Dny práva – 2010 – Days of Law, 1. ed. Brno : Masaryk University, 2010
http://www.law.muni.cz/content/cs/proceedings/

UNIVERSAL AND REGIONAL CONVENTIONS FOR HUMAN RIGHTS PROTECTION: CO-EXISTENCE AND/OR CONFRONTATION

MARTIN JANKU

Ústav práva a humanitních věd, Provozně - ekonomická fakulta, MENDELU Brno

Abstract in original language
Beginning with the adoption of the European Convention on Human Rights and Fundamental Freedoms in 1950, the trend to elaborate regional standards continued with the adoption of the American Convention on Human Rights in 1967, which was subsequently followed by the African Charter on Human and People´s Rights adopted in 1981. Various other international treaties have been elaborated in an effort to render the protection of not only civil and political rights, but also of economic, social and cultural rights more efficient. In some of these documents is, however, the understanding of these rights and the concrete scope of protection granted in the regional systems different. The paper attempts to answer the question to which extent the regional systems of human right protection are in conformity with the universally accepted catalogue of human rights and fundamental freedoms and to what extent the "double -track " regulation may disturb the uniform standard of their protection worldwide

Key words in original language
Human rights; UN conventions on Human rights protection; regional human right treaties.

Abstract
Počínaje přijetím Evropské úmluvy na ochranu lidských práv a základních svobod roku 1950, tendence vytvářet regionální standardy ochrany lidských práv pokračovala přijetím Americké úmluvy o lidských právech roku 1967, která byla následována Africkou chartou o lidských právech, schválenou roku 1981. byly vypracovány I další regionální úmluvy ve snaze učinit ochranu, poskytovanou nejen občanským a politickým právům, ale rovněž ekonomickým, sociálním a kulturním právům, efektivnější. V některých případech se však chápání těchto práv konkrétní rozsah jejich poskytování v rámci regionálních systémů ochrany liší. Příspěvek se snaží odpovědět na otázku, do jaké míry jsou regionální systémy ochrany lidských práv a základních svobod univerzálně uznávaným katalogem lidských práv a do jaké míry může jistá dvojkolejnost úprav a systémů ochrany mezinárodně právními akty různého regionálního dosahu narušovat žádoucí jednotný standard ochrany lidských práv a základních svobod.

Key words
Lidská práva; pakty OSN na ochranu lidských práv; regionální smlouvy na ochranu lidských práv.

INTRODUCTION

Starting with the Universal Declaration on the Human Rights ("UDHR" thereinafer) adopted in 1948, the international community created a universal system of human rights protection for the most part with control system headed by an international monitoring body accepting as complaints from states so individual complaints on behaviour – signatories of the conventions. The hardcore of this universal system of human rights protection represent six conventions adopted between 1965 and 2003 that achieved in average about 170 ratifications by signatory states (the Convention on the Rights of the Child is the most "successful" of these conventions with 193 ratification in total).

However, already the circumstance that there are about thirty states – members of the international community - who do not participate in the implementation of these conventions, weakens the really universal impact of these conventions. Their efficiency is furthermore impaired by the fact that the participation of states in the control system is less universal (e.g. the Optional protocol to the 1966 International Convenant on Civil and Human Rights the establishing the monitoring system of the Convenant received only 113 ratifications[1])

Therefore the regional systems of human rights and fundamental freedoms were created in the effort to strengthen the respect for human rights. Beginning with the adoption of the European Convention on Human Rights and Fundamental Freedoms in 1950, the trend to elaborate regional standards continued with the adoption of the American Convention on Human Rights in 1967, which was subsequently followed by the African Charter on Human and People´s Rights adopted in 1981. Various other international treaties have been elaborated in an effort to render the protection of not only civil and political rights, but also of economic, social and cultural rights more efficient.

AIM OF THE WORK

The various international documents differs as to the understanding of human rights and fundamental freedoms. These rights are given concrete scope of protection granted in the regional systems that vary according to the political, religious, moral and cultural traditions and concepts that underlie the philosophy of the individual documents. The present work attempts to answer the question to which extent the regional systems of human right protection are in conformity with the universally accepted catalogue of human rights and fundamental freedoms and to what extent the

---

[1] for more details on the monitoring system see Möller J.T./ de Zayas A.: The United Nations Human Rights Committee Case Law 1977-2008, N.P.Engel Publishers, Kehl/Strasbourg, 2009, ISBN 978-3-88357-144-7

"double -track " regulation may disturb the uniform standard of their protection worldwide

RESULTS AND DISCUSSION

In this part of the paper attention will be given of some of the major regional human rights treaties existing in Africa, Americas, Asia and Europe.

A. EUROPE

The European Union's activities are based on the main international and regional instruments for the protection of human rights, including the European Convention for the Protection of Human Rights and Fundamental Freedoms and Nine Protocols. The European Convention on Human Rights was adopted by the Council of Europe in 1950, and entered into force on 3 September 1953.[2]The Convention originally created both a European Commission and a European Court of Human Rights entrusted with the observance of the engagements undertaken by the High Contracting Parties to the Convention, but with the entry into force of Protocol No. 11 to the Convention on 1 November 1998, the control machinery was restructured so that all allegations are now directly referred to the European Court of Human Rights in Strasbourg, France. This Court is the first, and so far only, permanent human rights court sitting on a full-time basis. The rights protected by the Convention have been extended by Additional Protocols Nos. 1, 4, 6 and 7, all of which will be dealt with below. Protocol No. 12 concerning the prohibition of discrimination was opened for signature on 4 November 2000 in Rome, in the context of the fiftieth anniversary celebrations of the Convention itself, which was signed in the Italian capital on 4 November 1950. Finally, Protocol No. 13 was opened for signature in Vilnius on 3 May 2002.[3]

Some of the articles of the Convention and its Protocols provide for the possibility to impose restrictions on the exercise of rights in particular defined circumstances. This is the case with the right to respect for one's private and family life), the right to freedom of thought, conscience and religion, the right to freedom of expression and the right to peaceful assembly and freedom of association of the Convention. The same holds true with regard to the right to peaceful enjoyment of one's possessions in article 1 of Protocol No. 1 and the right to freedom of movement and residence in article 2 of Protocol No. 4.

---

[2] As of 29 April 2010 it had 47 States parties. (For the ratifications of the European Convention on Human Rights and its various Protocols, see http://conventions.coe.int/)

[3] This protocol concerns the abolition of the death penalty in all circumstances.

The restrictions on the exercise of these rights must, however, in all circumstances be imposed "in accordance with the law", be "provided for by law" or "prescribed by law"; and, with the exception of article 1 of Protocol No. 1, they must also be "necessary in a democratic society" for the particular purposes specified in the various articles, such as, for instance, in the interests of public safety, for the protection of public order, health or morals, the prevention of disorder or crime or the protection of the rights and freedoms of others (the legitimate reasons vary depending on the right protected). It is true that, while the notion of a democratic society is thus not referred to in connection with restrictions that might be imposed on the right to peaceful enjoyment of one's possessions, the notion of democracy and a democratic constitutional order is ever-present in the Convention and is a precondition for States that wish to join the Council of Europe. It is therefore possible to conclude that restrictive measures clearly alien to a democratic society respectful of human rights standards would not be considered to be in "the public interest" within the meaning of article 1 of Protocol No. 1.

The case-law of both the European Court of Human Rights and the now defunct European Commission of Human Rights contains rich and numerous interpretations of the term "necessity" in the various limitations provisions. Although it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of 'necessity' in the context of freedom of expression, for instance, it is for the Court to give the final ruling on the conformity of any measure with the terms of the Convention, a competence that covers not only the basic legislation but also the decision applying it, even one given by an independent court. This European supervision thus also comprises the aim and necessity of the measure challenged.

Another important document is the EU Charter of Fundamental Rights, which was officially proclaimed at the Nice Summit in December 2000. The charter makes the overriding importance and relevance of fundamental rights more visible to the European Union's citizens by codifying material from various sources, such as the European Convention on Human Rights, common constitutional traditions, and international instruments.

The European Court of Human Rights is an international institution based in Strasbourg, which in certain circumstances can examine complaints by people claiming that their rights under the European Convention on Human Rights have been infringed. This Convention is an international treaty by which a large number of European States have agreed to secure certain fundamental rights. The rights guaranteed are set out in the Convention itself, and also in a number of protocols (which only some of member States have accepted).

B. NORTHERN AND SOUTHERN AMERICA

The American Convention on Human Rights, 1969, also commonly called the Pact of San José, Costa Rica, since it was adopted in that capital city, entered into force on 18 July 1978 and, as of 9 April 2002, had 24 States parties, following the denunciation of the treaty by Trinidad and Tobago on 26 May 1998[4] . The Convention reinforced the Inter-American Commission on Human Rights, which since 1960 had existed as an autonomous entity of the Organization of American States. It became a treaty-based organ which, together with the Inter-American Court of Human Rights, "shall have competence with respect to matters relating to the fulfilment of the commitments made by the States Parties" to the Convention[5]

In 1988, the General Assembly of the OAS further adopted the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, also called the Protocol of San Salvador. This Protocol develops the provisions of article 26 of the Convention whereby the States parties in general terms "undertake to adopt measures, both internally and through international co-operation, ... with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires". This Protocol entered into force on 16 November 1999.[6]

Lastly, in 1990 the General Assembly also adopted the Protocol to the American Convention on Human Rights to Abolish the Death Penalty, which entered into force on 28 August 1991. The States parties to this Protocol are not allowed to apply the death penalty in their territory to any person subject to their jurisdiction. No reservations may be made to this Protocol, although States parties may declare at the time of ratification or accession that they reserve the right to apply the death penalty in wartime in accordance with international law, for extremely serious crimes of a military nature.

The States parties to the American Convention on Human Rights undertake to respect the rights and freedoms recognized therein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination on certain cited grounds[7]

---

[4] . for the text see: http://www.oas.org/juridico/english/Sigs/b-32.html

[5] Robertson A.H., Human Rights in National and International Law, Wien, Universitat Wien, 1968

[6] for the text see: http://www.oas.org/juridico/english/Sigs/a-52.html

[7] These undertakings have been interpreted by the Inter-American Court of Human Rights in particular in the case of Velásquez, which concerned the disappearance and likely death of Mr. Velásquez. In the view of the Court the obligation to respect the rights and freedoms recognized in the Convention implies that "the exercise of public authority has certain limits which derive from the fact that human rights are inherent attributes of human dignity

However, the American Convention on Human Rights foresees the possibility for the States parties to derogate from the obligations incurred by the Convention under the condition of

- exceptional threat: a State party can only resort to derogations in time of war, public danger, or other emergency that threatens the independence or security of a State Party. [8]

- strict necessity: a State party may only take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation

- consistency with other international legal obligations: the measures of derogation taken by the State party must not be "inconsistent with its other obligations under international law", such as obligations incurred under other international treaties or customary international law.

The Inter-American Commission on Human Rights examines petitions filed by individuals who claim the violation of a protected right and may recommend measures to be carried out by the state to remedy the violation. If the country involved has accepted the Inter-American Court's jurisdiction, the Commission may submit the case to the Court for a binding decision.

The Inter-American Court of Human Rights is an autonomous judicial institution. Its purpose is the application and interpretation of the American Convention on Human Rights.

Not all American states have ratified the American Convention on Human Rights. In the Caribbean, Barbados, Dominica, Grenada and Jamaica have ratified or acceded to the convention. Trinidad and Tobago denounced it in a communication addressed to the General Secretary of the OAS in 1998. Of the Commonwealth member states in the Caribbean, only Barbados has accepted the jurisdiction of the Inter-American Court on Human Rights without reservation (Trinidad has accepted the jurisdiction of the Court but has denounced it).

C. **AFRICA**

The African Charter on Human and People's Rights was adopted by the members of the former Organisation of African Unity- OAU (now the African Union) in 1981. It is the youngest of the regional mechanisms and also the most widely accepted of the regional charters, with 53 ratifications

---

and are, therefore, superior to the power of the State". (-A Court HR, Velásquez Rodríguez Case, judgment of July 29, 1988, Series C, No. 4, p. 151, para. 165.)

[8] This definition is worded differently from that under article 4 of the International Covenant and article 15 of the European Convention on Human Rights

or accessions. All African members of the Commonwealth are part of the regional Charter.[9]

The African Commission on Human and People's Rights is the institution created under the Charter to promote and protect human rights in the African context and interpret the Banjul Charter when required by the states or institutions of the African Union. The Commission has procedures in place to receive complaints from states and individuals.

The African Court on Human and People's Rights (ACHPR) was established in 1998 by a protocol (Protocol to the African Charter on Human And Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights). The Protocol establishing the ACHPR entered into force on January 1, 2004 upon its ratification by fifteen member states. However, the statute of the ACHPR has not yet been promulgated and a seat for the court has yet to be determined. Therefore much of the data regarding its functioning is not yet available.[10]

The African Charter on Human and Peoples' Rights is specific in that it protects not only rights of individual human beings but also rights of people. The Charter also emphasizes the individual's duties towards certain groups and other individuals. While some provisions of the African Charter allow for limitations to be imposed on the exercise of the rights guaranteed, no derogations are ever allowed from the obligations incurred under this treaty.

The African Commission on Human and Peoples' Rights consists of eleven members serving in their individual capacity. Within its fiction falls, first, of promoting human and peoples' rights, and, second, to protect these rights, including the right to receive communications both from States and from other sources.

The African Commission on Human and Peoples' Rights is, in particular, competent to:

- promote human rights by collecting documents, undertaking studies, disseminating information, making recommendations, formulating rules and principles and cooperating with other institutions;

- ensure the protection of human and peoples' rights by receiving inter-State communications, communications other than those of the States parties; and periodic reports from the States parties.

---

[9] Brems, E.: Human Rights : Universality and Diversity, Martinus Noijhoff Publishers, Kluwer Law, 2001 ISBN 90-411-1618-4

[10] ibidem

As to the function of promoting human and peoples' rights, the Commission, in particular, collects documents, undertakes studies and researches on African problems, organizes conferences, encourages domestic human rights institutions, and, according to circumstances given, can give its views or make recommendations to Governments Further on, it formulated and laid down principles and rules aimed at solving legal problems relating to human and peoples' rights and, lastly cooperate with other African and international institutions concerned with the promotion and protection of these rights[11].

With regard to the Commission's function of ensuring the protection of human and peoples' rights under conditions laid down by the Charter, the Commission not only has competence to receive communications from States and other sources, but is also authorized to interpret all the provisions of the Charter at the request of a State Party, an institution of the OAU or an African Organization recognized by the OAU"[12].

D ASIAN AND PACIFIC REGIONAL HUMAN RIGHTS MECHANISMS

Unlike Europe, Africa and the Americas, the Asia and Pacific does not have a region-wide inter-governmental system – such as treaties, courts, commissions or other institutions – to protect and promote human rights.

However, steps have been taken at a sub-regional level to strengthen human rights:

- In South-East Asia the 10-member ASEAN group officially inaugurated the Intergovernmental Commission on Human Rights in 2009.
- In addition, Pacific Island nations are actively exploring strategies to develop human rights bodies that best meet their specific needs and circumstances.
- The Asia Pacific Forum , its member institutions and other partner organisations seek to support and engage with the various human rights protection systems in place across the region.

Regional cooperation of National human rights institutions

Asia Pacific Forum members also cooperate closely on human rights issues of common concern. One current area of joint action is the protection and promotion of the rights of migrants and migrant workers, as set out in the Seoul Guidelines (2008).

---

[11] Rehman, J., International Human Rights Law, Pearson Education, 2009, 2nd Ed. ISBN 978-1-4058-1181-1

[12] Hathaway, O. A. Do Human Rights Treaties Make a Difference? The Yale Law Journal, June, 2002, vol. 111, no. 8, s. 1935-2042

In June 2007 the national human rights commissions of Thailand, Indonesia, Malaysia and the Philippines signed a Declaration of Cooperation, which committed them to work together on five areas of shared concern.

The four institutions - jointly known as the ASEAN National human rights institutions Forum - have also worked together to promote the development of a human rights mechanism for the ASEAN region, and continue to encourage other ASEAN governments to establish national human rights institutions.

The 10-member Association of Southeast Asian Nations officially inaugurated the ASEAN Intergovernmental Commission on Human Rights in October 2009. The Terms of Reference, drafted by a High Level Panel and agreed to by all the ASEAN members, set out the role and functions of the new body. The AICHR will initially focus on human rights promotion and will not receive or investigate complaints of human rights violations. One of its primary tasks is to "enhance public awareness of human rights among the peoples of ASEAN through education, research and dissemination of Information." It is also required to develop an ASEAN Human Rights Declaration "with a view to establishing a framework for human rights cooperation through various ASEAN conventions and other instruments dealing with human rights." The AICHR will comprise one representative appointed by each member country to serve a three-year term. When appointing representatives, either drawn from civil society or government, member countries are required to consider "gender equality, integrity and competence in the field of human rights."[13]

CONCLUSION

As the regional catalogues of universal human rights appeared in various regions of the world the true universality of the concept represented by the UN- Convenants has been contested in some aspects. In the 1990s some representatives of the Asian countries argued that Asian values were significantly different from Western values and included a sense of loyalty and foregoing personal freedoms for the sake of social stability and prosperity. [14]However, the relativistic arguments tend to neglect the fact that modern human rights are new to all cultures, dating back no further than the UDHR in 1948. They also don't account for the fact that the UDHR was drafted by people from many different cultures and traditions.

Although the argument between universalism and relativism is far from complete, it is an academic discussion in that all international human rights instruments adhere to the principle that human rights are universally

---

[13] Rehman, J, op. cit. pp. 458 - 471

[14]Ball, O., Gready, P.: The No-Nonsense Guide To Human Rights , 2007 , New Internationalist, ISBN:1904456456

applicable. The 2005 World Summit reaffirmed the international community's adherence to this principle: The universal nature of human rights and freedoms is beyond question."[15]

Literature:

- Ball, O., Gready, P.: The No-Nonsense Guide To Human Rights , 2007 , New Internationalist, ISBN:1904456456
- Hathaway, O. A. Do Human Rights Treaties Make a Difference? The Yale Law Journal, June, 2002, vol. 111, no. 8, s. 1935-2042
- Möller J.T./ de Zayas A.: The United Nations Human Rights Committee Case Law 1977-2008, N.P Engel Publishers, Kehl/ Strasbourg, 2009, ISBN 978-3-88357-144-7
- Robertson A.H., Human Rights in National and International Law, Wien, Universitat Wien, 1968
- Rehman, J., International Human Rights Law, Pearson Education, 2009, 2nd Ed. ISBN 978-1-4058-1181-1
- Brems, E.: Human Rights : Universality and Diversity, Martinus Noijhoff Publishers, Kluwer Law, 2001 ISBN 90-411-1618-4

Contact – email
jankum@mendelu.cz

[15] 2005 World Summit, paragraph 12, available on http://www.un.org/en/ga/documents/index.shtml