 [204]; 27, 253 [283]; 35, 202 [235 f.]); bei der Erfüllung dieser Pflicht kommt dem Gesetzgeber ein weiter Gestaltungsspielraum zu (BVerfGE 18, 257 [273]; 29, 221 [235]). Das Sozialstaatsprinzip stellt also dem Staat eine Aufgabe, sagt aber nichts darüber, wie diese Aufgabe im einzelnen zu verwirklichen ist - wäre es anders, dann würde das Prinzip mit dem Prinzip der Demokratie in Widerspruch geraten: Die demokratische Ordnung des Grundgesetzes würde als Ordnung eines freien politischen Prozesses entscheidend eingeschränkt und verkürzt, wenn der politischen Willensbildung eine so und nicht anders einzu lösende verwassungsrechtliche Verpflichtung vorgegeben wäre. Wegen dieser Offenheit kann das Sozialstaatsprinzip den Grundrechten keine unmittelbaren Schranken ziehen.’)

(2) Comparative overview of the relevant legislation of the CoE member states

In some cases, the CCRC applies a comparative overview of the relevant legislation of the CoE Member States. Following examples are classified in chronological order.

“B. Comparative German and Austrian Law

15. ... When deciding on the appropriateness of the exclusion of voting rights, the gravity of the sanction imposed on the offeror should be considered on one hand, and on the other hand, the value of the desired aim (protection of minority shareholders). In order to assess such appropriateness, the approach used by other countries must also be considered. The European Union, in Article 17 of Directive 2004/25/EC, leaves the determination of the sanctions to the Member States, and no conclusion can be drawn from it either for or against the exclusion of voting rights. The exclusion of voting rights is a standard sanction in the countries of what is known as the German legal circle. Within the EU, this includes Germany, Austria and Slovenia. Different legal systems, such as French or English law, do not envisage this sanction. Therefore, this sanction as such is not unknown in other legal systems, especially those that are close to the Croatian system. In order to view it in the right light, the form in which it is known there must be considered, as well as the manner in which these countries protect in their constitutions the right to invest capital.

Germany:

German law regulates the exclusion of voting rights in § 59 of the Securities Acquisition and Takeover Act (Wertpapiererwerbs- und Übernahmegesetz - WpÜG). With regard to the sanction itself, German law is stricter than Croatian law because it does not just prescribe the exclusion of voting rights as does ATJSC, but the loss of all rights from shares, with the exception of the right to a dividend and to part of the assets after the liquidation of the company. It is considered that this sanction complements other sanctions (fines) and that it therefore represents a part of the system that ensures the correct conduct of the offeror. Some authors consider that this sanction is appropriate, effective and dissuasive in conformity with Directive 2004/25/EC (Article 17). It is appropriate (verhältnismäßig) because it is applied only as a sanction for the violation of duties related to the bid, and because the loss of rights does not include the loss of the right to dividends and to part of the assets after the company is liquidated. On the other hand, some authors criticise this provision precisely because, in their view, it is not appropriate and they call into question its constitutionality.

The proponents point out that § 37 WpÜG (1) provides for the possibility that the German Supervisory Authority (Bundesanstalt fur Finanzdienstleistungsaufsicht - BaFin) exempts the offeror from the duty to publish the bid, on the basis of his written proposal, if this proves to be justified in view of the manner of attainment, the objectives being pursued with the attainment of control, a drop below the control threshold subsequent to the attainment of control, the shareholder
structure of the target company, or the actual possibility of exercising control, taking into account the interests of the applicant and the interests of the holders of shares. German legal science stresses that this possibility of exemption provides the ‘necessary checks and balances’, because the control threshold can be overstepped even without any action being undertaken by the offeror and in that case the obligation of publishing the bid would constitute ‘unacceptable difficulties.’ It is also emphasised that the possibility of exemption has great practical importance and that in the first year from the coming into force of the WpÜG, as many as 43 proposals for exemption were already filed. It can be read in the writing of some German authors that the loss of rights attached to shares would be contrary to the Constitution if there was no exemption from the duty to publish a takeover bid. However, it must be taken into account that § 37 WpÜG is not the only exemption from the duty to publish a takeover bid. Thus, for example, pursuant to § 36 WpÜG, shares that were acquired by way of inheritance, gratuitous dispositions among spouses or relatives in direct line and up to the third degree, or by way of division of marital estate, the change of legal status or change in shareholder structure within a company remains unconsidered when calculating the percentage of voting rights on the basis of which the control threshold is determined. The literature stresses that, although only § 37 WpÜG is titled ‘Exemption from duty’, WpÜG also provides for other exemptions and exceptions which are viewed in their entirety. The specific quality of § 37 is that, unlike other exceptions, it is based on a discretionary decision of the Supervisory Authority (BaFin), in the framework of cases determined by law. And the possibility of such a discretionary assessment, even though it provides flexibility and adaptability to the needs of the case, is also subject to criticism in German law. These considerations must particularly be kept in mind when speaking of the principle of appropriateness and exceptions in Croatian law (…).

Austria:

In Austrian law, the suspension of voting rights is regulated by § 34 of the Takeover Act (Übernahmegesetz · ÜbG). This act was amended for the purpose of aligning it with Directive 2004/25/EC … In the present form, § 34 ÜbG resembles Article 13.3 ATJSC in the way it prescribes the suspension of voting rights if the offeror fails to publish the takeover bid. As the proponents point out, § 34(2) ÜbG prescribes that the Supervisory Commission (Übernahmekommission) may rescind the suspension of voting rights in cases where the breach of the law does not in fact threaten the financial interests of the shareholders of the offeree company in specific cases or if the threat can be eliminated by imposing conditions or guarantees. However, just as is the case in the German law, this is only one of the exceptions in the suspension of voting rights. Thus, for example, § 24 ÜbG … states that this duty does not apply if the offeror, in spite of having acquired the control threshold, does not have a decisive influence over the company.”

“a) Judicial protection against unlawful (arbitrary) criminal prosecution and investigation
39. Lawful pre-investigative and investigative actions, including police actions, are the basic preconditions of and the best preparation for the fair trial that may follow. The question is therefore whether the legislator has the constitutional obligation to prescribe a legal remedy against unlawful (arbitrary) criminal prosecution and investigation and thus ensure for anyone suspected of committing a criminal offence judicial protection against such prosecution or investigation?
39.1. The Constitutional Court notices that countries that have accepted the state attorney investigation have contradictory legal solutions in relation to judicial control of investigation in criminal procedure. Examples are German and Austrian laws on criminal proceedings. While, according to the German legislator, the rights of the defendant may not be violated by the institution of investigative proceedings or by consequences of investigative actions, or by a decision on the suspension of investigation because of which a person is not entitled to be informed that he or she is suspected of having committed a criminal offence, the Austrian legislator envisages certain legal remedies in pre-trial proceedings as well. (For more details Đurđević, Z: ‘Sudska kontrola državnoodevjetničkog kaznenog progona i istrage: poredbenopravni i ustavni aspekt’ (Judicial Control of Criminal Prosecution and Investigation: Comparative and Constitutional Aspects) Croatian Annual of Criminal Law and Practice, Zagreb, vol. 17 no. 1/2010, pp. 7-24.)”

V. Conclusion

In modern Europe, the constitution principle (constitutional democracy) has weighed supreme over the popular sovereignty principle (popular democracy), emphasising limits on the exercise of political power and constraints on majoritarian political institutions. The cornerstone of contemporary constitutionalism is to be found in an enforceable bill of constitutional rights.

The Croatian Constitution represents the fundamental law of the nation and serves as the supreme law of the land. It is a binding document, and it controls the entire legal order. It provides a judicial remedy for any violation of a constitutional right and creates the CCRC
to guard and protect the Constitution as a whole, including the constitutional identity of the Republic of Croatia.

On the other hand, the Constitution itself has enabled the “transfer of constitutional powers” to the EU, prescribing that “the Republic of Croatia shall confer upon the institutions of the European Union the powers necessary for the enjoyment of rights and fulfilment of obligations ensuing from membership.”

As to the ECHR, pursuant to what is today Article 141 of the Constitution, the Republic of Croatia recognised the jurisdiction of the ECtHR on 5 November 1997 by the special Declaration with respect to Article 46 of the ECHR. Namely, it recognised, for an indefinite period of time, “as compulsory ipso facto and without special agreement, on condition of reciprocity, the jurisdiction of the European Court of Human Rights in all matters concerning the interpretation and application of the present Convention and the Protocols thereto, based on facts occurring after the Convention and the protocols thereto entered into force in the Republic of Croatia.” Thus, a part of the sovereign judicial authorities of the Croatian State was also transferred to the ECtHR.

In such a situation, we can speak of the sovereignty of the Croatian State, but always and only within the framework of the fundamental postulates of modern constitutional democracy. The Croatian Constitution is based on the principles of openness towards European and international law, which oblige all state authorities, especially the CCRC, to give wide-ranging regard to European and international law and the decisions of European and international courts in order to avoid conflicts between the obligations of the Republic of Croatia under these laws, on the one hand, and national law, on the other hand, as far as possible.

When there is a competition of primacies between the Croatian Constitution, the EU law and the law of the ECHR, there are differences between the law of the ECHR and EU law in this respect. In sum, the following applies:

- When domestic courts implement EU law, EU law, including European fundamental rights guaranteed in the CFREU, prevails. The CJEU, not the CCRC, serves as the guardian of this law;
- The CCRC serves as the guardian of the Constitution, as well as of the ECHR at the national level.
  The ECHR has de facto quasi-constitutional status in the Croatian legal order. The jurisprudence of the ECtHR, which creates the law of the ECHR, has a function of obligatory guidance for the jurisprudence of the CCRC in the interpretation of the Constitution and the protection of individual constitutional rights within the domestic constitutional sphere.
As to the legal nature of the ECtHR and CJEU, it must be taken into account that the ECtHR constitutes the only judicial authority of the ECHR’s control mechanism (Article 19 of the ECHR) and that the CJEU (with its three courts: the CJ, GC and CST) constitutes the only judicial authority of the EU. From this aspect, these courts can be considered by the nature of things as ordinary jurisdictions of European law. However, as Voßkuhle has rightly mentioned, “in the field of fundamental rights, they [the ECtHR and CJEU] are facing similar questions as the national constitutional courts; they perform their review on the basis of comparable fundamental rights catalogues and in comparable procedures.”

Thus, as regards the functions of the national constitutional courts and the European courts in Strasbourg and Luxembourg to protect same fundamental rights at different levels, the ECtHR and CJEU may be regarded as European constitutional courts rather than ordinary jurisdictions of European law. Access to the ECtHR and CJEU as “European constitutional courts” in the field of fundamental rights facilitates the establishment of the necessary dialogue between these courts and the national constitutional courts. In these terms, Voßkuhle speaks of *europäische Verfassungsgerichtsverbund*, considering that the system of different levels of European and national constitutional courts “can be understood as a *Verbund* of constitutional courts – a system of multilevel cooperation.”

In this light, we advocate “constitutional pluralism” as the best analytical paradigm for the European system for the protection of human rights and fundamental freedoms. Considering that the national and European legal norms, which regulate the same or similar rights, overlap one another, the judicial dialogue is becoming a key issue in the debate on European constitutional pluralism. There is no doubt that the personal relationships among judges of the national constitutional courts, the ECtHR and CJEU are important. There is also no doubt that bilateral or multilateral meetings are always useful for their participants. However, in terms of the “national constitutional court ‒ the ECtHR” or the “national constitutional court ‒ the CJEU” we are *de facto* still very far from “judicial dialogue through judgments and decided cases.” Moreover, between the two European courts and national constitutional courts the relations are still hierarchically set. Thus, the “transition from pyramid to network” through judicial dialogue in today’s circumstances is more wishful

---


Finally, the decisions of the CCRC are a useful instrument for the formation of relevant public awareness on constitutional and European legal requirements, which is one of the most important tasks of the constitutional judiciary in transition democracies. The fact that the CCRC in its everyday work examines, accepts and implements the jurisprudence of the European courts as well as other national constitutional courts, together with the international law instruments, is undoubtedly transformative because the decisions of the CCRC gradually fill the legal framework of Croatia with constitutional content aligned with the European legal standards. However, in the situation when it is clear that there will be no EU accession to the ECHR in the near future, potential divergences between the law of the ECHR and EU law in the same matters will remain to exist thus making the tasks of the constitutional court judges very difficult when applying European law standards.

In spite of all the abovementioned problems, Wildhaber and Greer rightly pointed out that “any attempt to provide transnational legal protection for human rights in Europe is likely to be ineffective unless grounded in a full appreciation of the fact that, although a plurality of national and transnational legal and constitutional systems clearly exists, almost without exception they presuppose common constitutional fundamentals embodying democracy, the rule of law, and human rights”\(^{80}\) as exemplified by the national constitutions, ECHR and CFREU. These constitutional fundamentals are the European eternity clause to which the European Continent is truly devoted.

---

\(^{80}\) Greer, Wildhaber, Revisiting the Debate about ‘constitutionalising’ the European Court of Human Rights. See supra note 6, p. 684.
Selected bibliography


Spielmann, Dean, Opening Speech at the solemn hearing for the opening of the judicial year of the European Court of Human Rights, ECHR, Strasbourg, 31 January 2014.

The Role of the Supreme Administrative Court of Finland in the Protection of Basic Rights and Human Rights

Matti Pellonpää*

I. Introduction

As the title indicates, this paper deals with the role of the Supreme Administrative Court of Finland in connection with basic rights and human rights. The purpose is, however, not to analyse that court’s relevant practice in detail but rather to illustrate more generally the functioning of the Finnish fundamental rights system and its evolution, having the experience of the Supreme Administrative Court as the point of reference.

A preliminary terminological remark may be called for. By “basic rights” we normally refer to rights guaranteed in the catalogue of such rights contained in the Finnish Constitution, whereas ”human rights” mean corresponding rights protected by international human rights treaties. The material contents of both categories of rights (for which the common denomination of ”fundamental rights” is occasionally used in this paper) are today largely similar. Indeed, the catalogue of basic rights and liberties of Chapter 2 of the Finnish Constitution of 2000 (Act No. 731/1999) has been inspired by international human rights treaties, such as the European Convention on Human Rights (hereinafter also the ECHR) ratified by Finland in 1990 (Finnish Treaty Series 18-19/1990) and incorporated into our domestic law the same year.

Indeed, the ratification of that Convention and other developments contributing to the Europeanisation of the Finnish legal system, especially the membership in the European Union in 1995, brought about very important changes in the Finnish system of fundamental rights. Although the Constitution Act of 1919, repealed by the new Constitution, also contained a catalogue of basic rights, its scope was relatively limited and its role different from that of the present constitutional system of fundamental rights. According to the prevalent view it was incumbent above all on the legislator to guarantee that ordinary laws

* Justice and Chair of Division, Supreme Administrative Court of Finland
enacted were compatible both with constitutionally guaranteed basic right and international human rights instruments binding on Finland. In this respect the Constitutional Committee of Parliament played an important role, whereas courts were somewhat reluctant- or perhaps rather unaccustomed - to apply directly basic rights or human rights. There were exceptions, for example when the Supreme Administrative Court in some cases applied the principle of equal treatment contained in the Constitution Act\(^1\), but normally the courts could and did proceed from the assumption that Parliament does not enact legislation in violation of fundamental rights.

The situation started to change around 1990 when the ECHR was ratified. Although various conventions concluded especially under the auspices of the United Nations had even earlier been incorporated into the national legal system\(^2\), their role had remained limited in the judicial practice. It was especially the unique international supervision system of the European Convention with the European Court of Human Rights (hereinafter also ECtHR) competent to give legally binding judgments on applications filed by individuals that revealed the insufficiency of the old system. As no legislator can be perfect and especially not able to foresee new interpretations by the ECtHR, which approaches the Convention as

---

1) An example is provided by the Decision KHO 1979 I 4 in which at issue was the right of domicile in the self-governing province of the Åland Islands. The person in question, who otherwise fulfilled the relevant conditions, was not granted the provincial "citizenship" on the ground that his defective knowledge of Swedish was regarded a as a "weighty reason" for which the privilege in question could be denied according to the Act on the Autonomy of the Åland Islands. As the Act did not explicitly contain a corresponding requirement of language knowledge, the decision was regarded as incompatible with the constitutional provision on equality and therefore quashed. The contemporary Autonomy Act (Act. No. 1144/1991) contains an explicit requirement of "satisfactory" knowledge of Swedish as a precondition for the granting of the right of domicile, which must be seen against the background of one of the main purposes of the autonomy of the Åland Islands, namely the preservation of the province's Swedish language and culture. - As an explanation for the citation of the case the following should be mentioned: KHO is the Finnish abbreviation of the Supreme Administrative Court, 1979 refers to the year of the decision and I 4 indicates number of the case in the Yearbook of the court, in this instance that the case was published as no. 4 in volume I of the Yearbook. Nowadays (unlike in 1979) the numbering is consecutive, there being only one volume of the Yearbook which, moreover, is today published only electronically.

2) Thus the two important UN instruments of 1966, International Covenant on Economic, Social and Cultural Rights (Finnish Treaty Series 6/1976) and International Covenant on Civil and Political Rights with its (First) Optional Protocol (7-8/1976) had been ratified and brought into force as early as 1976.
The Role of the Supreme Administrative Court of Finland in the Protection of Basic Rights and Human Rights

a "living instrument"\(^3\), instead of waiting for the reaction of the legislator courts needed to be able to be proactive in order to avoid the condemnation of Finland at the international level. It was in this spirit that the reform of basic rights with the new catalogue of such rights, first included in the old Constitution Act in 1995, and then transferred to the Constitution of 2000 in the context of the overall constitutional reform, aimed not only to modernize the catalogue of rights but also to increase their role in every day workings of courts and other authorities,

In the following section (Ⅱ) an overview of the present system of basic rights and human rights and the role of the courts therein is given, followed by a description, with the help of a few examples, of the relevant practice of the Supreme Administrative Court (Ⅲ). The question of primacy of basic rights and the relevant constitutional provision are discussed separately (Ⅳ), and the paper ends with a few concluding remarks (Ⅴ).

### Ⅱ. The present system of fundamental rights in Finland and the role of courts therein: general remarks

Finland’s commitment to human rights and related values is born out by the very first section of the Constitution. It provides, inter alia, that “[t]he constitution shall guarantee the inviolability of human dignity and the freedom of rights of the individual and promote justice in society”, and declares that “Finland participates in international co-operation for the protection of peace and human rights…”

Although Parliament and its Constitutional Committee continue to play an important role in the furtherance of fundamental rights, there are other actors with responsibility in the field. Chapter 2 of the Constitution on "Basic rights and liberties", already referred to, not only contains a modern catalogue of such rights but also the following Section 22:

“The public authorities shall guarantee the observance of basic rights and liberties and human

---

3) “The Convention is a living instrument which … must be interpreted in the light of present day conditions.” Tyrer v. United Kingdom, judgment of 25 April 1978, Series A no. 26, para. 31. This classical pronouncement has been repeated in many other cases. Generally see, M. Pellonpää, "Continuity and Change in the Case-law of the European Court of Human Rights", in M. G. Kohen (ed.), Promoting Justice, Human Rights and Conflict Resolution through International Law, Liber Amicorum Lucius Caflisch, Leiden 2007, pp. 409-420.
Thus, it is incumbent on all authorities to observe and promote basic rights and human rights. In this respect there is no monopoly of courts, nor less of any particular court. While Section 22 imposes obligations on all authorities, the Chancellor of Justice and the Parliamentary Ombudsman should be separately mentioned as traditional guardians of fundamental rights.4)

As to the judiciary, there is no constitutional court in Finland. There is a bifurcated court system consisting of general courts competent in civil and criminal cases on the one hand, and administrative courts dealing with appeals against decisions by various authorities (as well as some other disputes of a public law nature), on the other. At the top there are two highest courts. According to Section 99(1) of the Constitution:

“Justice in civil, commercial and criminal matters is in the final instance administered by the Supreme Court. Justice in Administrative matters is in the final instance administered by the Supreme Administrative Court.”

These two courts are at the same hierarchical level. Although also lower courts are bound to guarantee the observance of basic rights and human rights, the two highest courts naturally have a special responsibility in their respective fields of jurisdiction. The following observations are limited to the role and practice of the Supreme Administrative Court in the context of basic rights and human rights. The cases chosen are believed to be illustrative of the different ways and the variety of situations in which basic rights and human rights play a role.

4) Section 22 contains a general obligation which only rarely can play a direct role in concrete cases before courts. However, the decision KHO 2014: 114 concerned such a rare situation. The appellant was a person from Western Sahara (a territory occupied by Morocco) whom the authorities had ordered to be expelled to Morocco, a country where the person had never been and where he did not want to go. As a resident of Western Sahara he would have been admitted to Morocco, and he also would have had a chance of getting the citizenship of that country. However, he did not wish to close any ties with Morocco. The Supreme Administrative Court held that in the circumstances of the case the Finnish authorities would act contrary to their duty under Section 22 to guarantee the observance of fundamental rights, if they were to force the person to go to Morocco. The decision of the immigration authority was quashed.
Ⅲ. Basic rights and human rights in the practice of the Supreme Administrative Court: examples

Chapter 2 of the Constitution contains not only provisions on traditional civil liberties but also a modern catalogue of economic and social rights. Especially as regards the latter category of rights, it is usually not necessary for courts to have resort to the Constitution, because normally the constitutional requirements have been taken into account in the legislation in question. Thus, for example, as a point of departure ordinary legislation on subsistence allowances guarantees the realization of the right, provided for in Section 19, sub-section 1, according to which "[t]hose who cannot obtain the means necessary for a life of dignity have the right to receive indispensable subsistence and care ."

However, situations may arise where a straightforward application of an ordinary act could lead to results which are unsatisfactory from the point of view of basic rights. In situations of that kind the constitutional provisions may give justification to depart from what otherwise would appear to be the "normal" interpretation of the law. What follows is an example concerning the law on certain services for the disabled . This law provides for an enforceable right of severely handicapped persons to have certain services from the municipality, such as financial assistance with a view to refurbishing a house to make it more suitable to the specific needs of a disabled person (building of wheelchair ramps, removing of obstacles etc.).

The case in question, KHO 2008:61, concerned a boy child who was physically well-developed but who suffered from mental deficiencies rendering him unable to control his behaviour, with the consequence that he needed constant surveillance in order not to hurt himself - or worse. The parents had applied under the act in question for a right to have their property fenced at the cost of the municipality so as to make it possible for the boy to be allowed to be outdoors with somewhat less strict need of surveillance and in this way to enjoy his life more in equality with other children. The application was rejected and the rejection upheld by the regional administrative court. The law as it had been interpreted earlier and a lower decree based on the law did not include the kind of fencing in question among the measures to which there was entitlement at the public cost. The wording of the relevant provision indeed seemed to suggest that what was covered was removal of obstacles, whereas building of a fence in a concrete sense would create a new one.
The Supreme Administrative Court, however, took distance from a literal interpretation and quashed the decision of the regional administrative court. The highest court pointed out that the law in question and its own earlier precedent which had been relied on by the municipal authorities and the regional administrative court both dated back to a period preceding the entry into force of the new constitutional provisions on basic rights. Now the law had to be interpreted in the light of Section 6 of the Constitution. It provides that no one shall be treated differently on the ground of, *inter alia*, disability and emphasizes rights of children. The case was sent back to the municipal authority for reconsideration.\(^5\)

In the decision just explained no reference was made to international instruments. In the context of social rights they would only rarely add anything to the relatively far-going requirements of the modern catalogue of basic rights contained in the Finnish Constitution.

In addition to economic and social rights, the Constitution guarantees also traditional civil liberties (or civil and political rights), such as freedom of expression and right to fair proceedings before courts. The relevant provisions resemble those of the European Convention on Human Rights, and their application can be challenged before the European Court of Human Rights after the exhaustion of domestic remedies. The role of the Supreme Administrative Court is not unaffected by such considerations. It not only has to guarantee the compatibility of its own practice with the Convention but it also has a broader responsibility for seeing to it that lower administrative courts respect the obligations deriving from the Convention and other human rights instruments. This is illustrated by the next examples.

The subject matter in these cases were domestic tax proceedings which had led to the imposition of tax surcharges of a punitive nature, upheld by the competent regional administrative court which did not hold a hearing in the cases. In the case-law of the ECtHR such tax surcharges, i.e administrative rather than criminal sanctions, are largely equated to criminal penalties, with the consequence that the fair trial guarantees of Article 6 of the Convention are, in principle, applicable. One of such guarantees is the right to an oral hearing. A hearing is not needed in every case but more frequently than has traditionally been the practice in Finnish administrative courts where proceedings are, as a main rule, written. In 2007 the Supreme Administrative Court gave two precedents (KHO 2007:67 and 2007:68) in which it applied the relevant Finnish law (Act on Administrative Judicial

\(^5\) In practice this means that the municipality had to give a new decision reflecting the position of the Supreme Administrative Court. In this kind of situation no further specific measures of enforcement of the court's decision are needed.
Proceedings) in light of the case-law of the ECtHR. In one of the cases the court sent the matter back to the regional administrative court for the holding of an oral hearing, thus seeing to it that the individual came to his rights at the national level. In the other the lack of oral hearing was accepted with reference to the particular circumstances of the case which were interpreted to be of such a nature as to allow the dispensing with a hearing. The Supreme Administrative Court "translated” the case-law of the ECtHR into the kind of legal language to which national regional administrative courts are more accustomed, and thus in a way acted as an intermediary between the Strasbourg court and national lower courts where the oral hearing, whenever required by the European Convention, normally should be held.

The values in the society change and such changes affect the interpretation of provisions on fundamental rights. In similarity to the ECHR - "a living instrument" - also the interpretation of the basic rights catalogue of the Constitution is susceptible of changes. Such changes may be triggered by changing attitudes in the own society but also by developments at the international level, as evidenced, for example, by the case-law of the ECtHR. The change in the interpretation may also be the result of an interplay between various contributing factors, as was the case in the next example.

The case KHO 2014:1 concerned the registration of the Finnish Cannabis Association (Suomen kannabisyhdistys, a non-registered association promoting the legalization of cannabis as far as private use is concerned). The court was faced with the question whether it should change its earlier stand taken in 1994. In that year it had upheld the authorities’ refusal to register the association (KHO 1994 A 8), and the Supreme Administrative Court’s decision was in turn accepted by the European Commission of Human Rights, which rejected as manifestly ill-founded an application made to it\(^6\). In 1994 the aim of the association was regarded as being against "public decency and morals”, which according to the Associations Act justified the refusal of registration. The law had not been changed meanwhile in this respect but the question was whether it should be interpreted differently in 2014. The Supreme Administrative Court held that the ground of refusal referring to "decency and morals” should as a very generally formulated legal norm be interpreted in

---

\(^6\) Case of Larmela v. Finland, 26712/95, Decision on admissibility of 28 may 1997. The Commission was one of the two predecessor organs of the present full-time single Court (the other was the "old", part-time European Court of Human Rights) which started on 1 November 1998. The applicant in the case was the chair of the non-registered association. Although an association can exist without being registered, registration improves its possibilities to carry out its activities.
light of the conditions prevailing in the present day society. The court stated that discussion concerning the policy towards toxicating substances had become more pluralistic and stressed the importance of free discussion also in controversial matters. It also cited a number of decisions of the ECtHR. They did not contain any precedent which would have directly amounted to an overruling of the Strasbourg decision of 1997 but nevertheless, along with other arguments, supported the conclusion that:

“When Section 1, sub-section 1 of the Associations Act on something being against public decency and morals is interpreted in a basic rights friendly manner in light of the practice of the European Court of Human Rights, the activities of the Finnish Cannabis Association foreseen in its articles of association do not, for reasons elaborated earlier, constitute a sufficiently weighty ground for refusing its registration.”

In this case constitutional considerations and the guidance sought in the practice of the ECtHR justified an outcome favourable to the appellant. In a way the Strasbourg case-law was used to support a conclusion which also seemed justified in light of the changes which the prevailing values of the Finnish society had undergone after 1994.

It may also happen that the Strasbourg case-law rather supports a decision which the authorities have rendered against the private party. In the next example both domestic law and the attitudes prevailing in the society gave arguments for the view that the measures taken against the appellants were justified. However, as the question remained whether a different conclusion might have to be drawn from the ECHR, the case had to be checked against the Strasbourg case-law as well.

The decision KHO 2011:56 concerned freedom of religion guaranteed in Article 9 of the ECHR and Section 11 of the Constitution. Two youth workers, civil servants of the Evangelic Lutheran Church of Finland, had repeatedly refused to participate in certain ceremonies on the ground that they were conducted by a female priest. In the church in question priesthood is open also to women, something that is regarded as normal by the

7) In similarity to the case dealt with in footnote 5 and the text preceding it, it was clear that the registration authority would proceed to the registration of the association after its negative decision had been quashed by the Supreme Administrative Court and the case sent back to the authority.
8) This church is not (anymore) a state church in a strict sense but for historical reasons there are certain important links between the church and the state. One expression of those links is the status of certain church employees as civil servants and the related jurisdiction of the Supreme Administrative Court.
overwhelming majority in the Finnish society. The two employees of the church, a married couple, were first rebuked, then given a warning and finally dismissed on the ground of their repeated refusal to comply with their official duties.

The couple appealed to the Supreme Administrative Court relying on their freedom of religion and arguing that their refusal to co-operate with a female priest was based on a deep religious conviction. The court held an oral hearing, largely in order to guarantee that the requirements of the ECHR be met. Having regard to what was at stake for the appellants, it was clear that their right to a fair trial required that they be given an opportunity of putting forward oral arguments. Also on the merits the court took into account the case-law of the ECtHR. The Supreme Administrative Court held, on reliance on the Strasbourg court, that although freedom of religion is an individual right it also has a collective dimension meaning that persons who enter the service of a church must accept the basic tenets of that church. If they disagree, they can use their freedom of religion by leaving the church. Thus there were relevant reasons for the sanctions imposed on the appellants.

When coming to the conclusions that the reasons for the dismissal were not only relevant but also sufficient the Supreme Administrative Court again relied on the case-law of the ECtHR. The Strasbourg Court has stressed equality of sexes as a fundamental value protected by the Convention, and in this light refusal to co-operate with women in a church which accepted female priesthood did not need to be tolerated. The sanctions, although severe, were also considered to fulfil the requirement of proportionality in view of the fact that the ultimate sanction of dismissal was resorted to only as the last measure after milder sanctions had not made the appellants to comply with their official duties. The decisions to dismiss the appellants were therefore upheld.

In addition to the constitutionally guaranteed basic rights and rights protected by international human rights treaties EU law nowadays add a new layer of fundamental rights. Aliens law especially in the context of asylum and other international protection is an area where, in addition to national constitutional provisions and the European Convention on Human Rights and other human rights treaties (including the UN Refugee Convention of 1951), also EU law, including the EU Charter of Fundamental Rights may have to be taken into account. The Charter is is applicable if the subject matter otherwise falls within the field of application of EU law. Case KHO 2014:152 concerning the application for international protection by a citizen of the Russian Federation can be cited as an example of a case in which both the requirements of the ECHR and those emanating from the EU Charter on Fundamental Rights play a role. An example can also be mentioned of a situation in which
both the EU Data Protection Directive and Article 10 of the ECHR (freedom of expression) have been applied to the same facts. 9)

Usually the application of basic rights and human rights by Finnish courts, including the Supreme Administrative Court, takes place as what may be called human rights or basic rights friendly interpretation, From among the possible interpretations of domestic law the one which is best compatible with fundamental rights is chosen. None of the examples 10) described above have involved a situation in which a domestic law would have been in an outright conflict with fundamental rights in a way which would necessitate the setting aside of the ordinary law (as distinct from its human rights friendly interpretation). Such situations, however, are also possible, as is suggested by the next example.

The example is based on the well-known change of the Strasbourg case-law concerning the principle of ne bis in idem (prohibition of double prosecution /punishment for the same offence) brought about by the Grand Chamber judgment rendered on 10 February 2009 in Sergey Zolotukhin v. Russia. In this case the Court decided that the question whether the two offences for which a person is prosecuted are the same should be decided not with the focus on the legal characterization of the

---

9) In 2007 the Supreme Administrative Court made to the EU Court a Reference for a preliminary ruling (KHO 2007: 9) concerning the question whether dissemination of taxation information on private persons on a very large scale was permitted in view of Directive 95/46/EC of 24 Oct. 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. Upon receiving the ruling (Case -73/07, judgment of the European Court of Justice of 16 Dec. 2008) the Supreme Administrative Court (KHO 2009:82) quashed the decisions by the regional administrative court and the Data Protection Board and sent the case back to the latter, as the Directive had not been taken into account appropriately. This led to new proceedings, including a new decision by the Supreme Administrative Court (KHO 2009:82). After this decision, in which in addition to the Directive and the legislation based on it also provisions on basic rights and human rights had been taken into account, an application was made to the ECtHR, in which especially violation of Article 10 of the ECHR was alleged. In its judgment of 21 July 2015 in the Case of Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland, a chamber of the ECtHR held (by six votes to one) that there had been no violation of the Convention. At the time of the writing the case is pending before the Grand Chamber of the Strasbourg Court, the Panel of the Grand Chamber having accepted the case for reconsideration on 14 December 2015, i.e. more than ten years after the commencement of the proceedings on the national level.

10) More examples could easily be given. For example, in the area child protection cases (involving measures such as taking a child into public care), the ECHR and the case-law of of the ECtHR are often cited.
offences but by deciding whether the double prosecution (or punishment) is based on the same conduct. For the Finnish legal system this had, among other things, the consequence that imposing of an administrative sanction of a punitive nature (such as tax surcharge)\textsuperscript{11}) and subjecting the person to criminal proceedings (tax fraud) for the same act or omission was not anymore possible unlike earlier, when such double proceedings had been regarded as compatible with the Convention on the ground that the "essential elements" of the two offences were not the same (although the two sanctions were based on the same underlying facts).\textsuperscript{12})

Also the Supreme Administrative Court had to adjust to this new interpretation. To take a recent example, in the case of KHO 2015:186 this court held that it was not any more possible to impose a tax surcharge on the ground that an unregistered motor vehicle had been used illegally after the registered owner had been imposed fine (penal sanction), which had become final, for using the vehicle in the traffic. The Supreme Administrative Court annulled the tax surcharge\textsuperscript{13}) which had been imposed by the competent authority. Thus the authority was told not to use its competence based on law. The situation perhaps should not be characterized as a real conflict between human rights obligations and national law, as the authority obviously had certain discretion as to whether to use its competence and therefore was not strictly compelled to impose the sanction, but it comes rather close to a conflict in the sense that the authority had to choose between the compliance with the Convention obligations and the use of its competence in what earlier would have been the normal way. Regardless of how the situation should be characterized it is obvious that in the pluralistic legal landscape of present day Europe courts may inevitably be faced with situations involving straightforward conflicts between ordinary laws and obligations deriving from

\textsuperscript{11}) The decisions KHO.2007:67 and 68 discussed dealt with the question whether proceedings related to administrative tax sanctions concerned "criminal charges" in the autonomous meaning of Article 6, not the question of \textit{ne bis in idem}.

\textsuperscript{12}) According to the earlier case-law of the ECtHR administrative tax proceedings and criminal proceedings in the strict sense did not concern the same offences, because administrative sanctions could be based on the mere failure to give a correct tax declaration, whereas for conviction of tax fraud a higher decree of subjective guilt is required. Therefore the "essential elements " in the sense of the old case-law were not the same, although both sanctions were based on the same conduct. See e.g. C. Grabenwarter, European Convention on Human Rights – Commentary, C.H. Beck München 2014, pp. 438-439.

\textsuperscript{13}) Only the surcharge was a "penal sanction", whereas the tax itself could be left intact despite the principle of \textit{ne bis in idem}. 
fundamental rights. What a Finnish court, especially the Supreme Administrative Court, can and should do in such a situation is a question dealt with next.

**IV. Primacy of the Constitution and its limits**

Primacy of EU law (formerly Community law) over conflicting national law is one of the pillars of the legal system of the Union. After Finland’s accession to the EU the principle was accepted without difficulties, and courts quickly became accustomed to the idea of not applying a conflicting domestic norm giving primacy to EU law. As shown by the last example in the previous section, also under the European Convention on Human Rights courts may in practice have to give certain primacy to the non-national norms. Gradually it became more and more unsatisfactory that the courts did not have a possibility of similarly giving primacy to our own constitutional provisions. As mentioned earlier, in Finland there is no constitutional court with the power to declare laws unconstitutional, and the Supreme Administrative Court (or the Supreme Court for that matter) does not have such a power either. However, triggered by reasons related to the Europeanisation of the legal order, referred to above, a cautious step in the direction of creating such a power was created in connection with the constitutional reform of 2000. Section 106 of the Constitution ("Primacy of the Constitution") reads as follows:

“If, in a matter being tried by a court of law, the application of an act would be in evident conflict with the Constitution, the court of law shall give primacy to the provision in the Constitution.”

This step was cautious in that Section 106 does not give the courts a right to declare an act of parliament unconstitutional as such. In their exercise of this judicial review the courts only have power not to apply the law in a manner which violates the Constitution, typically

14) This is shown by the fact in 1996, i.e. the year following the EU accession, the Supreme Administrative Court (KHO 1996 B 577) gave primacy to the relevant EU Directive on value added taxation which was more favourable to the tax payer company than the domestic law on the subject in force at the relevant time.

15) Traditionally courts have had power to give primacy to ordinary law over decrees and other lower rules, whereas they were not considered to have similar power to give primacy to constitutional norms over ordinary legislation enacted by Parliament.
The Role of the Supreme Administrative Court of Finland in the Protection of Basic Rights and Human Rights

16) While the basic right must be given precedence in that situation, the law remains in force in other respects. There also seems to be a limitation on the power of judicial review in that the conflict must be "evident". This limitation, however, may be more apparent than real in so far as to be evident, the conflict does not need immediately to hit in the eye. Even if a court needs time and long deliberations before coming to the conclusion that there is such a conflict, it may still consider the conflict to be "evident". Even so, the word evident reflect the legislator’s intention that the power granted by Section 106 should be resorted to only exceptionally.

Section 106 applies to all courts, not only the highest courts, although in practice the latter naturally have a special responsibility also in this respect. Although Section 106 accords primacy only to the Constitution, it de facto has created the same status for many international human rights provisions, especially when these have served as a model for the corresponding constitutional provisions. If, for example, application of a law would violate Article 8 of the European Convention on right to privacy in a way which cannot be healed by a human rights friendly interpretation, the Supreme Administrative Court most likely would come to the conclusion that such application would similarly run counter to the constitutional provisions. If the violation of the international norm is more or less clear against the background of the Strasbourg case-law, the national court no doubt would regard the situation as one of "evident" conflict with the Constitution.

16) Decision KHO 2013:192 concerned mining law and the question whether certain preparatory measures, based on the relevant legislation, taken against the will of the owner of the land with a view to establishing whether the land is suitable for mining activities could violate the constitutionally guaranteed property rights of the owner so as to be in evident conflict with the Constitution. The Supreme Administrative Court considered it possible that in principle situations of evident conflict within the meaning of Section 106 could arise in the application of the law but that there was no such conflict in the circumstances of the case in question.

17) Depending on the nature of the conflict the legislator may, however, be faced with the inevitable conclusion that the law must be changed.

18) At issue in case KHO 2011: 39 was a decision to appoint somebody to a public state office, an issue in which right to appeal to a court has traditionally been excluded in Finnish law. The decision was appealed against by a coapplicant to the office in question, the argument being that lack of access to court would be unconstitutional. The Supreme Administrative Court analysed the case-law of the ECtHR and came to the conclusion that access to public office was not a civil right within the meaning of Article 6 of the ECHR and that, the article not being applicable, there was no right of access to court guaranteed in the sphere of application of the article. As Article 6 was...
Decision KHO 2008:25 is both the first and so far the only case in which the Supreme Administrative Court has accorded primacy to the Constitution within the meaning of Section 106 of the Constitution. A civil servant’s position within the authority was changed by a decision which could not be appealed against, the law explicitly prohibiting right of appeal. The court held that the individual’s position was changed in a way which entitled her to have the legality of the decision reviewed by a court in accordance with Article 21 of the Constitution, a provision intended to guarantee fair trial and access to court as required notably by Article 6 of the ECHR (as well as Article 14 of the UN Covenant on Civil and Political Rights). Because of the categorical nature of the prohibition to appeal the problem could not be solved by fundamental rights friendly interpretation.19) In this situation the court gave precedence to the constitutional provision, refrained from applying the provision of the ordinary law excluding the right of appeal and examined the person’s grievances on the merits, thus guaranteeing her access to court in accordance with the Constitution and international human rights treaties.

Section 106 was intended to be used and has been used sparsely, basic and human rights friendly interpretation being preferred whenever possible. This is in conformity with the principle that Parliament still has the leading role in the field and that laws enacted by it should not be set aside if it is at all possible to interpret them in a way compatible with constitutional requirements. A related question is whether there are situations in which neither basic and human rights friendly interpretation nor primacy of the Constitution can be resorted to despite the fact that there is an evident conflict between the law and, for example, the European Convention on Human rights. In other words, can there be defects in law not applicable and therefore access to court not required, it was not either necessary on the basis of international obligations to interpret the corresponding Section 21 of the Constitution so as to guarantee access to court in these questions. It followed that there could be no question of evident conflict with the Constitution within the meaning of Section 106.

19) That the borderline between a case which can only be solved by giving primacy to the constitution and one in which basic/human rights friendly interpretation may lead to the same result is shown by decision KHO 2012:54 which also concerned the change of a position of a civil servant employed by the state. In the circumstances of this latter case the court held that the measures taken as regards the civil servant did not fall under the scope of applicability of the provision on the prohibition to appeal. Therefore access to court was guaranteed by fundamental rights friendly interpretation of the scope of that prohibition. It should be mentioned that KHO 2008:25 and KHO 2012:54, both of which were decided in favour of access to court, considered a civil servant already in that position, whereas KHO 2011:39 referred to in the previous footnote concerned alleged right to such a position.
which, because of the nature of the subject matter, should be left to be corrected by Parliament rather than by courts?

In fact the Supreme Administrative Court touched upon the question of possible limits on the courts’ power in a case which later ended before the Grand Chamber of the ECtHR.\(^{20}\) The applicant H was born male, married with a woman and father of a child born in 2002. H underwent a sex change operation. In her new sexual identity she could have her first names changed and her passport and driver’s license renewed. However, to have his or her (in this case male) identity number replaced by one indicating the new sexual identity required that the person was not married or that the spouse gave his or her consent. In the latter case (the situation of H and her spouse) the marriage would be transformed into a civil partnership, the Finnish law at that time not recognising same-sex marriages. The spouse, however, did not give her consent, she and the applicant both expressing their wish to continue their marriage.

H first turned to the Helsinki Administrative Court and, after her appeal had been rejected by that court, to the Supreme Administrative Court, arguing that the denial of her request amounted to a violation of Article 8 (right to private life) and Article 12 (right to marriage) of the ECHR. After an analysis of the relevant case-law of the European Court the Supreme Administrative Court came to the conclusion that in the circumstances the application of the Finnish rules was compatible with the Convention. However, before reaching this conclusion the court stated, in a somewhat obiter dicta like manner, inter alia, that:

“It was not possible under Finnish law for persons of the same sex to marry but, in such a case, it was a question of a civil partnership. As to its juridical and economic consequences, a civil partnership was essentially comparable to a marriage. The question of transforming the marriage institution into a gender-neutral one was connected to significant ethical and religious values and it was to be solved by an act enacted by Parliament.”\(^{21}\)

Thus the Supreme Administrative Court indicated that there might be certain limits to its willingness to give priority to the Constitution, certain matters inherently belonging to be regulated by the legislator. In this case these possible limits never really had to be tested, as


\(^{21}\) The English translation taken from the judgment of the Grand Chamber, para. 18.
the ECtHR, first a Chamber and then the Grand Chamber, accepted the interpretation of the Supreme Administrative Court as compatible with the Convention. It should be added that, the Finnish legislator has meanwhile intervened, for reasons not (at least not primarily) related to the case of *Hämäläinen*, and adopted a law on gender-neutral marriage which is due to enter into force in 2017.

V. Concluding remarks

The Finnish system of protection of fundamental rights has undergone profound changes due to internationalisation - more particularly Europeanisation - of the legal system. Especially the role of courts has been affected by these changes. While earlier courts could largely limit themselves to applying domestic law, whereby they could proceed from the assumption that the legislator had taken into account the requirements flowing from the Constitution and international treaties, today they need to know and be ready to apply a wide variety of sources. The interpretation of these sources, moreover, takes place in interaction with other actors at the international level, in particular the European Court of Human Rights and the Court of Justice of the European Union. This mutual influence is not a one way road but there is also an element of dialogue, and not only in the context of the EU law where dialogue has been institutionalised through the preliminary ruling procedure. Also as regards the ECHR, the supervision of which is not based on preliminary rulings asked by the national court before it decides the case but rather on control exercised by the Court in Strasbourg on the basis applications made after the final domestic decision, one may discern signs of a dialogue in relations between highest national courts and the ECtHR. Thus the fact that the European Court quoted verbatim, in the case of *Hämäläinen v. Finland*, the *obiter dicta* passage of the Supreme Administrative Court’s decision in which Parliament’s primary role in questions involving fundamental values in the society suggests that this concern expressed by the national court may have affected the Strasbourg Court’s judgment, and in any case this concern has clearly been noted.

However, the dialogue does not always function in an ideal way and national courts may sometimes face difficulties in bringing their concern to the attention of the European level.\(^\text{22}\) Therefore, although proceedings initiated by individual applications to the ECtHR

\(^{22}\) In its judgment of *X. v. Finland* of 3 July 2012 the ECtHR held that Article 5 (right to liberty
The Role of the Supreme Administrative Court of Finland in the Protection of Basic Rights and Human Rights

should remain the main form of the international supervision system of the ECHR, it would be desirable to strengthen the already existing elements of dialogue. A step in that direction, indeed, was taken when Protocol Number 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms, was opened for signature. According to the Protocol:

“Highest courts and tribunals of a High Contracting Party ...may request the Court to give advisory

and security) had been violated in a case of a mental health patient. The Court stated, with respect to the required periodic review of deprivation of liberty, inter alia, as follows: "...the Court draws attention to the fact that, according to Section 17(2) of the Mental Health Act, this renewal is initiated by domestic authorities. A patient who is detained in a mental hospital does not appear to have any possibilities of initiating any proceedings in which the issue of whether the conditions for his or her confinement to an involuntary treatment are still met could be examined." Para. 170. This passage of the X case is now cited in Guide on Article 5 prepared by the Secretariat of the Court (and available on the Court's webbsite) as authority for the (as such reasonable) proposition that "[a] system of periodic review in which the initiative lies solely with the authorities is not sufficient on its own." Para. 196 of the Guide. However, the conclusion of the Court appears to be based on a misreading of Finnish law. While it is true that Section 17(2) only deals with review initiated by the authorities, the right of the person to file an appeal at the same time when the authority initiates the review is clearly provided for in other provisions of the Act. Such an appeal gives the person additional rights as compared to the situation in which only the authority introduces the review, such as possibility to apply for an oral hearing and to have legal aid. Indeed, in the very case at issue (X) the Supreme Administrative Court at an early stage of the domestic proceedings held an oral hearing with several witnesses at the request of the applicant made in her appeal to the court. She also could and did appeal to the regional administrative court, the composition of which included an expert member specializing in psychiatry, against decisions by which her confinement was continued, and in that connection also benefited from an oral hearing. Moreover, if the first instance administrative court allows the continuation of the deprivation of liberty of the patient, the person has right to appeal further to the Supreme Administrative Court, whereas the authority has no such right, if the decision is in favour of the individual. At this stage thus the initiative lies solely with the individual. In the case KHO 2012:75 decided a couple of months after X the Supreme Administrative Court expressed the view that Finnish law had been erroneously interpreted in X and therefore could not follow the European Court's reasoning. The Finnish Government's request for a rehearing of the case of X in the Grand Chamber was not granted and thus no dialogue between the two levels ensued. If the possibility of requesting advisory opinion, to be discussed below, had existed at that time, the Supreme Administrative Court perhaps would have considered making such a request in order to get clarity as to what the European Court means by its reasoning in X v. Finland which in the eyes of the Supreme Administrative Court seems somewhat bewildering, and as to what the requirement of periodic review really means.
opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the Protocols thereto.”

The Protocol will enter into force upon 10 ratifications. As Finland belongs to the six countries which have ratified the Protocol and as the Supreme Administrative Court belongs to those entitled to ask for advisory opinions, the entry into force of the Protocol will in a foreseeable future open a new interesting chapter in the dialogue between this court and the European court level.23) Also the increasing interaction between three poles (national courts - Strasbourg -Luxembourg) in the emerging multipolar European system of fundamental rights is likely bring new challenges to courts such as the Supreme Administrative Courts of Finland. In this respect the case described in footnote 9 above may be just a beginning.

23) As of 8 January 2016 the Protocol had been signed by 16 Contracting Parties, including the six which had also ratified the instrument.
Chapter 3

Prospect for Future Court of Human Rights for Asia
The Role of Constitutional Courts in Promoting Human Rights

Sian Elias*

As a small island nation at the ends of the earth, New Zealand has always been willing to borrow law from other sources and adapt it to local circumstances. While most of our sources in early years were British or common law, in recent years New Zealand courts have increasingly engaged with international material, particularly since enactment of the New Zealand Bill of Rights Act 1990 to fulfil the obligations under the International Covenant on Civil and Political Rights (ICCPR).

The paper first considers current engagement by New Zealand courts with international materials in their role protecting rights. It summarises the development of mechanisms for protecting rights in New Zealand, including the role of courts in promoting change. It then considers challenges facing courts in protecting human rights at both a domestic and regional level. This includes discussion of issues around the role of the judge; appropriate levels of deference to elected officials; and concern about accommodating local values and customs. Some challenges discussed are faced by courts at a domestic level but take on heightened importance at the regional level, while others arise uniquely in the regional context.

I. Protection of rights in New Zealand and the influence of international materials

Despite the significant role played by New Zealand in the creation of the Universal Declaration of Human Rights following World War II, New Zealand did not immediately move to formalise statutory protection of rights but continued to rely on the existing protections for rights in the common law and a limited number of statutes dealing with discrete rights issues. The current statutory rights protection did not emerge until the

* Chief Justice of New Zealand
enactment of the New Zealand Bill of Rights Act in 1990.

The background to the enactment of the New Zealand Bill of Rights Act began in the 1960s when the Constitutional Society began to push for the protection of rights and freedoms in New Zealand through an entrenched bill of rights based on overseas models. Their petitions culminated in the Government introducing into Parliament a New Zealand Bill of Rights Bill 1963. The Bill was based on the 1948 Universal Declaration of Human Rights and the 1960 Canadian Bill of Rights. It was rejected at the Committee stage due to significant opposition both within Parliament and the legal profession.

Despite the failure of this domestic rights instrument, the New Zealand Government did continue to engage with international developments in rights, signing the ICCPR in 1968 and ratifying it in 1978. Then in 1984, the Bill of Rights was back on the political agenda when the opposition Labour Party made an entrenched Bill of Rights part of its reform agenda in the lead up to the election that year.

When Labour won the election in 1984, the discussion document A Bill of Rights for New Zealand: A White Paper outlining a proposal for bill of rights of supreme law status was presented to Parliament in 1985. Following the Committee process, a statutory rather than supreme law bill of rights was introduced to Parliament in 1989. The Bill required the Courts to interpret ambiguous legislation in a rights-consistent way and created a process whereby the Attorney-General was required to report on the rights-compliance of Bills. The Bill passed and became the New Zealand Bill of Rights Act.

In addition to the creation of this domestic rights instrument, in 1989 the Government also subjected itself to the individual communication process to the Human Rights Committee, which had been established in the First Optional Protocol to the ICCPR in 1966. This enabled the possibility of scrutiny of New Zealand’s human rights breaches beyond our domestic judicial system. As at 30 June 2013, 20 Communications against New Zealand had been heard and determined by the HRC, with three complaints having been upheld.

It was at this point that we became part of what Lord Lester, the distinguished British public lawyer, has called “overseas trade in the American Bill of Rights”. Of course, the most direct influence came from international instruments - the Declaration of Human

1) For a detailed discussion of these common law protections see Andrew Butler and Petra Butler The New Zealand Bill of Rights Act: A Commentary (2nd ed, Lexis Nexis, Wellington, 2015) from [3.2].
3) Butler and Butler, above n , at [3.6.14].
The Role of Constitutional Courts in Promoting Human Rights

Rights and its progeny, most importantly to date the ICCPR. The Long Title to the Bill of Rights states that one of its purposes is to “affirm New Zealand’s commitment to the International Covenant on Civil and Political Rights”. The Human Rights Act 1993, the successor to a number of earlier Acts, also has the purpose to “provide better protection of human rights in New Zealand in general accordance with United Nations Covenants or Conventions on Human Rights”. In addition to drawing on the ICCPR and other international rights instruments, the drafting on the New Zealand Bill of Rights and the accompanying White Paper did also draw heavily on the language of the American Bill of Rights, the Canadian Charter of Rights and Freedoms and the European Convention on Human Rights. The White Paper also referred to decisions under these documents when explaining the effect of certain draft provisions. These direct influences have led to the change in the use of arguments based on international instruments in New Zealand courts. Forty years ago, when I first practised in the courts of New Zealand, human rights were something invoked in other jurisdictions. We did not think to invoke in argument international instruments respectful of family relationships or human dignity or political speech. Indeed, when the United Nations Declaration of Human Rights was cited in a New Zealand case in 1967, judges were indignant. McCarthy J said “it needed no Charter of the United Nations” to remind us in New Zealand about the importance of freedom of speech. Such a position is no longer tenable. The fact of the matter is that our New Zealand Bill of Rights Act 1990, like many similar domestic measures in other countries, was adopted to fulfil obligations under international covenants, principally the ICCPR. For those countries which have ratified it, the Optional Protocol to that Covenant permits direct scrutiny by the Human Rights Committee. It would be inconsistent and wasteful for the domestic courts not to draw on

5) New Zealand Bill of Rights Act 1990, Long Title, recital (b).
7) For example, the provision allowing rights to be subject to reasonable limits prescribed by law and demonstrably justifiable in a free and democratic society, modelled on the Canadian Charter: White Paper, above n . at 71.
9) Cooke P in Tavita v Minister of Immigration [1994] 2 NZLR 257 (CA) at 266 suggested that since New Zealand’s accession to the Optional Protocol “the United Nations Human Rights Committee is in a sense part of this country’s judicial structure, in that individuals subject to New Zealand jurisdiction have direct rights of recourse to it”. This is something of an overstatement. Certainly for the purposes of legal aid, the Human Rights Committee is not part of the judicial structure of
the body of thinking being developed by the Human Rights Committee, just as it is idle to suggest that the domestic courts should not gain what help they can from the decisions of other jurisdictions based on the same foundation.\(^\text{10}\) These standards now “march with those of the common law”.\(^\text{11}\) As Sir Anthony Mason put it plainly “a convention provision, like other legitimate material, whatever it may be, is something to be taken into account in formulating common law principles”.\(^\text{12}\) It seems blindingly obvious - and makes all the brow furrowing about the theory upon which such material is to be received seem beside the point. My impression is that it is now standard practice for the courts of most jurisdictions to inform their decisions by reference to the authorities of international bodies and the decisions of national courts interpreting constitutions and legislation relating to human rights. In New Zealand it has been said that the New Zealand Bill of Rights Act has engaged our jurisprudence in an “international conversation about human rights” as well as investing it with greater moral content.\(^\text{13}\)

Increasing numbers of prominent New Zealand cases have drawn on international materials. This includes the Court of Appeal’s use in *Simpson v Attorney-General (Baigent’s case)* of art 2(3) of the ICCPR (requiring states to ensure effective remedies for breaches of rights and to develop the possibility of a judicial remedy) to find that Parliament must have intended there to be a remedy for breaches of the New Zealand Bill of Rights Act even though none had been expressly included in the Act itself.\(^\text{14}\) In *R v Goodwin (No 2)*, a

---

\(^\text{10}\) Professor Rosalyn Higgins QC has explained why in Rosalyn Higgins “The Relationship between International and Regional Human Rights Norms and Domestic Law” (1992) 18 CLB 1268 at 1273–1274.

\(^\text{11}\) See *R v Secretary of State for the Home Department, ex p McQuillan* [1995] 4 All ER 400 at 421 per Sedley J.


\(^\text{13}\) PA Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at [28.1]. Thus in *R v Butcher* [1992] 2 NZLR 257 (CA) at 267 Cooke P explained the adoption of a prima facie exclusion rule for evidence obtained in breach of the Act as lying not in “judicial discretion but [in] the increasing international recognition of basic human rights.”

\(^\text{14}\) *Simpson v Attorney-General [Baigent’s Case]* [1994] 3 NZLR 667 (CA).
case concerning the interpretation of “arbitrary” (in terms of the freedom from arbitrary detention), without making a final determination the Court of Appeal noted that it would have preferred an interpretation that was consistent with the jurisprudence of the Human Rights Committee.\textsuperscript{15} The Supreme Court has also looked at these materials in a number of cases, including in \textit{Taunoa v Attorney-General}, where international standards for the treatment of prisoners were looked to by the Supreme Court.\textsuperscript{16} A series of studies by one author identified that between 1999 and 2010 the courts referred to the ICCPR 164 times.\textsuperscript{17}

While in many ways this global view has enriched our law, the comparative perspective brings challenges as well as comfort. First, the challenge. We do have to be careful about legislative differences and the different contexts (constitutional and cultural) in which the statements of rights in other societies come to be considered. Without insight into these differences, translation of approaches to human rights assessments from one jurisdiction to another is risky. I am not sure that we are good enough as comparative lawyers to be sufficiently discerning in such matters. The challenge is that unlike much domestic legislation, you cannot start and largely stop with the statute itself (although reading the statute is a pretty good start not always observed). You have to know a lot of law to work with rights. As the scope of the New Zealand Bill of Rights indicates, the rights also crisscross across all areas of law. Natural justice, discrimination, and other values provided for in the Act are not confined to criminal law. But if these differences are understood, comparative law treatment of rights is extremely helpful and indeed is necessary given the acknowledgement in the New Zealand Bill of Rights Act mentioned above.

Finally, although this paper considers the role of the courts in protecting rights and the potential challenges created by future regional developments, it is important to keep in mind the effect rights instruments and institutions (at both a national and international level) can have on executive action. There is no doubt that, in New Zealand, the success of the New Zealand Bill of Rights Act is not principally to be gauged from reading court decisions. It has permeated the processes of power, from the Cabinet Manual down. There has been a

\textsuperscript{15} \textit{R v Goodwin (No 2)} [1993] 2 NZLR 390 (CA) at 393.
\textsuperscript{16} \textit{Taunoa v Attorney-General} [2006] NZSC 95, [2008] 1 NZLR 429.
revolution in what has been required of those exercising public power, including in terms of
giving reasons (prompted in part by other legislative measures concerning freedom of
information and other checks such as are provided by Ombudsmen). It would be cynical to
doubt that the observance of human rights by public agencies has greatly improved as a
result.

II. Challenges for future national and regional defences of human
rights

Our increasing engagement with international material and in particular those from
regional rights bodies such as the European Court of Human Rights raises the question of
whether the next step in the protection of rights in our part of the world is the development
of our own such bodies. This move has been much discussed within the Asia Pacific region
but it presents a number of challenges, some that are also levelled at courts at a domestic
level but take on heightened importance at the regional level, and some that arise uniquely in
the regional context.

1. The role of judges in human rights

I am from a jurisdiction in which the constitutional arrangements are largely unwritten
and orthodox thinking ascribes plenary power to the legislature. In this context, critics
commonly voice concerns about the legitimacy of judicial determination of rights. To them,
“unelected” and “unaccountable” judges usurp the functions of the legislative and executive
branches of government. These criticisms need to be taken seriously as they are easy to
make and difficult to answer simply. They have the capacity to shake confidence in the
administration of justice and thus threaten judicial independence, ultimately based on public
confidence.

There seems to be particular caution about international regulation of human rights.
Some of the more intrusive impacts of international law on domestic legal systems are now
arising in the context of Investor-State Dispute Settlement processes. The Chief Justice of
Australia has asked whether such processes are set up as “a cut above the courts?”18) It is

18) RS French “Investor-State Dispute Settlement – A Cut Above the Courts?” (Supreme and Federal
feared the Investor State Dispute Settlement processes could undermine capacity to regulate the banking and finance sector or control environmental impacts. Such caution is, if anything, even more apparent as regards international regulation of human rights. Professor Hilary Charlesworth has asked whether the international appears threatening in the context of human rights.\(^\text{19}\) She pointed to the paradox that the global forces which have led to privatisation of public functions in many states themselves provide resistance to internationally based guarantees of human rights.

Despite inconsistencies and the frustrations they cause,\(^\text{20}\) concern about diminution in state sovereignty remains a critical issue for those seeking to enhance judicial protection of human rights, particularly at the supra-national level. It has been a prominent issue for Pacific states considering the establishment of a regional human rights institution, particularly given the history of colonial rule and relatively recent acquisition of independence. As Kathryn Hay has noted: “[one] attitude within the smaller Pacific states is that maintaining a high level of state sovereignty is more important than regional co-operation or integration given the recent consolidation of nationhood”.\(^\text{21}\) Ethnic and cultural diversity within Pacific countries has, she suggested, enhanced the need to focus internally on unity and cementing a national identity before looking outwards. This phenomenon has been described as “state-centric resistance” to interference in domestic affairs, and nations who ascribe to this view would prefer the development of further consultative and advisory bodies rather than more prescriptive models of rights protection.\(^\text{22}\)

---


20) Sir Kenneth Keith, for example, commented in the discussion cited above that: “[a] few years ago I was close to suggesting that we should abandon the word [sovereignty]”: referring to KJ Keith “Sovereignty at the Beginning of the 21st Century: Fundamental or Outmoded?” (2004) 63 CLJ 581.


22) Andrea Dunbach, Catherine Renshaw and Andrew Byrnes “A tongue but no teeth?: The Emergence of a regional human rights mechanism in the Asia Pacific Region” (2009) 31 Sydney L Rev 211 at 224.
Further challenges arise given the nature of human rights disputes, which can raise questions of competing values and the appropriate level of deference to elected representatives. To some extent, these challenges can be dealt with by commitment to the rule of law. Judges are highly accountable, through reasons given in public and through the appellate system. Accountability through readyer dismissal for unpopular decisions risks, as Sir Stephen Sedley points out, “the central attribute of judicial office: independence”. 23) No one with any experience of judicial elections and who believes that independence is central to judicial function would seriously suggest that model.

But there are more thoughtful concerns reflecting the unique nature of human rights litigation. Professor Carol Harlow has raised the dangers of “campaigning litigation”, which human rights litigation opens up and which may result in “colonisation of the legal by the political process”. 24) She continues:

If we allow the campaigning style of politics to invade the legal process, we may end up by undermining the very qualities of certainty, finality and especially independence for which the legal process is esteemed, thereby undercutting its legitimacy.

Harlow’s concern is that the extension of standing to allow campaigning groups to argue for particular outcomes may “push courts into areas of policymaking to which their processes are inherently ill-adapted”. 25) Statements of human rights recognise that politics cannot do everything. It is important to recognise that neither can law. The distinctiveness of law and politics needs to be acknowledged.

Lord Hoffman too has cautioned that it is important for courts to show restraint in interpreting the limits that human rights impose upon democratic institutions. Particular care is needed in decisions, whether in application of human rights law or outside it, where the outcome is likely to impact upon public expenditure. Judges must recognise that they are “not appointed to set the world to rights”. 26)

However slow, obtuse and maddening the democratic process may be, there is a legitimacy about the decisions of elected institutions to which judges, however enlightened, can never lay claim.

25) At 10.
26) Lord Hoffman “Separation of Powers” (COMBAR Annual Lecture, 23 October 2001) at [30].
I do not doubt the need for some circumspection, both in procedure and substantive review in human rights cases, particularly where public moneys are involved and I certainly would agree that judges cannot expect to set the world to rights. But the role of the courts is to uphold legality. The doctrine of separation of powers was devised as an “auxiliary precaution”,27) not to promote the efficiency of government or even to uphold majoritarian democratic process, but to prevent the exercise of arbitrary power.28)

A judge cannot avoid deciding a case just because it is controversial. Nor can the judge decline to exercise a jurisdiction conferred by Parliament or the constitution and properly invoked by a litigant. Abstention is itself a judicial determination with political repercussions. The courts are themselves subject to the rule of law. They cannot usurp powers lawfully exercised by other agencies, including Parliament. They operate at the boundaries, making sure that power is exercised only according to law. But that responsibility they cannot constitutionally shrug.

The principal answer to suggestions of judicial overreaching lies in scrupulous adherence to judicial method. An important part of that method is attention to the limits of judicial scrutiny. While I have in my time done my share of railing against *Wednesbury*29) as a standard for review,30) it represents an enduring and important perspective. Whether the limits of review are set at Wednesbury unreasonableness (a point which shades into bad faith, as Lord Greene in that case noted),31) or proportionality, or some stricter standard, boundaries are required wherever there is a legitimate area of discretion lawfully conferred upon someone other than the court. A great virtue of human rights litigation is that it demonstrates why there can be no single touchstone. Judicial method has only been enhanced by human rights litigation. It is a benefit obtained by our legal systems which will not be confined to human rights cases.

Further solutions to this difficulty, in the context of international methods of solving human rights disputes, concern the level of deference given to national decision-makers. Where a national court or institution has come to a reasoned decision based on sound principles, it may be appropriate for an international tribunal to exercise a level of deference. Whereas a margin of wide appreciation may be inappropriate for a domestic tribunal, which

---

29) *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (CA).
31) *Wednesbury*, above n, at 229.
is able to weigh competing demands in a local context, it may be appropriate for an international tribunal further removed from the particular context in which initial decisions are made. These sorts of considerations require greater reflection and would no doubt be addressed in the course of creating such a court. I point them out only to indicate that such problems are not insurmountable.

2. Culture and custom

Further challenges arise at an international level given diversity among states. Care must be taken to avoid perception that particular states - perhaps those that are larger, wealthier or more developed – are imposing their agenda upon others. Human rights might be seen as reflecting Western values with less relevance to the lives of ordinary people in developing states, particularly given the emphasis in human rights law on individual rights rather than collective rights and duties. Within the Pacific region, countries like New Zealand and Australia should be careful to bring other countries together and form a shared view on how to proceed, to avoid any perception that human rights are being imposed from the outside. Moves such as the inclusion of collective rights in the United Nations Declaration on the Rights of Indigenous Peoples are all part of an effort to ensure that rights discourse meets the diverse needs of all the world’s citizens and is not western or euro-centric.

The Law Association for Asia and the South Pacific (LAWASIA) began exploring the creation of a regional human rights mechanism in the 1980s. Among the several reasons offered to explain why these efforts stalled was concern that the process was driven by outsiders. This experience “is a salutary warning to all of us, that if this initiative is seen to be driven by outsiders, no matter how well intentioned or sensitive to Pacific Islanders and their concerns, the initiative will fail.”

32) See Brown v Stott [2003] 1 AC 681 (PC) at 703, where Lord Bingham said “a national court does not accord the margin of appreciation recognised by the European court as a supra-national court”. In that case, Lord Steyn also said the European Court of Human Rights “accords to domestic courts a margin of appreciation, which recognises that national institutions are in principle better placed than an international court to evaluate local needs and conditions. That principle is logically not applicable to domestic courts”. National courts, on the other hand, “may accord to decisions of national legislatures some deference where the context justifies it” (emphasis original) at 710–711.

33) See Hay, above n , at 204–205.

Of particular concern is a perception that rights may be incompatible with cultural practices and traditions that nations have fought hard to preserve throughout the colonial era. These concerns feed into long running debates between universalists who contend that human rights must be the same everywhere and cultural relativists who argue that notions of right and wrong and moral rules “necessarily differ throughout the world because the cultures in which they inhere themselves differ”.

Those relying on international rights templates will need to be mindful of local concerns. As Joy Liddicoat notes in relation to the Pacific:

Experience from dialogue on national human rights mechanisms suggests that attempts to impose “template mechanisms” from elsewhere will either be resisted or will fail. While there is interest in mechanisms from other regions in the world, consultations consistently show that there is a desire for the Pacific to be able to give its own unique expression to such mechanisms.

Careful dialogue is therefore necessary “to encourage a unique Pacific expression of a system for protection of human rights that does not derogate from international minimum human rights standards”. Such concerns will affect that workings of any regional mechanism and are particularly complicated when diverse cultural values are present within the region.

3. Framing rights

One matter of debate is the extent, if at all, that human rights should be defined in a way to reflect the specific values of a particular time and place. As noted above, successful creation of a regional human rights mechanism will require buy-in from those who will be subject to it. It has been suggested that a set of specific “Pacific” human rights, agreed to collectively by Pacific states, may foster ownership by people across the region.


37) At 289.
That is the approach taken in the African Human Rights Charter, adopted in 1981. It reflects customs and traditions of African society by imposing duties upon individuals, including duties to family and society. Its framers took the view that “individual rights cannot make sense in a social and political vacuum, unless they are coupled with duties on individuals”. Care must be taken to avoid framing rights in a way that is or could be static and unchanging; for example, some have queried whether a duty to family could be used to legitimise practices that can be harmful to women.

Once again this issue highlights the universalist/cultural relativist debate discussed above. Valmaine Toki and Natalie Baird note that in the Pacific context recognising duties alongside rights would play an important role in giving any regional rights instrument a distinctive Pacific character, as “[r]ecognising duties alongside rights more clearly recognises cultural values of reciprocity and community and situates individuals within his or her community”. Though they too highlight the risk that inclusion of duties could in some circumstances be used to undermine human rights, they suggest that the risk could be mitigated by explicitly noting in the rights document that duties are to be non-justiciable. This was the position adopted in the Vanuatu Constitution and it allows duties to be used in the context of human rights education.

It has been contended that a regional charter offers an opportunity to reinforce universal rights recognised by international instruments while also expanding the rights and duties particular to a region, provided care is taken to ensure recognition of wider values does not conflict with or “whittle down” universal rights. The author gives as an example the right to fish, which takes on enhanced importance in the Pacific region because it forms an essential component of food security. Given the disproportionate effect of climate change on low-lying Pacific islands, the right to a safe or quality environment or land on which to live are rights of particular relevance to Pacific states.

38) Hay, above n , at 201
41) Toki and Baird, above n , at 233.
42) At 234.
44) At 184.
4. Is a regional institution necessary?

In addition to the challenges outlined above, some of the challenges for courts applying human rights law apply particularly to supranational mechanisms. For example, some commentators question the need for a regional institution and suggest that a regional human rights court would duplicate protections already available at a national or international level. Others, while recognising the need for better protection of human rights, argue that the focus should be the building up of national institutions. Limited resources available to many developing states, both financial and personnel, foster concern about unnecessary duplication. Work towards a regional mechanism may therefore need to first ensure that participant nations feel their existing institutions have adequate resources to function. Strong national machineries will in turn foster stronger regional machineries.45)

Given such pressures, it is important we do not understate or ignore the benefits regional institutions offer by sitting as an intermediate between national institutions and international mechanisms like the United Nations Human Rights Committee. A regional institution may be more insulated than national bodies from domestic politics and pressures. Particularly in developing states where judicial independence and commitment to the rule of law may not be firmly entrenched, this separation could allow the court to provide redress in circumstances where a domestic system is unable to provide a just outcome. A regional court will tend to be more insulated from cronyism, nepotism and other ills that may plague domestic systems.46)

While international institutions offer similar advantages, the intermediate position a regional court occupies provides benefits not matched by international mechanisms.47) A regional court would necessarily require more substantial commitment and buy-in from its member states, fostering a greater sense of ownership and legitimacy. The higher level of visibility and accessibility could help to rebut perceptions of outsider dominance. A regional court is likely to be more aware of local history, customs and traditions. Such a court also offers a forum for regional dialogue and interaction.

45) Liddicoat, above n , at 288.
46) See Jalal, above n , at 189.
47) See the discussion in Jalal, above n , at 185.
III. Conclusion

I hope that by charting the development of human rights protections in New Zealand this paper has shown the significant cultural changes around reliance on international human rights material that can occur over a short period of time. We have come a long way from the indignation that typically met reference to such material. I hope too that this discussion on the role of courts in promoting human rights has demonstrated that the challenges associated with future of national and regional defences of human rights, while significant, are not insurmountable. A regional court would be uniquely placed: more accessible and visible than an international court, and perhaps better placed to consider local values and histories, but also able to take a wider view and offer a level of independence not always possible at the local level. I encourage you to persevere in your efforts to create such a court.
Following World War II, there has been a trend of strengthening inter-state networks on constitutional justice and human rights. This caused countries around the world to introduce and develop systems as a way of regretting the atrocities of human rights violations. Constitutional adjudication is the most specific and direct way in which human rights violation has been protected at the national level. There has been recognition that violation of human rights within a country is not just that specific country’s problem but it can also pose a serious threat to that region and international peace. Hence, this recognition has caused recent developments and trends to strengthen international networking for human rights protection.

As a result of these developments, the United Nations being in the midst of it, international human rights conventions aiming at global human rights protection has been established. Likewise, joint efforts have been made to establish systems in order to protect human rights at the regional level. The classic example of the latter is the European Court of Human Rights in the European system.

Due to historical remorse, several layers of protection mechanisms have been put into place to protect individuals’ human rights in the national, regional and global level. However, this also proves that protecting an individual’s rights is not an easy task.

I would like to present an example that illustrates the efforts of the Constitutional Court of Korea to guarantee universal rights. This issue is yet to be fully settled. The issue concerns the violation of rights of Korean comfort women who were forced into slavery under the Japanese military rule during the Second World War.

I intend to elaborate on the necessity and importance of international networking for protecting human rights. I especially wish to discuss the possibility of establishing

* President, Constitutional Court of Korea
a regional human rights mechanism in Asia to provide legal remedies to those whose rights have been infringed by serious violations against humanity.

I. Summary of case law

The Korean Constitutional Court declared on August 30, 2011 that it was unconstitutional that the Korean government omitted to act under measures set forth by its agreement with the Japanese government to settle the dispute over whether the damage claims of the comfort women enslaved by the Japanese military during World War II had been extinguished.1) In this case, the Court reviewed whether the Korean government fulfilled its duty to protect the victims of sexual slavery committed by the Japanese military.

In fact, this case underlies the issue of Japan's comprehensive national responsibility towards the women who were, against their will, sexually enslaved by the Japanese government and military. The decision of this case also involves a matter of great significance regarding humanity as a whole: offering remedies to the women whose rights had been infringed upon by systematic sexual violence perpetrated by a nation during wartime.

II. Relation of facts

1. Sexual slavery forced by Japanese military2)

1) Under the name of giving soldiers "mental solace" by forcing women from colonized countries into sexual slavery, the Japanese military installed comfort stations in occupied areas during World War II. The number of comfort women is estimated at 80,000-200,000. About 80 percent of them were from Chosun, which is an old

1) 23-2(A) KCCR 366, 2006Hun-Ma788, August 30, 2011.
International Cooperation for the Promotion of Fundamental Rights and Peace in Asia

name for Korea, and the other victims were from the Philippines, China, Taiwan, and even the Netherlands. 3)

2) The comfort women were dragged to war-fronts in many ways, such as by fraud, blackmailing, and kidnapping. They also had to meet all kinds of sexual needs from Japanese soldiers, with no control and power over their will and the situation. They were ill, beaten, and had to live in sub-human conditions. Most comfort women victims died during war. Some of those who were able to return home also died at a young age from side effects. The rest who survived have lived in deep despair, isolated from their families and society.

Meanwhile, former U.S. State Secretary Hillary Clinton has reportedly said that the term "comfort women" should be corrected as "enforced sex slaves."

2. History and progress of the Agreement between Republic of Korea and Japan

1) After World War II when Korea became independent from the Japanese colonial rule, and as a result of the talks to settle issues regarding debts and properties between Japan and Korea, the governments of Korea and Japan signed an agreement in 1965 on the settlement of claims, or the "Agreement on the Settlement of Problem concerning Property and Claims and the Economic Cooperation between the Republic of Korea and Japan (hereinafter the "Agreement"). The Agreement stated that Japan shall ultimately provide a designated amount of grants and loans to Korea and that the Contracting Parties shall confirm that the "problem concerning property, rights, interests and claims of the two Contracting Parties and their nationals will be settled completely and finally.” 4)

2) Article 2 Paragraph 3 of the Agreement provides that no contention shall be made on any claims of either Contracting Party and its nationals against the other


4) Agreement on the Settlement of Problems Concerning Property and Claims and on Economic Cooperation Between Japan and the Republic of Korea (1965, Treaty No.172)
Contracting Party and its nationals. And Article 3 of the Agreement states that any
dispute between the Contracting Parties concerning the interpretation and
implementation of the Agreement shall be first settled through diplomatic channels
and, if unsettled, be referred for decision to an arbitration board.

3) Yet, the comfort women issue was never on the agenda throughout the
Korea-Japan talks held for the purpose of signing the Agreement. Moreover, even
when the Agreement was signed, the comfort women were not included in the list of
beneficiaries who would receive individual compensation from the Korean
government.

3. Beginning and evolution of comfort women issue

1) It was not until the 1990s when the comfort women victims themselves held
a press conference that the comfort women issue was raised officially and its nature
revealed to the world.5)

2) At first, the Japanese government totally denied its responsibility, but in January
1992 some official documents indicating direct involvement of the Japanese military
in the drafting of comfort women were discovered.

On August 4, 1993, the Japanese government finally admitted to its wrongdoing,
as Chief Cabinet Secretary Yohei Kono issued a statement acknowledging and
apologizing for the involvement of the Japanese military and authorities in forced
drafting of the comfort women and in committing a grave violation of the victims’
rights.6)

3) Nearly 20 years have passed since the statement took place, but the Japanese
government has taken no action to pay damages to the victims forced to sexual
slavery by its military, who are now quite advanced in age. Instead, some within the
Japanese government are even claiming that the fact about forced drafting should be
denied and the Kono Statement should be revised, despite numerous convincing pieces

5) On November 16, 1990, the “Korean Council for Women drafted for Military Sexual Slavery by
Japan” was established and started working on confirming the facts; On August 14, 1991 there was
the first press conference and public testimony from a victim, Haksoon Kim, which led to the filing
of claims against Japan.

6) Yohei Kono, Chief Cabinet Secretary, Statement on the Result of the Study on the Issue of "Comfort
of evidence that indicate otherwise. In 2014, the Abe Shinzo administration was condemned by the international community when it unveiled a report on the process of the panel review that led to the drafting of the Kono Statement.

The Japanese government is maintaining its position that the compensation for the comfort women victims has all been settled by the Agreement, and that no legal compensation can be made other than through the privately-administered "Asian Women's Fund."

4) The comfort women victims in Korea, Taiwan, and other countries objected to the private fund, saying that it was the Japanese government's way of evading responsibility, and that it treated comfort women as those in need of humanitarian aid instead of who rightfully deserved compensation.

5) The Korean government enacted a law on June 11, 1993 to provide the comfort women with support for living expenses and, on May 7, 1998, paid each of them 43 million Korean won (approx. 31,000 euros), the amount that had initially been suggested by the Asian Women's Fund.

6) The Korean comfort women filed several claims for compensation against Japan starting from 1991, but the Supreme Court of Japan rejected them all, citing the Agreement among other reasons. Even the cases filed by the comfort women from other countries, such as China and Taiwan, were also dismissed by the Japanese courts.

4. International response

1) The international community has contended that the comfort women issue constitutes a serious violation of women's rights perpetrated by a state, and that Japan has to take action: make apologies, disclose all relevant records and materials, and compensate for the damage inflicted on the victims.

2) The "Coomaraswamy Report" submitted at the 52nd session of the UN Commission on Human Rights on April 19, 1996, the Gay McDougall Report adopted by the UN Sub-Commission on Human Rights on August 12, 1998, and the

Commission's recommendation on the International Covenant on Civil and Political Rights adopted on October 30, 2008, etc. confirmed that the sexual slavery system forcefully implemented by the Japanese military during World War II constituted a clear violation of international law. Those Reports and the Commission's recommendation called on the Japanese government to, among others, provide prompt compensation for damages to the aged, surviving victims at the governmental level, punish those who are responsible, disclose all government materials, make an official apology, and revise its history textbooks.8)

3) The U.S. House of Representatives (July 30, 2007), the House of Representatives of the Netherlands (November 8, 2007), the House of Commons of the Parliament of Canada (November 28, 2007), and the European Parliament (December 13, 2007) also adopted similar resolutions, calling on the Japanese government to make a formal apology for its brutality in forcing over 200,000 comfort women into sexual slavery, accept historical and legal responsibilities, compensate the victims, and educate the current and future generations about the sexual enslavement.

III. Court judgment on the constitutionality of the government's omission to act

Now, I will look into the Korean Constitutional Court's decision that ruled unconstitutional the Korean government's omission to act, namely not taking any diplomatic actions to address the issue of comfort women.

1. Dispute over interpretation of the Agreement and its settlement procedure

1) First, the Constitutional Court reviewed whether there exists a dispute between the Korean and Japanese governments over the interpretation of the Agreement and whether there is a procedure to settle it.

2) The government of Korea announced its position that the Japanese government should be held legally accountable. The reason for stating that position is because the Agreement was signed with the purpose of resolving the financial, civil debtor/creditor relationship between Korea and Japan and did not address the "unlawful acts against humanity" where the state power was directly involved, such as the comfort women case.9)

However, the Japanese government claims that the comfort women issue has already been legally settled under the Agreement.

3) Therefore, these different views in interpretation of whether the comfort women's damage claims should also be considered as part of the claims expired by the Agreement constitute a "dispute" defined in Article 3 of the Agreement.

Once a dispute occurs, the problem at issue is whether the omission to act by the "Korean government" to pursue settlement through diplomatic channels or arbitration according to the procedure provided in Article 3 of the Agreement infringed on the fundamental rights of comfort women forced into sexual slavery and whether this is unconstitutional.

2. Whether the Korean government's omission to act violates comfort women's fundamental rights (court opinion by 6 Justices)

As to whether the Korean government's omission to act violates the comfort women victims' fundamental rights, the Constitutional Court held that it does for the following reasons:

1) The State has the duty to protect the fundamental rights of citizens. "Human dignity," as prescribed by Article 10 of the Constitution, is a supreme constitutional value and a normative goal set forth by the state. Therefore, the state has the duty to protect citizens from a third party which threatens their dignity.

In fact, the duty to restore human dignity and worth of the comfort women victims who long experienced tragic lives while being forced into sexual slavery should be

one of the most fundamental duties of the state to protect the safety and lives of its citizens.

2) In this sense, the state's obligation to follow dispute settlement procedures pursuant to Article 3 of the Agreement stems from the constitutional request to protect the citizens who had their dignity and worth seriously violated, and is obviously stipulated in the Agreement.

3) Furthermore, the fundamental rights violated by an omission to act by the state carry great significance.

The damage done to the comfort women comes from the forced drafting and sexual slavery enforced by the Japanese government and military, and this is an exceptional, incomparable harm inflicted on the victims’ fundamental dignity and worth.

The international community has characterized Japan's comfort women system as "sexual slavery by the military,"10) "crime against humanity,"11) and "forced military prostitution by the government of Japan, considered unprecedented in its cruelty and magnitude and one of the largest cases of human trafficking in the 20th century."12)

By settling the claims of comfort women against the Japanese government, the victims’ dignity and worth and their individual liberty that had been ruthlessly and


I. Definition

8. The Special Rapporteur, however, holds the opinion that the practice of "comfort women" should be considered a clear case of sexual slavery and a slavery-like practice in accordance with the approach adopted by relevant international human rights bodies and mechanisms.


D. Status of Korea

30. Japan is not exempt from liability even under these circumstances. As set forth above, prohibitions concerning slavery are not based solely on war crimes. Both as a customary international crime applicable in wartime and peacetime and as a crime against humanity, these acts were clearly prohibited as egregious violations of customary international law regardless of the territorial status of the Korean peninsula at the time that the offences were committed. As a result, these norms apply equally to Korean women, whether or not they were civilians in an occupied territory.

continuously violated will be able to be restored.

4) Almost 70 years have passed since the end of World War II when the victims were forced into sexual slavery, and it has been more than 20 years since the victims brought lawsuits against Japan.

The surviving comfort women victims have all become advanced in age, and this means that we are in an urgent situation where if we delay any longer, it would be nearly impossible to bring justice to history and restore the victims' dignity and worth through the settlement of their damage claims.

5) Therefore, the Korean government’s omission to act in taking dispute settlement procedures under the Agreement violates the Constitution and infringes on the fundamental rights of the complainants.

3. Dissenting opinion by 3 Justices

On the other hand, three Justices dissented to the court opinion, stating that if the Constitutional Court imposes a duty to "undertake diplomatic settlement" on the executive branch, this may violate the principle of separation of powers, under which the executive is given the power to make policy decisions, formulate, and execute policies on diplomatic actions.

4. Aftermath

1) On April 17, 2013, the UN Security Council held a meeting to discuss the agenda of preventing sexual violence during wartime and urged member countries to take action, while Korea called for the abolition of the statute of limitations, compensation and support for victims, and the implementation of resolution 1325 on women, peace, and security (2000) at the national level.13)

On August 6, 2014, UN High Commissioner for Human Rights Navi Pillay issued a statement expressing regret that Japan had failed to pursue a comprehensive, impartial, and lasting resolution of the wartime sexual slavery issue while calling for its resolution.14)

13) UN security council 6948th meeting, 17 April 2013, S/pv.6948
2) This outright criticism by the international community of Japan's passive attitude explains the need to send a clear message to Japan and citizens across the world that, given the nature and extent of perpetration as well as the continuing nature of the ongoing damage, forcing women, the symbol of maternity, to be military sex slaves is the most heinous crime that cannot be tolerated by humanity.

3) After the decision of this case was made, the Foreign Ministry of Korea sent diplomatic documents to Japan on two occasions, proposing "bilateral talks for dispute resolution," and bilateral talks were held at the director-general level. At a joint press conference held on the occasion of the Korea-Japan Foreign Ministers’ Meeting on December 28, 2015, the Japanese government announced that Japan admits to its “liabilities” regarding the comfort women issue and that it reached an agreement with the Korean government that the two countries would resolve the issue finally and irreversibly on condition that Japan provides 1 billion yen to the foundation established by the Korean government to support comfort women victims.15)

IV. Remedies against human rights violations provided by national constitutional courts

1. Significance of the ruling

1) A constitutional state must provide judicial remedies to individuals when their rights have been violated. Otherwise, human rights enumerated in the constitution would be nothing more than merely words on paper with no normative power.

The Constitutional Court of Korea upheld that the state has to provide legal remedies to protect the people from the violation of their fundamental rights, but that it has no discretion to arbitrarily neglect the claims to property made by those whose rights had been violated.

15) Some say that this settlement is a more evolved form of agreement between Korea and Japan, whereas others condemn it as an agreement that disregards the position of victims, doubting whether the Japanese government admitted to its “legal responsibilities” by making a sincere apology and whether the 1 billion yen can be construed as compensation for damages.
This decision confirms the international standard that universal human rights should be guaranteed so that legal remedies are offered to women whose rights are seriously violated by state powers.

This case will provide a meaningful precedent also in term of the compliance and enforcement of international human rights law aimed at guaranteeing the fundamental rights of individuals.

2) As we can see from the examples such as the Bosnian War, the Islamic State, and Nigeria's militant Islamist group Boko Haram, infringing on women's rights to sexual self-determination during wartime has become an issue that is ongoing in many disputed areas of the world. Leaving this situation unattended cannot be tolerated by the standards of the global community and civilized countries of this 21st century that have endeavored to promote human rights over the centuries.

This ruling tells us that the world will not stop demanding until an apology and self-reflection is made when there are serious violations of human rights. It also sends us a strong message that the human rights violations named sexual slavery perpetrated by the state can never take place again under any circumstances.

The international community needs to prevent the recurrence of tragedies of crimes against humanity by seeking a fundamental solution to eradicate and prevent inhuman violations of human rights. This is indeed a common challenge for the entire humanity.

2. Cases in comparison

1) Unlike Japan, Germany acknowledged its responsibility for the human rights violations committed during World War II by the Nazi regime. The country has made an apology and is paying monetary reparations to the victims. In 1999, the Federal Constitutional Court of Germany held in a case (BVerfG, Beschluss v. 13. 5. 1996, 2BvL33/93) concerning the reparations for forced laborers that the state’s declaration of abandonment under international law cannot prevent an individual from exercising his or her right to request reparations.

Furthermore, Germany is still punishing the Nazi criminals by extending or abolishing the statute of limitations for crimes against humanity such as war crimes and genocide. This attitude of Germany toward its past wrongdoings is symbolically
shown by the fact that, on December 7, 1970, West German Chancellor Willy Brandt travelled to Warsaw, Poland and knelt down before the commemoration monument in Warsaw Ghetto with tears in his eyes. Also, on August 20, 2013, German Chancellor Angela Merkel visited the Dachau Concentration Camp, the first concentration camp for political prisoners located near Munich, and expressed her feelings of remorse for what had happened. These activities opened up the hearts of not just the victims but the neighbouring countries and the whole world as well. With this, Germany was able to become a respected member of the international community, which in turn became the basis for regional peace and cooperation, ultimately leading to the foundation of the European Union.

2) In 2001, the International Commission on Intervention and State Sovereignty developed the concept of the state's "responsibility to protect" in its report titled "The Responsibility to Protect." Its central theme was that "sovereign states have a responsibility to protect their own citizens from avoidable catastrophe such as mass murder, rape, and starvation."\(^{16}\)

Regarding the state’s right to offer diplomatic protection, the Constitutional Court of the Republic of South Africa held that "the government has an obligation to provide diplomatic protection to its citizens to prevent or repair egregious breaches of international human rights norms. Where the government were, contrary to its constitutional duty, to refuse, it would be appropriate for the Constitutional Court to make a mandatory order directing the government to give due consideration to the request."\(^{17}\)

In addition, the Supreme Court of Canada, in a case dealing with the Canadian government's failure to take action on behalf of a 15 year-old Canadian citizen whose constitutional rights were not being protected in Guantanamo Bay, upheld the lower court's ruling that such inaction by the government was contrary to the Canadian Charter of Rights and Freedoms.\(^{18}\)

\(^{16}\) Carseten Stahn, Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?, American Journal of International Law, Vol. 101, No. 1 (Jan 2007).


V. Constitutional justice and international networks

1. Importance of networking between constitutional courts

A judgment by a national constitutional court has some limitations given its limited jurisdiction. This is where the international networks and partnership need to come into play. In particular, national borders should not serve as an obstacle when addressing issues which require respect for universal human rights, such as serious violations against humanity. This is an issue universal to human beings, and anyone at any moment can become a victim.

We may think of two options for dealing with this challenge.

First is the networking among courts of constitutional jurisdiction around the world, as the guardians of the rights of individuals. Constitutional courts serve as the last resort for the protection of human rights at the national level, and the networking among them will not only offer valuable opportunities to share experiences and wisdom on human rights protection but will also reduce the risk of countries losing objectivity and universality by being preoccupied with their own circumstances and cultures.

There are already a number of platforms of cooperation among constitutional courts, such as the Conference of European Constitutional Courts, the Association of Constitutional Courts using the French Language, the Union of Arab Constitutional Courts and Councils, and in Asia, the AACC, which was established in May 2012 with the Korean Constitutional Court playing a leading role. The AACC started off with seven member states, but now it has as many as 16 member states. There is also the World Conference on Constitutional Justice, which brings together all these regional and linguistic groups of constitutional courts.

Based on these cooperative frameworks of constitutional courts and with the compilation of case-laws of countries around the world, we will be able to discuss issues of protecting universal human rights, including the punishment of crimes against humanity, and continue to build consensus on the importance of international human rights standards.

Nevertheless, the regional or linguistic groups of constitutional courts have limitations in that they, in themselves, lack legal binding force.
2. Regional human rights mechanisms

This shortcoming can be mitigated by regional human rights mechanisms. The regional human rights mechanisms established by multilateral international treaties have an advantage in that the states have consensus on the specifics of human rights guarantees, and in that they are operated according to enforceable agreements even on issues such as the investigation, judgment, and execution regarding the acts of violation. In addition, mutual supervision and pressure among the states can ensure the implementation of decisions taken by regional human rights bodies, which is likely to promote social cohesion and effective protection of human rights.

At present, we have regional systems in place in Europe, America, and Africa, namely the European Court of Human Rights (1959), the Inter-American Court of Human Rights (1979), and the African Court on Human and Peoples’ Rights (2006), respectively. They have binding international instruments as their basis, and the states will be held legally responsible for any violation of their international commitments.

The regional human rights mechanism of Europe is well known to be most successful and is considered to have set a good example for other regional human rights systems. One of the key elements behind Europe’s success in protecting human rights, advancing democracy and implementing the rule of law, thereby bringing peace and integration to the region after World War II was, in fact, the existence of the European Court of Human Rights.

As demonstrated in the case of Europe, a regional human rights system can improve the human rights situation of the entire region through constant communication with the region’s constitutional courts and broaden the consensus on human rights, democracy, and the rule of law throughout the region.

Unfortunately, Asia, the home of 60 percent of the world population is the only continent that does not have a regional human rights court. This is very regrettable, considering the difficult human rights situations found in Asia today, and the tragic history of Asia, as, unlike Europe, where apologies and reflections for the past human rights violations are still needed in order to resolve the issues related to human rights violations in the past, including the violations during World War II.
VI. Ways to pursue the initiative for an Asian Court of Human Rights

1. General agreement on human rights protection

By adopting the “Seoul Communiqué” at the 3rd Congress of the World Conference on Constitutional Justice held in Seoul in 2014, the constitutional courts of countries across the world expressed general support and appreciation for the proposal of the Korean Constitutional Court to create a human rights court in Asia.

The goal of this initiative is to prevent the recurrence of so many human rights abuses that occurred in Asia in the past century, such as the sexual enslavement by the Japanese military, and resolve this issue from a future-oriented perspective.

As a matter of fact, the constitutional courts in Asia have also engaged in the exchange of experiences and wisdom on constitutional law and constitutional justice under the framework of the AACC. It is already generally agreed among Asian countries that the inviolable rights of individuals have to be guaranteed. If the Asian countries can see the need for human rights protection at the regional level and agree on concrete ways to that end, I believe the historical and cultural differences of the region will not be a major issue.

2. Starting with limited jurisdiction and its gradual expansion

1) Still, we have to admit that the differences in politics, religion, culture, economy, and history among Asian countries imply limitations in creating a human rights court that matches the level of the European Court of Human Rights right from the start. Enforcing an extensive list of human rights from the beginning may backfire, and the execution and implementation of the court’s judgments may become irrelevant as a result.

Considering the historical, cultural and economic disparities between the different Asian countries, it would be most practical to start out with the court that protects a limited scope of human rights that would hardly be disputed by any state despite the numerous differences that they may have. This will be a viable way to create a valid consensus between the Asian nations. The court could evolve over time and
have a more inclusive and expansive list of universal human rights later on.

We may take an incremental approach, by initially starting with some countries that may agree to a common mechanism for human rights protection and then gradually expanding the membership moving forward. It took quite a while even for Europe or America to see their regional human rights systems take root.

2) The ultimate role of the Asian Court of Human Rights would be to promote human rights and establish peace in the region based upon self-reflection on the atrocities of human rights violations.

Then it would be necessary to start from the most pressing issues—the most serious and damaging violations. We may first think of providing special protection to the most vulnerable groups in society and regulating the most serious and cruel violations of human rights.

Specifically, this may include prohibition of genocide, and special protection for women and children. If possible, establishing more specific standards would be a way to encourage more countries to join in, as it would be easier for them to agree on and, at the same time, understand and be ready for what they are subject to.

3) First, the prohibition of genocide has been set forth under the first international treaties addressing human rights issues enacted after World War II. The prohibition of genocide currently stands as one of the most prominent mandatory principles that bind all nations, regardless of whether a nation is a party to the international treaty or not.

In our civilized societies of the 21st century, killing members of a certain group or inflicting serious physical or mental harm, imposing measures intended to prevent births within a group, or forcibly relocating the children of such group, with a purpose to destroy or eliminate a national, racial, ethnic, or religious group, cannot be accepted under any circumstances.

4) Second, the human rights court of Asia should also address violence against women, which has been persistently repeated in the history of mankind.

This would include prohibition of not only physical violence, but also the prohibition of any type of violence that inflicts a sexual, mental, or economic harm. Particularly, stopping violence against women caused by war, civil war or regional armed conflicts is one of the most important common goals for humanity.

5) Third, we must protect our children, which are yet another group that is most vulnerable to human rights violations.

Prohibiting trafficking and sex trafficking of children, stopping child labor, and
protecting children from forced participation in the military are urgent issues that the Asian court of human rights must address.

6) The prompt establishment of an Asian human rights mechanism is very important. That is why I have proposed three forms of violations against humanity that require the most urgent attention and intervention from the regional system. I have mentioned them as an example, so any other human rights that are subject to such serious violations should be added to the list.

If there are any other human rights accepted by all member states, a more inclusive list could be made in the human rights charter from the early stage. The number of human rights on the charter will gradually grow over time with follow-up agreements.

7) Furthermore, if some states are willing to accept “discretionary jurisdiction” of the Asian Court of Human Rights as to certain human rights protections derived from international human rights conventions to which they are already a party, the Court would be given the power to hear a larger scope of cases with regard to those countries.

8) In fact, there are many examples in history that tell us it takes a very long time to finalize the list of human rights to be included in the human rights charter. For this reason, I propose that we launch a regional human rights mechanism first and then develop an Asian human rights charter that is more inclusive.

While this is in the making, ways to provide stronger, more seamless protection might be considered. For example, we may include additional rights by taking into account the uniqueness of the Asian region, certain rights can be fine-tuned, or procedural flexibility may be sought for circumstantial changes.

In the beginning, we may allow the states to choose the provisions of the charter they are willing to accept as binding international obligations, like the European Social Charter (in which the states must accept at least six out of nine so-called “core” provisions and 16 articles out of 31 in total). In other words, some provisions can be reserved for later ratification. However, we can also have a procedure to regularly confirm the ratification status of the remaining provisions.

In this process, it would be preferable that constitutional courts, government institutions with powers to sign and ratify treaties, major human rights groups, and human rights commissions all get involved and engage in a comprehensive dialogue.
3. Limitation on applications

As in the case of Europe, the Asian Court of Human Rights, in its early stage, can make its jurisdiction, including jurisdiction over individual applications, optional and take this further after the system is stabilized.

In fact, it has to be discussed with flexibility as to whether the court will exercise mandatory jurisdiction over the acts of violating human rights conventions from the start, whether a human rights commission will be set up as an interim body, or whether the court will deal with individual applications.

In the initial stage, introducing the jurisdiction over individual applications can be put off until later as a long-term task, and the Court may begin by hearing the cases referred to it by the human rights commission or other international human rights bodies. Over time, we will be able to enhance the level of human rights protection and the effectiveness of its guarantees.

4. Effective remedies

Yet, while being able to limit the list of rights and methods of applications, the states should still take on legal obligations to comply with the rulings of the Asian Court of Human Rights and offer effective remedies such as financial compensation to the parties concerned. The Court is also required to supervise whether its rulings are properly enforced in the states in question, and secure indirect measures to enforce the implementation of those obligations. If the Court decides that there has been a violation of human rights, the state in question should amend the laws to meet the standards set forth by the Court and improve its relevant practice accordingly.

One of the initial tasks that can be performed by the Asian Court of Human Rights or the human rights commission would be to collect and review the reports on human rights situations of the states, conduct field studies on human rights conditions, identify, document, and research materials related to human rights violations, and to carry out training for public officials. This way, the member states can go beyond just fulfilling their passive obligations to avoid violations of rights laid out in the convention but also provide guarantees more proactively.
5. Composition of the Asian Court of Human Rights

Of course, the precise composition of the Asian Court of Human Rights should be defined in an international treaty, but we may refer to the organization of the European Court of Human Rights, where the number of judges is the same as that of member states and only one judge represents each state.

For instance, the judges of the European Court of Human Rights are elected by the Parliamentary Assembly of the Council of Europe by a majority vote from among the three candidates nominated by the respective states. The candidates must be a person of high morality with qualifications to be appointed to high-level judicial posts or accredited jurists. For the purpose of reinforcing the independence and impartiality of judges, the term of a judge is fixed at nine years and is not renewable.

When there are not so many cases to deal with in the early stage of the Court’s establishment, the judges may also work on a non-permanent basis.

6. Involvement of constitutional courts

It is imperative that national constitutional courts, as the guardian of human rights, democracy, and the rule of law in their respective countries, involve themselves in the course of creating the Asian Court of Human Rights. The AACC, which covers major countries from East Asia and Southeast Asia to Southwest Asia and Central Asia, is an appropriate body that can play a huge role in adopting a human rights convention, as well as establishing a human rights commission and a human rights court in the Asian region.

Admittedly, it should be the governments and parliaments of each country that should be responsible for the ratification and approval of the finalized treaty. However, in order to develop a shared understanding and momentum throughout Asia for the initiative to create a human rights court for regional human rights protection, it is preferable that the AACC and its member constitutional courts take the lead, as they are the ones that have played critical roles in advancing democracy, protecting human rights, and establishing the rule of law.
VII. Conclusion

In the last century, Asian countries experienced wars and serious violations of human rights, and one of the main reasons for this was the disrespect for the human dignity and human rights of individuals.

Just as the European Court of Human Rights founded on respect for human rights brought integration and peace to the region, the activities of the Asian Court of Human Rights will bring the region under the common goal of protecting universal human rights. Above all, creating the Asian Court of Human Rights will present us with a significant opportunity to learn lessons from history.

By overcoming regional disputes under the framework of the Asian Court of Human Rights, we will be able to benefit from a mechanism that will prevent the recurrence of wars and massive violations of human rights and secure, in the long-term perspective, the enhancement of universal human rights and peace in the Asian region. This will offer a foundation for historical reflection on the human rights violations that are yet to be resolved fully, unlike Europe, and a good starting point for regional harmony, headed for a bright future.

At the same time, the Asian Court of Human Rights will establish a framework for international cooperation to provide guarantees for the respect of human rights and human life and secure, at the regional level, the prevention of violations against humanity and the implementation of remedies for victims. By doing so, the Court will enable the promotion of human rights and a remarkable progress in world peace.

I believe the Court will make a tremendous contribution to the promotion of universal human rights, advancement of democracy and the rule of law, as well as regional peace. I hope that the constitutional court of Korea and other Asian countries' constitutional institutions will continue to work together towards building an international platform of cooperation in order to confirm and protect universal human rights in Asia.
Die Janus-Köpfigkeit des Menschenrechtsschutzes
– Überlegungen zur Einrichtung eines regionalen Schutzmechanismus in Ostasien

Martin Nettesheim*

I. Doppelnatur der Menschenrechte


* Professor of Law, University of Tuebingen Law School


derartiger Verbrechen zu fassen. Er fand in der Ausarbeitung einer Allgemeinen Erklärung der Menschenrechte seinen Niederschlag.3)

In den zwischenzeitlich vergangenen Jahrzehnten hat sich die Sprache der Menschenrechte zur *lingua franca* der internationalen Beziehungen entwickelt. Kein Staat kann Mitglied der “internationalen Gemeinschaft” sein, der sich diesem Diskurs entzieht.4) In dem internationalen Menschenrechtsdiskurs zeigt sich allerdings eine auffällige Dichotomie. Einerseits dienen Menschenrechte als Argumentationstopoi, mit denen sich die Lebensbedingungen der Menschen thematisieren und normativ kritisieren lassen. Die Berufung auf Menschenrechte kann im kommunikativen Prozess dazu verwandt werden, um Aussagen über die Rahmenbedingungen zu machen, die erfüllt sein müssen, damit Menschen ihre Vorstellungen über ein gutes Leben realisieren können. Menschenrechte sind danach Sprache, die die Grundlage für Deliberation und Entscheidung bietet. Andererseits sind Menschenrechte – das ist schon im Wortlaut angelegt – immer aber auch “Rechte”, die als Trümpfe eine Diskussion gerade beenden. Wer ein Recht hat, muss sich nicht auf Diskussionen einlassen und muss auch nicht befürchten, dass blanke Macht, Mehrheitspositionen oder politische Opportunitätserwägungen die eigene Position überspielen.

Die Janusköpfigkeit der Menschenrechtsidee ist kein Zufall. Die Doppelnatur ist nicht lediglich – obgleich dies manchmal so behauptet wird – Ausdruck einer noch unvollkommenen Verwirklichung und ein letztlich zu überwindender Zwischenstand. In der Menschenrechtsidee ist vielmehr, wie im folgenden begründet werden soll, ein Konzept angelegt, das zugleich im und außerhalb des politischen Prozesses zu verwirklichen ist. Auf diese Weise entsteht eine Spannungslage, die befuchtend ist. Sie durch eine einseitige Politisierung oder durch eine einseitige Juridifizierung aufzulösen, würde die Textur beschädigen, auf denen Menschenrechte überspielen.

---


beruhen.

1. Menschenrechte als soziale Konstruktion


Ein Text des inhaltlichen Anspruchs, wie er in der Erklärung vertreten wird, kann seine Bedeutung nur in einem politisch-diskursiven Prozess erlangen, der in einem konkreten räumlich-zeitlichen Rahmen und im Wissen um die dort vorfindlichen Gegebenheiten geführt wird. Der Text der Allgemeinen Erklärung hat sich als so reichhaltig, offen und zukunftsmächtig erwiesen, dass er die Entwicklung der Staatenwelt von den 1940er Jahren bis heute begleiten konnte.

2. Menschenrechte im politischen Raum

Menschenrechte wirken zunächst und vor allem als Argument im politischen Raum. Hier müssen sie zunächst so rekonstruiert werden, dass sie ihre konkrete Bedeutung in einer spezifischen Lage finden können; hier auch müssen sie sich gegen kollidierende Positionen durchsetzen. Heute wird in unzähligen Foren globaler, regionaler und staatlicher Art über die jeweilige Bedeutung von Menschenrechten gerungen. Menschenrechte können im innerstaatlichen Diskurs geltend gemacht werden, um die Träger der Hoheitsgewalt zu einem bestimmten Verhalten zu veranlassen. An die Seite dieses Diskursraums sind inzwischen transnationale Sphären und Foren getreten, in denen in mehr oder weniger

institutionalisierter Form über Menschenrechte diskutiert wird. In einer beständigen Abfolge wird auf Konferenzen über die Bedeutung der Menschenrechte und über Maßnahmen zu deren Verwirklichung diskutiert. Wer die Praxis des Menschenrechtsdiskurses verfolgt, kommt nicht um die Schlussfolgerung herum, dass sie in überaus unterschiedlichen politischen Diskursen auch eine immer neue und andere gesellschaftliche Wirklichkeit finden. 6)

Inzwischen ist anerkannt, dass sie jedenfalls dem UN-Sicherheitsrat auch als Eingriffstitel dienen, der die Ermächtigung von Zwangsmaßnahmen ermöglicht. 7) Über die Frage, ob sie einen Staat zur humanitären Intervention berechtigen, wird bekanntlich seit langem gestritten. 8) Man übertreibt nicht, wenn man feststellt, dass Menschenrechte heute überall sind. Menschenrechte versprechen Emanzipation und Befreiung. Sie dienen als Hebel, mit dem Unterdrückung und Diskriminierung in Frage gestellt werden können. Dieses emanzipative Versprechen der Menschenrechtsidee macht ihre globale Wirksamkeit und Attraktivität aus. Während das Konzept der Menschenrechte universelle Anerkennung beansprucht, entfaltet es seine konkrete Bedeutung erst mit Blick auf je spezifische Lagen. In ihnen muss geklärt werden, was der normative Anspruch der ja hochabstrakt formulierten Menschenrechtsbestimmungen ist. Hier wird verhandelt, durchaus auch im Schatten der Macht. Im Idealfall erfolgt dies in einem demokratischen Umfeld, in dem den Prozess der Entscheidungsfindung nicht nur Mehrheitsausschüssen, sondern auch die menschenrechtlich geschützten Anliegen der Minderheiten einfließen und zu einem fairen Ergebnis zusammengeführt werden. In einem autoritären Umfeld wirkt der politische Modus der Menschenrechte eher als permanenter Stachel.

Menschenrechtspraxis ist damit politische Praxis. Man könnte nicht ganz frei von Ironie sagen: Rechte dienen als Argument. Auch wenn es für einen Juristen, der die Beschäftigung mit harten Rechtsnormen gewöhnt ist, vielleicht nicht sofort einsichtig ist: Der politische


3. Menschenrechte als Trümpfe gegenüber der Politik

Es sind die vorstehend beschriebenen Unsicherheiten, die dazu Anlass geben, über eine „Verfestigung“ der Menschenrechte nachzudenken. Die Lösung wird im Begriff des „Rechts“

gesucht und mündet in Forderungen danach, Menschenrechte als a-politische Rechtspositionen zu begreifen, mit denen der politische Prozess übertrumpft werden kann – und zwar gleichgültig, ob es sich dabei um die autoritäre Manifestation eines undemokratischen Regimes oder um eine Realisation demokratisch-repräsentativer Entscheidungsfindung handelt. Dieser Konzeption liegen teleologische und funktionale Erwägungen zugrunde, die die rechtskulturelle Bedeutung von Menschenrechten gerade in ihrer Unverfügbarkeit sehen. Seine intuitive Plausibilität gewinnt dieser Ansatz schon aus dem Begriff des “Rechts”: Wer sich auf Rechte berufen kann, hat eine Position, die sich letztlich (jedenfalls im Wesensgehalt) gegen Politik durchsetzen können muss.

Diese Verhärtung der Menschenrechte wird einerseits dadurch betrieben, dass den Menschenrechten eine substanzielle Fundierung zugeschrieben wird. Als Grundlage stützt man sich teilweise auf Beweisführungen moralischer Art.10) Teilweise beruft man sich auch auf eine bestimmte Konzeption des guten Lebens, etwa einen bestimmten religiösen Glauben, eine Wertekonzeption oder ein bestimmtes Naturrechtsverständnis. Einige dieser Konzeptionen begreifen sich als ausschließlich und ausschließend. Andere verstehen sich als Deutungsoption im Kreis einer pluralistischen Vielfalt von Perspektiven. Das Problem liegt dabei auf der Hand: Je starker ein Ausschließlichkeitsanspruch vertreten wird, desto härter ist die Konzeption; zugleich allerdings leidet die Anschlussfähigkeit. Je eher die Menschenrechtsstheorie zuzugestehen bereit ist, dass sich die Menschenrechtsidee auf verschiedene Konzeptionen des guten Lebens stützen lässt, desto angreifbarer macht sie sich. Denn in einem pluralistischen Universum verschiedener Konzeptionen könnte es auch solche gegeben, die ohne die Menschenrechtsidee auskommen. Die inzwischen verbreitete Behauptung, die Menschenrechte würden unbedingt und universell gelten, ohne dass die Menschenrechtsstheorie Aussagen über die substanzielle Fundierung machen sollte, erweist sich auf diesem Hintergrund als prekär. Die jahrzehntealten und bis heute nicht beendeten Versuche, den Menschenrechten eine Basis zu verschaffen, die sie entpolitisierter (sei sie transzendent, sei sie innerweltlich), bringt zwar eine “Sakralisierung der Menschenrechte” mit sich – bei genauem Hinsehen erweist sie sich allerdings nur zu häufig als hohl und begründungsdefizitär.

Umso attraktiver erscheint es, die fehlende Einigkeit über die Fundierung der Menschenrechtsidee durch rechtliche Positivierung auszugleichen. Auch so lässt sich eine Verhärtung bewirken. Die Geschichte der Menschenrechtsidee war insofern immer auch eine

Die Janus-Köpfigkeit des Menschenrechtsschutzes _ 479


Weiterhin ist im Menschenrechtsdiskurs vielfach die Vorstellung zu beobachten, dass

11) schnell auf Grenzen stoßen dürfte.
12) Die Akzeptanzprobleme, mit denen der EGMR in Straßburg konfrontiert ist, belegen dies deutlich.

\section*{Wesensmäßige Doppelnatur – Pragmatische Vermittlung}

\subsection*{1. Primat der politischen Realisation der Menschenrechtsidee}

einen Platz zu haben, kann, muss aber nicht das für eine konkrete Gemeinschaft angemessene Denken sein. Ein egalisierendes Menschenrechtsdenken, das auf die Gleichstellung aller Menschen hinausläuft, überspielt faktische Unterschiede und moralisch unterschiedliche Verpflichtungen.

Menschenrechtsdenken muss sich konkret auf die Suche nach Lösungen einzulassen, die dem Leben der betroffenen Menschen in der Gemeinschaft gerecht werden. Das kann nur in einem offenen politischen Prozess geschehen. Es gibt insofern keine Vollendung des internationalen Menschenrechtsschutzes, nur eine immer weiter fortzusetzende politische Diskussion.

Menschenrechtsdenken muss danach zunächst und vor allem darauf abziehen, in dem Staaten der Welt ein politisches Umfeld zu schaffen, in dem Menschenrechtsargumente Gehör finden können.


15) Bekanntlich kann ein Staat die Realisation der Menschenrechtsidee im Inneren ganz oder jedenfalls weitgehend dem politischen Prozess überlassen (Modell Vereinigtes Königreich). Denkbar ist es auch, einer Verfassungsgerichtsbarkeit ein mehr oder weniger weitgehendes grundrechtliches Mandat zu erteilen (Modell USA, Bundesrepublik Deutschland).


2. Unterwerfung unter externe Kontrollmechanismen


Der hier vertretenen These zufolge ist die Unterwerfung unter externe Kontrollmechanismen nicht per se und in jeder Hinsicht gewinnbringend. In dieser Unterwerfung liegt eine Selbstbindung (“tying your hand”-Argument). Ihr Wert erschließt sich ohne weiteres dort, wo es um die Gewährung und Sicherung von Rechtspositionen geht, über die auch nach dem internen politischen Verständnis des betroffenen Staats nicht mehr politisch verhandelt werden soll. Diese Unterwerfung kann sich auf das

---

17) Der Menschenrechtsdiskurs ist vielfach auch ein Konstitutionalisierungsdiskurs. Was von der deutschen Völkerrechtswissenschaft abstrakt diskutiert wurde, findet hier im Konkreten statt. Menschenrechte sind dann jene internationale Konstitution, an denen sich die konkreten Ordnungen messen lassen müssen.
18) Dieses Ringen belegen die Berichte, die im Rahmen der Monitoring-Systeme wichtiger Menschenrechtsabkommen erstellt werden. Die Vielfalt der Monita, Rügen und Vorschläge, die hier auch gegenüber Staaten gemacht werden, deren Menschenrechtsstandards grundsätzlich nicht in Frage gestellt werden können, ist bemerkenswert.

Diese Überlegungen belegen, dass die Entscheidung über die Einrichtung menschenrechtlicher Kontrollinstanzen wohlüberlegt sein sollte. Der gelegentlich zu beobachtende Glaube daran, dass die Schaffung von Menschenrechtsgerichtshöfen immer sinnvoll und per se gewinnbringend ist, ist einer verengten Sichtweise verhaftet, die für den Eigenwert politischer Selbstbestimmung nicht immer den notwendigen Sinn aufweist. Es ist kein Zufall, dass diese Sichtweise gleichwohl sehr verbreitet ist. Menschenrechtliche Anliegen lassen sich im Diskursraum internationaler Kontrollinstitutionen leichter verfolgen als im Rahmen traditioneller innerstaatlicher politischer Prozesse. Die Akteursgruppen, die im erstgenannten Fall auftreten, unterscheiden sich signifikant von den „stakeholdern“ in den Sphären innerstaatlicher Politik. Der Diskurs ist inhaltlich

### III. Zwischen maximalen und minimalistischen Konzeptionen der Menschenrechtskodifikation

Die vorstehenden Überlegungen ermöglichen es, zur Diskussion um die Möglichkeit der Schaffung eines regionalen Menschenrechtsschutzinstruments in Ostasien Stellung zu beziehen. Zwei Schlussfolgerungen sind geboten.

#### 1. Zuschnitt des menschenrechtlichen Diskursraums

Einem außenstehenden Europäer fällt die Einschätzung schwer, inwieweit in Ostasien die Voraussetzungen dafür gegeben sind, sich auf einen Menschenrechtskatalog zu einigen, in dem sich eine umfassende (liberale oder auch kommunitaristische) Konzeption des guten Lebens niederschlägt.\(^{21}\) In der Art der politischen Selbstorganisation zeigen sich zwischen


Wie ist auf diese Heterogenität zu reagieren? Drei Ansätze sind denkbar:


b) Denkbar wäre es, den Versuch zu unternehmen, jene spezifische Vorstellungen eines guten Lebens, die in der betroffenen Region gewährleistet werden sollen, grundrechtlich abzubilden und so einen für die Region charakteristischen Menschenrechtskanon zu erzeugen. In den bislang vorliegenden regionalen Menschenrechtsdokumenten findet dieser Ansatz nur begrenzten Niederschlag. Die Europäische Menschenrechtskonvention22) und


---

Vorstellung vom guten Leben ausformuliert ist, desto größer ist die Gefahr, dass das Dokument Vielfalt unterdrückt und Freiheit beschränkt.


Es ist hier nicht der Raum, eine derartige Konzeption im einzelnen auszumalen. Einige wenige Bemerkungen müssen genügen. Im Bereich des privaten Lebens bedeutet dies Schutz vor Unterdrückung und beträchtlicher Diskriminierung. Soziale Strukturen dürfen Menschen nicht dauerhaft in eine soziale Stellung zwängen, die kein Entkommen zulässt. Märkte müssen so organisiert werden, dass die – gegebenenfalls zu unterstützenden - Menschen über Raum für die Beschaffung der elementaren Lebensgrundlagen verfügen. 26) Im politischen Raum setzt dies kein Recht auf Demokratie voraus, wohl aber die

Möglichkeit, sich im politischen Prozess für jene Rahmenbedingungen einsetzen zu können, die für die Realisierung der je eigenen Vorstellungen erforderlich sind. Dissenz darf nicht zur Unterdrückung führen, sondern muss im politischen Raum aufgenommen, verarbeitet und absorbiert werden. Der politische Diskursraum muss so organisiert werden, dass alle Menschen in Selbstbestimmung teilnehmen können, ohne davon durch Ausgrenzung, Unterdrückung und Diskriminierung gehindert zu werden. Minimalistischer Menschenrechtsschutz realisiert sich nicht lediglich in einer parlamentarischen oder präsidentiellen Demokratie.

Die in der Menschenrechtsidee liegende Ermächtigung des Menschen mag für ein autoritäres Regime eine Gefahr bedeuten, muss aber zur Wahrung des Anspruchs, sich auf die Selbstbestimmung der Menschen stützen zu können, hingenommen werden. Der immer wieder zu beobachtende Versuch, hierauf mit dem Hinweis auf abweichende Traditionen, andere kulturelle Prägungen oder besondere Sitten zu reagieren, greift nicht.

2. Durchsetzungsmechanismen

Der inhaltliche Zuschnitt eines Menschenrechtskatalogs entscheidet wesentlich über die Wahl der Durchsetzungsmechanismen. Je bereiter, unschärfer und grundsätzlicher die Bestimmungen eines Menschenrechtskatalogs gefasst sind, desto eher ist anzunehmen, dass die politische Dimension dieser Rechte im Vordergrund steht. Im Lichte dieses Grundsatzes implizieren die vorstehend beschriebenen drei Ansätze verschiedene Kontroll- und Durchsetzungskonzeptionen.


c) Beschränkt sich eine Menschenrechtskodifikation demgegenüber auf den Mindeststandard, so verliert der politische Diskursraum an Bedeutung: Menschenrechte dieses Zuschnitts sind absolute Trümpfe, über die sich eine Regierung auch unter Berufung auf Macht, auf bessere Argumente oder auf das Gemeinwohl nicht hinwegsetzen kann. Die Einrichtung gerichtsförmiger Durchsetzungsmechanismen gewinnt in diesem Fall an konzeptioneller Schlüssigkeit. Ein Gericht, dessen Mitglieder sich als neutrale Wächter über die vereinbarten Menschenrechte begreifen und sich dabei rechtsvergleichend an internationale Standards anlehnen, ist für die Durchsetzung von Menschenrechte als Trümpfe über den politischen Prozess besonders geeignet. Sie können für gleiche, stetige und kontinuierliche Durchsetzung von Standards sorgen, über die aufgrund ihrer minimalistischen Fassung nicht mehr politisch verhandelt werden kann. Die Schaffung richterlicher Kontrollinstrumente wirkt im übrigen auf den politischen Prozess reflexiv zurück: Das Wissen um die Möglichkeit, den politischen Prozess mit der Berufung auf Rechte und die Einschaltung eines Kontrollorgans „überholen“ zu können, ändert den Prozess selbst.
IV. Die europäischen Erfahrungen


28) Von wesentlicher Bedeutung war nicht zuletzt, dass der große Staat Westeuropas, die Bundesrepublik Deutschland, zur Wiedererlangung ihrer Anerkennung als gleichberechtigtes Mitglied der europäischen Staatengemeinschaft auf die Einbindung in ein supranationales Regime angewiesen war.


V. Die Herausforderung

Zu den wichtigsten und weitreichendsten Wandlungen, die die internationalen Beziehungen und das internationale Recht in den letzten Jahrzehnten vollzogen haben, ist die Überwindung der Vorstellung absoluter Souveränität. Das Willensargument steht den Regierenden zur Rechtfertigung der inneren Zustände in einem Staat nicht mehr zur Verfügung. Sie müssen die Verhältnisse anders -- etwa als Ausdruck der Selbstbestimmung des Volkes -- rechtfertigen. Diese Umstellung der Legitimationsstrukturen ändert das Verhältnis von Regierenden und herrschaftsunterworfenen Menschen grundsätzlich. In diese Strukturen ist heute unablösbar die Idee der Menschenrechte eingewebt. In der internationalen Politik wird die Verbindlichkeit des Menschenrechtsdenkens nicht mehr grundsätzlich bestritten – das ist eine kaum zu überschätzende Errungenschaft.\(^{31}\)

Gegenwärtig besteht eher die Gefahr, dass das Pendel zu weit in die Gegenrichtung ausschlägt: Manchmal scheint es, als ob die Idee der Menschenrechte der letzte feste Orientierungspunkt in einer Welt geworden ist, die den Glauben an transzendentale Weisheiten verloren hat. Michael Ignatieff spricht von der Gefahr einer säkularen Vergötzung.\(^{32}\) Damit wird der Idee der Menschenrechte nicht gedient. Die Menschenrechte lassen sich nicht als dichte Konzeption des Guten begreifen, mit denen der politische Prozess der Suche nach konsensierten Lösungen einfach überspielt werden kann.\(^{33}\) So wenig es heute noch möglich ist, die Idee der Souveränität zu hypostasieren, so wenig dürfen die Menschenrechte zu einer außerhalb des politischen Raums stehenden objektiven Idee des Guten erhoben werden.\(^{34}\)

---


33) Pointiert: P. Kennedy, The International Human Rights Movement (oben Fn. 13), S. 101 : Menschenrechtsaktivisten seien heute „more part of the problem in today’s world than part of the solution."


Ein Rechtswissenschaftler ist nicht in der Position, beurteilen zu können, wie das grundsätzliche Spannungsverhältnis, das in der Idee der Menschenrechte angelegt ist, in einer Region wie Ostasien aufzulösen ist.36) Seine Aufgabe kann es nur sein, Handlungsalternativen aufzuzeigen und darzulegen, wie sich das konkrete Kosten-Nutzen-Verhältnis darstellt. Er kann darauf hinweisen, dass die einfache Gleichung, wonach „mehr Menschenrechtsschutz immer besser ist“, nicht richtig ist. Er muss aber auch darauf hinweisen, dass jedenfalls die Standards einer minimalistischen Menschenrechtskonzeption, ohne die sich der Anspruch einer Regierung, Ausdruck der Selbstbestimmung einer Gruppe zu sein, nicht aufrechterhalten lässt, heute nicht mehr verhandelbar sind.

Menschenrechtsschutz wird gelegentlich als nicht hinterfragbarer Ausdruck einer bestimmten Fortschrittsidee bezeichnet. Er wird auch zur moralisch alternativlosen Praxis stilisiert, die jeden, der sich daran beteiligt, adelt. Er wird mit einem Unterton theologischer

35) Menschenrechte sind “emanzipatorisches Vokabular.”
1. I would like to begin my address with the problem of integration of the whole humankind, more precisely – with the analysis of the most substantial, in my opinion, global challenges and threats fraught with disintegrative processes of global character. I think, this will not be an exaggeration to say that the biggest danger of this sort is contained in the increasing division of the world society into countries-winners obtaining benefits from globalization processes and, as Jürgen Habermas says, “countries which sustained a defeat”1). The main advantages of the global interaction are received today by the most economically powerful states, transnational monopolies and even some family clans. Global all-social expanse more and more converts itself into the arena of egoistic interests, including interests often acquiring criminal character (I mean situations when transnational criminal structures penetrating into legal business begin to influence world economy and world finances).

This leads to increasing marginalization and deprivation of wide masses in many (first of all developing) countries, to appearance of the whole army of “superfluous people”, who are particularly vulnerable for the ideas and practices of extremism. As a spontaneous reaction to this evolution of events various local (first of all confessional and national-ethnic) identities are actively reviving in last decades, opposing themselves to the rest of the world and having confrontational character.

From the legal point of view, such distribution of revenues of the world economy according to the principle of accumulated advantage means deviation from justice and entails substantial restriction of the right to development for all the rest. In this connection

* President of the Constitutional Court of the Russian Federation / Doctor of Science in Law, Professor, Lawyer Emeritus of the Russian Federation

following questions are in order. Why the law, which by virtue of its generally significant nature is the most efficacious instrument of social integration, obviously does not cope with this function within the framework of global social expanse? And what has to be done to increase the effectiveness of the integrative function of the law? To answer these questions, I would single out two basic directions of work connected with: a) perfecting of the legal doctrine with respect to understanding of what is law in the modern world and b) developing the democratic elements of supranational law-making.

a) Within the framework of the first direction the question may be made more precise as follows: Is liberal-individualistic interpretation of human rights dominating at present not fully adequate to the tasks of social integration of the humanity? Answering this question from the point of view of understanding law as a quintessence of reasonable elements of human communal life one should, I think, confide in the authority of great Kant and agree with him that nature, having intended human as a reasonable creature, had the plan to fully develop these reasonable elements not in a human being as such but on the scale of humanity as a whole, leading it to attainment of “perfect civil unification of mankind” on the basis of law (“The Idea of Universal History in the World Civil Aspect”). If one tries, he said, to disclose nature’s goal in the senseless motion of human affairs, where many things are weaved of “childish malice and passion for destruction”, one must recognize that instincts of a human as an intelligent creature “develop entirely not in an individual, but in a kind”(ibid.). Not an individual human, however great he might be, can be called the crown of nature, but only the entire mankind in its non-realized potentiality.

From the position of such arrangement of priorities law as the fullest expression of reasonable fundamentals of social normativity must make for preservation and development of mankind and, as a minimum, not undermine the fundamentals of its preservation and development. Meanwhile, life shows that liberal-individualistic interpretation of human rights often contradicts this imperative. We see it in various fields of human life – from egocentric behavior of economic monopolists attracting basic vital resources of the planet to aggressive struggle of sexual minorities for equality of possibilities of self-realization, including in such questions as upbringing of children. These phenomena, apparently so far from each other, have common root – individualistic ideology determining at present dominating approach to the understanding of ideological essence and normative content of human rights. From the point of view of such an approach human looks at the world surrounding him not as at environment of his inhabitance internally tied with him being the condition of continuation of the mankind, but as at totality of means external in relation to
him, which he can use for his personal well-being and self-realization in the channel of the ideology of all-permissibility.

I think that “clearance” of the modern law-understanding from deforming influence of such interpretation of liberalism would make for strengthening of the role of law in ensuring social integration. I call in question neither the ideology of liberalism in itself nor the principle of liberal understanding of law, according to which a human is free in his actions if he does not violate the freedom of another human. The point is that the notion “freedom of another human” must be interpreted in the context of the mankind as a whole: the freedom of each individual human is possible only under the condition of preservation and development of the entire mankind.

b) Strengthening of democratic elements of supranational law-making must become another factor of legal restriction of aggressive egoism of individual subjects of common social interaction in the interests of the humanity as a whole. The demand for legal democracy, which can now be observed in the whole world, also extends to the field of global relations. The concept of global constitutionalism forming at present, in my view, can be used as a conceptual ensuring of this social demand.

Let me make a reservation straight away: I very well understand the anxiety of those who consider that formation of transnational constitutionalism is fraught with loss of the possibility to independently determine the fundamentals of their State and social system within the framework of their national constitutions by nations. Difficulties and dangers connected with absence of democratically legitimate mechanisms of law-formation within the framework of supranational and moreover global expanse are understandable as well. But, on the other hand, it is obvious that without handing a part of State powers over to the level of international structures in accordance with the idea of united nations, i.e. united sovereignties (and what is principally important, united on the basis of equality) it is already impossible to cope with numerous challenges of globalization, including extremely dangerous trends of privatization of global public expanse by individual states arming themselves with the concept of global leadership, as well as transnational financial-economic groups which have already been converted into international nets functioning according to their own rules.

In the last decade, the idea of global constitutionalism acquires more and more adherents in different countries. True, in the meanwhile its conceptual forming is at the stage of coming into being. Therefore, I will confine myself to the general understanding of this idea going back to the Kant's project of “eternal peace”, whose attainment, in his opinion, was
possible within the framework of the all-embracing federation of sovereign equal republics. I think that all characteristics of the subjects of this cosmopolitan union of states sought for named by Kant – sovereignty, equality and republican form of government – have principal significance. In our days they have not lost actuality, but are only filled with new content adequate to modern realities and challenges of globalization.

I categorically disagree with those who say that deviation and even renunciation of the principle of national-State sovereignty is a motion towards legal integration of the world community and the only means to ensure security and human rights in the conditions of globalization. The notion of sovereignty has changed, it does not fit in the well-known Jean Bodin's formula: “Sovereignty is an absolute and constant power of the State over nationals and citizens”, being in the basis of the Westphalian international system. The fact that this power is no more absolute only means that the world passes from former unlawful sovereignty as the right of the strong one to arbitrariness to legal construction of sovereignty as legal organization of force. At this, it is not a question of dying off or destruction of sovereignty of the State, but of voluntary unification of sovereignties of various states in order to ensure more effective guarantees of law. World system, answering the requirements of security and able to resist challenges and threats of globalization, can be built only by sovereign states having united their efforts and their sovereignties on voluntary and equal basis. Only on this basis legal integration of humanity on all-planet scale is possible.

As far as understanding of the principle of equality of states is concerned, here too we have long ago went away from the approach which was in the basis of the Westphalian system more than three and a half centuries ago, when this equality was ensured by balance of forces of big nations and had a very limited character. At present, when larger number of small nations pretend to statehood and sovereignty, their equality with others can be guaranteed only within the framework of liberal-democratic model of the world order. In this sense the demand for democracy in the system of global relations which I spoke about earlier is first of all demand for legal equality of states realized within the framework of unification of State sovereignties on a democratic basis.

And finally, perhaps, the most difficult aspect of Kant's project in terms of its practical realization – the requirement of republican form of government for all participants of the world-wide union. What is to be done with states, which disagree to have principles of the State structure republican in essence or demonstrate exclusively imitational character of republicanism? Here one must not be guided by formulas like “states-outcasts” or “fail
states”, as well as by other simplified approaches orientated at international isolation of some or other states. As international practice of the beginning of XXI century has shown, such formulas lead only to aggravation of disintegration and escalation of aggression. Apparently, the solution of the problem must be sought for first of all in the channel of the principle of “mild force”, i.e. by way of demonstration of advantages of participation in international unions based on the ideas of global constitutionalism.

Questions connected with human rights protection constitute particular complexity and particular significance in the context of the problem of correlation of principles of global constitutionalism and national-State sovereignty. I think, substantial imperfections of the doctrine of “Responsibility for protection”, which replaced the discredited doctrine of “humanitarian intervention”, are evident to many. In themselves, ideas that State sovereignty is not a privilege but an obligation, and first of all obligation of the State to ensure guarantees of rights of its citizens and that fulfilment of this task must be controlled by the international community do not cause doubts. But the devil, as is well-known, is concealed in details, and the details of this concept have not been worked at yet. This opens expanse for voluntarism of “global leaders”, the consequences of which are well-visible in Iraq, Libya and Syria.

I think, an important step on the way of perfecting the system of international law would be elaboration of wordings of basic UN documents determining juridical limits and mutual coordination of such basic notions as State sovereignty, human rights, obligation of the State to protect human rights, responsibility of the world community for observance of human rights in the whole world, etc. In the absence of precise normative wordings fixing legitimate grounds for armed protection of human rights without consent of the leadership of the State in which these rights are violated arbitrary manipulations of so called “right to intervention” deduced from the doctrine of “responsibility for protection” are inevitable. Ruined confidence in international law, international and supranational political and legal institutions may be restored only on the basis of serious juridical working at these questions and attainment of principal accord of the world community on them. Extension of the present legal uncertainty is fraught with collapse of international law and return to the archaic “right” of the strong.

Of course, on the background of the present international political crisis the scale of which gives analysts reasons to discuss the situation in terms of the “Cold War”, talks about global constitutionalism may seem cut off from reality. However, Kant's ideas about “eternal peace” were at one time considered as Utopia. And now Kant's project becomes
more and more demanded, and the idea of peace as a basic value common to all mankind
acquires more and more actuality in the conditions of disintegration of former bipolarity of
the global political expanse. I think that global constitutionalism is a prospect for the future,
but for such a future which is already quite visible.

At the present stage one has, in my view, to agree with those authors who consider that
theoretical model of global constitutionalism can be presented as multi-level system, in
which internal republican constitution is supplemented with international public law
regulating relations among states and a global layer of universal human rights. In the
channel of exactly this theoretical construction one can look for and find solutions of the
problems which stand on the way of global constitutionalism as a normative-institutional
basis of all-humanity integration.

2. Turning to Russian experience of solving problems of social integration on the
intra-State level, I must first of all recognize that for our country these problems are now
particularly acute. The principal among them is unacceptably sharp social stratification.
Explosive character of such state of affairs is clearly demonstrated by the situation in
Ukraine, where such a deep-laid factor as injury to the fundamentals of social justice
determined by the oligarchic structure of Ukrainian economy is concealed behind numerous
reasons and causes of intra-national conflict. For Russia this experience is very instructive
and I hope that all institutions of power will make correct conclusions from it. As to the
Constitutional Court, from the very beginning of its activity it paid great attention to the
protection of social rights of those wide sections of the population, which found themselves
cut off from the process of privatization of our common socialist inheritance.

At the same time we proceed from the fact that with all expenses of coming into being of
the institution of private property in the post-Soviet Russia the right to private property
which formed in the end is the most important achievement of transformations realized in
the country and basis for her subsequent legal development. Therefore, there is a task before
the Constitutional Court to look for optimal balance between the protection of social rights
of those sections of the population which are deprived of private property and ensuring
appropriate guarantees of the right to private property as the most important condition of
normal legal development of the country.

Resolving this very complicated task, the Constitutional Court leans on such principles
of legal regulation formulated on the basis of the Constitution of the Russian Federation as:
*the principle of support of citizens' confidence in law and actions of the State; the principle
of legal certainty and reasonable stability of legal regulation; the principle of predictability of legislative policy.

To sum up my address, I would like to return to its beginning and emphasize that search for legal solutions of concrete problems of social integration by constitutional courts is always a certain contribution to the development of the notion of law as the main instrument of social integration worked out by the humanity. I think that practice accumulated by the constitutional courts in this field gives rich material for perfection of the paradigm of law-understanding towards strengthening of solidarity elements of the law. Such a vector of development of the legal doctrine and international, supranational and intra-State law-making based on it would allow in prospect to bring spontaneously spreading processes of modern globalization in legal channel and ensure social integration both within the framework of national states and on the scale of the humanity as a whole.
Toward an International Human Rights Court for Asia?

Tom Ginsburg*

We live in an era in which the international and constitutional are blending in novel and hybrid ways. Constitutional courts have spread around the world, and the judicialization of politics is a major topic in many countries. Scholars around the world have also been devoting much attention in recent years to the expansion of international courts and tribunals, both in number and scope. The Project on International Courts and Tribunals identifies 25 such bodies at the moment, and this does not include ad-hoc bodies like the Iran-United States Claims Tribunal, or bodies that have closed up shop such as the United Nations Compensation Commission. The judicialization of international politics, by which we mean the expansion of judicial involvement in international governance, is proceeding apace (Alter 2014; Romano 2014; Stone Sweet and Brunell 2013).

Yet East Asia has been somewhat of an outlier. The region is the only major one in the world without a human rights court of commission. While some countries, like South Korea and the Philippines, have National Human Rights Institutions with some capacity and power, there is very little that is institutionalized on a transnational level. The major exception, ASEAN, has historically placed tremendous emphasis on state sovereignty and non-interference in the internal dimensions of other states, a kind of sovereignty-reinforcing regionalism that seems to undermine the possibility of rigorous international enforcement of human rights. As I have put it elsewhere, if one was to characterize the East Asian international order as “Eastphalia”, its dominant characteristic would be the similarities with classic Westphalian emphasis on sovereignty. Since the Bandung conference in 1955, Asian powers have emphasized non-interference in internal affairs, territorial integrity, and peaceful coexistence as the dominant tropes of foreign policy. Nor are East Asian countries linked with other transnational adjudicative bodies in the fields of trade investment or borders. The region seems underjuridified.

* Leo Spitz Professor of International Law, University of Chicago Law School
This is particularly the case with regard to human rights institutions. The sole intergovernmental exception is the ASEAN Intergovernmental Commission on Human Rights (AICHR) established in 2009, is by its own terms a consultative body of government appointees. Other regional organizations such as the South Asian Association for Regional Cooperation (SAARC) and the Pacific Islands Forum (PIF) have made only modest steps toward including human rights in the social agenda.

Why Asia is an outlier in both regional organization and human rights is a complex question. A common argument has to do with cultural factors, as the now two decades old debate on “Asian values” exemplified. Asian cultures, it was argued, differ fundamentally from western ones in terms of their treatment of human rights issues. Asians valued duties over rights, the group over the individual, and harmony over conflict. These cultural preferences, it was argued, translated into a continent-wide preference for mediation over law, and negotiation over formal dispute resolution.

The large literature on that question need not be reiterated here(see Thio 1999), but let us sketch two lines of critique. First, the argument about Asian values was often advanced by government representatives who themselves had a substantive interest in minimizing rights claims. The many Asians involved in liberal civil society movements did not agree with the position proffered by government bureaucrats. Second, the position that Asian values were different ignored many liberal elements that were found in Confucian, Buddhist and other Asian traditions of thought. Third, the position assumed that Asian culture was unchanging and was not dynamic. In fact, cultures are always changing, and the powerful forces of globalization are affecting East Asia in fundamental ways. Few today push the Asian values position.

If culture is not the dispositive factor, what else might be? One factor may be state capacity. Most Asian countries have a tradition of a relatively strong states, especially compared with other regions in the developing world. This means that Asian countries are less subject to leverage from Europe, which plays a major role in subsidizing international courts in Latin America and Africa.

State capacity also means there is less need for international institutions. A long line of scholarship suggests that states will turn to international courts to resolve problems of credible commitments and to make promises enforceable. For example, if a state cannot credibly promise to prosecute war criminals or monitor human rights abuses in its own borders, it might decide to join an international criminal court or human rights court. Scholars who have looked at the institutionalization of the European human rights regime in
the early 1950s have emphasized this dynamic. While newly democratized countries in the aftermath of World War II might have made promises to their citizens to protect human rights, why would citizens believe them? Embedding the promises into international institutions made them more enforceable and thus more believable. While it may seem unusual to think of European states as being weak, from one point of view they were. Asian states, which were both less democratic and had a record of delivering on policy promises, may have had less need for international institutions.

Another argument is historical. European history is one of continent-wide civilization, in which legal ideas have had common roots and shared institutions. The Roman Empire unified the continent under a single set of legal ideas; these were revived in the middle ages with the jus commune and the so-called reception of Roman law. This period also saw the emergence of canon law, under the Catholic Church, which played an important role in the evolution of western law. East Asia, in contrast, is the home of the paradigmatic nation states: Japan, Korea, China and Vietnam. These nations have histories far older than the relatively recent emergence of nation-states in Europe. There is no history of a jus commune or Holy Roman Empire to inform a regional vision for the future.

One way to think about this history is that states have a diversity of preferences. The cultural diversity among states in the region—with virtually every major religious tradition, and tremendous ethnic and linguistic diversity—might mean that states would have a difficult time agreeing on the particular norms to govern the collectivity. Asia, in this view, encompasses too much cultural, economic, and political diversity to make it possible or productive for member states to coordinate under one human rights regime (Phan 2009).

All these arguments help to explain why it is that Asia is the one major region of the world without a human rights court. What then are the prospects for one to develop in the future?

First we must recognize that history is not destiny. One might argue that forces of globalization will act on all states in the region to push toward a greater convergence of preferences. Immigration, in particular, is likely to reduce differences among regions and so help to build the basis for East Asian community structures in the future (Baik 2012; Sato 2010). As citizens come to share preferences, and to demand better human rights protections, governments may respond by seeking to develop regional institutions. The traditional emphasis on sovereignty might begin to erode.

One vision of human rights emphasizes the acculturation of states to norms associated with institutions. Institutions provide fora wherein state elites can be persuaded of the merits
of alternative visions. Elites can also become “acculturated” to the importance of human rights, leading to internalization at the level of the state. Either of these paradigms would suggest that there may be pressures for greater development of regional human rights courts in the future, and Asia would look more similar to the universalist vision associated with global constitutionalism. The key factor here involves the shift in preferences among populations and their leaders toward a kind of global convergence.

Second, the extra-state infrastructure is beginning to emerge. The set of NHRIs in Asia is growing more institutionalized, and presumably civil society groups are starting to organize transnationally to create pressures for human rights protections. But at the end of the day, I am somewhat skeptical that an Asian human rights court, along the line of the InterAmerican or European Court of Human Rights, will emerge in the immediate future.

Perhaps the first steps should be limited. In the Fall of 2013, President Moncef Marzouki of Tunisia proposed the creation of an international court for constitutional law. The idea is to create an international treaty regime that states could opt into for selective adjudication of national constitutional questions. This proposal raises profound theoretical questions about the relationship between national constitutional law and international institutions. External evaluation of constitutional law is in fact very common. For example, American statutes require a cutoff in foreign aid for countries which have experienced and unconstitutional change in power, so that the U.S. Government must in some sense “interpret” the national constitution of other countries. In Europe, the Venice Commission on Democracy through Law serves to produce reports and monitoring of constitutional law in other jurisdictions, including those outside the region. These can be likened to a kind of “peer review” in which institutions in one country contribute to socializing those in another country.

Similarly, one might imagine a regional treaty regime in Asia that starts with only the most significant international human rights violations. Asian countries have not generally been willing to sign onto the Rome Statute of the International Criminal Court—it is the region of the world with the lowest percentage of countries participating. But perhaps a regional court that focused only on genocide, the highest international crime, might be acceptable to Asian states. Few would want to argue that they need to preserve the right to commit genocide in the future. If such a limited human rights court was created, with jurisdiction over only a small number of heinous rights violations, states would learn that they had little to fear from an international court. This might lead to a dynamic in which more and more human rights were protected over time. Furthermore, the Court could be staffed by sitting judges from the member jurisdictions, which would presumably make it
more palatable to states than a court staffed by European or North American judges, or a
court staffed with Asian academics or activists. Learning is a powerful mechanism.

One milieu in which human rights adjudication plays out is in national constitutional
courts. The South Korean Constitutional Court has become a major leader in bringing global
norms to Asia, and a model for constitutional courts throughout the world. The country’s
participation in organizations such as the Venice Commission on Democracy through Law
demonstrate that it is a leading Asian jurisdiction in promoting the spread of constitutional
ideas around the world. Human rights jurisprudence is part of the jurisprudence of
constitutional courts. In addition, the Court’s leadership in promoting dialogue among
judges of constitutional jurisdiction in Asia will help to institutionalize a genuine debate.
The Court is to be commended for its leadership, not only in practice but in theory as well, as
this volume attests.
References


Sugestões para uma futura Corte de Direitos Humanos para a Ásia baseadas na experiência da Corte Interamericana

Roberto F. Caldas*

I. Aspectos históricos e estruturais da Corte Interamericana

O Sistema Interamericano de Proteção dos Direitos Humanos, criado no âmbito da Organização dos Estados Americanos (OEA), é o mais influente mecanismo de promoção e proteção dos direitos humanos no Continente americano e tem sob sua jurisdição mais de 500 milhões de habitantes. O SIDH se encontra integrado por dois órgãos: a Comissão Interamericana de Direitos Humanos, cuja sede está em Washington, D.C., e a Corte Interamericana de Direitos Humanos, com sede em San José, Costa Rica.

Para compreender como este Sistema foi consolidado, é preciso retornar às origens históricas do Sistema, precisamente à Comissão Interamericana de Direitos Humanos, que foi o primeiro órgão de proteção dos direitos humanos das Américas. Estas origens datam de 1948, quando a Organização dos Estados Americanos aprovou, em Bogotá, Colômbia, a Declaração Americana dos Direitos e Deveres do Homem. Neste ponto também é preciso destacar que a Declaração Americana é o primeiro instrumento internacional sobre direitos humanos de caráter geral no mundo. Isso porque a Declaração Universal de Direitos Humanos foi adotada alguns meses mais tarde, no mesmo ano de 1948. Na mesma conferência em que se aprovou a Declaração Americana foi promulgada a Carta da Organização dos Estados Americanos, que previu, em seu artigo 106, a existência da Comissão Interamericana, cuja função é “promover a observância e a defesa dos direitos humanos e servir como órgão consultivo da Organização nesta matéria”. A própria Carta da OEA também estabeleceu que existiria uma “Convenção Interamericana sobre Direitos Humanos [que] determinar[ia] a estrutura, competência e procedimento desta Comissão, assim como a dos outros órgãos encarregados dessa matéria”.

* President of the Inter-American Court of Human Rights
Em 1959 foi então criada a Comissão Interamericana. Seu primeiro período de sessões foi celebrado em 1960.

A partir dessa data, e de forma progressiva, a Comissão Interamericana foi assumindo e expandindo suas funções. Em 1961, começou a realizar visitas a vários países para observar in loco a situação dos direitos humanos e, em 1965, foi expressamente autorizada a examinar denúncias ou petições relacionadas a casos específicos de violações aos direitos humanos. No entanto, ainda não havia sido assinada a Convenção Americana sobre Direitos Humanos e isso não seria feito até 20 anos depois da promulgação da Carta da OEA, em 1969, durante a Conferência Especializada Interamericana sobre Direitos Humanos, que teve lugar em São José, Costa Rica.

A Convenção Americana apenas entrou em vigor nove anos depois, em 1978. Este instrumento internacional, certamente com influência do Convênio Europeu de Direitos Humanos de 1950, estabelece um catálogo de direitos e liberdades que os Estados Parte acordaram respeitar e garantir. Igualmente, criou a Corte Interamericana de Direitos Humanos e formalizou e definiu as funções da Comissão Interamericana, que até aquele momento haviam sido práticas realizadas motu proprio ou referendadas por intermédio de resoluções da Assembleia Geral da OEA.

Naquela época, nos encontrávamos na América Latina do final dos anos 70, com ondas de ditaduras militares que recrudesciam suas práticas contra os direitos humanos. Em particular, os governos do denominado “Cone Sul” (Argentina, Brasil, Chile e Uruguai), foram fortes opositores ao estabelecimento e à entrada em função da Corte Interamericana. Não obstante isso, com o apoio de outros Estados da região, finalmente, no segundo semestre de 1978, foi designado um orçamento de 100 mil dólares para o Tribunal e, por aprovação da Assembleia Geral, foi decidido que sua sede seria na Costa Rica, um Estado que, desde 1948 até a atualidade, goza de governos democráticos ininterruptos. Certamente algo incomum para a região. Em maio de 1979, foram eleitos os primeiros Juízes da Corte Interamericana e, em setembro daquele ano, o Tribunal iniciou suas funções nas instalações da Corte Suprema de Justiça da Costa Rica, pois ainda não contava com uma sede própria e tinha poucos recursos. O tema dos recursos foi um problema constate, que perseguia e continua perseguindo a Corte até os dias de hoje. Como veremos mais adiante, a Corte Interamericana é o tribunal internacional com menos recursos no mundo.

Voltando um pouco às funções da Comissão Interamericana, ao não ser esta um órgão eminentemente jurisdicional, como é a Corte Interamericana, esta realiza atividades mais amplas do que aquelas estritamente contenciosas, de natureza política, ou mais parecidas
aos órgãos especializados em direitos humanos das Nações Unidas. Podemos destacar, por exemplo, a visita realizada à Argentina em 1979, em plena ditadura militar, e seu papel fundamental para denunciar as graves violações aos direitos humanos cometidas pelo Estado, ou ainda a visita ao Peru, em 1993, logo depois da ruptura democrática e do denominado autogolpe do ex-Presidente Fujimori.

Apesar disso, além destas funções políticas, a Comissão tem funções “quasi-jurisdicionais” ao conhecer de petições de pessoas que reclamam que seus direitos humanos foram violados. Ao resolver estas petições ocorre uma interação com a Corte Interamericana, já que a Comissão constitui um passo necessário e obrigatório para ter acesso à jurisdição da Corte. Trata-se de um esquema mais parecido ao da Comissão Europeia antes da entrada em vigência do Protocolo 11, em 1998. Ou também ao Sistema Africano, a respeito dos Estados que não realizaram a declaração prevista no Protocolo da Carta Africana, sob o artigo 34.6, que permite o acesso direto das vítimas à Corte Africana de Direitos Humanos e dos Povos.

Em virtude de que a Comissão é um órgão que encontra seu sustento na Carta da Organização dos Estados Americanos, esta tem jurisdição sobre os 35 Estados Membros da Organização; diferentemente da Corte Interamericana, que apenas pode conhecer de alegadas violações aos direitos humanos a respeito dos 20 Estados que ratificaram a Convenção Americana e que, além disso, reconheceram sua competência contenciosa.

A Corte está integrada por 7 juízes nacionais dos Estados Membros da OEA, que são eleitos pela Assembleia Geral e exercem suas funções a título pessoal por um período de 6 anos, podendo ser reeleitos uma vez. O Presidente e o Vice-Presidente são eleitos pelos próprios juízes por um período de dois anos e podem ser reeleitos. Quem lhes fala, de nacionalidade brasileira, exerce as funções de Presidente do Tribunal, ao passo que o Juiz Eduardo Ferrer MacGregor, de nacionalidade mexicana, atua como Vice-Presidente. Além disso, compõem a Corte juízes da Argentina, Chile, Colômbia, Costa Rica e Equador. A Corte é apoiada tecnicamente por uma Secretaria.

A Corte possui três funções diferentes: contenciosa, consultiva e cautelar. Em seus 37 anos de existência, a Corte Interamericana já conheceu casos sobre as mais relevantes problemáticas de direitos humanos em cada um dos Estados sob sua jurisdição. O impacto de suas decisões vai além das reparações às vítimas das mais graves violações aos direitos humanos, porque por intermédio destas sentenças desenvolveram-se importantes padrões em diversas matérias do Direito Internacional dos Direitos Humanos.

Nesse sentido, por exemplo, tendo como contexto os conflitos armados da década dos
anos 80 e 90 em diversos Estados da região, o Tribunal decidiu casos sobre graves violações aos direitos humanos, tais como massacres, desaparecimentos forçados, tortura e execuções extrajudiciais. Igualmente, a Corte realizou importantes pronunciamentos sobre a questão da impunidade em relação a estas violações, e sobre a incompatibilidade das leis de auto anistia com a Convenção Americana.

Além disso, foram estabelecidos importantes padrões sobre a violência contra a mulher por razão de gênero e no tocante à violência contra defensores de direitos humanos. Ademais, o Tribunal desenvolveu padrões inovadores em matéria de direitos dos Povos Indígenas e Tribais, especialmente no acesso ao direito à terra, bem como sobre outros temas que vão do direito à propriedade e sua justa indenização, o direito à não discriminação por orientação sexual, os direitos dos migrantes, os direitos trabalhistas, a independência judicial, e até mesmo a responsabilidade do Estado por prestações de saúde por parte de particulares.

Entre o ano passado e a metade do presente ano, a Corte proferiu mais de 20 sentenças, que desenvolveram importante jurisprudência em torno a temas muito diversos e relevantes para o contexto latino-americano e a proteção dos direitos humanos na região. A este respeito, apenas para indicar alguns exemplos, o Tribunal se pronunciou sobre direitos das pessoas migrantes, direitos das mulheres e violência contra a mulher, direito à não discriminação na educação a uma pessoa com HIV, direitos dos Povos Indígenas e Tribais sobre seus territórios ancestrais, desaparecimento forçado, entre outros.

Da mesma forma, ao cumprir sua função consultiva, recentemente a Corte emitiu dois pareceres consultivos. Um sobre a situação das crianças migrantes e o segundo sobre a possibilidade de que as pessoas jurídicas sejam titulares de direitos humanos reconhecidos na Convenção Americana. Esta função da Corte é sumamente valiosa, já que permite estabelecer especificamente quais são as obrigações dos Estados no momento de, por exemplo, elaborar, adotar, implementar e aplicar suas políticas migratórias. Ainda no que respeita ao Parecer Consultivo sobre crianças migrantes, a Corte respondeu a um contexto da região centro-americana no qual milhares de crianças saíam de seus países desacompanhadas com o fim de chegar aos Estados Unidos.
II. Desenvolvimento e Impacto da Corte Interamericana de Direitos Humanos

Para mostrar as dimensões do desenvolvimento da Corte Interamericana ao longo de sua história, gostaria de me referir principalmente a quatro temas que são extremamente inovadores e que, além disso, contribuíram diretamente a proporcionar uma proteção efetiva aos direitos das pessoas nas Américas. O primeiro é o desenvolvimento realizado pela Corte sobre o conceito de reparação integral. O segundo tem a ver com a efetiva implementação dos padrões internacionais desenvolvidos pelo Tribunal e é a consolidação da doutrina do ‘controle de convencionalidade’. O terceiro se refere ao desenvolvimento jurisprudencial e seu impacto em relação às leis de anistia para graves violações aos direitos humanos. Em quarto lugar, farei referência à produção do Tribunal em torno à incompatibilidade de julgamento de violações de direitos humanos cometidas contra particulares por intermédio da jurisdição militar.

1. Reparação integral

Um aspecto particular que podemos destacar no desenvolvimento jurisprudencial da Corte Interamericana – o qual representa um selo distintivo que influiu ativa e positivamente nos diferentes processos de direitos humanos, tanto no Continente americano como em outras regiões do mundo, é o conceito de reparação integral.

A reparação integral, além das clássicas categorias de dano material e imaterial, inclui a implementação de medidas inovadoras e mais completas, tais como a investigação dos fatos, a restituição dos direitos, a reabilitação física e psicológica, a satisfação, mediante atos de desculpas públicas ou do reconhecimento de responsabilidade internacional por parte do Estado, ou ainda de garantias de não repetição.

Por intermédio desta faculdade, a Corte Interamericana ordenou medidas emblemáticas para muitos Estados da região, as quais contribuíram com a consolidação do Estado de Direito e a vigência dos direitos humanos. Estas medidas, em sua dimensão individual, beneficiaram a milhões de pessoas, ao passo que sua dimensão coletiva permitiu verdadeiras transformações na sociedade, uma vez que se dirigem às causas estruturais das violações.

Como medidas de não repetição, o Tribunal ordenou reformas legislativas que chegaram
ao ponto de emendas ou modificações à Constituição de um Estado. Isso ocorreu, por exemplo, no caso **Última Tentação de Cristo Vs. Chile**, que se relacionava à existência de censura prévia para apresentações cinematográficas na normativa constitucional chilena. O Tribunal, ao condenar o Chile pela violação ao direito à liberdade de expressão, ordenou ao Estado a modificação normativa com o fim de adequar sua legislação interna à Convenção Americana. O Estado do Chile deu cumprimento a esta Sentença da Corte Interamericana ao realizar uma reforma constitucional no ano de 2003.

No caso **Campo Algodeiro Vs. México**, cujos fatos se referem ao desaparecimento e morte de três jovens mulheres em Ciudad Juarez, México, o Tribunal estabeleceu que o alto número de homicídios de mulheres, ou feminicídio, estava fundamentalmente associado à uma forte cultura de discriminação contra a mulher. Neste contexto, o Tribunal considerou adequado ordenar, entre outras medidas de reparação, o dever do Estado de adotar programas e cursos permanentes de educação e de capacitação em direitos humanos e gênero a funcionários públicos, bem como um protocolo de busca e de investigação para possíveis casos de desaparecimento ou homicídios por razão de gênero.

### 2. Diálogo jurisprudencial e controle de convencionalidade

Um dos fenômenos jurídicos mais interessantes e inovadores sendo desenvolvido na América Latina é o “diálogo jurisprudencial” em torno da Convenção Americana e da Corte Interamericana. Isso se deve a uma recepção cada vez mais crescente da jurisprudência da Corte Interamericana por parte dos diversos ordenamentos jurídicos nacionais. As referências e citações à Corte Interamericana são parte do dia a dia dos altos tribunais da América Latina.

Entretanto, além deste diálogo jurisprudencial, existe uma obrigação concreta por parte dos Estados Parte da Convenção Americana de que todos os juízes nacionais devem aplicar a Convenção Americana e a jurisprudência da Corte, bem como interpretar o direito em conformidade com estas decisões. Esta obrigação foi desenvolvida pela Corte sob a denominação de “controle de convencionalidade”.

Trata-se de uma instituição jurídica *suis generis*, própria do Sistema Interamericano de Proteção dos Direitos Humanos, e tem fundamento jurídico na Convenção Americana, particularmente nos artigos 1 e 2, que estabelecem, respectivamente, as obrigações de garantir e respeitar os direitos contidos na Convenção e de adotar disposições jurídicas no
ordem interno para implementar estes direitos.

Em aplicação do controle de convencionalidade, as autoridades estatais, que não se limitam a juízes e servidores do poder judiciário, mas incluem todos aqueles que agem em nome do estado, deverão:

i. Realizar uma “interpretação em conformidade” entre as leis nacionais e os padrões interamericanos de proteção dos direitos humanos;
ii. Deixar de aplicar normas que não possam ser interpretadas de acordo com estes padrões, independentemente da hierarquia desta norma;
iii. Utilizar os recursos legais existentes para garantir a adequação aos padrões interamericanos;
iv. Utilizar o controle de convencionalidade para dar acatamento às Sentenças proferidas pela Corte Interamericana.

3. Anistias

Um dos pontos altos de desenvolvimento jurisprudencial da Corte Interamericana que gerou especial impacto nos ordenamentos jurídicos nacionais, e especialmente na proteção dos direitos humanos das pessoas da região, é o pronunciamento enérgico da Corte em relação à incompatibilidade de leis de anistia em relação a graves violações de direitos humanos com a Convenção Americana.

Como consequência destas sentenças, muitos outros juízes nacionais utilizaram estes fundamentos jurídicos para continuar desenvolvendo as obrigações estatais em torno ao tema com base na doutrina assentada pela jurisprudência da Corte IDH.

Em 2005, a Corte Suprema da Argentina considerou que as “Leis de Ponto Final e Obediência Devida”, que haviam sido adotadas com posterioridade à ditadura militar para evitar investigar e julgar os responsáveis por violações de direitos humanos “apresentavam os mesmos vícios que haviam levado a Corte Interamericana a rejeitar as leis peruanas de ‘auto anistia’. Pois, em idêntica medida, ambas constituem leis ad hoc, cuja finalidade é a de evitar a persecução de lesões graves aos direitos humanos [e] outorgam impunidade aos autores que pertenciam ao regime anterior, e infringem, deste modo, o próprio dever de perseguir penalmente as violações aos direitos humanos”. Este pronunciamento permitiu declarar a inconstitucionalidade destas leis, o que gerou um “efeito dominó” e levou à abertura e à continuação dos julgamentos de centenas de causas penais que encontraram
responsabilidade por delitos de lesa humanidade cometidos durante a ditadura militar na Argentina.

Igualmente, em 2009, uma Promotora na Guatemala utilizou a decisão do caso Barrios Altos contra o Peru como fundamento jurídico para reabrir processo de investigação sobre graves violações aos direitos humanos, ignorando a lei de anistia guatemalteca e dando passos contra a impunidade existente. Esta decisão foi recebida apropriadamente pela Câmara Penal da Corte Suprema de Justiça da Guatemala e permitiu reabrir processos que se encontravam arquivados durante anos.

Posteriormente, em 2014, no caso Marguš v. Croácia o Tribunal Europeu de Direitos Humanos utilizou a jurisprudência da Corte Interamericana em diversos casos (Barrios Altos Vs Peru ; Almonacid Arellano e outros Vs Chile, La Cantuta Vs Peru, Gelman Vs Uruguai e Massacres de El Mozote) para adotar um critério similar quanto à inadmissibilidade de disposições de anistia que pretendem evitar responder pela obrigação de investigar, julgar e punir os responsáveis por violações de direitos humanos.

4. Jurisdição militar

Em diversos casos, a Corte Interamericana teve uma posição determinante sobre a incompatibilidade entre a Convenção Americana e a utilização da jurisdição militar para julgar graves violações de direitos humanos, assim como para julgar a civis. Nesse sentido, a Corte Interamericana tem argumentado que a obrigação de não julgar violações de direitos humanos por intermédio da jurisdição penal militar é uma garantia do devido processo. Nesse sentido, ao assumir competência a justiça militar sobre um assunto que deve ser conhecido pela justiça ordinária, vê-se afetado o direito ao juiz natural e, como consequência, o devido processo, o qual, por sua vez, encontra-se intimamente ligado ao próprio direito de acesso à justiça. Para exemplificar o impacto da jurisprudência do Tribunal em matéria da garantia do juiz natural em relação à jurisdição militar, menciono quatro casos emblemáticos contra o México, decididos entre os anos de 2009 e 2011 (Radilla Pacheco, Fernandez Ortega, Rosendo Cantú e Cabrera García e Montiel Flores). Como resultado das condenações internacionais contra este Estado por parte do Tribunal, foi realizada, em 2014, uma reforma da jurisdição militar neste país.
IV. Metas e desafios da Corte Interamericana

1. Orçamento

Não posso deixar passar esta oportunidade para falar sobre os desafios institucionais enfrentados pela Corte Interamericana. O principal deles é de suma gravidade por se tratar da situação orçamentária. A Corte Interamericana, apesar de ser o único tribunal especializado das Américas em Direitos Humanos e um dos mais influentes do mundo na matéria, é o Tribunal internacional com menos recursos. Temos um orçamento regular de apenas 2.7 milhões de dólares, proveniente da Organização dos Estados Americanos. Este montante representa 58% do total do orçamento da Corte, ao passo que o restante é coberto por fundos especiais, provenientes de contribuições voluntárias, projetos de cooperação internacional e contribuições de várias entidades.

Historicamente, o baixo orçamento regular designado para a Corte pela Organização dos Estados Americanos fez com que esta dependesse fortemente destas contribuições voluntárias para continuar funcionando. Nesse sentido, a Corte está agradecida a alguns Estados Americanos que realizam contribuições voluntárias e, principalmente, a alguns países europeus que prestam cooperação internacional, como Noruega, Dinamarca, Espanha e Alemanha, e à União Europeia.

Entretanto, em dezembro do ano passado, dois importantes doadores notificaram à Corte que deixariam de prover cooperação internacional, ao que sabemos em razão da grave crise migratória que assola a Europa. Trata-se de Noruega e Dinamarca. Entre ambos, suas contribuições somavam cerca de 38% do orçamento total da Corte.

Como as senhoras e os senhores podem imaginar, esta situação terá efeito direto no acesso à justiça, afetará a organização e a administração da Corte e colocará em perigo o trabalho dos funcionários que trabalham na instituição. Temos esperança que esta lamentável situação seja resolvida e superada imediatamente por parte dos próprios Estados Americanos. No entanto, dentro das estratégias da Corte para poder continuar oferecendo justiça, encontra-se a possibilidade de estar aberta a contribuições de novas entidades ou Estados, sem que isto afete sua reconhecida independência, imparcialidade e autonomia.
2. Maior institucionalidade e estrutura

Ao visitar tribunais nacionais, como o que hoje tão gentilmente nos dá as boas-vindas, não se pode deixar de observar que são em geral adequadamente estruturados e neles nos inspiramos para procurar também nos estruturar. Mesmo que possa ser difícil de acreditar, uma Corte como a nossa, com jurisdição sobre 20 Estados e mais de 560 milhões de pessoas, tem enorme deficiência de recursos materiais, logísticos e de pessoal. Estamos estabelecidos em um prédio pequeno, na cidade de San José, e com menos de 100 funcionários trabalhando, entre eles 25 que prestam serviços gratuitos por intermédio de programas de estágios. Como já lhes mencionei, a Corte Interamericana é o Tribunal Internacional com menos recursos do mundo e quase todo o esforço institucional se encaminha para a estrita atividade jurisdicional, isto é, redigir e proferir sentenças. Portanto, a estrutura institucional carece de, por exemplo, uma assessoria de comunicação social, um departamento de recursos humanos, e um quadro permanente para tradução para suas sentenças nos quatro idiomas oficiais da OEA. Nesse sentido, é preciso dotar à Corte Interamericana de recursos suficientes e necessários para exercer o seu importante e histórico mandato.

3. Supervisão de cumprimento das decisões

Como todo tribunal nacional e internacional, um dos principais desafios que a Corte Interamericana enfrenta é a supervisão da devida execução de suas sentenças. Historicamente, a Corte assumiu para si mesma a tarefa de supervisionar o cumprimento de suas decisões. Esta é uma nota característica, diferente do Tribunal Europeu de Direitos Humanos, cuja função de execução é delegada a um órgão político, o Comitê de Ministros do Conselho da Europa.

A Corte Interamericana monitora o cumprimento de cada uma das medidas de reparação ordenadas em suas sentenças, até que sejam cumpridas completamente, e então pode considerar concluído um caso. Tendo em consideração que as medidas de reparação são complexas e envolvem, em muitos casos, a aprovação de normas jurídicas, a adoção de políticas públicas, entre outros, a Corte enfrenta a tarefa de dar seguimento por intermédio de relatórios e audiências periódicas. Desta maneira, o Tribunal busca superar a eventual falta de vontade política de algum Estado ou outros obstáculos materiais, que fazem com que a execução de algumas sentenças seja difícil, razão pela qual este ponto constitua a ser
V. Lições aprendidas e sugestões para uma futura Corte de Direitos Humanos para a Ásia

Com base na experiência de muitos êxitos, mas também de desafios enfrentados ao longo destes 37 anos de existência de nossa Corte, e ao atender ao honroso convite e solicitação desta Corte Constitucional, podemos fraternalmente oferecer algumas sugestões alicerçadas nas lições aprendidas para uma futura Corte Asiática de Direitos Humanos:

• Orçamento: uma nova iniciativa que busque criar um Tribunal Internacional que envolva a jurisdição sobre vários Estados deve contar, desde o seu início, com bases orçamentárias muito claras. A partir da história da Corte Interamericana, podemos ver que esta iniciou com um orçamento de 100 mil dólares, em 1979. Esse montante, já naquela época, era insuficiente para realizar adequadamente os seus trabalhos. Nesse sentido, deveriam ser estabelecidos mecanismos claros e efetivos para dotar o futuro tribunal de orçamento suficiente. Os recursos materiais e uma adequada estrutura institucional são fundamentais também para o seguinte ponto.

• Assegurar sua independência, imparcialidade e autonomia: a Corte Interamericana foi um exemplo de independência e imparcialidade desde o início de seus trabalhos. Ao ser um Tribunal de Direito, deve ser regida pela justiça e transparência, ser e parecer o mais justo possível. A autonomia orçamentária é necessária para poder implementar efetivamente estas garantias.

• Possuir um marco normativo claro e garantista, uma Convenção Asiática de Direitos Humanos. Em nosso caso, a Convenção Americana é o instrumento internacional que deu vida à Corte Interamericana e inclui os direitos que os Estados se comprometeram a respeitar. Além disso, a Convenção Americana permite que a Corte tenha competência sobre outros tratados como, por exemplo, a Convenção Interamericana sobre Desaparecimento Forçado.

• Uma futura Corte Asiática poderia estabelecer um mecanismo de diálogo institucional como o que hoje se realiza e observar a experiência desenvolvida por outros tribunais e órgãos de proteção de Direito Internacional dos Direitos Humanos.
VI. Conclusão

Saúdo efusivamente a importante iniciativa deste debate proporcionado por esta Egrégia Corte Constitucional da Coreia, sob a direção de Vossa Excelência, Presidente Park Han-Chul, o que bem revela que é nossa missão comum: a proteção dos direitos de todas as pessoas humanas. Façamos da melhor maneira, com a melhor estrutura possível, com a maior independência, imparcialidade e transparência, para que as pessoas que estão sob nossas jurisdições recebam o tratamento jurisdicional célere e justo às violações de que foram vítimas com confiança e plena satisfação. Muito obrigado.
I. Introduction

The authors welcome the initiative 1) by the President of the Constitutional Court of the Republic of Korea, Mr Park Han-Chul, to establish an Asian Court of Human Rights. He made this proposal during the 3rd Congress of the World Conference on Constitutional Justice 2) in Seoul in September 2014. The Seoul Communiqué, which was adopted by the

1) http://www.venice.coe.int/WCCJ/Seoul/docs/WCCJ_key-note-session_2-Park_ENG.pdf.
2) The World Conference on Constitutional Justice unites 98 Constitutional Courts and Councils and Supreme Courts in Africa, the Americas, Asia and Europe. It promotes constitutional justice – understood as constitutional review including human rights case-law – as a key element for democracy, the protection of human rights and the rule of law. The main purpose of the World Conference is to facilitate judicial dialogue between constitutional judges on a global scale. The Venice Commission acts as the Secretariat of the World Conference: Founded in 1990, the Venice Commission is an advisory body of the Council of Europe. The Venice Commission has 60 member States, including the 47 members of the Council of Europe. The Commission is composed of independent experts in the field of constitutional law. While the main activity of the Commission consists of providing legal opinions for the preparation of constitutional reforms and para-constitutional legislation (electoral laws, legislation on the structure of the Judiciary etc.), the Commission runs a world-wide network of Constitutional Courts and publishes the CODICES
participants of the 3rd Congress, supported this proposal:

“Furthermore, the participants were informed about the initiative of the Constitutional Court of the Republic of Korea to promote discussions on human rights co-operation, including the possibility of establishing an Asian human rights court based on international human rights norms, in order to enhance human rights protection in the region. Recognising the great contribution by existing international human rights Courts in Europe, the Americas and Africa to the protection of human rights in the respective regions through the effective implementation of international human rights norms, the participants encourage participating Asian Courts to promote such discussions.”

In order to get such an important project moving, many stakeholders should exchange and work together. The present book, published at the initiative of President Park, is a further step in this long process.

This paper will provide a short overview of some existing regional human rights protection systems before turning to some of the key issues which need to be dealt with in such an endeavour.

II. Existing systems of human rights protection as a model

There are major regional human rights protection systems in Europe, the Americas, Africa and the Arab world.

1. Europe

In Europe, two major international organisations deal – at least partially – with human rights. The oldest pan-European organisation, the Council of Europe, is specialised in the field of human rights and has 47 member States. The Council of Europe is the founding organisation for the European Court of Human Rights in Strasbourg. The Council of Europe not only hosts the Court, the contribution of the whole organisation is essential for the database (www.CODICES.coe.int), which contains some 9000 judgments from Constitutional Courts and equivalent bodies world-wide.

functioning of the Court. The Council’s Committee of (foreign) Ministers supervises the execution of the judgments and its other parts assist the member States in living up to the Convention’s stringent commitments. The Council of Europe offers advice on drafting of legislation in conformity with human rights standards, provides human rights training for judges, prosecutors, police, prison guards and other categories of civil servants, promotes human rights education in schools, trains youth leaders and provides many more services that help the states in improving human rights.

Following the exhaustion of national remedies, individuals can appeal to the European Court of Human Rights, which will first decide on admissibility (a high percentage of cases are inadmissible). The Court has 47 judges (one for each party) who decide on the admissibility of cases individually. It decides cases in chambers of seven judges. Following the judgement of a chamber, the parties may request a referral of the case to the Grand Chamber, which is composed of 18 judges.1

Following the accession of many Eastern European States to the Council and Europe and their accession to the European Convention on Human Rights, the case-load of the Court increased dramatically, culminating in a delay of some 160,000 cases in 2011. Through various measures, notably by streamlining procedures and by reducing the number of judges deciding on admissibility from three judges to one (Protocol 14 to the Convention), the Court was reformed successfully and it was possible to bring the number of pending cases below 60,000.

The European Union, which is a different organisation with 28 member States, established the Court of Justice in Luxembourg. This Court originally dealt with economic issues only but it was forced by a national court, the Constitutional Court of Germany, through the Solange I judgment, to establish its own human rights jurisdiction. Without a specific legal basis for the protection of Human Rights, the Court of Justice first drew inspiration from “constitutional traditions common to the Member States”. In practice, this meant that the Luxembourg Court followed the case-law of the European Court of Human Rights.

A new element came in when the European Union proclaimed the Charter of Fundamental Rights in 2000 and, especially, when the Charter was transformed into binding law through the Lisbon treaty in 2009. This means that in Europe, in respect of the EU and

4) http://www.echr.coe.int/Documents/FAQ_GC_ENG.pdf (accessed 03/02/2015)
5) Solange I, BVerfGE 37, 271 ff.
its 28 member States, which are all parties to the European Convention on Human Rights as well, two European Courts deal with human rights and they apply two parallel human rights treaties.

The Charter contains a number of rights which do not exist in the Convention, for instance Article 8 on data protection. However, many of the fundamental rights contained in the Charter overlap with rights contained in the European Convention on Human Rights Convention, for example the right to a fair trial under Article 6 of the Convention is covered by Article 47 of the Charter. It is these overlapping rights that bring about the danger of divergent interpretation between the two texts. In order to avoid such a divergence, the Lisbon treaty obliges the European Union to become a party to the European Convention on Human Rights).

Unfortunately, the very complicated accession process of the EU to the Convention is stalled since Opinion 2/13 of 18 December 2014 of Court of Justice of the European Union on draft agreement of accession, which found the draft agreement not in conformity with the EU treaties. Following a thorough analysis of the Opinion, negotiations are likely to resume. The negotiators have to satisfy not only the stringent demands of the Court of Justice, but they also have to remain acceptable for the 19 non EU members States, which are parties to the Convention.

While the delay in the accession of the European Union is deplorable, not least from the viewpoint of the Union itself, the relations with some of its member States are a more serious challenge for the European Court of Human Rights.

Due to the conflict between the European Court of Human Rights and Russia, the entry into force of Protocol 14, simplifying the procedure of the Court, was considerably delayed. The reason for this conflict is some judgments, which were not well accepted by the Russian authorities. A judgement of the Constitutional Court of the Russian Federation of 14 July 2015 confirmed that Russia was bound by the Convention but held that the execution of

7) Article 6.2: “The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union’s competences as defined in the Treaties.”


9) E.g. ECtHR, Ilaşcu and others v. Moldova and Russia, no. 48787/99; ECtHR, Kononov v. Latvia, no. 36376/04.

10) Judgment No. 21-P/2015.
individual judgements of the European Court of Human Rights could be contrary to the Constitution of the Russian Federation and it was for the Constitutional Court to decide when this was the case. The Russian Parliament amended the law on the Court in order to give it a competence for such a determination.11) A definitive non-execution of a judgment of the Strasbourg Court because of such a finding by the Russian Constitutional Court would bring the Russian Federation in conflict with public international law.

Another conflict opposes the United Kingdom to the European Court of Human Rights. In the case Hirst v. UK, the European Court held that the UK violated the Convention when it denied all prisoners without distinction the right to vote12). Another judgment was even more contentious, Abu Qatader v. UK, where the Court prevented the expulsion of an Islamist hate preacher to Jordan because of the danger that he might be tortured there. As a consequence, the UK Government announced the adoption of a national human rights bill, which would break the formal link between British courts and the European Court of Human Rights, which had been established by the Human Rights Act.13) The question whether the United Kingdom should leave the European Convention on Human Rights is being seriously considered.14) Currently, this discussion is however superseded by the discussion on the exit of the United Kingdom from the European Union (“Brexit”), which will be decided at a referendum on 23 June 2016.

Even in Switzerland a wave of resentment against the European Court of Human Rights has built up, especially on the right wing of the political spectrum. This may be related to the traditional Swiss insistence on its independence and the rejection of the idea of “foreign judges”. While it is unlikely that Switzerland will leave the European Convention on Human Rights, such discussions probably contributed to the insistence of Switzerland on

12) For arguments for and against implementation, presented to the House of Lords, European Court of Human Rights rulings: are there options for governments?, Vaughne Miller, International Affairs and Defence Section, House of Lords Library, Standard Note SN/IA/5941.
‘subsidiarity’ in the process of reform of the Court.\textsuperscript{15)}

Notwithstanding these challenges, the European Court of Human Rights is an outstanding success. Human rights protection has become a key element of European legal culture and many Europeans are rightly proud of these achievements.

2. Americas

Like the European system until the entry into force of Protocol 11 to the Convention in 1998\textsuperscript{16)}, the Inter-American human rights protection system has two main components: the Inter-American Commission on Human Rights, established in 1959 and the Inter-American Court of Human Rights, established in 1979. Both organs now have their legal basis in the American Convention on Human Rights, which was ratified by 25 States\textsuperscript{17)}.

The Inter-American Commission has its seat in Washington D.C. It is composed of seven Commissioners who are elected by the General Assembly of the Organisation of American States. In addition to general country reports\textsuperscript{18)}, the Commission was authorised in 1965 to examine individual cases of human rights violations\textsuperscript{19)}.

Domestic remedies have to be exhausted before a petition can be filed. Once a case is found admissible, the Commission first tries to find a friendly settlement, but it will prepare a report on the merits with recommendations if this is not possible.

In respect of States which have made a declaration accepting the jurisdiction of the Inter-American Court\textsuperscript{20)}, the petitioner can request that the case be transferred by the


\textsuperscript{17)} Trinidad and Tobago originally signed the Convention on 28 May 1991 but denounced it in 1998 referring to a constitutional obligation, established by the Judicial Committee of the Privy Council, to speedily execute persons convicted to the death penalty. An appeal to the Convention bodies would have delayed such executions (http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm?Trinidad%20and%20Tobago).

\textsuperscript{18)} http://www.cidh.oas.org/pais.eng.htm.

\textsuperscript{19)} http://www.oas.org/en/iachr/mandate/functions.asp.
Commission to the Inter-American Court of Human Rights if the State does not comply with the recommendations within two months. However, the applicants cannot bring cases to the Court themselves. Only the States and the Commission can refer a case to the Court.

The Court has its seat in San José, Costa Rica. Its seven Judges are elected by the General Assembly of the Organisation of American States for a period of six years. If none of the even judges is a national of the defendant State, the State can nominate an ad hoc judge.21) Like the European Court of Human Rights22), the Inter-American Court can adopt provisional measures “in cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons”.23)

A unique aspect of the Inter-American system is the role of the Centro por la Justicia y el Derecho Internacional (CEJIL).24) CEJIL is a semi-official NGO which also brings cases on behalf of victims of human rights violations to the Inter-American Commission and supports them in the procedure before the Inter-American Court of Human Rights. This is particularly important for defending the rights of indigenous people or communities in Latin America who often are unable to present formal applications on their own. The establishment of a similar body might be of interest also for other regional mechanisms, notably in Asia.

Another particular feature of the American system is that the Court, which supervises the execution of its own judgments, often insists on highly symbolic forms of reparation, such as public apologies to victims.25) This is very different from the European system, which focuses on compensation and on general (often legislative) measures, rather than symbolic measures.

In Asia, it might be difficult to request public apologies from the authorities if this would result in a ‘loss of face’.

20) Article 62 of the Convention.
21) This is different from the Inter-American Commission were a national of the State concerned has to recuse him/herself.
23) Article 63.2 of the Convention.
25) For example, in the Barrios Altos case Peru agreed to disseminate the judgement, make a public expression of apology to the victims, to erect a memorial monument in Lima, to grant scholarships, school uniforms and educational materials to the victims (http://www.corteidh.or.cr/docs/casos/articulos/seriec_87_ing.pdf).
Like the European Court, the American system faces some challenges. Venezuela denounced the American Convention on 10 September 2013 because the Court had allegedly given “political” judgments.

Another issue relates to the Dominican Republic. Following a judgment of the Inter-American Court finding a violation of the Convention by the Dominican Republic because it refused citizenship to Haitian immigrants\(^{26}\), the Constitutional Court of the Dominican Republic found in its judgment TC/0256/14 that the instrument accepting the jurisdiction of the Inter-American Court of Human Rights in respect of the Dominican Republic had not been adopted in a constitutional manner. The effects of this judgment are still unclear.\(^{27}\)

However, notwithstanding these difficulties, the Inter-American too is a highly successful and effective system of human rights protection, which also contains many elements of potential relevance for other regions.

### 3. Africa

The African Charter on Human and People’s Rights of 1981 establishes the African human rights protection system, which has two components: the African Commission on Human and People’s Rights and the African Court on Human and People’s Rights. The Commission was established in 1986 and has its seat in Banjul, Gambia. It is therefore often called the “Banjul Commission”. The Commission has eleven members who have renewable six-year mandates.

The African Court on Human and People’s Rights was established by Article 1 of the Protocol to the Charter, which was ratified by 27 States. The Court, which is composed of 11 judges, has its seat in Arusha, Tanzania. Seven States (Burkina Faso, Ghana, Malawi, Mali, Rwanda, Tanzania and Cote d’Ivoire) have accepted the jurisdiction of the Court including for complaints brought from individuals and by non-governmental organisations with observer status with the African Commission. Similar to the European system, the execution of the Court’s judgments is monitored by the Committee of Ministers of the African Union.

The African Court gave its first judgment against Senegal in 2009 (inadmissibility).\(^{28}\)


On 14 June 2013, it handed down its first judgment on the merits, finding a violation of the Charter against Tanzania. In 2014, Burkina Faso was condemned for failing to investigate the murder of a newspaper editor.

In the light of this recent case-law, the African Court seems to be set on a promising course towards an effective human rights protection system.

A specific aspect of the African system is the inclusion of group rights and people’s rights, notably family protection by the state, the right to self-determination, the right to development, the right to peace and security and to a general satisfactory environment.

The Charter also sets out duties of individuals such as the duty towards one’s family and society and to cultural values, or the duty of non-discrimination and tolerance. There is a controversial discussion about the inclusion of duties in human rights catalogue. While the inclusion of reference to duties would seem acceptable, it should be made very clear in the text that human rights cannot depend on the prior fulfilment of duties. The respect for human rights cannot be refused, even if a person has not fulfilled his or her duties.

---


31) Article 18.

32) Article 20.

33) Article 22.

34) Article 23.


36) Article 27.

37) Article 29.7.

38) Article 28.

duties.

4. Arab League

The League of Arab States, usually referred to as the Arab League, unites 22 Arab States. In 1994, the League prepared the Arab Charter of Human Rights, but the text did not enter into force. A revised version of that text was however adopted by the Arab League in 2004 and entered into force in 2008. The Arab Charter contains political, civil, economic, social and cultural rights and the right to development.

The Arab Human Rights Committee is composed of seven experts elected by the member States. It monitors the implementation of the Charter by the member States through national reports from the parties and by issuing comments and recommendations.

In September 2014, a ministerial meeting of the Arab League approved the statute of a future Arab Court for Human Rights. It will enter into force with seven ratifications. The seat of the Court is to be in Bahrain. An inter-state complaint procedure is foreseen, but unfortunately no individual complaint mechanism.

5. Asia / Pacific

While the current initiative of the Constitutional Court of Korea carries much weight, it is not the first attempt to establish a Human Rights Court in the wider Asian region, in particular in the Pacific.

41) Article 2.
In 1985, the non-governmental Law Association for Asia and the South Pacific (LAWASIA) tried to establish a regional human rights mechanism for the Pacific at a meeting in Fiji, which was attended by 63 governmental and NGO delegates. 45)

A draft Pacific Charter of Human Rights was elaborated at a further meeting in Samoa in 1989. The draft was inspired by the African Charter on Human and Peoples’ Rights and provided for civil and political rights, and some economic, social and cultural rights. A commission supervising implementation was to be established. However, the Charter was not adopted at the inter-governmental level.46)

A renewed call for a Pacific regional mechanism is being made under Strategic Objectives 12.1 and 12.5 of the Pacific Plan and, with the support of the Office of the High Commissioner for Human Rights, the Secretariat of the Pacific Islands Community prepared an excellent report on the possibilities for establishing such a system in 2012.48)

In continental Asia various potential fora exist: the Asia Co-operation Dialogue is a rather loose grouping of 32 Asian countries, which promotes dialogue between its members and pursues various projects in fields such as energy, agriculture, biotechnology, tourism, poverty alleviation, IT development, e-education and financial co-operation. However, the Asia Co-operation Dialogue does not yet have a human rights dimension.

Conversely, as part of its “human dimension”, the Conference on Interaction and Confidence Building Measures in Asia (CICA) is a multi-national forum for enhancing co-operation towards promoting peace, security and stability in Asia. CICA has, as one of its priorities, the promotion of respect for fundamental rights and freedoms. The relevant


48) See above, footnote 75.
49) http://www.acddialogue.com/ (accessed 28/01/2015)
2007 concept paper\(^{51}\) refers to “protecting respect for fundamental rights and freedoms within the provisions of the UN Charter, the Almaty Act and other CICA documents” as one of the goals of CICA. The parallel action plan foresees inter alia the holding of CICA conferences on human rights.\(^{52}\)

The initiative to establish an Asian human rights protection system could thus refer to work done in these fora and try to include them in discussions in order to obtain sufficient political weight.

In 2009, the Association of Southeast Asian Nations (ASEAN) established the ASEAN Intergovernmental Commission on Human Rights (AICHR)\(^{53}\). One of the main tasks of this Commission was to prepare the ASEAN Human Rights Declaration, which was adopted in 2012 in Phnom Penh\(^{54}\). The Declaration builds on the Universal Declaration of Human Rights of the United Nations and includes both civil and political rights as well as economic, social and cultural rights. The Declaration adds further rights, for instance the right to safe drinking water and sanitation (Article 28.e). However, there were also critical voices\(^{55}\) which pointed to the danger that the reference to “corresponding duties” in Article 6 of the Declaration\(^{56}\) might be used to withhold human rights from a person who is not considered to have fulfilled his or her duties towards society. Other clauses questioned were the references to “national security” and “public morality” in Article 8 of the Declaration as grounds for limiting the exercise of human rights and fundamental freedoms.

The establishment of the ASEAN system was certainly difficult because of the diversity of the ASEAN member States. Therefore, the adoption of the ASEAN Human Rights Declaration was a remarkable achievement and further work will be necessary to make the system more independent.

---

53) http://aichr.org/about/.
56) Article 6 of the Declaration reads: “The enjoyment of human rights and fundamental freedoms must be balanced with the performance of corresponding duties as every person has responsibilities to all other individuals, the community and the society where one lives.”
Ⅲ. Issues that should be addressed in the establishment of an Asian Court of Human Rights

The task of establishing an Asian Court of Human Rights is daunting. Numerous questions need to be addressed. The replies to these questions will determine how efficient it can be from a human rights perspective. From the outset, we can identify obvious trade-offs between size (larger membership) and quality.

1. **Scope *ratione loci***

1) Intergovernmental organisation as a basis

A major issue is that Asia lacks a continental international organisation. The European Court of Human Rights is an emanation of the Council of Europe. The Inter-American Court of Human Rights was established within the Organization of American States and the African Court of Human Rights is part of the African Union. The project to establish an Arab Court of Human Rights is set within the framework of the Arab League.

In Asia, if a continental human rights court or mechanism\(^{57}\) was established such an international organisation would need to be created at the same time. Why is such a “framework organisation” necessary for a human rights court? Such a court or a human rights commission needs individuals as members and they in turn need to be appointed. In one way or another, the States, i.e. the Governments, need to be involved, first in the drafting of the founding treaty\(^{58}\) or decision in establishing the mechanism. In the case of a treaty, there is also a need to have a depositary, a body which keeps the signatures and ratifications, as well as any declarations or reservations and notifies the parties to the treaty thereof. Usually, the “framework organisation” fulfils this task. It is true that this function, which resembles that of a notary, could be entrusted to the United Nations, whose treaty office is available also for regional treaties. However, the involvement of an international organisation can be essential in the appointment of judges or members of the human rights

---

57) Prof Obata doubts whether a Court handing down legally binding decisions can be established: Obata, Kaoru, Perspectives for a Regional Human Rights Regime in East Asia; *How should Asians Interpret the History of European Regional Constitutionalization*, Nagoya University Journal of Law and Politics, No. 245 (2012), pp. 299-322 (in Japanese, English translation available).

58) E.g. the European Convention on Human Rights.
Depending on the model chosen, an involvement of an intergovernmental organisation can also be necessary in the implementation of the decisions taken by the human rights body. This is the case of the European system, where the Committee of Ministers supervises the execution of the judgments of the European Court of Human Rights. In the Inter-American System, the Court itself has this task.

Admittedly, it could be imagined that such a human rights body be established by an international non-governmental body, but without the participation of States, it seems unlikely that the decisions of such a non-governmental body would be followed by the States concerned. The involvement of the States is therefore indispensable if such a mechanism is to be effective.

2) Participating countries

A related question is the geographical scope for the establishment of an Asian human rights court or system. Asia is a vast continent; its countries are very diverse. They are probably less homogenous than European countries, even with all their differences.59)

While there is a geographical definition of Asia, being separated from Europe by the Urals and the Caucasus and by the Suez Canal from Africa, there are also different references as concerns Asia as an entity. Often, the Middle East is seen as a region of its own. More importantly, Asia contains countries which differ widely not only in size, history and culture but – essentially – in the respect for human rights by their Governments. In Asia, we find genuinely democratic states but – sadly – also some of the worst dictatorships in the World; let me only mention North Korea. Including those in such a system would obviously defeat the purpose of protecting human rights. Therefore, the geographical scope will need to be limited to countries that share the genuine protection of human rights as a goal. Let us call them like-minded countries. In East and South-East Asia, there are some which could be candidates, let me only mention South Korea, Japan, Mongolia or Indonesia, but there are of course also others.60)


60) Taiwan would certainly be an interesting partner but the question of its status in international law might complicate co-operation.
In Asia, it thus seems reasonable to start cooperation only among such like-minded countries, even if they are not contiguous geographically. Once these countries have established a functioning Human Rights Court, other countries could join one by one.

3) Relationship to the European system

Another territorial issue concerns the borders between Asia and Europe. The Council of Europe, and as a consequence the European Court of Human Rights, have five members, which geographically are either partially or totally in Asia. Both Russia and Turkey have the larger part of their territory in Europe and Armenia, Azerbaijan and Georgia are – according to a geographical definition – totally in Asia because they are on the south rim of the Caucasus range, which is supposed to separate Europe from Asia. As a consequence, the question of their participation in an Asian system of human rights protection can be legitimately raised. The question is pertinent because the Constitutional Courts of three of these countries (Azerbaijan, Russia and Turkey61) are indeed members of the Association of Asian Constitutional Courts and Equivalent Institutions and the Seoul Communiqué calls upon the participating Asian Courts to promote discussions on the establishment of an Asian Court of Human Rights.

The question that arises is whether countries already covered by the European Convention on Human Rights, should join another regional human rights protection mechanism. In 1998, the Venice Commission had the opportunity to pronounce itself on a similar issue when it was asked to give an opinion on the legal problems arising from the coexistence of the Convention on Human Rights and Fundamental Freedoms of the Commonwealth of Independent States (CIS) and the European Convention on Human Rights. Having established that the human rights protection resulting from the CIS Convention was more limited than that of the European Convention, the Venice Commission recommended for “those States which are members of the Council of Europe or candidates to become members, ratification of the ECHR is mandatory and the ECHR should have priority over other European systems for protection of human rights.”62)

4) Seat

Whenever an international body is set up, the question of its seat needs to be decided. The problem may be that several founding members wish to have the seat in their country. However, unless this is a very complex body, a single seat should be chosen.\(^{63}\)

Strasbourg was chosen as the seat of the Council of Europe and the European Court of Human Rights because of its symbolic value for the reconciliation between France and Germany after the war.\(^{64}\)

Of course a special responsibility comes with the seat and hosting such a body can also entail significant costs for the host country.

2. Scope ratione personae - the ultimate goal: individual access

The highest level of human rights protection can be achieved through individual access, even this can lead to a serious overburdening of the commission/court concerned. The question is not whether individual access is desirable – this is obvious – but whether it can be achieved from the outset. Originally, the European Convention provided for individual petitions only as an option for countries made a declaration of submission under the jurisdiction of the Court also for individual complaints under then Article 25 of the Convention. Protocol 11 to the Convention, which entered into force in 1998, removed this option and made the right of individual petition compulsory for all States parties to the Convention.

Like in Europe, it may be necessary to introduce individual access in Asia first as an option for States, which are willing to submit to such a jurisdiction. The result of such an option would be a system of variable geometry because not all States would have the same obligations. However, this may be the price to pay for establishing such a system in the first place. If however the number of founding countries remains small and if they are really like-minded, individual access should become the rule from the outset.

\(^{63}\) The European Union still faces this challenge. Often specialised agencies are established in member states, which do not host the main seat, for example the Fundamental Rights Agency of the EU has its seat in Vienna, Austria. Unfortunately, the dispute over the seat of the European Parliament – Strasbourg or Brussels – still bogs down this institution.

\(^{64}\) The proposal for Strasbourg was made by the then foreign minister of the United Kingdom, Sir Ernest Bevin (http://en.strasbourg-europe.eu/history,127,en.html, accessed 02/02/2015).
3. Scope ratione temporis

From the outset, it will also be important to avoid misunderstandings. An Asian system of human rights should be geared towards the future. The history of Asia includes dire periods of war with unspeakable atrocities having been committed. The collective memories of these crimes remain vivid and this history hampers dialogue in the region.\(^65\) Unresolved territorial disputes add to these historic tensions.\(^66\)

Dialogue about what has happened in the past is necessary and such dialogue should lead to more mutual understanding, but this may take time. However, past violations of human rights and the still open wounds should not prevent the establishment of a human rights protection system, which is directed towards a better future.

Therefore, in the process of establishing such a system, it may be necessary to set out clear rules that this system is applicable to future cases only. Otherwise, unresolved conflicts from the past might doom the common goal of establishing a regional human rights protection system.

4. Asian values

In the past, the concept of Asian values has unfortunately been advanced in order to contest the idea of universal human rights and to justify authoritarian rule.\(^67\) When I refer to Asian values, I do so by insisting on universal human rights as a minimum standard. Based on these universal standards, national and regional systems should provide additional rights.


\(^66\) E.g. disputes relating to the Senkaku Islands or the Spratly Islands.

but cannot derogate from the minimum standard. In this sense, Asian values can provide specific features of an Asian system of human rights protection and they can facilitate the acceptance and support of such a system by the people which it is to protect. In the process of establishing the system care should be taken that Asian values are understood as concept which is open to further development of human rights.

As seen above, each regional human rights mechanism has its specific characteristics. For example, when we compare judgments of the European and the Inter-American Courts, the European Court is certainly much more sober in its decisions, focusing on monetary compensation and general measures, which often involve legislative amendments. By contrast, the Inter-American Court often goes further and calls for symbolic measures like a public apology by the Government or the construction of a monument in memory of the victims.68)

In Asia, reference is often made to the Confucian notion of harmony: ‘the exemplary person pursues harmony (ho), not sameness’69). To outsiders it seems that this might provide a useful source for human rights protection. Maybe elements of reconciliation could be built into an Asian system of human rights in order to re-establish harmony.

Reference to such specific Asian values might facilitate the emergence of a regional consensus in the preparation of an effective Asian system of human rights protection. However, Asian values should while building on universal minimum standards.

5. Networking

In order to achieve the necessary impetus in the prospective participating (like-minded) countries, it is essential to ‘weave’ an effective multi-level network for the promotion of the establishment of an Asian human rights mechanism or court.

On the international level, it would seem essential to seek the support of the UN Office of the High Commissioner for Human Rights (OHCHR), which already supported the establishment of a human rights mechanism for the Pacific.70) Other Asian fora referred to in section II.5 above might be usefully included in the discussions.

On the governmental level, this networking exercise should include Constitutional and Supreme Courts, Ministries of Justice, Ministries of Foreign Affairs and interested Members of Parliament.

On the non-governmental level, it would be important to include human rights NGOs, universities and interested journalists, who can amplify the call for such a system.

There may even be commercial actors who are interested in a human rights mechanism in Asia, law firms or other private companies, and they may be willing to invest money in this project. Such contributions can make a difference but, of course, the other actors have to be on their guard to avoid that these commercial interests do not interfere with the goal of human rights protection.

Even if this may not be usual practice in all countries concerned, the success of this endeavour will also depend on an effective dialogue between the governmental and non-governmental actors.

### Conclusion

We have seen that establishing an Asian human rights protection system is a complex issue where many players need to interact. Various models exist in other regions, which all have advantages and disadvantages.

Geography seems to be the key for success. It is essential not to wait for a pan-Asian organisation to establish a Human Rights Court. A few like-minded should go ahead and make substantial commitments. Others who are hesitating at the beginning can join in at a later stage. Otherwise, the hesitant countries could slow down or even completely stop the progress of the more advanced ones. It is true; this would first be a Human Rights Court in Asia, which could later become an Asian Court of Human Rights.

Once again, the authors warmly welcome and support the initiative by President of the Constitutional Court of the Republic of Korea, Mr Park Han-Chul, to propose the establishment of an Asian Court of Human Rights.
Partners in Justice?
- Fostering dialogic ties between Asian highest courts and a future Asian Court of Human Rights

Maartje de Visser*

I. Introduction

Addressing the press at the culmination of his visit to the Vietnamese president in the spring of 2015, UN Secretary Ban Ki-moon remarked that the country’s stint on the Human Rights Council would place it “in an ideal position to demonstrate its commitment to human rights by working to improve its own domestic human rights record”.1) There has in fact been a growing rights consciousness in Asia in the past years, evident on the social as well as the political plane. New or amended constitutions adopted by States in the region devote considerable attention to the entitlements and liberties of individuals on their territory,2) using language that is often reminiscent of that found in international covenants. In line with the global trend of strengthening the position of courts as favoured triadic dispute resolvers, the enforcement of domestic fundamental rights is increasingly entrusted to judges and we have seen the creation of new judicial institutions, such as constitutional courts, across Asia to aid this cause.3) In addition to the work done by well-known NGOs, home-grown movements and civil society actors have become more vocal in demanding recognition of, and respect for, fundamental rights. Beyond such municipal developments, many Asian countries are today signatories to the principal UN human rights instruments4) and in 2009,

* Associate Professor, School of Law – Singapore Management University

1) UN Secretary-General, “Remarks at press encounter with President Trương Tấn Sang of the Socialist Republic of Viet Nam”, Hanoi (Viet Nam), 22 May 2015.
2) See e.g. Wen-Chen Chang and Jiunn-Rong Yeh, ‘Internationalization of Constitutional Law’ in Michel Rosenfeld and András Sajó (eds), The Oxford Handbook of Comparative Constitutional Law (Oxford University Press, 2012) p. 1167-8.
3) See e.g. Andrew Harding and Penelope Nicholson (eds), New Courts in Asia (Routledge, 2010).
the Association of Southeast Asian Nations (ASEAN) took a first step towards a regionalized rights system with the setting up of the ASEAN Intergovernmental Commission on Human Rights (AICHR).5)

On this account, the present project undertaken by the Korean Constitutional Court to explore the creation of an Asian Court of Human Rights (ACHR) can be the next step in the (inexorable?) advent of fundamental rights and showcase the region’s growing human rights maturity. Assuming that this initiative comes to fruition, it would further mean that Asia too – like other regions – would have its own human rights court with presumably a dedicated Asian convention on fundamental rights. At the same time, it must be recognized that any such judicial system would mark a significant shift in the manner in which external fundamental rights scrutiny is practiced. On that note, the challenge of generating sufficient political support looms particularly large, also bearing in mind the tendency of Asian nations to jealously safeguard their sovereignty and their attachment to the idea of non-interference in each other’s domestic affairs. There are also several pressing legal questions that must be resolved, whereby the answers to some of these may make an ACHR either more or less politically palatable. This is notably the case for decisions regarding the jurisdiction and competences to be attributed to the court.

This contribution will however not engage with these threshold questions, but is instead devoted to one aspect of the ACHR’s eventual operation: its relationship with highest courts (understood to denote both supreme and constitutional courts) in the would-be contracting States. My reasons for doing so are twofold. The obvious importance of the scope of the court’s powers and remit means that these topics will receive ample academic scrutiny and will, in due course, also be at the centre of political negotiations. Less attention is likely to be devoted to issues that will only come into sharper relief once the ACHR has duly come into existence. It is suggested, however, that it is misconceived to believe that such issues can safely avoid the limelight until that time. The aim is not the creation of a regional judicial regime as such, but rather the contribution that such a mechanism can make to “enhance

---


human rights protection in the region”.

Whether victims of rights infringements and others will perceive the ACHR as a credible player in this regard will be determined mainly by its actual functioning; this is not simply a factor of political agreement as to its establishment. Put differently, casting our eye to ‘implementation’ issues reduces the risk of the courts and its advocates being caught unaware by impediments that, if they had been recognized in good time, could have been alleviated or managed.

II. Approach

For reasons of time and space, I have decided to focus on a single implementation issue and analyse this in some depth, with due attention to possible prescriptions: proceeding in this manner seems more useful than simply drawing up a laundry list that stakeholders would do well to think about as they take planning for an ACHR forward, without providing concrete guidance on how to do so. As mentioned, this contribution is dedicated to an examination of inter-court ties. The claim advanced here is that the development of good working relationships that genuinely have a dialogic character (a notion that will be elaborated below) is important for the effectiveness and popular legitimacy of an ACHR, and that every effort should accordingly be made to foster such relations at the earliest opportunity. The Association of Asian Constitutional Court and Equivalent Institutions (AACC) can be a useful mediator in this regard.

To cater for the fact that the topic under investigation is in a pre-embryonic stage, I proceed on the basis of certain working assumptions, while acknowledging that if these do not materialize fully, the recommendations elaborated below may similarly need to be tweaked to correspond to a different legal reality. First, and in line with the approach taken by the Korean constitutional court, I assume that the regional body to be created will be judicial in nature. There should thus be a considerable degree of similarity in terms of institutional role and design between this regional court and national最高 courts, which will make the case for developing cross-jurisdictional relations appear more natural and easier to those involved. This contribution further proceeds on the basis that the ACHR will be able to hand down decisions that bind the State involved as a matter of international law.

Finally, taking the professed aim of enhancing human rights protection seriously would mean that victims are given the right to petition the ACHR directly, and that the bulk of the work to be done by this body consists of adjudicating individual-State disputes as opposed to inter-State cases.

Regional human rights systems that more or less operate along those lines exist in Europe, the Americas and Africa. Among these, the European mechanism is the oldest and most sophisticated, and its long experience with operating quite successful inter-court relations will have particular educational value for those designing an ACHR. Many of the points developed in this contribution will accordingly be supported with reference to the practice of the European Court of Human Rights (ECtHR).

In what follows, I commence by explaining the importance of investing in cultivating a true partnership between an ACHR and courts located at the apex of national judicial orders. Next, I identify various design options geared towards this objective, whereby I cover channels that range from the formal and institutionalized to the personal and case law based. I conclude with some observations on the role that the AACC, as the region’s most well developed forum for horizontal relations among apex courts inter alia responsible for fundamental rights protection, can play in this regard.

7) The third working assumption does not fully hold for the Inter-American and African systems, where individuals have the possibility to petition a regional human rights commission. Only the Commission and contracting States are competent to subsequently request that the case also be considered by respectively the Inter-American or African Court on Human Rights - individuals thus have at most ‘indirect’ access to these judicial institutions.

8) See www.echr.coe.int.


Ⅲ. The case for good inter-court relationships

1. The procedural context

Much like its counterparts elsewhere, an ACHR will offer subsidiary rights protection. Access to this judicial organ accordingly presupposes that victims have sought, and failed to obtain, redress for their grievances at the domestic level. This is the well-known ‘exhaustion of local remedies’ requirement11) and normally means that victims must have challenged the objectionable conduct of the public authorities in the municipal courts. Once the case is taken outside the national legal system and brought before the ACHR, the applicant will argue that the national courts are complicit in the breach of his fundamental rights by failing to provide relief for the executive or legislative action that first led him to initiate proceedings. In effect, an ACHR will thus be asked to determine whether the last domestic court – typically the country’s supreme or constitutional court – to adjudicate the issue has struck the right balance between two competing rights or correctly defined the meaning and scope of a specific right. As such, interaction between national highest courts and an ACHR is an inherent structural feature of a regional human rights system designed in accordance with the assumptions set out above.

2. The practical relevance of inter-judicial liaisons for individuals and the ACHR

Now, what is the practical relevance of good inter-judicial working relations? From the perspective of affected individuals and others alleging breaches of their fundamental rights, such relations can result in better protection. This is not because victims would be provided with another opportunity to plead their case after they have failed to convince the domestic courts of the merits of their claim – although this is of course a potent way in which a regional human rights institution can enhance individual protection. The point is more nuanced and takes its cue from the idea that infusing multiple perspectives in legal interpretative exercises is likely to improve the understanding of the legal issue at stake. When adjudicating rights cases, national judges are regularly faced with questions that are

11) See e.g. Art. 35(1) ECHR and Art. 46(1)(a) ACHR.
not conclusively answered by the text to be applied – concerning, for example, the outer reaches of a right (like the point at which offensive expression crosses from protected free speech into the realm of racist hate speech) or the application of established rights to novel situations. The availability of an international court that is similarly committed to rights, but offers an independent analysis of the reading that such rights ought to be given, helps to expand the argumentative terrain. It has been noted that courts might have different approaches to the law “which are grounded in their different institutional roles and positions in the overall system”.\textsuperscript{12} The ACHR will be expected to review State action in light of fundamental rights to the exclusion of other functions that national highest courts can perform and that could impact on their approach to rights adjudication. In a related vein, the greater proximity to relevant economic, political and social factors for the latter may also shape their decision-making in this area in a way that is unlikely to be mirrored exactly in ACHR case law. By engaging with one another, national courts as well as the ACHR may learn about additional arguments not thought of by those within their own system or arrive at new solutions that could even involve legal innovation in the fundamental rights domain. Such insights could result in courts recognizing that they have been too restrictive or critical in adjudicating certain claims, thereby eventually securing more human rights protection. For the national courts, additionally, even if no substantive volte-face is deemed proper, knowing that a regional court may be called upon to re-adjudicate a case that has previously percolated through the national legal order can motivate national courts to be more explicit about their underlying motivations in their reasoning – which is good from the viewpoint of accessibility and transparency of judicial decisions – and lead them to emphasize legal principles over policy concerns, which might advance perceptions of judicial independence.

The second reason that can be given to support inter-court relations refers to the legitimacy and effectiveness of the ACHR and the fundamental rights text that it interprets in final instance. A 2011 report on the ECtHR poignantly explained the importance of legitimacy for a regional judicial institution:

\textbf{“[I]t does not have enforcement or sanctioning powers. Furthermore, its main task is to judge the actions of exactly those state authorities upon whose support it relies to enforce its judgments. Thus, it primarily relies on its legitimacy to gain respect and deference from domestic judges and}\n
politicians. Individual applicants turn to the Court because they trust that domestic actors perceive it as a legitimate institution and will therefore enforce and respect its judgments.”[13]

National courts can play a prominent role in this regard in light of the exhaustion of local remedies requirement. Under the ECHR, for instance, States are expected to ensure that such local remedies are effective[14] – that is to say, to ensure that fundamental rights are upheld within the domestic legal order so that there is no longer any need for victims to take their case to the international level. Ideally, then, a regional human rights regime should operate in an integrated fashion across different levels of governance, whereby ACHR judgments and the related regional fundamental rights text are used (in one way or another) at the domestic level and become part of the national fundamental rights consciousness. When national courts do so, they enhance the impact of the regional human rights system, which would not enjoy a reputation as a last-ditch avenue for lawyers to suggest to their clients, of interest only after the (often long) national route has proven unsuccessful, but considered as working in a symbiotic fashion with the domestic regime. They also boost familiarity with an ACHR, its rulings and its dedicated rights text among national audiences, which may entice potential applicants to turn to the court in sufficiently great numbers for it to actually churn out a comprehensive body of case law that in turn allows it to show stakeholders that it is delivering performance-wise. Courts in monist States – such as South Korea, Japan, Sri Lanka, Timor Leste, Cambodia and the Philippines – may find it easiest to act as an ACHR’s allies on the domestic plane along the lines just set out.[15] Yet even in dualist States like Singapore, Thailand, Indonesia and Vietnam, that require additional steps in the form of incorporation or transformation to make regional human rights norms part of the municipal order, national courts can make a useful contribution by pursuing a strategy of indirect incorporation, whereby domestic fundamental rights provisions are interested in light of the regional instrument and relevant ACHR rulings.


[14] Art. 13 ECHR and see also Art. 1, charging the contracting States to “secure to everyone within their jurisdiction the rights and freedoms defined in [the ECHR]”.

[15] I acknowledge that the precise status of ACHR rulings and the regional fundamental rights text in the domestic hierarchy of norms may not be the same across the board for monist countries.
3. Embracing dialogue

Yet it is not sufficient for contact among domestic apex courts and an ACHR to take place; for it to be considered worthy of the epithet “good”, it is suggested here that such contact ought to exhibit the characteristics of a genuine dialogue. This assumes that the participants recognize each other as equal partners, with all sides expected to contribute to a constructive exchange of viewpoints and take something home from that exchange. A dialogue, then, is infused with egalitarian values, premised on argumentative rationality and ideally geared towards finding a mutually acceptable understanding of fundamental rights.\textsuperscript{16} There is, in short, a Habermasian quality to this type of interaction. This requires that national courts cogently articulate any concerns that they believe should be taken into account by an ACHR when it decides cases coming from their jurisdiction, why they have given a specific fundamental right a certain interpretation or why they consider that deference to this national (constitutional) approach is warranted. In this manner, municipal courts provide valuable input in defining the content and scope of regional fundamental rights. For its part, an ACHR ought to be responsive to such concerns in its judgments and show how it has balanced these against other considerations in reaching a specific interpretative outcome. This is a point that will be revisited later.

\textbf{IV. Designing for dialogic working relations}

There are a number of strategies that can be pursued to further the eventual flourishing of dialogic working relations amongst ACHR and national apex courts. As will become clear, some of these can be put in place when designing the regional judicial organ, whereas others can only be implemented once the latter has commenced its operations.

\textsuperscript{16} This does not necessarily mean that every court needs to adopt the exact same view: a mutually acceptable solution can also consist of a shared view on when there is room for national diversity and the extent of such diversity.
1. Institutionalizing a direct procedural link between the national and regional courts

An obvious way to encourage inter-court relations is to forge a formal and direct procedural link between national courts and an ACHR in the relevant legal instruments. This has happened recently within the ECHR system through Protocol 16.\(^{17}\) Given the focus of this contribution, it should be pointed out that the ECHR procedure has been explicitly conceived and designed to strengthen the dialogue between the ECtHR and national courts.\(^{18}\) The hope is that this in turn will augment awareness and the correct administration of the ECHR at the national level, with all the benefits that such an outcome should yield in terms of better protection of rights and resource-savings. As of this writing, the Protocol has not yet entered into force, which means that there is no evidence as to its precise functioning and impact.\(^{19}\) Having said that, a perusal of the text of the Protocol and related documents offers ample insights for the design of an equivalent procedure within an ACHR regime.

The core features of the Protocol 16 procedure are as follows. Competent courts can refer “questions of principle relating to the interpretation or application” of the fundamental rights enshrined in the ECHR.\(^ {20}\) Such questions must relate to a specific case pending before them; the procedure cannot be used to solicit the ECtHR’s view on hypothetical or abstract questions.\(^ {21}\) To enable the latter to verify that this precondition has been met,

---


18) Cf. the preamble to Protocol 16. See also the observations by the then-president of the ECtHR, Dean Spielmann, ‘Judgments of the European Court of Human Rights: Effects and Implementation’ (keynote speech at the conference at the Paulinerkirche Göttingen, Georg-August University, 20 September 2013); and the High Level Conference on the Future of the European Court of Human Rights, Brighton Declaration, para. 12 (19-20 April 2012), available on the ECtHR’s website. A second aim of the procedure is to ease the ECtHR’s workload: with national courts able to solicit the ECtHR’s views during the domestic proceedings, they would be able to ensure satisfactory protection of fundamental rights at that stage, making subsequent proceedings at the international level superfluous.

19) For this to happen, ten States must have ratified the Protocol, cf. Art. 8(1). As of this writing, six have done so.


national courts are required to set out their reasons for making a request and provide the relevant legal and factual background of the dispute. 22) A further limitation is that only the highest courts and tribunals within a jurisdiction can be vested with the power to request the ECtHR’s guidance – and it is for each contracting State to decide which judicial organs qualify in this regard. 23) The exclusion of lower courts has been justified by the drafters as consistent with the exhaustion of remedies requirement and as reflecting “the appropriate level at which the dialogue should take place”. 24) Within the ECtHR, the Grand Chamber comprising 17 judges (rather than the smaller Chambers that decide many of the contentious cases brought to the Court) is given responsibility for delivering the advisory opinion. 25) The judge elected by the State from which the request emanated will be part of this Grand Chamber, 26) presumably to help ensure that the ECtHR’s opinion is duly cognizant of the relevant national legal setting and his presence may enhance the acceptability of the opinion for the requesting court. This is important also because the Protocol states that opinions handed down by the ECtHR “shall not be binding”, 27) although they undeniably will have (considerable) legal effects. 28) This is because such opinions will “form part of the case-law of the Court [and the] interpretation of the Convention and the Protocols thereto contained in such advisory opinions would be analogous in its effect to the interpretative elements set out by the Court in judgments and decisions.” 29) To be clear, depending on the manner in which a national court has framed its request, advisory opinions – much like judgments – can consist of two ‘elements’. On the one hand, the ECtHR can formulate general standards or criteria that should be considered in deciding on the scope and meaning of a given fundamental right; these are the ‘interpretative elements’ referred to just now. Failure to heed such general observations arguably qualifies as a violation of Convention obligations.

22) Ibid, Art. 1(3).
23) Ibid, Art. 1(1) read together with Art. 10.
26) Ibid, Art. 2(3).
28) A similar position has been adopted by the Inter-American Court of Human Rights in relation to its advisory opinions, see Reports of the Inter-American Commission on Human Rights, Advisory Opinion OC-15/97, Series A. No. 15, para. 26.
29) Explanatory Report to Protocol 16, para. 27. In recognition of this fact, the President of the Court may invite States other than that to which the requesting court pertains to submit written comments or participate in any hearing.
On the other hand, the Court could also suggest how the ECHR ought to be applied to the facts of the case: such recommendations are not envisaged to commit the national court, which may for instance attribute a different weight to the fundamental rights involved. The Explanatory Report further clarifies that the parties to national proceedings in relation to which the ECtHR has delivered an opinion are not prevented from subsequently petitioning this institution to review their case. This is understandable: the alleged victims are not envisaged to have any control over the manner in which the national court has framed the request; the latter may implement the Court’s advise incorrectly or, as just explained, even choose to disregard its opinion on how the Convention should be applied in the case. The expectation, however, is that those aspects of the complaint that have been dealt with by the competent national court in line with the views expressed by the ECtHR, will “be declared inadmissible or struck out” to avoid duplication of work.

A noteworthy feature of the procedure is the considerable amount of discretion for all the actors involved. The Protocol is facultative, meaning that the States party to the European system are not obliged to accede to it. Those domestic courts designated as entitled to use the procedure can choose whether to do so at all, and if so, at what stage of the proceedings they request an opinion (although this will happen before a final decision is adopted, hence the characterization of this procedure as a preliminary reference procedure). For its part, the ECtHR is free to decide whether to accept a request, although it must give reasons for any refusal to do so in a further effort to “reinforce dialogue between the Court and national judicial systems”.

It is suggested that in many respects the design of the ECHR preliminary reference procedure offers a suitable template for a similar mechanism within the context of an ACHR regime, although some deviation is called for to boost the impact of this procedure. Thus, it would be prudent to grant only national apex courts the competence to refer preliminary questions to an ACHR. This should help prevent unmanageable numbers of requests, with attendant resource problems and inevitable delays in the delivery of advisory opinions. It moreover means that an ACHR will only become involved towards the conclusion of the national judicial debate. At that juncture, the relevant legal issues and related arguments will have crystallized and a nation’s supreme or constitutional court(s) can be presumed to have a more comprehensive understanding of the challenges involving in giving effect to

31) Protocol 16, Art. 2(1). Decisions to accept or reject a request are made by a five-member panel.
fundamental rights. As a consequence, an ACHR can be presented with a clear account of what is at stake, which in turn can help it craft an answer likely to be considered useful and appropriate by the requesting court. This is notably relevant for preliminary requests concerning the interpretation of fundamental rights provisions, in contrast to those querying the application to the case at hand – and it is to be expected that there will be a great many questions of that nature in the first years of an ACHR’s operation. When these national courts subsequently decide the dispute with reference to the general interpretative standards formulated by an ACHR, they are able, by virtue of their position within the municipal judicial hierarchy, to aid the percolation of those standards within the municipal legal order much better than lower courts would be able to. This is so not only in common law jurisdictions with their doctrine of stare decisis. In civil law systems too, rulings delivered by supreme courts are de facto attributed considerable force by lower-level judges and more likely to be discussed in legal scholarship, thereby raising awareness of an ACHR’s interpretations among the judicial community, while decisions of constitutional courts are often stated to be legally binding for all State authorities, other courts included. Finally, reserving the right to request advisory opinions to highest courts signals to these institutions that their special status on the domestic plane is duly recognized. From a judicial mentality perspective, this may very well make those courts more amenable to use their privileged means of direct communication with an ACHR and actually provide it with a steady supply of requests for advisory opinions.

The requirement that the request must relate to a specific case can be defended on the ground that allowing an ACHR to answer a hypothetical or purely theoretical question is a waste of judicial resources, not least because the issue may subsequently ‘concretize’ in a way different from that envisaged by the national court, thus calling into question the relevance of the ACHR’s answer. In a similar vein, giving it discretion to accept requests enables an ACHR to allocate its necessary finite resources among its advisory and contentious jurisdiction so as to best achieve its overall aim of enhancing the protection of fundamental rights. It will also be able to decline requests for opinions when it perceives that the requesting court is acting strategically, trying to get an ACHR to decide a (politically) sensitive issue in its place and simultaneously take most of the blame if the national legislative or executive authorities disagree with the outcome.

Yet, as alluded to, an ACHR preliminary reference procedure should not be an exact carbon copy of the European version. Two deviations in particular merit consideration. First, a formal avenue linking national courts and an ACHR should be part of the regional
human rights regime from the outset, rather than grafted onto the system at a later point in time. This signals that direct dialogues are an expectation; their occurrence represents normality and national judicial attitudes towards an ACHR should *ab initio* develop accordingly. The alternative approach results in unnecessary adjustment costs and carries risks with it. The inevitability of having to interact with an ACHR entails that national highest courts will find ways of doing so, even if none are formally provided for. The subsequent introduction of a direct procedural link means that national courts will have to modify established patterns of judicial behaviour, with all the institutional and mental investment that this entails. They may be reluctant to make such a change and there could be a slower and more limited take-up of the direct channel for dialogue as and when it is added to the regime. This would be unfortunate: dialogues are easiest to conduct and most effective in determining the correct or preferred solution from among a range of alternatives when the participants engage with one another directly. If the Asian States participating in a regional human rights regime are in agreement that inter-court dialogues are indeed important and useful, in line with the reasons set out in the preceding section, then they ought to make sure that their original design of the regime duly reflects that view.

Secondly, and for similar reasons, a preliminary reference procedure should not be facultative, a mere optional add-on to an Asian rights regime should a country be so inclined. Rather, such a procedure ought to be an integral element of the system that States must accept when agreeing to accede to an Asian fundamental rights convention and accept the jurisdiction of the associated judicial institution. This further provides national apex courts in all the contracting States with equal opportunities to directly forge a partnership with an ACHR. This might keep judicial perceptions of being ‘left out’ or not being part of the ACHR’s inner circle at bay. Moreover, the States themselves stand to benefit as well, as their courts could directly explain relevant national concerns and fundamental rights standards in their request for advisory opinions, which could in turn shape the approach to regional fundamental rights adopted in ACHR case law.

2. The ACHR’s composition

Another issue that the contracting States may wish to consider when fashioning the ACHR’s institutional arrangements concerns its composition. By virtue of its character as
an international judicial institution, it is to be expected that the participating countries will want to exercise considerable if not full control over the nomination and appointment procedure. At the same time, they ought not to have unbounded discretion when it comes to the choice of candidates. It is important for prospective judges to have certain qualifications in terms of skills or knowledge that can positively contribute to the Court’s performance of its functions, with expected knock-on effects on its reputation among its interlocutors.

A brief examination of the European and Inter-American fundamental rights regime reveals the following. Candidates for a position on the ECtHR should “be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognized competence.” The Statute of the Inter-American Court of Human Rights has a more demanding set of eligibility criteria: judges are to be selected “from among jurists of the highest moral authority and of recognized competence in the field of human rights, who possess the qualifications required for the exercise of the highest judicial functions under the law of the State of which they are nationals or of the State that proposes them as candidates.”

These criteria provide useful guidance for drafters in regulating an ACHR’s make-up. Insisting on individuals with strong moral fibre seems opportune in light of the Asian Court’s mandate to uphold fundamental rights. The conception of an ACHR as a judicial institution should be reflected in the requirement of meeting the conditions stipulated in domestic law for elevation to domestic superior or apex courts. This should ensure that an ACHR has the necessary technical legal expertise, which is crucial if the ACHR is to operate as a serious law-based institution that places legal reasoning and principles at the heart of its work. What is more, such a requirement may induce States to look to current or former judges on those courts as natural candidates for appointment to an ACHR. The presence of seasoned judges that hail from the various contracting States can be instrumental in fostering a good *modus vivendi* between municipal judiciaries and a regional fundamental rights court, thereby contributing to the realization of the overarching claim advanced in this contribution. Such ACHR members will be intimately familiar with the workings of the various national judicial and legal systems and can explain national concerns or idiosyncrasies to others on the bench. While they will be expected to discharge their

33) Cf. e.g. IACHR Statute, Art. 7; ECHR, Art. 22; Protocol to the ACHPR, Art. 12(1).
34) ECHR, Art. 21(1).
35) IACHR Statute, Art. 4(1).
mandate independently, the perception among the municipal judiciary that ‘one of their own’ is on the ACHR bench can enhance their willingness to request advisory opinions and take account of ACHR case law in their own decisions. Further, after their stint on the regional court has come to an end, those judges could be particularly effective ‘missionaries’ of the regional fundamental rights regime in their home jurisdiction, by raising awareness of ACHR rulings and generate a pro-ACHR sentiment. These same considerations militate in favour of having (at least) one judge from each contracting State on the ACHR bench, in line with the rules governing the ECtHR’s composition.

In addition, the drafters are advised to replicate the IACHR criterion that new judges possess “recognized competence in the field of human rights”. Having such knowledge should mean that the ACHR bench is well equipped to assess whether the considerations advanced by the parties before it or a national apex court requesting an opinion are compelling. Its members can also be expected to write judgments or advisory opinions that are cogent and of high quality as far as the interpretation of fundamental rights is concerned. It could be ventured that contracting States will consider sufficient familiarity with fundamental rights when deciding who merits a seat on the ACHR even in the absence of a specific instruction to do so. That may well be so, but even then making this an explicit requirement would do no harm. In a somewhat more controversial move, the drafters may further wish to consider putting in place an international panel to carry out a vetting exercise in this regard and prepare an (confidential) advisory report for the benefit of the State concerned. Such a panel could comprise sitting or retired ACHR judges and senior members of national highest courts. The former would have a thorough understanding of who would

36) In line with practice at similar regional judicial institutions, appointments are likely to be for a fixed period of time rather than for life. Judges at the ECtHR hold office for a non-renewable term of nine years (ECHR, Art. 23(1)); their counterparts at the IACHR are elected for a term of six years and may be re-elected once (IACHR Statute, Art. 5(1)). The African Court on Human and Peoples’ Rights (ACHPR) also follows the latter approach, Protocol to the ACHPR, Art. 15(1).

37) ECHR, Art. 20. The IACHR comprises only seven judges, while there are 25 contracting States. Having a larger bench can also help in ensuring that the Court has ample manpower to discharge its functions in a timely manner, which will be particularly relevant if individual applicants are given the right to bring cases directly to the ACHR.

38) Similar requirements are applicable to ACHPR judges (Protocol to the ACHRPR, Art. 11(1)) and to the members of the Committee responsible for monitoring States’ compliance with the International Covenant on Civil and Political Rights (ICCPR), which must be composed of “persons … [with] recognized competence in the field of human rights” (Art. 28(2) ICCPR). Recall that most Asian States have acceded to this Covenant.
make a good ACHR judge, while the involvement of the latter can be seen as a further measure to inspire confidence in the Court’s credentials among its counterparts on the domestic plane.

3. Techniques of judicial decision-making

Having canvassed several institutional design strategies that States and their draftsman would be advised to pursue, I now turn to decision-making techniques that an ACHR can employ to stimulate dialogic interactions with national apex courts. I will discuss two such techniques in this section: the adoption of a discursive reasoning style and the use of a margin of appreciation doctrine in appropriate cases.

First, an ACHR ought to craft its decisions such that readership can easily identify the different arguments that it has considered and understand why it has dealt with them in the way that it did. It should, in other words, be explicit about the underlying reasons that support its holding. This not only makes it easier for national (highest) courts to correctly apply ACHR case law. It also incentivizes them to explain in their own judgments or requests for an advisory opinion what interpretation ought to be given to the fundamental right(s) at stake, as they would be entitled to assume that an ACHR will be responsive to such views in its judgment. This can become an opening volley in an indirect ‘dialogue-through-case-law’. The very logic of a regional fundamental rights system means that there will be instances where an ACHR arrives at an outcome or proposes an interpretation of a fundamental right different from that preferred by a national constitutional or supreme court. This can prompt the latter to articulate, in a subsequent decision, why it believes that the ACHR ruling should be reconsidered or clarified, in effect sending it a ‘message’. National apex courts may for instance consider that the ACHR has misunderstood national law or failed to appreciate a specific characteristic of the domestic legal system; likewise, they may have a different opinion on where the balance should be struck between two competing fundamental rights that are both deserving of protection. The position and arguments from the national courts can in turn be considered by the ACHR in some other case raising the same issue. Its judges may, upon reflection, agree with those national arguments and adjust their case law accordingly or explain why they have, on further analysis, decided to reject the views and concerns voiced by the national court. There are multiple instances of successful dialogues-through-case-law in the practice of the ECHR.
regime, with either national apex courts or the ECtHR modifying its original position in a process of mutual accommodation.39) The use of discursive reasoning by an ACHR, then, can be an effective tool of ‘soft’ conflict management.

To buttress this technique of judicial decision-making, ACHR judges ought to be given the possibility of delivering separate opinions. This is also the practice in the European and Inter-American fundamental rights regimes.40) While unitary rulings may give a greater sense of legal certainty and consistency, the fact that a bench of multiple judges need to speak with a single voice may detract from the persuasiveness of the decision, as the judges may agree on the end result, but not on the underlying reasons, which accordingly might not make their way into the final text. Separate opinions can further function as a harbinger of future change, thereby encouraging national courts to continue to engage with the ACHR in the hope of the minority view being embraced by the majority when the issue is again placed before this judicial institution.

Secondly, an ACHR would be well advised to develop doctrines that allow it to show deference to national (judicial) determinations or characteristics. This could for instance take the form of a ‘margin of appreciation’ doctrine. Practiced inter alia by the ECtHR, such a doctrine grants the contracting States and their organs a certain room for manoeuvre in giving effect to their commitments under an international fundamental rights regime. At the same time, as pointed out by the ECtHR in the locus classicus on this doctrine, the “[domestic] margin of appreciation given both to the domestic legislator and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force ... goes hand in hand with a European supervision.”41) A similar doctrine would allow an ACHR to acknowledge and accommodate national variations in cultural and social conditions, and could be particularly useful when it is asked to rule on issues that touch on areas where there is little common ground among the States.

Now, a margin of appreciation doctrine needs to be sufficiently nuanced and multi-faceted to cater to the diversity of situations where its application might be appropriate, and also requires a court to give some indication of the circumstances that

39) See e.g. BVerfG, 1 BvR 653/96 (1999); Von Hannover v Germany, App no 593200 (ECHR, 24 June 2004); BVerfG, 2 BvR 1481/01 (2004); Von Hannover v Germany (No 2) App nos 40660/08 and 60641/08 (ECHR, 7 February 2012).
40) ECHR, Art. 45(2); IACHR Statute, Art. 24(2).
41) Handyside v UK, App no 5493/72 (ECHR, 7 December 1976), para. 49 and see also Protocol No. 15 to the ECHR, Art. 1.
would justify reducing, or conversely expanding, the amount of deference to be accorded to State authorities. The richness of a deference doctrine means that it may be difficult (and even counter-productive) for the ACHR to provide a detailed formulation of the margin of appreciation doctrine with fixed criteria governing its application at the outset. Rather, this should be a feature of its decision-making the contours of which become progressively clearer only as its body of case law expands.

In a related vein, an ACHR may wish to practice restraint in substituting its views for those of national highest courts in cases where the latter have carefully and comprehensively analysed the alleged fundamental rights infringement with due attention to earlier ACHR pronouncements. This would not mean that the ACHR always habitually ‘rubberstamps’ the decisions of national apex courts, but is rather a plea to show respect for their rulings such as when the outcome “is on its face reasonable and not arbitrary.”

4. The personal dimension: official visits and other face-to-face gatherings

For both direct and indirect dialogues to flourish, good inter-personal contact is important. Knowing the actual people responsible for delivering judgments ‘on the other side’ fosters trust and respect, thereby reinforcing the idea of the national courts and ACHR as partners in the common enterprise to enhance respect for fundamental rights across Asia. The ACHR would accordingly be advised to invest in good personal relations with the highest municipal courts. It can do so in a variety of ways. To start with, it can invite delegations from senior national courts to its premises and pay official visits to the contracting States to meet members of the apex courts of these countries. Such bilateral meetings will be useful in enabling the ACHR to dispel any misunderstandings about its decisions, while national judges are provided with the opportunity to give “an input into the process of developing jurisprudence [at the international level and] explain where the shoe pinches most and how the new jurisprudence can best be absorbed into their own system”.

In addition, the ACHR may wish to organize seminars or conferences on a regular basis


43) This phrase was used to describe the objectives that personal contact between the ECtHR and national judges may achieve by Lady Justice Arden in her speech delivered during the 2010 Dialogue between Judges on the topic “The Convention is Yours” (available on the ECtHR’s website).
that bring representatives of the highest courts in all contracting States together to discuss an issue of common interest pertaining to functioning of the regional fundamental rights regime. The ECtHR has been doing so for slightly more than a decade now, with considerable success.\textsuperscript{44)} On the occasion of the opening of the new judicial year, it invites the presidents of the constitutional and supreme courts and other senior judicial figures from across Europe to participate in a one-day ‘Dialogue between Judges’. Each such ‘Dialogue’ follows the same format. A small steering committee within the ECtHR decides on the theme and prepares a background paper to frame the discussion. This paper is circulated to those members of the ECtHR and judges of senior national courts that are asked to deliver speeches setting out their views on the selected topic during the actual gathering, after which the floor is opened for discussion among all participants. Topics on which national and ECtHR judges have exchanged ideas and arguments include ‘how to ensure greater involvement of national courts in the Convention system’; ‘the role of consensus in the system of the ECHR’; and ‘implementing the ECHR in times of economic crisis’; and ‘confronting large-scale violations of human rights’. The proceedings of these events are recorded and made available on its website, together with the text of the speeches and the backgrounder. This is to be welcomed, both for reasons of transparency vis-à-vis the public at large and in enabling those judges unable to join the proceedings to get acquainted with the views expressed in relation to the topic under discussion.

V. The AACC as a valuable supporting actor

In cultivating ties with senior national courts, the ACHR could usefully liaise with, and leverage on, the work already undertaken by the Association of Asian Constitutional Courts and Equivalent Institutions (AACC). Launched in 2010, this is a formal network of judicial institutions that exercise constitutional jurisdiction that aims to foster respect for the bedrock constitutional values of fundamental rights, democracy and the rule of law. It presently has 16 members that hail from each of the sub regions recognized by the UN statistical division for Asia\textsuperscript{45)} and it has been candid about its ambition to become a


\textsuperscript{45)} I.e. Indonesia, Malaysia, Mongolia, the Philippines, Thailand, Uzbekistan, South Korea, Azerbaijan,
well-established and truly pan-Asian association of courts with responsibilities inter alia in
the domain of fundamental rights. In fact, in the Istanbul Declaration, adopted at the
culmination of its second congress, the AACC members affirmed that “protection of the
rights of individuals, socially disadvantaged and vulnerable groups should be given
priority” and noted that “the state organs using public power should refrain from trespassing
the limits of fundamental rights and freedoms”. There should, accordingly, be a clear
concordance in objectives between the AACC and an ACHR, making some form of
 collaboration both natural and mutually beneficial. The former’s Statute appears to permit a
couple of ways in which this can take shape. The AACC is expected to “enter into
 cooperation with organizations related to constitutional matters as deemed necessary” and
this would allow for the conclusion of an MOU with the ACHR along the lines of the
2012 cooperation agreement between the AACC and the Venice Commission. An even
closer working relationship could be achieved by the ACHR applying for observer status,
which would give it the right to participate in all AACC activities and meetings.

It is suggested that the AACC can perform two functions to buttress the work of the
ACHR. First, it can be instrumental in cultivating personal contact and thereby help build,
and strengthen, an epistemic community of Asian fundamental rights judges. Its biennial
congresses and summer schools extend the range of events where national and ACHR
judges can meet beyond those that may in due course be organized by the regional court
itself. For optimal results, the AACC and ACHR should coordinate the scheduling of
multilateral seminars or conferences so as to avoid overlapping dates. If resources and
judicial calendars would permit, the AACC could even explore implementing other formats
for personal meetings, such as the organization of transnational judicial exchanges.

Second, the AACC can be a useful conduit for the dissemination of information
pertaining to fundamental rights issues. This can be important notably in anticipation of the
launch of a regional fundamental rights system together with a dedicated judicial guardian.

Kazakhstan, the Russian Federation, Tajikistan, Turkey, Pakistan, Myanmar, Kyrgyzstan, and
Afghanistan.

46) Seoul Declaration, para. 4; Istanbul Declaration, para. 3.
47) AACC Statute, Art. 4(h).
49) For more discussion about this and other reform proposals, see Maartje de Visser, “We All Stand
Together: The Role of the AACCEI in Promoting Constitutionalism” (2016) 3 Asian Journal of Law
and Society 1.
As such, when deciding on the topic for its upcoming biennial congresses, the AACC could select a theme related to the design or functioning of such a regional structure. In so doing, it prepares the ground for the ACHR and directs the attention of its members to the fact that their working environment is due to undergo a significant change, with likely ramifications for the manner in which they discharge their mandate. By way of example, topics that are suitable for such preparatory biennial congresses include the exhaustion of domestic remedies requirement and other prerequisites to obtain access to the ACHR or the effect and execution of ACHR rulings. Since several current AACC members are located in countries that are party to the ECHR and its Court – such as Turkey, Azerbaijan and Russia – it would be sensible to invite these courts to share their experiences of operating under the possible ultimate control of a regional fundamental rights court. There is of course ample reason to also engage in knowledge-sharing as regards substantive rights issues, building on the recent practice of the AACC summer schools dedicated to discussing how participating courts interpret a given (set of) fundamental right(s). It would for instance be valuable to accumulate information on how the different national apex courts give effect to rights that are likely to be invoked by litigants before the ACHR (if the European experience is anything to go by, the right to a fair trial and freedom of expression would be prime candidates). Similarly, it might be useful to devote an AACC congress (or other meeting) to the identification of what are considered ‘live’ fundamental rights concerns in the would-be contracting States or an inventory of aspects that national senior courts consider to be part of their country’s constitutional identity and hence worthy of sufficient respect and deference by a regional court.

The AACC may further wish to consider aiding these accumulation-of-information-efforts by setting up a database that holds files on (landmark) national fundamental rights rulings. This should ideally be done prior to the establishment of the regional fundamental rights system. Each file in the database could contain basic information regarding the case (such as the names of the parties, applicable legal provisions, core issues at stake) as well as a (short) analysis clarifying the aim and significance of the court’s ruling, supplemented by English-language summaries or translations of the full text of judgments when these exist. Such a collection would undoubtedly be useful for the ACHR bench in developing its understanding of the fundamental rights enshrined in the regional text that it is charged to uphold. There is every reason to continue with such a database once the ACHR has come into existence, not least because this court may wish to adopt a dynamic, as opposed to static, approach to interpretation. In due course, it would be
prudent for the AACC and the ACHR to discuss whether responsibility for maintaining the
database ought to remain with the former or transferred to the latter. Which of these options
is chosen may depend on the resources available to either organization and their respective
membership.50)

VI. Final remarks

The benefits that may accrue to victims of fundamental rights violations as a result of
instituting a dedicated regional system, complete with an ACHR, are undeniable. Whether
this will actually become a reality for the millions of individuals living in Asia is largely
(though not exclusively) dependent on the willingness of those involved. In first instance,
this refers to the States who must accept to subject themselves to external scrutiny and build
an infrastructure capable of doing so meaningfully. Once in place, whether an Asian
fundamental rights machinery will be (perceived as) effective – which in turn may entice
victims to look beyond their own legal system for redress – is, amongst other things,
icontingent on good working relationships between the ACHR and senior national courts, as
this contribution as sought to demonstrate. While the would-be contracting States’
representatives can lay some of the foundations for solid inter-court relations that are
premised on a notion of partnership, they cannot fully control this process. Much will also
depend on the manner in which the ACHR will discharge its mandate and its members’
disposition to invest in dialogues with national highest courts. The real significance of
judicial mentality is accordingly something that the contracting parties ought to keep in
mind when nominating the first ACHR bench, as this initial group of judges will be
instrumental in shaping stakeholder perceptions and expectations of the court.

50) While the AACC has adopted a very broad definition of ‘Asia’, it is as yet an open question whether
the regional fundamental rights system will follow suit and for instance be open to States located in
central and western Asia. If so, the prospect of some countries being a party to both the European and
the Asian system looms large, which focuses attention on how to regulate the interplay between the
two regional courts.
Some Issues of Establishing the International Court of Human Rights in Asia

Bakhtiyar Mirbabaev*

I. Background of the issue

In September of 2014 in the course of the 3rd Congress of the World Conference on Constitutional Justice (Seoul) the President of the Constitutional Court of the Republic of Korea Park Han-Chul launched an initiative to develop in Asian region an international system of the protection of human rights and as a key in this system to establish the Asian Court of Human Rights (ACHR). He rightly pointed out that there are visible motions calling for the creation of an international regional human rights protection system in Arab and Asia-Pacific regions. Indeed, the system of human rights protection in Asia is in its initial stage of development. The adopted separate international instruments to some extent reflect the trends of the formation and development of the regional system of international protection of human rights in Asia. These include the Universal Islamic Declaration of Human Rights (1981), the Cairo Declaration on Human Rights in Islam (1990), the Arab Charter on Human Rights (2004), adopted within the framework of the League of Arab States and others.

Despite the existence of the above-noted international regional human rights instruments, until recently there was not any international regional (or sub-regional) body protecting human rights and freedoms in Asia. The situation changed in 2009, when the Association of Southeast Asian Nations (hereinafter - ASEAN) established Intergovernmental Commission on Human Rights, whose main aim is the promotion and protection of human rights and fundamental freedoms in the ASEAN countries. The international system of human rights protection in the ASEAN countries has evolved with the creation of the ASEAN Commission on the Promotion and Protection of the rights of

* Chairman of the Constitutional Court of the Republic of Uzbekistan
women and children on April 7, 2010 in Hanoi, as well as the adoption of the ASEAN Declaration on Human Rights on November 18, 2012 in Phnom Penh.

II. The relevance and practical importance of the issue

In our opinion, the reasons given below substantiate that the initiative made during the 3rd Congress of the World Conference on Constitutional Justice is commendable without doubt.

First. The idea of establishing a permanent international court of human rights has attracted for a long time the attention of the scientists professionals involved in international law and international relations in the field of human rights protection.

The establishment of three international institutions for the protection of human rights – the European Court of Human Rights (ECHR), the Inter-American Court of Human Rights (IACHR) and the African Court on Human and Peoples’ Rights (ACHPR) was the noteworthy event of the XX century.

Establishing the ACHR will enable Asian countries to integrate into the world community. If we consider globalization as a factor of the progress of humanity, and do not want Asian nations to polarize, i.e. to have different legal systems, we must recognize the need for a single international institution for the protection of human rights.

Second. The membership in ACHR will bring the Member States’ national legislation on human rights protection in accordance with the generally recognized norms and principles of international law as well as international standards on human rights protection.

Third. Establishing ACHR will enable the citizens of Asian countries to defend their rights and freedoms at the international level in cases of the judicial errors of the national courts.

The comparative analysis of the activity of the existing international regional courts of human rights indicates that only the similarity of the political systems, their political and legal stability, the historical experience, the proximity of the level of socio-economic development, common legal trends can provide effective activity of these courts. These factors largely explain why the operation of the ECHR was much more successful than that of the others.

It is no mere chance that there is still no international regional court of human rights in
Asia. In the absence of political, socio-economic and cultural similarity in Asia the states do not have the conditions for the establishment of the international regional court of human rights. The efforts of these states, according to the researchers, should be focused on the issues of political, socio-economic and cultural development. This, however, does not mean that the establishment of an international regional court of human rights in Asia should be waived. The UN General Assembly has repeatedly called on the states in the region, where there are no such bodies, to consider the possibility of concluding the agreement.  

### III. Problems to be solved

However, the establishment of the ACHR will require the joint efforts on large-scale and inter-state level, i.e. the formation of an international organization of Asian countries. As it is known, the establishment of the ECHR was preceded by the establishment of the Council of Europe, the IACHR – the Organization of American States, the ACHPR – the Organization of African Unity and the adoption of their statutes. Such an organization would have to elect the judges of the ACHR, to oversee the execution of its decisions. For example, the ECHR judges are elected by the Parliamentary Assembly of the Council of Europe and the ECHR’s decisions are sent to the Committee of Ministers of the Council of Europe, which supervises their execution and the payment possible compensation. According to the Statute of the Council of Europe the non-enforcement of the ECHR by the Member States of the Council of Europe may lead to a suspension of the membership of the state and then in accordance with the decision of the Committee of Ministers of the Council of Europe to the exclusion of the state from the Council of Europe.

In addition, it will be necessary to determine the basic document defining the legal status of the ACHR. Apparently, it will be the Asian Convention on Human Rights. As it is known, such a document for the ECHR is “The Convention for the Protection of Human Rights and Fundamental Freedoms” adopted in Rome in 1950, for the IACHR – “The American Convention on Human Rights”, adopted on November 22, 1969 in San Jose, for the ACHPR – “The African Charter on Human and Peoples’ Rights”, adopted on 26 June 1981 in

---

Nairobi. These documents establish the court, determine its powers and the rights and freedoms which Member States undertake to respect.

In formulation of the Convention, one should take into account the already existing positive experience of other international regional courts of human rights, avoid their mistakes and errors. The ACHR should not replace the national legal system and integrate into it, but allow judging the practice that has developed in the country in terms of meeting the criteria that are generally accepted in a democratic society.

One of the first human rights, defined in the conventions on human rights, is the right to life. Currently, out of 49 Asian countries 33 apply the death penalty. In terms of percentage, this amounts to more than 67%. It seems that the establishment of the ACHR in the initial stage will reduce the number of the countries that apply the death penalty, and later may lead to the complete abolition of the death penalty.

This practice has already been observed in European countries. For example, in accordance with the Protocol №6 to the Convention for the Protection of Human Rights and Fundamental Freedoms, adopted on April 28, 1983 in Strasbourg, the death penalty was abolished, except in cases of its application in time of war. A Protocol №13 to the Convention, adopted on May 3, 2002 in Vilnius, abolished the death penalty in all circumstances.

Paragraph 3 of Article 4 of the American Convention on Human Rights stipulates a provision stating that the death penalty shall not be re-introduced in those states that abolished it.

In Uzbekistan, on the initiative of President Islam Karimov since 2008, the death penalty has been abolished, which by that time was provided only for committing two crimes – for the aggravated murder and terrorism. If the ACHR documents provide said provisions of the American Convention on Human Rights and Uzbekistan ratifies the document it will be impossible to re-introduce the death penalty in the country.

In our view, it is also necessary to resolve the question of how to deal with the possible divergence of the Convention with the provisions of the laws or the Constitutions of the Member States. On October 21-22, 2015 Tashkent hosted an International Conference “Role of the Constitutional Court in the Realization of the Principle of Separation of Powers and Protection of Human Rights: the Experience of Uzbekistan and Foreign Countries”,

where one of the contentious issues between the participants of the conference was the question of the priority of the provisions of the law or Constitution of the country over the provisions of the international treaties of the Republic of Uzbekistan.

One group of the participants believed that the provisions of the international treaties should take precedence over the provisions of the law or Constitution as the legislation of the republic stipulates a provision that, in case an international treaty of the Republic of Uzbekistan stipulates other rules than those provided by the legislation of the Republic of Uzbekistan, the rules of international treaty shall be applied, and the provisions of the Constitution also constitute the legislation of Uzbekistan.

Another group of the participants believed that the provision of the Constitution should take precedence in relation to the provisions of the international treaty, since Article 109 of the Constitution of the Republic of Uzbekistan provides that the Constitutional Court of the Republic of Uzbekistan determines the constitutionality of the international treaty and other obligations of the Republic of Uzbekistan. This rule implies that if the Constitutional Court decides on the non-compliance of the provision of an international treaty with the Constitution, that provision of the treaty must be brought into conformity with the Constitution. As a result, the participants have not reached a consensus on this issue. The author of this article adheres to the second point of view, that is, the rules of the international treaty of the Republic of Uzbekistan shall have the priority only over the provisions of the laws of the Republic of Uzbekistan, but not the provisions of the Constitution.

There are divergent practices in the activities of the constitutional courts of foreign countries. For example, in the Russian Federation, in the Republic of Armenia and other countries in accordance with their Constitution, the Constitutional Court in the manner prescribed by the law determines the conformity with the Constitution of the commitments set forth in the international treaty prior to its ratification. The Constitutional Court may decide to hold the commitments set forth in the international treaty, in whole or in part, inconsistent with the Constitution. In such cases, these commitments may be adopted only after making appropriate changes into the Constitution.

Probably it will also need to consider the question of the relationship of the ACHR with the constitutional courts and equivalent institutions of the Member States, the mandatory interpretation of the Convention by the ACHR for the Member States, since in practice there may be conflicts on these issues. Such conflicts have occurred between the interpretation of provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms by the ECHR and the laws of the Member States, including the Russian
Federation. The Constitutional Court of the Russian Federation on this matter rendered a separate decision of 14 July 2015, in which held that if the Constitutional Court of the Russian Federation comes to the conclusion that the decision of the ECHR based on the interpretation of the Convention for the Protection of Human Rights and Fundamental Freedoms contrary to the Constitution of the Russian Federation, it may not be enforced and such an decision in this part shall not be implemented.

The report of the Panel of Eminent Persons of the Committee of Ministers of the Council of Europe contains among a number of proposals on further reforming of the ECHR a proposal to provide the highest national courts, including the constitutional courts with the right to request the ECHR advisory opinion on the legal questions concerning the interpretation of the European Convention for Protection of Human Rights and Fundamental Freedoms. There are authors who believe that such conclusions should be given a mandatory value 3).

It is necessary to determine in the Convention a procedure in accordance with which the court would not have the right to initiate the proceedings on its own initiative. As the ground for the legal action should serve an individual application or Inter-State complaints. The practice of regional courts on human rights distinguishes two types of the complaints:

- individual application submitted to the court by an individual, a group of individuals or non-governmental organization, who believe that their rights protected by the Convention have been violated;
- inter-state complaint filed by one State against another State.

In both cases, a complaint may be filed against a state which has ratified the Convention.

In Uzbekistan, until 2010 there was a practice of initiation of the criminal case by a court. However, the President of the Republic of Uzbekistan Islam Karimov in the “Conception of Further Deepening of Democratic Reforms and Formation of Civil Society in the Country” suggested excluding from the legislation the authority of court, in accordance with which it has the right to file a criminal case. It is well known that instigating a criminal case is, first of all, the duty of agencies of inquiry and pretrial investigation, other law enforcement agencies that carry out criminal prosecution. Meanwhile, the court is required to fairly

assess observance of law and reasonableness of charges brought against a person. At the same time, filing a criminal case by court, i.e. exercising a procedural act by it, which in fact means the start of criminal prosecution with all relevant consequences, makes the court a participant of this prosecution. This does not meet its high mission, i.e. to administer justice. In accordance with this proposal a law eliminating the practice of a criminal case by the court was passed.

Since 2001 the institute of reconciliation was introduced to the law enforcement and judicial practice and it is now effectively working. According to this practice, the person who commits a crime that does not pose grave public danger and fully compensates material and moral damage to victims shall not be a subject for criminal liability.

This institution proved to be effective and it meets the centuries-old traditions of the Uzbek people, such as mercifulness and ability to forgive, and these factors have served as a platform to consistently expand it. Today the opportunity to enforce this institution is envisaged on 53 types of crimes. As a result of introduction of the institution of reconciliation for over the past period about 170 thousand citizens were released from criminal liability.

Such experience could be taken into account also in the practice of the ACHR. The Convention could include such a provision, under which the reconciliation of the applicant and the respondent State in the case would be the basis for the dismissal of the case.

### IV. The main requirements for the judges

In determining the status of the judges of the ACHR it is also needed to consider the existing experience. Thus, the Convention for the Protection of Human Rights and Fundamental Freedoms (Article 23) specifies the maximum age for the judges that is the age after achieving which the term of office of the judge expires. At the same time, it would be wise to determine a minimum age that gives the right to work as a judge of the ACHR. In our view, this could be the age of 35 years. The legislation of the Republic of Uzbekistan provides that as a judge, including as the judge of the Constitutional Court, can work a

citizen of the Republic of Uzbekistan not younger than 30 years.

The ACHR judges should be elected from among several candidates submitted by the Member States. It is reasonable to define the term of office of the judges as 10 years, at the same time they must not be elected as a judge for the second time.

Thus, creating the ACHR is a very complex process that requires long-term, thorough efforts of Asian countries, and must consist of complicated measures to be carried out purposefully. Association of Asian Constitutional Courts and Equivalent Institutions can affect these processes at least indirectly, by considering the theoretical and practical aspects of this question at its Congresses.

In addition, in order to coordinate the activities of the organs of the constitutional control of Asian countries in the field of support, promotion and protection of human rights and the orientation of these countries to create the ACHR the Secretariat of the Association of Asian Constitutional Courts and Equivalent Institutions could establish a magazine, where it is would be possible to publish the documents on the international human rights protection system, the articles of the authors in this field, the drafts of the international instruments on human rights and other materials.
The Experience of Establishing and Operating the ECHR

Mark E. Villiger*

It is a great honor for me to have been invited, in the name of the European Court of Human Rights in Strasbourg in France, to assist at your Seminar on “A new perspective for multi-layered Human rights protection in Asia.”

We at the Court very much admire your endeavors to bring about an international Human rights protection in Asia. We have an experience of 65 years as regards the European protection of Human rights, and we very much appreciate that you have invited me to speak to you and to share our experiences.

In my presentation I shall make some general observations about different issues which have confronted the Court in the past decades. I should add that these observations are my own personal ones and in no way oblige the Court.

I. Human rights treaty or a Declaration of Human rights principles?

The first question is: which vehicle serves the protection of human rights better, enshrining human rights in an international treaty, or in a code of principles in a Declaration.

The mothers and fathers of the Convention preferred, for the European protection of human rights, the vehicle of an international treaty. They made this choice even though one year before they started their work on the European Convention (the ECHR), the United Nations in 1948 pronounced its Declaration of Human Rights.

One could argue that human rights principles laid down in a Declaration would equally be binding on States, namely as unwritten customary international law. But there always remains the question of proving the binding nature of customary principles. With a Human

* Prof. Dr. iur., University of Zürich/Switzerland
Rights Convention, there can be no doubt. The State ratifying the Convention knows precisely which obligations it has taken upon itself. Indeed, the Court’s entire activities presuppose international treaty norms which are binding on States. Thus, the Court examines in each judgment whether the particular State has complied with its obligations under the ECHR.

II. Is a supervisory body necessary?

The question which arises next: when applying a human rights treaty (or a declaration of human rights principles): who will decide in a concrete case? Is a supervisory body necessary? Of course, the Convention States will have their views in a concrete human rights case. One Convention State may see in the acts of another a violation of human rights, though that other State may disagree. Still, in view of the equality of all States in international law, no one State can definitively be right and the other wrong. As a result, the situation concerning individuals whose human rights have allegedly been violated could never objectively and definitively be examined and remedied.

It is for this reason that a supervisory body should be included in the international treaty setting up the human rights protection which can decide objectively and independently. Only this will ensure that human rights will eventually be carried out, only a supervisory body will, therefore, guarantee the effectiveness of human rights.

III. Should the supervisory body be a Commission or a Court, or both?

One of the central questions of my presentation is whether the supervisory body should be a Commission, or a Court, or both? Let me deal with the issues separately.

What is the difference between the two? The founders of the ECHR in 1950 envisaged as a first and political instance the Commission, and then as a second, purely judicial instance, the Court. The intention was that such a Commission would best understand the political implications of accusing a State of a breach of human rights – often implying issues of the sovereignty of States. Also, such a political Commission would be more easily able to
choose among the human rights complaints filed.

However, the history of the Strasbourg Commission and Court shows that matters developed differently. The European Commission from the beginning did not see itself as a political body (with very few exceptions, such as early inter-State applications, i.e. complaints by one State against another) but as a quasi-judicial body. Indeed, whereas the Convention stated that Judges of the Court should be lawyers, no such condition was stipulated in respect of Commissioners.

Thus, it transpired soon that the “advantage” of the Commission as a political body could also be found in a Commission acting as a quasi-judicial body. It could refuse even a high number of applications (it rejected up to 90% of all applications), though not on political but strictly legal grounds as to the admissibility of applications. Also, as regards the understanding, which a political body could have had as regards the sovereignty of States, the quasi-judicial Commission was able to bear this in mind, although in a legal manner, namely by considering for example that the human rights protection of the ECHR was subsidiary to national protection and that States had, in implementing human rights, a more or less large margin of appreciation.

It is true that the American and African Commissions of Human Rights had, and still have, a certain - quite limited - political touch in their approach to the protection of human rights. On the whole, however, both the American and African Commissions see themselves equally as quasi-judicial bodies.

This brings me to the point whether there should both a Commission and a Court in the international protection of human rights. The original ECHR envisaged both. As I said, the Commission soon adopted a judicial approach. It sorted out those cases which it found were admissible (some 10%) and prepared in these cases Opinions which were not however binding. (The inadmissibility decisions, on the other hand, were final and binding.) This non-binding final Opinion could be sent by the Commission (and only by the Commission) to the Court as second instance for final judgment; if not, the Committee of Ministers, a political body of the Council of Europe, would have the final decision. In the vast majority of cases, the Committee of Ministers took over the Opinion of the Commission. The situation was different if the case was in second instance to the Court; I would guess that the Court in about 40% of the cases overturned the Opinion of the Commission, thereby leading to a situation where in fact two legal instances decided on the same case.

There are two comments to be made in this context. First, the fact that only the Commission could refer cases to the Court (not the applicant). The Commission went
through different phases, at times referring few of its Opinions to the Court, later on more and even most of its Opinions. When it did not do so, some commentators suspected that the reason for this was that the Commission did not want its Opinion overturned by the Court – and that it would be adopted by the Committee of Ministers.

This filtering function was considered unfortunate by some. The Court was dealing with individual applications without the individual having brought the case before it, indeed, without the individual even having standing before the Court. All this was changed with the 9th Protocol to the Convention which, as from 1994 enabled applicants to bring their applications from the Commission to the Court.

Second, the fact that on the European level two judicial bodies were, successively, deciding on the same case was at first considered a salutary development. After all, in the 1950’s, the European protection of human rights was a new development. It was considered that accusing a State of a human rights violation could be a serious allegation which warranted a thorough and in particular double examination.

However, as the case-law of the Commission and the Court developed, and as the Commission became overburdened and proceedings before it lasted longer and longer, doubts arose as to the necessity of two instances.

This brings us to the 11th Protocol which was a watershed for the Convention. By the end of 1980 it was considered essential to overhaul the ECHR, and in particular the two successive instances. However, there were two groups of States in Europe with different views in this respect. One group wished a new, efficient, streamlined, and single highest Court in Europe, the other group of States continued to find it important to have a twofold examination of all human rights violations. A typical European compromise was found: A new single European Human Rights Court was created in 1998 (merging the former Commission and the former Court), however, within that single Court a Grand Chamber (consisting of 17 Judges) was established which allows for a second examination of a case within the same single Court.

Whilst the ECHR has thus been streamlined, the American and African Human Rights systems, which originally to a large extent copied the European system, have not changed. We see there the European system as it functioned until 1998 when the new Strasbourg Court took up its functions.
IV. Right to individual application?

Should the international protection system envisage the Commission and/or Court themselves deciding on whether to take up a case, or should States be allowed to bring cases, or even individuals?

If the institution itself were to choose its own cases, clearly this would call for a Commission with a certain flexible profile in the pick-and-choose proceedings. While this system may be efficient, the difficulty lies in the lack of legitimacy of the cases brought before the institution. It could immediately be criticized for having employed inappropriate criteria for choosing the case.

In this respect, the highest legitimation for a human rights supervisory body is achieved if individuals are permitted to file complaints. This attributes to the institution a certain democratic legitimation. Of course, while every individual should be allowed to file a complaint against any of the Convention States, there must be strict admissibility conditions (such as time-limits, exhaustion of domestic remedies etc.) to regulate such access.

For many years, the Strasbourg Court sitting in second instance lacked this democratic legitimation, as the only cases it dealt with were referred to it by the Commission in first instance. The Court was considered as a sort of ivory tower, detached from European society and dependent on the Commission.

Still a word about inter-State application, i.e. complaints filed by one State against another about alleged human rights violations in the other State. In the European system inter-State applications were originally considered to be the backbone of the human rights protection. European States should control each other to ensure that the horrors of the Nazi-régime would not happen again. In fact, while since 1950 hundreds of thousands of individual applications have been filed, there have only been some 20 inter State-application. These are less popular among European States, and some of the even consider such an application as an unfriendly act against another State. Currently, we have two inter-State cases pending before the Court, Georgia v. Russia II (concerning hostile activities in Abchasia) and Ukraine v. Russia (concerning complaints surrounding the annexation of Crimea and the fighting in the eastern part of the country). Recently, the Court has pronounced its judgment in the case of Georgia v. Russia I concerning the mass expulsion of Georgians from Russia some years ago.

I can mention two experiences of the Court as regards inter State-applications. First:
these cases have often raised major human rights issues and have thus substantially contributed to the further development of human rights. Take the case of Ireland v. the United Kingdom of 1978 where the Court laid down for the first time important principles as to inhuman treatment and torture as in Article 3 of the ECHR. **Second:** these inter-State cases, often involving hundreds or even thousands of persons in that particular State, frequently raise highly complex issues and are very politically charged, a situation which places a considerable burden on the Court.

V. Issues and difficulties which the new Court experienced since 1998

When in 1998 the former Commission and Court merged to a new European Court, the latter was confronted with particular circumstances. In particular, the Berlin Wall fell in 1998, subsequently many States from Central and Eastern Europe joined the Convention – from 29 to today 47 member States, thus implying 47 Judges. Actually, this in itself caused no major difficulties as regards the different legal cultures among the 47 member States, not least as there is much common ground among these States as to underlying legal methodology and philosophy.

Rather, the difficulty which then arose was the great number of new applications pouring into the Court. By 2012 commentators were already speaking of the Court being a victim of its own success and drowning in cases. The great number of cases had to do with the fact that the Court proved to be highly successful and popular, in part on account of the right to individual applications and also because of its binding judgments (I shall come back to that) – even though, I should add, the Court only finds violations of human rights in about 5% of all cases. By 2012 the Court was confronted with a backlog of 160’000 applications (whereby it dealt with about 70’000 cases a year). Everybody was announcing the demise of the Court.

It was the Convention States themselves which saved the Court. In Protocol no. 14 to the Convention, European States introduced the Single Judge, i.e. one Judge who could reject clearly inadmissible cases. This proved to be enormously successful, and meanwhile the Court’s backlog has considerably reduced. By 1 May 2015, there were still some 70’000 applications pending. To be objective and to better understand this dramatic reduction of the
case-load, it should be pointed out that the Single Judge has dealt with a great number of clearly inadmissible cases. What remains on the Court’s docket are often admissible cases which are highly complex and time-consuming.

**VI. The text embodying human rights**

When speaking about experiences of the Court, I must mention the text which guides its work, namely the ECHR. A number of issues could be mentioned, I will refer to two which confront the Court daily, namely how brief or extensive should the Human Rights guarantees be in the human rights treaty; and that the text should leave a certain margin of appreciation to States.

First, how brief or extensive should the formulation of the human rights guarantees be. In the annex you can see, for a brief example, Article 3 of the ECHR, and for an extensive example, Article 5 of the ECHR.

Of course, every Judge in every Court all over the world is confronted with laws which may be very brief or very extensive, and with the interpretation of these texts. On the international level, according to Article 31 of the 1969 Vienna Convention on the Law of Treaties, the written text remains the framework within which, inter alia, an international Judge can move. In other words, the briefer the Convention text, the more freedom the Judges will have to interpret and further develop the particular right. The more extensive the formulations, the less freedom the Judge will have.

Thus, when dealing with Article 3, the Court has in a whole series of judgments, starting with the inter-State case Ireland v. United Kingdom just referred to, explained in detail what the terms “inhuman treatment, degrading treatment, torture” mean – including a two-step approach whereby particularly serious inhuman treatment may amount to torture. Conversely, when dealing with Article 5, the Court has had far less freedom in its interpretation of this provision. For example, it is bound in para. 1 of Article 5 by the six groups of situations in subparas. (a)-(f) concerning deprivation of liberty – it cannot go beyond that. In Article 5, the Court’s judgments have thus dealt with more limited and detailed issues, for example in para. 3 of Article 5 that a person who has been detained shall be brought “promptly” before a Judge. How soon is promptly? Many judgments have been written on this point. The case-law says that as a rule the delay should not be longer than 48
hours, though in exceptional cases, for example concerning suspects of terrorism, it may last until 96 hours.

Thus, it is up to the States drafting the human rights in a Convention, to some extent, to limit or to the contrary, to encourage judicial activism.

Second, the principle of subsidiarity; and granting Convention States a certain margin of appreciation. The Court is faced with the situation that certain articles of the Convention allow it to leave States a certain freedom when deciding on how far it should interfere with human rights of individuals. In Articles 8-11 of the ECHR, it is stated that such interference must be “necessary in a democratic society”, which implies a certain flexibility for the Court, and for States. For instance, as regards the freedom of the press in Article 10: when press articles are censored, the Court may find this more easily acceptable (and grant a large margin of appreciation) when this concerns commercial freedom, for example advertisements; it may find this unacceptable (and thus limit the margin of appreciation) when political speech is concerned.

Now, while Articles 8-11 clearly allow such a margin of appreciation to States, other Convention guarantees are formulated more strictly, if I may call it that, allowing for no margin of appreciation. Again, take Article 3 ECHR as an example. Still, even here the Court was able to introduce a certain flexibility, namely by setting certain thresholds of pain or undignified treatment, after which only there will be a violation of Article 3. For instance, the threshold of a violation in Article 3 may not be reached if a prisoner complains that the window in his prison cell is open in winter, though it may be reached (this is the case of Kalashnikov v. Russia), when in a cell with a surface of 21 square metres there were 24 prisoners who had to share among them eight beds.

VII. Court’s experience with the implementation of its judgments

As a final point I should briefly refer to the Court’s experience as regards the implementation of its judgments.

The text of the ECHR tells us in Article 46 para. 1 that the Court’s judgments are binding. This is a central condition of States’ membership in the ECHR. A State is obliged to implement the judgments of the Court which are directed against it. Still, the Convention leaves a certain leeway to States which, in view of their different constitutional systems,
may encounter differing problems as to implementation. Whether or not a State has complied with its obligations under a judgment is examined, not by the Court, but by the Committee of Ministers, the political organ of the Council of Europe. The State must explain what it has done to comply with the judgment.

Maybe nothing can be done any more, for example if the Court considered that one applicant’s detention on remand was arbitrary – for freedom unlawfully taken away cannot later on be given back. Here, damages will have to be paid. In other cases, the violation found by the Court in its judgment may concern decisions of national courts. Here, it is difficult for the Government in view of the separation of powers to instruct a court how to react; all it can do is to draw the domestic courts attention to the judgment of the European Court. But of course, there are judgments where the State must react positively: in particular where domestic legislation is at issue leading to a human rights violation. This legislation must be changed in order to comply with the Court’s judgment.

Separately, in its judgment the Court may, if it has found a human rights violation, order the State to pay material and immaterial damages to the applicant. Material damages are the losses which the applicant may have directly incurred on account of the violation, immaterial damages represent the suffering which he may have encountered.

On the whole, I can say that in 99% of the cases, Convention States have – at least over time – complied with the Court’s judgment as regards its implementation. It is true that there are some judgments concerning highly political matters – think of Transnistria, a region belonging to Moldova but under the influence of Russia – where States have been slow to react.

There is one new development in this respect which is worth mentioning. For many years, the Court was not interested in the implementation of its judgments. Once the judgment left its building, that was it. However, the Court has seen that the correct implementation of a judgment may considerably influence its future case-load. It has now started, in its judgments, to give advice to States how best to implement them. In many cases concerning the fairness or unfairness of court proceedings, the Court may state that the best way to implement the judgment would be to reopen domestic proceedings and offer the applicant a new and fair trial. However, the Court has gone much further in some cases and, for example, told the respondent State that the best way to implement the judgment would be to release a person from arbitrary detention, or to reinstate a person who has arbitrarily been deposed of his office.

These new developments have, on the whole, been cautiously welcomed by the
Convention States. Some have criticized that this is an encroachment upon their sovereignty, as it is not the Court’s business to control the implementation of its judgments; as I said, this falls to the Committee of Ministers. I would agree with this criticism if the Court were to _instruct_ a State how to implement a particular judgment; I see no difficulty if the Court merely gives advice in this respect.

### VIII. Conclusion

President, colleagues Judges, ladies and gentlemen. I come to my conclusion – and here to two issues.

As you have seen, the Court has an experience dating back to 1956, when it was set up, in dealing with the Human rights protection in Europe. The first question is: how much has the Court influenced Human rights protection in Europe. The answer is clearly: considerably! There is no State in Europe whose constitution and legislation has not been influenced by the Court’s case law. Admittedly, today also the European Court of Justice of the European Union deals with human rights cases. But the Court undoubtedly remains the primary actor in this field in Europe.

Unfortunately, this does not mean that there are less and less human rights violations. European society constantly changes; there have also been many new Convention States in the last decades. All this means that the Court has constantly to decide on new issues.

The second issue is: what do the experiences of the Court tell us when considering establishing Human rights protection in Asia. I must immediately state that I will tread very carefully in this area – both out of my considerable respect for you, but also because I am not a specialist on the matter.

Clearly, the situation surrounding the creation of the ECHR and the Court in the 1950’s had to do with the horrors of the Nazi-Régime; States wished to prevent such atrocities in the future. At the time, it took two years to set up the ECHR. I wonder if today the ECHR could again be set up in Europe; I have certain doubts in view of the pluralism of European society. Certainly, it would not be possible to do it in two years.

Should the Asian protection of Human rights follow the path of the ECHR, or of the American or African Human rights conventions? One can certainly argue that Asia has different and additional values in its cultures which would justify modifying the European,
American or Asian approach, or even going a completely different way. Indeed, if one proposes to follow one of these regional protection systems one could immediately be criticized for overlooking the particularities of Asia.

These different cultures may also indicate certain difficulties in finding agreement on basic human rights – when the ECHR was created there were certain common legal traditions in all European member States. However, this difficulty could be circumvented in Asia by relying on international human rights norms which have been accepted by and are binding for Asian States, in particular the UN Human Rights Covenants and the UN Human Rights Declaration.

Actually, my proposal would be to start off modestly and to prepare a comparatively short code of core human rights, say 10-12 articles. At least at the outset, social rights (such as the right to education, the right to social security, the right to work, maybe even the right to property) should be left out. You can then follow the European practice of adding new substantive and procedural provisions to the ECHR by preparing new Protocols which become part of the original treaty document – as and when the European States were ready for that.

At the end of the day, what counts for me is that, for human rights protection to be successful, human rights of individuals must be protected effectively. With this objective in mind, I am sure that there are different possibilities of proceeding.

President, colleagues Judges, ladies and gentlemen. I am most grateful that you have invited me to explain the experiences of the Court in this respect. You can always count on my continuing support in the ensuing discussions.

Thank you.
A Possible Cornerstone for an Asian Human Rights Court

- The deliberative nature of the dialogue between comparative constitutional Law and international human rights law (a.k.a. global human rights law)

Akiko Ejima*

I. Introduction

The idea of an Asian human rights court is not new.\footnote{1) Tae-Ung Baik, Emerging Regional Human Rights Systems in Asia (Cambridge University Press, 2012); Tan Hsien-Li, The ASEAN Inter-Governmental Commission on Human Rights (Cambridge University Press, 2011).} On the contrary, it has been discussed in vain in Asia for several decades.\footnote{2) What Asia is or which area in Asia has been a problematic question from the beginning. The article uses the classification used by the Office of the United Nations High Commissioner for Human Rights (OHCHR), which includes the following countries in the Asia-Pacific group: Afghanistan, Australia, Bangladesh, Bhutan, Brunei Darussalam, Cambodia, China, Cook Islands, Democratic Republic of Korea, Fiji, India, Indonesia, Iran, Japan, Kiribati, Lao People’s DR, Malaysia, Maldives, Marshall Islands, Micronesia, Mongolia, Myanmar, Nauru, Nepal, New Zealand, Niue, Pakistan, Papua New Guinea, Palau, Philippines, Republic of Korea, Samoa, Singapore, Solomon Islands, Sri Lanka, Thailand, Timor-Leste, Tonga, Tuvalu, Vanuatu, Vietnam (41 countries in total). There is a problem with categorization. For example, the Association of Asian Constitutional Courts (see 3.5) includes members such as Azerbaijan, Kazakhstan, Kyrgyzstan, the Russian Federation, Tajikistan, Turkey, and Uzbekistan, which are not included in the abovementioned Asia-Pacific group.}\footnote{3) <http://www.worldcourtofhumanrights.net> (visited 31 March 2016).} However, other regional courts are flourishing, and even the idea of a world court dedicated to human rights is re-emerging.\footnote{2) What Asia is or which area in Asia has been a problematic question from the beginning. The article uses the classification used by the Office of the United Nations High Commissioner for Human Rights (OHCHR), which includes the following countries in the Asia-Pacific group: Afghanistan, Australia, Bangladesh, Bhutan, Brunei Darussalam, Cambodia, China, Cook Islands, Democratic Republic of Korea, Fiji, India, Indonesia, Iran, Japan, Kiribati, Lao People’s DR, Malaysia, Maldives, Marshall Islands, Micronesia, Mongolia, Myanmar, Nauru, Nepal, New Zealand, Niue, Pakistan, Papua New Guinea, Palau, Philippines, Republic of Korea, Samoa, Singapore, Solomon Islands, Sri Lanka, Thailand, Timor-Leste, Tonga, Tuvalu, Vanuatu, Vietnam (41 countries in total). There is a problem with categorization. For example, the Association of Asian Constitutional Courts (see 3.5) includes members such as Azerbaijan, Kazakhstan, Kyrgyzstan, the Russian Federation, Tajikistan, Turkey, and Uzbekistan, which are not included in the abovementioned Asia-Pacific group.}\footnote{3) <http://www.worldcourtofhumanrights.net> (visited 31 March 2016).} It seems that the recent transnational sharing of human rights documents (at constitutional and international levels) in courts and outside courts by domestic courts (particularly apex courts such as constitutional courts and supreme courts) and regional courts now creates a possible cornerstone for an Asian human rights court. Moreover, the establishment of the ASEAN Intergovernmental Commission on Human Rights (AICHR) suggests that it would...
be possible to create a transnational system to address human rights even in Asia. In light of this new environment, it is time to revisit the following questions: Would an Asian human rights court be useful? Is it necessary and feasible?

This article explores the possible cornerstones for an Asian human rights court. First, we briefly examine the achievements and problems of the United Nations (UN) human rights treaties. Subsequently, we explore the advantages and disadvantages of a regional court of human rights by examining the experiences of the European Court of Human Rights (ECtHR), which is one of the most successful regional human rights organization. In other words, what are the differences between regional human rights courts and the UN human rights treaty bodies? The former can accept individual complaints and make binding judgments, while the latter can assess national human rights reports, give recommendations, receive individual communications, and provide opinions (views); however, none of these are binding. Thus, it is necessary to evaluate the prospect and problems with the existing UN human rights regime. Is the UN human rights system sufficient for implementing human rights? What can an Asian human rights court contribute in terms of the realization of human rights?

Subsequently, the article examines the feasibility of an Asian human rights court and the present development of constitutionalism in Asia to determine its cornerstone. Of particular interest is the current situation of transnational sharing of human rights documents at courts of all levels. Although the use of comparative law in the human rights context is still controversial, its current usage can be viewed from a new perspective in which domestic and international bills of rights are intertwined to take the form of comparative human rights law, comparative international law, or even global human rights law. Moreover, the constitutional system and international system can be re-conceptualized to create a multi-layered protection system for human rights.
Ⅱ. What have the UN Human Rights Treaties achieved?
The problem of implementation

1. Achievements

The UN has constantly produced human rights documents since the Universal Declaration of Human Rights was adopted in 1948. The international community has obtained nine core international human rights instruments so far: International Convention on Elimination of All Forms of Racial Discrimination (ICERD, adopted in 1965 and entered into force in 1969); International Covenant on Civil and Political Rights (ICCPR, adopted in 1966 and entered into force in 1976); International Covenant on Economic, Social and Cultural Rights (ICESCR, adopted in 1966 and entered into force in 1976); Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, adopted in 1979 and entered into force in 1981); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT, adopted in 1984 and entered into force in 1987); Convention on the Rights of the Child (CRC, adopted in 1989 and entered into force in 1990); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW, adopted in 1990 and entered into force in 2003); International Convention for the Protection of All Persons from Enforced Disappearance (CPED, adopted in 2006 and entered into force in 2010); Convention on the Rights of Persons with Disabilities (CRPD, adopted in 2006 and entered into force in 2008). Taking into account the fact that it is usually very difficult for the international community to reach consensus on any issue in general and human rights issues in particular, the establishment of those treaties is already a great achievement of the post-World War II period.

The ratification of the treaty is another criterion for assessing the success of each human rights treaty. Seven core human rights treaties have been ratified by around 80-90% of the member states of the UN. (See Table 1.) The CRC was ratified by 99% of the member states. We should emphasize that the accumulated UN human rights instruments are broader and more detailed than the bills of rights in national constitutions.

Moreover, each treaty has a monitoring body for implementation: Committee on the Elimination of Racial Discrimination (CERD) for ICERD; Human Rights Committee...
Table 1: UN Core Human Rights Treaties

<table>
<thead>
<tr>
<th>UN Human Rights Treaties</th>
<th>State Party</th>
<th>State Party (%)</th>
<th>Signatory</th>
<th>No Action</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>ICERD</td>
<td>177</td>
<td>90</td>
<td>6</td>
</tr>
<tr>
<td>2</td>
<td>ICCPR</td>
<td>168</td>
<td>85</td>
<td>7</td>
</tr>
<tr>
<td>3</td>
<td>ICESCR</td>
<td>164</td>
<td>83</td>
<td>6</td>
</tr>
<tr>
<td>4</td>
<td>CEDAW</td>
<td>189</td>
<td>96</td>
<td>2</td>
</tr>
<tr>
<td>5</td>
<td>CAT</td>
<td>159</td>
<td>81</td>
<td>10</td>
</tr>
<tr>
<td>6</td>
<td>CRC</td>
<td>196</td>
<td>99</td>
<td>1</td>
</tr>
<tr>
<td>7</td>
<td>ICMW</td>
<td>48</td>
<td>24</td>
<td>18</td>
</tr>
<tr>
<td>8</td>
<td>CPED</td>
<td>51</td>
<td>26</td>
<td>51</td>
</tr>
<tr>
<td>9</td>
<td>CRPD</td>
<td>163</td>
<td>82</td>
<td>24</td>
</tr>
</tbody>
</table>

(CCPR) for ICCPR; Committee on Economic, Social and Cultural Rights (CESCR) for ICESCR; Committee on the Elimination of Discrimination against Women (CEDAW) for CEDAW; Committee against Torture (CAT) for CAT; Committee on the Rights of the Child (CRC) for CRC; Committee on Migrant Workers (CMW) for ICMW; Committee on Enforced Disappearances (CED) for CPED; Committee on the Rights of Persons with Disabilities (CRPD) for CRPD. Each committee has various functions including receiving individual communications.

2. Problems

How fully have these UN treaties been implemented in reality is another question. There are fundamental obstacles and practical problems for their implementation.

First, national governments are assumed to be responsible for the implementation of international human rights treaties. In other words, international institutions are subsidiary. National governments are assumed to have some discretion. In reality, it is still unimaginable to think of an international institution that can play the role of a national government.

Second, constitutional institutions, particularly older entities such as legislative, executive, and judiciary bodies, are not designed to take into account human rights treaties during the course of their business, despite the requirement that “each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without
distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status” (Article 2 of the ICCPR). That is why the Paris Principles encourage the establishment of national human rights institutions. Yet, some courts start to refer to foreign and international human rights sources (See 5.).

Third, the measures that treaty bodies can use to encourage and persuade national governments to implement human rights instruments are limited. In particular, the issue of legal binding has been problematic. Since recommendations provided by treaty organs are not legally binding, governments can easily ignore them. It is also problematic that some countries fail to submit national reports or submit them only after a long delay. Conversely, treaty bodies also have problems addressing national reports on time. Individual communication is a more specific measure by which a victim can directly take recourse. However, such individual communication must be accepted by ratification of separate optional protocols. It is true that the precedents (views) of the treaty organs are still less developed than those of the ECtHR. The rich case law of the European Convention on Human Rights (ECHR) is incomparable. Moreover, Asian countries are very reluctant to ratify any of the optional protocols that enable individual communication. For example, only seven of the 41 Asian countries have ratified the Optional Protocol to the ICCPR: Australia, Maldives, Nepal, New Zealand, Philippines, Republic of Korea, and Sri Lanka (17%). The convention the ICCPR itself was ratified by 59% of the member states. Thus, the percentages of nations ratifying the optional protocols are much lower than those of nations ratifying the treaties. Only the ICCPR-OP and CEDAW-OP managed to obtain over 50% ratification (Table 2 and 3). This proved that governments want to avoid external criticism in specific cases. On the other hand, this fact ironically shows that it is more difficult for governments that have not ratified the optional protocols of individual communications to accept a regional court of human rights whose judgment is legally binding, such as the European Court of Human Rights. If a government cannot accept the individual communication system of an existing treaty, how can governments be expected to support a regional court? On this point, it is necessary to take a new approach to a regional human rights court. (See 5.) The more effective a regional human rights court is, greater is the degree of resistance that can be expected from states. How can this dilemma be solved? An examination of the European experience with its

regional human rights court can be useful for tackling this issue.

Table 2: Ratification of Optional Protocols
(Individual Communication except for CAT-OP)

<table>
<thead>
<tr>
<th></th>
<th>Optional Protocols</th>
<th>State Party</th>
<th>State Party (%)</th>
<th>Signatory</th>
<th>No Action</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>ICCPR-OP</td>
<td>115</td>
<td>58</td>
<td>4</td>
<td>78</td>
</tr>
<tr>
<td>2</td>
<td>ICESCR-OP</td>
<td>21</td>
<td>11</td>
<td>26</td>
<td>151</td>
</tr>
<tr>
<td>3</td>
<td>CEDAW-OP</td>
<td>106</td>
<td>54</td>
<td>14</td>
<td>77</td>
</tr>
<tr>
<td>4</td>
<td>CAT-OP (Regular Visits)</td>
<td>81</td>
<td>41</td>
<td>17</td>
<td>99</td>
</tr>
<tr>
<td>5</td>
<td>CRC-OP</td>
<td>26</td>
<td>13</td>
<td>28</td>
<td>144</td>
</tr>
<tr>
<td>6</td>
<td>CRPD-OP</td>
<td>87</td>
<td>44</td>
<td>30</td>
<td>81</td>
</tr>
</tbody>
</table>

Table 3: Declarations for the Application of Procedures

<table>
<thead>
<tr>
<th></th>
<th>Declarations for the Application of Procedures</th>
<th>State Party</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>ICRED: Art 14 (Individual Communication)</td>
<td>57</td>
</tr>
<tr>
<td>2</td>
<td>ICESR-OP: Art 11 (Inquiry)</td>
<td>4</td>
</tr>
<tr>
<td>3</td>
<td>CAT: Art 20 (Inquiry and Report)</td>
<td>144</td>
</tr>
<tr>
<td>4</td>
<td>CAT: Art 22 (Individual Communication)</td>
<td>66</td>
</tr>
<tr>
<td>5</td>
<td>CEDAW-OP: Arts 8–9 (Inquiry and Report)</td>
<td>102</td>
</tr>
<tr>
<td>6</td>
<td>CRPD-OP: Art 13 (Inquiry)</td>
<td>16</td>
</tr>
<tr>
<td>7</td>
<td>CRC-OP: Arts 6–7 (Inquiry)</td>
<td>86</td>
</tr>
<tr>
<td>8</td>
<td>CED: Art 31 (Communication)</td>
<td>19</td>
</tr>
<tr>
<td>9</td>
<td>CED: Art 33 (Visit)</td>
<td>45</td>
</tr>
</tbody>
</table>

III. European experiences: the problem of copying

1. Gradual development

It is a naive illusion to believe that if Asia installed a regional human rights court such as the present ECtHR, human rights problems would be dealt with more efficiently and effectively. However, it is also a mistake to assume that the ECtHR resembled the present Court from the beginning. On the contrary, when the ECtHR was established, it was quite
different from its present form. The ECHR started with ten Contracting Parties that shared some values and ideas, particularly on human rights, the rule of law, and democracy. For the Court’s implementation, these parties chose a prudent, two-layered system: the European Commission on Human Rights (hereinafter the Commission) and the European Court of Human Rights (the commissioners of the Commission and judges of the ECtHR worked as a part-timer). Individuals could submit applications only to the Commission, but not to the Court. Only the Commission and the Contracting Parties could appeal to the ECtHR. Moreover, the Contracting Parties were free to decide whether to accept individual applications to the Commission and the jurisdiction of the ECtHR. Therefore, it was possible not to be challenged by individuals at the Court until the fundamental reform of the ECtHR in 1998. This two-layered system was a compromise between the states that supported individual complaints as an effective remedy for victims of human rights violations and those that defended national sovereignty. The compromised result showed that it was extremely difficult for sovereign states to accept the idea that a state could be sued by an individual at an international court, and that the state had to accept the Court’s judgment. When considering the feasibility of an Asian human rights court, this earlier stage of the ECtHR must be taken into account. If this was such a difficult path for Western European countries, what driving force would make these countries accept the idea, albeit in a highly mitigated form?

2. The driving force behind acceptance of the court

Past and future threats pushed Europe (Western Europe) to make a radical decision at that time. The past was World War II and Nazism. The unwanted future was the possibility

6) The preamble of the European Convention on Human Rights clearly stipulates that “the governments of European countries which are likeminded and have a common heritage of political traditions, ideals, freedom and the rule of law to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration.” The original ten States are France, Italy, the United Kingdom, Belgium, the Netherlands, Sweden, Denmark, Norway, Ireland, and Luxemburg.


8) See, the Preamble of the Statue of the Council of Europe (Convinced that the pursuit of peace based upon justice and international co-operation is vital for the preservation of human society and
of World War III during the Cold War, which would have been a nuclear war. To prevent such a fearful future, the people of Europe collected their knowledge and wisdom and created the Council of Europe (and the ECHR) and later created the EU. Therefore, when considering the feasibility of an Asian court of human rights, the interesting question arises of identifying a potential driving force in the Asian context. (See 4.)

Several points must be noted. First, in Europe, the number of potential members is smaller, and differences among members are smaller, so reaching consensus is relatively easier. For Asia, starting a regional court with more than forty countries at one time would be a formidable challenge. 9) Second, addressing how to address the past is essential. It should be noted that Europe started to foster economic cooperation by establishing the European Economic Community (EEC) in 1958; this developed into the present EU as a unique economic and political partnership of 28 European countries. 10) The idea that countries that trade with each another become economically interdependent and so more likely to avoid conflict is applicable to any region. Third, many universal concerns about the future of the world already exist. For example, climate change is transnational. The influence of temperature increase in coming decades will have a devastating effect on some tropical regions of Asia. More urgently, since some Asian countries (particularly China) have developed economically and become global manufacturing powers, environmental pollution has become a great concern. Therefore, it seems that there is no uniquely Asian concern, but universal concerns such as climate change and financial crises are likely to have an especially great impact on Asia.

3. The role of the individual complaint

What made it possible to change the two-layered semi-judicial system into the present Court, which is a single permanent court that now plays the role of a human rights court with confidence and authority? Interestingly it is accumulation of the individual applications that

civilization).

10) The history and achievement of the EU provides important impetus for academics in Asia. For example, Tamio Nakamura et al., Higashi Ajia Kyodotai Kenshoan [A Draft Charter for East Asia Community] (Showado Publisher, 2008) and Tamio Nakamura (ed.), East Asian Regionalism from a Legal Perspective (Routledge, 2009).
produced the extremely rich human rights case law of the ECtHR. It should be emphasized that the Strasbourg case law provides important ideas for solutions not only for applicants of particular cases (victims), but also for other Contracting Parties and even non-member states.\(^{11)}\) Since the Court started its operations in 1959, individual applications have constantly increased. In 2015, 40,650 applications were allocated to a judicial formation and 823 judgments were delivered in respect of 2,441 applications. It seems that being sued at Strasbourg has become part of the daily business of national governments, although some governments find it difficult to comply with some exceptional cases. (See 3.4.)

4. Success, pushback and dialogue

The ECtHR is often praised as the jewel in the crown among systems for protecting human rights. However, its success has not been effortless. The Strasbourg Court has faced incessant criticism. There are two separate, intertwined concerns.

One of these is the Court’s heavy caseload. With a population of 800 million people and 47 Contracting Parties, it is not difficult to imagine the volume of applications rushed to Strasbourg. Many of these are repetitive cases. For example, many countries share the problem of delays in judicial proceedings. It is easy to expect that if an application concerning judicial delay wins at Strasbourg and the same problem is common in a particular country, thousands of similar applications from that country will head to Strasbourg if the delay is caused by structural problems in the domestic judicial system. Therefore, resolving this problem requires complete judicial reform at a national level.\(^{12)}\) Moreover, the judgment of the ECtHR is not sufficient for changing domestic structural problems. If this change is not executed by the domestic government, possible actions by the Court are limited even though the Committee of Ministers supervises the execution.\(^{13)}\) The
same problem occurs with the issue of prisoners’ right to vote. This became one of the most controversial confrontations between the ECtHR and the Contracting Parties. In 2005, the Court held that a British blanket ban on prisoners’ right to vote violated Article 3 of the First Protocol to the ECHR. Then, about two and a half thousand prisoners in Britain brought cases related to this to Strasbourg. The ECtHR delivered a pilot judgment to address these clone cases by confirming the same conclusion in *Greens and M.T. v. the United Kingdom*. However, members of the House of Commons (a lower house of the Parliament) expressed strong opposition to any legislative attempt to execute the ECtHR’s judgment by passing a majority resolution. The judgment has not yet been executed, and it is unlikely that the UK will execute it.

The phenomenon reveals another concern: democratic legitimacy. How extensively can the ECtHR strike down domestic decisions, particularly domestic legislation passed through a democratic process of national governments? The British case shows that the idea of national sovereign decision-making remains strong. However, it is also interesting to note that the issue of prisoners’ right to vote does not necessarily trigger the same response in other countries, such as Austria, Ireland, Latvia, and Liechtenstein, which passed legislation to allow prisoners to vote without particular difficulties.

In the present difficult situation, the Court seems to be very keen on improving the efficiency and effectiveness of its system by installing new working methods such as priority rule and a pilot judgment procedure. Simultaneously, further organizational reforms have been taking place, such as a single-judge formation (and an establishment of a new filtering section), new inadmissibility criteria, and an infringement proceeding. Moreover, new reforms based on treaties are ongoing. A new Protocol 15 will introduce a reference to the principle of subsidiarity and the doctrine of the margin of appreciation in the preamble of the ECHR. It also reduces from six to four months the time limit within which an application may be made to the Court following the date of a final domestic decision. Another new protocol, Protocol 16, will allow the highest courts and tribunals of a state party to request advisory opinions from the Court on questions of principle relating to the interpretation or

---

14) *Hirst (No2.) v. the United Kingdom (No.2)*, judgment of 6 October 2005.
16) Strictly speaking, the judgment of the ECtHR does not have a power to strike down the domestic legislation. However, member states have dutifully executed most of the ECtHR’s judgments so far.
17) Recently Russia also expressed the similar attitude after its constitutional blanket ban was ruled as a violation by the ECtHR. *Anchugov and Gladkov v. Russia*, judgement of July 4, 2013.
application of the rights and freedoms defined in the Convention or the protocols thereto.

In addition, the ECtHR is eager to promote all kinds of dialogue. At the beginning of every judicial year, the Court invites a judge of a domestic apex court or a judicial minister to give a speech, and the president of the Court regularly visits member states and meets his or her local counterparts. Moreover, judges from the ECtHR frequently appear at academic conferences and generously offer their insights.

Those interactions between the ECtHR and member states show that the regional human rights protection system itself has been developing steadily in an on-going process and stands on a cornerstone constructed not from one piece of solid stone, but from a multilayered organic structure whose solidity relies on the present belief and efforts of its people. The present backlash against the ECHR and even the EU shows that the past does not guarantee the present. For example, the present UK government is planning to overturn the Human Rights Act of 1998 that incorporated the ECHR in 1998. Even Home Secretary Theresa May said the UK should quit the ECHR. 18) Meanwhile, the UK is also planning to hold a national referendum on its membership in the EU (BREXIT). 19)

5. The Venice Commission and constitutional courts

The role of The European Commission for Democracy through Law (hereinafter Venice Commission) in judicial dialogue should not be forgotten. The Venice Commission is the Council of Europe’s advisory body on constitutional matters. It was established in 1990 by 18 Council of Europe member states to facilitate the transformation of the former communist countries into countries with “human rights, rule of law and democracy.” The role of the Venice Commission is to provide legal advice to its member states and, in particular, to help states wishing to bring their legal and institutional structures into line with European standards and international experience in the fields of democracy, human rights and the rule of law. Although the opinions of the Venice Commission are not legally binding, their effect is substantial. 20) The commission presently includes 60 member states,

20) Wolfgang Hoffmann-Riem, The Venice Commission of the European Council – Standards and
consisting of 47 member states from the Council of Europe and 13 other countries (Algeria, Brazil, Chile, Israel, Kazakhstan, the Republic of Korea, Kosovo, Kyrgyzstan, Morocco, Mexico, Peru, Tunisia, and the USA). There are 5 observer countries (Argentina, Canada, the Holy See, Japan, and Uruguay) and 1 associate member (Belarus). The European Union, South Africa, and the Palestine National Authority have special status. Therefore, the commission does not represent Europe alone. The homepage of the Venice Commission provides a database of world constitutions and constitutional judgments (CODICES).

Furthermore, since 1996, the Venice Commission has played an important role in judicial dialogue by establishing cooperation among a number of regional or language-based groups of constitutional courts, in particular, the Conference of European Constitutional Courts, the Association of Constitutional Courts using the French Language, the Southern African Judges Commission, the Conference of Constitutional Control Organs of Countries of New Democracy, the Association of Asian Constitutional Courts and Equivalent Institutions, the Union of Arab Constitutional Courts and Councils, the Ibero-American Conference of Constitutional Justice, and the Conference of Constitutional Jurisdictions of Africa.21) Above all, the World Conference on Constitutional Justice, whose Secretariat is the Venice Commission, offers a global forum for judicial dialogue between constitutional judges. The conference unites almost a hundred constitutional courts and councils and supreme courts in Africa, the Americas, Asia, and Europe. This demonstrates the potential for building networks beyond each region.

In 2014, the Third Congress of the World Conference on Constitutional Justice was held in Seoul. The Seoul Communiqué adopted at the Congress revealed an initiative of the Constitutional Court of the Republic of Korea to promote discussions on human rights co-operation, including the possibility of establishing an Asian human rights court based on international human rights norms, in order to enhance human rights protection in the region.22) An Asian human rights court is not only a concern of Asian countries and people, but also for those outside Asia.


21) The Association of Asian Constitutional Courts and Equivalent Institutions consists of 16 member states: Afghanistan, Azerbaijan, Indonesia, Kazakhstan, Republic of Korea, Kyrgyzstan, Malaysia, Mongolia, Myanmar, Pakistan, Philippines, Russian Federation, Tajikistan, Thailand, Turkey, and Uzbekistan (16 members).

IV. The development of constitutionalism in Asia

The preceding background leads to the following questions: What could be a driving force for an Asian human rights court? Who can promote a firm vision and drive an effort to protect and promote human rights? What can be the cornerstone for establishing and maintaining an Asian human rights court? As previously mentioned, it is problematic that the definition of Asia is so ambiguous and diverse. Probably the most realistic definition of Asia is the residual area after Europe, Africa, and the Americas are removed from the world map. However, this passive definition is not meaningful for identifying a driving force. Can this residual area have a driving force on a specific cause? Perhaps a smaller region with more similarities could share a common driving force. The ASEAN is a good example. Then what about Asia as a larger area? This seems more difficult. For example, the chairman’s statement at the 10th East Asia Summit at Kuala Lumpur in 2015 (Our People, Our Community, Our Vision) does not mention human rights, rule of law, nor democracy (it referred to democracy only when mentioning the UN reform).

However, it is possible to start from what Asian countries have in common. It should be borne in mind that many Asian sovereign states were born after WWII with new constitutions. This means that most of the constitutions acknowledged the Universal Declaration of Human Rights and other international human rights documents. Therefore, it is not surprising that most of their constitutions are influenced by international human rights treaties, although some have direct effects and others indirect and hidden effects. Furthermore, the recent nation-building and constitution-making are likely to take place under observation by the international community. Those constitutions themselves are likely to mention international human rights treaties. Therefore, their influence is more visible. It is also important to emphasize that domestic bills of rights must be realized and maintained by constitutional institutions: the legislative, executive, and judiciary bodies. This constitutional arrangement itself is more or less a transplant of Western models or a mixture of indigenous and imported models. It must be noted that in Europe it took many centuries to institutionalize the ideas of democracy and rule of law (for example, the parliament and the court) and principles (for example universal suffrage, independence of the judiciary, and due process). Imagine how difficult it would be to develop a concept for a parliament or court when no such bodies exist. Now people are likely to take for granted the

concept of a parliament, the selection process for members of the parliament, what it is required to do, and what is not allowed to do. However, written constitutions cannot guarantee the realization of their content. It is not surprising that some states have difficulty in implementing democracy and rule of law. However, the gap between the reality and theory of the constitutional document is not necessarily unique to Asia. Despite Asia’s short period of experience with democratic or semi-democratic constitutions, the present emerging constitutional developments in Asia can be appreciated from a perspective of constitutionalism. These developments may have the potential to provide a possible cornerstone for an Asian human rights court. Moreover, once an Asian court is established, it can work as a defender of constitutionalism.

Several points must be noted in the development of constitutionalism. First, the development of constitutional review is significant. For example, the active practice of constitutional review in South Korea and Taiwan coincides with trends elsewhere, particularly in Europe. Even the more discreet Japanese judicial review endeavors to explore a new horizon with respect to foreign law and international human rights treaties. Despite the differences among countries, which are often over-emphasized, old and new human rights issues have similarities. When a domestic court tries to answer difficult questions, foreign sources could be helpful for exploring possible solutions. The aforementioned European experiences reveal that the judicial dialogue between national and European courts can be a helpful foundation for global human rights law and relevant not only for Europe, but also for other areas (for example, the Canadian court refers to the ECtHR case law). The globalization of judicial review in Asia and elsewhere may provide a stable cornerstone for an Asian human rights court. Therefore, criticism of the use of foreign and international human rights case law must be seriously addressed.

Second, the movement toward democratization is re-emerging in a different context in which new instruments, such as the internet and SNS, are available. It is too early to evaluate the outcome of such movements. So, far, movements such as the Arab Spring and Umbrella

---


Movement have not been sufficient for implementing democracy. Yet, taking into account the fact that almost all Asian states have installed a certain prototype of democracy (a government is elected by individuals with equal suffrage), even in the Asian context, undemocratic governments find themselves in a difficult position within the Asian and international communities.27)

Thirdly, the relationship between economic development and rule of law in the globalized world cannot be underestimated.28) The concept of rule of law exists not only at the domestic level, but at the international level. These interactions occur more frequently because of international or transnational business transactions and the increase in the number of international norms and international institutions. This environment has the potential to support the development of rule of law in domestic courts, which facilitates adoption of an Asian human rights court as a part of a mechanism to ensure rule of law.

V. The deliberative nature of International Human Rights Treaties in courts and re-conceptualizing constitutional, regional, and international institutions for human rights (A multi-layered protection system)

Because of the globalization of constitutional law and international law, many bills of rights in domestic constitutions and international human rights treaties overlap to a large degree. Domestic courts and regional courts face similar questions. It is imaginable that a judge facing a difficult issue would feel inclined to refer to their precedents, even if they hold outside his or her own jurisdiction. Such judicial dialogue has been attested in much academic research.29) However, there has been criticism that the use of foreign resources is “undemocratic, selective (cherry-picking), and misleading.”30)

There are two points to be addressed on this matter. First, reference to foreign sources can create a foundation for an Asian constitutional court. The situation previously described

27) Wen-Chen Chang et al, supra note 24.
29) See, Groppi and Ponthoreau, supra note 25.
(See 3.) induces some domestic judges to freely cite other foreign laws, case law, and international human rights treaties. This encourages judges to see human rights issues from a more global perspective, which may help when addressing global concerns.

Second, the existence of an Asian human rights court would promote reference to international human rights treaties. It is also imaginable to refer to various practices of other countries concerning the interpretation of treaties. The emergence of rich case law from the ECtHR based on its authority leads the domestic courts of ECHR member states to refer frequently to Strasbourg case law. How many domestic courts are willing to face the embarrassing situation of their conclusions being later overturned by the Strasbourg Court?

It is time to examine the criticism of referring to foreign sources. First, is it undemocratic for a domestic judge to refer to international human rights treaties? Here, it is important to differentiate between ratified international human rights treaties and foreign law. The judiciary is a part of the government under international obligation to the international human rights treaties it ratifies. If treaties are ratified according to a constitutional arrangement, which is usually approved by the legislature, referring to ratified international human rights treaties is not undemocratic. If a country adopts a constitutional arrangement in which a ratified treaty automatically becomes a part of domestic law, ignoring those treaties can be seen as unconstitutional.

Secondly, is reference to international human rights treaties selective (cherry-picking)? This is actually a more serious problem. For example, in 2013, the Supreme Court of Japan for the first time cited foreign law and international human rights treaties, including the specific recommendations of the Human Rights Committee and the Committee of the Rights of the Child when it invalidated a discriminatory clause against children born out of wedlock in the Civil Code. Taking into account the extremely deferential attitude of the Supreme Court of Japan toward the legislature, it is understandable that the Supreme Court referred to international recommendations because they could strengthen the Court’s reasoning. However, in 2015, the Supreme Court ignored the recommendations of UN human rights bodies when addressing the constitutionality of another controversial clause in the Civil Code. This selectiveness can be criticized as cherry-picking. It is now necessary

31) This does not mean foreign law is irrelevant. On the contrary international human rights treaties and foreign bills of rights are related to each other.
32) Decision of the SCJ (Grand Bench), 4 September 2013, 67(6) Minshu 1320.
33) Two separate judgments of the SCJ (Grand Bench), 16 December 2015, 2234 Hanji 38 and 2284 Hanji 20. For other examples of selectiveness, see, Fredman, supra note 230, 632.
to establish a consistent theory and methodology for referring to international human rights treaties.

There are two approaches on how to provide a theoretical foundation for applying international human rights treaties in courts. First, it is possible to strengthen the binding effect of human rights treaties. It is generally believed that the decisions of UN human rights bodies, such as recommendations, opinions, and general comments, are not binding. However, if domestic institutions such as the judiciary, legislative, and executive bodies try to faithfully implement the obligations under the human rights treaties, treaties may take on a quasi-binding effect. The accumulation of opinion and recommendations as precedent contributes to enhancing a de facto binding effect. Thus, if an Asian human rights court is established, it would be possible to render a regional human rights treaty binding. The question is how to make the government change its present attitude (minimalism in implementation). Therefore, the first approach is still too optimistic.

Second, a more realistic prescription is to treat international human rights treaties as deliberative resources.34) When the court makes a judgment (decision), it is necessary for a decision to be based on sound reasons. Imagine there are sound reasons A, B, and C and weak reasons D and E. If the court decides based on D and E only, it is easy to criticize its decision as wrong because the court failed to take into account other reasons, such as A, B, and C, despite the fact that they appeared more persuasive. It is not necessary to evaluate the strength of reasons D and E. The quality of the decision can be ensured by checking the process. How thoroughly are the reasons explored? In the aforementioned decision of the Supreme Court of Japan in 2013, all the possible reasons were examined thoroughly. Therefore, we can conclude that the 2013 conclusion is persuasive. In contrast, the 2015 judgments ignored some recommendations of the human rights treaty bodies. Therefore, the degree of persuasiveness of the 2015 judgment is lower than that of the 2013 decision.

It must be noted that a deliberative approach itself does not guarantee a single right answer. This requires a system of circulation in which no issues of human rights are overlooked until the issue is resolved or ceases to be a problem. In other words, opportunities for deliberation must be systematically secured for everyone. Thus, it is necessary to re-conceptualize all existing institutions at the domestic, regional, and international levels as multi-layered systems for human rights protection. The European protection system for human rights is already a good example of this model.35)

34) Fredman, supra note 30, 640.
Take the example of a child born out of wedlock. Until the first half of the 20th century, it was common for domestic civil law to distinguish children born in and out of wedlock. In the 1960s, European countries started to abolish this distinction. This was confirmed by the judgment of the ECtHR in *Marckex v. Belgium* in 1979. However, this judgment did not have the force to change the legislation of other countries’ discriminatory legislation. First, “The domestic margin of appreciation thus goes hand in hand with a European supervision”; and second, if an individual fails to bring a case to the Court, his or her problem cannot be addressed. This was true for French citizens until *Mazurek v. France* in 2000, in which the ECtHR ruled that the French discriminatory legislation violated the ECHR; thus, the French government changed the law. However, people under French jurisdiction had to wait 21 years, which revealed a limitation of the regional human rights protection system. However, the system continues to work to guarantee opportunities for deliberation to any victim wherever she or he lives within the jurisdiction of the ECHR. Moreover, a trickle effect of one system can have an impact beyond its jurisdiction. The aforementioned 2013 decision of the Supreme Court of Japan was indirectly influenced by the ECtHR case law just described. Thus, a particular regional court impacts more than just a particular region. In the future, an Asian human rights court can play an important role in maintaining as active a circulation as possible.

What would be the advantage of such a multi-layered system? First, the existence of such a system can contribute to gathering and sharing information concerning human rights beyond any borders. Second, it can offer opportunities for new perspectives. Imagine an example in which some countries already address a particular human rights problem without negative consequences. This can present an opportunity for other countries to rethink their own problems. Third, people who belong to certain minority groups have more difficulty expressing their voices effectively because of the volume of people. However, by understanding that the same minority concerns exist in every country at regional or international levels, the protection system can be more effective.

35) In this context, the protection system not only included the ECHR but also the EU and other international related institutions. It is also important to include NGOs and private sectors in terms of a problem discovery and implementation.
39) For details, see, Ejima, supra note 11, 166.
international levels, the minority can make a substantial presence. This can explain NGOs that work globally to raise their profiles in the international community. Fourth, as long as the system can maintain an active awareness of the issues, it would be possible to solve the problems. Fifth, such a system works to prevent human rights violations by any government by securing a minimum standard. Sixth, such a system works as a good detector of emerging human rights issues.

Ⅵ. Conclusion

The way to an Asian human rights court is probably still long and indirect. However, the difference between the 1950s and the present (probably even the 1990s and the present) is that an increasing number of developments in constitutional and international practices can be interpreted as a doorway to an Asian human rights court. In particular, the development of judicial review and interaction between different courts at the domestic, regional, and international levels can accelerate further developments. Moreover, one can argue that some Asian countries that have developed economically have an obligation to the rest of the world. An Asian human rights court would not only serve Asia, but would also serve as a missing piece in the jigsaw puzzle of the global human rights system. The establishment of an Asian court can thus develop a degree of protection that operates on a global scale. Thus, such a court can help the Asian region fulfill its responsibilities in a globalized world.
Systemic and Entrenched: Human Rights Abuse in Need of Regional Intervention in Asia

Surabhi Chopra*

I. Introduction

This chapter considers how a regional human rights mechanism in Asia might contribute towards protecting the rights of those who live in Asian countries. Focusing on India, I argue that a regional mechanism could be especially valuable in tackling two types of human rights violations. First, a regional mechanism can improve state practice on human rights violations that are so entrenched that they are rendered invisible, or seen as normal and unremarkable within a particular national context. Second, a regional mechanism could provide an important forum for challenging authoritarian practices to which governments are normatively committed.

Individuals who belong to groups that face chronic disadvantage tend to encounter serious barriers when trying to enforce their basic rights. Even if the state is formally committed to tackling bias and discrimination against disadvantaged groups, state functionaries might display bias in practice, undercutting the formal commitments included in law and policy.

Enforcing rights is even harder for individuals who come to the state’s attention in relation to issues where the state adopts authoritarian practices. Authoritarian state practices are characterized by a commitment to rights-reducing, accountability-limiting law and policy. These are certainly present in authoritarian states, but also present in constitutional democracies on a range of issues, most particularly in relation to national security.

A person who falls in either of these categories experiences a human rights “shortfall”: she is highly vulnerable to human rights abuse, and faces daunting barriers when seeking redress. Remedial mechanisms beyond national borders might be of particular aid to such individuals, who are likely to be poorly served by domestic mechanisms.

* Assistant Professor, Faculty of Law, Chinese University of Hong Kong
In this chapter, I consider these two types of vulnerability or “under-protection” in relation to human rights in India. In Section I, I focus on violence against women, which is so widespread in the Indian context as to be commonplace, despite the state’s formal commitment to gender equity. I then discuss unlawful violence against individuals suspected of threatening national security in India, which I argue is fostered by laws that whittle down individual rights and shrink checks and balances on the government. I look at a case-study that lies at the cusp of these two types of violence. I examine the experience of Soni Sori, an indigenous rights activist who was tortured by the police while in custody for alleged national security offences. I reflect on the barriers that Sori – a woman suspected of threatening national security – faces in accessing justice.

In Section II, I consider how a regional human rights mechanism in Asia might improve rights protection for someone like Soni Sori, who faces chronic disadvantage as a woman as well as encountering specific authoritarian practices as a national security suspect. I also consider briefly some of the challenges that an Asian human rights mechanism might face.

My focus is on domestic law and practice in India and the barriers to redress that make supra-national intervention useful. I do not delve into international law and touch only very briefly on the shape and form a regional human rights mechanism in Asia might take.

II. Human rights shortfalls in India

1. Chronic vulnerability: gender inequality in India

The Indian Constitution has recognized the equal citizenship of women since it first came into force in 1950\(^1\). However, equality before the law has had limited meaning in a country where women encounter deep discrimination within the home and at work, in public and in private.

Indian women confront deprivation early in their lives. Families feed and educate their sons better than their daughters\(^2\). Women’s rates of literacy are low: the most recent national government survey (now a decade old) indicates that 55 percent of Indian women are literate as compared to 78 percent of Indian men\(^3\). More recent data indicate that 81

---

1) Article 14, Constitution of India.

percent of primary school-aged girls are attending school, but attendance drops to 49 percent for secondary-school-aged girls\textsuperscript{4)}, suggesting a steep drop-out rate as girls become older, more vulnerable to violence, and more enmeshed in household duties. Indian boys have more licence to play, while girls are burdened early with household labour.

But discrimination against girls and women begins even earlier. Sex-selective abortion of female foetuses has risen steadily in India over the past twenty-five years\textsuperscript{5}). The prevalence of sex-selective abortion and the neglect – and resulting mortality - of girls in early childhood has resulted in India having amongst the lowest sex ratios in the world\textsuperscript{6}). Rising prosperity has not diluted the bias against girls. Within the country, the very lowest sex ratios are found in the wealthier states where more families can afford sex-determination medical services\textsuperscript{7}).

The bias that girls encounter shrinks their choices and opportunities as they get older. Women’s labour force participation is low by global standards\textsuperscript{8}) and a majority of women working outside the home are concentrated in low-wage jobs in the informal sector\textsuperscript{9}). Almost 50 percent of Indian girls are married by the age of eighteen, and almost 20 percent are married by the age of fifteen\textsuperscript{10}). Over 20 percent of girls have given birth by the time they are eighteen\textsuperscript{11}).

\begin{enumerate}
\item[7)] Action Aid, Disappearing Daughters (2014), at 20-22.
\item[8)] International Labour Organisation, Women’s labour force participation in India: Why is it so low? available at http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---sro-new_delhi/documents/genericdocument/wcms_342357.pdf. [Female labour force participation in India is less than 30% in 2014, as compared to approximately 50% in the Philippines and over 60% in China and Thailand].
\item[9)] Ibid., at 14.
\item[10)] UNICEF, Statistics on Child Protection in India, available at http://www.unicef.org/infobycountry/india_statistics.html#120
\item[11)] UNICEF, Statistics on Adolescents in India, available at
The subordinate status of girls and women is reflected in a range of different cultural practices, from the tradition of dowry to the prevalence of early marriage, from restrictions on what women can wear to the neglect and isolation of widows in many parts of the country. Gendered subordination is most starkly reflected in the violence that vast numbers of Indian women face, both within the home and outside it. \(^{12)}\)

Indian law prohibits such violence. The long-standing Indian Penal Code\(^{13)}\) recognizes a range of violent crimes, including rape, and prescribes punishments for them. In addition, India also has in place some more specialized laws that recognize specific types of violence against women, such as dowry-related violence and domestic violence. These include, inter alia, the recently passed Sexual Harassment of Women at Workplace (Prohibition, Prevention and Redressal) Act 2013, as well as longer standing laws such as the Protection of Women from Domestic Violence Act 2005, the Indecent Representation of Women (Prohibition) Act 1986, the Dowry Prohibition Act 1961, the Commission of Sati (Prevention) Act 1961 and the Immoral Traffic (Prevention) Act 1956. Specialized laws are tailored to particular forms of violence, and therefore might be better able to address those manifestations of violence than the general criminal law can.

However, laws focusing on gender-based violence against women remain lacking in many ways. While recent legislation, such as India’s law on domestic violence, has progressive, nuanced provisions, Indian law also retains some anachronistic provisions on violence against women.

For example, sexual harassment in the public sphere has tended, until very recently, to be prosecuted under the offence of “outraging the modesty of a woman”\(^{14)}\). This antiquated provision expressly seeks to protect a woman’s “modesty” rather than her autonomy and bodily integrity. By corollary, it fosters scrutiny of the victim’s appearance and actions (was she sufficiently modest?) rather than the culprit’s transgression. In another anachronism, rape is defined under Indian law to exclude marital rape\(^{15)}\). While recent reforms modernized and improved the law on rape in India, Indian legislators refused to lift


\(^{13)}\) Indian Penal Code 1860.

\(^{14)}\) Section 354, Indian Penal Code 1860

\(^{15)}\) Section 376, Indian Penal Code 1860
immunity for marital rape\textsuperscript{16}.

If the laws related to violence against women are inadequate in some respects, they are misused and poorly enforced in others. For example, while legislation bars doctors and nurses from performing sex-determination tests on foetuses and sex-selective abortions\textsuperscript{17}, this ban is easily circumvented in practice\textsuperscript{18}. The recently legislated Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013 is widely ignored even by well-resourced employers\textsuperscript{19}. Similarly, the Protection of Women from Domestic Violence Act 2005, although creative and comprehensive in scope, is weakly implemented\textsuperscript{20}. The legal system in India operates alongside informal community justice mechanisms that reinforce discrimination against women and disadvantaged castes. In recent years, informal community mechanisms in north India have issued startlingly misogynist edicts in response to sexual violence\textsuperscript{21}, and have also attempted to bar women and girls from wearing western clothing\textsuperscript{22}, using mobile phones,\textsuperscript{23} and choosing whom to marry\textsuperscript{24}.

Governments have failed to intervene when community mechanisms stigmatize or trivialize violence against women. More fundamentally, the state’s own machinery does not adequately respond to such violence. Police stations are poorly equipped to handle violence

\textsuperscript{16} Special Rapporteur, at 13, para 50.
\textsuperscript{17} The Prenatal Diagnostic Techniques Act 1994 and the Medical Termination of Pregnancy Act 1971 have provisions that prohibit sex-selective abortions.
\textsuperscript{18} Action Aid, \textit{supra} note 7, at 17-19.
\textsuperscript{20} Special Rapporteur, at 15, para 59-60.
\textsuperscript{23} \textit{Ibid}.
\textsuperscript{24} \textit{Supra} note 21.
against women\textsuperscript{25).} But alongside the lack of resources and training, gender bias also vitiates the state’s response to violence against women. Police officers, prosecutors, and judges stereotype women in damaging ways and dismiss violence against them\textsuperscript{26).} In 2013, many people took to the streets in protest and demanded reform after a young woman was brutally gang-raped on a bus in Delhi. A Member of Parliament described the young victim, struggling for her life in hospital, as a “living corpse” who would not “have a life worth living” even if she survived her injuries\textsuperscript{27).} Another Member of Parliament mocked the protestors as women who were “dented and painted”\textsuperscript{28),} tacitly disdaining demands for justice – and the women making these demands – as immodest and therefore, inherently suspect. In 2013, when a gang-rape in a car on one of the main thoroughfares of the city of Kolkata caused public outrage, the Chief Minister of the state dismissed the crime as a fabrication by the victim\textsuperscript{29).} If senior state functionaries dismiss victims of violence and campaigners for justice, the rank and file of the police harbour similarly damaging biases\textsuperscript{30),} as do judges and prosecutors\textsuperscript{31).}

Thus, women in India face sexism and misogyny within the home and outside it. Their chances to grow, study and work are hampered by bias. They are highly vulnerable to violence from their families, their communities and from more distant individuals.

The state in India, at the level of the constitution, statutory law and policy, attempts to counter gender-based discrimination and violence. However, some manifestations of violence are neglected at the formal level, and the violence that is formally acknowledged is routinely shrugged off by state functionaries in practice.

\textsuperscript{25) Special Rapporteur, at 13, para 50.  
30) Supra note 26.  
31) Supra note 26.
2. Authoritarian practices: national security legal regimes in India

While the Indian state is formally committed to women’s right to equality – and therefore the right to be free from gendered violence – it is considerably less committed to individual rights in the context of national security.

Since gaining independence in 1947, India has experienced movements for autonomy and independence in different parts of the country. While some separatist groups have been peaceful, many have been violent, attacking government officials and property as well as civilians. India has also faced serious terrorist violence on many occasions by radical-left groups in its eastern and central regions, and by religious extremists in different parts of the country.

Political violence has led Indian governments to create an array of security laws over the years. These laws, individually and as a whole, enhance the state’s ordinary powers to investigate, detain, prosecute, punish and use force against individuals. For example, the National Security Act allows governments to detain individuals preventively, without criminal charge, on the ground that detainees pose a potential threat to security and order32). Detainees can only challenge preventive detentions orders before a government-appointed administrative review board in the first instance. They are not entitled to legal representation during these proceedings33). India’s anti-terrorism laws contain broad, ambiguous offences, while diluting procedural rights available to the defendant34). The Armed Forces (Special Powers) Act empowers Indian governments to designate parts of the country as “disturbed”, and to deploy the armed forces to police the regions so designated35). Soldiers have liberal power to use force in disturbed areas, including the power to use fatal force without any express requirement of proportionality36). In addition to granting soldiers and the police greater-than-usual coercive power, Indian security laws also shield them from legal action if they abuse these powers37).

33) Section 9, National Security Act 1980.
35) Section 3, Armed Forces (Special Powers) Act.
36) Section 4, Armed Forces (Special Powers) Act.
37) Section 4, Armed Forces (Special Powers) Act and Section 197, Code of Criminal Procedure 1973. See also Surabhi Chopra, supra note 34, at 127-129.
The combination of expansive discretion and hefty legal immunity has proved corrosive. Indian security laws are closely associated with violations of human rights, both in custody and in public.\textsuperscript{38} Despite considerable evidence of serious abuses, including torture and extra-judicial execution, executive powers under security laws have been expanded over the years and checks and balances on these powers have been diluted rather than strengthened.\textsuperscript{39}

### 3. Gender and national security: the case of Soni Sori

Most suspects, detainees and defendants under security laws in India are men. Thus, more men than women are victims of unlawful violence by government functionaries who abuse their security powers. However, women who are suspected of threatening national security face particular, gendered vulnerabilities in this capacity. Human rights documentation and media reports indicate that women accused of endangering public order or security are disproportionately vulnerable to sexual violence by state actors. Below, I consider the case of Soni Sori, an indigenous-rights activist who was tortured and sexually assaulted by the police after being accused of extorting money on behalf of a separatist group.

Soni Sori lives in Dantewada, one of the poorest districts in the state of Chhattisgarh in central India. Chhattisgarh has a large proportion of residents from indigenous tribes, many of whom live in considerable poverty.\textsuperscript{40} Sori belonged to a middle-class indigenous family that espoused left-wing political views. She taught in a school for indigenous children, and had long lobbied for indigenous rights.\textsuperscript{41}

In September 2011, Soni Sori and her nephew, Lingaram Kodopi, were accused of pressuring a large mining conglomerate to give funds to a violent extreme-left group.\textsuperscript{42} Extreme-left insurgent groups have been active for many years in Chhattisgarh. The Chhattisgarh government has responded with strong policing, but also with severe

---

\textsuperscript{38} Surabhi Chopra, \textit{supra} note 34, at 125-133.
\textsuperscript{39} Surabhi Chopra, \textit{supra} note 34, at 110-111, 133-159.
\textsuperscript{40} Ilina Sen, \textit{A Situational Analysis of Women and Girls in Chhattisgarh}, at 4, 5 (National Commission for Women New Delhi 2004).
restrictions on expression and peaceful protest, and with informal militias to counter insurgent groups\textsuperscript{43}). Residents of the areas experiencing insurgency find themselves vulnerable to violence not just from non-state groups, but also from government forces\textsuperscript{44}). Journalists, NGOs and ordinary citizens who criticize heavy-handed policing risk falling foul of broadly-drafted national security crimes.

Sori – an vocal critic of the local authorities - had been accused by the police of colluding with insurgent groups on a number of occasions\textsuperscript{45}). The cases against her had collapsed or failed for lack of evidence. Her nephew, Lingaram Kodopi had also been accused of involvement with insurgent groups and, on a previous occasion, had been unlawfully detained in the toilet of a police-station for 40 days. He was released only after Sori successfully pressed a habeas corpus claim in court demanding that he be freed\textsuperscript{46}).

When the police made fresh allegations against Soni Sori in 2011, Sori absconded to New Delhi, the national capital, to avoid the persecution she feared she would face. A few weeks after the police accused Sori and her nephew of extorting money for insurgent groups, a local police officer admitted to a newsmagazine that the police had framed both of them\textsuperscript{47}).


\textsuperscript{44) Human Rights Watch, Being Neutral is Our Biggest Crime 6 (2008), at 6; Human Rights Watch, Dangerous Duty: Children and the Chhattisgarh Conflict (2008), at 14-19.}


\textsuperscript{46) Supreme Court of India, Judgment in Criminal Appeal No. 357 of 2014, arising out of petition for Special Leave to Appeal (Crl) No.7898/2013 (Kodopi v. Chhattisgarh); Petition for Special Leave to Appeal (Crl) No. 7913 of 2013 (Sori v. Chhattisgarh), Feb. 7, 2014, para 7; Chaudhury, supra note 42.}
Sori was arrested in Delhi, and when brought before a criminal court, she pleaded not to be sent to Chhattisgarh for fear of being tortured\textsuperscript{48).} Refusing her request to be kept in Delhi, the court transferred her to Dantewada\textsuperscript{49).} Shortly thereafter, Soni Sori was brutally tortured by the police. In a recent interview she recounted the details of her ordeal:

The superintendent, Ankit Garg, asked me to sign documents that would confirm I was involved with the Maoists. I refused. He then asked the lady constables to leave⋯.

The police officials started abusing me, calling me a whore and saying I indulge in sexual acts with Maoists. They stripped me naked, made me stand in an “attention” position and gave me electric shocks on various parts of my body. I still didn’t relent. They then shoved red chili powder inside my vagina. By now, I was losing consciousness, but I refused to sign the documents. The cops started inserting stones into my private parts. Many stones — so many that they started falling out. I finally collapsed.

The next morning, I could barely move when I was taken to court. My biggest complaint is that the magistrate didn’t even see me once and sent me to prison. In the days that followed, I was admitted to the hospital, where they chained me to the bed. When I asked why, they said it was procedural\textsuperscript{50)\).

Sori went on hunger strike to secure the medical attention she urgently needed, and petitioned the Supreme Court of India to intervene\textsuperscript{51)\).} The Supreme Court postponed Sori’s request to be moved to New Delhi for medical treatment, but ordered that she be taken to a public hospital in the eastern state of West Bengal for examination\textsuperscript{52)\).} The medical exam in West Bengal confirmed Sori’s allegations, revealing physical injuries as well as the

\begin{itemize}
  \item \textsuperscript{47) Shoma Chaudhury, \textit{supra} note 45.}
  \item \textsuperscript{48) Case history submitted by counsel for Soni Sori to the Supreme Court, summarized in Order in Sori v. Chhattisgarh WP(Crl) NO. 206 of 2011, Oct. 20, 2011, para 1.c.}
  \item \textsuperscript{49) Ibid., para 3.}
  \item \textsuperscript{51) Sori v. Chhattisgarh, (2011) SCR 206 ¶ 5 (noting that Sori had requested the Supreme Court to order the government of Chhattisgarh to transfer Sori to New Delhi and to order admit her to the All India Institute of Medical Sciences, a public hospital, for medical treatment) [on file with author].}
  \item \textsuperscript{52) Ibid., para 9.}
\end{itemize}
remnants of stones that had been forced inside her body\footnote{The medical report is summarized by the Supreme Court in its Order dated May 2, 2012, in Sori v. Chhattisgarh, (2012) SCR 206, CRL.M.P. Nos. 1104, 4981 & 8976 [on file with author].}. Despite this medical confirmation of custodial torture, Soni Sori was denied bail by the Supreme Court. She remained in state custody for over two years, and was not released even when her husband died in August 2013\footnote{Priyali Sur, \textit{supra} note 50.}. In November 2013, Sori was finally granted bail subject to stringent conditions\footnote{Order in Kodopi v. Chhattisgarh Petition(s) for Special Leave to Appeal (Crl) No(s).7898/2013, Sori v. Chhattisgarh SLP(Crl) NO. 7913 of 2013, Petition(s) for Special Leave to Appeal (Crl) No(s).7898/2013, Supreme Court of India, Nov. 12, 2013, para 3.}. It was not until February 2014 that Sori’s bail conditions were lowered sufficiently to allow her to return home and to be reunited with her two young children\footnote{Amnesty International, Amnesty India Welcomes Bail for Prisoners of Conscience Soni Sori and Lingaram Kodopi, February 7 2014, available at \url{http://www.amnesty.org.in/show/entry/amnesty-india-welcomes-bail-for-prisoners-of-conscience-soni-sori-and-linga}.}. Four and half years after Soni Sori was accused of extorting money on behalf of insurgents, she has yet to be put on trial\footnote{Sori’s petition to the Supreme Court challenging her bail conditions and other aspects of the criminal proceedings against her is listed as “pending” on the website of the Supreme Court of India, with the next court hearing scheduled for March 29, 2016. Supreme Court of India, Notice of Matters, \url{http://supremecourtofindia.nic.in/FileServer/2016-03-16_1458125892.pdf} (last visited on Mar. 20, 2016). This indicates that the criminal proceedings continue against Sori in relation to allegations of assisting violent radical-leftist groups.}. Despite the admission by a police officer involved in her case that she had been framed, the case against her has not been dropped. Further, despite the strong medical evidence validating her account of torture, the government has yet to formally acknowledge what happened. The officials responsible for torturing Soni Sori have never been prosecuted, or even investigated for their serious acts of violence. Moreover, Sori remains vulnerable to continued harassment. On February 20, 2016, unknown assailants threw acid in her face\footnote{Pavan Dahat, AAP leader Soni Sori Attacked, The Hindu, February 21 2016, available at \url{http://www.thehindu.com/news/national/other-states/soni-sori-attacked/article8262627.ece}.}. She has given interviews stating that she believes the local police were involved in the attack\footnote{Police Framing My Family For Attack On Me, Indian Express, March 12, 2016, available at \url{http://indianexpress.com/article/india/india-news-india/police-framing-my-family-for-attack-on-me-soni}.}.\footnote{Police Framing My Family For Attack On Me, Indian Express, March 12, 2016, available at \url{http://indianexpress.com/article/india/india-news-india/police-framing-my-family-for-attack-on-me-soni}.}
4. Entrenched abuse, systemic barriers to redress

Soni Sori’s situation is so stark as to seem anomalous. But even though her ordeal has been extreme, it highlights human rights shortfalls that are systemic in India, and would very likely affect other women too.

As discussed above, security laws in India expand the state’s coercive powers, grant officials wide discretion, dilute checks and balances on official decision-making, and place strong limits on the rights to freedom of expression, assembly and a fair trial. Widely-drafted security offences potentially capture within their ambit not just violent and dangerous activities, but a wide swathe of non-violent speech and action as well. This renders peaceful activists like Sori who criticize government behavior highly vulnerable to legal proceedings under security laws.

If the potential for abusing these powers is high, so is the temptation to do so. National security powers are often being wielded in situations where the authorities might be under considerable pressure to “get results”, incentivizing abuses. Torture, forced confessions, hasty arrests, unfair trials and manufactured evidence might elicit “successful” outcomes – the death or capture of a purportedly dangerous individual – more reliably than conscientious adherence to legal procedure would60).

Security powers are often wielded in regions that have been formally designated as “disturbed”. Residents of areas experiencing insurgency, particularly those who share the religion, tribe or ethnicity of insurgent groups tend to be regarded with suspicion by police and soldiers. The latitude that officials are given by security laws allows ample room for decisions driven by bias and fear rather than reasonably-founded suspicion.

While expansive security powers facilitate abuse, Indian law shields government functionaries from legal proceedings for transgressions committed while exercising security powers. Soldiers and civil servants cannot be prosecuted unless the national government expressly permits such proceedings61). As a result, to try the police officers who tortured Soni Sori, or to prosecute a soldier suspected of unlawful violence in a disturbed area, the prosecutor on the ground would have to ask the state government to request the Ministry of


Home Affairs in New Delhi for permission to proceed.

The national government does not readily disclose information about requests to prosecute government officials and the armed forces. However, the limited information available suggests that permission has rarely been granted. For example, research indicates that the national government did not grant any applications for permission to prosecute soldiers for unlawful violence from the northern state of Jammu & Kashmir between 1989 and 2011, despite strong evidence of serious crimes such as torture and extra-judicial killing by soldiers in this region. Out of 50 applications that it received, the government declined 26 and did not respond to the rest.

Thus, the Indian state is skeptical at a normative level about individual rights in relation to national security. Laws dilute individual rights, bolster the state’s coercive power and insulate state actors from legal accountability. Skepticism about rights at the normative level becomes amplified at the practical level. Individual government functionaries have abused their national security powers in serious ways, and when they have done so, the Indian government has tended to protect them staunchly rather than holding them accountable.

Because of the way that Indian security laws are structured and applied, individuals suspected of threatening national security are highly vulnerable to unlawful, abusive treatment. Women suspected of threatening national security face this structural vulnerability to abuse in a societal context where violence against women is widespread. As security suspects, women are vulnerable to abuse just as their male counterparts would be, but such abuse tends to manifest in particular, gendered ways when directed at them. Specifically, experience shows that women suspected of threatening national security in India are highly likely to encounter sexual violence and harassment by government functionaries.

Soni Sori was sexually and physically tortured in prison. The type of violence she faced has also been inflicted on women not just in state custody but also in their homes and neighbourhoods. Particularly in areas facing separatist violence, police and soldiers have sexually attacked and harassed women when conducting searches and investigating alleged security crimes. Such violence has been directed at young girls as well as adult women, in

front of their families and sometimes in public\textsuperscript{66).}

In some notorious instances, state actors have sexually attacked women in groups, in “retaliation” against a community’s suspected support for insurgent groups. In 1987, for example, the Indian army occupied Oinam village in the north-eastern state of Manipur for four months, torturing and attacking local residents.\textsuperscript{67) Many women in Oinam were sexually assaulted; two women in labor were denied medical help and forced to give birth while soldiers watched.\textsuperscript{68) In another example, in December, 1994, soldiers attacked civilians in Mokokchung town in the state of Nagaland after their commanding officer was killed in an exchange of fire with militants. In the violence that ensued, many women in Mokochung were raped, sexually assaulted, and stripped of their clothes\textsuperscript{69) Even as recently as December 2015 and January 2016, security forces are alleged to have raped and assaulted women and girls in remote villages in Soni Sori’s home state of Chhattisgarh\textsuperscript{70).}

It is no coincidence that the police officers torturing Soni Sori directed misogynist slurs at her. As an outspoken, politically active rights-advocate, she challenges societal restrictions on how women should behave. By petitioning the Supreme Court of India about

\textsuperscript{66) North East Network, \textit{supra} note 65, at 29-33, 39-40, 47, 50, 54.}
\textsuperscript{69) North East Network, \textit{supra} note 65, at 28.
the torture she suffered, Sori continues to defy biases against women who speak about sexual violence.

When Soni Sori was attacked in custody, she was a school-teacher and activist, experienced in engaging with the state and in handling harassment by the police. Despite her skills and experience, her attempts to seek redress for being tortured have not elicited results. She has encountered the neglect and skepticism which so many victims of sexual violence in India are forced to confront. Her predicament is worsened by the fact that she has criticized state actions in Dantewada for many years. As a suspect under a security law, she faces not just disregard from the government but active resistance to her efforts to pursue justice.

III. Regional intervention on human rights shortfalls

I argue above that individuals who face two types of human rights shortfalls will struggle to access adequate remedies within their own states. First, those who belong to groups that face deeply entrenched, discriminatory bias within a particular socio-cultural context are disproportionately prone to abuse, but also disproportionately encounter cynicism and neglect when they challenge abuse. The state may formally subscribe to equality, but institutions and officials routinely disregard abuse against disadvantaged groups. Second, on issues where the state is normatively committed to minimizing the scope of individual rights, laws and policies may be designed to diminish rights-protection and to loosen restraints on executive power in ways that facilitate serious violations of human rights. Victims of unlawful abuse by the government in this context will face formal restraints, as well attitudinal “blind-spots” and suspicion when seeking a remedy. Some, like Sori, risk retaliation when they pursue justice.

Individuals experiencing these systemic, stubborn shortfalls in rights protection are unlikely to access timely, effective justice within national borders. Barriers to justice will be particularly daunting for those who, like Soni Sori, simultaneously experience both types of human rights shortfalls. In light of these entrenched obstructions at the domestic level, a regional human rights mechanism could contribute to improving the protection of human rights for those who face chronic, heightened vulnerability to abuse.
1. Challenges to a regional human rights mechanism

Before I consider the potential value of a regional rights mechanism, it is worth noting that I am not addressing in detail the barriers to establishing such a mechanism in Asia. I certainly do not seek to downplay or underestimate the challenges involved in establishing a supranational human right mechanism in the world’s largest, most populous and most diverse region.

The very definition of what constitutes Asia is debatable in way that the composition of Africa or South America is not. For example, while Turkey is sometimes described as spanning both Europe and Asia, and it is, of course, a part of the Asian continent, it is often grouped with the Middle-Eastern countries or categorized as belonging to the Near-East by geopolitical analysts. Central Asian states like Kazakhstan, Kyrgyzstan and Tajikistan, which share a border with China and were formerly a part of the Soviet Union, also confound categories. While located in Asia, they share deep political and economic links with Eastern Europe.

Of course, there is more clarity about the membership of regional blocks within Asia. Few would struggle to identify which countries belong in South, South-east and East Asia respectively. The countries in each of these blocks have intertwined histories and cultural and linguistic affinities. At the same time, the legacy of these historical ties can be fraught. Officials from India, Pakistan and Bangladesh might be uniquely qualified to understand one another’s challenges and contexts. But these states might also be concerned about scrutiny or review by officials from neighbouring states, given the tensions they have had with one another in the latter half of the twentieth century.

Some states in Asia continue to be non-democratic, with very limited mechanisms for asserting individual rights. Even in states with strong traditions of independent judicial review, we find zones of authoritarian practice, where the scope of individual rights and the potential to challenge rights-violations is significantly constricted by law and policy. As discussed earlier, Indian laws on national security are an example of illiberal or authoritarian practice, creating a zone where ordinary checks and balances on executive power are scaled back rather sharply. Thus we find weak normative commitment to fundamental rights in general in some Asian states, and selective weakening of rights-protection in relation to certain issues in other Asian states.

In addition to this normative agnosticion on rights protection at the domestic level, many
Asian states have articulated an exceptionalist position on international human rights law. For example, some ASEAN states, Malaysia and Singapore in particular, were vocal in this regard in the 1990s. Many Asian states have been reluctant to allow hard-edged international scrutiny of their human rights records, and have not joined the Optional Protocol to the International Covenant on Civil and Political Rights, which allows individuals to bring complaints against their home states before the United Nations Human Rights Committee.

Given the wariness that many Asian governments display towards international human rights mechanisms, it is improbable that these states will welcome a supra-national regional mechanism that has binding force or that can adjudicate disputes between individuals and states. An Asian parallel to the Inter-American Court of Human Rights or the European Court of Human Rights is highly unlikely to garner official support in the foreseeable future.

However, many Asian governments might be more welcoming of a supra-national human rights mechanism that is not judicial or binding. The Inter-American Commission on Human Rights provides an interesting model of a regional mechanism that is not judicial, but nevertheless has the power to issue public opinions about a state’s actions and advise governments about how to redress violations of human rights.

2. The potential contributions of a regional human rights mechanism

Of course, advice and recommendations do not have the force and import of a binding judicial decision. Nevertheless, “soft” supra-national intervention of this nature can contribute to improving human rights protection in a number of ways.

A supra-national human rights mechanism, with its birds-eye view of different countries, could effectively counter the argument that international human rights norms are a


72) As of May 1 2016, Asian states that are not parties to the Optional Protocol to the International Covenant on Civil and Political Rights include, *inter alia*, Afghanistan, Bangladesh, Bhutan, China, India, Indonesia, Japan, Laos, Malaysia, Myanmar, Pakistan, Republic of Korea, Singapore, Thailand, Timor Leste. Asian states that are parties to the Optional Protocol include Nepal, the Philippines and Sri Lanka. Cambodia has signatory but not yet a party [membership status available at http://indicators.ohchr.org/].
culturally inappropriate Western imposition on a skeptical East\textsuperscript{73}). By juxtaposing a supposedly self-centred “West” with a putative family-focused “East”, this argument flattens the complexities of Asian countries as well as Western ones, and ignores the countries of Africa and Latin America entirely. Threadbare as this argument is, it has persisted, sometimes deployed self-servingly by governments to justify restrictions on human rights. Proponents of this view disregard the many movements for rights and representative government that Asian nations have seen throughout the twentieth century and in the present day. A regional human rights mechanism could usefully shift discussion of human rights away from a dubious East-West binary, by elucidating how human rights are recognized and protected in different Asian states.

A shift from whether human rights should be protected to how they are being protected might be especially beneficial on rights protection shortfalls that are widespread and chronic, such as discrimination and violence against women. Cultural difference or tradition is often cited to explain – and excuse – the discrimination and violence that women experience in many countries. As discussed in Section I, the sheer ubiquity of gendered bias and violence means that officials might not take it very seriously. Similarly, simplistic and essentializing arguments are sometimes deployed by governments to justify or neglect discrimination against ethnic, religious or sexual minorities.

A supra-national human rights mechanism could challenge chronic under-protection of the rights of vulnerable groups. By highlighting the range of official responses within Asia to gender and sexuality discrimination, a regional mechanism would push states to explain their own shortcomings without resorting simply to glib invocations of cultural difference. For example, Nepal’s express recognition of LGBT rights in its new constitution\textsuperscript{74}), India’s law securing greater representation for women in local government\textsuperscript{75}), or Taiwan, Japan and South Korea’s criminalization of spousal rape could usefully inform debates on these issues in other Asian states.

A regional human rights mechanism could assist governments at a normative and a practical level. Non-binding opinions can help to clarify human rights standards. An institution with human rights expertise can advise governments on the content of national

\textsuperscript{73}) For a summary of the “Asian Values” position on international human rights standards, see Helen Quane, \textit{supra} note 71.


\textsuperscript{75}) 73\textsuperscript{rd} Amendment to the Constitution of India; The Constitution (Seventy-Third Amendment) Act 1992.
policy that impacts human rights. For example, a regional human rights mechanism might develop standards on inclusive, egalitarian access to the right to education that influence education policies in different Asian countries. It can also advise governments on more specific predicaments that they might be facing. For example, regional experts might assist a particular government in developing measures to counter gender or race discrimination in secondary schools. In addition, it can draw attention to human rights violations that governments have neglected. For example, an investigation by regional experts might highlight how violence within the home and at school is affecting children’s educational achievements. In making these contributions, a regional mechanism can support and reinforce the work that national human rights institutions as well as multilateral agencies such as UNICEF are doing in various states.

If a supra-national mechanism could bolster national efforts to protect human rights on the one hand, it could make a more challenging, but also more crucial contribution when governments adopt authoritarian practices. On issues where a state has adopted rights-minimising law and policy, domestic checks and balances on executive power are likely to be weak, and remedies for abuse ineffectual. When governments are normatively uncommitted to human rights, national judiciaries and watchdog institutions tend to be overly deferential to executive power. Regional human rights interventions – even soft, non-binding ones – can serve as an important bulwark against abuse.

A supra-national mechanism could urge states to amend legal standards as well as to reform routines and practices that foster human rights abuse. In the context of national security, for example, a supra-national mechanism could highlight international guidance such as the Siracusa Principles, and pressure states to articulate a higher standard of human rights protection. A regional mechanism could advise states on how to incorporate these norms domestically, and disseminate examples of good practice amongst Asian states. At the same time, it could also serve an important “naming and shaming” function by criticizing states that allow persistent and egregious human rights abuse, such as torture and sexual violence by state actors wielding security powers. Disapproval from a regional human rights mechanism, given the multilateral, official nature of such an institution, would be harder for governments to discredit than similar criticism from civil society groups.

A regional human rights mechanism could also provide civil society groups from

different Asian countries a platform to exchange expertise and strategies. At the international level, the proceedings of United Nations human rights mechanisms provide such a platform. However, a regional mechanism would be more accessible to a larger swathe of NGOs, particularly from developing countries. Standards articulated by the regional mechanism as well as good practice within other Asian countries would serve as useful lobbying tools domestically. Networking and collaboration can strengthen the capacity of domestic NGOs to advocate for human rights within their countries, particularly as many human rights shortfalls have transnational impacts. For example, an asylum claim by a human rights defender who was tortured in her home country might be argued more effectively by her lawyer on understanding that human rights abuse against security suspects is systemic in the country of origin. Similarly, understanding the factors that expose women migrant workers to violence in the countries where they work might help NGOs in their home countries to advocate for bilateral cooperation between governments to counter such violence.

IV. Conclusion

Across Asia, social movements, civil society groups, government officials, politicians and ordinary citizens have worked in important, inspiring ways to secure rights and freedoms. These efforts have led to momentous changes, including decolonization, independence and transitions to democracy in many Asian countries. These efforts also fuel more modest progress, helping to develop law and policy that advance human rights and helping to redress violations of rights.

However, the recognition and protection of rights is generally weak in some Asian states, and highly uneven in others. A regional human rights mechanism could strengthen rights protection in Asia. Supra-national scrutiny and support could prove particularly important in addressing systemic, entrenched human rights abuse where domestic remedies are least likely to deliver.
Article 25 of the 1992 Statute of the Central American Court of Justice (CCJ), that states that the jurisdiction of the Central American Court does not extend to the area of human rights, which belongs exclusively to the Inter-American Court of Human Rights, produces several problems at the time of admission or not of cases that are submitted to the Regional Court that are related to alleged human rights violations:

1. The American Convention on Human Rights of 1969 in article 61 establishes that only State Parties and the Inter-American Commission on Human Rights have the right to submit a case to the decision of the Inter-American Court of Human Rights, and although its Article 44 anticipates that any person or nongovernmental organization can submit petitions to said Inter-American Commission, these can only refer to violations by States, which means that an individual cannot present himself to the Commission or the Court if the violation of human rights is committed by a body of the Central American Integration System (SICA).

2. Community matter is not exempt from the presence of fundamental rights because when the integration bodies issue rules that constitute Derivative Law they must have done so on the basis of respect for human rights.

3. The Esquipulas Peace Accords I and II elevated to the level of Community Law the principles that grant rights to the social conglomerate that integrates the Central American Community, ensuring particularly for citizens, community individualized rights, which are enforceable against the actions of its Member States when they affect them by their decisions or actions.

Such being the case, ¿which is the body that must then take control of the legality of the acts of the institutions or States of the Community if they violate fundamental rights?

In the daily jurisdictional work of the CCJ we deal with realities such as:
1. The basis of the Protocol of Tegucigalpa of 1991 in article 3a reaffirms as purpose of the Central American Integration System (SICA): “To consolidate democracy and strengthen its institutions on the basis of the existence of Governments elected by universal, free and secret suffrage and unrestricted respect for human rights.”

In article 4a, it notes that SICA must proceed according to the fundamental principle of “The protection, respect and promotion of Human Rights” (which) constitutes the fundamental basis of the Central American Integration System.”

Let’s not forget that the Protocol of Tegucigalpa emerges as a consequence of the Esquipulas Process which precisely rests on the basis of a full respect for human rights.

2. One of the many competences of the Court is to hear disputes that arise between individuals and a State or any of the bodies of SICA in full utilization of the ius standi. Because of this competence is that article 10 of the new CCJ’s Court Proceedings Ordinance expressly grants the individual a status as subject of rights when it states: “In court proceedings the procedural subjects are: … d) natural or legal persons.

A fortiori, Article 22 of the CCJ Statute establishes four competences in which the individual may become a Party:

1. “c) To hear, at the request of any interested Party, of the legal, regulatory, administrative or provisions issued by a State, when they affect Conventions, Treaties or any other rules of the Central American Integration Law or the agreements and decisions of its organs or bodies;”
2. “f) The second assumption of literal f) that expressly states: “To hear and resolve at the request of the aggrieved party … when de facto judicial decisions are not respected;”
3. “g) To hear issues referred directly and individually by anyone affected by the agreements of an Organ or Body of the Central American Integration System;”
4. “j) Hear as last resort, on appeal, of the administrative decisions dictated by the Organs or Bodies of the Central American Integration System that directly affect its personnel and whose reversal has been denied.”

1) Bold is ours.
2) Bold is ours.
The arguments put forth so far demonstrate that the CCJ can and should have competence over a possible violation of fundamental rights and liberties of individuals by a regulatory action of a State, body or institution of SICA, since in the development of any integration process of States it is indispensable to have a judicial protection of such rights and liberties in the framework of the law of the organizational structure that drives the process. Therefore, respect for human rights should be considered a basic criterion for the CCJ to control the legality of the regulatory actions of the States or bodies of SICA (Primary, Complementary and Derivative Law).

Therefore, it was only natural that legal actions in this direction arrived to the CCJ and evidently they will continue to do so. Here are some examples:

Since 2000 the first judges of the CCJ met with such a problem. In this regard, Dr. Rafael Chamorro Mora, former President of CCJ, in his book “The Court of Justice of the Central American Community” recognized the eventual competence that the CCJ had on human rights when they were violated by decisions of bodies, secretariats or SICA institutions, when he wrote: “From the competence of the Court the matter of Human Rights is expressly excluded, since it belongs exclusively to the Inter-American Court of Human Rights”, as stated in Article 25 of CCJ’s Statute. However, in accordance with its Article 30, the Court has the power to determine its own competence in each particular case it is referred to, by interpreting the relevant treaties or conventions in the matter at issue and applying the principles of the Integration and International Laws. It is therefore my view, that in cases of human rights violations committed not by States, but by bodies or organs of the Central American Integration System, the Court can hear them, as the Inter-American Court on Human Rights has no competence in the matter for not being the States the offenders.

Very soon the Court would have the opportunity to apply this criterion when to its knowledge came the emblematic case (11-1-8-2000) regarding the lawsuit filed by José Viguer Rodrigo against the Judicial Body of the State of Nicaragua. The judgement that the CCJ sentenced on October 24, 2000, although unfavorable to the plaintiff, is in my opinion historic in this matter for two reasons: 1) It outlines for the first time the idea that the CCJ can examine violations of human rights in certain cases; and 2) it clearly defines the areas of competence of both international courts on the matter. The sentence in question stated the following in Whereas Clause I): “That if the alleged violations are attributed to a Body, Organ or Institution of the Central American Integration System (SICA) as a result of a breach of rules governing the System, perhaps they could be judicially noted by this Court, considering that one of the pillars on which the Central American Integration System
(SICA) lies is, the full respect, protection and promotion of Human Rights, in accordance with articles 3a and 4a of the Protocol of Tegucigalpa, which this Court is internally obliged to safeguard and give effect in the System, as these Bodies, Organs and Institutions are not subject to the jurisdiction of the Inter-American Court of Human Rights, with a result that those affected by them would be unprotected.” And in the final decision, it unanimously declared … the request is denied because it doesn’t lie within the competence of this Court, since what has been expressed pertains to alleged violations of Fundamental Rights attributed to the Bodies responsible for administering justice in Nicaragua, State for which the American Convention on Human Rights is in effect, and consequently their knowledge can fall under the exclusive competence of the Inter-American Court of Human Rights, according with the provisions of articles 44 and 61 numeral 2 of said Convention….

Luis Paulino Mora, eminent Costa Rican jurist, expressed his views on the subject when he wrote in his book “Community Law and Human Rights”: community law cannot collide with the protection of human rights, if it did, the first reigns supreme, not only because it is an issue of jus cogens but for the provisions in constitutional jurisprudence that gives supra constitutional rank to everything that favors or better protects the person. In the same line of reasoning, it can be said that if a rule of community law better protects the human being, in that case the source to apply is the one that provides a better protection under the “pro homine” principle, so - for that case - the order of priority would be inverted and the rule of community law should be applied since it provides a more favorable outcome.”

While the idea that the CCJ can hear about violations of human rights in certain cases was first established in its previous period (1995-2005), it is till this one that the Court elaborated and began to develop the concept of the individualized community rights. Indeed, in this Regional Court’s judgement, handed down on October 20, 2010, following the Claim to Declare Void and Noncompliance with Community Normative, filed by Mr. Pablo Javier Pérez Campos, Congressman by the Republic of Panama to the Central American Parliament (PARLACEN), in his capacity as plaintiff and Gilberto Manuel Succari as co-plaintiff, against the State of Panama, which is contained in File 1-18-02-2010, the CCJ in another historic ruling that favored them broadly, pronounced in Whereas Clause IX of the judgment, not only the definition of what should be understood by Individualized Community Rights, but also establishing as its philosophical basis the Esquipulas Peace Accords I and II: “That with the Peace Accords of Esquipulas I and II, a framework of objectives, principles, values and rules that support the current process of Central American regional integration is established. This set of values and rules are
intended to ensure the purpose of the Central American Regional Integration: the common welfare through development, peace, justice and democracy. In this regard, the community normative incorporates principles, being such the guides of the current legal framework of the Central American Integration System and the actions of State Parties as well as of the Bodies, Organs and Institutions of said System. Thereof, these principles are elevated to the level of Community Law and therefore provide rights to the social conglomerate that integrates the Central American Community, ensuring particularly for citizens community individualized rights which are enforceable against the actions of the community bodies and the State Members when they are affected by their decisions and actions.”

On May 7, 2014 the Central American Court of Justice ruled again in this same direction, in the judgment that resulted from the lawsuit against the State of Panama (File 8-7-05-2012) filed by Mr. Octavio Bejerano Kant, for alleged perpetration of acts in violation of provisions of the Protocol of Tegucigalpa and the PARLACEN’s Bylaws. The basis of Whereas Clause XI of the judgement was: “Being the right to elect and be elected by universal, direct and secret suffrage, a fundamental right under the constitutional instrument of the Central American Integration System, the Protocol of Tegucigalpa to the Charter of the Organization of Central American States, in article 3 literal a), and also set forth in the Treaty Establishing the Central American Parliament, in articles 2 and 6; that fundamental right constitutes itself in an individualized community right, thereby corresponding to this court hearing and determining the case.” Consequently, the decision established: “that the State of Panama has violated Community Law and thus incurred in liability, being obliged to appropriate compensation for the damages and losses caused, which shall be known by the national jurisdiction.”

In consonance with all of the above arguments, and in the progressive development of the expressed central idea, apart from what the Court’s jurisprudence has already established, CCJ Justice Alejandro Gómez Vides in his book “Significant Contributions of the Central American Court of Justice to International and Community Laws” systematizes what, in his view, are the special features that make individualized community rights differ from the classical human rights:

1. Alleged violations are attributable to an organ, body or institution of SICA;
2. The concept of individualized community rights is based on the principles, values and standards set out in the Peace Accords of Esquipulas I and II, where a new concept of rights was reflected in favor of the Central American citizens.
3. The International Individual Human Rights legally convert themselves in Individual Community Rights the moment they are incorporated in any Central American community legal instrument.

Conclusions:
1. The concept of individualized community rights complements the traditional concept of human rights.
2. The control of legitimacy of decisions of the bodies of the Community when they violate fundamental rights corresponds to the CCJ.
3. The Inter-American Court of Human Rights has competence over human rights contained in the Pact of San José, the Inter-American Democratic Charter, the American Convention on Human Rights and the American Declaration of the Rights and Duties of Man, whereas the CCJ derives its competence of individual community rights from the Protocol of Tegucigalpa, its complementary instruments and derived acts.
4. Individuals who choose to resort to any of both courts for violation of human rights, should do so by basing their claim on the respective aforementioned international instruments, which grants them their specific competence. What they couldn’t do is litigate in both courts simultaneously.
Le rôle de la Cour Constitutionnelle dans la Promotion des Droits de l’Homme en République du Congo

Auguste Iloki*

I. Le rôle de la Cour constitutionnelle dans la promotion des droits de l’Homme en République du Congo

Il sied de relever, dès l’abord, que la Cour constitutionnelle n’a qu’une compétence d’attribution. Elle la tient de la Constitution du 20 janvier 2002 et de la loi organique n° 1-2003 du 17 janvier 2003 portant organisation et fonctionnement de la Cour constitutionnelle.

Ainsi, aux termes des dispositions combinées des articles 146 alinéa 1 de la Constitution et 2 de la loi organique, «La Cour constitutionnelle est chargée du contrôle de la constitutionnalité des lois, des traités et des accords internationaux.»

L’article premier de la même loi organique dispose que : «La Cour constitutionnelle est l’organe régulateur de l’activité des pouvoirs publics. Elle assure, à travers ses missions de contrôle, la protection des droits et libertés fondamentaux du citoyen.»

Il est évident que ces attributions n’affichent pas directement la Cour constitutionnelle en organe de promotion des droits de l’Homme. Cette charge est assumée par les organisations non gouvernementales et le ministère de la justice à travers la direction générale des droits humains.

Aussi, la Commission nationale des droits de l’homme, institution constitutionnelle, assure-t-elle la mission de régulation dans ce domaine des droits humains. L’article 168 de la Constitution dispose, en effet, que : « La Commission nationale des droits de l’homme est un organe de suivi de la promotion et de la protection des droits de l’homme. »

Le rôle de la Cour constitutionnelle dans la promotion des droits de l’Homme n’est pas expressément consacré par les deux textes sus cités. La Cour constitutionnelle n’assure la

* Président de la Cour constitutionnelle de la République du Congo.
protection des droits et libertés fondamentaux du citoyen qu’indirectement lorsque la question se pose à l’occasion d’un contrôle de constitutionnalité.

Ce rôle indirect confié à la Cour constitutionnelle lui permet de vérifier que, dans le domaine des droits de l’Homme, une loi, un traité ou un accord international ne viole pas les droits et libertés garantis par la Constitution. Autrement ce texte peut être soumis à la censure de la Cour constitutionnelle.

Pour ce faire, les citoyens disposent de deux modes de recours : le recours par voie d’action et le recours par voie d’exception. L’article 43 de la loi organique dispose, à ce propos, que : « Tout particulier peut saisir la Cour constitutionnelle sur la constitutionnalité des lois, soit directement, soit par la procédure de l’exception d’inconstitutionnalité invoquée devant une juridiction dans une affaire qui le concerne. »

1. Le recours par voie d’action

Le recours par voie d’action est régi par l’article 44 de la loi organique précitée : « Le recours en inconstitutionnalité n’est soumis à aucun délai. Il est valablement introduit par un écrit quelconque pourvu que celui-ci permette l’identification : nom, prénoms, date et lieu de naissance, profession et localisation : adresse du requérant et soit assez explicite en ce qui concerne l’acte ou la disposition dont l’inconstitutionnalité est alléguée et la disposition ou la norme constitutionnelle dont la violation est invoquée.»

A l’issue des débats, lorsque la Cour constitutionnelle statue sur le fond du recours, deux options se présentent. Elle peut, d’une part, constater que la loi qui lui est déférée est conforme à la Constitution. Dans ce cas, elle rejette le recours en inconstitutionnalité.

Elle peut, d’autre part, constater que le recours en inconstitutionnalité est bien fondé, c’est-à-dire que l’acte ou la disposition critiquée de la loi viole effectivement une disposition ou une norme constitutionnelle relative aux droits de l’Homme. Dans ce cas, la Cour constitutionnelle prononce son annulation. La loi ainsi annulée ne peut, conformément à l’article 45 alinéa 2 de la même loi organique, être ni promulguée ni mise en application.

2. Le recours par voie d’exception

Aux termes de l’article 48 de loi organique précitée, « Le recours en inconstitutionnalité par voie d’exception appartient aux parties en procès devant toute juridiction. »
A ce propos, l’article 51 de la même loi prévoit que « Si devant une juridiction quelconque, une partie soulève une exception d’inconstitutionnalité, cette juridiction sursoit à statuer et saisit la Cour constitutionnelle. »

Ce mécanisme permet, également, à un plaideur de déroger à la Cour constitutionnelle une loi qu’il estime qu’elle viole, par exemple, ses droits et libertés fondamentaux et qui lui est appliquée dans le cadre d’un procès ordinaire devant les juridictions de droit commun.

Lorsque la Cour constitutionnelle statue sur un tel recours, l’issue reste identique à celle d’un recours par voie d’action : la Cour constitutionnelle peut rejeter le recours ou déclarer l’acte déféré inconstitutionnel et l’annuler.

Tels sont les deux moyens mis à la disposition des citoyens à l’effet de leur permettre de faire respecter leurs droits fondamentaux par la Cour constitutionnelle. Il s’agit, plus, du rôle de la Cour constitutionnelle dans la protection des droits et libertés fondamentaux du citoyen que de leur promotion. L’on peut, toutefois, par analogie, estimer qu’en assurant la protection des droits et libertés fondamentaux du citoyen, la Cour constitutionnelle contribue, par voie de conséquence, à leur promotion.

Un autre mécanisme, plus restrictif, permet aussi à la Cour constitutionnelle de censurer une loi avant sa promulgation. En effet :

- La Cour constitutionnelle donne un avis de conformité à la Constitution avant la promulgation d’une loi organique. Pour cela, elle ne peut être saisie que par le président de la République ou le secrétaire général du Gouvernement par délégation ;

- Les lois ordinaires peuvent, également, avant leur promulgation, être déréglées à la Cour constitutionnelle pour avis de conformité par le président de la République, le président de l’Assemblée nationale, le président du Sénat ou par un tiers des membres de chaque chambre du Parlement.

Dans tous ces cas, si la Cour constitutionnelle constate que la loi qui lui est soumise est contraire à la Constitution, ladite loi ne peut être ni promulguée ni publiée. Il s’agit, aussi, par ces mécanismes, pour la Cour constitutionnelle d’empêcher, par exemple, qu’une loi qui viole les droits et libertés fondamentaux des citoyens entre dans l’ordonnancement juridique national.
Ⅱ. Les limites du système national de protection et de promotion des droits de l'Homme et les moyens d'y remédier dans le cadre de la création d'une Cour régionale des droits de l'Homme

1. Les limites du système national congolais de protection et de promotion des droits de l'Homme

Le système national de protection et de promotion des droits de l'Homme a l’avantage d’intégrer la plupart des instruments juridiques internationaux relatifs aux droits de l’Homme. Il appartient, à cet égard, aux citoyens de se les approprier afin de mieux les faire prévaloir chaque fois que de besoin. Le dynamisme des citoyens permet, en effet, de donner visibilité à leurs droits et de parfaire progressivement, au regard de la pratique, des circonstances et de l’évolution de la société, les différents instruments juridiques qui les garantissent.

Les droits de l’Homme sont universels et la République du Congo, consciente de cette dimension, a constitutionnalisé ces droits dans l’actuelle Constitution du 20 janvier 2002 aussi bien dans le corps même de la Constitution que dans son préambule.

Ainsi, le préambule de la Constitution énonce : « déclarons partie intégrante de la présente Constitution, les principes fondamentaux proclamés et garantis par :
« - la Charte des Nations Unies du 24 octobre 1945 ;
« - la déclaration universelle des droits de l’Homme du 10 décembre 1948 ;
« - la Charte africaine des droits de l’Homme et des peuples du 26 juin 1981 ;
« - tous les textes internationaux pertinents dûment ratifiés relatifs aux droits humains ;
« - ………………………………………………………………………………………………… »

Aussi, le titre II de la même Constitution est-il consacré aux « droits et libertés fondamentaux. »

Il est évident que le système juridique congolais consacre des standards qui assurent la protection et la promotion des droits de l’Homme. Il est alors difficile d’y voir des limites ou des insuffisances surtout que des textes législatifs et réglementaires, d’ailleurs à la portée des citoyens, complètent et structurent l’édifice constitutionnel.

Il sied, toutefois, de souligner qu’il peut arriver que les circonstances, des impératifs liés à l’ordre public, à l’intérêt général ou à toute autre situation exceptionnelle justifient
quelques restrictions à l’exercice des droits et libertés fondamentaux et par conséquent à leur protection et promotion.

Pour le reste, il appartient aux citoyens de faire prévaloir leurs droits devant telle administration ou telle juridiction. Dans tous les cas, le système juridique congolais prévoit, d’ailleurs, des garanties pour que, le cas échéant et selon les cas, la victime mette en jeu la responsabilité civile, pénale ou administrative de la personne physique ou morale mise en cause dans la violation des droits humains.

Par ailleurs, les syndicats, les organisations non gouvernementales et les autres groupes de pression œuvrant dans le domaine de la protection et de la promotion des droits de l’Homme sont assez outillés et savent toujours, en cas de besoin, se faire entendre.

Toute chose étant par nature perfectible, les faiblesses constatées par les acteurs étatiques et non étatiques font souvent l’objet de recommandations en vue de leur prise en compte par l’Etat dans le cadre de sa politique législative. Cette pratique est, d’ailleurs, courante de la part des observateurs de l’Organisation des Nations Unies, de l’Union européenne, des Etats-Unis d’Amérique, de l’Union africaine, de la société civile, de telle organisation non gouvernementale... dans le cadre, par exemple, de l’observation électorale, du contrôle des personnes détenues ou condamnées par la justice, des réfugiés, du droit d’asile, des déplacés...

2. Les moyens d’y remédier dans le cadre de la création d’une Cour régionale des droits de l’Homme

Une instance supranationale peut, en matière de protection et de promotion des droits de l’Homme, constituer un autre degré de garantie desdits droits en raison de ce qu’elle bénéficie de fortes présomptions d’impartialité, d’indépendance et surtout de détachement par rapport aux contingences nationales.

A cet égard, la création d’une Cour régionale des droits de l’Homme, pour garantir davantage la protection et la promotion des droits de l’Homme, n’est possible que sous certaines conditions :

- Il faut que les Etats qui s’y engagent partagent les mêmes valeurs, au regard des standards sous-régionaux, régionaux et internationaux afin de mieux les promouvoir et les défendre ;
- Le projet de création d’une telle instance supranationale doit faire l’objet d’une large consultation et d’une totale adhésion des Etats concernés et prévoir une clause de
reconnaissance de la juridiction obligatoire de l’institution dont la création est envisagée ;
• Le traité portant création de cette instance doit être signé, ratifié par tous les États partie et intégré au bloc de constitutionnalité. Les États partie doivent, aussi, chaque année, présenter un rapport à la Cour sur la situation des droits de l’Homme et les mesures d’ordre législatif ou réglementaire prises à l’effet de promouvoir et protéger effectivement les droits et libertés consacrés ou garantis dans le traité.

Le même traité doit :

• consacrer le principe de l’épuisement des voies de recours internes ;
• prévoir des sanctions susceptibles d’inciter les États partie à se conformer aux décisions de la Cour ;
• obliger chacun des États partie à mettre en place un fonds de garantie destiné, par exemple, à réparer les atteintes aux droits de l’Homme pour lesquelles la responsabilité de l’un dudit État a été retenue ;
• ouvrir la saisine de la Cour à tous les citoyens pourvu qu’ils aient, au préalable, épuisé les voies de recours internes.

Tels sont, monsieur le Président, les éléments de réponse que je crois convenir à votre sollicitation.
The Development of Regional Human Rights Institutions in Asia  
- Dialectical and functional perspectives

Jiunn-rong Yeh*

I. Introduction

Recent decades have witnessed the strengthening of human rights protection and strong revival of human rights discourse across the globe. Such a trend has been particularly noticeable on a regional basis exemplified by Europe, America and Africa. In Europe, the Convention for the Protection of Human Rights and Fundamental Freedoms, better known as the European Convention on Human Rights (ECHR), and its enforcement mechanism, the European Court of Human rights (ECtHR), have been functioning effectively over forty-seven member states for decades.\textsuperscript{1)} The European Union (EU), with its twenty-eight member states, has also placed the protection of human rights as one of its central missions by adopting the EU Charter of Fundamental Rights binding EU member states since 2009.\textsuperscript{2)}

Across the Atlantic Ocean, the American Convention on Human Rights (AmCHR) adopted by member states of the Organization of American States (OAS) has become increasingly influential with the strong collaboration by the two enforcement mechanisms, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.\textsuperscript{3)} More recently, in Africa, the African Charter on Human and Peoples’ Rights (AfCHR) that became effective in 1986 has gradually taken root. The implementations have been provided by the African Commission on Human Rights set up in 1987 as well as by the

\* Professor, College of Law, National Taiwan University

\textsuperscript{1)} For further information, see http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty
\textsuperscript{2)} For further information, see http://europa.eu/pol/rights/index_en.htm
\textsuperscript{3)} For further information, see http://www.corteidh.or.cr/index.php/en/about-us/historia-de-la-corteidh
African Court on Human Rights (AfCtHR) operational in 2006. As of February 2016, there are only seven state parties that recognized the jurisdiction of AfCtHR and a handful of cases filed with the Court.

Intriguingly however, this transnational development of human rights protection with functioning regional human rights institutions does not seem as viable in Asia as in other regions described above. Unlike Europe, America or Africa, Asia has not yet had any regional organization across the Continent or binding regional human rights instrument. The Association of Southeast Asian Nations (ASEAN), established in 1967, has ten member states covering only Southeast Asia. The ASEAN member states created the ASEAN Intergovernmental Commission on Human Rights (AICHR) in 2009 and adopted the ASEAN Human Rights Declaration in 2012. The largest intergovernmental organization in the region, the Asia-Pacific Economic Cooperation (APEC) has twenty-one member economies including members in the Pacific such as Canada, Chile and the United States. Taiwan known as ‘Chinese Taipei’ is also a member economy to the APEC. Yet, this regional network has mainly focused on economic cooperation but not on human rights protection. Absent intergovernmental arrangements notwithstanding, nongovernmental organizations have never ceased efforts in pushing forward the realization of regional human rights charters or organizations. For example, the Asian Human Rights Commission, a nongovernmental body, was founded in 1984 by a transnational group of human rights lawyers and activists in Asia. In 1998, an Asian Human Rights Charter characterized as a people’s charter was declared in Kwangju, South Korea by another transnational group of human rights lawyers and activists.

It is true that judged by formal terms, Asia has not yet had any regional human rights conventions or institutions. Seen in functional or dialectical terms, however, Asia has been developing transnational human rights discourses, frameworks and institutions for quite some time. As I have argued elsewhere, driven by globalization and its related complexities,

---

4) For further information, see [http://www.achpr.org/](http://www.achpr.org/)
5) For further information, see [http://en.african-court.org/](http://en.african-court.org/)
6) For further information, see [http://www.asean.org/asean/about-asean/](http://www.asean.org/asean/about-asean/)
7) For further information, [http://www.apec.org/About-Us/About-APEC/Mission-Statement.aspx](http://www.apec.org/About-Us/About-APEC/Mission-Statement.aspx)
8) [http://www.apec.org/About-Us/About-APEC/Member-Economies.aspx](http://www.apec.org/About-Us/About-APEC/Member-Economies.aspx)
9) For further information, see [http://www.humanrights.asia/about](http://www.humanrights.asia/about)
10) For the content of the charter, see [http://www.refworld.org/pdfid/452678304.pdf](http://www.refworld.org/pdfid/452678304.pdf)
The development of constitutionalism, rule of law and human rights has been channeled through beyond nation-states.\textsuperscript{11} There is no exception in Asia. Both internationalization of constitutional laws and constitutionalization of international laws have appeared in many Asian jurisdictions.\textsuperscript{12}

This paper argues that transnational developments of human rights discourses and institutions are increasingly seen in Asia at least in three aspects: 1) national incorporation of core human rights conventions, 2) international human rights references by domestic courts, and 3) establishment of national human rights institutions. By acceding to core international human rights norms and modeled on mainstream human rights institutions, Asian states have paved a solid foundation for further integrations of human rights norms and institutions. Future directions in establishing human rights institutions including human rights council, commission and court will be anchored by what have now been developing on a transnational scale in Asia.

\textbf{II. Functional and dialectical developments of regional human rights in Asia}

Absent regional human rights organization notwithstanding, Asia has been witnessing a rapidly developing trend in the integration of transnational human rights by both norms and institutions. First is national incorporation of core human rights conventions by a majority of Asian states. Accession to a similar line of international human rights norms renders Asian human rights integration more likely and less costly. Next, there are an increasing number of judicial references to international human rights laws or even to foreign national laws. The emergence of judicial human rights discourse does not only reflect the strength of human rights lawyers and communities in the region but also shows some level of readiness in further human rights integration in Asia. Last but not the least is the establishment of national human rights institutions pursuant to an international standard, which in varying degrees prepares for capacity building of regional human rights integration.

\textsuperscript{11} Jiunn-Rong Yeh & Wen-Chen Chang, The Emergence of Transnational Constitutionalism: Its Features, Challenges and Solutions, 27 (1) Penn St. Int’l L. Rev. 89-124 (2008).

\textsuperscript{12} Wen-Chen Chang & Jiunn-Rong Yeh, Internationalization of Constitutional Law, in Oxford Handbook of Comparative Constitutional Law1166(Michel Rosenfeld & András Sajó eds., 2012)
1. National incorporations of core human rights conventions

In the development of transnational constitutionalism, rule of law and human rights, the incorporation of core international human rights treaties has been one of the key approaches, by which international human rights norms have crossed sovereign boundaries and become entrenched into domestic legal systems. Recent decades have witnessed this vibrant development of incorporation of international human rights norms into domestic legal systems around the globe.

Three approaches to such development can be discerned. The first—and perhaps most important—is the incorporation of international human rights treaties and norms into domestic constitutions. The Constitution of Bosnia and Herzegovina is a great example since it annexes 15 international human rights documents to the Constitution and obligates the state to implement and obey. The second approach is that many recently enacted or revised constitutions of new democracies such as South Africa or those in Central and Eastern European typically include a chapter on rights reflective of international human rights. These new constitutions may also add one or two clauses to give international human rights laws direct applicability and superior normative status in the domestic legal system and instruct governments and courts to take into consideration these international human rights laws. Thirdly, domestic incorporation of international human rights can be made through legislation. In states without written constitutions, legislative incorporation indicates no less effect than constitutional incorporation. The Human Rights Act of the United Kingdom serves as a great example.

Such development also exists in Asia. Numerous Asian countries have embraced international human rights norms in recent decades. For example, Japan ratified the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR) in 1979. Later, it ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1985. To implement this Convention, the Japanese Diet passed the Act on Securing Equal Opportunity and Treatment between Men and Women in Employment at the same year.

14) Wen-Chen Chang & Jiunn-Rong Yeh, Internationalization of Constitutional Law, in Oxford Handbook of Comparative Constitutional Law1167 (Michel Rosenfeld & András Sajó eds., 2012).
15) Id.
16) Id.
After the democratization in the beginning of the 1990s South Korea acceded to two covenants: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR). In addition, it also ratified the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) in 1978, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in 1984, and the Convention on the Rights of the Child (CRC) in 1991.18)

Taiwan also made more significant progress to internalize international human rights norms in the first decade of the twenty-first century. In 2007, accession to the Convention on Elimination of All Forms of Discrimination against Women (CEDAW) was passed by an overwhelming parliamentary majority and formally announced by the president.19) In 2009, the Legislative Yuan ratified the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) and passed the Implementation Act for two Covenants.20) In 2012, the

---


19) However, the instrument of accession was rejected by the UN on the ground that Taiwan (ROC) was not a member state based on the aforementioned Resolution 2758. Notwithstanding the rejection, the government released the initial state report in March 2009, and invited experts, all of whom were ex-CEDAW committee members, to review it. Jiunn-rong Yeh & Wen-Chen Chang, A Decade of Changing Constitutionalism in Taiwan: Transitional and Transnational Perspectives, in Constitutionalism in Asia in the Early Twenty-first Century 153-154 (Albert H. Y. Chen ed., 2014).

20) The initial state reports of ICCPR and ICESCR were released on April 22, 2012, with the official English translation published on December 18, 2012. Under the initiative and preparation of the Presidential Consultative Human Rights Committee, an international review of both state reports, which closely emulated the reviewing practice of the Human Rights Committee and the Committee on Economic, Social and Cultural Rights, took place at the end of February 2013. Ten international experts, all of whom have had outstanding records in international human rights practices, were invited to serve on the two reviewing bodies, one for the ICCPR and the other for the ICESCR.36 Concluding observations and recommendations were adopted by these experts on March 1, 2013, and the government has pledged full compliance and implementation. Jiunn-rong Yeh & Wen-Chen Chang, A Decade of Changing Constitutionalism in Taiwan: Transitional and Transnational Perspectives, in Constitutionalism in Asia in the Early Twenty-first Century 153-154 (Albert H. Y. Chen
Enforcement Act of CEDAW was passed, rendering CEDAW’s women’s rights and gender equality provisions applicable to domestic law. Most recently, the Implementation Acts of Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities were passed in June 2014 and August 2014 respectively. 21)

Countries in Asia hold different positions to the incorporation of international human rights laws. Some national constitutions directly embrace international laws to be part of their laws and many more national judicial bodies have referred to international treaties or transnational norms to which their national political counterparts have not yet agreed. For example, Article 23 of the Constitution of Timor-Leste states that fundamental rights enshrined in the Constitution shall be interpreted in accordance with the Universal Declaration of Human Rights. Article 9 further states that the legal system of East Timor adopts the general or customary principles of international law, and that ‘rules provided for in international conventions, treaties and agreements shall apply’ in its legal system, and all rules that are contrary to the provisions of international conventions, treaties and agreements applied in the internal legal system shall be invalid. Similarly, Article 31 of the Constitution of Cambodia makes an express recognition of and respect for of human rights under the United Nations Charter, the Universal Declaration of Human Rights, and the covenants and conventions relating to human rights, and women’s and children’s rights. 22)

On the contrary, some new democracies such as Mongolia, South Korea and Taiwan have not provided a privileged status for international human rights law within the domestic legal regime. 23) For example, Article 6(1) of the Constitution of South Korea, which accords domestic legal status to treaties duly concluded and promulgated under the Constitution as well as the generally recognized rule of international law. A similar example is Article 141 of the ROC Constitution that requires the Government to respect treaties and the Charter of the United Nations. 24)

Although there is no one regional human rights institution in Asia, the incorporation of

22) Wen-Chen Chang, Kevin YL Tan, Li-ann Thio & Jiunn-rong Yeh, Constitutionalism in Asia: Cases and Materials 430 (2013).
24) Wen-Chen Chang, Kevin YL Tan, Li-ann Thio & Jiunn-rong Yeh, Constitutionalism in Asia: Cases and Materials 431 (2013).
international human rights treaties by Asian countries has served some institutional and dialectical functions in this region. First, an international normative legal order that guarantees these rights and compels states— as well as all other public and private actors—to respect, protect, and fulfill these rights in their respective domestic legal regimes has been well accepted in Asia. Second is the recognition that all fundamental rights and freedoms guaranteed in domestic constitutions are manifestations of universal human rights, and thus a convergent understanding and realization of these rights for the region is inevitable.  

2. International human rights reference by domestic courts

Incorporation of international human rights into domestic legal systems may also be carried out effectively through judicial interpretation. Courts may reference international human rights on their own assertion with or without any clear constitutional or legislative mandate. Judges may ground their incorporation of those rights on legal concepts such as the law of nations, generally accepted norms, or principles recognized by civilized nations. In the process of judicial incorporation, not only international human rights or documents ensuring those rights are discussed or referenced, but also decisions or interpretations by international courts regarding those rights and documents. In the many new constitutions of third-wave democracies, there has often been a demand for judicial reference to international law or at least international human rights law, and some even directly pronounce that international laws are part of their domestic laws. This domestic “constitutionalization” process of international norms has facilitated not only judicial conversations regarding external norms, but also constitutional functions of international norms.

Recently, there are a growing number of cases where East Asian courts reference

25) Wen-Chen Chang & Jiunn-Rong Yeh, Internationalization of Constitutional Law, in Oxford Handbook of Comparative Constitutional Law 1172 (Michel Rosenfeld & András Sajó eds., 2012).
27) Wen-Chen Chang & Jiunn-Rong Yeh, Internationalization of Constitutional Law, in Oxford Handbook of Comparative Constitutional Law 1166-1184 (Michel Rosenfeld & András Sajó eds., 2012).
international human rights laws.\textsuperscript{29} For example, constitutional courts in Taiwan, South Korea and Indonesia have given international human rights laws a direct domestic applicability by adopting a monistic view on the relationship between domestic and international laws. For example, the Constitutional Court of Taiwan in JY Interpretation No 578 advised the Government to conduct a comprehensive examination of the current scheme regarding labour retirement payments and stressed that ‘the provisions of international labour conventions and the overall development of the nation shall also be taken into account’. Similarly, the South Korean Constitutional Court in Constitutional Complaint against Article 8(1) of the Support for Discharged Soldiers Act, referred to the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) to review the veterans’ extra point system in the public officer exam, and suggested that the Government revise the system accordingly. The Court stated that CEDAW and other international treaties ban discrimination against women and treat the protection of rights for women and the disabled as fundamental. The veterans’ extra point system, despite its benign attempt to support economically disadvantaged veterans, came at the expense of vulnerable groups, such as women and the disabled. Thus, the Court held that the extra point system, as a means of aiding veteran soldiers, fell short of reasonableness and had to be revised accordingly.\textsuperscript{30} In addition, the Constitutional Court of Indonesia in several decisions actively cited international human rights laws. For example, the Court in one famous case used Article 6 of ICCPR to review the constitutionality of the death penalty provision in Indonesian Law No. 22 of 1997.\textsuperscript{31}

Influenced by this global and regional trend, the Supreme Court of Japan recently changed its conservative attitude toward the reference of international human rights treaties.\textsuperscript{32} The Court in Nationality Law Case was requested to review the constitutionality of the Nationality Act, which rejects the child born out of wedlock of a Japanese father and a foreign mother to obtain Japanese nationality.\textsuperscript{33} ICCPR and CRC were used as reasons for

\textsuperscript{30} Wen-Chen Chang, Kevin YL Tan, Li-ann Thio & Jiunn-rong Yeh, Constitutionalism in Asia: Cases and Materials 431 (2013).
\textsuperscript{31} HikmahantoJuwana, Courts in Indonesia: a Mix of Western and Local Character, in Asian Courts in Context 324-325 (Jiunn-Rong Yeh & Wen-Chen Chang eds., 2015)
\textsuperscript{32} Akiko EJIMA, Newborn Transjudicial Dialogue on Human Rights in Japan, Judicial and Extra-judicial Conversation on Constitutions, The IXth World Congress of the IACL, June 16-20, 2014.
\textsuperscript{33} Jiunn-Rong Yeh & Wen-Chen Chang, The Emergence of East Asian Constitutionalism: Features in
Apart from the use of international human rights treaties, some Asia courts also embraced foreign laws in their decisions. For example, the Constitutional Court of Taiwan directly cited foreign precedents in the majority opinion in JY Interpretation No 165. The Court cited a Japanese Supreme Court case to support its decision to extend less immunity to local councilors given the silent nature of the Constitution. In addition, the Constitutional Court of Taiwan in JY Interpretation No 342 was requested to decide whether three controversial Bills concerning national security organs were passed despite the chaotic voting situation with bloody filibusters. Although the applications did not mention any foreign precedents, the Court on its own initiative referred to the Japanese Supreme Court.34)

The use of international human rights laws and foreign precedents facilitates the vibrant transnational judicial dialogue among Asian countries. Such development in Asia not only triggers the entrenchment of transnational norms into national schemes, but also facilitates the rise of regional legal order.35)

3. Establishment of national human rights institutions

Another function and dialectical feature of transnational human rights development in Asia is the convergence of human rights institutions.36) Along with the vibrant development of national human rights commissions around the globe, many countries in Asia created their own national human rights institution to protect human rights and promote human rights standards in realizing human dignity and protection of human rights through the submission of opinion, recommendation, proposal or report on human rights matters to the Ministers.37) Nowadays, countries in Asia that established national human rights commissions include: Bangladesh (2009), India (1993), Indonesia (1993), Malaysia (2000),

34) Wen-Chen Chang & Jiunn-Rong Yeh, Judges as Discursive Agent: The Use of Foreign Precedents by the Constitutional Court of Taiwan, in The Use of Foreign Precedents by Constitutional Judges 386-387 (Tania Groppi & Marie-Claire Ponthoreau eds., 2013).

The convergence of national human rights institutions makes it more likely and feasible for the rise of transnational human rights system, especially when such national human rights institutions have the obligation to implement international human rights treaties. For example, some of commissions within the Asia Pacific region organized Asia Pacific Forum of NHRCs – serving as one dialogue forum to exchange information with regards how to spread and implement international human rights norms in this region. In addition, Paris Principles function dialectically as one shared ground for national human rights institutions in Asia to guide the development of human rights within the region.

Ⅲ. Future directions of regional human rights institutions in Asia

As analyzed above, Asia’s recent accession to core international human rights norms and institutions has paved a solid foundation for further integrations of human rights in this region. While in formal terms, there are no formal human rights institutions such as human rights council, commission or court in the region, there are nevertheless functional or dialectical institutions or networks that have been serving similar functions. Those efforts will serve as foundations that are pivotal to future regional human rights institutions when created.

1. Regional human rights council

If Asia creates a regional human rights council, such a council can monitor and provide advice for better implementation of human rights policy within the region. Although in formal terms, no regional human rights council exists in Asia, some of the present human rights institutions or networks may perform similar functions.

One possible candidate is the ASEAN Intergovernmental Commission on Human Rights

38) The official website of Asia Pacific Forum of NHRCs, available at http://www.asiapacificforum.net/about/

Established in 2009, the AICHR serves as a regional body for intergovernmental cooperation and dialogue on human rights issues in Southeast Asia. This role has become even more salient especially when more Asian states incorporated international human rights norms into their domestic legal systems. As a consultant institution, the main purpose of AICHR is to help member states of ASEAN fulfill their human rights obligations through intergovernmental dialogue, capacity building, and technical assistance. The AICHR meets at least twice a year and conducts numerous thematic studies including corporate social responsibility, migration and human trafficking, and makes reports to ASEAN Foreign Minister’s Meeting for further development of human rights situation within the region.

2. Regional human rights commission

The task of a regional human rights commission is among others to monitor the implementation of human rights in the region, to investigate human rights violations through individual complaints, and to submit reports to a regional court to address the domestic human rights violations. Absent a regional human rights commission notwithstanding, some organizations or networks may serve similar functions. One likely candidate is the Asia Pacific Forum of National Human Rights Institutions. This forum was organized by some Asian countries in 1996. Following the Paris Principles, the representatives of national human rights commissions from South Korea, India, Nepal, the Philippines, Indonesia, Malaysia, Mongolia, Thailand, and Sri Lanka held regular meetings to exchange information and facilitate human rights dialogue within the region. Its periodic meetings not only monitor, promote and protect human rights, but also provide technical advice to the governments on the compliance of international human rights standards.

41) The brief history of development about AICHR is available at : http://aichr.org/about/
42) The website of Asia Pacific Forum of National Human Rights Institutions is available at http://www.asiapacificforum.net/
3. Regional human rights court

As exemplified by the European or American Court of Human Rights, a regional human rights court is empowered to hear cases of human rights violations submitted by a regional commission and to issue advisory opinions for interpretation of regional human rights treaties. Although Asia does not have a regional human rights court, it has had a few judicial networks that may shoulder similar functions and developed a mutually inclusive circle of human rights discourse.

The Association of Asian Constitutional Courts is one example. This association was established by the Association of Asian Constitutional Court Judges through adoption of the “Jakarta Declaration” in 2010. It works as a regional forum for constitutional judges to deliberate the issues concerning the development of democracy, rule of law and fundamental rights in Asia.

Ⅳ. Conclusion

Although Asia has not yet had any regional human rights institution, it has nevertheless been developing functional or dialectical human rights discourses, frameworks and institutions on a regional scale. Transnational developments of human rights discourses and institutions are increasingly seen in Asia.

By acceding to core international human rights norms and developing human rights institutions modeled on an international standard, Asian states have paved a solid foundation for further integrations of human rights norms and institutions. Future directions in establishing human rights institutions in this region are more likely to be anchored by what have now been developing on a transnational scale in Asia. Based upon such an incremental development of functional and dialectical human rights institutions on a regional scale, future Asian human rights institutions may evolve better than its counterparts in other continents as they may have more experiences in having dialogues and relationship

45) The website of Association of Asian Constitutional Courts is available at http://www.aaccej.org/ ccourt?act=aacc
with different nations and diverse groups. Seen this way, Asian regional integration of human rights institutions may be developed late, but in no way less mature or vital.
References


Wen-Chen Chang, Kevin YL Tan, Li-ann Thio & Jiunn-rong Yeh, 2013,09, CONSTITUTIONALISM IN ASIA: CASES AND MATERIALS, Oxford: Hart Publishing.

Wen-Chen Chang & Jiunn-Rong Yeh, 2013,03, Judges as Discursive Agent: The Use of Foreign Precedents by the Constitutional Court of Taiwan, in THE USE OF FOREIGN PRECEDENTS BY CONSTITUTIONAL JUDGES (Tania Groppi & Marie-Claire Ponthoreau eds.), Oxford: Hart Publishing, pp. 373-392.


Tae-Ung Baik, 2012, EMERGING REGIONAL HUMAN RIGHTS SYSTEMS IN ASIA, Cambridge University Press.


Brian Burdekin, 2007, NATIONAL HUMAN RIGHTS INSTITUTIONS IN THE ASIA PACIFIC REGION, BRILL.
Prospects for an Asian Human Rights Court and the Role of Constitutional Courts

Mücahit Aydin*

The world has witnessed important developments with regard to human rights in the twentieth century. Until about the second half of the century, human rights were regarded solely as the responsibility of the state. The atrocities and destructive effects of the World War II have changed this view drastically and triggered international action on the issue. The adoption of the Universal Declaration of Human Rights on December 10, 1948 by the UN General Assembly was a landmark step in recognition and articulation of human rights by the international community. The declaration enshrined the bedrock principle that all human beings, by virtue of their common humanity, are entitled to minimum standards of human dignity regardless of any distinction such as race, sex, origin, religion, or political opinion. 1) The recognition of human rights continued with the emergence of human rights arrangements at the regional level. Europe, America and Africa have established their regional human rights instruments along with implementation machineries. 2) Asia, the largest and most populous continent of the world, remains the only region that lacks a region-wide mechanism for the protection of human rights.

It has been argued that certain unique characteristics of Asia, such as geographical vastness of the continent, the great diversity of ethnicities, cultures, and religions across the region, and significant disparities in the level of economic and social development among the regional states hinder the establishment of a regional human rights mechanism. 3) The

* Rapporteur Judge at the Constitutional Court of Turkey

1) See art. 2 The Universal Declaration of Human Rights.

2) It should be noted that the conceptualization of human rights and the implementation mechanisms vary in these three regional systems to some extent. See infra notes 13–27 & accompanying text.

lack of political will and heterogeneity of the political regimes are other and, perhaps the most underlying, factors that explain the absence of a human rights arrangement in the region.4)

However, there have been visible movements in Asia towards recognition and improvement of human rights standards in the last few decades.5) Asian states have increasingly signed and ratified international human rights instruments, most notably the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination against Women.6) The participation of Asian governments, national human rights commissions and civil society organizations in the regional meetings and activities to address human rights issues has also risen significantly.7) Moreover, serious efforts have been undertaken by certain Asian states for the establishment of a human rights mechanism at the sub-regional level.8) All these developments raise hope for

4) The Role of Regional Human Rights Mechanisms, supra note 3, at 5.
6) Kim, supra note 3, at 57.
7) Id. at 82.
8) Association of Southeast Asian Nations (ASEAN) made considerable progress towards establishing a sub-regional human rights mechanism. Article 14 of ASEAN Charter stipulates the establishment of an ASEAN human rights body for the promotion and protection of human rights and fundamental freedoms. Pursuant to the Article, the Terms of Reference (TOR) was adopted in 2009, and following, ASEAN Intergovernmental Commission on Human Rights was established in the same year. TOR states that the purpose of AICHR are, inter alia, “to promote and protect human rights and fundamental freedoms of the peoples of ASEAN” and “to uphold international human rights standards as prescribed by the Universal Declaration of Human Rights, the Vienna Declaration and Programme of Action, and international human rights instruments to which ASEAN Member States are parties.” ASEAN TOR available at file:///C:/Users/ay700244/Downloads/TOR-of-AICHR%20(1).pdf, accessed on 28.09.2015. For a detailed information of ASEAN’s human rights initiative see AICHR What You Need to Know, 2nd edition, The ASEAN Secretariat, available at file:///C:/Users/ay700244/Downloads/AICHR_Booklet_2nd_Edition_1.pdf, accessed on 28.9.2015; Hao Duy Phan, A Blueprint For a Southeast Asian Court Of Human Rights, 10 Asia-Pac. J. on Hum. Rts. & L. 385, 385-91 (2009).
institutionalization of human rights in the region.

As emphasized in the Vienna Declaration of 1993 and epitomized by the three existing regional human rights mechanisms, “regional arrangements play a fundamental role in promoting and protecting human rights.”9) As such, a regional human rights system would undoubtedly contribute to the enhancement of human rights culture and practices in Asia. In such a diverse region as Asia, greater respect for human rights will facilitate an environment that diverse cultures and ethnicities and vulnerable groups can live together in peace and harmony. A regional mechanism will also create an impetus for further cooperation and integration among Asian states and will help settle regional disputes. Further, it will strengthen the efforts and cooperation in combating transnational problems in the region, such as child and women trafficking and forced labor. Therefore, the establishment of a regional human rights system in Asia should be supported to the full extent.

The establishment of a region-wide human rights mechanism, however, involves many challenges, particularly considering the regional idiosyncrasies of Asia. The path toward that end requires genuine and continuous efforts by political actors and civil society organizations. Although it ultimately depends on political will of the regional states, civil society organizations and various non-political state organs, such as judiciary, may play an important role in promoting political consensus. The involvement of constitutional courts in such efforts will indeed contribute to this endeavor. The constitutional courts of Asia should thus undertake an initiative to discover possibilities for the establishment of an effective and credible human rights system.

The progress of regional human rights systems in Europe, America and Africa may provide valuable lessons for Asia. In Europe and in the Americas rather effective and advanced human rights systems are in place. The European Convention on Human Rights

9) Art. 37 Vienna Declaration and Programme of Action, UN Doc A/CONF.157/23 (1993). The Article reads as follows: “Regional arrangements play a fundamental role in promoting and protecting human rights. They should reinforce universal human rights standards, as contained in international human rights instruments, and their protection. The World Conference on Human Rights endorses efforts under way to strengthen these arrangements and to increase their effectiveness, while at the same time stressing the importance of cooperation with the United Nations human rights activities. The World Conference on Human Rights reiterates the need to consider the possibility of establishing regional and subregional arrangements for the promotion and protection of human rights where they do not already exist.”
(ECHR), which is the primary human rights instrument in Europe, comprises civil and political rights\(^\text{10}\) and currently has forty seven state parties, covering nearly entire Europe and eight hundred million people.\(^\text{11}\) The Convention had originally prescribed an implementation machinery consisting of a Commission having quasi-judicial functions and a non-permanent Court. In 1998, the Protocol 11 replaced the existing mechanism with the permanent European Court of Human Rights.\(^\text{12}\) The Court supervises state compliance with the Convention through individual and inter-state complaints.\(^\text{13}\) Individual complaint mechanism is the pillar of the European system. Well-developed case law and high compliance rate of the member states with the judgments of the Court constitute the major strengths of the individual complaint mechanism.

The inter-American Commission on Human Rights was established with a mandate to promote and protect human rights through facilitating the exchange of information and cooperation among governments.\(^\text{14}\) Although the Commission was bound with the principle of non-interference and had lacked the power to adjudicate individual complaints for violation of human rights, it played an eminent role in promoting human rights in the region by carrying out on-site observations and publishing country reports.\(^\text{15}\) The inter-American system was strengthened by the adoption of the American Convention on Human Rights (ACHR), which primarily affords protection to civil and political rights.\(^\text{16}\) The Convention extended the powers of the Commission to examine individual complaints and prescribed the non-permanent American Human Rights Court.\(^\text{17}\)

\(^\text{10}\) See art. 2–17 ECHR.
\(^\text{13}\) See art. 33–34 ECHR. The Court can also issue advisory opinions interpreting the Convention upon the request of the Committee of Ministers. The Committee is composed of the Ministers of Foreign Affairs of the states of the Council of Europe. See art. 47 ECHR.
\(^\text{16}\) See art. 3–25 ACHR. Art. 26 adopts an evolutionary approach with regard to social, economic and cultural rights.
Prospects for an Asian Human Rights Court
and the Role of Constitutional Courts

and the state parties are empowered to refer a case to the Court, and thereby they are performing a filter function with respect to the individual complaints in the inter-American system.

The African Charter on Human and People’s Rights (ACHPR) covers both civil and political rights and economic, social and cultural rights. It is also unique among international and regional human rights instruments in the sense that it includes not only human rights but also people’s rights and a list of duties of individuals to the community and the state. The Charter established the African Commission as the supervisory organ, and the Protocol, which entered into force in 2004, supplemented the system with the African Court for Human and People’s Rights (ACtHPR) with the power to render legally binding decisions. Similar to the inter-American system, individuals are not entitled to direct access to the Court.

As the experience of Europe, Americas and Africa demonstrate, the establishment of a regional human rights system requires an evolving process. It took, for example, five decades for the European system to reach its current form. With this in mind, Asia should employ a step by step process to achieve an effective and credible system. The prerequisite for a regional human rights system is an intergovernmental organization. All the three existing regional systems were built within a political organization: the Council of Europe, the Organization of American States, and the African Union (previously the Organization of African States). Thus, at the initial stage of an Asian human rights system, the focus of efforts should be primarily directed at establishing an intergovernmental organization to promote cooperation among regional states for the development of human rights.

One may raise the concern that such an organization might not attract widespread interest from Asian states. It should be not forgotten, however, the Council of Europe was established by only ten West-European countries in 1949, and today it virtually encompasses the entire Europe. There exist a considerable number of advanced liberal

17) See art. 41, 52–69 ACHR.
18) See art. 61 ACHR.
19) See art. 3–14, 15–17 ACHPR.
20) See art. 19–24, 27–29 ACHPR.
21) See art. 5 ACtHPR Protocol.
22) The Council of Europe, the main intergovernmental organization in the region, was established in 1949 by ten Western European countries in London as a response to the horrors of the World War II with the aim of protecting and promoting human rights, democracy and the rule of law. See The Role of Regional Human Rights Mechanisms, supra note 3, at 56.
democracies in Asia, and those countries may lead the establishment of a regional-intergovernmental organization. The accomplishment of this initial step, in turn, might prompt more Asian countries to participate in the organization in the near future.

The next component of a regional system is a human rights instrument. With respect to the scope of rights to be addressed in the instrument, it may be more practical for Asia to follow the European and American examples. Accordingly, the instrument might incorporate primarily political and civil rights, and social, cultural and economic rights might be addressed in a separate document. Alternatively, both generations of rights might be embraced by employing an evolutionary approach concerning second generation of rights. Due to low level of economic development across Asia, the fulfillment of social and economic rights may need to be considered in the long term. Therefore, it might be advised for Asia to give the priority to civil and political rights at the formation stage of a regional arrangement.

A prospective Asian human rights instrument should reflect the regional characteristics while respecting universal human rights. The very purpose of a regional system is to promote and protect human rights standards within the context of local cultures, needs, and priorities. That does not implicate a disregard of universal standards but to pay due regard to regional values and particularities. The African Charter, for example, incorporates its regional peculiarities along with international standards. Collective rights and duties and respect for family and community are explicitly defined in the African Charter. In a similar fashion, regional values and cultures, such as collectivism and filial piety may be embraced in the Asian instrument without deviating from universal standards. In this way, the portrayal of Asian values in a contradictory manner with universal human rights would be invalidated. Further, certain regional human rights issues, such as exploitation of woman and children, may need to be addressed with a special emphasis in the instrument.

Also critical is that the establishment of an appropriate mechanism to supervise the compliance of the state parties with the regional instrument. It might be advised for Asia to follow an evolutionary approach with respect to the supervision mechanism as well. Because the principles of sovereignty and non-interference are highly regarded by Asian states, it may not be feasible at an early stage to reach a widespread consensus for a regional human rights court with power to render legally binding decisions. The operation of a regional court in an effective manner also would require adequate funding and human resources, which may be more achievable over time. The African Court, for example, lacks effectiveness due to such hardships.23) Though the ultimate goal of a prospective Asian
system should be the implementation of human rights principles through a competent regional court, its establishment might need to be considered at a later stage.

The early progress of the Inter-American system may provide a good example for Asia with respect to the implementation mechanism. As noted earlier, although the American Commission was initially established with a soft mandate to promote human rights in the region and was bound with the principle of non-interference, it played an eminent role in promoting and protecting human rights in the region by holding on-site visits and publishing country reports with the consent of the concerned state. Asia may follow a similar path by establishing a Commission having a mandate to promote state parties to respect human rights and the regional system. The Commission may be empowered to interpret the prospective Convention upon the request of state parties, to investigate alleged massive human rights violations with the cooperation of the concerned state, and to publish reports on the progress of the state parties on human rights. The regional states may be more comfortable with granting such soft powers to the Commission since they rest upon cooperation rather than enforcement and therefore are not in direct conflict with the principle of sovereignty. This initial step may lead to a greater cooperation and consensus on human rights issues among the regional states, and in the future the Commission may be supplemented with a Court competent to adjudicate individual complaints for human rights violations.

The structure of the Commission carries great significance to ensure a well-functioning mechanism. First, a single Commission rather than a set of separate bodies may be more practical and effective. Several sub-commissions may be formed to assist the Commission with administrative matters or certain human rights issues of regional importance, such as woman and child exploitation. Every state party to the Convention should be represented in the Commission. However, in order to assure impartiality and independence, a special emphasis should be placed on the qualifications of individuals who will serve in the Commission. The members of the Commission should not be affiliated with their governments, and they should serve in their personal capacity. Further, they should be granted a full-time and long term service, with a restriction on engaging any activities that is in compatible with their positions. The Commission must also be provided with adequate and stable funding.

This rather soft mechanism outlined above may be more achievable at the early stage of

institutionalization of human rights in Asia. The central factor in establishing and maintaining a regional human rights system is the political will, and this soft approach may be necessary to induce the regional states to participate in the system. As stated earlier, there has been growing presence of civil society organizations in the field of human rights in recent years, demanding from Asian governments a greater respect for human rights. Similarly, the number of national human rights institution has risen significantly in Asia, and Asia-Pacific Forum has been very successful in promoting human rights in the region.24) All these developments, however, have yet to lead to a tangible outcome with respect to a regional human rights arrangement.

The participation of the constitutional courts in such efforts may give a momentum to the process and accelerate the pace of institutionalization of human rights. Although not political actors, constitutional courts play a crucial role in state affairs by safeguarding the principles of democracy, the rule of law, and human rights, and they may exercise a greater influence on political actors for the establishment of a human rights system.25) In this sense, the constitutional courts may serve as a bridge between state authorities and civil society organizations. In addition, constitutional courts may cooperate with civil society organizations in raising public awareness on human rights through capacity building and education, which are necessary for accomplishing advanced human rights practices and standards in the long run. Constitutional courts of Asia thereby may play a constructive role in the advancement of human rights by integrating different actors concerned.

The Association of Asian Constitutional Courts and Equivalent Institutions (AACC) might engage in activities to advance public opinion toward the establishment of an Asian human rights system. AACC might prompt and coordinate the cooperation of Asian constitutional courts with national human rights institutions and civil society organizations at the national and regional level so as to enhance human rights fulfillment and buttress demands for a regional arrangement. AACC might hold region-wide events and activities on a regular basis to explore the prospects of a human rights arrangement. It might also

24) As one noted commentator stated, “the APF and its network of national human rights institutions are the closest that the Asia Pacific region has come to a regional arrangement or machinery for the promotion and protection of human rights.” Cited from Durbach, Renshaw & Byrnes, supra note 5, at 217.

25) See generally Tom Ginsburg, Constitutional Courts in East Asia: Understanding Variation, 3 Journal of Comparative Law 80 (2008) (a case study regarding the role of constitutional courts in political and state affairs in Asia (Indonesia, Thailand, South Korea, Mongolia)).
adopt an Asian Human Rights Declaration as a way of leveraging the establishment of a regional instrument. Although not legally binding, the Declaration would serve as a basis for a prospective Asian human rights instrument as well as contributing to the development of customary human rights law in Asia. AACC might also initiate a forum to facilitate intergovernmental collaboration for a regional human rights arrangement.

The Turkish Constitutional Court (TCC) is committed to the development of constitutional justice and human rights in Asia. As a member of AACC, TCC undertook extensive activities to that end. TCC assumed the term presidency of AACC between 2012-2014 and hosted its 2nd Congress on 27 April-1 May, 2014 in Istanbul. It is also worth mentioning the Summer School on Constitutional Law, which has been organized by TCC for three consecutive years on behalf of AACC. The third summer school was held between 30 August, 9 September, 2014 in Ankara, with the participation of representatives of fourteen constitutional courts from Asia and Europe. The participants have shared and discuss their experiences and ideas on the topic of freedom of expression and association as well on general constitutional and human rights law, with a particular focus on their respective countries. The summer school is a noteworthy project in the sense that it significantly contributes to the development of regional understanding on human rights law. TCC will maintain its commitment to the development of human rights in Asia and will support and participate in the efforts toward the establishment of a human rights arrangement to the full extent.
## Introduction of Authors

<table>
<thead>
<tr>
<th>Court / Institution</th>
<th>Author</th>
<th>C.V.</th>
</tr>
</thead>
</table>
| Seoul National University | Song Seo-Yun | - Professor at Seoul National University School of Law  
- Universität Bielefeld, Dr.jur.  
- Yonsei University, LL.M  
- Seoul National University, LL.B |
| Constitutional Court of Kosovo | Ivan Đukanović | - Judge of the Constitutional Court of Kosovo  
- Professor in the Faculty of Law in Kragujevac  
- Doctorate in the Univ. of Belgrade (International Law) |
| Constitutional Court of the Republic of Macedonia | Elena Gosheva | - President of the Constitutional Court of the Republic of Macedonia  
- Graduated at the Law Faculty of the University "St.Cyril and Methodius" - Skopje in 1975 |
| Constitutional Court of Romania | Augustin Zegrean | - President of the Constitutional Court of Romania  
- Senator in between the years 1990-1992 and deputy 2004-2007  
- Faculty of Law of the Babes-Bolyai University in Cluj and conferred the title of doctor honoris causa by the University of Suceava |
| Cour constitutionnelle de la République du Congo | Auguste Boki | - Président de la Cour constitutionnelle de la République du Congo  
- Président de la Chambre administrative et constitutionnelle de la Cour suprême  
- Diplôme de l’école nationale de la magistrature de Paris (E.N.M), section internationale (1978) et d’un doctorat d’État en droit |
<table>
<thead>
<tr>
<th>Court / Institution</th>
<th>Author</th>
<th>C.V.</th>
</tr>
</thead>
</table>
| Constitutional Court of the Republic of Armenia | Gagik Harutyunyan | - President of the Constitutional Court of the Republic of Armenia  
- Prime Minister of the Republic of Armenia from November 1991 to July 1992  
- Doctor of Law, graduated from the faculty of Economics of the Yerevan State University |
| Supreme Court of Norway | Arnfinn Bårdesen | - Supreme Court Justice  
- Court of Appeal Judge, President Judge/ Head of Department and acting Chief President Judge, Gulathing Court of Appeal  
- Juris Dr (JD) 1999 |
| Austrian Constitutional Court | Gerhart Holzinger | - President of the Austrian Constitutional Court  
- Chairman of the Conference of European Constitutional Courts  
- Doctor of Law at the University of Salzburg, 1972 |
| | Stefan Leo Frank | - Deputy Chief Executive Director of the Constitutional Court of the Republic of Austria  
- Deputy Secretary General of the Constitutional Court of the Republic of Austria  
- Studies in law, University of Vienna, 1999 |
| Supreme Court of Israel | Yoram Danziger | - Justice of the Supreme Court of Israel  
- Member of the Israel Bar Association  
- LL.B, (1980) and LL.M, degrees (1981) from the Tel-Aviv University Faculty of Law  
- Ph.D, in law from the London School of Economics and Political Science (University of London) (1983) |
<table>
<thead>
<tr>
<th>Court / Institution</th>
<th>Author</th>
<th>C.V.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Constitutional Court of the Republic of Uzbekistan</td>
<td>Bakhtiyar Mirzabaev</td>
<td>- Chairman of the Constitutional Court of the Republic of Uzbekistan</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- State Counselor of the President of the Republic of Uzbekistan</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- Law faculty of Tashkent State University</td>
</tr>
<tr>
<td>Constitutional Court of Turkey</td>
<td>Mucahit Aydin</td>
<td>- Rapporteur Judge at the Constitutional Court of Turkey</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- S.J.D. degree from the University of Kansas, School of Law, and LLM degree from Case Western Reserve University, School of Law</td>
</tr>
<tr>
<td>Central American Court of Justice</td>
<td>Guillermo Pérez-Cadalso Arias</td>
<td>- Central American Court Justice</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- President of the National Autonomous University of Honduras</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- Minister of Foreign Affairs of Honduras</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- University Degree in law with specialization in International Law</td>
</tr>
<tr>
<td>Council of State of the Netherlands</td>
<td>Bernardus Petrus Vermeulen</td>
<td>- Member of the Council of State of the Netherlands</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- Professor of Constitutional and Administrative Law, VU University Amsterdam</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- Doctor of Laws, Erasmus University Rotterdam, 1989</td>
</tr>
<tr>
<td></td>
<td>Petrus van Dijk</td>
<td>- Member, Council of State of the Netherlands, 1990–2013</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- LL.M, University of Utrecht, 1966</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- Ph.D. (cum laude) University of Leiden, 1976</td>
</tr>
<tr>
<td>Court / Institution</td>
<td>Author</td>
<td>C.V.</td>
</tr>
<tr>
<td>-------------------------------------------</td>
<td>------------------------------------------------</td>
<td>----------------------------------------------------------------------</td>
</tr>
<tr>
<td>Council of State of the Netherlands</td>
<td>Hendrika Johanna Theodora Maria van Roosmalen</td>
<td>- Legal Adviser to the Dutch Council of State</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- Official Secretary to the Constitutional Law Committee</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- PhD-Fellow, E.M. Meijers Institute and Department of</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Constitutional and Administrative Law, Leiden University</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- Doctor of Laws, Leiden University</td>
</tr>
<tr>
<td>Constitutional Court of the Czech Republic</td>
<td>Pavel Rychetský</td>
<td>- President of the Constitutional Court</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- Former Deputy Prime minister and Minister of Justice</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- Charles University in Prague (Doctor Iuris)</td>
</tr>
<tr>
<td>Constitutional Court of Jordan</td>
<td>Taher Hikmat</td>
<td>- President of the Constitutional Court of Jordan</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- Former member of the Board of Jordanian Bar Association</td>
</tr>
<tr>
<td></td>
<td></td>
<td>and a Former chairman of the disciplinary council of the Bar</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- Bachelor of Law from Damascus University</td>
</tr>
<tr>
<td>Constitutional Court of Ukraine</td>
<td>Yuriy Baulin</td>
<td>- Chairman of the Constitutional Court of Ukraine</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- Professor at Criminal Law Department, Deputy Dean of Extra-Mural</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Faculty of YaroslavMudryi National Law Academy of Ukraine;</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- Doctorate at Kharkiv Law Institute</td>
</tr>
<tr>
<td>Supreme Administrative Court of Finland</td>
<td>Matti Paavo Pellopöldi</td>
<td>- Justice at the Supreme Administrative Court of Finland</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- Former Judge of the European Court of Human Rights</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- Former Professor of International Law at the University of</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Helsinki</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- LL.D., 1984, University of Helsinki, LL.M., University of Toronto,</td>
</tr>
<tr>
<td></td>
<td></td>
<td>1979</td>
</tr>
<tr>
<td>Court / Institution</td>
<td>Author</td>
<td>C.V.</td>
</tr>
<tr>
<td>-------------------------------------</td>
<td>---------------------------------------------</td>
<td>------------------------------------------------------------------------------------------------</td>
</tr>
</tbody>
</table>
| Constitutional Court of Thailand    | Nurak Marpraneet                            | • President of the Constitutional Court  
• President, the Juvenile and Family Division of the Court of Appeal Region VII  
• LL.B., Thammasat University, Thailand                                                                 |
| Conseil Constitutionnel du Royaume du Maroc | Mohamed Achargui                           | • Président du Conseil Constitutionnel du Royaume du Maroc  
• Procureur Général de S.M le Roi près la Cour des Comptes  
• Doctorat d'Etat en Droit Public                                                                 |
| Constitutional Court of the Republic of Croatia | Jasna Omejec                               | • LL.D, and Full Professor at the Department of Administrative Law, Zagreb Univ.  
• Judge of the Constitutional Court of the Republic of Croatia  
• Member of the European Commission for Democracy through Law                                                                 |
| Constitutional Court of Albania     | Bashkim Deja                                | • President of the Constitutional Court of Albania  
• Member of the Commission on the Justice Collaborators and Witness Protection  
• Graduated from the Faculty of Law at Tirana University                                                                 |
| Constitutional Court the Russian Federation | Valery Dmitrievich Zorkin                   | • President of the Constitutional Court the Russian Federation  
• Head of an expert group at the Congress of People’s Deputies’ Constitutional Commission,  
• Professor at the Soviet Interior Ministry Academy’s Constitutional Law and Theory of State and Law Department,  
• Doctor of Jurisprudence at the Moscow State University’s Law Department                                                                 |
<table>
<thead>
<tr>
<th>Court / Institution</th>
<th>Author</th>
<th>C.V.</th>
</tr>
</thead>
</table>
| Singapore Management University        | Maartje de Visser                           | • Associate Professor of Law at the Singapore Management University (Singapore)  
• PhD (Tilburg University, the Netherlands - cum laude);  
• MJur (Oxford University, United Kingdom - with distinction); and  
• LLM (Maastricht University, the Netherlands, cum laude) |
| Venice Commission of the Council of Europe | Gianni Buquicchio                          | • President of the Venice Commission of the Council of Europe  
• Doctor of Law cum laude at Bari University |
|                                        | Schnutz Rudolf Diller                      | • Head of Constitutional Justice Division at the Venice Commission of the Council of Europe  
• Secretary General of the World Conference on Constitutional Justice  
• Doctor of Law from the University of Vienna |
| Tribunal Constitucional de Chile        | Gonzalo García Pino                        | • Minister of the Constitutional Court  
• Head of Division Public Safety Ministry of the Interior  
• Doctor of Fundamental Rights by the Carlos III University of Madrid |
| Constitutional Court of the Republic of Lithuania | Dainius Žalimas                           | • President of the Constitutional Court of the Republic of Lithuania  
• Member of the Permanent Court of Arbitration(‘05~’11)  
• Graduated from the Faculty of Law of Vilnius Univ. (PhD), 2001 |
<table>
<thead>
<tr>
<th>Court / Institution</th>
<th>Author</th>
<th>C.V.</th>
</tr>
</thead>
</table>
| University of Chicago Law School    | Tom Ginsburg                | • The Leo Spitz Professor of International Law at the University of
|                                     |                             | Chicago                                                            |
|                                     |                             | • Legal advisor at the Iran-U.S. Claims Tribunal, The Hague, Netherlands |
|                                     |                             | • B.A., J.D., and Ph.D. degrees from the University of California at Berkeley |
| Meiji University, Tokyo             | Akiko Ejima                 | • Professor of Constitutional Law, Meiji University, Tokyo          |
|                                     |                             | • Visiting Scholar at King’s College London, Visiting Fellow at Harvard
|                                     |                             | Law School and Visiting Scholar at Hughes Hall                     |
|                                     |                             | • Faculty of Law, University of Cambridge, Visiting Scholar at
|                                     |                             | Wolfson College, University of Oxford                                 |
|                                     |                             | • MA in Law & Doctor of Law (Meiji University)                       |
| Chinese University of Hong Kong     | Surabhi Chopra              | • Assistant Professor at the Faculty of Law, Chinese University of
|                                     |                             | Hong Kong                                                           |
|                                     |                             | • Law degree from Cambridge University (First Class), a Masters in
<p>|                                     |                             | Human Rights from the London School of Economics (Distinction)       |
|                                     |                             | • BA in Anthropology from Harvard University (Magna cum Laude)       |
| Supreme Court of New Zealand        | Dame Sian Elias             | • Chief Justice of New Zealand                                      |
|                                     |                             | • Queen’s Counsel (appointed in 1988)                               |
|                                     |                             | • Auckland University with an LLB Honours Degree, 1970               |
| National Taiwan University          | Jiunn-rong Yeh              | • National Taiwan University chair professor                        |
|                                     |                             | • Doctorate degree of judicial science from Yale Law School          |</p>
<table>
<thead>
<tr>
<th>Court / Institution</th>
<th>Author</th>
<th>C.V.</th>
</tr>
</thead>
</table>
| University of Tuebingen Law School | Martin Nettesheim    | - Professor of Law, University of Tuebingen Law School  
- Holder of the Chair for German Constitutional and Administrative Law, European Community Law and International Law  
- Doctorate in Law (Dr. jur.), Free University of Berlin Law School |
| Supreme Court of Canada          | Richard Wagner       | - Superior Court judge  
- Chairman of the liaison committee of the Bar of Montréal and the Superior Court  
- Licentiate in Laws (LL.L.) from the University of Ottawa’s Faculty of Law |
|                                  | PARK Han-Chul        | - President, Constitutional Court of Korea  
- Member, Venice Commission of the Council of Europe  
- Justice, Constitutional Court of Korea  
- Chief Prosecutor, East Branch of Seoul District Prosecutors' Office  
- Ph.D, h.c., University of Seoul  
- LL.M., University of Seoul  
- LL.B., Seoul National University |
| Constitutional Court of Korea    | Lee Jinsung          | - Justice, Constitutional Court of Korea  
- Chief Judge, Gwangju High Court  
- Chief Judge, Seoul Central District Court  
- Vice Minister, National Court Administration of the Supreme Court of Korea  
- LL.B, Seoul National University |
|                                  | Kang Il-Won          | - Justice, Constitutional Court of Korea  
- Member of Bureau, Venice Commission of the Council of Europe  
- Co-President, Joint Council on Constitutional Justice of the Venice Commission  
- Director General of Planning and Coordination Office, National Court Administration of the Supreme Court of Korea  
- LL.M., University of Michigan Law School  
- LL.B., Seoul National University |
<table>
<thead>
<tr>
<th>Court / Institution</th>
<th>Author</th>
<th>C.V.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Inter-American Court of Human Rights</td>
<td>Roberto F. Caldas</td>
<td>- President of the Inter-American Court of Human Rights</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- Member of the Institute of Brazilian Attorneys, with a seat</td>
</tr>
<tr>
<td></td>
<td></td>
<td>on the Standing Committee for Labour Rights</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- Doctor honoris causa, São Luís College, Maranhão</td>
</tr>
<tr>
<td>European Court of Human Rights</td>
<td>Mark E. Villiger</td>
<td>- Prof. Dr. iur., University of Zürich/Switzerland</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- Former Judge (2006-2015) and Section President (2012-2015)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>at the European Court of Human Rights</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- Doctorate at the University of Zürich (all law studies</td>
</tr>
<tr>
<td></td>
<td></td>
<td>awarded magna cum laude)</td>
</tr>
</tbody>
</table>