Yumiko Nakanishi *Editor*

Contemporary Issues in Human Rights Law

Europe and Asia

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Preface

The EUSI (EU Studies Institute in Tokyo) organized an international symposium "Human Rights Issues in Europe and Asia" on January 30, 2017. This book is based on this symposium. European and Asian scholars of EU law, international law, constitutional law cooperate to actualize this project. We discussed human rights issues from a variety of aspects.

I appreciate speakers, participants of the symposium as well as the EUSI staff. I am very thankful for the European Commission, especially the EU delegation in Japan which enabled us to do activities of the EUSI including the symposium.

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Tokyo, Japan
June 2017

Prof. Dr. Yumiko Nakanishi

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About the Editor

Yumiko Nakanishi is Professor of European Union Law at Graduate School of Law, Hitotsubashi University, Tokyo. She studied European law at Hitotsubashi University and Münster University (Germany). She got Master of law (Hitotsubashi University 1993), Magister Legum (University of Münster 1995), and Doctor of law (University of Münster 1998). She is a member of the board of directors of the European Union Studies Association–Japan, member of Japan Association of Environmental Law and Policy, member of Japanese Society of International Law. She is founder and representative of Hitotsubashi Association of European Union Law. She is Chief Editor of the journal *Review of European Law*. Her fields of research are EU constitutional law, EU environmental law, and EU external relations law. Her publications include the following. Books: *Contemporary Issues in Environmental Law—The EU and Japan*, Springer 2016; *Collection of Case Law Analysis regarding EU Competences*, Shinzansha 2015 (in Japanese); *Legal Structure of EU Competences*, Shinzansha 2013 (in Japanese); *European Union Law*, Shinseisha, Tokyo 2012 (in Japanese). Articles: Completion of EU measures through court decisions: the example of the European arrest warrant, *Hitotsubashi Journal of Law and Politics*, Vol. 45, 2017, February, pp. 13–21; Japanese environmental law in the context of globalization—a focus on chemical law, in Alexander Proelß and others (ed.) *Protecting the Environment for Future Generations-Principles and Actors in International Environmental Law*, Berlin, Erich Schmidt Verlag 2017, pp. 283–304; Animal welfare in the European Union's external relations law, in Jeremiah Weaver (ed.) *Animal Welfare*, Nova Science Publishers 2016, pp. 125–145; Introduction: The impact of the international and European environmental law on Japanese basic environmental law, pp. 1–13, The principle of animal welfare in the EU and its influence in Japan and the world, pp. 87–113, in Y. Nakanishi (ed.) *Contemporary Issues in Environmental Law*, Springer 2016; Economic partnership agreement between Japan and the European Union and legal issues, *Hitotsubashi Journal of Law and politics*, Vol. 44, 2016, pp. 19–30; Political principles in article 21 TEU and constitutionalism, *Hitotsubashi Journal of Law and Politics*, Vol. 42, 2014, pp. 11–23; Characteristics of free trade agreements of the EU in the legal context: a Japanese perspective, *European Yearbook of International Economic Law*, Springer 2017 (forthcoming).

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Part I
Human Rights in Europe

Mechanisms to Protect Human Rights in the EU's External Relations

Yumiko Nakanishi

1 Introduction

Protection of fundamental rights in the European Union (EU) has developed through the role of the Court of Justice of the EU (CJEU), especially since the 1970s.[1] The CJEU has relied on constitutional traditions common to the EU Member States and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), in particular, in order to guarantee fundamental rights in the EU.[2] The Treaty of Lisbon changed the protection of fundamental rights in the EU. The Treaty made the EU Charter of Fundamental Rights legally binding after the charter was solemnly proclaimed by the various EU organs in 2000. Now, the EU has its own catalogue of fundamental rights, the Charter of the EU Fundamental Rights. The CJEU guarantees fundamental rights in the Union, relying on this instrument, although it is influenced by national (constitutional) courts such as the German Federal Constitutional Court (GFCC) and the European Court of Human Rights (ECtHR).

On the other hand, the CJEU has not played and cannot play an important role regarding protection of human rights in the EU's external relations because of a lack of jurisdiction over third countries. The CJEU is the court of the EU, not an international court. In fact, there are few cases regarding human rights in the EU's external relations. Rather, the legislative and executive organs [the Commission, the Council, and the European Parliament (EP)] are more active in this field. For

[1]CJEU, Case 4/73, Nold v Commission, ECLI:EU:C:1974:51.
[2]CJEU, Case 44/79, Hauer v Land Rheinland-Pfalz, ECLI:EU:C:1979:290.

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example, the Council has a specialised body, the Working Party on Human Rights (COHOM), which focuses on international affairs directly related to human rights.[3] The Council publishes an EU annual report on human rights and democracy in the world.[4] Wouters and others explain that the restrictive approach of the Court can be understood in part by a desire to protect the integrity and autonomy of the EU legal order, while much of the legislature's openness can be understood in light of the desire of the EU political organs to present the EU as a responsible international actor that shapes developments at the international level.[5] The High Representative of the EU for Foreign Affairs and Security Policy and the European Commission have published a joint communication document Action Plan on Human Rights and Democracy (2015–2019), titled 'Keeping human rights at the heart of the EU agenda'[6], and on 20 July 2015, the Council adopted a new 'Action Plan on Human Rights and Democracy' for the period 2015–2019.[7] The action plan states that the EU will ensure a comprehensive human rights approach to preventing and addressing conflicts and crises, and further mainstream human rights in the external aspects of EU policies in order to ensure better policy coherence.[8] The protection of human rights is becoming a major plank of EU policies. The above-mentioned joint communication identifies strategic areas of action. One of them is fostering better coherence and consistency. That document states it is necessary to mainstream human rights considerations in the external aspects of EU policies, particularly with regard to trade/investment, migration/refugee/asylum, and development policies, as well as counter-terrorism, in order to ensure better policy coherence.[9] The EP has a subcommittee for human rights as one of the parliamentary committees. Moreover, the EP has published a Resolution on the Annual Report on Human Rights and Democracy in the World and the European Union's Policy on the Matter 2015.[10] The EU legislative and executive organs complement and boost the protection of human rights in the EU's external relations and contribute to improving coherence between the EU's internal actions and external actions regarding human rights.

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[3]http://www.consilium.europa.eu/en/council-eu/preparatory-bodies/working-party-human-rights/ (accessed 23 June 2017).

[4]Annual report on human rights and democracy in the world 2015, thematic part, http://data.consilium.europa.eu/doc/document/ST-10255-2016-INIT/en/pdf (accessed 23 June 2017), and country and regional issues part, http://data.consilium.europa.eu/doc/document/ST-12299-2016-INIT/en/pdf (accessed 23 June 2017).

[5]Wouters, Odermatt, and Ramopoulos (2014, p. 276).

[6]The High Representative and the European Commission, JOIN(2015)16, 28 April 2015.

[7]Council of the EU, 10897/15, http://data.consilium.europa.eu/doc/document/ST-12299-2016-INIT/en/pdf (accessed 23 June 2017).

[8]Ibid., p. 3.

[9]Ibid., p. 6.

[10]European Parliament, A8-0355/2016, 14 December 2016, Annual Report on Human Rights and Democracy in the World and the European Union's Policy on the Matter 2015, http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2016-0502+0+DOC+XML+V0//EN&language=EN (last accessed 23 June 2017).

The Treaty of Lisbon provides a mechanism to protect human rights in the EU's external relations as well as in the EU. This article will show how the Treaty of Lisbon enables the EU to mainstream human rights in the EU's external relations. On the one hand, the Treaty of Lisbon provides the EU's values in Article 2 TEU, its political principles in Article 21 (1) TEU, and its objectives in Article 3 (5) TEU and Article 21 (2) TEU. On the other hand, the Treaty of Lisbon confers new competences to the EU. Furthermore, the combination between the former and the latter enables the Union to conclude not only international agreements, including human rights, but also international human rights agreements. In addition, Article 21 TEU can be used as a means for cross-fertilisation in the context of the protection of human rights. First, the EU's values, political principles, and objectives will be discussed. Second, the article will clarify the competences in the EU's external relations, including international agreements involving or on human rights.

2 Values, Principles, and Objectives

2.1 Protection of Fundamental Rights in the EU

Before human rights in the EU's external relations are discussed, protection of fundamental rights in the EU are referred to briefly in order to explain the coherence between the EU' internal policies and its external policies. Article 21 TEU requires consistency not only between all external policies but also between external policies and internal policies.[11]

At the beginning of the European Economic Community (EEC) in 1958, the Community sought to achieve economic integration, especially the establishment of a common market. The Community had been criticised because of a lack of a catalogue of fundamental rights.[12] Owing to the CJEU, fundamental rights are now well guaranteed in the Community (now the Union) after Case 4/73 Nold[13] in 1974. Since the Treaty of Lisbon, the CJEU can rely on the EU Charter of Fundamental Rights as well as the constitutional traditions common to the EU Member States and the ECHR to guarantee fundamental rights in the EU. Eeckhout argues that the EU system of human rights protection is characterised by the integration of law (the constitutional laws of the Member States and the ECHR).[14]

The CJEU does not hesitate to give a judgement which might be incompatible with international obligations, even those of the United Nations, if such a

[11]Cremona (2011a, p. 77).

[12]For example, the so-called Solange I decision by the German Federal Constitutional Court, BVerfGE 37, 285, Order of the Second Senate of 29 May 1974, 2 BvL 52/71. For an English translation, see https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=588 (accessed 23 June 2017).

[13]CJEU, Case 4/73, Nold v Commission, Judgment of 14 May 1974, ECLI:EU:C:1974:51.

[14]Eeckhout (2014, p. 97).

judgement is necessary to protect fundamental rights in the Union. The position of the CJEU is shown in Joined Cases Kadi, where it stated that the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty (now the TFEU), which includes the principle that all European Union acts must respect fundamental rights.[15]

Furthermore, what is important for the protection of fundamental rights in the Union is the EU's judicial system. Article 19 (1) TEU ensures a complete judicial system, in particular, through the preliminary ruling procedure in Article 267 TFEU. According to the settled case law of the CJEU, the Treaty establishes a complete system of judicial remedies and procedures designed to ensure the legality of the institutions' acts.[16] National courts are built into the judicial system to ensure effective legal protection. This is a concretisation of a multi-layered judicial system in a positive way. It can be said that there exists a mechanism to guarantee fundamental rights at the EU level owing to the EU legal order and the EU organs, especially the CJEU.

2.2 *The Treaty of Lisbon and Human Rights in the EU's External Relations*

The Treaty of Lisbon entered into force on 1 December 2009. It amended existing treaties, that is, the TEC and TEU, substantially. It has changed and is changing the protection of human rights in the EU's external relations. There are two big changes at different levels which are related to them. The first big one is linked to the values and principles of the Union. The second one is combined with amendments on the EU's competences. The second part will be discussed in Sect. 3.

2.3 *Values, Principles, and Objectives*

2.3.1 Values

The Treaty of Lisbon gave the Union its own values for the first time. Weatherill observed that there was no values-driven vocation in Treaty of Rome of 1958, but

[15]CJEU, Joined Cases C-402/05 P and C-415/05 PJoined Cases C-402/05 P and C-415/05 P, Kadi and AI Barakaat International Foundation v Council, Judgment of 3 September 2008, ECLI:EU:C:2008:461, paras. 285, 326 and 327; CJEU, Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, Commission and others v Kadi, Judgment of 18 July 2013, ECLI:EU:C:2013:518, paras. 22 and 23.

[16]Ex. CJEU, Case C-461/03, Case C-461/03, Gaston Shul Douane-expediteur BV v Minister van Landbouw, Natuur en Voedselkwaliteit, Judgment of 6 December 2005, para. 22, EU:C:2005:742; CJEU, Joined Cases C-402/05 P and C-415/05 P, *supra* note (15), para. 285; CJEU, Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, *supra* note (15), para. 22.

the Treaty of Lisbon altered this completely, and with effect from its entry into force, the EU has values. These are written into the Treaties in advance of any engagement with objectives and activities.[17] He points out that Article 2 TEU locates 'the EU as a project driven by *values*'.[18] It is positioned as the highest level of the EU. Cremona analysed the values and first considered values as an integral part of the Union's identity and its constitutional order.[19] Article 2 TEU lays down the Union's values on which it is founded: respect for human dignity, freedom, democracy, equality, the rule of law, and respect for human rights. Protection of human rights is one of the Union's values. Article 2 TEU commits the EU to respecting human rights.[20]

The EU's values should be respected not only by the EU's organs, but also by the EU Member States. Explicit insertion of the values in the Treaty is meaningful for the EU Member States. For instance, a meaning of the insertion can be found in the following decision of the German Federal Constitutional Court (FGCC) regarding the Comprehensive Economic and Trade Agreement (CETA).

The EU and its Member States and, on the other side, Canada ended negotiations of the CETA. Some citizens and NGOs brought a proceeding, a Preliminary Injunction (einstweilige Anordnung), before the FGCC, claiming that a decision by the Council of the EU authorising the signing of the CETA, its provisional application, and the conclusion of the Agreement violated their rights under Article 38s. 1 of the Basic law (Grundgesetz, GG).[21] The GFCC declared the judgment on the next day of the oral proceedings, just before the signature of the CETA. The GFCC pointed out that a preliminary injunction preventing German approval of the provisional application of CETA would significantly interfere with the—generally broad—legislative discretion of the Federal Government in the fields of European, foreign, and foreign economic policy and, furthermore, the issuance of a preliminary injunction would have a negative effect on European external policy and the international status of the EU in general.[22] The GFCC took not only the German interest but also the EU's interest into consideration. Furthermore, the GFCC referred to the Union's values, stating that the international status of the EU was related to the Union's and the Member States' efforts to make the Union's standard a global one in the area of trade relations in order to strengthen the international effectiveness of the Union's values in the EU legal order.[23] The GFCC recognises

[17]Weatherill (2016, p. 393).

[18]Weatherill (2016, p. 393) (emphasis in original).

[19]Cremona (2011b, p. 313).

[20]See Weatherill (2016, p. 128).

[21]BverfG, Urteil des Zweiten Senats vom 13. Oktober 2016, 2 BvR 1368/16, http://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2016/bvg16-071.html (accessed 23 June 2017).

[22]Ibid., Rn. 47 and 48.

[23]Ibid., Rn. 48.

well the Union's interest in the standardisation of the EU's norms and the importance of extending the Union's values in the world.

2.3.2 Principles

The Treaty of Lisbon systemised the EU's external relations, laying down general provisions on the Union's external actions and specific provisions on the common foreign and security policy in Articles 21–46 TEU and the general provisions of the Union's external actions in Articles 205–222 TFEU. Article 21 (1) TEU provides general political principles for the first time, although respect for human rights and democracy were regulated in Article 177 TEC (former Article 130u TEC) for development cooperation and Article 181a TEC for economic, financial, and technical cooperation. Now, political principles apply to those fields, but also to all external actions.[24] Article 21 (1) TEU lists the following principles: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations and international law. The political principles in Article 21 (1) TEU are confirmed in Article 205 TFEU for the EU's external actions.

Some political principles, such as respect for human rights, democracy, and the rule of law, have been used as a condition in the case of giving financial support to developing countries. However, Article 21 (1) TEU applies to all the EU's external actions. It means that the political principles apply to developed countries too.

Indeed, the EU and Canada have concluded a political agreement, a strategic partnership agreement (SPA)[25], as well as the CETA. It is the first case of the application of political principles to developed countries. Article 2 (1) of the SPA lays down the following:

> Respect for democratic principles, human rights and fundamental freedoms, as laid down in the Universal of Human Rights and existing international human rights treaties and other legally binding instruments to which the Union or the Member States and Canada are party, underpins the Parties' respective national and international policies and constitutes an essential element of this Agreement.

According to Article 28 (7) SPA, if there was to be a particularly serious and substantial violation of human rights, it could serve as grounds for the termination of the CETA.

In addition, Article 21 (1) TEU also enumerates respect for the principles of the United Nations Charter and international law as well as human rights as one of political principles and, furthermore, the EU "shall seek to develop relations and build partnerships with third countries, and international, regional or global

[24]Nakanishi (2014, p. 18).

[25]OJ of the EU 2016 L329/45, Strategic Partnership Agreement between the EU and its Member States, of the one part, and Canada, of the other part.

organisations which share" its political principles. This provision boosts the Union in protecting human rights in its external relations. The EU can be bound by international agreements, which concretise the political principles. Those agreements might raise the level of the protection of human rights in the EU. In this meaning, Article 21 TEU can be used as an instrument for cross-fertilisation in the context of human rights.

2.3.3 Objectives

Articles 3 (5) TEU and 21 (2) TEU set the EU's objectives in its external action.

Article 3 (1) TEU lays down that the Union's aim is to promote peace, its values, and the wellbeing of its people. The promotion of the Union's values is found in Article 3 (5) TEU for the external relations. It says: 'the Union shall uphold and promote its values and interests' and 'shall promote…the protection of human rights…' The above-mentioned decision of the GFCC contributed to this objective as a member state of the EU.

Article 21 (2) TEU states: 'the Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to…(a) safeguard its values, fundamental interests, security, independence and integrity; (b) consolidate and support democracy, the rule of law, human rights and the principles of international law…' Safeguarding the Union's values and consolidating and supporting human rights are considered to be the purposes of the Union.

Larik observed that through the provisions contained in Article 21 TEU, 'the "active paradigm" of EU external relations converges on an emphasis on value promotion on a global scale as well as on approaching the EU's active engagement with the world as an inherent legitimising part of its *raison d'être*.'[26] Reid points out that the Treaty of Lisbon provides some much-needed clarity regarding the legal basis of the EU's external human rights policy and that there can be no doubt that under Article 21 (2) (b) TEU, the EU has an obligation to pursue the protection of human rights.[27]

A combination of the objectives in Articles 3 (5) TEU and 21 (2) TEU, on the one hand, and their competences, on the other hand, offer the EU the opportunity, and enable it, to protect human rights in the world as well as pursue its internal and external policies.

[26]Larik (2014, p. 63) (emphasis in original).

[27]Reid (2015, p. 126).

3 Competences Regarding Human Rights in the EU's External Relations

3.1 Competences and Practice Prior to the Treaty of Lisbon

The EU is based on the principle of conferral (Article 5 TEU). This means that the EU can act in internal and external policies only within the limits of the competences conferred upon it by the Member States. Although the Maastricht Treaty of 1993 codified the above-mentioned practice of the CJEU in Article F TEU (now Article 6 TEU), that is, in reference to the constitutional traditions common to the Member States and the ECHR, the CJEU clarified in Opinion 2/94 that the Community did not have the competence to accede to the ECHR and that an amendment to the Treaty would be necessary to do this.[28] Reid has observed that there was a distinction between human rights as a fundamental principle underlying Community actions and policies and the competence to develop a specific human rights policy per se, saying that human rights had been recognised as a general principle of Community law, but there was no specific power of the EU in relation to human rights.[29]

The Maastricht Treaty consolidated constitutionalism in the internal relations of the EU, while also reflecting its development in its external relations. An important change was the introduction of Article 130u TEC (prior to the Treaty of Lisbon, Article 177 TEC, now Article 208 TFEU) for development cooperation and, furthermore, this change led to the introduction of human rights clauses in international treaties concluded by the EU with third countries.[30] The Community (now the Union) was not given a specific power in the field of human rights. However, this does not mean that international agreements concluded by the Community (now the Union) cannot include human rights clauses. In fact, many international agreements concluded by the EU with third countries include human rights clauses.[31] Human rights have been considered as an essential element of those agreements. In the case of violation of these rights, the EU can suspend or terminate the agreements.[32]

Furthermore, the CJEU confirmed this in Case C-268/94 Portugal v Council, ruling that Article 130u (2) TEC requires the Community to take account of the objective of respect for human rights when it adopts measures in the field of development cooperation, and the mere fact that respect for human rights

[28]CJEU, Opinion 2/94, Accession to the ECHR, Opinion of 28 March 1996, ECLI:EU:C:1996:140.

[29]Reid (2015, p. 120).

[30]Nakanishi (2014).

[31]Ex. Nakanishi (2014, p. 13); Bartels (2015, pp. 74–81).

[32]The procedure of suspension is regulated by Article 218 (9) TFEU; see Koutrakos (2015, p. 155).

constitutes an essential element of the related Agreement does not justify the conclusion that provision goes beyond the objective stated in Article 130u (2) TEC.[33]

3.2 *Relationship Between Values, Objectives, and Competences*

The Member States confer the Union with competences to attain objectives in the Treaties (the TEU and the TFEU) (Article 1 (1) TEU). Then, the EU can act based on the principle of conferral in the field of external policies as well as that of internal policies. Even if the EU is not given external competences explicitly in the Treaties, it can negotiate and conclude international agreements with third countries and international organisations, using the so-called implied powers under the certain conditions (Article 3 (2) TFEU and Article 216 (1) TFEU). Furthermore, if the EU has exclusive external competences (ex. Article 207 TEU) or exclusive implied competences under the fulfilment of the conditions (for example, in cases that an agreement is likely to affect common rules), it can conclude international agreements alone without any participation of the EU Member States. On the other hand, even if the EU does not have exclusive explicit or implied competences, but shared competences, it can conclude agreements together with the EU Member States. In that case, concluded agreements will be mixed agreements. What is important for the concluding of international agreements is that the EU is given competences. The EU cannot extend its external competences based on the EU's values, principles, or objectives to conclude them even if the subject matter is related to the protection of human rights.

The EU values in Article 2 TEU are abstract and it is difficult to define them in practice.[34] They can be interpreted widely. However, the EU values cannot be used to extend the Union's competences. The EU's competences are based on the principle of conferral. Neframi indicates that the CJEU has been given a role of exercising the constitutional function of patrolling the vertical division of competences between the EU and the Member States. In the field of the EU's external actions, it must ensure respect for the principle of conferral while pursuing the objective of unity in the international area[35], although Murswiek insists that the EU competences have been extended by the EU organs.[36] Herlin-Karnell also points out that the extension of the EU's values requires careful consideration from the perspective of the proper monitoring of EU competences.[37] He notes that there is a

[33]CJEU, Case C-268/94, Portugal v Council, Judgment of 3 December 1996, ECLI:EU:C:1996:461, paras. 23–24; see Koutrakos (2015, pp. 67–70); Reid (2015, pp. 124–126).

[34]Leino (2008, p. 263).

[35]Neframi (2014, p. 73).

[36]Murswiek (2011, p. 787).

[37]Herlin-Karnell (2014, p. 95).

constitutional dimension here, anchored in the question of what the EU is empowered to do, and, in this regard, the reference to 'values' as a means of justification is difficult to monitor.[38]

The objectives listed in Article 21 (2) TEU are comprehensive. However, they cannot be used to justify a means to enlarge the EU's competences. Neframi clarifies that while substantive specific objectives correspond to specific external action competences conferred on the Union in Part V TFEU, the objective to promote an international system based on stronger multilateral cooperation and good global governance in Article 21 (2) (h) TEU is not linked to a specific competence of the Union.[39]

The Union cannot derive its competences to conclude international human rights agreements from the EU's values in Article 2 TEU, the political principles in Article 21 (1) TEU, or the objectives in Article 3 (5) TEU and Article 21 (2) TEU.

3.3 *Two Types of International Human Rights Agreements*

There are two types of international agreements in relation to human rights.[40] The first type is international agreements which include human rights provisions. This means that the protection of human rights forms a part of those agreements, but it is not the main subject matter. The second type is international agreements on human rights. This means that the subject matter of those agreements is related to human rights.

The Community (now the Union) had no specific competence to conclude international agreements on human rights. On the other hand, especially since the Treaty of Maastricht, the EU has concluded international agreements with human rights clauses as their essential element in the context of its development policy, enlargement policy, and neighborhood policy, as well as of economic and technical cooperation.[41] This means that the Union can conclude international agreements which govern human rights protection.

3.4 *International Agreements with Human Rights Provisions*

3.4.1 Horizontal Clause for Human Rights

The EU cannot rely on the EU's values, principles, or objectives to extend or create its competences. However, this does not mean that the EU cannot conclude

[38]Ibid., Herlin-Karnell (2014, p. 95).

[39]Neframi (2014, p. 73).

[40]Cf. Eeckhout (2004, p. 470).

[41]For example, Nakanishi (2014, p. 13); Bartels (2015, pp. 74–81).

international agreements which lay down the protection of human rights. Neframi indicates that the global approach to external action objectives in Article 21 TEU and Article 205 TFEU implies that specific objectives can also be pursued incidentally through the exercise of an external competence corresponding to another main specific objective, whether external or internal.[42] This leads to the idea that human rights can be pursued incidentally. As mentioned above, many international agreements concluded by the EU contain human rights clauses. Now, the EU has more possibilities of concluding international agreements, including human rights ones, applying its values, principles, and objectives, which the Treaty of Lisbon inserted in Articles 2, 3, and 21 TEU because those provisions function as horizontal clauses. This is explained as follows.

There are some horizontal clauses contained in the Treaties, for example, Article 11 TFEU for environmental protection and Article 13 TFEU for animal welfare.

Article 11 TFEU lays down the principle of environmental integration. It is a horizontal clause. According to the principle, 'environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development'. As a result, measures regarding protection of the environment are based on not only Article 192 TFEU but also on other legal bases, such as Article 43 TFEU, Article 114 TFEU, and Article 194 TFEU. Theoretically, the Commission, the Council, and the European Parliament must apply environmental aspects to all the Union's internal and external policies. In fact, the concept of sustainable development can also be found in international trade agreements.[43]

Article 13 TFEU is a horizontal clause on animal welfare: the Union and the Member States must pay full regard to the welfare of animals as sentient beings in the field of agriculture, transport, the internal market, and so on. The EU does not have a specific competence for animal welfare, but many measures regarding animal welfare have been adopted.[44] Furthermore, international agreements which the EU concluded or is negotiating with third countries have provisions that refer to animal welfare.[45]

Meanwhile, protection of human rights is one of the EU's values in Article 2 TEU and one of the political principles of Article 21 (1) TEU. The protection of human rights is regulated by Article 177 TEC, which deals with development cooperation. EU measures were adopted in order to organise Union activity aimed at fostering respect for human rights in third countries.[46] The CJEU confirmed in Case C-268/94 Portugal v Council[47] that EU measures in the field of development

[42]Neframi (2014, p. 90).

[43]See Bartels (2015, pp. 82–88).

[44]Nakanishi (2016a, pp. 88–91, pp. 101–104 and pp. 109–111).

[45]For details, Nakanishi (2016b, pp. 138–142).

[46]Dashwood (2008, p. 85 and footnote 44).

[47]CJEU, Case C-268/94, Portugal v Council, Judgment of 3 December 1996, ECLI:EU:C:1996:461, paras. 23–24.

cooperation could include the objective of respect of human rights, as mentioned above. Now, Article 21 (2) TEU rules that 'the Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in *all* fields of international relations'[48], in order to consolidate and support human rights. This means that Article 21 TEU can be considered as a horizontal clause for protection of human rights in the EU's external relations. As a result, a human rights consideration should be seen in all the EU's external activities.

The following is an example. Article 209 TFEU is an article for development cooperation, while Article 212 TFEU is for economic, financial, and technical cooperation with third countries. Based on Articles 209 and 212 TFEU, Regulation No 235/2014, establishing a financing instrument for democracy and human rights worldwide, has been adopted by the EP and the Council.[49] In its preamble, the regulation refers to the EU's values in Article 2 TEU and principles in Article 21 TEU, and protection of human rights as an objective is emphasised.

3.4.2 Article 207 TFEU: The CCP

The Common Commercial Policy (CCP) is one of the oldest policies regulated with the establishment of the EEC in 1958. The CCP was laid down in Article 113 Treaty establishing the EEC (TEEC). Article 113 TEEC has had amendments several times since then. Since the Treaty of Lisbon, Article 207 TFEU governs the CCP.[50] Currently, not only traditional trade but also foreign direct investment, as well as the commercial aspect of intellectual property and trade in service, belong to the CCP's framework. The EU has exclusive competences in this field (Article 3 (1) (e) TFEU).

How can Article 207 TFEU for the CCP be a legal basis for concluding international agreements which contain human rights provisions? Marx, Natens, Geraets, and Wouters say that under Article 21 TEU, the Union must pursue international policies and actions inter alia to consolidate democracy, the rule of law, and human rights, and to preserve and improve the quality of the environment and the sustainable management of global natural resources.[51] They indicate that these objectives apply to the CCP.[52] Cremona observes that the CCP now also has an explicit sustainable development and human rights mandate derived from Article 21 TEU.[53] Larik also indicates that in the CCP, the Union speaks with one voice on the international stage, and the message it is constitutionally mandated to spread globally is to be found in Articles 21 and 3 (5) TEU.[54] Academics agree that human

[48]Emphasis by the author.

[49]OJ of the EU 2014 L77/85.

[50]For details, see Bungenberg and Herrmann (2013).

[51]Marx et al. (2015, p. 4).

[52]Ibid., Marx et al. (2015, p. 4).

[53]Cremona (2014, p. 19).

[54]Larik (2015, p. 65).

rights issues can or even must be included in the CPP according to Article 21 TEU. That means that Article 21 TEU cannot create or extend competence for human rights, but it mandates the Commission to negotiate on human rights issues in the context of trade and to include human rights considerations in agreements. In fact, the Free Trade Agreements (FTAs) which the EU has concluded or is negotiating with third countries after Lisbon contain definite human rights provisions. Further, the CJEU clarified in Opinion 2/15 regarding the FTA between the EU and Singapore that the CCP should be conducted in the principles and objectives in Article 21 (1) and (2) TEU and therefore the provisions regarding social and environmental issues fall within the scope of the CCP.[55] It shows substantial changes of the CCP after the Treaty of Lisbon. The CJEU recognized those changes by itself.

There is, furthermore, an example of the CCP measure where human rights are related. On 14 April 2014, the Council adopted a Decision on the signing, on behalf of the EU, of the Marrakesh Treaty to facilitate access to published works for persons who are blind, visually impaired, or otherwise print disabled. The Council Decision 2014/221 is based on Articles 114 and 207 TFEU.[56] According to its preamble (5) of the Decision, the Council indicates that the Marrakesh Treaty should be signed on behalf of the Union as regards matters falling within the Union's competence.

3.5 International Human Rights Agreements

3.5.1 General

The EU needs specific competences to conclude international human rights agreements. Those competences cannot be derived from the EU's values, principles, or objectives. As mentioned above, any specific competence for it was not given to the EU. The CJEU clarified this in Opinion 2/94 in 1996.[57] The EU (formerly the Community) could not accede to the ECHR because of a lack of competence. Does the Treaty of Lisbon lay down new competences for that? Now, Article 6 (2) TEU lays down that the EU shall accede to the ECHR. The means that the EU may not only accede to the ECHR, but also must accede to it, although the EU is not yet a Member of the ECHR.[58] Article 6 (2) TEU rules specifically, that is, it refers only to accession to the ECHR.

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[55]CJEU, Opinion 2/15, FTA between the EU and Singapore, Opinion of 16 May 2017, ECLI:EU:C:2017:376, paras. 141–142 and 167.

[56]OJ of the EU 2014 L115/1.

[57]CJEU, Opinion 2/94, *supra* note (28).

[58]CJEU, Opinion 2/13, Accession to the ECHR, Opinion of 18 December 2014, ECLI:EU:C:2014:2454; The CJEU judged that the draft of the accession agreement was not compatible with the TEU and the TFEU.

Does the EU have competences to conclude international human rights agreements generally? In particular, Article 19, 114, 82–86 and 352 TFEU are discussed. Article 19 TFEU provides a legal basis for non-discrimination. Article 114 TFEU provides a legal basis for the approximation of measures for the establishment and functioning of the internal market. Article 82–86 TFEU are new provisions for judicial cooperation in criminal matters since the Treaty of Lisbon. Article 352 TFEU has been considered as a potential competence to pursue an objective of the EU.

3.5.2 Article 19 TFEU and Article 114 TFEU

Just before the entry into force of the Treaty of Lisbon on 26 November 2009, the Council adopted a decision concerning the conclusion of the United Nations Convention on the Rights of Persons with Disabilities (hereinafter referred to as the UN Convention).[59] This UN Convention is one of the international human rights agreements or international agreements on human rights. The Council decision 2010/48/EC is based on Article 13 TEC (now Article 19 TFEU) and Article 95 TEC (now Article 114 TFEU). According to its preamble (7), the Community (now the Union) and its Member States have competences in the fields covered by the UN Convention. Article 4 of the Decision lays down that with respect to matters falling within the Community's exclusive competence, the Union shall represent the Community at meeting of the bodies created by the UN Convention and, on the other hand, with respect to matters falling within the shared competences of the Union and the Member States, the Community and the Member States shall determine in advance the appropriate arrangements for representation of the Union's position at meetings of the bodies. This means that the EU had both partly exclusive and partly shared competences partly in concluding the UN Convention.

The Council may take appropriate action unanimously to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age, or sexual orientation according to Article 19 TFEU (former Article 13 TEC). This legal basis can be used with other legal bases cumulatively.[60] Article 19 TFEU also can be used as an independent legal basis. Article 13 TEC (now Article 19 (1) TFEU) was inserted in the Treaty by the Treaty of Amsterdam in 1999.[61] Article 13 (2) TEC (now Article 19 (2) TFEU) was added in the TEC by the Treaty of Nice in 2003. Article 19 TFEU has, furthermore, a lot of potential for the concluding of international agreements on human rights.

Article 114 TFEU (former Article 95 TEC) is a legal basis for the establishment and functioning of the internal market. This Article has been applied conveniently

[59]Council of the EU, Council Decision of 26 November 2009 (2010/48/EC), OJ of the EU 2010 L23/35.

[60]See, Streinz (2012), Art. 19 AEUV, Rn. 3; there is also an opinion according to which Article 19 TFEU can be applied only in cases that there is not any other legal basis.

[61]Streinz (2012), Art. 19 AEUV, Rn. 1.

for various measures[62], although sometimes measures are challenged before the CJEU because of a lack of competences.[63]

Article 19 TFEU and Article 114 TFEU were relied on cumulatively to conclude the above-mentioned UN Convention. Article 19 TFEU regulates not only disability but also other types of discrimination. Each Article by itself and a combination of both Articles or can be legal basis further to conclude international agreements on human rights in the context of mainstreaming of human rights in the EU's external relations.

3.5.3 Articles 82–86 TFEU

After the Treaty of Lisbon, the so-called third pillar is laid down in the TFEU (former TEC), while the so-called second pillar remains in the TEU. The third pillar was related to the areas of freedom, security, and justice, in particular, judicial cooperation on criminal matters (Chap. 4) and police cooperation (Chap. 5). Articles 82, 83, 84, 85, and 86 TFEU can be the legal bases for judicial cooperation measures.

The Commission made proposals for a Council Decision on the signing, on behalf of the EU, of the Council of Europe Convention on preventing and combating violence against women and domestic violence[64] and on a Council Decision on the concluding of that.[65] According to both proposals for the Convention, the legal bases of the Decisions are Articles 82 (2) and 84 TFEU. De Vido argues that, additionally, Article 19 TFEU should also be relied on.[66] Article 82 (2) TFEU is a legal basis for establishing minimum rules for facilitating the mutual recognition of judgments and judicial decisions and police and judicial cooperation matters having a cross-border dimension. Article 84 TFEU is made use of to 'establish measures to promote and support the action of Member States in the field of crime prevention'.

Based on the new Articles 82–86 TFEU after the Treaty of Lisbon in the field of judicial cooperation, the EU can negotiate and conclude international agreements on human rights.

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[62]Ex. Regulation 1007/2009 on trade in seal products, OJ of the EU 2009 L286/36; Council Decision (2014/221/EU) on the signing of the Marrakesh Treaty to facilitate access to published works for persons who are blind, visually impaired, or otherwise print disabled, OJ of the EU 2014 L115/1.

[63]Ex. As for advertising tobacco products, see CJEU, Case C-376/98, Germany v EP and Council, Judgment of 5 October 2000, ECLI:EU:C:2000:544; as for seal products, see Case T-526/10, Inuit Tapiriit Kanatami and others, Judgment of 25 April 2013, ECLI:EU:T:2013:215 and Case C-398/13 P, inuit Tapiriit Kanatami and others, Judgment of 3 September 2015, ECLI:EU:C:2015:535; as for an agency of the EU (ESMA), see CJEU, Case C-270/12, UK v EP and Council, Judgment of 22 January 2014, ECLI:EU:C:2014:18.

[64]European Commission, COM (2016)111, 4 March 2016.

[65]European Commission, COM (2016)109, 4 March 2016.

[66]The Convention is also referred to as the Istanbul Convention on Preventing and Combating Violence against Women and Domestic Violence. For details, see De Vido (2017).

3.5.4 Article 352 TFEU

In the past, the CJEU certainly clarified in Opinion 2/94 the legal character and limitations of Article 235 TEC (now Article 352 TFEU). The Court said that Article 235 TEC could not be used as a legal basis for accession to the ECHR, 'whose effect would, in substance, be to amend the Treaty without following the procedure which it provides for that purpose'.[67] Furthermore, the CJEU indicated that respect for human rights was a condition of the lawfulness of the Community acts, but accession to the Convention would, however, entail a substantial change in the Community system for the protection of human rights.[68] Finally, the CJEU judged that such a modification to the system for the protection of human rights in the Community would be of constitutional significance and would, therefore, be such as to go beyond the scope of Article 235 TEC.[69]

However, the situation changed after the Treaty of Lisbon. Concluding international agreements on human rights will not bring substantial change in the Union system for the protection of human rights. As mentioned above, protection of human rights belongs to the EU's values and means a concretisation of political principles and accomplishment of the EU's objectives. Article 352 TFEU is considered as a potential competence. For example, an EU Agency for Fundamental Rights was established by Council Regulation 168/2007, the legal basis of which was Article 308 TEC (now Article 352 TFEU).[70] Article 352 (1) TFEU rules: "if action by the Union should prove necessary … to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council … shall adopt the appropriate measures". Protection of human rights is now one of the most important objectives of the EU. Article 352 TFEU could be a legal basis for international agreements on human rights under the conditions and procedure of that Article, respecting the principle of conferral.

4 Conclusions

Already in 2004, Eeckhout had observed that human rights concerns were increasingly being integrated into the many different dimensions of EU external actions (mainstreaming), and that a growing number of instruments were being used to consolidate democracy and the rule of law and to further human rights protection.[71] He also noted that unfortunately, however, there were significant

[67]CJEU, Opinion 2/94, *supra* note (28), para. 30.

[68]Ibid., para. 34.

[69]Ibid., para. 35.

[70]Council Regulation 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights, OJ of the EU 2007 L53/1.

[71]Eeckhout (2004, p. 473).

constitutional hurdles on the road towards a more meaningful external human rights policy, and the EU's powers in this field were much disputed in light of the importance of human rights for the federal balance between the EU and its Member States.[72] This was true then.

Leino points out that human rights are presented as a subject of shared interest.[73] The EU seeks to develop relations and build partnerships with third countries and organisations that share the political principles expressed in Article 21 TEU.[74] He observes that, in practice, this is realised both through the mainstreaming of human rights into EU foreign policy and by making human rights considerations an aspect of international agreements concluded by the EU.[75] This is true today.

The Treaty of Lisbon enables this. On the one hand, the EU has its own values in Article 2 TEU, sets out the political principles which should be applied in its external actions in Article 21 (1) TEU, and lays down comprehensive objectives in this field in Articles 3 (5) and 21 (2) TEU. For example, sustainable development including human rights issues can be inserted in the FTA and those issues fall within the scope of the CCP in connected to Article 21 (1) and (2) TEU. The CJEU confirmed it in Opinion 2/15.[76]

On the other hand, the EU has new competences for judicial cooperation in Articles 82–86 TFEU. They can be relied on for concluding international agreements on human rights. Article 19 TFEU and/or Article 114 TFEU can also be relied on for those agreements. Article 207 in the CCP and other Articles in other policies can be used in the context of strengthening support of human rights in combination with Article 2 TEU, Article 3 (5) TEU, and Article 21 TEU. Furthermore, Article 352 TFEU has a lot of potential to form a legal basis for concluding international agreements on human rights in combination with Article 2 TEU, Article 3 (5), and Article 21 TEU. Those changes after the Treaty of Lisbon enable the EU to mainstream human rights in the EU's external relations. It can also be said that Article 21 TEU plays a role as an instrument for cross-fertilisation in the context of human rights.

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[72]Ibid., Eeckhout (2014, p. 483).

[73]Leino (2008, p. 263).

[74]Ibid., Leino (2008, p. 261).

[75]Ibid., Leino (2008, p. 261).

[76]CJEU, Opinion 2/15, *supra* note (55), paras. 141–142.

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Fundamental Rights Regimes in the European Union: Contouring Their Spheres

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1 Introduction

Various fundamental rights regimes are in operation within the European Union (EU), and frequently overlap: national regimes, and in states which have a federal system even sub-national fundamental rights, the EU's fundamental rights and the European Convention on Human Rights (ECHR). This raises the issue of how to determine their respective scope of application, which is not only a substantive question, but also a procedural one since different courts are entrusted with their protection, notably the European Court of Justice (ECJ), the European Court of Human Rights (ECtHR), and national constitutional courts. It is also a sensitive and controversial question since conflicts of jurisdictions and institutions may and do arise: From a top-down perspective, and this has been confirmed by the experience in states which have a federal system such as the US or Germany, a far-reaching application of central fundamental rights catalogues may entail a significant unitarisation; and conversely, from a bottom-up perspective, applying decentral guarantees to EU action may endanger its uniform application.

Against this background, the first part of the paper (Sect. 2) explores the relevance of national fundamental rights for EU action. In this respect, a recent ruling of the German *Bundesverfassungsgericht* (Federal Constitutional Court—BVerfG)

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on the European Arrest Warrant (of 15 December 2015) has shown that constitutional reservations (such as the famous *"Solange"* jurisprudence) are not only of theoretical, but also of practical relevance. The second part of the paper (Sect. 3) addresses the controversial question of the degree to which EU Member States are bound by EU fundamental rights, which in turn have finally been codified with the Treaty of Lisbon in 2009. Here, a potentially broad approach of the ECJ (notably *Fransson* case) contrasts with a somewhat restrictive position taken up by national constitutional courts.

2 Delimitation of National and EU Fundamental Rights with Regard to EU Action

While it is clear that EU action is comprehensively bound by EU fundamental rights (cf. only Art. 51 para. 1 CFR),[1] the applicability of national fundamental rights to EU action remains controversial.[2] There is however a need to distinguish between EU (Sect. 2.1) and national (Sect. 2.2) perspectives in this respect. This notwithstanding, an approximation between these two perspectives may be observed (Sect. 2.3).

2.1 The EU Law Perspective

Based on its understanding of EU law as an autonomous legal order, the ECJ rejects the (direct) applicability of national fundamental rights to EU action. The ECJ already held in its landmark ruling *Costa/E.N.E.L.* of 15 July 1964 "that the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question."[3] In *Internationale Handelsgesellschaft*, a ruling handed down on 17 December 1970, the Court concretised this finding with regard to the protection of fundamental rights:

> Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the Community would have an adverse effect on the uniformity and efficacy of Community law. The validity of such measures can only be judged in the light of Community law. In fact, the law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as Community law

[1] Cf. in more detail, Wollenschläger (2014a), paras 56 ff.

[2] This section is based on Wollenschläger (2014a), paras 12 ff.

[3] ECJ, Case 6/64, Costa/E.N.E.L., [1964] ECR 587, 594.

> and without the legal basis of the Community itself being called in question. Therefore the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure.[4]

2.2 The National Constitutional Law Perspective

2.2.1 Constitutional Conditions for European Integration

There is however a differing national perspective on this issue. For, notwithstanding diverging approaches, national legal orders do not acknowledge the unconditional primacy of EU law and make primacy notably dependent on an adequate protection of fundamental rights.[5] To take the German example, according to the well-known

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[4]ECJ, Case 11/70, Internationale Handelsgesellschaft, [1970] ECR 1125, para 3 – while emphasising the role of national constitutional law as source of inspiration for EU fundamental rights, though (para 4). Cf. more recently ECJ, Case C-409/06, Winner Wetten GmbH, [2010] ECR I-8015, para 61; Case C-399/11, Melloni, EU:C:2013:107, para 59.

[5]See only for Denmark: Højesteret, 6 April 1998 – I 361/1997 (Maastricht), Nr. 9.2 (EuGRZ 1999, 49); France: Conseil Const., 20 December 2007 – 2007-560 DC (Lissabon), Nr. 9: "lorsque des engagements … contiennent une clause contraire à la Constitution, remettent en cause les droits et libertés constitutionnellement garantis ou portent atteinte aux conditions essentielles d'exercice de la souveraineté nationale, l'autorisation de les ratifier appelle une révision constitutionnelle"; Art. 28 III Constitution of Greece; Italy: Corte Cost. ("Controlimiti-doctrine"), 27 December 1973 – 183/1973 (Frontini), Nr. 9 (EuGRZ 1975, 311); 5 June 1984 – 170/1984 (Granital), Nr. 7 (EuGRZ 1985, 98); 13 April 1989 – 232/1989 (Fragd); 18 April 1991 – 168/1991 (Giampaoli), Nr. 4: "l'ordinamento statale non si apre incondizionatamente alla normazione comunitaria giacché in ogni caso vige il limite del rispetto dei principi fondamentali del nostro ordinamento costituzionale e dei diritti inalienabili della persona umana, con conseguente sindacabilità, sotto tale profilo, della legge di esecuzione del Trattato"; Poland: Tryb. Konst., 24 November 2010 – K 32/09 (Lissabon), III.2.1 (EuGRZ 2012, 172): Protection of the "constitutional identity", notably "decisions specifying the fundamental principles of the Constitution and decisions concerning the rights of the individual which determine the identity of the state, including, in particular, the requirement of protection of human dignity and constitutional rights, the principle of statehood, the principle of democratic governance, the principle of a state ruled by law, the principle of social justice, the principle of subsidiarity, as well as the requirement of ensuring better implementation of constitutional values and the prohibition to confer the power to amend the Constitution and the competence to determine competences"; Art. 3 a Constitution of Slovenia: "respect for human rights and fundamental freedoms, democracy and the principles of the rule of law"; Spain: Trib. Const., 13 December 2004 – DTC 1/2004 (Constitutional Treaty), II.2. : "respeto de la soberanía del Estado, de nuestras estructuras constitucionales básicas y del sistema valores y principios fundamentales consagrados en nuestra Constitución, en el que los derechos fundamentales adquieren sustantividad propia" (EuR 2005, 339); affirmed in Trib. Const., 13 February 2014 – DTC 26/2014, II.3: "Notwithstanding, the Constitutional Court also upheld that 'In the unlikely case where, in the ulterior dynamics of the legislation of the European Union, said law is considered irreconcilable with the Spanish Constitution, without the hypothetical excesses of the European legislation with regard to the European Constitution itself being remedied by the ordinary channels set forth therein, in a final instance, the conservation of the sovereignty of the Spanish people and the given supremacy of the Constitution could lead this Court to approach the problems which, in such a case, would arise. Under current circumstances, said problems are considered inexistent

Solange jurisprudence of the BVerfG, first formulated in 1974, the primacy of EU law depends on a standard of fundamental rights protection at EU level, which must be in essence comparable to the indispensable requirements of the Basic Law.[6] Hence, the BVerfG reserves the right to measure EU action against fundamental rights standards enshrined in the Basic Law. In view of the openness of the Basic Law towards European integration (cf. the preamble and the goal of European integration formulated in Art. 23 GG), however, the BVerfG does not exercise this control as long as such a standard is secured at EU level, notably by the ECJ. The BVerfG has acknowledged since the *Solange* II ruling of 22 October 1986 that this is the case.[7] These boundaries on European integration developed by the BVerfG have been incorporated into the Basic Law in the context of the ratification of the Maastricht Treaty (1992) by introducing a specific article (Art. 23) dedicated to European integration. Its first paragraph reads: "With a view to establishing a united

(Footnote 5 continued)

through the corresponding consti-tutional procedures.' (DTC 1/2004, of 13 December, Ground 4)." Chap. 10 Art. 6 Constitution of Sweden: "protection for rights and freedoms in the field of cooperation to which the transfer relates corresponds to that afforded under this Instrument of Government and the European Convention for the Protection of Human Rights and Fundamental Freedoms"; UK: High Court, 18 February 2002 (Thoburn/Sunderland City Council et a.l), [2002] EWHC 195 Admin, Nr. 69 (Lord Justice Laws): "In the event, which no doubt would never happen in the real world, that a European measure was seen to be repugnant to a fundamental or constitutional right guaranteed by the law of England, a question would arise whether the general words of the [European Communities Act] were sufficient to incorporate the measure and give it overriding effect in domestic law"; Supreme Court, 22 January 2014, [2014] UKSC 3 – HS2, para 111 (Lord Reed): "There is in addition much to be said for the view, advanced by the German Federal Constitutional Court … that as part of a co-operative relationship, a decision of the Court of Justice should not be read by a national court in a way that places in question the identity of the national constitutional order", para 207 (Lord Neuberger and Lord Mance): "It is, putting the point at its lowest, certainly arguable (and it is for United Kingdom law and courts to determine) that there may be fundamental principles, whether contained in other constitutional instruments or recognised at common law, of which Parliament when it enacted the European Communities Act 1972 did not either contemplate or authorise the abrogation"; further the overview in BVerfG, Order of 15 December 2015 – 2 BvR 2735/14, para 47, and the contributions in: von Bogdandy et al. (2008), §§ 14–26. From a comparative perspective: Huber (2008b), paras 29 ff., 65 ff., 91; Grabenwarter (2009), p. 121; Mayer and Wendel (2014), paras 13 ff.; Wendel (2011), p. 104 ff; Wollenschläger (2015b), para 23.

[6]BVerfG, Order of 22 October 1986 – 2 BvR 197/83, BVerfGE (reports) 73, 339, 376; further Order of 12 May 1989 – 2 BvQ 3/89, NJW 1990, 974, 974; Order of 9 July 1992 – 2 BvR 1096/92, NVwZ 1993, 883, 883; Judgment of 12 October 1993 – 2 BvR 2134/92, 2 BvR 2159/92, BVerfGE (reports) 89, 155, 174 f.; Order of 4 October 2011 – 1 BvL 3/08, BVerfGE (reports) 129, 186, 207 f. Cf. for a contextualisation of this jurisprudence, Davies (2015), p. 434.

[7]BVerfG, Order of 22 October 1986 – 2 BvR 197/83, BVerfGE (reports) 73, 386. The Solange I-ruling of 29 May 1974 did not yet consider the fundamental rights protection on EU level as adequate [BVerfG, Order of 29 May 1974 – 2 BvL 52/71, BVerfGE (reports) 37, 271, 285; see, however, the dissenting opinions of justice Rupp, Hirsch and Wand, ibid, 291 ff]. The Vielleicht-decision of 25.7.1979 indicated that a different assessment might be possible [BVerfG, Order of 25 July 1979 – 2 BvL 6/77, BVerfGE (reports) 52, 187, 202 f.]. For restrictive tones: Kirchhof (2014), p. 1538 ff.

Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law. To this end the Federation may transfer sovereign powers by a law with the consent of the Bundesrat. The establishment of the European Union, as well as changes in its treaty foundations and comparable regulations that amend or supplement this Basic Law, or make such amendments or supplements possible, shall be subject to paragraphs (2) and (3) of Article 79."[8]

These conditions for Germany's participation in European integration have most recently been affirmed in the ruling of the BVerfG on the European Arrest Warrant handed down on 15 December 2015. This judgment has, moreover, added in terms of fundamental rights protection limits following from Germany's constitutional identity[9] to those of the *Solange* jurisprudence (see on this at Sect. 2.2.2):

> In general, sovereign acts of the European Union and acts of German public authority – to the extent that they are determined by Union law – are, due to the precedence of application of European Union Law (*Anwendungsvorrang des Unionsrechts*), … not to be measured against the standard of the fundamental rights enshrined in the Basic Law (1.). However, the precedence of application of European Union Law is limited by the constitutional principles that are beyond the reach of European integration (*integrationsfest*) pursuant to Art. 23 sec. 1 sentence 3 in conjunction with Art. 79 sec. 3 GG (2.). This in particular encompasses the principles contained in Art. 1 GG, including the principle of individual guilt in criminal law, which is rooted in the guarantee of human dignity (3.). It has to be ensured that, also in applying the law of the European Union or legal provisions that originate from German public authority but that are determined by Union law, these principles are guaranteed in every individual case (4.). However, one can only claim a violation of this inalienable core of fundamental rights protection before the Federal Constitutional Court if one submits in a substantiated manner that the dignity of the person is in fact interfered with (5.).
>
> 1. Pursuant to Art. 23 sec. 1 sentence 1 GG, the Federal Republic of Germany participates in establishing and developing the European Union. Uniform application of its law is of central importance for the success of the European Union … Without ensuring uniform application and effectiveness of its law, it would not be able to continue to exist as a legal community of currently 28 Member States … In this respect, Art. 23 sec. 1 GG also assures that Union law is effective and will be enforced …
>
> Therefore, through the authorisation to transfer sovereign powers to the European Union—an authorisation provided under Art. 23 sec. 1 sentence 2 GG –, the Basic Law endorses the precedence of application accorded to Union law by the Acts of Assent to the Treaties. As a rule, the precedence of application of European Union Law also applies with regard to national constitutional law …, and, in conflict, as a rule, it results in national law being inapplicable in the specific case …
>
> Based on Art. 23 sec. 1 GG, the legislature deciding on European integration matters not only may, generally and in all matters, exempt European Union institutions and agencies from being bound by the fundamental rights and other guarantees under the Basic Law, to

[8]Translation available at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0125, accessed 3 January 2017.

[9]Cf. for a critical view on the identity review only Ingold (2015), p. 1.

the extent that they exercise public authority in Germany, but also German entities that execute law of the European Union … This in particular applies to the legislature at federal and at state level if they transpose secondary or tertiary law without possessing a leeway to design (*Gestaltungsspielraum*) … In contrast, the legal acts that are issued in using an existing leeway to design are amenable to scrutiny by the Federal Constitutional Court …

2. However, the precedence of application of European Union Law only applies insofar as the Basic Law and the Act of Assent permit or provide for the transfer of sovereign powers … The national order giving effect to Union law at national level (*Rechtsanwendungsbefehl*), contained in the Act of Assent, may only be given within the framework of the applicable constitutional order … Limits to opening German statehood—limits that apply beyond the specific design of the European integration agenda laid down in the Act of Assent—follow from the Basic Law's constitutional identity as stipulated in Art. 79 sec. 3 GG (a). This is compatible with the principle of sincere cooperation (Art. 4 sec. 3 TEU) (b) and is corroborated by the fact that the constitutional law of most Member States of the European Union contains similar limits (c).

(a) The scope of precedence of application of European Union Law is mainly limited by the Basic Law's constitutional identity that, according to Art. 23 sec. 1 sentence 3 in conjunction with Art. 79 sec. 3 GG, is beyond the reach of both constitutional amendment and European integration (*verfassungsänderungs- und integrationsfest*) (aa). The constitutional identity is safeguarded by the identity review conducted by the Federal Constitutional Court. (bb).

(b) To the extent that acts of an institution or an agency of the European Union have an effect that affects the constitutional identity protected by Art. 79 sec. 3 GG in conjunction with the principles laid down in Arts. 1 and 20 GG, they transgress the limits of open statehood set by the Basic Law. Such an act cannot be based on an authorisation under primary law, because the legislature deciding on European integration matters, despite acting with the majority required by Art. 23 sec. 1 sentence 3 GG in conjunction with Art. 79 sec. 2 GG, cannot transfer sovereign powers to the European Union which, if exercised, would affect the constitutional identity protected by Art. 79 sec. 3 GG … Nor can it be based on initially constitutional conferrals that have supposedly evolved through a development of the law, because the institution or the agency of the European Union would thereby act ultra vires …

(c) Within the framework of the identity review, one has to review whether the principles laid down as inalienable by Art. 79 sec. 3 GG are affected by an act of the European Union … The result of such a review may be that in exceptional cases—as is the case with the *"Solange"* reservation ("as long as" reservation) … or with the *ultra vires* review … –, Union law must be declared inapplicable in Germany. However, to prevent German authorities and courts from simply disregarding the Union law's claim to validity, the application of Art. 79 sec. 3 GG in a manner that is open to European law in order to protect the effectiveness of the Union legal order and that takes into account the legal concept expressed in Art. 100 s. 1 GG require that finding a violation of the constitutional identity is reserved for the Federal Constitutional Court … This is underlined by Art. 100 s. 2 GG according to which in case of doubts whether a general rule of international law creates rights and duties for the individual, the court must refer the question to the Federal Constitutional Court… An identity review may also be triggered by a constitutional complaint (Art. 93 sec. 1 no. 4a GG)….[10]

[10]BVerfG, Order of 15 December 2015 – 2 BvR 2735/14, paras 36 ff., English translation available at http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2015/12/rs20151215_2bvr273514en.html, accessed 3 January 2017. See also the Lisbon-judgment of the BVerfG: BVerfG, Judgment of 30 June 2009 – 2 BvE 2/08, BVerfGE (reports) 123, 267, 335, 399, paras 191, 337 of the English translation, available at http://www.bverfg.de/e/es20090630_2bve000208en.html, accessed 13 January 2017.

2.2.2 Mitigation of Possible Conflicts by Substantive and Procedural Safeguards

The application of (at least) two different fundamental rights regimes to EU acts, moreover interpreted by different institutions (the ECJ and national constitutional courts), may undoubtedly give rise to constitutional conflicts. The possibility of such conflicts is however first of all mitigated by the fact that, in the context of European integration, the Basic Law does not require an identical standard of fundamental rights protection, but only one which is comparable (cf. notably Art. 23 para. 1 sentence 1 GG: "a level of protection of basic rights essentially comparable to that afforded by this Basic Law"). Moreover, various procedural safeguards apply.[11] First of all, only the BVerfG may declare an EU act inapplicable in terms of the German legal order.[12] Next, the ordinary courts must refer the case to the ECJ in order to enable the latter to assess the conformity of the EU act in question with EU law before the BVerfG may be called upon to declare the EU act inapplicable because of a violation of (national) constitutional standards.[13] If a constitutional complaint (e.g. a constitutional complaint against a statute) is admissible without the prior involvement of the ordinary courts, this implies a reference to the ECJ by the BVerfG itself—a requirement which the BVerfG has mentioned,[14] but it has not followed this path in the context of fundamental rights so far[15]—unlike

[11]See for an overview, Wollenschläger (2014a), para 14.

[12]BVerfG, Order of 29 May 1974 – 2 BvL 52/71, BVerfGE (reports) 37, 284 f.; further Judgment of 30 June 2009 – 2 BvE 2/08, BVerfGE (reports) 123, 354, para 241 of the English translation, available at http://www.bverfg.de/e/es20090630_2bve000208en.html, accessed 13 January 2017; BVerfG, Order of 15 December 2015 – 2 BvR 2735/14, para 43, English translation available at http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2015/12/rs20151215_2bvr273514en.html, accessed 3 January 2017.

[13]BVerfG, Order of 29 May 1974 – 2 BvL 52/71, BVerfGE (reports) 37, 271, 281; further Order of 4 October 2011 – 1 BvL 3/08, BVerfGE (reports) 129, 186, 207 f.; Seidel (2003), p. 97. See also ECJ, Joined Cases C-188/10 and C-189/10, Melki und Abdeli, [2010] ECR I-5667, paras 52 ff.

[14]See only BVerfG, Order of 24 January 2012 – 1 BvR 1299/05, BVerfGE (reports) 130, 151, 177 f.; Judgment of 2 March 2010 – 1 BvR 256/08, 1 BvR 263/08, 1 BvR 586/08, BVerfGE (reports) 125, 260, 307 f. See further BVerfG, Order of 15 December 2015 – 2 BvR 2735/14, para 46, English translation available at http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2015/12/rs20151215_2bvr273514en.html, accessed 3 January 2017. For such an obligation: Sauer (2016), p. 1137.

[15]BVerfG, Order of 24 January 2012 – 1 BvR 1299/05, BVerfGE (reports) 130, 151, 191 f.; Judgment of 2 March 2010 – 1 BvR 256/08, 1 BvR 263/08, 1 BvR 586/08, BVerfGE (reports) 125, 260, 308. For a critical view on not having referred cases to the ECJ so far, von Danwitz (2013), p. 261; Huber (2009), p. 582; Kingreen (2013a), p. 809 f. Reservedly: Britz (2015), p. 280 f. Beyond fundamental rights issues, the BVerfG has, for the very first time, made a reference to the ECJ in the OMT-case, see BVerfG, Judgment of 14 January 2014 – 2 BvR 2728/13, 2 BvR 2729/13, 2 BvR 2730/13, 2 BvR 2731/13, 2 BvE 13/13, NJW 2014, 907; a further example is the recent reference in the case of the ECB's Expanded Asset Purchase Programme, see BVerfG, Order of 18 July 2017 – 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15.

constitutional courts of other Member States.[16] Moreover, in its recent ruling in the European Arrest Warrant case of 15 December 2015, the BVerfG applied the "*acte clair*" doctrine to deny the necessity of a preliminary reference to the ECJ before an EU act can be declared inapplicable:

> There is no need for a preliminary ruling by the Court of Justice of the European Union under Art. 267 TFEU. The correct application of Union law is so obvious as to leave no scope for any reasonable doubt ("acte clair", cf. ECJ, Judgment of 6 October 1982, CILFIT, 283/81 [1982] ECR p. 3415, paras. 16 et seq.). In the case at hand, there is no conflict between Union law and the protection of human dignity under Art. 1 sec. 1 GG in conjunction with Art. 23 sec. 1 sentence 3 in conjunction with Art. 79 sec. 3 GG. As shown above, the Framework Decision on the European arrest warrant does not require German courts and authorities to execute a European arrest warrant without reviewing its compliance with the requirements ensuing from Art. 1 sec. 1 GG. This is not changed by the fact that the limits of the obligation to investigate and establish the facts of the case, in particular as regards the scope of investigations permissible under Union law and the related delays in the execution of the arrest warrant, have not yet clearly been defined in the case-law of the Court of Justice of the European Union. At least in the case to be decided here, there is no indication of a conflict of Union law with the obligation of the Higher Regional Court to examine more extensively whether the complainant's rights would be safeguarded. This holds true in particular for the substantiated indications submitted by the complainant to the Higher Regional Court that under Italian [criminal] procedural law he was not afforded an opportunity to defend himself effectively.[17]

Furthermore, the danger of conflicts is minimised by the strict conditions for admissibility of constitutional review aiming at declaring an EU act inadmissible: The applicant has to substantiate in detail that the minimum standard of fundamental rights protection required by the Basic Law is not *generally* secured at EU level.[18] In its judgment in the recent European Arrest Warrant case of 15 December

[16]See Österr. VerfGH, 28 November 2012 – G47/12 et al. (Seitlinger u.a.); Corte Cost., 13 February 2008 – 102/2008 (Tasse di Lusso Sardegna); Conseil Const., 4 April 2013 – 2013-314P QPC (M. Jeremy F.).

[17]BVerfG, Order of 15 December 2015 – 2 BvR 2735/14, para 125, English translation available at http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2015/12/rs20151215_2bvr273514en.html, accessed 3 January 2017. Cf. for a critical view on refraining from referring the case to the ECJ, Nowag (2016), p. 1450 f.,—identifying a new interpretation of the CILFIT-doctrine requiring a reference only in cases of conflict between national and EU law; Reinbacher and Wendel (2016), p. 342 f.; Rung (2016), p. 149 f.

[18]BVerfG, Order of 7 June 2000 – 2 BvL 1/97, BVerfGE (reports) 102, 147, 164; further Order of 9 January 2001 – 1 BvR 1036/99, NJW 2001, 1267, 1267 f; Order of 13 March 2007 – 1 BvF 1/05, BVerfGE (reports) 118, 79, 95; Order of 14 May 2007 – 1 BvR 2036/05, NVwZ 2007, 942, 942; Order of 14 October 2008 – 1 BvF 4/05, BVerfGE (reports) 122, 1, 20; Judgment of 30 June 2009 – 2 BvE 2/08, BVerfGE (reports) 123, 267, 334 f, paras 190 f. of the English translation, available at http://www.bverfg.de/e/es20090630_2bve000208en.html, accessed 13 January 2017.

2015, the BVerfG has relativized[19] this wide test by declaring—as a consequence of the protection of Germany's constitutional identity—a (possible) infringement of human dignity always subject to constitutional review (and not only if a general deficit in EU fundamental rights protection has become manifest).[20] This might be a potentially wide relativisation since the identity control extends not only to the right to human dignity itself (Art. 1 para. 1 GG), but to the core content of other fundamental rights which is inherent in human dignity.[21] A subsequent ruling of the BVerfG has however followed a restrictive path by stressing the limited extent of what might be considered the core content of fundamental rights-based requirements (such as of the right not to incriminate oneself).[22] Moreover, here too a

[19]For the further relevance of the Solange-II-jurisprudence (beyond human dignity issues), Reinbacher and Wendel (2016), p. 334 f.

[20]BVerfG, Order of 15 December 2015 – 2 BvR 2735/14, para 34, English translation available at http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2015/12/rs20151215_2bvr273514en.html, accessed 3 January 2017: "If a violation of the guarantee of human dignity is asserted, the Federal Constitutional Court reviews such a serious violation of a fundamental right in the context of the identity review...—notwithstanding its past jurisprudence declaring inadmissible both constitutional complaints and referrals in specific judicial review proceedings that assert a violation of fundamental rights under the Basic Law by secondary Community law or Union law respectively". Cf. for a *critical view* on this deviation, Sauer (2016), p. 1135 ff. Since the BVerfG has seen *in casu* no conflict between EU law and national law (in terms of fundamental rights protection), the application of the identity-control is criticised, see, Reinbacher and Wendel (2016), p. 336 f.; Rung (2016), p. 148 f.; Sauer (2016), p. 1135 f. Nuanced: Hong (2016), p. 553 ff.

[21]BVerfG, Judgment of 21 June 2016—BvR 2728/13, para 138 (OMT); further Order of 6 September 2016 – 2 BvR 890/16, paras 36, 39. See also Hong (2016), p. 557.

[22]See BVerfG, Order of 6 September 2016 – 2 BvR 890/16, para 36: "Daraus, dass der Grundsatz der Selbstbelastungsfreiheit in der Menschenwürde wurzelt, folgt allerdings nicht, dass jede verfassungsrechtlich gewährleistete Ausprägung dieses Grundsatzes auch unmittelbar dem Schutz von Art. 1 GG unterfiele. Die Beachtung dieses Grundsatzes wird verfassungsrechtlich durch Art. 2 Abs. 1 in Verbindung mit Art. 20 Abs. 3 GG sowie Art. 2 Abs. 1 in Verbindung mit Art. 1 Abs. 1 GG sichergestellt. Nur wenn der unmittelbar zur Menschenwürde gehörende Kerngehalt der Selbstbelastungsfreiheit berührt ist, liegt auch eine Verletzung von Art. 1 GG vor. Dies wäre etwa der Fall, wenn ein Beschuldigter durch Zwangsmittel dazu angehalten würde, eine selbstbelastende Aussage zu tätigen und so die Voraussetzungen für seine strafgerichtliche Verurteilung zu schaffen. Dagegen folgt unmittelbar aus Art. 1 GG nicht, dass ein Schweigen des Beschuldigten unter keinen Umständen einer Beweiswürdigung unterzogen und gegebenenfalls zu seinem Nachteil verwendet werden darf. Dementsprechend hat das Bundesverfassungsgericht nicht beanstandet, dass in bestimmten Konstellationen des sogenannten Teilschweigens aus dem Aussageverhalten des Beschuldigten im Rahmen der Beweiswürdigung Schlüsse zu dessen Nachteil gezogen werden (vgl. BVerfGK 17, 223 <227>), obgleich auch in derartigen Fällen die Selbstbelastungsfreiheit berührt ist und ein gewisser Aussagedruck entstehen kann. Vor dem Hintergrund, dass die Achtung der Menschenwürde eine Würdigung und Verwertung des Schweigens zum Nachteil des Beschuldigten nicht unter allen Umständen verbietet, sind auch die Ausführungen der 3. Kammer des Zweiten Senats in ihrem Beschluss vom 22. Juni 1992 (2 BvR 1901/91, juris, Rn. 10 f.) zu verstehen, wonach eine Auslieferung von Verfassungs wegen auch dann zulässig sein kann, wenn das Schweigen des Beschuldigten im ersuchenden Staat als belastendes Indiz gewertet werden darf. Eine Auslieferung auf der Grundlage eines Europäischen Haftbefehls ist somit nicht schon dann unzulässig, wenn die Selbstbelastungsfreiheit im Prozessrecht des ersuchenden Staates nicht in demselben Umfang gewährleistet ist, wie dies von

sufficiently substantiated application on the part of the complainant is required: "The strict requirements for activating the identity review are paralleled by stricter admissibility requirements for constitutional complaints that raise such an issue. The complainant must substantiate in detail to what extent the guarantee of human dignity that is protected by Art. 1 GG is violated in the individual case."[23] Finally, further potential conflicts are averted by interpreting (national) constitutional standards in the light of standards enshrined in EU law.[24]

2.2.3 Evaluation

In view of the high standards for declaring an EU act inapplicable in the German legal order, the *Solange-Vorbehalt* has been widely considered a theoretical option only.[25] The practical relevance of limitations on European integration in terms of fundamental rights has however been demonstrated by the recent ruling of the BVerfG on the European Arrest Warrant of 15 December 2015—which is already referred to as "*Solange* III" ruling[26,27] The BVerfG held an order of Düsseldorf Higher Regional Court which declared the extradition of a person on the basis of a European Arrest Warrant permissible to be a violation of the fundamental right of human dignity (Art. 1 para. 1 GG), although this decision was determined by EU law. For, the court order related to a sentence that was rendered *in absentia* did not respect the principle of individual guilt, that is based on human dignity and thus belongs to the German constitutional identity (again, it should be stressed that this identity review is not identical to the *Solange* jurisprudence):

(Footnote 22 continued)

Verfassungs wegen im deutschen Strafverfahren der Fall ist. Vielmehr ist die Auslieferung erst dann unzulässig, wenn selbst der dem Schutz von Art. 1 GG unterfallende Kernbereich des nemo-tenetur-Grundsatzes nicht mehr gewährleistet ist."

[23]BVerfG, Order of 15 December 2015 – 2 BvR 2735/14, para 50, English translation available at http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2015/12/rs20151215_2bvr273514en.html, accessed 3 January 2017. Emphasising the need for a restrictive application: Reinbacher and Wendel (2016), p. 335.

[24]BVerfG, Order of 7 July 2009 – 1 BvR 1164/07, BVerfGE (reports) 124, 199, 220, 233; further Order of 30 April 2003 – 1 PBvU 1/02, BVerfGE (reports) 107, 395, 409; Order of 4 May 2004 – 1 BvR 1892/03, BVerfGE (reports) 110, 339, 342; (left open *in casu*) Order of 26 August 2013 – 2 BvR 441/13, NJW 2013, 1540, 1542.

[25]See notably Dederer (2006), p. 597; Hoffmann-Riem (2002), p. 476; Huber (2008b), para 36; Kühling (2009), p. 702 f; Liisberg (2001), p. 1195; Lindner (2007b), p. 190 f; Ludwigs (2014), p. 274; Masing (2006), p. 265; idem (2016), p. 496: "reservation for extremely exceptional cases"; Rung (2016), p. 147; Szczekalla (2006), p. 1021; Voßkuhle (2010), p. 6; Walter (2004), p. 40.

[26]See Hong (2016), p. 550: "As long as the German Constitution remains in force, the German Federal Constitutional Court will enforce the Constitution's right to human dignity, law of the European Union notwithstanding." Reservedly: Reinbacher and Wendel (2016), p. 334.

[27]Qualifying this judgment as a partial overruling of Solange II: Sauer (2016), p. 1135; further Nowag (2016), p. 1447 ff.

> The challenged decision rendered by the Higher Regional Court transgresses the limits set by Art. 1 sec. 1 in conjunction with Art. 23 sec. 1 sentence 3 and Art. 79 sec. 3 GG. Executing the Framework Decision on the European arrest warrant affects the principle of individual guilt, a principle that is rooted in the guarantee of human dignity (Art. 1 sec. 1 GG) and in the principle of the rule of law (Art. 20 s. 3 GG) and that forms part of the inalienable constitutional identity under the Basic Law (1.). This fact justifies and mandates a review of the Higher Regional Court's decision, a review according to the standards of the Basic Law, but limited to this protected interest, although the Higher Regional Court's decision is determined by Union law (2.). On the one hand, the requirements set by Union law, and by German law transposing it, on which the decision is based, comply with the requirements set by Art. 1 sec. 1 GG, as they guarantee the mandatory rights of the requested person in the context of extraditions for the purpose of executing sentences rendered in absence of the person concerned and as they do not only allow the courts that deal with the extradition to investigate appropriately, but they demand it (3.). On the other hand, however, in applying those provisions, the Higher Regional Court violated the principle of individual guilt and thereby violated the complainant's right under Art. 1 sec. 1 GG, because with regard to the interpretation of the dispositions of the Framework Decision and the Act on International Cooperation in Criminal Matters, its application of the law did not adequately take into account the significance and the scope of human dignity (4.).[28]

In keeping with similar reservations voiced by other constitutional courts, the *Solange-Vorbehalt* must not be seen as a threat to the primacy and uniform application of EU law pure and simple. Rather, it may also contribute to an improvement of fundamental rights standards at EU level by means of a judicial dialogue.[29] This has been the case for the initial *Solange* jurisprudence as well as for similar reservations, notably formulated by the Italian Corte Costituzionale.[30] And it was also the case in the context of the European Arrest Warrant. Here, the aforementioned judgment of the BVerfG moved the ECJ to emphasise EU fundamental rights standards in this respect only a few months later.[31]

2.3 Reconciling the Perspectives

Despite the different perspectives of the ECJ, on the one hand, and of the national constitutions/national constitutional courts on the other, with regard to the relevance of national fundamental rights for European integration, tendencies towards reconciling the perspectives have become manifest.

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[28]BVerfG, Order of 15 December 2015 – 2 BvR 2735/14, para 51, English translation available at http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2015/12/rs20151215_2bvr273514en.html, accessed 3 January 2017.

[29]See from a general perspective: Poli (2016), p. 373.

[30]Reservedly: Reinbacher and Wendel (2016), p. 343.

[31]ECJ, Joined Cases C-404/15 and C-659/15, Aranyosi und Căldăraru, EU:C:2016:198. See on this, Hong (2016), p. 561 ff.; Nowag (2016), p. 1452 f.; Dietz (2016), p. 1383 ff.; Reinbacher and Wendel (2016), p. 337 ff.

First, the constitutional traditions common to the Member States have since the beginning constituted one source for developing EU fundamental rights (Art. 6 para. 3 TEU; Art. 52 para. 4 CFR), albeit the plurality of national traditions acts as a brake on approximation.[32] Similarly, national fundamental rights are interpreted in the light of EU law standards (cf. Sect. 2.2.2).

Moreover, since Maastricht, Art. 4 para. 2 sentence 1 TEU has required the EU to respect the national identities of the Member States "inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government."[33] Thus, EU law itself acknowledges limits to European integration in view of the national constitutional identity. It however remains a limitation of EU law, so that it is up to the ECJ to ultimately define its scope. This notwithstanding, the reference procedure enables a constructive dialogue between the latter and the courts of the Member States.[34] One example is the *Omega* case, in which the ECJ qualified a prohibition of laser quest games—issued in view of human dignity (Art. 1 para. 1 GG), and thus in view of German constitutional identity—Please change to identity—as a justified restriction on the freedom to provide services.[35]

3 Delimitation of National and EU Fundamental Rights with Regard to Member State Action

While the so-called *Solange-Vorbehalt* (Provisional Reservation) discussed in the previous section, and first formulated in 1974, intends to secure the adequate protection of fundamental rights with respect to an action of the European Union, the perspective has taken a 180° turn since the end of the 1980s. Central importance no longer attaches to the question raised in the *Solange* jurisprudence's with regard

[32]See on this Kokott and Sobotta (2010), p. 266; Wollenschläger (2010), paras 85 f. Overemphasising the relevance of national fundamental rights standards with regard to Art. 53 CFR: Hwang (2014), p. 411 ff.; idem (2016), p. 369.

[33]See on this clause: von Bogdandy and Schill (2010), p. 711 ff; Lerche (1996), p. 919; Pernice (2011), p. 185; Wendel (2011), p. 572 ff. The BVerfG has, in its Lisbon judgment, parallelised Art. 79 para 3 GG with Art. 4 para 2 sentence 1 TEU [cf. BVerfG, Judgment of 30 June 2009 – 2 BvE 2/08, BVerfGE (reports) 123, 267, 354, 400, paras 235, 339 of the English translation, available at http://www.bverfg.de/e/es20090630_2bve000208en.html, accessed 13 January 2017; similarly Tryb. Konst., 24 November 2010—K 32/09, III.2.1, EuGRZ 2012, 172 (Lissabon)], but, in the meantime, deviated from this qualification, see BVerfG, Order of 14 January 2014 – 2 BvR 2728/13, BVerfGE (reports) 134, 366 (386 f., para 29).

[34]See only, Franzius (2015a), p. 401 f.; idem (2015b), p. 150.

[35]ECJ, Case C-36/02, Omega, [2004] ECR I-9609. See further Case C-379/87, Groener, [1989] ECR 3967, paras 12 ff; Case C-159/90, Grogan, [1991] ECR I-4685, paras 24 ff; Case C-208/09, Sayn-Wittgenstein, [2010] ECR I-13693, para 92—with explicit reference to Art. 4 para 2 sentence 1 TEU. See insofar also, Besselink, (2012), p. 678 ff; von Bogdandy and Schill (2010), p. 707 f; von Danwitz (2008), p. 783 ff; Mayer et al. (2008), p. 71 f, 86 f; Pernice (2011), p. 204 f; Voßkuhle (2010), p. 7; Wollenschläger (2010), paras 83 f.

to the extent to which an indispensable national fundamental rights standard restricts the applicability of EU law at national level. The particularly acute issue is now in fact the question of the extent to which the EU's fundamental rights, finally codified with the 2009 Treaty of Lisbon, are also binding on the Member States.[36] A somewhat broad approach taken by the ECJ contrasts here with a somewhat restrictive stance assumed by the BVerfG. It has been established in Karlsruhe's settled case-law that national fundamental rights do not apply to national measures in as far as they implement mandatory requirements of EU law. The EU's fundamental rights come into effect in this regard (see Sect. 2.2). However, the expansive tendencies that are evident especially in the *Fransson* judgment of the ECJ of 26 February 2013[37] were countered by the BVerfG a mere 2 months later in its judgment of 24 April 2013 regarding the anti-terror database, with the words "thus far and no further". Karlsruhe not only considered the expansive applicability of EU fundamental rights to the Member States to constitute an *ultra vires* act, but also established a new barrier to European integration assigned to the inviolable identity of the German constitutional order (Art. 79 para. 3 GG)—namely that a substantial scope for national fundamental rights protection has to be preserved.[38]

Given the issues at stake here, this is understandable.[39] Experience in federal systems (for example, in the German federal state or in the USA) demonstrates that a considerable potential for unitarisation resides within central catalogues of fundamental rights—also in areas for which there are no, or only weak, competences at the federal level –, in particular if interpreted in activist jurisprudence; this is accompanied by a marginalization of the Member States' fundamental rights as well as of the (state) constitutional courts entrusted with their protection.[40] This is problematical, and especially so with regard to well-functioning, differentiated systems of protection such as the protection of fundamental rights in Germany. On the other hand, federal experience also demonstrates that legal unity and precedence of federal law require uniform fundamental rights standards.

It is against this background that this article raises the question of the scope of application of EU fundamental rights to the Member States. I will be focussing primarily on the substantive delimitation of the spheres of fundamental rights, which will comprise the first two parts of this section (Sects. 3.1 and 3.2). In the third part (Sect. 3.3), I will be looking briefly at the institutional and procedural dimensions.

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[36]On this, see Wollenschläger (2014a), paras 10 ff. Snell (2015), p. 295, speaks of "a certain irony" inherent in this development. This section updates Wollenschläger (2015a).

[37]ECJ, Case C-617/10, Fransson, EU:C:2013:105, paras 17 ff.

[38]BVerfG, Judgment of 24 April 2013 – 1 BvR 1215/07, BVerfGE (reports) 133, 277, 316; English translation available at http://www.bverfg.de/e/rs20130424_1bvr121507en.html, accessed 13 January 2017.

[39]On this and the following, see Eeckhout (2002), p. 945; Groussot et al. (2013), p. 100 f.; Huber (2008a), p. 190, 198 f.; idem (2011), p. 2385 f.; Kirchhof (2011), p. 3681 f.; Mayer (2009), p. 93; Wollenschläger (2014a), paras 16, 29 ff.

[40]Cf. already Ipsen (1968), p. 125; further Masing (2016), p. 509 ff.; Snell (2015), p. 286 f.

According to the jurisprudence of the ECJ established since the end of the 1980s, Member States are bound by EU fundamental rights if national authorities act "within the scope of application of EU law".[41] Art. 51 para. 1 sentence 1 CFR is somewhat more reserved in its formulation, and orders an obligation incumbent on Member States to apply EU fundamental rights "only when they are implementing Union law". Three cases may be distinguished.[42] First, the implementation and enforcement of EU law, notably of EU directives and EU regulations. Second, action by Member States in a context that is determined by EU law in some manner, a category still lacking in profile and to which the aforementioned *Fransson* case belongs. Third, Member State action in the context of restricting the EU's fundamental freedoms, a category which was fiercely called into question shortly after the Charter came into force. This article will not deal with the third category. In my view, however, the dimension of EU fundamental rights in this constellation is exaggerated, since there is no doubt that EU law determines autonomously the admissibility and extent of limitations to the fundamental freedoms—the only issue to be avoided is to comprehensively apply EU fundamental rights on the occasion of a restriction on fundamental freedoms.[43]

3.1 The Implementation and Enforcement of EU Secondary Law

An obligation to apply EU fundamental rights exists under Art. 51 para. 1 sentence 1 CFR when Member States implement EU law, particularly including the enforcement of an EU regulation or the implementation of an EU directive. What is disputed, however, is the extent of the obligation. Do Member States only have an obligation to respect EU fundamental rights when they implement obligatory requirements of EU law, or do they also have to do so when they are granted discretionary power? Both cases also raise the question of the parallel applicability of national fundamental rights beyond EU fundamental rights.[44]

When implementing mandatory requirements of Union law, the Member States are not only bound by EU fundamental rights. Rather, securing the precedence and uniform application of EU law precludes the parallel application of national fundamental rights, even though national implementation acts do exist. This has been

[41]ECJ, Joined Cases 60/84 and 61/84, Cinéthèque, [1995] ECR 2605, para 26 ("area"); Case C-260/89, ERT, [1991] ECR I-2925, para 42; Case C-368/95, Familiapress, [1997] ECR I-3689, para 24; Case C-276/01, Steffensen, [2003] ECR I-3735, para 70.

[42]See, Wollenschläger (2014a), paras 16 ff.

[43]Cf. the so-called ERT-jurisprudence (ECJ, Case C-260/89, ERT, [1991] ECR I-2925, paras 42 ff.); also confirmed after the CFR has entered into force in ECJ, Case C-390/12, Pfleger, EU:C:2014:281, paras 30 ff. Cf. for a detailed discussion, Wollenschläger (2014a), paras 25 ff.; idem (2014b), p. 577. Reservedly: Snell (2015), p. 304 ff.

[44]Cf. for more details and with further references, Wollenschläger (2014a), paras 18 ff.

recognized—within the limits of the *Solange* jurisprudence and constitutional identity (see Sect. 2.2)—by the BVerfG, and convincingly so.[45] Let us take the example of EU Directive 2006/24/EU on data retention (which has since been held void because it infringes EU fundamental rights[46]). Here, national legislation implements the obligation incumbent on telecommunications providers to retain connection data as stipulated by EU secondary law. If we were to examine these national implementation acts in the light of national fundamental rights, the retention of data made obligatory by EU law would depend on the result of the national scrutiny of fundamental rights in the respective Member States. This conflicts with the precedence and uniform application of EU law and—at least as long as there is an adequate standard of protection at EU level—is also not imperative in the interest of protecting fundamental rights. Besides, given that they have no leeway of their own, the Member States function as an extended arm of the EU, so that, from a substantive point of view, there can be no question of their exercising national sovereign power.[47]

The situation is different in cases where EU law grants discretion to Member States with regard to implementation—in our example, Member States may determine how long telecommunications providers have to retain data on telecommunications connections for periods ranging between 6 and 24 months. Nevertheless, the ECJ assumes that Member States are also obliged to adhere to EU fundamental rights in the case of discretion. This is because such discretion has been granted by EU law.[48] This approach is not

[45]BVerfG, Order of 13 March 2007 – 1 BvF 1/05, BVerfGE (reports) 118, 79, 95 ff. Affirmative: Britz (2015), p. 276. Cf. for a critical view with regard to the criterion of determinedness, Sauer (2016), p. 1135 f.; further, Franzius (2015b), p. 148 ff., 152. In view of the primacy of EU law, it is admissible to scrutinise the national measures with regard to national fundamental rights and confirm it (only a declaration as unconstitutional would be problematic), cf. only BVerfG, Order of 02 March 2010—BVerfGE (reports) 125, 260, 309, para 187 of the English translation, available at http://www.bverfg.de/e/rs20100302_1bvr025608en.html, accessed 13 January 2017: "With these contents, the Directive can be implemented in German law without violating the fundamental rights of the Basic Law. The Basic Law does not prohibit such storage in all circumstances. On the contrary, even independent of any priority of Community law, it may permissibly be ordered in compliance with the fundamental rights enshrined in the Basic Law (see IV below). A review of the challenged provisions as a whole by the yardstick of German fundamental rights is therefore not in conflict with Directive 2006/24/EC, and therefore the validity and priority of the latter is not relevant."; Bäcker (2015), p. 409 f.; Britz (2015), p. 277.

[46]ECJ, Joined Cases C-293/12 and C-594/12, Digital Rights Ireland Ltd et al., EU:C:2014:238.

[47]Cf. ECJ, Case C-206/13, Siragusa, EU:C:2014:126, para 32; von Danwitz (2013), p. 259; Dederer (2006), p. 584; Jacobs (2001), p. 333 f.; Masing (2016), p. 499 f.; Snell (2015), p. 301 f.; Weiler and Fries (1999), p. 161 f.

[48]Cf. ECJ, Case C-540/03, Parliament/Council, [2006] ECR I-5769, paras 104 f.; further Joined Cases C-411/10 and C-493/10, N.S. et al., [2011] ECR I-13905, paras 64 ff.; Case C-418/11, Texdata, EU:C:2013:588, paras 70 ff.: "In the present case, the main proceedings concern the penalty imposed for failure to comply with the disclosure obligation, as laid down in the Eleventh Directive. As can be seen from paragraph 49 above, the EU legislature, by Article 12 of the Eleventh Directive, left the Member States responsible for determining the appropriate penalties—that is to say, penalties which are effective, proportionate and dissuasive—in order to ensure

uncontroversial.[49] At first sight, there appear to be good reasons for this restrictive position.[50] True, an obligation incumbent on the Member States with regard to EU fundamental rights, also when enjoying discretion, is still covered by the wording of Art. 51 para. 1 sentence 1 CFR, referring to "implementing". However, the addition of the word "only", and the fact that it contains reservations regarding Member States' competences [cf. only Art. 51 para. 2 CFR; cf. further Art. 6 para. 1 subpara. 2 TEU], means that EU law expresses a somewhat restrictive tendency. Moreover, the unitarisation effect resulting from an obligation with regard to EU fundamental rights questions the granting of discretion to the Member States. Finally, if EU law opens up various options to the Member States, then choosing one of these options does not endanger the uniform application of EU law.

However convincing this delimitation of the spheres of fundamental rights may seem at first, we must not overlook its problems and limitations.[51] For, differentiating between obligatory requirements of a directive and those that grant discretion may artificially split up a uniform set of circumstances and its regulatory context, which can give rise not only to legal difficulties, but also to deficits in terms of protection, since protection of fundamental rights is then parcelled out. Having said that, the following objection is even more important, and it significantly reduces the persuasiveness of the separation solution: Not every leeway is a leeway. For,

(Footnote 48 continued)

compliance with the disclosure obligation [para. 49: Under Article 12 of the Eleventh Directive, Member States are to provide for appropriate penalties in the event of failure to disclose accounting documents. However, that directive does not lay down more precise rules with regard to the establishment of those national penalties and, in particular, it does not establish any explicit criterion for the assessment of the proportionality of such penalties.]"; Bäcker (2015), p. 402 ff.; von Bogdandy et al. (2012), p. 55; von Danwitz (2009), p. 27 ff.; Epiney (2007), p. 63 f.; Franzius (2015b), p. 141; Griebel (2013), p. 388; Ladenburger (2012), p. 165; Lenaerts (2015), p. 354 f.; Trstenjak and Beysen (2013), p. 304 ff.; Ward (2014), para 51.119.

[49]Disagreeing: ECJ, Case C-2/92, Bostock, [1993] ECR I-972, Opinion of AG Gulmann, paras 33 f.; Calliess (2009), p. 120 f.; Masing (2006), p. 267; further Kingreen (2016), paras 14 f.; idem (2013b), p. 453. The position of the BVerfG is not entirely clear since most rulings only address the issue of the applicability of national fundamental rights in this situation. A rejection of the applicability of EU fundamental rights might be seen in BVerfG, Judgment of 24 April 2013 – 1 BvR 1215/07, BVerfGE (reports) 133, 277, 313 f.; English translation available at http://www.bverfg.de/e/rs20130424_1bvr121507en.html, accessed 13 January 2017: "The European fundamental rights under the EUCFR are not applicable in the case at hand. The challenged provisions must be measured against the fundamental rights under the Basic Law, if only because they are not governed by Union law … Accordingly, this is also not a case of implementation of European Union law, which alone could result in the Member States' being bound by the Charter of Fundamental Rights (Art. 51 sec. 1 sentence 1 EUCFR)." This finding is subsequently relativised, though [see ibid., p. 316 and on this Thym (2013), p. 894 f.].

[50]See ECJ, Case C-2/92, Bostock, [1993] ECR I-972, Opinion of AG Gulmann, paras 33 f.; Calliess (2009), p.120; Kingreen (2013b), p. 453; Lindner (2007b), p. 191 f.; Masing (2006), p. 267.

[51]Cf. Calliess (2009), p. 121; von Danwitz (2009), p. 23, 27 f.; De Cecco (2006), p. 11; Di Fabio (2006), p. 10 f., 15; Franzius (2015a), p. 391 f.; idem (2015b), p. 141; Lindner (2007a), p. 72; Reinbacher and Wendel (2016), p. 336; Thym (2013), p. 892.

requirements of EU law might reduce the scope of discretion, where that latter seems to be granted according to the wording of a directive. This is because directives—given that they are acts of the Union legislature—have to be interpreted in line with requirements of EU fundamental rights. In our example, therefore, the question would arise as to whether the data retention period of between 6 and 24 months provided for in the directive is consistent with EU fundamental rights. Were we to conclude that, in view of the considerable limitation of fundamental rights, a maximum of 6 months' retention is permitted at most, there would be no leeway at national level at all. Hence, as a preliminary question for applying national fundamental rights to national acts exercising discretion granted by EU law, the question always arises as to whether and to what extent this leeway is limited by EU law. A strict separation of spheres of fundamental rights is therefore not possible in view of the layered process of law-making.[52]

Against this background, we have to consider the applicability of national fundamental rights to acts of Member States that make use of discretionary powers. As the ECJ has emphasized several times recently, national fundamental rights may be applied, but only "provided that … neither the level of protection of the Charter … nor the priority, the unity and the effectiveness of EU law is affected".[53] The BVerfG applies national fundamental rights, but sometimes assumes a very broad scope of discretion with regard to implementation (and does so without referring to the ECJ).[54]

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[52]Cf. on the interaction, ECJ, Joined Cases C-293/12 and C-594/12, Digital Rights Ireland Ltd et al., EU:C:2014:238, paras 60 ff.; further Ohler (2013), p. 1437.

[53]Cf. ECJ, Case C-399/11, Melloni, EU:C:2013:107, para 60; further Case C-617/10, Fransson, EU:C:2013:105, para 29; Opinion 2/13, EU:C:2014:2454, paras 187 f. (accession to the ECHR); Case C-168/13, Jeremy F., ECLI:EU:C:2013:358, para 53; Wollenschläger (2014a), para 24, with further references. See further—distinguishing three types of (EU) legislative consensus with regard to remaining discretion of the Member States—Lenaerts (2015), p. 357 ff. See for a solution for preserving national autonomy by granting a margin of appreciation to the Member States only Bäcker (2015), p. 406 f.,—this approach is, however, questionable since it leads to double standards vis-à-vis the Member States and the EU and neglects that the task of the ECJ is not to guarantee a minimum fundamental rights standard within the EU (like the EctHR), but to provide full fundamental rights protection within the scope of applicability of EU law, cf. Wollenschläger (2014a), para 77, with further references. Reservedly: Franzius (2015b), p. 141 ff. For a restrictive approach questioning the primacy of EU (fundamental rights) law: Kirchhof (2014), p. 1538 ff. Proposing a reversed Solange-formula, i.e. an application of national fundamental rights as long as they guarantee adequate protection, Ludwigs (2014), p. 282.

[54]See only BVerfG, Order of 02 March 2010 – BVerfGE (reports) 125, 260, 308 f., English translation available at http://www.bverfg.de/e/rs20100302_1bvr025608en.html, accessed 13 January 2017; Order of 19 July 2011 – 1 BvR 1916/09, BVerfGE (reports) 129, 78, 104 f.; Order of 24 January 2011 – 1 BvR 1299/05, BVerfGE (reports) 130, 151, 186 ff. Cf. for a critical view Griebel (2013), p. 386 ff., 395. Cf. further BVerfG, Order of 15 December 2015 – 2 BvR 2735/14, English translation available at http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2015/12/rs20151215_2bvr273514en.html, accessed 13 January 2017, and on this Hong (2016), p. 553 ff.

3.2 *Member States' Acting in a Context Determined by EU Law*

The question of whether Member States implement EU law, and are therefore bound by EU fundamental rights, does not only arise with regard to obligations that are clearly defined by EU law, such as the previously discussed requirement contained in an EU directive that data from telecommunication connections be retained for a certain period of time. This takes us to the second part of this section—namely to the diffuse group of cases in which Member States act in a context that is somehow determined by EU law. The debate on this issue is only in its very infancy.[55]

One prominent example is the *Fransson* case, which has already been mentioned several times. This case concerns the applicability of the EU fundamental right of "*ne bis in idem*" (Art. 50 CFR) with regard to national tax and criminal proceedings that run in parallel and which were based on infringements of the obligation to declare Value Added Tax. The fact that neither national criminal procedural law nor the law on tax sanctions implement specific norms of EU secondary law has been declared immaterial by the ECJ. According to the Court, it is, rather, sufficient for the levying of VAT and for the sanctioning of violations of the obligation to declare taxes to be determined by EU law. In order to establish such a determination, the ECJ has referred to the principle of loyalty, the obligation to declare taxes provided for by EU secondary law, and the obligation incumbent on primary law "to impose effective penalties for conduct prejudicial to the financial interests of the European Union" (Art. 325 TFEU).[56] That said, are these links to EU law sufficient to activate EU fundamental rights? One might even go further and concur with Advocate General Sharpston in applying EU fundamental rights in all areas of shared competences irrespective of their having been exercised by passing EU legislation. This would result in a far-reaching obligation of the Member States to apply EU fundamental rights.[57]

Generally speaking, the ECJ still has no clear line here.[58] Besides far-reaching judgments such as the *Fransson* case just mentioned, there are also restrictive approaches – for example, the repudiation of an obligation with regard to fundamental rights where EU competences have not been exercised (*Bartsch* case),[59] or

[55]For more details, see Wollenschläger (2014a), paras 29 ff., with further references.

[56]ECJ, Case C-617/10, Fransson, EU:C:2013:105, paras 17 ff. Approving: Franzius (2015b), p. 141; Kokott and Sobotta (2015), p. 70 f. Disagreeing: Britz (2015), p. 278.

[57]ECJ, Case C-34/09, Ruiz Zambrano, [2011] ECR I-1177, opinion of AG Sharpston, paras 163 ff.

[58]See for an overview of the case-law: Snell (2015), p. 292 ff.

[59]ECJ, Case C-427/06, Bartsch, [2008] ECR I-7245, para 18.

where there is only an indirect link to EU policy areas (*Annibaldi* case).[60,61] The BVerfG emphasized in its judgment on the anti-terror database that an indirect link to EU law is not sufficient to apply EU fundamental rights, and even created a new barrier to European integration consisting in the preservation of a meaningful fundamental rights protection scheme at national level.[62] The English press release reads as follows:

> The constitutional complaint provides no reasons for a preliminary ruling before the European Court of Justice. Clearly, the Counter-Terrorism Database Act and actions that are based on it do not constitute an implementation of Union law according to Art. 51 sec. 1 sentence 1 of the Charter of Fundamental Rights of the European Union. The Counter-Terrorism Database Act pursues nationally determined objectives which can affect the functioning of the legal relationships under EU law merely indirectly. Thus, the European fundamental rights are from the outset not applicable, and the European Court of Justice is not the lawful judge according to Art. 101 sec. 1 sentence 2 of the Basic Law … The European Court of Justice's decision in the case Åkerberg Fransson … does not change this conclusion. As part of a cooperative relationship, this decision must not be read in a way that would view it as an apparent *ultra vires* act or as if it endangered the

[60]ECJ, Case C-309/96, Annibaldi, [1997] ECR I-7493, paras 13 ff.; further Case C-40/11, Iida, ECLI:EU:C:2012:691, para 79: "To determine whether the German authorities' refusal to grant Mr. Iida a 'residence card of a family member of a Union citizen' falls within the implementation of European Union law within the meaning of Article 51 of the Charter, it must be ascertained among other things whether the national legislation at issue is intended to implement a provision of European Union law, what the character of that legislation is, and whether it pursues objectives other than those covered by European Union law, even if it is capable of indirectly affecting that law, and also whether there are specific rules of European Union law on the matter or capable of affecting it (see Case C 309/96 Annibaldi [1997] ECR I 7493, paragraphs 21 to 23)."

[61]Cf. further ECJ, Case C-457/09, Chartry, [2011] ECR I-819, paras 23 ff. (intermediate proceedings); Case C-466/11 Gennaro Currà and Others, EU:C:2012:465, para 25 (compensation in the context of Second World War); Case C-369/12, Corpul Național al Polițiștilor, EU:C:2012:725, para 15 (salary reductions in the public sector); Case C-370/12, Pringle, EU:C:2012:756, paras 179 f. (ESM-Treaty); Case C-128/12, Sindicato dos Bancários, EU:C:2013:149, paras 11 ff. (salary reductions in the public sector); Case C-73/13, T., EU:C:2013:299, paras 11 ff. (attorneys' fees); Case C-282/14, Stylinart, EU:C:2014:2486, paras 18 and 20 (expropriation): "à cet égard, la Cour a itérativement refusé de reconnaître sa compétence dans une situation où la décision de renvoi ne contient aucun élément concret permettant de considérer que l'objet de la procédure au principal concerne l'interprétation ou l'application d'une règle de l'Union autre que celles figurant dans la Charte … à cet égard, la question posée par la juridiction de renvoi se borne à citer des dispositions de la Charte sans invoquer d'autres dispositions du droit de l'Union. Certes, selon la description faite par la juridiction de renvoi, l'activité économique de la requérante au principal consiste à assurer des transports internationaux et la livraison de meubles à destination de magasins de meubles situés en Allemagne. Toutefois, la demande de décision préjudicielle ne contient aucun élément concret qui aurait conduit celle-ci à s'interroger sur l'interprétation ou l'application d'une règle de l'Union autre que celles figurant dans la Charte"; Case C-199/14, Kárász, EU:C:2014:2243, paras 14 ff. (national pension); Case C-305/14, Băbășan, EU:C:2015:97, paras 13 ff. (electoral law); Case C-451/14, Petrus, EU:C:2015:71, paras 16 ff. (prescription acquisitive). Cf. further, von Danwitz (2013), p. 260; Iglesias Sánchez (2012), p. 1588 ff.

[62]BVerfG, Judgment of 24 April 2013 – 1 BvR 1215/07, BVerfGE (reports) 133, 277, 316; English translation available at http://www.bverfg.de/e/rs20130424_1bvr121507en.html, accessed 13 January 2017. See also Wollenschläger (2015b), para 103.

> protection and enforcement of the fundamental rights in the member states in a way that questioned the identity of the Basic Law's constitutional order. The Senate acts on the assumption that the statements in the ECJ's decision are based on the distinctive features of the law on value-added tax, and express no general view. The Senate's decision on this issue was unanimous.[63]

Where then can we draw the line?[64] For the reasons explained in the context of an obligation with respect to fundamental rights when Member States enjoy discretion, a restrictive reading seems appropriate.[65] Only sufficiently specific requirements of (primary and secondary) EU law trigger the applicability of EU fundamental rights.[66] This requires a careful analysis of the EU legislation in question. In view of the variety of possible constellations, a great deal of concretization work still needs to be carried out in the jurisdictional and academic fields in order to operationalize this delimitation.[67] In any case, competences that have not yet been exercised certainly do not suffice.[68]

The ECJ has also recently adopted a more restrictive approach—namely, in its judgment in the *Siragusa* case of 6 March 2014, the subject of which was the question of the applicability of EU fundamental rights to an order issued by an authority of one of the Member States to remove buildings that had been erected in breach of landscape protection law.[69] No specific rules of EU law applied to this situation; the referring Italian court, however, saw a link to EU environmental policy, albeit the latter was not sufficient for the ECJ. Although it reaffirmed its interpretation as developed in the *Fransson* case of Art. 51 para. 1 sentence 1 CFR, according to which EU fundamental rights apply to any national measure falling within the scope of application of EU law,[70] the ECJ, though drawing on previously developed principles, also stressed the limits of the obligation of the Member States to respect EU fundamental rights. Thus, "the concept of 'implementing Union law', as referred to in Art. 51 of the Charter, requires a certain degree of connection above and beyond the matters covered being closely related or one of those matters having an indirect impact on the other".[71] The important point is whether the

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[63]Press release available at http://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2013/bvg13-031.html, accessed 13 January 2017.

[64]Too far-reaching the fusion model of Thym (2015), p. 57 ff.; see further, Franzius (2015b), p. 151 ff. The challenge lies—with Masing (2015), p. 477; idem (2016), p. 502 ff.; further Britz (2015), p. 280 f.—in delimitating the different spheres of fundamental rights. Advocating an extension of the BVerfG's standard of review to the EU fundamental rights Bäcker (2015), p. 410 ff.

[65]See Kirchhof (2011), p. 3684 ff.; Ladenburger (2012), p.163 f.; Masing (2016), p. 506 ff.

[66]von Danwitz (2009), p. 28; further Kokott and Sobotta (2015), p.71 f.; Masing (2016), p. 507 f.

[67]For a test, cf. Ward (2014), para 51.118. See further, Britz (2015), p. 277 ff.: danger for efficient implementation of EU law decisive.

[68]Cf. Ohler (2013), p. 1434; Thym (2013), p. 894.

[69]ECJ, Case C-206/13, Siragusa, EU:C:2014:126.

[70]ECJ, Case C-206/13, Siragusa, EU:C:2014:126, paras 21 f.

[71]Ibid., para 24.

national legislation in question "is intended to implement a provision of EU law; the nature of that legislation and whether it pursues objectives other than those covered by EU law, even if it is capable of indirectly affecting EU law; and also whether there are specific rules of EU law on the matter or capable of affecting it".[72] In any case, EU law needs to impose on Member States an obligation "with regard to the situation at issue in the main proceedings".[73] Finally, the critical point is whether the non-application of EU fundamental rights would "undermine the unity, primacy and effectiveness of EU law".[74] The recent judgments in the *Hernández* case of 10 July 2014, in the *Dano* case of 11 November 2014, and in the *Nistlahnz Poclava* case of 5 February 2015, follow the same lines.[75] However, the ruling on the applicability of EU fundamental rights to the retention of telecommunication data handed down on 21 December 2016 stands for a wide understanding.[76]

3.3 Procedural Implications

Let me conclude by taking a brief look at the procedural implications. Insofar as obligatory requirements of EU law are implemented, and national fundamental rights do not therefore apply, the BVerfG has no jurisdiction, as its competence is limited to applying national constitutional law.[77] Matters are different where discretionary powers of Member States are concerned. Due to the parallel applicability of EU and national fundamental rights, the BVerfG retains jurisdiction in view of the latter. Even so, the question will often arise as to how far Member States' leeway is limited by EU law, which takes precedence. This presumes a reference to the ECJ, a path which the BVerfG has not followed so far in the area of fundamental rights (see Sect. 2.2.2). This presents challenges to legal protection in two respects: First, the obligation to refer a case to the ECJ not only takes time, but it may also overburden the latter in view of the great number of cases involving such issues of EU law. Second, individuals may challenge EU legislation before the ECJ only under very limited conditions [cf. Art. 263 para. 4 TFEU]. As an outlook, it should be mentioned that some commentators advocate an extension of the BVerfG's competence to review EU fundamental rights standards, be it by interpreting national fundamental rights in the light of EU fundamental rights, or by directly applying EU fundamental rights.[78]

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[72]Ibid., para 25.

[73]Ibid., para 26. See also, Ladenburger (2012), p. 167 N. 104; Lenaerts and Gutiérrez-Fons (2014), paras 55.12 ff.

[74]ECJ, Case C-206/13, Siragusa, EU:C:2014:126, paras 31 f.

[75]ECJ, Case C-198/13, Hernández, EU:C:2014:2055, paras 32 ff. Case C-333/13, Dano, EU:C:2014:2358, paras 87 ff.; Case C-117/14, Nisttahuz Poclava, EU:C:2015:60, paras 27 ff.

[76]ECJ, Joined Cases C-203/15 and C-698/15, Tele2 Sverige, EU:C:2016:970. Disagreeing, Wollenschläger and Krönke (2016), p. 906.

[77]See also N. 46.

[78]See N. 65.

As a last procedural implication, let me point to the strengthening of ordinary courts in relation to the BVerfG, since the former (unlike the BVerfG) have jurisdiction to apply EU fundamental rights, and thus to set aside national legislation that is in breach of them.[79]

4 Conclusion

The constitutional limitations on European integration, and more specifically on the precedence of EU law, produce an ambivalent result: On the one hand, the principles of precedence and of uniform application of EU law are endangered unilaterally. However, the contribution of these limitations to improving the protection of fundamental rights at EU level must not be overlooked, and neither must the gradual reconciliation of these two perspectives.

With regard to national law, the principles of the precedence and uniform application of EU law require EU fundamental rights to be applied to national law determined by EU law. This extends not only to constellations in which secondary EU law explicitly obliges the Member States to act in a certain way. Rather, even in cases in which Member States enjoy discretion, the question arises as to the extent to which EU fundamental rights limit the scope of discretion that is awarded. In this (limited) sense, the *Fransson* judgment of the ECJ was right to stress: "Since the fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls within the scope of European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter."[80] Or: "Metaphorically speaking, this means that the Charter is the 'shadow' of EU law".[81]

The latter reflects the reason (not always sufficiently well considered) why Member States are increasingly bound by EU fundamental rights. This development results from a growing allocation of competences to the European Union and the exercise of these competences, notwithstanding expansive approaches in the ECJ's jurisprudence and in the literature (a safety net for fundamental rights[82]). It seems to me to be important to give this some thought—against the background, for example, of the current debate about the general regulation on data protection.[83]

[79]Cf. Bäcker (2015), p. 400 ff.; Thym (2013), p. 895; further, Kingreen (2013a), p. 808 f.

[80]ECJ, Case C-617/10, Fransson, EU:C:2013:105, para 21; further Case C-418/11, Texdata, EU:C:2013:588, para 73.

[81]Lenaerts and Gutiérrez-Fons (2014), para 55.26.

[82]von Bogdandy et al. (2012), p. 45. Against: Britz (2015), p. 276.

[83]See also, Britz (2015), p. 281; Franzius (2015b), p. 144.

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Human Rights Protection in the EU as *Unitas Multiplex*

Noriko Ofuji

1 Introduction

Under the legal order of a State, rights set by law are guaranteed only to those who are qualified: the holders of nationality. That is to say, in the field of State law, the protection of human rights is assured under the sovereignty of Nation-States. According to this premise, holders of nationality are considered, if not the only, the primary *ratione personae* whose human rights are protected by the State. Through nationality, people are generally considered as socially subsumed to a specific State.

Therefore, those who possess foreign nationalities are not, in principle, considered to be the subjects of rights. The scope of *ratione personae* and the scope of *ratione materiae* of rights have been dependent upon the sovereign decisions of each State.

Indeed, as a result of remorse for the atrocities of the States during WWII, the "universal" nature of human rights has been emphasized since the end of the war, and human rights have been internationally guaranteed by treaties and conventions. However, these treaties and conventions only gain their legal binding force through acts of implementation by the States. Moreover, in the hierarchical structure of the legal order of the States, the validity of international treaties and conventions is very often considered to be inferior to Constitutional law. National courts frequently deny the "self-executing" nature of certain treaties, including those concerning human rights, and judge that they can only be effective through implementation by national legislation. Human rights guaranteed by treaties and conventions are thus restrained within the framework of the State legal order. In other words, the "universal" nature of human rights is dependent upon the active or passive protective measures of the sovereign States.

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At the same time, however, sovereign rights of the States are no longer absolute or exclusive, as they were before. Ecological problems, for example, require global solutions, and refugee problems necessitate unified actions of the States, based on principles of humanity. The sovereign States often abstain from exercising their sovereign rights, accepting "supra-national" values and opting for peaceful coexistence with other States in an international context. Every state is in close coordination with other states, and state sovereignty, once considered to have an absolute and exclusive nature, is now seen more increasingly relative.

The traditional premise of the protection of human rights based on nationality is thus becoming less meaningful. It reflects the hierarchical relationship, within a sovereign State, between Constitution and treaties. However, in a situation where transborder movements and activities of people are not exceptional, the traditional way of protecting rights based on nationality may well cause difficulties.

The protection of human rights in the framework of the European Union (EU) law shows us a new way of protecting human rights, in the sense that the traditional static binary conflict between national Constitution and treaties in a State's legal order is dealt with "dynamically".[1]

The Maastricht Treaty, signed in 1992 and put into force in 1993, first laid down the principles of EU citizenship, stipulating the possession of nationality of a Member State as a condition for its acquirement. By virtue of this notion, human rights, which were guaranteed in principle to the nationals within the framework of State legal order, are now guaranteed transnationally in the EU.

Below, I will present, first, the premises of EU law, which constitute the background of transnational human rights protection, and secondly, the relationship between a Member State's nationality and EU citizenship. Finally, I will cite a number of cases referred to the European Court of Justice concerning EU citizens who were placed in situations that made it difficult for them to exercise their rights. These situations arose either due to their having dual citizenship, or due to losing their nationality or national citizenship "placing them in a position capable of causing them to lose the status of the EU citizen"[2] and the rights attaching thereto.

2 Premises of EU Law

2.1 Unitas Multiplex

EU is a polity that unites the Member States, with each State recognizing each other's differences and heterogeneity. In other words, the EU aims for *unitas multiplex*.

[1]See Bobbio (2012).

[2]Quotation from the Opinion of Advocate General (AG), Poiares Maduro, 30 September 2009 in Case C-135/08, *Janko Rottmann v. Friestaat Bayern*, at para 42.

Article 2 of the Treaty on European Union (TEU) stipulates that the EU is a "multilateral" community "founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities", and that these values are common to the Member States in a "society" in which "pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail". This statement forms the basis for the assertion in the preamble of the Charter of Fundamental Rights of the EU that the EU "contributes to the preservation and to the development of …common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States".

The concept of *unitas universalis* is opposed to the concept of *unitas multiplex*. To assume that EU law is based on the concept of *unitas universalis,* is to place the EU in a superior position which transcends the sovereignty of the Member States: the EU will wield *super*-sovereignty over the Member States.

In contrast, *unitas multiplex* is a method of unification that seeks a "pluralistic solidarity", wherein each Member State reserves the right to its own sovereignty in relation to the EU as well as to other Member States. Member States will aim to unite as a whole, while at the same time remaining independent of each other. "United in diversity" is, in fact, the motto of the EU that first came into use in 2000. The Preamble to the TEU indicates that being "united in diversity" serves "to deepen the solidarity between their peoples while respecting their history, their culture and their traditions", and, according to the EU's official site, "it signifies how Europeans have come together, in the form of the EU, to work for peace and prosperity, while at the same time being enriched by the continent's many different cultures, traditions and languages".[3]

While human rights are thus held to be a supreme value under the concept of *unitas universalis*, they are secured through mutual reference and coordination of protection by each Member State and the EU under the concept of *unitas multiplex*.

[3]https://europa.eu/european-union/about-eu/symbols/motto_en. This motto was clearly set out in Article I-8 of the Constitutional Treaty, which did not come into effect because of the rejection of ratification by 2005 referendums in France and in the Netherlands. See Cohen-Jonathan and Dutheil de La Rochère (2003); Duprat (1996); Ruzié (1993), for example, regarding the EU law and the human rights in general. Concerning philosophical foundations of the EU law, see Dickson and Eleftheriadis (2012); Jaklic (2014). On *unitas multiplex*, see, for example, Prost (2013). Cf. Morin (1990) that states that Europe is a "complex" entity and any analysis of it must be based on the "Gordian knot" in which political, economic, social, cultural, religious and anti-religious histories are interwoven and interconnected in both conflicting and harmonious ways.

2.2 Core Principles of the EU: Principle of Non-discrimination on Grounds of Nationality (TFEU Art. 18) and Principle of Mutual Recognition

EU aims to establish an "internal market", that is, "an area without internal frontiers in which the free movement of goods, persons, services and capital" is ensured (Article 26). In this market, the principle of non-discrimination on grounds of nationality plays an essential role, as people will be less inclined to trade across borders if there is a possibility that they will be discriminated against by the host Member State. Without this principle, freedom of movement between States would necessarily be hindered.

In this way, the principle of non-discrimination based on nationality confirms that goods, persons, services and capital of a Member State will be treated equally across borders, regardless of the State of origin or nationality. In other words, the purpose of the principle is to maintain the "compatibility" of the legal treatment of goods, persons, services and capital, and to ensure that the EU will be able to create a single market through its enforcement.

There are often cases where the regulatory measures of a State, applied to certain goods, persons, services and capital, differ from those of other States: for example, regulations for alcoholic beverages, or varying labor standards. The principle of mutual recognition is applied when the States implement their own legislative regulatory measures not only to their own products and workers, but also to foreign products and workers which are not subject to EU legislation, or to aspects of products falling outside the scope of such legislation.

Based on this principle of mutual recognition, Member States may not prohibit the sale of products or the employment of workers on its territory that are legal in other Member States, even when those products were manufactured or those workers were employed in accordance with technical rules different from those to which one Member State's domestic products and workers are subject.

Consequently, each Member State, in refraining from applying its own regulatory measures to other Member States' products and workers, thereby accepts the "difference" between its own regulations and those of other Member States. This principle enables the construction of a "loose" cooperative and confidential relationship among the Member States.

3 Functions of Member States' Nationality and EU Citizenship

Nationality is a legal tie that binds a person to a State. A person belongs to a specific state and holds its nationality. He or she acquires rights and assumes responsibilities that the legal norms of the State provide.

In a modern State, under the principle of national sovereignty, nationality becomes a condition for acquiring citizenship, which entitles people to participate in a democratic system on which a "nation" is based. Following the adoption of universal suffrage, citizenship was given to all nationals without regard to property. Through citizenship, nationals form a legally and culturally unified community.[4]

What kind of people can then acquire nationality? That is to say, what conditions do people have to meet to acquire nationality? In the field of constitutional law as well as international law, these conditions are basically left to the discretion of the States. People who satisfy the requirements set by the State in the aim of helping them assimilate to the cultural norms of the State and accept its national identity, acquire nationality.

At the same time, States can deprive people of their nationality for specific reasons, so that they lose their rights and citizenship. Alternatively, States can deprive certain people of their rights and citizenship and yet let them keep their nationality. The concepts of nationality and citizenship can thus be used by the States to assimilate and accept people or exclude them.

3.1 Conditions for Acquisition of EU Citizenship and the Rights One Holds as a Citizen

EU is a body uniting the Member States, but it is not itself a State. Therefore, "a nationality of the EU" or "EU nationality" does not exist. Nor is the notion of EU citizenship tied to a particular EU nationality or to a particular people within the Union.

How, then, do people acquire citizenship without EU nationality? The Maastricht Treaty, which came into effect on 1993, defined "EU citizenship". Since then, EU Treaty states that "every person holding the nationality of a Member State shall be a citizen of the Union" (TFEU Article 20 (1), TEU Article 9). That is to say, EU citizenship is given on condition that people are nationals of one of the Member States. According to the European Court of Justice, EU citizenship "is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for". Thus, the Court confirms that, in any situation within the scope of *ratione materiae* of EU law, EU citizens can make use of the principle of non-discrimination on grounds of nationality.[5]

Under the Treaty on the Functioning of the European Union (TFEU), EU citizens have "*inter alia*" (a) the right to move and reside freely within the territory of

[4]Duchesne (2007, pp. 71–81).

[5]Case C-184/99 *Grzelczyk v. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-6193, at paras 31–33. See also Case C-85/96 *Martinez Sala* [1998] ECR I-2691.

the EU (Article 20 (2) (a), Article 21). This is an effect of the formation of the internal market. The Treaty Establishing the European Economic Community, enacted in 1958 (it was a predecessor of the Maastricht Treaty), had already assured workers' rights to move and reside freely within the internal market, but the Maastricht Treaty widened the scope of *ratione personae* concerning the rights to all the EU citizens. As mentioned above, in exercising the freedom to move and reside within the internal market, the right of an EU citizen to receive equal treatment in another Member State is also guaranteed through application of the principle of non-discrimination on grounds of nationality.

However, these rights are exercised in accordance with "the conditions and limits" defined by the Treaties and by the measures adopted thereunder [TFEU Article 20 (2)]. In principle, such freedom is assured only when EU citizens actually exercise their right to conduct transborder activities.[6] In fact, in order that citizens have "the right of residence on the territory of another Member State for a period of longer than three months", they have to be "workers or self-employed persons in the host Member State". Or they must "have sufficient resources for themselves and their family members", and "have comprehensive sickness insurance cover in the host Member State" so as "not to become a burden on the social assistance system of the host Member State during their period of residence".[7]

Furthermore, Member States are banned from expelling Union citizens who have resided in the host Member State for the previous ten years, unless such expulsion is based on grounds of national security, as defined by Member States.[8]

The EU citizens also have (1) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in other States under the same conditions as nationals of these States (Article 20 (2) (b), Article 22). The principle of non-discrimination on grounds of nationality is equally applied to this right.[9] (2) They have the right to enjoy, in the territory of a country in which their own State is not represented, the protection of the diplomatic and consular authorities of any Member State under the same conditions as the nationals of that state (Article 20 (2) (c), Article 23). (3) They also have the right to petition the European Parliament, to apply to the European Ombudsman, to address the institutions and advisory bodies of the Union in any of the Treaty languages, and to obtain a reply in the same language (Article 20 (2) (d), Article 24).[10]

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[6]Article 3 (1) of the Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 (on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States) affirms that "this Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members defined in point 2 of Article 2 who accompany or join them".

[7]Article 7 (1) of the Directive 2004/38/EC.

[8]Article 28 (3) of the Directive 2004/38/EC.

[9]Cf. Case C-650/13 *Delvigne v. Commune de Lesparre-Médoc* [2015] ECR I-nyr, at para 43.

[10]These rights are also exercised in accordance with "the conditions and limits" defined by the Treaties and by the measures adopted thereunder [TFEU Article 20 (2)].

As well as the above rights, the Lisbon Treaty, signed in 2007 and put into force in 2009, ensures that "not less than one million" EU citizens "who are nationals of a significant number of Member States" are provided with the right to "take initiative of inviting [the] European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties" [TEU Article 11 (4)], and that "in all its activities, the Union shall observe the principle of the equality of its citizens" (Article 9).

Under the Charter of Fundamental Rights of the European Union, signed in 2000 and given a legally binding effect by the Lisbon Treaty, "citizens" also have the right to good administration (Article 41) and the right of access to documents (Article 42). The provisions of the Charter including these rights are "addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers" [Article 51 (1)]. That is to say, "the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by European Union law", and therefore EU citizens can rely on any rights prescribed in the Charter opposed to contrary national legislation, as long as it "falls within the scope of European Union law".[11]

3.2 *"Interstate Citizenship"*

EU citizenship does not belong to a single people. It opens up the political entity of each Member State to the citizens of other Member States, and gives them a specific legal and political status. In fact, the EU belongs to and is composed of citizens who do not share the same nationality.[12] That is to say, the EU does not compel its citizens to have only one nationality or to be members of only one group: rather, it recognizes the *unitas multiplex* of different nationalities, of different peoples.[13] It is based on "mutual commitment [of the Member States] to open their respective bodies politic to other European citizens and to construct a new form of civic and political allegiance on a European scale. It does not require the existence of a people, but is founded on the existence of a European political area from which

[11]Case C-617/10 *Åklagaren v. Hans Åkerberg Fransson* [2013] ECR I-nyr, at para 19. As regards EU citizenship and the rights of an EU citizen, see, for example, Fauvarque-Cosson, Pataut and Rochfeld (2011); Garot (1999); Konstadinides (2010); Wollenschläger (2011).

[12]Weiler (1999, p. 344).

[13]Opinion of Advocate General Poiares Maduro, 30 September 2009 in Case C-135/08, *Janko Rottmann v. Friestaat Bayern*, at para 23.

rights and duties emerge".[14] This is the "radically innovative character" of EU citizenship.[15]

In fact, EU citizenship is "citizenship beyond the state", an "interstate citizenship"[16] that enables citizens to exercise their freedom to move and reside within the internal market, to claim the right to be treated equally, and the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections, etc. in Member States other than their own. It guarantees the legal status of EU citizen, to the nationals of the Member States, who have moved to another Member State other than their own.

In the EU, a political area in which pluralistic integration is realized through the political relationship among European citizens, EU citizenship functions as a notion that loosely integrates the "peoples of Europe".

3.3 What It Means to Hold Nationality in a Member State

The significance of holding nationality in a Member State of the EU, which was clarified by the opinion of the Advocate General Maduro in the European Court of Justice preliminary ruling in the *Rottmann* case (cited below), can be summarized as follows.[17]

(1) First, it means that EU citizens are involved in political relationships among themselves as well as in the "political area", where they are given not only citizenship of the State in which they hold their nationalities, but also a "new form of citizenship", which is the EU citizenship given "beyond the States".
(2) Second, the acquisition of EU citizenship does not negate citizenship in a State. Treaties state that EU citizenship "shall be additional to and do not replace the national citizenship" (TFEU Article 20 (1), TEU Article 9). EU citizenship is granted for the very reason that citizens hold nationalities of Member States. Therefore, EU citizenship may well strengthen the ties between the citizen and its Nation, but will not weaken it.
(3) Third, the status of "EU citizen" acquired by holding nationality in a Member State grants "a body of rights" not only to EU citizens themselves, but also by extension to their family members. Insofar as access to these rights are guaranteed "beyond the States", independently of the State, EU citizens are thus emancipated from their State of origin.
(4) Last, "the body of rights and obligations" associated with EU citizenship cannot be limited in an unjustified manner by the nationality of a Member State. That is to say, even though the acquisition and loss of nationality (and consequently

[14]Ibid.
[15]Ibid.
[16]Ibid., at para 16.
[17]Ibid., at para 23.

of Union citizenship) is not in itself governed by EU law, "the conditions for the acquisition and loss of nationality must be compatible with" EU rules and "respect the rights of the European citizen".

3.4 Acquisition and Loss of Nationality and the Discretion of Member States

Under traditional international law, acquisition and loss of nationality has been left to the discretion of the States. According to the advisory opinion of the Permanent Court of International Justice expressed in 1923, concerning Nationality decrees issued in Tunis and Morocco, even though "the question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question" and "it depends upon the development of international relations". And yet, "in the present state of international law, questions of nationality are…in principle, within this reserved domain".[18]

Article 1 of the Convention on Certain Questions Relating to the Conflict of Nationality Laws concluded in 1930 that "it is for each State to determine under its own law who are its nationals" and that "this law shall be recognized by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality".[19] More recently, the European Convention on Nationality, introduced in the Council of Europe in 1997 and concluded in 2000, stated that "each State shall determine under its own law who are its nationals" (Art. 3, Sect. 1).[20]

Also, according to EU law, the conditions for acquisition and loss of nationality are, in principle, left to the competence of the Member States. Along with Declaration No. 2 on Nationality of a Member State, attached to the Maastricht Treaty, "wherever in the Treaty establishing the European Community reference is made to nationals of Member States, the question whether an individual possesses

[18]Advisory Opinion of Permanent International Court of Justice, 7 February 1923, on Nationality Decrees Issued in Tunis and Morocco, Series B No. 4 (1923), at para 40. See Sugihara (1972).

[19]Convention on Certain Questions relating to the Conflict of Nationality Laws, 12 April 1930, 179 L.N.T.S. 89 (LoN-4137), entered into force on 1 July 1937.

[20]Council of Europe, European Convention on Nationality, adopted on 6 November 1997, European Treaty Series 166. See Okuda and Tateda (2000, p. 1213). According to Article 2 (a) of the Convention, "'nationality' means the legal bond between a person and a State and does not indicate the person's ethnic origin". On the other hand, the International Court of Justice (ICJ) of the United Nations ruled on April 6, 1955 in *Nottebohm* Case (*Liechtenstein v. Guatemala*) (Second Phase), that "a State cannot claim that the rules it has laid down are entitled to recognition by another State unless it has acted in conformity with this general aim of making the nationality granted accord with an effective link between the State and the individual". This position of the ICJ is called the "genuine link" theory and, as will be explained below, it has not been adopted by the European Court of Justice. See Ruzié (1993, p. 109).

the nationality of a Member State shall be settled solely by reference to the national law of the Member State concerned".[21]

However, as stated by the case law of the European Court of Justice, the competence of the Member States concerning granting and deprivation of nationality has been subject to certain restrictions based on the notion of EU citizenship.

4 Cases of the European Court of Justice Concerning EU Citizens and Restrictions of the Discretionary Power of Member States

4.1 Member States Are not Allowed to Prefer One Nationality Over Another in a Case of Dual Nationality

First, Member States are not allowed to prefer one nationality over another in a case of dual nationality. The European Court of Justice, in the 1992 *Micheletti* Case, judged that "under international law, it is for each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality. However, it is not permissible for the legislation of a Member State to restrict the effects of the grant of the nationality of another Member State by imposing an additional condition for recognition of that nationality with a view to the exercise of the fundamental freedoms provided for in the Treaty".[22]

Mr. Micheletti, who was born in Argentina of Italian parents, has since birth possessed both Argentine nationality by virtue of *ius soli* and Italian nationality by virtue of *ius sanguinis*. Mr. Micheletti applied for permission to establish himself definitively in Spain as a dentist, but he was denied this right by Spanish authorities. The freedom to move and to reside within the European Economic Community (predecessor of the EU) for the purpose of establishment of a business and the provision of services had already been given to nationals of the Member States. However, the Spanish authorities stated that, according to the Spanish Civil Code, for a person with dual nationality, the nationality corresponding to his or her last or actual residence is the nationality considered, and that therefore Mr. Micheletti must be regarded as an Argentine national rather than a Spanish national because, before he arrived in Spain, he had been residing in Argentina.

The European Court of Justice states that "the provisions of Community law on freedom of establishment preclude a Member State from denying a national of another Member State who possesses at the same time the nationality of a non-member country entitlement to that freedom on the ground that the law of the host State deems him to be a national of the non-member country".[23] Such decision

[21]OJ 1992 C 191, p. 45.

[22]Case C-369/90 *Micheletti and Others*, 7 July 1992, [1992] ECR I-4239, at para 10.

[23]Ibid., at para 15.

of a Member State will differentiate from one Member State to another, "the class of persons to whom the Community rules on freedom of establishment".[24]

Advocate General Tesauro explains why the Spanish law was not acceptable in this case. He says that "if the argument were to prevail that only one nationality must always and invariably prevail, even for the purposes of Community law, it would follow—in the absence of unambiguous and uniform criteria common to all the Member States—that each case of dual nationality would be resolved differently in each Member State. The inevitable consequence of that situation would be that, on the basis of criteria which are in themselves lawful, there would be discrimination among different categories of nationals. Their eligibility or otherwise to share in the benefits conferred by Community law would depend on the internal provisions and/or criteria applied, for the purpose of resolving conflicts of nationality, by the State in which they intend to establish themselves, to the detriment of fundamental freedom guaranteed by the Treaty in the same manner to all the nationals of the Member States".[25]

In short, a Member State may not apply other criteria (for instance, residence, as in *Micheletti* case) other than the possession of the Member State's nationality [Article 20 (1)], in order to prefer one nationality (of a non-member country) over another (Member State's nationality), in the case of dual nationality. It should be noted that the Court is not giving priority to EU citizenship over a difference in nationalities. But is, rather, in accordance with the core principles of EU law, prohibiting discrimination among EU citizens on grounds of nationality, and guaranteeing them the rights given through EU citizenship, after having moved from one Member State to another.

4.2 Surnames as a "Format" of EU Citizenship

In *Garcia = Avello* case of 2003, European Court of Justice stated that "although… the rules governing a person's surname are matters coming within the competence of the Member States, the latter must none the less, when exercising that competence, comply with Community law".[26]

This case concerned the change of the registered surname of two infants with dual nationality (Belgian and Spanish). The plaintiff in the case, the father of the two infants, acting as their legal representative, argued that the Articles of the Treaty prescribing the principle of non-discrimination on grounds of nationality and EU citizenship must be construed as precluding the administrative authority of a

[24]Ibid., at para 12.

[25]Opinion of Advocate General Tesauro, delivered on 30 January 1992, ECR I-4239. In relation to the *Nottebohm* case of the ICJ, cited above, under the EU law, the genuineness and the effectiveness of the nationality of the Member State will not be questioned in case of dual nationality.

[26]Case C-148/02, *Garcia Avello* [2003] ECR I-11613, at para 25.

Member State from refusing to grant an application for a change of surname made on behalf of minor children resident in that State and holding dual nationality of that State and of another Member State.[27]

European Court of Justice held that it is not permissible to refuse to allow someone to change the surname of the children solely on the grounds that, in Belgium, the country of residence, "children who have Belgian nationality assume, in accordance with Belgian law, their father's surname". According to the Court, "a discrepancy in surnames is liable to cause serious inconvenience for those concerned at both professional and private levels resulting from, *inter alia*, difficulties benefiting, in one Member State of which they are nationals, from the legal effects of diplomas or documents drawn up in the surname recognized in another Member State of which they are also nationals".[28] The European Court of Justice applied the non-discrimination principle on grounds of nationality, stating that "non-discrimination" requires not only "that comparable situations must not be treated differently", but also "that different situations must not be treated in the same way".[29]

Furthermore, the Court quoted *Micheletti* case, saying that, "with a view to the exercise of the fundamental freedoms provided for in the Treaty", "it is not permissible for a Member State to restrict the effects of the grant of the nationality of another Member State by imposing an additional condition for recognition of that nationality".[30]

Thus, in *Garcia = Avello*, which concerned holders of dual nationality, European Court of Justice, while admitting that the rules governing a person's surname are matters coming within the competence of the Member States, emphasized that Member States should definitely avoid a situation in which the discrepancy in surnames makes a person difficult to identify himself or herself and prevents him or her from exercising his or her rights as an EU citizen. A person's surname, therefore, functions here as a format that guarantees the rights based on EU citizenship.

This case demonstrates that, even though the matter concerning nationality was left to the discretion of the State, Member States are not allowed to restrict the possession of nationality of another Member State. In other words, what is important here is not the assurance of uniform protection of the rights of every EU citizen (beyond nationality), but the avoidance of placing an EU citizen in a discriminatory or differential situation in which he or she will not be able to enjoy rights that are conferred on nationals of other Member States.

[27]Ibid., at para 45.

[28]Ibid., at paras 36-38.

[29]Ibid., at para 31.

[30]Ibid., at para 28.

4.3 *Nationality of a Member State Based on* Ius Soli *and EU Citizenship*

The relationship between EU citizenship and national legislation on immigration control should also be noted. In cases concerning a child of an immigrant or a refugee applicant born in one EU Member State who has become an EU citizen by acquiring the nationality of a Member State, European Court of Justice judged that not only the child, but also other family members who are caretakers of the child, should receive the right of residence. These are the cases involving acquisition of nationality by birth which occur in Member States adopting *ius soli*.

Zhu and Chen decision[31] delivered in 2004 involves a woman of Chinese nationality (second appellant) who entered the United Kingdom (UK) but had given birth to her child (first appellant) in Ireland. As Ireland had adopted *ius soli* allowing any person born in Ireland to acquire Irish nationality, the child obtained Irish nationality.[32] The mother and child, living in the UK, covered by health insurance and having sufficient resources, went to court because the UK refused to give them long-term residence: they claimed their right to permanent residence in the UK under EU law. European Court of Justice recognized the right to UK residence of the applicants, saying that "a refusal to allow the parent, whether a national of a Member State or a national of a non-member country, who is the carer of a child…to reside with that child in the host Member State would deprive the child's right of residence of any useful effect. It is clear that the child is entitled to be accompanied by the person who is his or her primary carer and accordingly that the carer must be in a position to reside with the child in the host Member State for the duration of such residence".[33]

A similar case is *Zambrano*,[34] held in 2008, concerning a married couple of Columbian nationality who applied for refugee status in Belgium and gave birth to two children during the period of their application for asylum in Belgium. The two children obtained Belgian nationality under Belgian law,[35] and subsequently became EU citizens. The father of the two children had been working illegally in Belgium, and, having had his employment contract canceled, he lodged an application for unemployment benefits. His application for these benefits having been

[31]Case C-200/02, *Zhu and Chen* [2004] ECR I-9925.

[32]According to then Irish law, a person born in Ireland is an Irish citizen from birth if he or she is not a citizen of any other country. The child in this case lost the right to acquire Chinese nationality by virtue of having been born in Northern Ireland and her subsequent acquisition of Irish nationality. See paras 9–13. However, by the Amendment of the Constitution Act, which was approved by referendum in 2004, the principle of automatic acquisition of Irish nationality by birth in Northern Ireland was abolished.

[33]Ibid., at para 45.

[34]Case C-34/09, *Zambrano* [2011] ECR I-1177. See Nakamura (2011, pp. 64–75).

[35]Columbian law did not recognize Colombian nationality for children born outside Colombia when the parents did not take specific steps to have them so recognized.

rejected, he stated in the court that he should be able to enjoy the right of residence in Belgium as the parent of a minor child who was a national of a Member State in the EU, and that he should be exempt from the obligation to hold a work permit.[36]

The European Court of Justice judged that the expulsion of the parents of minor children (EU citizens), "would lead to a situation where those children…would have to leave the territory of the Union in order to accompany their parents." "Similarly, if a work permit were not granted" to such a parent, "he [or she] would risk not having sufficient resources to provide for himself and his family, which would also result in the children, citizens of the Union, having to leave the territory of the Union". It further averred that "Article 20 TFEU precludes national measures" such as the ones presented in this case, "which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union".[37]

In this manner, for immigrants or those seeking asylum, their rights to residence as the parents of an EU citizen who holds nationality in a Member State and whose nationality was based on the application of *ius soli*, are recognized, and the immigration control of the Member State concerned is restricted by EU law on the basis of the rights of EU citizens.

4.4 *"Due Regard to EU Law" and the "Principle of Proportionality"*

According to the European Court of Justice, even though the decision to withdraw the right of nationality is one of the competences of the Member States, as long as it falls within the scope of European Union law, the principle of non-discrimination on grounds of nationality must be applied, and Member States are obliged to "have due regard to European Union law" with the decision to withdraw naturalization being subject to the "principle of proportionality".

In *Rottmann*[38] of 2010, the applicant, born in Austria, lost his Austrian nationality just after he had been given German nationality. During the time when the applicant was undergoing the procedures to become a naturalized citizen of Germany, he failed to mention the fact that he might lose his Austrian citizenship in an ongoing court case in Austria. Therefore, Freistaat Bayern (Germany) retracted his German citizenship retroactively, on the grounds that he had not disclosed the fact that he was the subject of judicial investigation in Austria and that he had, in consequence, obtained German nationality by deception.

In this case, the European Court of Justice held that, although the "matter falls within the competence of the Member States", "it is clear that the situation of a

[36]Ibid., at para 34.

[37]Ibid., at paras 42–45. See Nakamura (2012, pp. 135–157).

[38]Case C-135/08, *Janko Rottmann v. Freistaat Bayern*, [2010] ECR I-1449.

citizen of the Union who…is faced with a decision withdrawing his naturalization, adopted by the authorities of one Member State, and placing him, after he has lost the nationality of another Member State that he originally possessed, in a position capable of causing him to lose the status conferred by [Article 20 TFEU] and the rights attaching thereto falls, by reason of its nature and its consequences, within the ambit of European Union law".[39] As a necessary condition for acquisition of EU citizenship is the possession of a Member State's nationality, losing the Austrian nationality as well as the German nationality meant that the applicant would also lose his status as an EU citizen.

According to the European Court of Justice, when Member States exercise "their powers in the sphere of nationality", they must "have due regard to European Union law".[40] In the case of "a decision withdrawing naturalization", the decision must be governed by the "principle of proportionality".[41] That is to say, with regard to the loss of the rights of EU citizen, whether or not the measure taken by the Member State can be "justified" must take into consideration the following points: (1) "the consequences" of the decision withdrawing naturalization for the applicant and for the members of his family; (2) "the gravity of the offence" committed by the applicant; (3) "the lapse of time between the naturalization decision and the withdrawal decision"; (4) the possibility for the applicant to "recover his original nationality".[42]

In addition, the Court states that "a Member State whose nationality has been acquired by deception cannot be considered bound…to refrain from withdrawing naturalization merely because the person concerned has not recovered the nationality of his Member State of origin".[43]

Rottmann is hence an anomalous case in which European Court of Justice stated that the decision of the Member State to negate naturalization is not always bound to be reviewed by the Court even if the withdrawal of citizenship causes the applicant to become stateless.

4.5 Restriction of a Member State's Decision of Deprivation of the Right to Vote in the Case of a Criminal Conviction

The *Delvigne* case[44] of 2015 concerns a Member State's decision to deprive a citizen of the right to vote.

[39]Ibid., at para 42.
[40]Ibid., at para 45.
[41]Ibid., at para 55.
[42]Ibid., at para 56.
[43]Ibid., at para 57.
[44]Case C-650/13 *Delvigne v. Commune de Lesparre-Medoc* [2015] ECR I-nyr, para. 43.

France established a new Criminal Code in 1992, which provided that the total or partial deprivation of civil rights may not exceed 10 years in the case of a conviction for a serious offense. The applicant in this case was convicted of a serious crime and given a sentence of 12 years previous to the establishment of this new Code. The sentence also called for the permanent loss of the applicant's civil rights, so that he was deprived of his right to vote and of his right to run for office. The new Code repealed these provisions of the old Criminal Code, but only in cases of sentences passed after the new Code had been enacted, not retroactively. The applicant challenged the French court's decision, saying that, as he had been deprived of his rights to vote and stand for election in European Parliament (rights guaranteed under EU law as an EU citizen),[45] the decision was contrary to the provisions of the Charter of Fundamental Rights of the European Union, Article 39.[46]

European Court of Justice stated that Article 39 (1) of the Charter "is confined to applying the principle of non-discrimination on grounds of nationality to the exercise of the right to vote in elections to the European Parliament," and thus "is not applicable to the situation at issue in the main proceedings, since…that situation concerns a Union citizen's right to vote in the Member State of which he is a national".[47] It also stated that Article 39 (2) of the Charter, which "constitutes the expression in the Charter of the right of Union citizens to vote in elections to the European Parliament", shows that "it is clear that the deprivation of the right to vote" to which the applicant is subject under the provisions of the French legislation "represents a limitation of the exercise of the right guaranteed in Article 39 (2) of the Charter".[48] Thus the limitations of the right imposed by the Article should fulfill the requirement that "the limitations are provided for by law, respect the essence of those rights and freedoms and, subject to the principle of proportionality, are necessary and genuinely meet objectives of general interest recognized by the EU or the need to protect the rights and freedoms of others".[49] Concerning the French legislation at issue in the main proceedings, the European Court of Justice judged

[45]According to French Law No. 77-729 of 7 July 1977 concerning the election of representatives to the European Parliament (JORF, 8 July 1977, p. 3579), "the election of representatives to the European Parliament provided for by the Act annexed to the Decision of the Council of the European Communities of 20 September 1976…shall be governed by the [French] Electoral Code…" (Article 2).

[46]Besides rejecting the plaintiff's argument based on Article 39, the European Court of Justice also rejected his argument based on Article 49 (1) for the following reasons: "the rule of retroactive effect of the more lenient criminal law, contained in the last sentence of Article 49 (1) of the Charter, does not preclude [the French legislation]…since…, as amended, that legislation is limited to maintaining the deprivation of the right to vote resulting, by operation of law, from a criminal conviction only in respect of final convictions by judgment delivered at last instance under the old Criminal Code. In any event…that legislation expressly provides for the possibility of persons subject to such a ban applying for, and obtaining, the lifting of that ban". Case C-650/13 *Delvigne*, op. cit., at paras 56–57.

[47]Ibid., at paras 42 and 43.

[48]Ibid., at paras 44 and 45.

[49]Ibid., at para 46.

that, since the limitation had the effect of "excluding certain persons, under specific conditions and on account of their conduct, from those entitled to vote in elections to the Parliament", it did not "call into question that right as such", "as long as those conditions are fulfilled".[50] It then concluded that "a limitation such as that at issue in the main proceedings is proportionate in so far as it takes into account the nature and gravity of the criminal offence committed and the duration of the penalty".[51]

From these preliminary rulings of European Court of Justice, it can be comprehended that, even though matters such as the conditions for acquisition and loss of nationality are basically left to the discretionary power of the Member States, those conditions must be correlated with rights given under EU law, insofar they are linked with rights assured through EU citizenship. In other words, the laws of the Member States concerning nationality cannot unreasonably restrict rights and obligations based on EU citizenship.

5 Conclusion

What is important in the context of EU law, is to assure a holder of nationality of a Member State, after having settled to another Member State, the enjoyment of the rights as an EU citizen.

Nationality under the legal system of a Member State functions as a tool of "identifying" people, designating the State to which they belong (function of identification), whereas under the EU law, nationality functions as an index that "differentiates" itself (one nationality) from another (function of differentiation).

Accordingly, in the EU, difference of nationalities reveals conflicts among legal treatments of various Member States. In order to avoid such conflicts, each Member State will have to change its own legal treatment to attain mutual "compatibility" among various treatments of the Member States. As mentioned above, it is the EU citizenship that makes such "compatibility" possible through rights assured therein and through principles of "non-discrimination on grounds of nationality" and "mutual recognition".

EU law guarantees human rights to EU citizens. They are not guaranteed by simply granting them "EU nationality", as each Member State does by virtue of its State sovereignty. Human rights under EU law are rather protected by referring both to the rights based on the nationalities of Member States and to the rights grounded in EU citizenship. Maintaining and developing "compatibility" between these two references is the basic task for both European Court of Justice and the Member State's courts: This reflects the dynamics of the EU law under the concept of *unitas multiplex*.

[50]Ibid., at para 48.

[51]Ibid., at para 50.

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Part II
Human Rights in Asia

The Role of the Judicial Branch in the Protection of Fundamental Rights in Japan

Masahito Tadano

1 Introduction

The current system of constitutional review or control of constitutionality by the judiciary is accepted as "an essential or desirable feature of a liberal democracy."[1] Generally, two models of constitutional review exist: First, the American model, wherein ordinary courts exercise judicial review in concrete cases, also referred to as decentralized review: and second, the European model, characterized by centralization of control of constitutionality by a specialized constitutional court.[2] These two models have evolved in a unique manner.

Originally, constitutional review was not necessarily designed to protect fundamental rights. It is noteworthy the constitutional court model was conceived to guarantee constitutional order. Hans Kelsen, founder of the European model, defined this function as an element of the system of technical measures whose objective is to ensure the regular exercise of State functions.[3] Currently, the protection of fundamental rights, a key element of constitutional order, constitutes the most highlighted aspect of this system.

In 1946, Japan introduced the system of judicial review under its constitution. Article 81 of the Constitution stipulates that "The Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act." As this article is considered an adaptation of the American style of

[1]Chen and Maduro (2015, p. 101).
[2]Cappellettie (1971, pp. 46–51).
[3]Kelsen (1928, p. 198).

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judicial review, the Supreme Court is vested with the role of "the court of last resort" with respect to ruling in concrete cases, as well as constitutional review. Under this system, the power of constitutional review is exercised only in concrete cases involving individual rights: the function of the protection of individual rights is considered to be prominent.

However, the Supreme Court of Japan has taken a moderate view when exercising its power of judicial review, whereas the U.S. Supreme Court has exercised it liberally. Seemingly, it performed the role of being "the court of last resort," in the ruling of civil or criminal cases, rather than constitutional review. The approach of the Japanese Supreme Court is often viewed as "judicial passiveness." Instances of constitutional review often supports the democratic transition: however, postwar Japan makes "the most important exception."[4]

To be certain, a judicial branch without democratic legitimacy should moderately and sensibly exercise its power of constitutional review: however, the passiveness of the Japanese Supreme Court in the ruling of the unconstitutionality of law is remarkable. From 1947, the year in which the Japanese Constitution was enacted, to 2016, the Supreme Court found a law to be unconstitutional in only ten cases. In addition, in cases involving official acts, no more than ten cases found the action to be unconstitutional. Although the Japanese Constitution adopted the American model of judicial review, perhaps only the concept itself was rooted.

In 1976, the Court held that "the people should be equipped with as many means of remedy as possible against acts of government impairing fundamental human rights" considering the constitutional requirements.[5] However, it seems that the Court has not yet fully demonstrated its expected role and has maintained a reserved attitude toward the political branch. From the beginning of this century, the Japanese Supreme Court has begun to assume a more active role in discrimination and vote equality cases. Despite a few remarkable rulings, the scope of this change is still uncertain. It has been asserted that institutional reforms are indispensable for activating the system.

After reviewing the fundamental characteristics of judicial review under the Japanese Constitution, the background of the Supreme Court's judicial review will be analyzed in comparison to the European constitutional justice system. Further, recent developments in rulings by the Japanese Supreme Court will be examined and the appropriate role of the judicial branch in protecting fundamental rights and the conditions for its realization will be discussed.

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[4]Sweet (2012, p. 826).

[5]Supreme Court, grand bench, 14 April 1976, 30 *Minshu*, p. 223 (http://www.courts.go.jp/app/hanrei_en/detail?id=48. Accessed 2 June 2017). English translations of Judgments of the Supreme Court as well as that of the provisions of laws concerning them are available at the following website: http://www.courts.go.jp/english/judgments/index.html.

2 Japanese Judicial Review

2.1 Establishing Constitutional Review

Japan's modern Constitution was promulgated in 1889 and enacted in 1890. It was entitled, "The Constitution of the Empire of Japan" or the "Meiji Constitution." Although this Constitution indicated elements of a modern constitution, such as the separation of powers and the guarantee of rights, its central authority was the Emperor. Therefore, this Constitution was characterized by constitutionalism but in a more formal sense. Although certain rights were guaranteed, they were not human rights: rather the rights of "subjects" were guaranteed within the limits of laws. Moreover, "suits which relate to rights alleged to have been infringed by the illegal measures of the administrative authorities" belonged to the competency of the Court of Administrative Litigation (Article 61), and it accepted only limited matters enumerated by law. The system of judicial remedy against illegality of the administration was fragile.

The Constitution lacked a provision regarding constitutional review. A possibility of constitutional review over the formality of laws or orders was admitted by constitutional doctrines. However, the possibility of substantial control of constitutionality was denied by influential doctrines although certain doctrines asserted its possibility.[6]

After Japan's defeat in the Second World War, the Constitution was enacted in May 1947. On August 14, 1945, the Japanese Government accepted the Potsdam Declaration and promised democratization. The Constitution of Japan was influenced by the United States and the General Head Quarters (GHQ), which occupied Japan. Formally, the final Constitution was a result of amending the former Constitution and radically changing fundamental principles.

Article 76 of the Constitution stipulates that "the whole judicial power is vested in a Supreme Court and in such inferior courts as are established by law," and the duality of jurisdiction, namely, the judicial court and the court of administrative litigation, is denied. The concept of this "judicial power" vested in courts (Article 76) is interpreted as adopting the American concept, which presupposes cases and controversies. Although this established interpretation is favorable to the American method of judicial review, decentralized and exercised in concreto, opposing opinions asserted that the centralized judicial review or the control of constitutionality in abstracto was possible without amending Article 81. Throughout the discussion on the draft of the Constitution, the meaning of Article 81 briefly became a controversial issue.

[6]See, Shishido (2005, pp. 332–340) and Kawagishi (2007, pp. 314–315).

2.2 Choosing Between the American and the Constitutional Court Model

During discussions among the Imperial Diet regarding the draft of the new Constitution, different interpretations of the judicial review adopted by Article 81 were developed. For example, Soichi Sasaki, a constitutional scholar and member of the House of Peers, argued that the Supreme Court could exercise the "power to determine the constitutionality" of laws (Article 81) in abstracto.[7] Ultimately, this interpretation was rejected by the government.

With respect to interpreting the original draft of Article 81, Japanese governmental experts had examined the American model and Austrian Constitutional Court model and remarkably excluded the latter. However, whether lower courts could exercise the judicial review was not decided. During the discussion on the draft of the Tribunal Act, they discussed other systems of centralized constitutional review within the limit of cases and controversies: the centralized system in which lower courts transferred constitutional issues to the Supreme Court. Finally, GHQ strongly recommended the American system of decentralized judicial review within the limit of cases and controversies. This was also ultimately adopted.

In 1952, the Supreme Court confirmed this rejection in its holding by providing the following statement: "for judicial power to be invoked, a concrete legal dispute must be brought before the courts." Therefore, "the Supreme Court possesses the power to review the constitutionality of laws, orders, and the like, but that authority may be exercised only within the limits of judicial power: in this respect, the Supreme Court is no different from the lower courts."[8]

2.3 Basis of Japanese Model

The introduction of judicial review was viewed as a great change by Japanese constitutional scholars, who understood that Japan was previously under the influence of German public law doctrines.[9] Kenzo Takayanagi, an authority on Anglo-American law and who had authored an article about American judicial review in the prewar period, commented about the impact of judicial review in the following manner in 1948: "The inheritance of the judicial supremacy by our Constitution is not merely a genuine technical change such as an introduction of

[7]Select committee on the amendment of the Constitution of the Empire Commission, House of Peers, September 23, 1946.

[8]Supreme Court, Grand Bench, 8 October 1952, 6 *Minshu*, p. 783 (http://www.courts.go.jp/app/hanrei_en/detail?id=4. Accessed 2 June 2017).

[9]Tomatsu (2001, pp. 256–257).

judicial review of law. We must have branded on our mind its deep and great impact on our politics and judicial system."[10]

After ten years, Takayanagi presented a less optimistic view about the future of judicial review in Japan, comparing the Anglo-Saxon approach with that of continental countries.[11] He argued that throughout the European continent, the judicial courts adopted the character of "judicial bureaucracy" composed of legal technicians skilled in civil and criminal cases. The legal technicians could hardly assume the construction of the constitution, which is "a political law" as well as "a law enforced by justice."[12] Therefore, the court of administrative litigation and subsequently the constitutional court were distinguished from the ordinary judicial courts and introduced throughout Europe. In contrast, the Anglo–Saxon's long tradition of unifying the legal profession, wherein judges are recruited from distinguished lawyers, nourished the strong political ability of the protection of the rule of law. It is also where lawyers and judges could unify against the government. Consequently, the Court can assume the function of constitutional review in the United States. Each system has its own consistency. Takayanagi mentioned the risk to the bureaucratic Supreme Court, incapable of handling "the political law" in Japan without the unification of the legal profession. Takayanagi also underlines the importance of the rule of law, which should be widely accepted for judicial review to take root in Japan.[13]

The unity of the legal professions, although preferable for a reinforced judiciary, appears difficult to achieve in Japan because of the solid tradition of the career judges. But in some aspects, the justices of the Supreme Court seem to be equipped with certain resources to deal with "the political law." The justices of the Supreme Court are already equipped with a certain degree of political legitimacy, at least at the institutional level. The cabinet selects and appoints the justices of the Supreme Court.[14] They too are submitted for review by the people at the first general election following their appointment (Article 79 of the Constitution). A judge is ultimately dismissed if the majority of the voters favor dismissal, although in practice, the removal of a judge is unlikely.

Moreover, the justices of the Supreme Court can be recruited not only from career judges but also from legal professionals other than career judges or non-legal professionals as well. Article 41 of the Tribunal Act stipulates that the justice of the Supreme Court is appointed among those who are more than 40 years with great insight and good legal knowledge and at least ten of them must be legal professionals (e.g., not only career judges, but also prosecutors, attorneys, or law professors with more than ten years of experience). Non-legal professionals, who meet the above requirements, may also be justices of the Supreme Court. Recently, the

[10]Takayanagi (1948, pp. 2–3).

[11]Takayanagi (1958, pp. 2–3).

[12]*Id*., pp. 62–63.

[13]*Id*., pp. 6–9.

[14]On the appointment process of justices, see, Law (2009) and Matsui (2011b, pp. 1377–1378).

composition of the Court has essentially been constant, consisting of six former career judges, two former prosecutors, four former lawyers, two former bureaucrats (one of whom is former diplomat), and one former law professor.[15]

The commentary on the Tribunal Act published by the Supreme Court explains that this article expects the Court to hold sound political and social sense considering the character of the Supreme Court as an organ with power to rule finally the construction of the Constitution, the fundamental law of the nation.[16] Each justice can submit their individual opinion in the ruling, as do the nine Justices in the United States.

However, this institutional basis was insufficient for the justices to decide "the political law," as is indicated by the docket sheet for the last seventy years. There have only been ten rulings suggesting that a law was unconstitutional. It is pertinent to understand the aspects that brought about the differences between the American prototype and the system ultimately implemented in Japan. Three explanations will be discussed below.

3 Backgrounds of Passiveness

3.1 Overburden of the Court[17]

First, the Supreme Court has been overburdened with cases assigned to it as the court of last resort. Final appeals to the Supreme Court consist of the following aspects: violations of the Constitution or misinterpretation of Constitutional provisions; grave procedural contraventions by the lower courts, and discretionary acceptance of cases it considers significant with regard to civil or administrative cases; and conflicts with precedence from prior decisions, with regard to criminal cases. The Supreme Court judges annually consider approximately 7000–8000 civil, administrative, and criminal cases of final appeal and an additional 2000 or 3000 special appeals from procedural rulings of the lower courts.[18] They are assigned to three Petty Benches, each composed of five justices.

In 1993, the former Justice of the Supreme Court, Masami Ito, remarked that under these conditions it is difficult for justices to be responsive to constitutional issues included in numerous ordinary cases, even if the function of constitutional justice is expected of them.[19] The Tribunal Act mandates that rulings of

[15]See, Law (2009, pp. 1568–1569). In March 2017, former law professor was appointed, succeeding former attorney.

[16]Bureau of the Supreme Court (1969, p. 55).

[17]See, Law (2009, pp. 1577–1579) and Matsui (2011b, pp. 1409–1411).

[18]See, http://www.courts.go.jp/english/vcms_lf/2017-STATISTICAL_TABLES.pdf. Accessed 2 June 2017.

[19]See, Itoh (1993, pp. 123–124).

unconstitutionality or new constitutional constructions must be decided by the Grand Bench composed of all fifteen justices, a mandate from which overloaded justices might abstain. The Supreme Court functions as a court of last resort in civil or criminal cases, rather than providing a pathway for constitutional review.

In the United States, the Federal Supreme Court selects the cases it will hear through a system of certiorari. Cappellettie remarked that the constitutions throughout the European continent generally adopted the constitutional court system of centralized judicial review because European supreme courts lack "the compact manageable structure"[20] symbolic of the United States.

Incorporate certiorari into Japan appears difficult. Unlike the US Supreme Court, where each State has its own supreme court, the Japanese Supreme Court hears civil, administrative, and criminal cases as the sole court of final resort.[21] Among the numerous cases transferred to the Supreme Court every year, 95 percent or more are rejected for failure to present sufficient grounds for appeal.[22] However, former justices of the Supreme Court indicate that the examination of grounds for appeal may require circumspection, even if the appeal is rejected.[23] Reforms for reducing the overburdening of the justices' caseload, such as reorganization of Grand and Petty Benches, introduction of the special high court filtering appeals[24] or reinforcement of professional assistants,[25] can be envisaged.

3.2 Career Judge System and Constitutional Review

Second, we focus on an incompatibility between the function of a career judge, characterized as being technical in nature or impartial, and that of a constitutional justice, inevitably considered to be "value-oriented, quasi-political."[26] Cappelletti asserts that "the task of fulfilling the constitution often demands a higher sense of discretion than the task of interpreting ordinary statutes." Therefore, the constitutional court model was diffused in the European continent where the career judge originated. The justices of the American Supreme Court are not career judges, in the European sense, and are equipped with sufficient authority through political nomination and tradition. As observed above, Takayanagi's remarks are similar to those of Cappelletti.

It is pointed out that "for the judges trained in the civil law tradition, the Constitution looks more like a political principle than a legal rule applied by the

[20]Cappellettie (1971, p. 62).
[21]See, Izumi (2013, p. 121).
[22]See, Fujita (2012, pp. 62–63).
[23]See, Takii (2009, p. 47).
[24]See, Sasada (2008, pp. 16–18).
[25]See, Izumi (2013, pp. 136–138).
[26]Cappellettie (1971, pp. 63–64).

judge."[27] If the justices in Japan possess "the weakness and timidity of the continental model,"[28] similar to the European career judges, would the constitutional court model be more preferable to the American model? That was the position of former justice Itoh in 1993. He argues that under the impersonal "faceless judges" of the continental model, constituting an ideal in Japan, it is difficult to expect an active role in constitutional review, which requires the judgement of individual characters. Thus, Itoh recommends the continental constitutional court model.

This type of reform necessitates an amendment to the Constitution, which is difficult to accomplish, and the result remains uncertain. The introduction of the constitutional court system may highlight the "value-oriented, quasi-political" aspect of the constitutional adjudication: therefore, there are concerns about "politicization of justice and judicialization of politics."[29] Whether enough strength exists for the highest court to assume the "value-oriented, quasi-political" role of a constitutional court in Japan must be carefully examined.

As noted above, the justices of the Supreme Court can be recruited from legal professionals other than career judges or from non-legal professionals. This system involves an expectation regarding the sound political and social sense. But this recruitment system does not provide a sufficient basis to enable a constitutional ruling. In continental Europe, a constitutional court can obtain such a basis partly from "political investiture," a designation of non-career judges by political authorities. But the political equilibrium, which mitigates the political character involved in such a nomination, is indispensable for this process to adequately function. Postwar Japan was characterized by the lack of a power shift, which provides the third explanation for the passiveness of the Court.

3.3 Political Constellation and "Faceless Judges"

A change of government can introduce diversity to the composition of the Supreme Court. It can also lessen the pressure over the Court facing a political majority. In Japan, the Liberal Democratic Party (LDP) maintained a majority of seats in both Houses of the Diet from 1955 to 1989 (the "Regime of 55"). The lack of change in government seems to have affected the appointment and the attitude of the justices. Consequently, the Court's task of expressing its identity is difficult when facing the same stable majority in the Diet. Justices of the Supreme Court are not supposed to be legal technicians but are expected to exert their individuality. However, it seems difficult for justices without democratic legitimacy to respond in an expected manner in these conditions. It seems that "The conservatism of Japan's courts is the inevitable result of their longtime and ongoing immersion in a conservative political

[27]Matsui (2011a, p. 148).
[28]Favoreu (1986, p. 9).
[29]Ashibe (1999, p. 289).

environment."[30] The lack of a power shift certainly seems to be a convincing argument for the passiveness of the Supreme Court.[31] The dysfunction of power shift might have excessively underlined "the weakness and the timidity" of the justices.

However, it should also be noted that the Supreme Court has not been necessarily passive in approving the constitutionality of laws suspected their conformity to the supreme law, notably in 1950s and 1970s.[32] "Faceless judges" sometimes revealed their political aspect. Moreover, the justices, including former career judges, sometimes express their individual characters by submitting dissenting opinions, entailing controversies among them.

After the 1990s, the "Regime of 55" concluded and the LDP lost their majority in the Second Chamber–House of Councilors. The coalition government became a convention, and in 2009, the power shift to the Democratic Party of Japan (DPJ) occurred. However, he LDP regained its dominance and opposition parties lost their competitive edge after the general elections in December 2012.

It is important to examine how the change in the political constellation after the 1990s impacted the Supreme Court and the Japanese system of judicial review. Such examination should consider that such a change constitutes one aspect of the wider change of political and social structure and popular sense from the 1990s. In these movements, the Supreme Court moderately began to assume a more active role, but with respect to the protection of fundamental rights, the change is ambiguous despite some remarkable rulings discussed below.

4 Ambiguous Changes

4.1 Signs of Changes

The highest court began to assume a more active role in civil, criminal, and administrative cases as the court of last resort: it has already been remarked that there was "substantial judicial creativity" notably in private realms in dealing with non-political issues.[33] Remarkably, individual opinions submitted to decisions also increased considerably. With regard to the constitutional adjudications, the Court censored a provision of law in five cases, since this century. In contrast, it found a provision of law that was unconstitutional only in five cases throughout more than 50 years in the last century. These facts appear to signal a change.

There has been a focus not only on the small number of rulings regarding the constitutionality of law but also on the areas in which an active role by the judiciary

[30]Law (2009, p. 1587).

[31]See, Matsui (2011b, p. 1405) and Sakaguchi (2013, p. 73).

[32]See, Higuchi (1979, p. 183).

[33]Ginsburg and Matsudaira (2012, p. 23).

is notably expected. Additionally, there is scrutiny where constitutional doctrines have underlined the prudent attitudes of the Supreme Court, including restrictions of rights indispensable for maintaining the sound functioning of the democratic process, such as the freedom of speech or the right to vote. This is also the case for discrimination against minorities.

Remarkably, two of the five cases where the Court ruled that a provision of the law was unconstitutional, involved discrimination against children born out of wedlock. Another concerned the restriction on the right to vote. Moreover, the Court declared the apportionment of seats or demarcation of constituencies contrary to the constitutional requirement of equality five times from 2011 to 2015. The power of judicial review by the Supreme Court seems to have finally been activated.

However, the Supreme Court remains prudent or passive in other cases concerning the freedom of thought and conscience and the freedom of speech. In five cases concerning equality of vote, the Court did not rule the electoral law or elections as being unconstitutional but only found that the disparity was contrary to the constitutional requirement of equality. Hence, this was a reserved stance against the political branch.

A constitutional doctrine describes this attitude as small judiciary.[34] The Supreme Court seems to refrain from rulings that might affect "macro constitutional politics" (challenge against the constitutional construction of political branch) by focusing on the realization of "micro justice" (resolution of legal disputes). Such a small judiciary highlights the function of an ordinary court at the expense of constitutional justice.[35] Moreover, this attitude could affect the role that is most expected of the judiciary with the competence of constitutional review: the protection of fundamental rights.

Considering this, the recent rulings of the Supreme Court will be reviewed next.

4.2 Skillful Rulings for Remedy

Two rulings of unconstitutionality concerning discrimination against children born out of wedlock merit examination because of "a reasonable construction" as a remedy.

In 2008, a provision of the Nationality Act was at issue. The Act required legitimation of a child for acquisition of Japanese nationality by notification after birth, prescribed in article 3 para.1., even if the father acknowledged the filiation.[36]

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[34]See, Munesue (2012, pp.171–175) and Sakaguchi (2016, pp.81–83).

[35]Shishido (2015, pp. 264–265).

[36]Supreme Court, Grand Bench, 4 June 2008, 62 *Minshu*, p. 1367 (http://www.courts.go.jp/app/hanrei_en/detail?id=955. Accessed 2 June 2017). The Court deemed that the provision enacted in 1984 had lost its raison d'être because of "changes in social and other circumstances at home and abroad" and determined it as unconstitutional.

The court ruled that the provision was unconstitutional. However, annulment of the provision requiring the legitimation (article 3, para.1), as a whole, made it impossible for the appellant to acquire Japanese nationality. The appellant can only acquire Japanese nationality by a notification prescribed in article 3 para.1. The Court ruled, by inserting "a reasonable construction" in article 3, para.1, the appellant "shall be allowed to acquire Japanese nationality" if the child satisfies the requirements prescribed in the said paragraph," except for the requirement of the legitimation. Consequently, the Court only annulled the requirement of the legitimation included in article 3, para.1, providing a remedy for the appellant.

Further, in 2013, the Court considered a provision of the Civil Code, which stipulated that the share of inheritance for a child born out of wedlock is one-half of the share of a child born in wedlock. The justices unanimously found that this provision is contrary to the constitutional requirement of equality under the law.[37] In this case, concerning the inheritance that commenced in July 2001, the Court put a reasonable construction on retroactivity of the ruling. The Court judged it appropriate to "construe that the judgment of unconstitutionality made by the decision of this case has no effect on any legal relationships" involved in other cases of inheritance commenced after July 2001 that had already been decided. The Supreme Court seems to be attentively concerned about the stability of the legal system.

Next, the ruling concerning the constitutionality of the penal provisions of the National Public Service Act is remarkable.[38] The penal provisions prohibit public officials' "political acts." The Court ruled that the act of distributing political party-issued newspapers performed by "a public official who was not in a managerial position or vested with any discretion in performing duties or exercising power" on days off "cannot be considered to pose a substantial risk of undermining the political neutrality of the public official." Furthermore, the court held that this act "does not correspond to the constituent element of the penal provision," while ensuring that the penal provisions did not violate Article 21 (freedom of speech) and Article 31 (due process of law) of the Constitution. Significantly, this type of ruling, termed constitutional adjudication without explicit constitutional reasoning,[39] reveals the possibility of the skilled small judiciary, as well as its limit. The skillful ruling for remedy, useful for protecting fundamental rights to some extent, is not without inconvenience because constitutional protection of them "only works as a background fact."[40]

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[37]Supreme Court, Grand Bench, 4 September 2013, 67 *Minshu*, p. 1320 (http://www.courts.go.jp/app/hanrei_en/detail?id=1203. Accessed 2 June 2017). Without reviewing the precedent which had held the provision not contrary to the Constitution, the Court rendered the decision of unconstitutionality because of the changes of facts which had supported constitutionality of the provision.

[38]Supreme Court, 2nd Petty Bench, 7 December 2012, 66 *Keishu*, p. 1337 (http://www.courts.go.jp/app/hanrei_en/detail?id=1179. Accessed 2 June 2017).

[39]Shishido (2009, p. 100).

[40]Sakaguchi (2013, p. 70).

Considering these points, the rulings favorable to civil liberties and minorities remain insufficient for establishing a change in the overall passiveness of the Supreme Court. With respect to the freedom of speech or the freedom of thought and conscience, notably in politically controversial cases, the attitude of the highest jurisdiction remains prudent and even conservative. This conventional approach is illustrated by a series of judgments regarding cases involving the national flag and anthem. Specifically, the issue involved the official orders by the principals of public schools that required teachers to stand facing the national flag and sing the national anthem during school ceremonies. The Supreme Court, although admitting that these orders "could somewhat indirectly constrain the individual's freedom of thought and conscience," ruled that the orders were not in violation of the freedoms guaranteed by the Constitution.[41]

4.3 The Guarantee of Democratic Process

The Supreme Court conducted an in-depth review of the right to vote or the value in the equality of vote. In 2005, the Supreme Court found a provision of the electoral law to be unconstitutional. Such a law precluded Japanese citizens, who reside abroad and were without a valid address in any area of a municipality within Japan, from voting in national elections.[42] The most remarkable aspect of this ruling is the strict standard presented by the Court to justify the restriction on the right to vote. The Court stated that "in order to restrict the people's right to vote or their exercise of the right to vote, there must be grounds that make such restriction unavoidable." The rationale for the strict standard was embraced by the ruling of a lower Court, which declared the restriction of the right to vote for an adult ward under guardianship as being unconstitutional.[43]

Analyzing the vote value equality, during the elections of deputies, was highlighted in two rulings under the "medium constituency election system": the multimember and single ballot system. The Court ruled that the district and apportionment provisions were unconstitutional, without invalidating the illegal election.[44] Two additional rulings confirmed the disparity, contrary to the constitutional requirement, while maintaining the legality of the election by providing "a

[41]Supreme Court, 2nd Petty Bench, 30 May 2011, 65 *Minshu*, p. 1780 (http://www.courts.go.jp/app/hanrei_en/detail?id=1106. Accessed 2 June 2017).

[42]Supreme Court, Grand Bench, 14 September 2005, 59 *Minshu*, p. 2087 (http://www.courts.go.jp/app/hanrei_en/detail?id=1264. Accessed 2 June 2017).

[43]District Court of Tokyo, 14 March 2013, 2178 *Hanreijihou*, p. 3.

[44]Supreme Court, Grand Bench, 14 April 1976 (*supra* note 5), Supreme Court, Grand Bench, 17 July 1985, 39 *Minshu*, p. 1100 (http://www.courts.go.jp/app/hanrei_en/detail?id=79. Accessed 2 June 2017).

reasonable period of time" for legislators to rectify the inequality.[45] The judgment of the latter type is called the judgment confirming the situation of unconstitutionality, distinguished from the judgment of unconstitutionality.

In this century, the Supreme Court has become stricter with regard to the equality of vote value in the representation of both the Houses in evidence. As indicated by the March 23, 2011 ruling (Judgment of the Grand Bench), the change is quite visible.[46] For the first time, the Court confirmed the disparity, contrary to the requirements for equality, under the single-member constituency system introduced in 1994 for the elections of deputies. Though the Diet adopted the bill ordering the reapportionment to the independent commission on the day of the dissolution of the lower House, the general election in December 2012 was held under the former electoral districts. After the election, the Reapportionment Bill was adopted. Again, the Supreme Court confirmed the disparity as being contrary to the requirements for equality.[47] In contrast to the rulings by Higher Courts in March 2013, this ruling appears to be more moderate because fifteen rulings judged the disparity as being unconstitutional and two of them invalidated the election. In 2015, the Supreme Court confirmed the disparity as being contrary to the requirements for equality for the third time.[48]

The Supreme Court also rendered the ruling that confirmed the disparity as being antagonistic to the Constitution with respect to the election of Councilors in 2012 and 2014.[49] The Court remarked on the prefecture constituency system stating that "the inflexible use of a prefecture as a unit of constituency has prolonged great inequality in the value of votes" and that "the mechanism itself needs to be reformed" instead of the reapportionment within the mechanism. This type of an explicit request to the Diet is exceptional, especially with the backdrop of the Court's prudent stance toward the political branch.

[45]Supreme Court, Grand Bench, November 7 1983, 37 *Minshu*, p. 1243, Supreme Court, Grand Bench, 20 January 1993, 47 *Minshu*, p. 67 (http://www.courts.go.jp/app/hanrei_en/detail?id=1481. Accessed 2 June 2017).

[46]Supreme Court, Grand Bench, 23 March 2011, 65 *Minshu*, p. 755 (http://www.courts.go.jp/app/hanrei_en/detail?id=1097. Accessed 2 June 2017).

[47]Supreme Court, Grand Bench, 20 November 2013, 67 *Minshu*, p. 1503 (http://www.courts.go.jp/app/hanrei_en/detail?id=1287. Accessed 2 June 2017).

[48]Supreme Court, Grand Bench, 25 November 2015, 69 *Minshu*, p. 2035 (http://www.courts.go.jp/app/hanrei_en/detail?id=1424. Accessed 2 June 2017).

[49]Supreme Court, Grand Bench, 17 October 2012, 66 *Minshu*, p. 3357 (http://www.courts.go.jp/app/hanrei_en/detail?id=1176. Accessed 2 June 2017) and Supreme Court, Grand Bench, 26 November 2014, 68 *Minshu*, p. 1363 (http://www.courts.go.jp/app/hanrei_en/detail?id=1311. Accessed 2 June 2017).

4.4 Possible Dialogue with Political Branch

Throughout its rulings in cases involving the equality of vote, the Supreme Court has urged or persuaded the legislature to rectify distortions in the rules of democracy. Nevertheless, the Court appears to have a reserved attitude toward the political branch. Although the Court has often warned the branch about the disparity, in contradiction to the requirements for equality, it has only declared the provision unconstitutional twice, without invalidating the election. The ruling of 2013 indicates that this moderate approach is based upon "the relationship between the judicial power and the legislative power that is assumed by the Constitution," because "the court itself is not authorized to establish a specific system as a substitute but such problematic system is to be corrected through the legislation by the Diet." It remains uncertain whether this moderate method that evaluates the efforts made by the Diet[50] to make a correction will succeed.

This statement, however, deserves reconsideration. The method that evaluates the efforts made by the Diet presupposes "the constitutional order," wherein "the Diet should take necessary and appropriate measures for correction while taking the court's determination into account." The ruling emphasizes that "this would be consistent with the spirit of the Constitution." It reveals the limits of constitutional review exercised within the judicial power, cases, and controversies. The prudence of the highest Court may be justified to some extent from this limit, but perhaps the constitutional review of the Supreme Court, in other areas, such as civil liberties and the freedom of the speech, is not really "consistent with the spirit of the Constitution."

A constitutional doctrine describes these rulings as a dialogue between the judicial branch and political branch (Sasaki 2013). The sentences included in the 2013 ruling quoted above seem to justify the reference to this theory. It is true that the dialogue functions to some extent because the Diet reduced the disparity by reapportionment of a single-member district of deputies or retouched the prefecture constituency system of House of Councilors: this was done by merging the four smallest prefectures into two electoral districts, following the rulings of the Supreme Court. Nonetheless, the response of the Diet remains at a minimum.

Two rulings of December 16, 2015,[51] by the grand bench, illustrate the reserved stance of the small judiciary against the political branch, surrounding a politically controversial issue. The Court held that the provision of the Civil Code, which prohibits women from remarrying for a period exceeding 100 days, was unconstitutional. It is remarkable that the Court censored the provision, whereas it dismissed the appellant's claim (damages against the Diet, which has not amended the provision, supposed to be unconstitutional).

[50] Fujii (2012, p. 406).

[51] Supreme Court, Grand Bench, 16 December 2015, 69 *Minshu*, p. 2427 (http://www.courts.go.jp/app/hanrei_en/detail?id=1418. Accessed 2 June 2017).

However, the Court did not censor Article 750 of the Civil Code, stipulating the same surname system, with the opinions of five justices deeming this Article as being unconstitutional.[52] The Court concluded its judgement by issuing the following significant remark. The court stated that this is a matter "that needs to be discussed and determined by the Diet." In his opinion, Chief Justice Itsuro Terada added that it seems suitable "to leave this issue to a national debate, that is, to the democratic process," and "this approach does not involve such a situation in which fair consideration through the democratic process cannot be expected." It is uncertain whether the Diet, dominated by a conservative majority, would accept the dialogue proposed by the Court.

5 Conclusion

Since the beginning of this century, the Japanese Supreme Court has to assume a more active role. However, it still seems that the Court has not yet fully demonstrated its expected role and has maintained a reserved attitude of the political branch as well.

The pivotal question remains whether a constitutional court, specialized in constitutional review, would provide a proper solution for a more effective protection of fundamental rights in Japan. It is certain that the successful implementation of such a system requires an adequate basis. As discussed above the institutional conditions of constitutional review, we here look to non-institutional ones.

The risk of "politicization of justice" is always attached to the system of constitutional review that handles "political law," notably in the case of a constitutional court model. Yoichi Higuchi underlines the importance of the traditional authority of legist or law professors as a source of legitimacy of constitutional justice in continental Europe, compared with the Anglo–Saxon tradition of the authority of lawyers[53]: the significant presence of law professors with independent status constitutes a common characteristic of European constitutional courts.[54] The introduction of the European model would not have a positive result in Japan, wherein such legitimacy does not exist, in addition to the insufficiency of political equilibrium.

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[52]Article 750 stipulates that "a husband and wife shall adopt the surname of the husband or wife in accordance with that which is decided at the time of marriage."

The Court argued that although "in view of the current situation in which the overwhelming majority of married couples choose the husband's surname, it is presumed that women are more likely to suffer the abovementioned disadvantages." These "disadvantages can be eased to some degree as such use of the pre-marriage surname as the by-name after marriage becomes popular." Supreme Court, Grand Bench, 16 December 2015, 69 *Minshu*, p. 2586 (http://www.courts.go.jp/app/hanrei_en/detail?id=1435. Accessed 2 June 2017).

[53]See, Higuchi (2007, pp. 463–464).

[54]See, Favoreu (1986, p. 23).

Moreover, could another model be practicable? The observation of Alexis de Tocqueville on the American judicial review in its early period enlightens the essential element. He argued that the weak point of constitutional review by the judicial court could become the basis for strong competency, because the evils of the immense political power entrusted to American courts "are considerably diminished by the obligation which has been imposed for attacking the laws through the courts of justice alone."[55] The small judiciary might provide potential, even though the Supreme Court cannot be expected to address "macro justice."

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[55]de Tocqueville (1900, p. 100).

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Does Formal Rank Matter?

A Framework-Oriented View on the Binding Force of International Human Rights Law on Constitutional Law

Shu-Perng Hwang

1 Introduction

As is well known, different countries may have a different attitude toward the formal rank of international human rights law[1] in the hierarchy of domestic legal order. While the superiority of international human rights law over national constitutional law is recognized by some legal orders, many if not most countries determine the rank of international human rights law in between the constitution and the statutes or simply as the rank of ordinary statutory law.[2] In those countries that qualify the rank of ratified international human rights law merely as statutory law, the formal rank of international human rights law is often used as an argument against the binding force of international human rights law on domestic constitutional law. For example, in context of the German constitutional order, international law enjoys the same rank as federal statute. Accordingly, the major opinion

[1]In context of this paper, international human rights law primarily refers to international treaties or agreements on human rights. This specification does not imply that this paper argues for an absolute distinction between international treaties and customary international law, but rather results from the fact that international treaties or agreements on one hand and customary international law on the other hand are sometimes ranked differently in the hierarchy of domestic legal order. For example, according to the German Basic Law, customary international law (including those norms qualified as *ius cogens*) enjoys a higher status in the hierarchy of German legal norms in comparison with ordinary international treaties. See, e.g., Talmon (2013, pp. 12–16), Herdegen (2015, pp. 176–180), Tomuschat (2013, Rn. 26–27), Vöneky (2013, Rn. 26), Geiger (2009, pp. 152–153, 160–161), Czerner (2007, pp. 548–549), Rojahn (2001a, Rn. 37–40), Rojahn (2001b, Rn. 37), Krumm (2013, pp. 366–367), Lehner (2012, p. 400) and Payandeh (2009, pp. 471–475, 486).

[2]See Denza (2014, pp. 418–425) and Herdegen (2015, pp. 172–173).

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maintains that the German Constitution is not bound by the international human rights law.[3] On the other hand, however, the case of Taiwan tells another story: Although the Taiwanese Constitutional Court itself ruled that international treaties hold the same status as statutory law,[4] it seems that this determination on the formal rank of international law not at all stops the Court from referring to international human rights law in light of its constitutional interpretation. Moreover, in some rare cases, it seems that the Taiwanese Constitutional Court even recognized the binding force of international human rights law on constitutional law. In view of this contrast between Germany and Taiwan, the following discussion intends to clarify the relationship of international human rights law and domestic constitutional law through exploring why or in what sense the binding force as well as practical influences of international human rights law on constitutional law cannot be totally determined by the formal rank of international law in domestic law. I will argue that, from a framework-oriented point of view, the determination on the formal rank of international human rights law in domestic legal order matters only because it has to do with the determination of a certain constitutional order on the way in which it concretizes international human rights law.

2 The Formal Rank as Well as Normative Role of International (Human Rights) Law in Domestic Law: Lessons from a Comparison Between Germany and Taiwan

2.1 The German Perspective: International Human Rights Law as an Interpretative Tool

As indicated in the introduction, according to the mainstream opinion of the German scholars of constitutional law, international treaties rank as statutory law in German constitutional order. Article 59.2 of the German Basic Law provides, "Treaties that regulate the political relations of the Federation or relate to subjects of federal legislation shall require the consent or participation, in the form of a federal law, of the bodies responsible in such a case for the enactment of federal law. […]" Based on this provision, the German Constitutional Court has constantly held in its case-law that international treaties or agreements, "to the extent that they have come into force for the Federal Republic of Germany, have the status of a federal

[3]See Sect. 2.1 for further discussion.

[4]See Judicial Yuan Interpretation No. 329. For an official English translation of this decision, see Justices of the Constitutional Court, Judicial Yuan, R.O.C. (1993). See Sect. 2.2 for further discussion.

statute."[5] It is thus generally accepted that even the international human rights laws are unlikely to override the German constitutional law and constitutional rights (*Grundrechte*). Accordingly, the European Convention on Human Rights only enjoys the same status as statutory law[6] and thereby does not have a normative binding force on German constitutional law. In its famous case of *Görgülü*, for example, the Constitutional Court of Germany held that, while the German public authority is committed to international cooperation, "the Basic Law did not take the greatest possible steps in opening itself to international-law connections." Rather,

> [t]he Basic Law is clearly based on the classic idea that the relationship of public international law and domestic law is a relationship between two different legal spheres and that the nature of this relationship can be determined from the viewpoint of domestic law only by domestic law itself; this is shown by the existence and the wording of Article 25 and Article 59.2 of the Basic Law. The commitment to international law takes effect only within the democratic and constitutional system of the Basic Law.[7]

Under the premise of the supremacy of the Basic Law,

> [t]he text of the Convention and the case-law of the European Court of Human Rights serve, on the level of constitutional law, as guides to interpretation in determining the content and scope of fundamental rights and constitutional principles of the Basic Law, provided that this does not lead to a restriction or reduction of protection of the individual's fundamental rights under the Basic Law – and this the Convention itself does not desire.[8]

In its decision on *Sicherungsverwahrung* in 2011, the Constitutional Court reaffirmed the supremacy of the German Basic Law over the European Convention on Human Rights. As the Court said:

> Invoking the European Convention on Human Rights as an interpretation aid for the provisions of the Basic Law is results-oriented, as is the European Convention on Human Rights itself with regard to its enforcement in national law. It does not aim at a schematic parallelization of individual constitutional concepts, but serves to avoid violations of international law. […] Against this background something similar is true of an interpretation of the concepts of the Basic Law that is open to international law as of an interpretation based on a comparison of constitutions: similarities in the text of the norm may not be permitted to hide differences which follow from the context of the legal systems: the human rights content of the agreement under international law under consideration must be 'reconceived' in an active process (of reception) in the context of the receiving constitutional system.
>
> Limits to an interpretation that is open to international law follow from the Basic Law. In the first instance, such an interpretation may not result in the protection of fundamental rights under the Basic Law being restricted; this is also excluded by the European Convention on Human Rights itself. This obstacle to the reception of law may become relevant above all in multi-polar fundamental rights relationships in which the increase of liberty for one subject of a fundamental right at the same time means a decrease of liberty

[5]See BVerfGE 111, 307 (317). For an official English translation of this decision, see Bundesverfassungsgericht (2004). See also Herdegen (2015, pp. 172–173) and Schweitzer (2010, pp. 179–181).

[6]See only Herdegen (2011, pp. 36–37), Richter (2010, p. 176) and Langenfeld (2002, p. 95).

[7]See BVerfGE 111, 307 (318).

[8]BVerfGE 111, 307 (317).

> for the other. The possibilities of interpretation in a manner open to the Convention end where it no longer appears justifiable according to the recognized methods of interpretation of statutes and of the constitution. Furthermore, even where the Basic Law is interpreted in a manner open to the Convention—just as when the case-law of the European Court of Human Rights is taken into account on the level of ordinary law—the case-law of the European Court of Human Rights must be integrated as carefully as possible into the existing, dogmatically differentiated national legal system, and therefore an unreflected adaptation of international-law concepts must be ruled out.[9]

Following this viewpoint of the Constitutional Court, most German scholars of constitutional law maintain that, while the constitutional significance of international human rights law is fully recognized, it by no means suggests that the international human rights law "trumps" the German Basic Law. This point of view is clearly reflected in the recent debates on the right to strike of civil servants. As is well known, in the cases of *Demir and Baykara v. Turkey* and *Enerji Yapi-Yol Sen v. Turkey*,[10] the European Court of Human Rights declared that Article 11 of the European Convention on Human Rights guarantees the right to collective bargain and does not allow a general ban on the right to strike for civil servants. This interpretation of the European Convention on Human Rights leads to a collision with the constitutional order of the German Basic Law, which, according to the mainstream opinion in Germany, explicitly prohibits the right to strike for civil servants.[11] Nevertheless, in reaction to the incompatibility between the European Convention on Human Rights and the German Basic Law on this issue, many if not most German scholars insist that the general strike prohibition for civil servants is constitutionally fixed and therefore must not be lifted through constitutional interpretation of the courts even in view of the principle of the Basic Law's commitment to international law.[12] This example shows that, while the European Convention on Human Rights serves as a significant interpretative tool in determining the content and scope of constitutional rights guaranteed in German Basic Law, its practical influence on constitutional interpretation is limited due to lack of formal binding force.

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[9]See BVerfGE 128, 326 (369–371). For an official English translation of this decision, see Bundesverfassungsgericht (2011).

[10]See EGMR, Urteil vom 12.11.2008, NZA 2010, 1425; EGMR, Urteil vom 21.4.2009, NZA 2010, 1423.

[11]See only Battis (2011, Rdnr. 71, 73).

[12]*Ibid*., Rdnr. 65, 67. See also Widmaier and Alber (2012, pp. 401–402), Lindner (2011, p. 306), Scholz (2014, pp. 582–583) and Kees (2015, pp. 73–77). This opinion is supported by a series of decisions of the administrative courts, including a recent decision of the Federal Administrative Court of Germany. See only OVG Münster, Beschluss vom 23.4.2012, NVwZ 2012, 890 (892, 898); VG Osnabrück, Urteil vom 19.8.2011, NVwZ-RR 2012, 323 (325); BVerwG, Urteil vom 27.2.2014, NVwZ 2014, 736 (738–742). For an overview of Germany's debates on the right to strike for civil servants, see Seifert (2009), Schubert (2012) and Traulsen (2013).

2.2 *The Taiwanese Perspective: International Human Rights Law as a Symbol of Internationalization*

From a formal perspective, international human rights law has a similar status in Taiwanese legal order. Although there is no specific constitutional provision concerning the rank of international law or international treaties in domestic law, the Constitutional Court of Taiwan ("Judicial Yuan") explicitly held that international treaties "hold the same status as statutes."[13] Interestingly, however, it does not follow from this statement that the Taiwanese Constitutional Court thus has a similar attitude towards the normative role of international human rights law in light of its constitutional interpretation. Rather, both the Taiwanese Constitutional Court and many scholars of constitutional law tend to recognize the special significance of international human rights law based on its international character. As is well known, Taiwan has been isolated from international legal community over the past few decades, while in reality the interaction between Taiwan and the international society has never stopped growing. Against this background, Taiwan has been eager to take part in more international activities, including international agreements on human rights, and thereby tends to regard the reference to international human rights law in light of constitutional interpretation as a symbol of "internationalization" of Taiwanese constitutional order. In this respect, therefore, it is not surprising that, for many Taiwanese scholars of constitutional law, international human rights law is to be classified as supra-positive legal principles and precisely in this sense has a binding force on domestic law.

In comparison with the academic discussions, the Taiwanese Constitutional Court has rarely referred to international human rights law in its constitutional adjudication. Nevertheless, it can be inferred from the 12 cases in which international or regional human rights treaties were mentioned that, from the viewpoint of the Constitutional Court, international human rights law actually plays a significant role in determining the content of the Taiwanese Constitution and especially constitutional rights. For example, in Judicial Yuan Interpretation No. 587, the Constitutional Court held that "A child's right to identify his/her blood filiations was declared by Article 7, Section 1, of the UN Convention on the Rights of the Child, validated on September 2, 1990. The right to establish paternity is concerned with a child's right to personality and shall be protected under Article 22 of the Constitution."[14] Moreover, Judicial Yuan Interpretation No. 710 went one step

[13]See Judicial Yuan Interpretation No. 329.

[14]See Judicial Yuan Interpretation No. 587. For an official English translation of this decision, see Justices of the Constitutional Court, Judicial Yuan, R.O.C. (2004a). See also Judicial Yuan Interpretation No. 372, Justices of the Constitutional Court, Judicial Yuan, R.O.C. (1995a), Judicial Yuan Interpretation No. 392, Justices of the Constitutional Court, Judicial Yuan, R.O.C. (1995b); Judicial Yuan Interpretation No. 582, Justices of the Constitutional Court, Judicial Yuan, R.O.C. (2004b), for similar arguments concerning the normative significance of international and regional human rights law to the constitutional interpretation of the Taiwanese Constitutional Court.

further and indicated that even the special constitutional provisions dealing specifically with the sensitive relationship with the Chinese People must comply with the corresponding international human rights treaties. As the Court said:

> The Preamble of the Additional Articles of the Constitution stipulates, "To meet the requirements of the nation prior to national unification, the following articles of the Constitution are added or amended to the Constitution in accordance with Article 27, Paragraph 1, Subparagraph 3; and Article 174, Subparagraph 1, of the Constitution: […]" Article 11 of the Additional Articles of the Constitution provides, "Rights and obligations between the people of the Chinese mainland area and those of the free area, and the disposition of other related affairs may be specified by law." […] Given that the two sides of the Taiwan Strait are currently governed by different political entities, restrictions are therefore imposed on the freedom of people from the Mainland Area to enter into the Taiwan Area (see J.Y. Interpretations Nos. 497 and 588). However, after formally obtaining permission from the competent authorities and having legally entered the Taiwan Area, the freedom of movement of people from the Mainland Area should in principle be protected by the Constitution (see Article 12 and Paragraph 6 of the General Comment No. 15 of the UN International Covenant on Civil and Political Rights). Except where immediate actions are otherwise required in response to a threat to national security or social order, the mandatory deportation of a person from the Mainland Area who legally entered into the Taiwan Area must fulfill corresponding due process requirements (see Articles 13 of the UN International Covenant on Civil and Political Rights; Article 1 of Protocol No. 7 to the European Convention on Human Rights). In particular, mandatory deportation of Mainland spouses who have been permitted to legally enter into the Taiwan Area requires extra caution because it significantly affects marriages and family relationships.[15]

These examples show that, while international human rights law ranks merely as statutory law in Taiwanese legal order, the Taiwanese Constitutional Court tends to recognize its binding force on domestic constitutional law insofar as the international human rights laws and treaties are generally deemed to be principle- and value-oriented and as such bind the domestic constitutional order.[16]

3 A Human Rights Perspective on the Significance of International Human Rights Law in Domestic Constitutional Order

3.1 International Human Rights Law as "External Law?"

The foregoing discussion shows that, while both in Germany and in Taiwan the international human rights treaties formally rank as ordinary statutory law, the German and the Taiwanese Constitutional Courts as well as constitutional law

[15]See Judicial Yuan Interpretation No. 710. For an official English translation of this decision, see Justices of the Constitutional Court, Judicial Yuan, R.O.C. (2013). For a critical analysis of this decision, see Hwang (2016a, pp. 109–111, 117–118).

[16]See also Hwang (2016a, pp. 111–113) and Chang (2012, p. 22).

scholars construe the relationship between international human rights treaties and domestic constitutional rights in a very different way. As mentioned above, it is generally accepted in Germany that the formal rank of international human rights laws and treaties as statutes already implies their limited normative significance to domestic constitutional order and constitutional norms.[17] On the contrary, it is frequently argued in Taiwan that international human rights laws and treaties enjoy the same rank as statutes and thereby are to be recognized as "part of the law." As such, they serve as the effective and binding norms in domestic legal order. Moreover, according to the general opinion in Taiwan, this recognition usually means that international human rights laws and treaties have a binding force even in relation to domestic constitutional law, as it is important to Taiwan to claim itself to be part of the international legal community. On one hand, the different attitudes towards the binding force of international human rights law on constitutional law in Germany and Taiwan clearly reflect the incomparable international status of these two countries: Many German scholars of constitutional law believe that the standards of human rights protection in Germany and especially through the German Constitutional Court are relatively high in international comparison. To this extent, they resist the overreaching influences of international human rights law on domestic constitutional law because they are worried that Europeanization and internationalization might do harm to the high quality of human rights protection in German constitutional order.[18] By contrast, most Taiwanese are not only fully aware of the fact that Taiwan has been isolated from the international legal community for a long time, but also tend to recognize that the level of human rights protection in Taiwan falls behind the international standards. Accordingly, they feel it necessary to frequently refer to international human rights laws and treaties both from the perspective of international relations and from the viewpoint of human rights protection.[19] On the other hand, though, this contrast between Germany and Taiwan reveals common ground in the sense that the majority opinions in both countries tend to regard international human rights law as "external law."[20] Precisely under this presupposition, international human rights law is either limited to "interpretative tool" in reaction to the fear of invasion by international human rights laws and treaties, or it is automatically classified as something superior and

[17]In contrast with international human rights law, such as the European Convention on Human Rights, the European Union law (primary law in particular) is qualified by most German scholars as "supranational law" based on the highly integrative character of the European Union, so that its human rights norms – especially the Charter of Fundamental Rights of the European Union – are in principle recognized to enjoy superiority over domestic law. Nevertheless, even such superiority (the so-called "primacy in application [*Anwendungsvorrang*]") is never deemed absolute in the opinion of the German scholars as well as the German Constitutional Court. See only Voßkuhle (2010, pp. 3–4), Masing (2015, pp. 477–478) and Peterson (2012, pp. 248–255).

[18]See, e.g., Bäcker (2015, pp. 395, 397–400), Lübbe-Wolff (2010, pp. 198–199), Huber (2008, pp. 194–195), Thym (2006, p. 3250) and Grimm (2013, pp. 591–592).

[19]See, e.g., Kure (2011, p. 153), Chang (2009, p. 260) and Lin (2010, p. 38).

[20]For a more detailed analysis, see Hwang (2016a, pp. 93–98).

progressive and in this respect may replace domestic constitutional law without difficulties.

It follows from these brief observations that, unlike the general impression, the formal rank of international law in domestic legal order does not have much to do with the binding force of international human rights law on domestic constitutional law. Nor is it able to clarify the interaction between international human rights law and domestic constitutional law. This explains why the German Constitutional Court as well as many German scholars cannot but recognize the special significance of the European Convention on Human Rights to German Basic Law even though they insist that international human rights treaties rank merely as statutory law.[21] The decisive factor in determining whether or in what sense international human rights law has a binding force on domestic constitutional law, therefore, lies not in the formal rank of international law in domestic law, but rather in the theoretical presuppositions with regard to the relationship between international human rights law and national constitutional rights. As illustrated above, the majority opinions in Germany and Taiwan distinguish themselves from each other to the extent that they have a different attitude towards the role as well as function of international human rights law in pursuit of the realization of human rights. Nevertheless, a closer look reveals that both the German and the Taiwanese discussions regard international human rights law as external law from the very beginning and on this basis believe that a conflict between international human rights law and domestic constitutional law could only be avoided either by absolutely denying the quasi- or supra-constitutional significance of international human rights law or conversely by simply substituting the international human rights standards for the domestic ones. In this way, however, the human rights issue is inevitably turned into the competence issue (particularly with regard to the relationship between international and domestic courts), whereby the protection of human rights can no longer play the central role.

3.2 International Human Rights Law as a Framework Order

The classification of international human rights law as external law from the perspective of domestic legal order corresponds to the general dualistic impression that international law and national law are qualitatively different. However, even regardless of the question whether this viewpoint on the nature of international and national law is persuasive, the "external law"-presupposition itself triggers human rights concern. First, those who insist that international law and national law are

[21]See BVerfGE 111, 307 (317–318); BVerfGE 128, 326 (368). See also Papier (2006, pp. 2–3), Schaffarzik (2005, p. 867), Schröder (2013, p. 284), Polakiewicz and Kessler (2012, p. 843) and Bergmann (2006, pp. 110–114).

heterogeneous legal norms tend to overlook the potential compatibility between international and domestic human rights law. In other words, they tend to presuppose that the contents both of international human rights law and of domestic constitutional rights norm are predetermined and fixed and thereby resistant to external influences. In this way, however, they neglect that, at the domestic level, even a norm collision with international human rights law could be avoided through constitutional interpretation which takes international human rights laws and treaties into account.[22] From this point of view, the "external law"-presupposition inevitably runs counter to the protection of human rights because it fails to notice the dynamic dimensions of human rights developments. Secondly, and more fundamentally, it seems that this "external law"-presupposition is based on the classic conception of sovereignty, according to which any intervention of international human rights law into domestic constitutional law may threaten the self-determination of national (legal) order.[23] As a result, for (normal) countries like Germany, it is plausible to insist on national sovereignty in cases where national constitutional rights norms are not compatible with international human rights law. On the other hand, even though in reality Taiwan has not been allowed to join or to ratify any international human rights treaties after it left the United Nations in 1971, the mainstream opinion in Taiwan seldom challenges the binding force of international human rights law on the basis of national sovereignty precisely because it is fully aware of Taiwan's special international situation. The cases of Germany and Taiwan thus illustrate that, from the viewpoint of the "external law"-presupposition, the potential conflict between national sovereignty and human rights could only be avoided either by ignoring the former or by sacrificing the latter. Clearly, this point of view misconstrues the relationship between national sovereignty and human rights particularly in the age of internationalization and globalization of human rights protection.[24]

These analyses indicate that, overall, the "external law"-presupposition fails to notice the framework character of international human rights law, that is to say, it neglects that international human rights norms, just like the human rights norms of national constitutions, are usually not fully predetermined provisions, but rather consist of numerous task delegations on the basis of which the national constitutional orders are authorized and at the same time obliged to concretize international human rights norms so as to fulfill the ultimate goal of international

[22]In light of the German debate on the right to strike for civil servants, for example, the alleged conflict between the German Basic Law and the European Convention on Human Rights could have been avoided simply through a more dynamic understanding of Article 33.5 of German Basic Law, where the term "traditional principles of the professional civil service" is apparently open to interpretation. For a detailed analysis of this issue, see Hwang (2017).

[23]See only Grimm (2013, pp. 591–592), Di Fabio (2005, pp. 242–243, 250, 256) and Di Fabio (2013, p. 183).

[24]See only Kelsen (2000, pp. 333–336, 339–343), Kelsen (1966, pp. 573–588).

human rights law.[25] From a framework-oriented point of view, therefore, neither international nor national human rights norms are to be interpreted as content-fixed norms. Rather, in light of the multi-level system of human rights, in which most mechanisms of human rights protection are to be concretized and implemented by the national authorities, the human rights norms both on international and on national level are open to communication, influence as well as dynamic development.[26] Viewed this way, the international human rights law functions not as external law which either threatens or is ready to replace the domestic constitutional order, but rather as delegation norm that needs to be concretized through domestic constitutional law and precisely in this sense calls for cooperation with national law. Moreover, to the extent that international human rights law constitutes a framework order of human rights protection, it is apparent that a monistic view on the relationship between international and national human rights law not necessarily endangers the national sovereignty.[27] On the contrary, the monistic view that recognizes the superiority of international human rights law presupposes and guarantees enough room for national self-determination in the sense that, from a framework-oriented perspective, the superiority of international human rights law does not indicate that all the national mechanisms of human rights protection must be predetermined or completely dominated by international human rights norms.[28] As mentioned before, the framework character of international human rights law already implies the delegated power of national authorities in pursuit of the realization of human rights protection. Accordingly, the national constitutional order is bound by international human rights law only in the sense that it is obliged to contribute to the realization of the goals set by the framework order of international human rights law.

4 Conclusion: The Formal Rank Issue from the Framework-Oriented Perspective

The foregoing analysis not only illustrates that the determination on the formal rank of international law in domestic legal order does not have much to do with the binding force of international human rights law on national constitutional law, but

[25]For the framework character of international human rights law, see Hwang (2016a, pp. 93–105). See also Hwang (2014a, pp. 575–586), Hwang (2013, pp. 307–322), Hwang (2014b, pp. 410–418) and Hwang (2016b, pp. 380–386).

[26]See, e.g., Hwang (2014b, pp. 416–418) and Hwang (2016b, pp. 384–386).

[27]For the contrast between Monism and Dualism within the context of international legal theory, see only Kelsen (1981, pp. 120–241), Herdegen (2015, pp. 168–171) and Schorkopf (2007, pp. 237–240).

[28]This dimension of Monism (with primacy of international law) has been clearly demonstrated by Hans Kelsen's international legal theory. See only Hwang (2014a, pp. 577–586).

also suggests that the contemporary mainstream opinion on the issue of the relationship between international and national human rights norms misconceives the binding force of international human rights norms exclusively as a content-based predetermination because it interprets the human rights norms in an over-materialized way and thereby neglects the cooperative dimension of the interaction between international and national human rights law. As previously argued, from a framework-oriented point of view, recognizing the binding force of international human rights law on national constitutional law by no means indicates that the contents of national human rights norms are to be determined and dominated by international human rights laws and treaties. Rather, the international human rights law has a binding force merely in the sense that, as a framework order, the international human rights law delegates and at the same time obliges the national constitutional orders to concretize international human rights norms and in this way to fulfill the task of human rights protection.

The foregoing discussion does not imply that the formal rank of international human rights law in domestic legal order is not important at all. Rather, from a framework-oriented perspective, the phenomenon that international human rights law ranks differently in different countries reflects the fact that, precisely on the basis of the delegating framework order of international law, the national legal orders are usually delegated to determine the most appropriate rank of international human rights law so as to protect human rights in a way most suitable to domestic interests and needs.[29] As illustrated above, though, the determination on the formal rank does not and should not affect the binding force of international human rights law on domestic constitutional law. Especially in light of the multi-level system of human rights, it is precisely a cooperative interaction between international and national human rights norms that is able to contribute to the maximal realization of human rights. Observed this way, the framework order of international human rights law argues for a monistic construction of the relation of international to domestic law on one hand and yet puts special emphasis on the constructive role of national constitutional law in pursuit of human rights realization on the other hand. For the national constitutional order, therefore, international human rights law is neither external nor heterogeneous law, but rather sets the human rights goals that are to be fulfilled particularly by the national constitutional orders.

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[29]See also Bleckmann (1996, p. 140), Nettesheim (2016, Rn. 173), Ruffert (2007, pp. 246, 249), Stein (2006, p. 506) and Buchholtz (2014, p. 199).

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The Asian Region and the International Criminal Court

Hitomi Takemura

1 Introduction

As of May 2017, the International Criminal Court (hereinafter the ICC or Court) had 124 States Parties. Among them, 19 states and regions belong to the Asia-Pacific region, based on the United Nations Regional Group.[1] Although the Asia-Pacific region is home to half of the global population, the people of the region, especially those living in Southeast Asian states, are apparently underrepresented at the ICC. Only two of the ten Member States of the Association of Southeast Asian Nations (ASEAN)—that is, Cambodia and the Philippines—have ratified the Rome Statute. Although, with the exception of Jordan, the Arab states' lack of participation in the ICC is also conspicuous, the Asia-Pacific region's comparatively lower acceptance rate undoubtedly undermines the universality of the Rome Statute and the ICC system. Even worse, Philippines' President Rodrigo Duterte said on 17 November 2016 that he might follow the example of Russia and have the Philippines withdraw from the ICC.[2] The future prospects of the Asian region's involvement with the ICC thus currently appear to hang in the balance.

First, the present article explores the reluctance by Asian states to accept the Rome Statute and the ICC. Second, it explores the current relationship between the Asian region and the ICC, especially from the perspective of preliminary investigation activities by the ICC in the Asian region. Despite Asian states' hesitations

[1]Those states and regions are Fiji, Tajikistan, Marshall Islands, Nauru, Cyprus, Cambodia, Jordan, Mongolia, Timor-Leste, Samoa, Republic of Korea, Afghanistan, Japan, Cook Islands, Bangladesh, Philippines, Maldives, Vanuatu, and Palestine.
[2]See e.g., Forster (2016).

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about the ICC, the investigative screws may be tightening on the Asian region, as the Office of the Prosecutor (OTP) is conducting preliminary examinations in several Asian states. Last, this article forecasts the future prospects for the Asian region and the ICC by analysing the on-going preliminary examinations of an Asian incident.

2 The Rationale Behind Asian Reluctance: Various Policy Considerations and So-called Asian Values

The rationales behind the hesitancy of the Asian region to join the Rome Statute should be clarified. Are these rationales legal or political? Seemingly, the rationales provided by governments are legal ones. Especially the Chinese government's argument against the ICC appears to be very legal and partially reflects its own status as one of the permanent five Member States of the Security Council. The Chinese government provides the following five reasons why it has not signed the Rome Statute[3]: First, the jurisdiction of the ICC is not based on the principle of voluntary acceptance; the Rome Statute imposes obligations on non-States Parties without their consent, which violates the principle of state sovereignty and the Vienna Convention on the Law of Treaties. The Chinese government also regards it as problematic that the complementarity principle gives the ICC the power to decide whether a state is able or willing to conduct proper trials of its own nationals. Second, the Chinese government calls into question the scope of the definition of war crimes. For China, it is problematic that war crimes committed in internal armed conflicts fall within the jurisdiction of the ICC. Moreover, the Chinese government finds it questionable that the definition of "war crimes" goes beyond those accepted under customary international law and in Additional Protocol 2 to the Geneva Conventions. Third, the Rome Statute's definition of "crimes against humanity" does not require that the state in which they are committed be "at war" while, from the standpoint of China, the existing customary international law norm does. From the Chinese perspective, the list of acts prohibited as crimes against humanity in the Rome Statute belong to the area of interest of international human rights law rather than international humanitarian law. Fourth, the Chinese government is concerned that the inclusion of the crime of aggression within the jurisdiction of the ICC invokes the power of the UN Security Council. Fifth, China argues that the *proprio motu* power, the power of the Prosecutor under Article 15 of the Rome Statute to choose a situation at her own initiative rather than receiving a referral from either a State Party or the Security Council permits the Prosecutor to act in a political manner rather than in a manner that is independent and fair.

[3]See Jianping and Wang (2005, pp. 611–612).

While the Chinese government's explanation—which is endorsed by some Southeast Asian governments—seems legal and political,[4] cultural explanations have also been offered as possible reasons for why many Asian countries have not acceded to the Rome Statute. Motoo Noguchi, who is currently chair of the Board of the Directors of the Trust Fund for Victims of the ICC and a former Supreme Court Chamber Judge of the Extraordinary Chambers in the Courts of Cambodia, has identified four common features of Asian society and culture that might be hindrances to Asian states joining the ICC. First, Noguchi points out that law has not traditionally been the primary guiding principle of Asian society, and to some extent, it is still not in many parts of Asia.[5] Whereas in other parts of the world the courthouse, like the church, has been an integral part of the community, the law and lawyers play a lesser role in Asia, especially because of Asian people's preference for unofficial dispute settlement outside of courts.[6] Second, the criminal justice systems of many Asian countries have fundamental problems, so they are not supported by a majority of nationals.[7] A culture of corruption flourishes in such countries, and they face limits on or a lack of judicial independence.[8] Third, many people of the Asian region consider matters relating to criminal justice to be a sovereign matter that is essentially within the domestic jurisdiction and immune to external intervention.[9] Fourth, the immense diversity of the region prevents the Asian people from opening a discussion on criminal justice in international or regional forums.[10]

Setting aside the stringency and reasonableness of the above cultural explanations about a region with diverse cultures, the third concern appears to misconstrue the ICC's principle of complementarity, according to which the Court may only exercise its jurisdiction when national jurisdictions are themselves unable or unwilling to investigate or prosecute (Article 17(1)(a) of the Rome Statute). Nevertheless, it is understandable that states that are unable, if not unwilling, to investigate and/or prosecute serious crimes of international concern would be apprehensive about joining the ICC. There is a need for Asian countries to have confidence in their own criminal justice systems. Then, they would not fear the ICC's jurisdictional reach into their sovereign matters.

After all, the ICC's complementary jurisdiction requires international society to support the development of the legal and functional capacity of developing countries. Otherwise, theoretically developing countries having problems with the

[4]The spokesman for the then Philippines president reportedly said in September 2002 that endorsing the Rome Statute would open the floodgates to further malicious allegations, while the security forces of the Philippines already had to deal with internal rebellions. Toon (2004, pp. 219–220).

[5]Noguchi (2006, p. 587).

[6]Ibid pp. 587–588.

[7]Ibid p. 588.

[8]Ibid.

[9]Ibid p. 589.

[10]Ibid p. 590.

functioning of their criminal justice systems will always be "unable genuinely to carry out the investigation or prosecution" according to the admissibility criteria for situations and cases before the ICC under Article 17 of the Rome Statute. The legal culture of the Asian region can essentially be characterised as formalised justice processes detached from indigenous or embedded methods for resolving conflicts. Non-Western legal forms existing the Asian region are also considered, in part, to prevent Asian states from ratifying the Rome Statute.[11] While the principle of complementarity has precipitated ICC membership among those African states hoping for the ICC to shoulder their burden to investigate and prosecute domestic crimes, it has hindered membership among Asian states fearing the Court's interference in their domestic affairs. In this sense, the principle of complementarity may be a double-edged sword.

3 Future Prospects of the Asian Region and the International Criminal Court

3.1 Future of Non-state Parties of the Rome Statute

Is there any hope that additional states from the Asian region will accede to the Rome Statute? The European commitment to the Asian region in this regard is remarkable. The European Union has strongly promoted the ICC since the Court's establishment.[12] All EU Member States signed and ratified the Rome Statute within four years,[13] and now all 28 EU Member States are ICC Member States. In June 2007, the European Council adopted the EU Strategy for Central Asia. Subsequently, in 2009, the European Union stated:

> In promoting the consolidation of peace and international justice, the European Union and its Member States are determined to share with the Central Asia States their experience in the adoption of the necessary legal adjustment required to accede to the Rome Statute of the International Criminal Court, and in combating international crime in accordance with international law.[14]

Prior to the Strategy, the Asia-Europe Meeting (ASEM), an informal meeting between European Union Member States and 21 Asian states including the ASEAN Secretariat, had been a place for dialogue on the topic of the ICC. For example, the fifth Asia-Europe Meeting (ASEM 5) was held in Hanoi, and the leaders of the EU

[11]Findlay (2014, p. 87). Jo and Simmons (2016, pp. 452–453).

[12]De Búrca (2013, p. 55). The European Union concluded its first agreement with another international organization: Agreement between the EU and the ICC of 6 December 2005 on Assistance and Cooperation.

[13]Groenleer (2015, p. 928).

[14]General Secretariat of the European Council (2009, pp. 16–17).

and Asian states agreed to continue dialogue on the ICC.[15] Furthermore, at ASEM 6 in 2006, the leaders "referred to the need to ensure that there is no impunity for the most serious international crimes and discussed in this context the role of the International Criminal Court (ICC)."[16] Since then, the focus of ASEM has arguably shifted from the ICC to combating piracy and cybercrime.

Nonetheless, since 2002, the European Union itself keeps encouraging the ratification and implementation of the Rome Statute in areas where the ICC is underrepresented. The EU's attempts reportedly contributed to increasing the number of States Parties to include Asian states such as Japan and Maldives.[17] Hopefully, such encouragement and extrinsic motivation will continue to cultivate new ICC members from South East Asia.

Apart from South East Asian prospects for ICC participation, some have an encouraging perspective on the future relationship between China and the ICC. For instance, Hafetz writes: "As China becomes more proactive in global affairs, particularly through increased multilateral humanitarian interventions, it will likely become more engaged with the ICC and supportive of its activities."[18]

3.2 Overview of the Current Relationships Between the Asian Region and the International Criminal Court

3.2.1 Present Circumstances

Although not many Asian states have made much headway toward ICC participation, four situations geographically belonging to the Asian region have been or are the subject of preliminary examinations by the ICC OTP, and they fall within different phases of pre-investigation in accordance with the OTP's classifications.

The OTP has publicly proclaimed that "the Office has established a filtering process comprising four phases."[19] Phase 1 consists of an initial assessment of all information on alleged crimes received under Rome Statute Article 15. Phase 2, which represents the formal commencement of a preliminary examination, is an investigation into whether preconditions to the exercise of jurisdiction under Article 12 are satisfied and whether a reasonable basis exists to believe that the alleged crimes fall within the subject-matter jurisdiction of the Court. Phase 3 focuses on

[15]ASEM 5 (October 2005), *Chairman's Statement, Hanoi*, para. 1.4.

[16]ASEM 6 (10–11 September 2006), *Chairman's Statement of the Sixth Asia–Europe Meeting, Helsinki*, p. 4, para. 12.

[17]European Union (7 July 2014), *the European Union's Reply to the Information Request in paragraph 6, sub-paragraph h) of the Plan of Action for Achieving Universality and Full Implementation of the Rome Statute*, p. 4, para. 2.1.

[18]Hafetz (2014, p. 54).

[19]Office of the Prosecutor (2016, p. 4), para. 15.

the admissibility of potential cases with regard to their gravity and the principle of complementarity, while continuing to collect information on alleged new or on-going crimes. Phase 4 examines interests of justice considerations to formulate a final recommendation to the Prosecutor on whether a reasonable basis exists to initiate an investigation.

The four situations relating to the Asian region are (i) the situation of the Republic of Korea (phase 1), (ii) the situation of Ukraine (phase 2), (iii) the situation of Afghanistan (phase 3) and (iv) registered vessels of Comoros, Greece, and Cambodia (situation under reconsideration).

3.2.2 Situation of the Republic of Korea

First, on 6 December 2010, the ICC OTP announced that it had opened a preliminary examination to evaluate whether two incidents that occurred in 2010 in the Yellow Sea, namely the sinking of a South Korean warship, the *Cheonan*, on 26 March 2010 and the shelling of South Korea's *Yeonpyeong* Island on 23 November 2010, could amount to war crimes under the jurisdiction of the Court.[20] The OTP found that the contextual requirement of the existence of an international armed conflict was met in this situation by the alleged launching of a torpedo at the *Cheonan* and the launching of artillery shells onto *Yeonpyeong*.[21] However, the Prosecutor concluded that, based on a thorough legal and factual analysis of the information available in June 2014, the statutory requirements for seeking authorization to initiate an investigation of the situation in the Republic of Korea had not yet been satisfied.[22]

As to sinking of the *Cheonan*, since the *Cheonan* was a naval vessel and all those on board who drowned—46 sailors from the Republic of Korea—were military personnel, the OTP thought it was not a war crime to attack military objectives including naval ships or to kill enemy military personnel including sailors on a naval ship.[23]

The OTP subsequently determined that the prohibition on the conclusion of an agreement suspending combat with the intention of attacking by surprise an adversary relying on it is not listed as a war crime in the Rome Statute and customary law is unclear.[24] Moreover, the OTP said that it would need to be shown that the Democratic People's Republic of Korea (DPRK) entered into the armistice agreement of 1953 with the specific intent to conduct surprise attacks such as the alleged 2010 attack on the *Cheonan*.[25]

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[20]Office of the Prosecutor (2014a), p. 3, para. 2.

[21]Ibid p. 5, para. 10.

[22]Ibid p. 3, para. 3.

[23]Ibid p. 5, para. 13.

[24]Ibid p. 6, para. 15.

[25]Ibid.

With regard to the shelling of *Yeonpyeong* Island by the DPRK on 23 November 2010, the shells fired hit both military and civilian objects on the island.[26] The shelling resulted in the deaths of four people (two civilians and two military), injuries to sixty-six people (fifty civilians and sixteen military), and large-scale destruction of military and civilian facilities.[27] The OTP considered that, on balance, the available information did not provide a reasonable basis to believe that the DPRK intentionally targeted the civilian population or civilian objects.[28] Since the civilian population of the island was merely 1361, the OTP concluded that a reasonably well-informed person in the circumstances of the actual perpetrator would not have expected the civilian impact to be high.[29] Thus, the situation of Republic of Korea was closed with a decision not to investigate unless further information later became available that would lead the Office to reconsider these conclusions in the light of new facts or evidence.[30]

3.2.3 Situation of Ukraine and the Downing of MH17

Although Ukraine belongs to the Eastern European region and is not an ICC State Party, its situation is under preliminary examination by the ICC and entails the downing of MH17, Malaysia Airlines flight 17, on 17 July 2014. While the state of registration of MH17 is an Asian regional state—Malaysia—she is also not an ICC State Party. The situation of the Ukraine is labelled a phase 2 situation, meaning that the preconditions to the exercise of jurisdiction and the existence of a reasonable basis to believe that the alleged crimes fall within the jurisdiction of the ICC are being considered. In terms of the jurisdictional basis for this non-State Party situation, it was not referred by the United Nations Security Council, but is based on a declaration by a non-State Party under Article 12(3) of the ICC Statute.

On 17 April 2014, the Government of Ukraine lodged a declaration under Article 12(3) of the Rome Statute and accepted the jurisdiction of the ICC over alleged crimes committed on its territory from 21 November 2013 to 22 February 2014.[31] On 25 April 2014, the OTP opened a preliminary examination on the situation of Ukraine.[32] On 8 September 2015, the government of Ukraine lodged a second declaration under Article 12(3), accepting the exercise of ICC jurisdiction in relation to alleged crimes committed on its territory from 20 February 2014 onwards, with no end date.[33] Subsequently, the Prosecutor announced that the

[26]Ibid p. 6, para. 17.
[27]Ibid p. 4, para. 6.
[28]Ibid p. 7, para. 20.
[29]Ibid p. 8, para. 23.
[30]Ibid p. 24, para. 83.
[31]Office of the Prosecutor (2016, p. 33), para. 147.
[32]Ibid p. 33, para. 148.
[33]Ibid p. 33, para. 149.

preliminary examination of the situation in Ukraine now includes alleged crimes occurring after 20 February 2014.[34]

The preliminary examination by the OTP considers that, in parallel with the existence of an international armed conflict between Ukraine and the Russian Federation beginning at the latest on 26 February 2014, there were intense anti-governmental protests in Eastern Ukrainian provinces. On 17 July 2014, a civilian Malaysia Airlines aircraft, flight MH17 from Amsterdam to Kuala Lumpur with 298 passengers and crewmembers, was shot down over Eastern Ukraine. It is alleged that some 80 of the passengers were children.[35] There were no survivors, and the crewmembers were all citizens of Malaysia. The passengers on this aircraft were from the following countries: the Netherlands (193 victims), Malaysia (43 victims), Australia (27 victims), the Republic of Indonesia (12 victims), the United Kingdom (10 victims), Germany (4), Belgium (4 victims), the Republic of Philippines (3 victims), Canada (1 victim), and New Zealand (1 victim).[36] An investigation was conducted by a joint investigation team comprising members from both some of the victims' states and the Ukraine and, according to this joint investigation, the aircraft was shot down from a location near *Pervomaisk* in territory controlled by anti-government armed groups.[37] In Eastern Ukraine, fighting has persisted for more than two years between Ukrainian government forces and anti-government elements allegedly supported by the Russian Federation.[38] The OTP has collected information about more than 800 incidents, including MH17, between February and November 2016 in the context of events in Eastern Ukraine, and the OTP continues to engage in a preliminary examination.[39] In contrast to the Rome Statute, the Convention on Civil Aviation does not provide a legal framework for individual criminal responsibility.[40] Since the shooting down of MH17 has been attributed to a likely non-state actor in the Ukraine, arguably with support from Russia, the states affected by the crash have allegedly tried to secure criminal accountability for the possible suspects rather than pursuing a compensation claim based on state responsibility.[41]

By adopting Resolution 2166 (2014) on 21 July 2014, the Security Council demanded that those responsible for shooting down MH17 be held to account and that all states cooperate fully with efforts to establish accountability.[42] Since some states and civil society activists asked for an international ad hoc tribunal,

[34]Ibid.

[35]UN Doc. S/PV.7498 (29 July 2015), p. 6.

[36]The Dutch Safety Board, *Preliminary Report: Crash Involving Malaysia Airlines Boeing 777-200 Flight MH17, Hrabove, Ukraine, 17 July 2014* (September 2014) p. 12.

[37]Office of the Prosecutor (2016, p. 37), para. 165.

[38]Ibid p. 37, para. 166.

[39]Ibid p. 39, para. 177.

[40]Williams (2016, p. 211).

[41]Ibid.

[42]UN Doc. S/RES/2166 (21 July 2014), para. 11.

a *so-called* MH17 tribunal, or the exercise of jurisdiction by the ICC, a draft resolution to establish such an ad hoc tribunal was presented by Malaysia before the Security Council on 29 July 2015, co-sponsored by Australia, Belgium, Canada, France, Germany, Ireland, Israel, Italy, Lithuania, the Netherlands, New Zealand, the Philippines, Romania, Spain, Ukraine, the United Kingdom, and the United States.[43] However, Russia vetoed the draft resolution and prevented the establishment of an ad hoc tribunal. Angola, China, and Venezuela abstained from the resolution.[44]

If the OTP should decide to open an investigation of incident, one question is the characterization of the shooting down of MH17.[45] According to Professor Sarah Williams, the most likely characterization of the incident is as a potential war crime under Article 8 of the Rome Statute, because one of the requirements of this Article, namely the existence of an armed conflict, appears to be met by the non-international armed conflict between the armed forces of the government of the Ukraine and the separatists.[46] Professor Williams said that, within the context of a non-international armed conflict, possible charges would be the war crime of murder as a violation of Common Article 3 of the Geneva Conventions of 1949 under Rome Statute Article 8(2)(c) and the war crime of intentionally directing attacks against the civilian population under Article 8(2)(e)(i).[47] The most difficult element of war crimes to prove in this incident would be the contextual element of war crimes being "committed as part of a plan or policy or as part of a large-scale commission of such crimes" under Article 8(1). The shooting down of MH17 itself seems unlikely to fulfil this requirement.[48]

The mental elements of the separatists would also be difficult to prove unless the separatists targeted MH17 knowing it was a civilian aircraft and intending to destroy it.[49] In addition, the involvement of Russia with the Ukrainian separatists appears not to have reached the level of overall control required to internationalize the conflict at the time of the shooting down of MH17 in July 2014.[50]

Last but not least, the ICC is only allowed to exercise jurisdiction when competent national courts are unwilling or unable to investigate and prosecute the most heinous crimes of interest to the international community. To meet this ICC admissibility test, the existence of a national investigation and prosecution of the same person and same conduct would be very important under the jurisprudence of

[43]UN Doc. S/2015/562 (29 July 2015), Annex, Statute of the International Criminal Tribunal for Malaysia Airlines Flight MH17.

[44]UN Doc. S/PV.7498 (29 July 2015), p. 2.

[45]Williams (2016, p. 216).

[46]Ibid.

[47]Ibid p. 217.

[48]Ibid p. 220.

[49]Ibid pp. 218–20.

[50]Ibid p. 217.

the ICC.[51] At the same time, the crime would have to be of sufficient gravity in light of Article 17(1)(d) of the Rome Statute. In this respect, an international joint criminal investigation by Australia, Belgium, Malaysia, the Netherlands, and the Ukraine may be comprehensive and large-scale enough to cover similar investigative targets as the ICC OTP if were to select this incident for preliminary examination.[52] Hence, the complementarity requirement of the Rome Statute does not yet seem to be met, especially considering paragraph 4 of Security Council resolution 2166 recognizing the efforts under way by the Ukraine to undertake an international investigation of the incident.[53] For good or for bad, the MH17 incident seems unlikely to be investigated and prosecuted by the ICC, especially given that the ICC has a limited budget and resources targeting the perpetrators of the most serious crimes. Although some lawyers wish the OTP to investigate and prosecute the incident,[54] the principle of complementarity—the principle of exhaustion of local remedies—remains a hurdle.

3.2.4 Situation of Afghanistan

Afghanistan became an ICC Member State in May 2003. Following 112 communications under Article 15 of the Rome Statute, a preliminary examination of the situation in Afghanistan was announced in 2007.[55] The OTP considers the situation in Afghanistan to be an armed conflict of a non-international character between the Afghan government, supported by US forces and an international security force established by United Nations Security Council Resolution 1386, and non-state armed groups, particularly the Taliban.[56] The OTP has already determined that a reasonable basis exists to believe that, at a minimum, the following crimes within the ambit of the Court's jurisdiction have occurred: (i) crimes against humanity and war crimes by the Taliban and its affiliated Haqqani Network; (ii) war crimes of torture and related ill-treatment by Afghan government forces, in particular the intelligence agency (National Directorate for Security) and the Afghan National Police; (iii) war crimes of torture and related ill-treatment by US military forces deployed to Afghanistan and in secret detention facilities operated by the Central

[51]Prosecutor v. Thomas Lubanga Dyilo, "Decision concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo," Pre-Trial Chamber I, Case No. ICC-01/04-01/06 (24 February 2006) p. 20 para. 31. Nonetheless, the decision famously held that "the Chamber considers that it is *a conditio sine qua non* for a case arising from the investigation of a situation to be inadmissible that national proceedings encompass both the person and the conduct which is the subject of the case before the court."

[52]Williams (2016, p. 222).

[53]UN Doc. S/RES/2166 (21 July 2014), para. 4.

[54]Reduan (2016).

[55]Office of the Prosecutor (2016, p. 43), para. 192.

[56]Ibid p. 44, para. 197.

Intelligence Agency, principally in the 2003–2004 period.[57] These crimes were seemingly committed in all 34 Afghanistan provinces[58] and by three separate groups of perpetrators: members of the Taliban and their affiliates constituting anti-government groups, members of the Afghan authorities, and members of the US armed forces or the Central Intelligence Agency (CIA).[59] The OTP has found the potential cases that would arise from an investigation of the situation of Afghanistan admissible pursuant to Article 53(1)(b), apparently fulfilling the requirements of Article 17.[60]

A few elements seem to remain uncertain for the OTP to open an investigation into the situation of Afghanistan officially. First, there exists a law on general amnesty passed by the Afghan parliament in 2007.[61] The law entered into force in 2009, and it had neither a temporal limitation on its application nor an exception for international crimes.[62] However, for now, the OTP "would have no substantial reasons to believe that the opening of an investigation would not be in the interests of justice."[63] Nevertheless, the OTP continues to engage with competent stakeholders to assess whether there are substantial reasons to believe that an investigation would not serve the interests of justice before deciding whether to open an investigation into the situation.[64] Whereas the complementarity test seems fulfilled for the crimes committed by members of anti-governmental groups and the Afghan authorities, the US Department of Justice conducted a preliminary review of allegations related to the abuse of the detainees in the custody of the Central Intelligence Agency, so the OTP is seeking to obtain further clarification on the scope of relevant preliminary reviews and investigations before finalising its determination on the admissibility of the US-related Afghan cases.[65]

The preliminary examination of the situation of Afghanistan has been already treated as a situation in phase 3 of admissibility. This implies that the preliminary examination has reached its final stage. The potential for opening an investigation may be dependent on the availability of domestic investigation and prosecution, as well as the outcome of those available justice alternatives, if any. The gravity of the crimes allegedly committed by the three separate groups of perpetrators in the territory of Afghanistan seems to be serious enough to satisfy the admissibility threshold under Article 53(1)(c) of the Rome Statute, for example the approximately 17,000 civilian casualties between January 2007 and June 2015 attributed to

[57]Ibid p. 44, para. 198.
[58]Ibid p. 44, para. 199.
[59]Ibid p. 47, para. 214.
[60]Ibid p. 47, para. 214.
[61]Ibid p. 48, para. 215.
[62]Ibid.
[63]Ibid p. 50, para. 225.
[64]Ibid p. 51, para. 228.
[65]Ibid pp. 48–49, paras. 221–222.

anti-government armed groups.[66] While the deterrent effect of opening of an OTP investigation on future crimes in Afghanistan remains questionable, the cycle of impunity should be halted, especially for those who are most responsible for the atrocities in Afghanistan.

3.2.5 Situation of the Registered Vessels of Comoros, Greece and Cambodia

Israel imposed a naval blockade on the Gaza Strip up to a distance of 20 nautical miles from the coast,[67] on the high seas. After this blockade, the Free Gaza Movement was formed to challenge it.[68] According to the OTP, the Free Gaza Movement consisted of an eight-vessel flotilla with over 700 passengers from approximately 40 countries seeking to (i) deliver aid to Gaza, (ii) break the Israeli blockade, and (iii) raise international awareness about the closure of the Gaza Strip and put pressure the international community to review its sanctions policy.[69] Of the flotilla's eight ships, one was the *Mavi Marmara*, registered in the Comoros; the remaining ships were registered in Greece, Turkey, Kiribati, Cambodia, and the United States.[70] Of these states of registration, the Comoros, Cambodia and Greece are ICC States Parties. The Cambodian-registered vessel was named the *Rachel Corrie*.[71]

On 31 May 2010, the Israeli Defence Forces (IDF) intercepted six vessels, including the *Mavi Marmara*. By that time, one of the eight vessels had withdrawn due to mechanical difficulties, and the *Rachel Corrie* was delayed in its departure.[72] Although the captain of the *Rachel Corrie* informed Israel that he disputed the Israel's right to board, the *Rachel Corrie* offered no resistance and cut her engines, and the IDF soldiers boarded and detained the vessel peacefully.[73] Therefore the OTP did not view the incident of the *Rachel Corrie* as an attack.[74] However, the interception operation of the *Mavi Marmara* resulted in the death of ten passengers, nine of whom were Turkish nationals, and one had dual Turkish and American nationality.[75] A United Nations Human Rights Council fact-finding mission was created to conduct an inquiry, and its report was delivered in September 2010.[76]

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[66]Ibid p. 48, para. 216.

[67]Office of the Prosecutor (2014b p. 4), para. 10.

[68]Ibid p. 4, para. 11.

[69]Ibid p. 12.

[70]Ibid pp. 13–14, para. 18.

[71]Ibid p. 14, para. 18.

[72]Ibid pp. 4–5, para. 12.

[73]Ibid p. 42.

[74]Ibid.

[75]Ibid pp. 4–5, para. 12.

[76]*Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident* (September 2011).

The OTP received a referral letter from the government of the Comoros, which had ratified the Rome Statute in 2006,[77] on 14 May 2013.[78] The Comoros asked the Prosecutor to look into the 31 May 2010 Israeli interception of the humanitarian aid flotilla bound for the Gaza Strip.[79] On the same day as the referral, the prosecutor announced that she had opened a preliminary examination on it, but on 6 November 2014 she said that the information did not provide a reasonable basis to proceed with an investigation of the situation. Basically, the Prosecutor found that the gravity threshold for admissibility of the situation had not been satisfied for the incident of the *Mavi Marmara*.

The *Mavi Marmara* was carrying over 500 civilian passengers; nine of the 500 passengers were killed by the IDF during the interception, and another passenger later died of injuries caused by the 31 May 2010 incident.[80] On the seven other vessels in the flotilla, no serious injuries occurred during the course of their interception.[81] Therefore, the OTP found that the total number of victims of this situation was relatively limited compared with other cases investigated by the Office.[82] According to the OTP, considering that Israel made offers and proposals to the flotilla participants to permit the delivery of humanitarian supplies through an alternative route and that the humanitarian supplies carried by the vessels were ultimately distributed in Gaza, the interception of the flotilla could not be considered to have a significant impact on the civil population of Gaza.[83]

However, on 29 January 2015, the Comoros filed an application for review of the Prosecutor's decision not to proceed.[84] On 16 July 2015, Pre-Trial Chamber I requested the Prosecutor to reconsider her decision.[85] On 6 November 2015, the Appeals Chamber dismissed the Prosecutor's appeal against the Pre-Trial Chamber's request.[86] Rule 108, paragraph 2, of the ICC Rules of the Procedure and Evidence obligate the Prosecutor to reconsider a decision not to initiate an investigation "as soon as possible." Accordingly, the OTP considered the significance of information made available to the Prosecutor after her decision not to open an investigation.[87] As of November 2016, the OTP is nearing the completion of its review of all information gathered and is preparing to issue the Prosecutor's final

[77]Union of the Comoros, *Referral under Articles 14 and 12(2)(a) of the Rome Statute arising from the 31 May 2010, Gaza Freedom Flotilla Situation* (14 May 2013).

[78]Union of the Comoros, *Referral under Articles 14 and 12(2)(a) of the Rome Statute arising from the 31 May 2010, Gaza Freedom Flotilla Situation* (14 May 2013).

[79]Office of the Prosecutor (2016, p. 69), para. 308.

[80]Office of the Prosecutor (2014b, p. 56).

[81]Ibid.

[82]Ibid.

[83]Ibid p. 57.

[84]Ibid p. 69, para. 310.

[85]Ibid p. 69, para. 311.

[86]Ibid p. 69, para. 312.

[87]Ibid p. 73, para. 330.

decision under Rule 108, paragraph 3, in the near future.[88] In any event, as long as the interception of the *Rachel Corrie* is not characterized as an attack, and it did not involve any casualties, the preliminary examination of the registered vessels of Comoros, Greece, and Cambodia would not in the end have a direct relationship with the Asian region.

3.3 *Possible Targets in the Asian Region of the OTP's Preliminary Examination*

What are the future prospects for the Asian region and the ICC? There are some foggy prospects for both the ICC itself and its relationship with the Asian region. To be precise, the future prospects for the ICC and African countries are unclear and shaky compared with the ICC's relationship with Asian countries. Today, 34 states of 124 ICC Member States belong to the African continent. However, some African states, such as Burundi, South Africa, and Gambia were reported on October 2016 to be ready to exit from the ICC.[89] Experts reportedly believe that Kenya, Namibia, and Uganda could be among the next countries leave the Court.[90]

The African States are still in flux. There is a glimmer of hope found the movements of some African countries. After the democratically elected President of Gambia, Mr. Adama Barrow, took his office in the end of January 2017, the Gambia notified the United Nations Secretary-General of the country's rescission of its withdrawal from the Rome Statute of the International Criminal Court.[91] On 22 February 2017, the High Court of South Africa ordered that The notice of withdrawal from the Rome Statute of the International Criminal Court, signed by the Minister of International Relations and Cooperation on 19 October 2016, without prior parliamentary approval, is unconstitutional and invalid. Of course, it remains to be seen whether South Africa continues its membership of the ICC.[92]

On 13 October 2016, the Prosecutor expressed her concern about reported extra-judicial killings of alleged drug dealers and users in the Philippines.[93] On 17 November 2016, the Philippines' president, Rodrigo Duterte, said that the

[88]Ibid p. 73, para. 331.

[89]Sieff (2016).

[90]Ibid.

[91]"Statement attributable to the Spokesman for the Secretary-General on the Occasion of the Gambia's Notification of Recession of its Withdrawal from the Rome Statute of the International Criminal Court" 16 February 2017, https://www.un.org/sg/en/content/sg/statement/2017-02-16/statement-attributable-spokesman-secretary-general-occasion-gambia's (accessed 25 February 2017).

[92]*Democratic Alliance v. Minister of International Relations and Cooperation and Others (Council for the Advancement of the South African Constitution Intervening)*, "Judgment", North Gauteng High Court, 83145/2016 [2017] ZAGPPHC 53 (22 February 2017).

[93]ICC-CPI (2016).

Philippines might withdraw from the ICC, having heard the news from the OTP and the news of the Russian withdrawal of her signature from the Rome Statute.[94] Just one day before the President Duterte's announcement, on 16 November 2016, the Russian President Vladimir Putin ordered his Foreign Ministry to inform the Secretary General of the United Nations that Russia had formally withdrawn her signature from the Rome Statute and no longer intended to participate in it.[95] Yet, some hopeful signs may be found in the statement of the Philippines at the general debate of the 15th Assembly of States Parties on 17 November, the same day as the statement by the President Duterte on a possible withdrawal from the Rome Statute. The representative of the Philippines government confessed in closing his speech that "we await further instructions from the President of the Philippines, on the matter of our future relationship with the Court. Meanwhile, the Philippines fervently hopes for the faithful implementation of the system of the Rome Statute."[96] Nonetheless, the government of the Philippines warned the OTP about the Prosecutor's statement on the situation in the Philippines, describing it as "premature."[97] The report indirectly suggested the likelihood of a chilling effect on the interests of the Eastern Asian countries in joining the Rome Statute.[98]

Even though the potential harm from a few African states walking away from the Court and the Russian withdrawal of its signature from the Rome Statute are yet to be seen, the OTP must want to address the geographical imbalance among the situation countries of the Court so as to maintain its sociological legitimacy and substantive legitimacy for the Court's stakeholders, especially States Parties.

In addition to the current preliminary examination conducted by the OTP on incidents in the Asian region, massive human rights violations in Cambodia may be the next target for a preliminary examination by the OTP. On 7 October 2014, a communication under the Article 15 of the Rome Statute was filed with the OTP with regard to alleged crimes against humanity committed against Cambodian civilians through the Cambodian state apparatus.[99] If the OTP takes this communication on Cambodian human rights violations seriously and the admissibility test

[94]Rauhala (2016).

[95]Plachta (2016, p. 463).

[96]"Statement of the Philippines," General Debate of the 15th Assembly of States Parties to the Rome Statute of the International Criminal Court, World Forum, the Hague, Netherlands (17 November 2016) p. 2.

[97]Ibid.

[98]Ibid. The representative of the Philippines said that: "Without passing upon how that [the Prosecutor's] statement may have somehow chilled the interest of our neighboring countries in joining the Rome Statute, allow us to help clear the air."

[99]FIDH/Global Diligence, Executive Summary: *Communication under Article 15 of the Rome Statute of the International Criminal Court: the Commission of Crimes against Humanity in Cambodia July 2002 to Present* (7 October 2014) para. 1. See also FIDH Press Release, "Cambodia: Preliminary Examination Requested into Crimes Stemming from Mass Land Grabbing" (7 October 2014).

is also met, then as one commentator has noted: "This shift is remarkable. Not only is the ICC beginning to move away from cases involving African States; it is also partly moving away from atrocities committed during war."[100] Moreover, given the fact that the communication was driven by Cambodian victims' groups rather than a state's self-referral, as in many African situations, "[w]ere the Prosecutor's office to take on more files brought by victims or civil society, the ICC would appear to act on behalf of victims' rights rather than as a complaint tool of opportunistic political interests."[101]

4 Conclusion

Active participation by Asian states in the ICC would be a step towards the Court's universality. The core values of the Rome Statute and the ICC are unambiguously linked to human dignity and the universality of human rights. The preamble of the Rome Statute stresses such universalism. For example, the first preambular paragraph says that State Parties to this Statute are conscious "that all people are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time." For the ICC to enhance its legitimacy among stakeholders, ensuring universality and the universal application of law is a key. Especially under the current circumstances of some African States stepping out of the ICC while accusing it of focusing on Africa, Asian regional support for the ICC would dispel growing distrust in the Court.

However, before doing that, the international community and State Parties, especially those of the Asian region, should give non-State Parties of the Asian region confidence about their domestic criminal justice systems in the context of the principle of complementarity of the Rome Statute. In this sense, the ICC is, inherently, not a charitable foundation through which developing countries and post-conflict countries can develop their domestic legal systems. The mandate of the ICC is restricted in this respect. Although the Trust Fund for Victims was established in accordance with Article 79 for the benefit of victims of crimes within the Court, there is no equivalent fund envisaged by the Statute to offer financial support for the establishment of independent and fair domestic legal systems.

Human rights are human's rights and shall be universal. Taking cynical attitudes towards the ICC under the cloak of the uniqueness of Asian culture runs counter to the basic spirit of human rights. As is well known, the Vienna Declaration and Programme of Action 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." In this connection, the ASEAN Human Rights Declaration was adopted at the 21st the ASEAN summit in November 2012,

[100] Cruvellier (2016).
[101] Ibid.

using the Vienna Declaration as a benchmark.[102] Nonetheless, the Vienna Declaration may be interpreted as emphasising regionalism backed by universalism, as it declares:

> While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.

The Asian State Parties of the Rome Statute have already contributed to the development of the ICC in several ways. At the time of writing in January 2017, the Asian region holds three seats in the ICC judicial chambers: Republic of Korea Judge Chung-ho Chung, Japanese Judge Kuniko Ozaki, and Philippine Judge Raul Cano Pangalangan. These three Asian states' financial contribution to the ICC are also not small.[103] In addition, the Asian region has already experienced the international prosecution of mass atrocities through the International Military Tribunal for the Far East (*aka* Tokyo tribunal), the Special Panels of the Dili District Court in East Timor, and the Extraordinary Chambers in the Courts of Cambodia. Against this background, the Asian region may contribute to the ICC by utilizing lessons from the past and taking the initiative in international criminal justice outreach.[104]

In 2017, the ICC will have the 15th anniversary of its creation. By its 20th anniversary, the Asian region or the ICC, which will be marginalised? The result remains to be seen, but the ratification map of the Rome Statute may already imply the marginalisation of the Asian region and the United States in international criminal justice. Scepticism and timid regionalism will not promote human rights, but undermine confidence in respecting universal human rights in the Asian region. Despite the Asian region's cultural uniqueness and various differences from Western cultures, the core values of international criminal justice are common through the world. The Asian region must also be a part of the fight against impunity and can enhance the legitimacy and universality of the International Criminal Court through the active participation of Asian states.

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[102]Jones (2014, pp. 77–78).

[103]For example, in 2016, Japan contributed to 23,391,916 euros, the Republic of Korea contributed 4,875,871 euros, and the Philippines contributed 385,802 euros. See Assembly of States Parties, *Report of the Committee on Budget and Finance on the Work of Its Twenty-Seventh Session*, ICC-ASP/15/15 (28 October 2016) pp. 36–67.

[104]Judge Song (2011, p. 8).

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Part III
Special Topics of Human Rights in Europe and Asia

The Principle of Non-discrimination in the European Convention on Human Rights and in EU Fundamental Rights Law

Niels Petersen

1 Introduction

The demand that everybody should be treated equal before the law seems to be one of the central requirements of the rule of law. However, while the postulate of equal protection is intuitively plausible, its application is not straightforward. Instead, norms necessarily discriminate.[1] They only apply to a certain group of people and grant them benefits or impose obligations on them. For this reason, there is a discussion in legal scholarship on the essence of equal protection clauses.[2]

In principle, there are two ways to deal with this tension. First, differentiations are not prohibited as such. Instead, they can be justified. The question then becomes under which conditions differentiations between two individuals or social groups are justified. However, there is a certain fear that a simple two-step test that asks first whether there is a differentiation and second whether this differentiation can be justified gives judges too much discretion.[3] For this reason, there are attempts to restrict the scope of equal protection clauses. Such restrictions may either be contained in the text of the provision or they may be imposed by the jurisprudence.

The most influential approach to restrict the scope of an equal protection clause is the system of tiered scrutiny that has been developed by the US Supreme Court. The Supreme Court has identified three levels of scrutiny. Under the strict scrutiny

[1]Sunstein (1982, p. 129), Farrell (1999, p. 358) and Chemerinsky (2016, p. 4).
[2]See e.g., Hellman (2008) and Khaitan (2015).
[3]See Yoshino (2011, p. 759) (arguing that "courts simply cannot perform the Sisyphean task of independently testing the fairness of every governmental distinction").

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test, distinctions are only justified "if they are necessary to promote a compelling government interest."[4] At the other end of the scale is the rational basis test. Under the rational basis test, a distinction is justified if it has a rational connection to a legitimate aim.[5] It is a rare exception that a legislative act is declared unconstitutional under the rational basis test.[6] Finally, the Court has developed an intermediate scrutiny test for distinctions which are not serious enough to merit strict scrutiny, but which demand for a more searching inquiry than the rational basis test.

While the tiered scrutiny model of the US Supreme Court has rarely been fully adopted in other legal systems, the idea that equal protection clauses need some kind of restrictive application has been very influential. This contribution will analyze two European solutions to the problem and the interplay between restrictions imposed by the text and their interpretation by the competent courts. First, I will look at the European Convention of Human Rights. Art. 14 ECHR contains two types of restrictions. On the one hand, the scope or application of the provision is limited. It only applies to discriminations occurring in the context of other convention rights. On the other hand, it is supposed to protect, in particular, against discriminations based on specific grounds, listed in Art. 14 ECHR, even though this list is not exclusive.

Second, I will analyze the case of the European Court of Justice. While the EU treaties contain a number of different equal protection guarantees, I will focus on two of them: the prohibition of discriminations based on nationality contained in Art. 18 TFEU and the general prohibition of discrimination in Art. 21 (1) of the EU Charter of Fundamental Rights. Both also have two qualifications, one concerning the scope and one concerning the criterion of distinction.

2 The European Convention on Human Rights

Art. 14 ECHR contains two explicit qualifications regarding its scope. First, Art. 14 ECHR does not prohibit all kinds of discriminations, but only discriminations that occur during the "enjoyment of the rights and freedoms set forth in this convention." There has been a recent attempt to abolish this restriction. Art. 1 of Additional Protocol No. 12 contains a general prohibition of discrimination that does not presuppose a connection with any other convention right. However, the practical relevance of this new provision has been limited. It has been ratified by only 19 member states. Consequently, the European Court of Human Rights has, as of yet, rarely referred to it in its jurisprudence so that the restriction contained in

[4]See *Reno v. Flores*, 507 U.S. 292, 301-02 (1993); *Washington v. Glucksberg*, 521 US 702, 720-21 (1997).

[5]See *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421 (1952); *Williamson v. Lee Optical*, 348 U.S. 483 (1955); *Allied Stores v. Bowers*, 358 U.S. 522 (1959); *U.S. R.R. Retirement Bd. v. Fritz*, 449 U.S. 166 (1980); *Pennell v. City of José*, 485 U.S. 1 (1988).

[6]Yoshino (2013, p. 333), Holoszyc-Pimentel (2015, p. 2071) and Chemerinsky (2016, p. 2).

Art. 14 ECHR stays very relevant. Second, the textual restriction regarding the criterion of distinction *prima facie* looks like a rather weak one. Art. 14 ECHR is not per se limited to specific reasons for discrimination. Certainly, the provision contains a list of grounds of distinction that are considered to be particularly problematic, such as sex, race, religion or origin. However, the list is not exclusive.

2.1 The Scope of Application of Art. 14 ECHR

The ECtHR has interpreted the scope of application of Art. 14 ECHR rather broadly. The Court does not require the violation of another guarantee of the Convention for Art. 14 ECHR to be applicable.[7] It does not even demand that the alleged discrimination falls within the scope of application of another convention right. Instead, it is sufficient that "the facts at issue fall within the ambit" of a provision of the ECHR or one of its additional protocols.[8]

One of the paradigmatic cases to illustrate the meaning of this interpretation is *Karlheinz Schmidt v. Germany*.[9] The applicant had been asked to pay a yearly fire service levy of 75 Deutsche Mark (approx. 38.35 EUR). In the region where he lived, such a fire service levy was seen as a compensation for not performing fire service duty. However, in the region in question only males were required to serve the fire service so that the levy only applied to male residents. The applicant argued that this provision imposed a discrimination based on sex.

The Court ruled that the fire service levy fell into the ambit of Art. 4 (2) ECHR, which prohibits forced or compulsory labor.[10] It referred to Art. 4 (3) lit. d ECHR, which stated that normal civic obligations should not fall under the term 'forced and compulsory labor'.[11] It argued that the levy was closely connected to these civic obligations because of its compensatory function for the obligation to serve in the fire brigade.[12] While Art. 4 (3) lit. d explicitly excluded such civil obligations from the scope of application of Art. 4 (2) ECHR, it also showed that they were close enough to fall into the ambit of the provision.[13]

This tendency to consider certain facts as part of the ambit of a convention guarantee even though they explicitly do not fall into the scope of application can also be observed in other decisions. This concerns in particular the application of

[7] *Abdulaziz, Cabales and Balkandali v. U.K.*, 28 May 1985, Series A No. 94, at para. 71.

[8] *Rasmussen v. Denmark*, 28 Nov. 1984, Series A No. 87, at para. 29; *Inze v. Austria*, 28 Oct. 1987, Series A No. 126, at para. 36; *Karlheinz Schmidt v. Germany*, 18 July 1994, Series A No. 291-B, at para. 22; *Van Raalte v. the Netherlands*, App. No. 20060/92, ECHR 1997-I, at para. 33.

[9] *Karlheinz Schmidt*, supra note 8.

[10] *Id.*, at para. 22.

[11] *Id.*

[12] *Id.*, at. para. 23.

[13] *Id.*, at para. 22.

Art. 14 ECHR to taxes, public contributions and social benefits. The Court argues, for example, that the obligation to pay taxes falls into the ambit of Art. 1 of the Additional Protocol even though the provision explicitly states that it does not "impair the right of a State […] to secure the payment of taxes or other contributions or penalties."[14] In *Darby*, the Court regarded a Swedish rule according to which only Swedish residents who were not member of the church could be exempted from church taxes, while non-residents did not qualify for an exemption, as a violation of Art. 14 ECHR.[15] When analyzing the scope of application, the Court referred to the second paragraph of Art. 1 AP, which excludes taxes from the protection of the norm, but argued that it put them into the "field of application" of Art. 1 AP.[16]

In other decisions, the Court regarded social benefits for families to be part of the ambit of Art. 8 ECHR even if member states were not obliged to grant benefits under the Convention.[17] For example, the decision in *Okpisz* concerned a German rule according to which child benefits were only granted to permanent residents, but not to individuals with a provisional residence permit.[18] The Court argued that, even if states were not obliged to grant child benefits under Art. 8 ECHR, they showed "their respect for family life" through them so that they fell under the ambit of the provision.[19]

This short review on the applicability of Art. 14 ECHR shows that the ECtHR interprets the scope of application of the provision rather extensively. In particular, Art. 8 ECHR and Art. 1 AP serve as 'door openers' for the application of the equal protection guarantee. With this extensive interpretation, almost any facts have some kind of connection to a convention right. In its effects, therefore, Art. 14 ECHR does not differ that much from a general prohibition of discrimination as established by Art. 1 AP XII.

2.2 Criteria of Distinction

While the ECtHR interprets the scope of application of Art. 14 ECHR rather broadly, it does not show the same tendency with regard to the criteria of distinction. While the wording of Art. 14 ECHR, which is not restricted to specific

[14] *Darby v. Sweden*, 23 Oct. 1990, Series A No. 187, at para. 30; *van Raalte*, *supra* note 8, § 34; *P. M. v. UK*, App. No. 6638/03, 19 July 2005, at paras. 26–29; *Driha v. Romania*, App. No. 29556/02, 21 Feb. 2008, at paras. 34–39.

[15] *Darby*, *supra* note 15.

[16] *Id.*, at para. 30.

[17] *Okpisz v. Germany*, App. No. 59140/00, 25 Oct. 2005, at para. 32; *Weller v. Hungary*, App. No. 44399/05, 31 March 2009, at para. 29; *Fawsie v. Greece*, App. No. 40080/07, 28 Oct. 2010, at paras. 31–40.

[18] *Okpisz*, supra note 18.

[19] *Id.*, at para. 32.

criteria of distinction would allow for an extensive interpretation, the Court shows self-restraint. It argues that

> Article 14 does not prohibit all differences in treatment but only those differences based on an identifiable, objective or personal characteristic, or 'status', by which persons or groups of persons are distinguishable from one another.[20]

This approach also shows in the jurisprudence. When the ECtHR finds a violation of Art. 14 ECHR, the distinction in question is usually based on a suspect classification even if the criterion of distinction is not always explicitly mentioned in the catalogue of the provision. Discriminations based on race or ethnicity,[21] sex,[22]

[20] *Clift v. UK*, App. No. 7205/07, 13 July 2010, at para. 55.

[21] See e.g., *Aziz v. Cyprus*, App. No. 69949/01, ECHR 2004-V; *Nachova and others v. Bulgaria* [GC], App. No. 43577/98, ECHR 2005-VII; *Moldovan and others v. Romania*, App. No. 41138/98, ECHR 2005-VII; *Bekos and Koutropoulos v. Greece*, App. 15250/02, ECHR 2005-XIII; *Šečić v. Croatia*, App. No. 40116/02, 31 Aug. 2007; *Cobzaru v. Romania*, App. No. 48254/99, 26 July 2007; *Angelova and Iliev v. Bulgaria*, App. 55523/00, 26 July 2007; *Petropoulou-Tsakiris v. Greece*, App. No. 44803/04, 6 Dec. 2007; *Sampanis and others v. Greece*, App. No. 32526/05, 5 June 2008; *Turan Cakir v. Belgium*, App. No. 44256/06, 10 March 2009; *Muños Díaz v. Spain*, App. No. 49151/07, ECHR 2009; *Seijdic and Finci v. Bosnia and Herzegovina*, App. No. 27996/06, ECHR 2009; *Oršuš and others v. Croatia*, App. No. 15766/03, ECHR 2010; *Paraskeva Todorova v. Bulgaria*, App. No. 37193/07, 25 March 2010; *B.S. v. Spain*, App. No. 47159/08, 24 July 2012; *Makhashevy v. Russia*, App. No. 20546/07, 31 July 2012; *Fedorchenko and Lozenko v. Ukraine*, App. 387/03, 20 Sept. 2012; *Yotova v. Bulgaria*, App. No. 43606/04, 23 Oct. 2012; *Lăcătuş v. Romania*, App. No. 12694/04, 13 Nov. 2012; *Sampani and others v. Greece*, App. No. 59608/09, 11 Dec. 2012; *Horváth and Kiss v. Hungary*, App. No. 11146/11, 29 Jan. 2013; *Lavida v. Greece*, App. No. 7973/10, 30 Mai 2013; *Abdu v. Bulgaria*, App. No. 26827/08, 11 March 2014; *Antayev v. Bulgaria*, App. No. 37966/07, 3 July 2014; *Zornić v. Bosnia and Herzegovina*, App. No. 3681/06, 15 July 2014; *Ciorcan and others v. Romania*, App. No. 29414/09, 27 Jan. 2015; *Balázs v. Hungary*, App. No. 15529/12, 20 Oct. 2015; *Boacă and others v. Romania*, App. No. 40355/11, 12 Jan. 2016; *Biao v. Denmark* [GC], App. No. 38590/10, ECHR 2016.

[22] See e.g., *Abdulaziz*, supra note 8; *Schuler-Zgraggen v. Switzerland,* 24 June 1993, Series A No. 263; *Karlheinz Schmidt*, *supra* note 9; *van Raalte*, *supra* note 9; *Wessels-Bergervoet v. Netherlands,* App. No. 34462/97, ECHR 2002-IV; *Willis v. UK,* App. No. 36042/97, ECHR 2002-IV; *Ünal Tekeli v. Turkey,* App. No. 29865/96, ECHR 2004-X; *Zarb Adami v. Malta*, App. No. 17209/02, ECHR 2006-VIII; *Zeman v. Austria,* App. No. 23960/02, 29 June 2006; *Paulik v. Slovakia,* App. No. 10699/05, 2006-XI; *Hobbs, Richard, Walsh and Geen v. UK,* App. No. 63684/00, 14 Nov. 2006; *Weller*, *supra* note 18; *Opuz v. Turkey,* App. No. 33401/02, ECHR 2009; Losonci Rose and Rose v. Switzerland, App. No. 664/06, 9 Nov. 2010; *Konstantin Markin v. Russia,* App. No. 30078/06, ECHR 2012; *Huela v. Romania,* App. No. 33411/05, 2 Oct. 2012; *García Mateos v. Spain,* App. No. 38285/09, 9 Feb. 2013; *Leventoglu Abdulkadiroglu v. Turkey,* App. No. 7971/07, 28 May 2013; *Eremia v. Moldova,* App. No. 3564/11, 28 May 2013; *Mudric v. Moldova,* App. No. 74839/10, 16 July 2013; *Tanbay Tüten v. Turkey,* App. No. 38249/09, 10 Dec. 2013; *Cusan and Fazzo v. Italy,* App. No. 77/07, 7 Jan. 2014; *T.M. and C.M. v. Moldova,* App. No. 26608/11, 28 Jan. 2014; *Emel Boyraz v. Turkey,* App. No. 61960/08, 2 Dec. 2014; *Vrountou v. Cyprus,* App. No. 33631/06, 13 Oct. 2015; *Di Trizio v. Switzerland,* App. No. 7186/09, 2 Feb. 2016; *M.G. v. Turkey,* App. No. 31740/96, 22 March 2016.

sexual orientation[23] or religion[24] amount to more than half of all decisions in which the Court held that Art. 14 ECHR was violated. The remaining decisions predominantly concern situations in which specific social groups typically are not sufficiently represented in and thus protected by the political process. These relate, for example, to discriminations based on nationality,[25] birth out of

[23]See e.g., *Salgueiro da Silva Muta v. Portugal,* App. No. 33290/96, ECHR 1999-IX; *L. and V. v. Austria,* App. No. 39392/98, ECHR 2003-I*; Karner v. Austria,* App. No. 40016/98, ECHR 2003-IX; *B.B. v. UK,* App. No. 53760/00, 10 Feb. 2004; *Bączkowski v. Poland,* App. No. 1543/06, 3 May 2007; *E.B. v. France,* App. No. 43546/02, 22 Jan. 2008; *Kozak v. Poland,* App. No. 13102/02, 2 March 2010; *P.B. and J.S. v. Austria,* App. No. 18984/02, 22 July 2010*; J.M. v. UK,* App. No. 37060/06, 28 Sept. 2010; *Alekseyev v. Russia,* App. No. 4916/07, 21 Oct. 2010; *Genderdoc-M v. Moldova,* App. No. 9106/06, 12 June 2012; *X v. Turkey, App. No. 24626/09, 9 Oct. 2012; X and others v. Austria,* App. No. 19010/07, 19 Feb. 2013; *E.B. and others v. Austria,* App. No. 31913/07, 7 Nov. 2013; *Vallianatos v. Greece,* App. No. 29381/09, ECHR 2013; *Identoba v. Georgia,* App. No. 73235/12, 12 May 2015; *Pajić v. Croatia, App. No. 68453/13, 23 Feb. 2016; M.C. and A.C. v. Romania,* App. No. 12060/12, 12 Apr. 2016*; Taddeucci and McCall v. Italy,* App. No. 51362/09, 30 June 2016.

[24]See e.g., *Hoffmann v. Austria*, 23 June 1993, Series. A No. 255-C; *Thlimmenos v. Greece*, App. No. 34369/97, ECHR 2000-IV; *Palau-Martinez v. France*, App. No. 64927/01, ECHR 2003-XII; *97 Members of the Gldani congregation of Jehova's Witnesses v. Georgia*, App. No. 71156/01, 3 May 2007; *Religionsgemeinschaft der Zeugen Jehovas v. Austria,* App. No. 40825/98, 31 July 2008; *Löffelmann v. Austria,* App. No. 42967/98, 12 March 2009; *Sâmbata Bihor Greek Catholic Parish v. Romania,* App. No. 48107/99, 12 Jan. 2010*; Grzelak v. Poland,* App. No. 7710/02, 15 June 2010; *Savez crkava "Riječ života" and others v. Croatia,* App. No. 7798/08, 9 Dec. 2010; *Milanović v. Serbia,* App. No. 44614/07, 14 Dec. 2010*; O'Donoghue and others v. UK,* App. No. 34848/07, ECHR 2010; *Manzanas Martín v. Spain,* App. No. 17966/10, 3 Apr. 2012; *Jehovas Zeugen in Österreich v. Austria,* App. No. 27540/05, 25 Sept. 2012; *Vojnity v. Hungary,* App. No. 29617/07, 12 Feb. 2013; *Begheluri v. Georgia,* App. No. 28490/02, 7 Oct. 2014; *Cumhuriyetçi Eğitim ve Kültür Merkezi Vakfi v. Turkey,* App. No. 32093/10, 2 Dec. 2014; *İzzettin Doğan v. Turkey,* App. No. 62649/10, 26 April 2016.

[25]See e.g., *Koua Poirrez v. France*, App. No. 40892/98, ECHR 2003-X; *Luczak v. Poland*, App. No. 77782/01, 27 Nov. 2007; *Andrejeva v. Latvia*, App. No. 55707/00, ECHR 2009; *Weller*, *supra* note 18; *Fawsie v. Greece*, App. No. 40090/07, 28 Oct. 2010; *Ponomaryovi v. Bulgaria*, App. No. 5335/05, ECHR 2011; *Rangelov v. Germany*, App. No. 5123/07, 22 March 2012; *Kurić and others v. Slovenia* [GC], App. No. 26828/06, ECHR 2012; *Dhahbi v. Italy*, App. No. 17120/09, 8 Apr. 2014.

wedlock or adoption,[26] health issues or disability,[27] or discriminations related to prisoners.[28]

Nevertheless, there are certain cases that do not fit under this general rule. In *Chassagnou*, the ECtHR held that a French provision that obliged the owners of small pieces of farm- or wood-land to enter into a municipal hunters' association, while owners of larger estates were excluded from this obligation, violated Art. 14 ECHR.[29] In *Driha*, it qualified a Romanian practice, according to which the old-age allowances of some soldiers were subject to taxation while the allowances of other soldiers in similar circumstances were not taxed, as discrimination.[30] Finally, in *Altinay*, the Court found a violation because the rules for access to university had been changed without further notice and without providing transitional arrangements for individuals who had made investments according to the old rules.[31]

However, these cases are exceptions. In general, the Court indeed only finds violations if the law or state measure in question makes a distinction based on a suspect criterion. These criteria are not necessarily only the ones explicitly mentioned in Art. 14 ECHR. Rather, the Court has also identified other criteria, such as sexual orientation, which are, in its view, equally problematic. Nevertheless, the observations demonstrate that the Court shows considerable restraint when it comes to the criteria of distinction that can be a basis for discrimination.

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[26]See *Marckx v. Belgium*, 13 June 1979, Series A No. 31; *Inze*, *supra* note 9; *Mazurek v. France*, App. No. 34406/97; ECHR 2000-II; *Hoffmann v. Germany*, App. No. 34045/96, 11 Oct. 2001; *Sahin v. Germany* [GC], App. No. 30943/96, ECHR 2003-VIII; *Merger and Cros v. France*, App. No. 68864/01, 22 Dec. 2004; *Pla and Puncernau v. Andorra*, 69498/01, ECHR 2004-VIII; *P.M. v. UK*, *supra* note 15; *Brauer v. Germany*, App. No. 3545/04, 28 May 2009; *Zaunegger v. Germany*, App. No. 22028/04, 3 Dec. 2009; *Sporer v. Austria*, App. No. 35637/03, 3 Feb. 2011; *Negrepontis-Giannisis v. Greece*, App. No. 56759/08, 3 May 2011; *Genovese v. Malta*, App. No. 53124/09, 11 Oct. 2011; *Fabris v. France*, App. No. 16574/08, ECHR 2013; *Topčić-Rosenberg v. Croatia*, App. No. 19391/11, 14 Nov. 2013.

[27]See e.g., *Glor v. Switzerland*, App. No. 13444/04, ECHR 2009; *G.N. and others v. Italy*, App. No. 43134/05, 1 Dec. 2009; *Kiyutin v. Russia*, App. No. 2700/10, ECHR 2011; *I.B. v. Greece*, App. No. 552/10, ECHR 2013; *Çam v. Turkey*, App. No. 51500/08, 23 Feb. 2016; *Novruk and others v. Russia*, App. No. 31039/11, 15 March 2016; *Guberina v. Croatia*, App. No. 23682/13, ECHR 2016.

[28]See e.g., *Clift*, *supra* note 21; *Laduna v. Slovakia*, App. No. 31827/02, ECHR 2011; *Gülay Cetin v. Turkey*, App. No. 44084/10, 5 March 2013; *Varnas v. Lithuania*, App. No. 42615/06, 9 July 2013; *Costel Gaciu v. Romania*, App. No. 39633/10, 23 June 2015; *Martzaklis v. Greece*, App. No. 20378/13, 9 July 2015.

[29]*Chassagnou and others v. France*, App. No. 25088/94, ECHR 1999-III.

[30]*Driha v. Romania*, App. No. 29556/02, 21 Feb. 2008.

[31]*Altinay v. Turkey*, App. No. 37222/04, 9 July 2013.

3 EU Fundamental Rights Law

The treaties establishing the European Union and, formerly, the European Communities have contained non-discrimination clauses from the beginning. However, these prohibitions of discrimination have been very specific in their scope. First, Art. 157 TFEU and its predecessors established the principle of equal pay for male and female workers for equal work or work of equal value. This prohibition of discrimination only concerned distinctions based on the sex of the employee and only with reference to the remuneration. Second, the fundamental freedoms implicitly contained a prohibition to discriminate based on nationality. Again, this prohibition contains a double restriction: It only concerns direct or indirect discriminations with regard to the nationality of the concerned individual or company, and the discriminatory measure has to fall into the scope of application of the respective fundamental freedom. Third, the treaties contained, from the beginning, a general prohibition to discriminate based on nationality, which is contained in Art. 18 TFEU. While this norm is, in principle, more extensive than the non-discrimination principles of the fundamental freedoms, its application is also restricted. It only applies to situations "within the scope of application of the Treaties".

An explicit general prohibition of discrimination has, for the first time, been introduced by Art. 21 (1) of the EU Charter of Fundamental Rights, which has been part of European primary law since the entry into force of the Treaty of Lisbon. Like Art. 14 ECHR, Art. 21 (1) of the Charter lists certain grounds of discrimination that are particularly problematic. However, these grounds are not exclusive. Art. 21 (2) repeats the prohibition to discriminate on the basis of nationality which is already contained in Art. 18 TFEU. In the following analysis, I will restrict myself to these latter two prohibitions of discrimination.

3.1 The Prohibition of Discrimination Based on Nationality

The European Court of Justice (ECJ) has developed the prohibition to discriminate on the basis of nationality contained in Art. 18 TFEU and Art. 21 (2) of the Charter into a powerful instrument of judicial review. As already mentioned, the norm contains two explicit restrictions: On the one hand, it only prohibits discriminations based on nationality, not on other grounds, such as gender, race or sexual orientation. On the other hand, it only has normative force within the scope of application of the European treaties. Outside the scope of the treaties, member states are, in principle, free to discriminate based on nationality.

However, the ECJ has interpreted the scope of Art. 18 TFEU extensively. Concerning the ground of distinction, the Court not only targets direct discriminations, but also indirect discriminations, in which an apparently neutral distinction has the effect of favoring nationals of the home state over nationals of

other member states.[32] In particular, it has on several occasions qualified residency requirements as indirect discriminations.[33] Furthermore, it has also seen distinctions based on the country of secondary education,[34] the membership in the national public social security scheme,[35] the place of registration of a motor vehicle,[36] the reception of certain national social benefits[37] or the country of origin of an operating license[38] as indirect discriminations. Nevertheless, the prohibition of indirect discriminations is not absolute. The Court has on several occasions accepted justifications if the distinction pursued a legitimate objective and was proportionate.[39]

The Court did not only interpret Art. 18 TFEU extensively with regard to the criterion of distinction, nationality, but also with regard to the scope of application. In the early years of the European Communities, the general prohibition to discriminate based on nationality only played a marginal role next to the non-discrimination principles contained in the fundamental freedoms. After all, economic integration was the main purpose of the European Communities so that activities falling into the scope of the treaties were usually also covered by the fundamental freedoms. However, this changed considerably after the introduction of the union citizenship with the treaty of Maastricht in 1993.[40]

One of the landmark cases in which the ECJ developed the connection between the prohibition of discrimination in Art. 18 TFEU and the general right to freedom of movement, which was newly introduced through the union citizenship, was the decision in *Martínez Sala*.[41] The applicant in the case was a Spanish national who had come to Germany as a child and worked there for several years before receiving social assistance payments. After the birth of her child, she applied for a child-raising allowance. Her application was refused because she did not have a formal residence permit, which was, under the German law, a precondition for receiving the allowance. The Court argued that Art. 18 TFEU was applicable because every union citizen who lawfully resided in another member state took

[32]Cases C-29/95, *Pastoors* [1997] ECR I-300, para. 16; C-411/98, *Ferlini* [2000] ECR I-8126, para. 57; C-224/00, *Commission v. Italy* [2002] ECR I-2981, para. 15; C-628/11, *International Jet Management GmbH*, EU:C:2014:171, para. 64.

[33]*Pastoors*, *supra* note 7, at para. 17; C-209/03, *Bidar* [2005] ECR I-2151, para. 52–53; C-155/09, *Commission v. Greece* [2011] ECR I-65, para. 46; C-73/08, *Bressol* [2010] ECR I-2735, para. 42–46; C-382/08, *Neukirchinger* [2011] ECR I-139, para. 34.

[34]Cases C-224/98, *D'Hoop* [2002] ECR I-6212, para. 31–34; C-65/03, *Commission v. Belgium* [2004] ECR I-6429, para. 29; C-147/03, *Commission v. Austria*, [2005] ECR I-5992.

[35]*Ferlini*, *supra* note 7, at para. 58.

[36]*Commission v. Italy*, *supra* note 7, at para. 16.

[37]Case C-75/11, *Commission v. Austria*, EU:C:2012:605, para. 50–51.

[38]*International Jet Management GmbH*, *supra* note 7, at para. 65–67.

[39]*Bressol*, *supra* note 8, para. 48.

[40]On the union citizenship, see Shaw (1998), Hailbronner (2005), Bellamy (2008), Spaventa (2008), Kadelbach (2010) and Wollenschläger (2011).

[41]Case C-85/96, *Martínez Sala* [1998] ECR I-2708.

advantage of the guarantee of freedom of movement contained in Art. 21 TFEU. Therefore, the case fell under the provision of European citizenship and thus under the scope of application of the treaty.[42]

The Court confirmed this principle in *Grzelczyk* where it ruled that students had the same right to social assistance as member state nationals even if they did not fall under the scope of the freedom of movement for workers according to Art. 45 TFEU.[43] The fact that they were lawfully resident in another member state and thus exercising their right under Art. 21 TFEU was sufficient to open the scope of application of Art. 18 TFEU.[44] In *Bickel and Franz*, the ECJ extended the protection of Art. 18 TFEU to union citizens on short-term trips to another member state for professional purposes or as tourists. As such individuals exercised their rights to move and reside freely in another member state pursuant to Art. 21 TFEU, they could also enjoy the equal protection guarantee of Art. 18 TFEU.[45]

If we accept this interpretation of the ECJ, there are hardly cases imaginable, in which Art. 18 TFEU does not apply. At least to the extent that a union citizen is lawfully present in the territory of another member state, he also enjoys the protection of Art. 18 TFEU. The restrictive character of the qualification that a situation has to be "within the scope of application of the Treaties" only has practical significance if a union citizen resides within its home state. A Romanian or Bulgarian citizen residing in his home country cannot claim social assistance in France or Belgium.

However, to reach that result the qualification is not necessary because, in principle, the ECJ accepts residency requirements for the reception of social benefits as justified.[46] In other cases, the ECJ has recently also shown a more restrictive tendency when it comes to the payment of social benefits to union citizens who are not actively working or studying in their host state in order to prevent social benefits tourism.[47] However, these cases are rather a specification of the ECJ's previous jurisprudence than a deviation from it. After all, despite the broad interpretation of the scope of application of Art. 18 TFEU, the Court has never established an absolute prohibition of discrimination.

[42] *Id.*, at para. 61.

[43] Case C-184/99, *Grzelczyk* [2001] ECR I-6229.

[44] *Id.*, at para. 31–33.

[45] Case C-274/96, *Bickel and Franz* [1998] ECR I-7650, para. 16.

[46] See Cases C-137/02, *Collins* [2004] ECR I-2735, para. 67–72; C-158/07, *Förster* [2008] ECR I-8507, para. 45–58.

[47] See Cases C-22/08 and C-23/08, *Vatsouras and Koupatantze* [2009] ECR I-4585; C-333/13, *Dano*, EU:C:2014:2358; C-67/14, *Alimanovic*, EU:C:2015:597.

3.2 The General Prohibition of Discrimination in Art. 21 (1) of the EU Charter on Fundamental Rights

Art. 21 (1) of the Charter, establishing a general prohibition of discrimination regardless of the ground of distinction is also restricted in its scope of application. According to Art. 51 of the Charter, the fundamental rights of the Charter are binding for the member states only to the extent that they implement EU law. The ECJ has interpreted the term "implementation of EU law" broadly so that it also covers situations in which member states have a margin of appreciation in the implementation of directives[48] or in which they restrict the fundamental freedoms of the EU treaties.[49] Nevertheless, its scope of application is not as broad as the scope of Art. 18 TFEU because the mere fact that a union citizen is present in another member state does not yet constitute the implementation of EU law by a member state. Such an interpretation would make the Charter applicable to all interactions between member states and citizens of other member states on their territory. However, the ECJ has not decided on the issue, yet.

The existing case law on Art. 21 (1) of the Charter is scarce. The two most important cases concern age discrimination.[50] In *Mangold*, the ECJ had to decide on a German labor law provision concerning fixed-term employment contracts.[51] In principle, a fixed-term employment contract could only be concluded for a specific reason. However, the law allowed for an exception for employees of more than 52 years of age. In order to facilitate their reintegration into the labor market, fixed-term contracts with employees over 52 years could be concluded without a specific reason. The ECJ regarded the provision to be in violation of Art. 6 (1) of the Directive 2000/78 because it went beyond what was necessary to promote the reintegration of older employees into the labor market.[52] However, it could not apply the directive directly because the period for transposition had not yet expired. Therefore, the Court argued that the "principle of non-discrimination of age" had to be regarded as a general principle of EU law[53] and that the national court had to set aside national provisions violating this principle.[54]

The decision in *Kücükdeveci* also concerned a German labor law norm.[55] According to the provision in question, employment periods before the age of

[48]See Cases 5/88, *Wachauf* [1989] ECR 2633; C-117/06, *Möllendorf* [2007] ECR I-8390, para. 78–79; C-411/10 and C-493/10, *N.S.* [2011] ECR I-13905, para. 60–68; C-617/10, *Åkerberg Fransson*, EU:C:2013:105.

[49]See Cases C-260/89, *ERT* [1991] ECR I-2951; C-368/95, *Familiapress* [1997] ECR I-3709, para. 24–25; C-60/00, *Carpenter* [2002] ECR I-6305.

[50]Cases C-144/04, *Mangold* [2005] ECR I-10013; C-555/07, *Kücükdeveci* [2010] ECR I-365.

[51]*Mangold*, *supra* note 26.

[52]*Id*., at para. 58–65.

[53]*Id*., at para. 75.

[54]*Id*., at para. 77.

[55]*Kücükdeveci*, *supra* note 26.

25 years were not taken into account for the calculation of the notice period for terminating an employment relationship. The Court held that the provision was not in conformity with directive 2000/78. However, even though the transposition period had now expired, the Court could again not apply the directive directly because there is no horizontal direct application of directives.[56] Nevertheless, the Court argued that the directive opened the scope of application of Art. 21 (1) of the Charter and that it was the latter which was applicable in the case at hand.[57]

4 Conclusion

General prohibitions of discriminations are often considered to be problematic because they give courts a large amount of discretion. For this reason, the drafters of equal protection guarantees often include qualifications and limitations in order to avoid judicial activism. Sometimes, courts also exercise self-restraint. This contribution analyzed equal protection guarantees in the European Convention of Human Rights as well as the EU treaties and the interpretation of these guarantees by the respective courts.

Art. 14 ECHR and the analyzed equal protection guarantees of the EU treaties contain two types of qualifications and limitations. The first concerns the scope of application. Art. 14 ECHR only applies to facts that also fall in the ambit of other convention rights. Art. 18 TFEU exclusively extends to situations within the scope of application of the EU treaties. Art. 21 (1) of the Charter imposes obligations on member states to the extent that they are implementing EU law. Both analyzed courts have tendencies to interpret the scope of application rather broadly. The ECtHR defines an ambit of each convention right, which is wider than the scope of application and sometimes also includes situations that are explicitly excluded from the latter. Similarly, the ECJ uses the general freedom of movement in Art. 21 TFEU as a 'door opener' for Art. 18 TFEU. Consequently, there are hardly any relevant situations, in which the courts refuse to find a discrimination because of the limited scope of Art. 14 ECHR or Art. 18 TFEU. With regard to Art. 21 of the Charter, the evidence is rather scarce. But the ECJ has also shown a general tendency to interpret the scope of application of the Charter rather generously.[58]

The second criterion concerns the criterion of distinction. The most specific provision in this respect is Art. 18 TFEU, which only prohibits distinctions based on nationality. The ECJ has interpreted the criterion of distinction broadly as it does not only include direct, but also indirect discriminations. However, this doctrinal

[56] *Id.*, at para. 46.

[57] *Id.*, at para. 50.

[58] On this issue see Lenaerts (2012), Matz-Lück (2012), Jarass (2012), Kadelbach (2013) and Ward (2014), para. 51.49. For a critique of this jurisprudence, see Cremer (2003), Huber (2008) and Sauer (2012), pp. 28–29.

move is necessary in order not to deprive the guarantee of its effectiveness. By contrast, the ECtHR has exercised restraint when it comes to the criteria of distinction in Art. 14 ECHR. Even though the provision does not contain a *numerus clausus* of prohibited distinctions, the ECtHR has argued that not any distinction be covered by Art. 14 ECHR. Instead, it has generally only applied the provision to problematic distinctions suggesting that a measure may have been the result of an intentional discrimination. The case law on Art. 21 of the Charter is not sufficiently developed to draw any definitive conclusions on the position of the ECJ in this respect.

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Women's Rights and Gender Equality in Europe and Asia

Sara De Vido

1 Introduction

Women's rights do not only constitute a fertile ground of research for feminists worldwide, but should be put at the forefront of the research of international law scholars to challenge a male-centred conception of the law.[1] The international law of human rights is not devoid of guarantees to women: international conventions have been adopted both at the international and regional level, and soft law has spurred the recognition of women's rights over the 20th Century and at the beginning of the 21st Century. The principle of non-discrimination on the basis of sex is enshrined in the majority of national constitutions, although it is absent from the constitutions of some ASEAN countries,[2] and States have adopted laws promoting equality between women and men in employment and in many other sectors. Nonetheless, the data available at the international level show that, despite important achievements to combat de jure or formal discrimination, which is nonetheless present, de facto or substantive discrimination is still a matter of severe concern.

[1]See in that respect Chinkin and Charlesworth (2000).
[2]The principle of non-discrimination is not included in the constitutions of Brunei Darussalam, Lao PDR, Philippines, and Thailand. Furthermore, Singapore and Indonesia, despite having a provision on non-discrimination, does not mention gender as ground of discrimination.

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1.1 Some Data on Gender (in)Equality

According to the data provided by the World Bank, the rate of participation of women in paid work in East Asia and the Pacific is 61%, compared to 79% for men.[3] Europe and Central Asia present lower rates, due to the persistence of the economic crisis: 51% for women, 67% for men. If we have a closer look at two countries belonging to these two areas of the world, Japan and Italy, we can easily see that, despite existing a difference in numerical terms, the gap between female and male population in the labour market is similar. Hence, the rate of the female labour force participation amounts to 49% in Japan, whereas male labour force participation reaches 70%. In Italy, the percentages are respectively 40 and 60. The gap is 21 percentage points for Japan, 20 percentage points for Italy.

According to the most recent data available at the European Union level, the gender pay gap is 16%, and this happens despite the fact that women have outnumbered men among new graduates, which implies that female employees are now generally more educated than male employees.[4] In OECD countries, the gender wage gap, related to full-time employees, has reached, according to the latest data, 15.46%, with the highest level in Korea (36.60), Estonia (31.50), Japan (26.59), Israel (21.83).[5] Above the OECD average are also some European countries, such as the Netherlands (20.46), and, shifting to the American continent, the United States (17.91). The lowest rate has been registered in New Zealand (5.62).

As far as violence against women (VAW) is concerned, global statistics published by the World Health Organisation indicate that about 1 in 3 women worldwide have experienced either intimate physical and/or sexual partner violence or non-partner sexual violence in their lifetime, and that most of the violence is intimate partner violence.[6] Having a look at the different regions of the world, the rate does not significantly differ between Europe (25.4) and Western Pacific area (24.6), although a higher level of violence has been registered in the South-East Asia region (37.7). Furthermore, the data are only partially reliable since women's perception of violence is different and so is the level of reporting to the authorities

[3]Gender data portal of the World Bank, available at http://datatopics.worldbank.org/gender/ (last accessed on 1 June 2017). It is a comprehensive source for the latest sex-disaggregated data and gender statistics covering demography, education, health, access to economic opportunities, public life and decision-making, and agency.

[4]European Commission, *Report on Equality between women and men 2015*, Bruxelles, 2016.

[5]https://www.oecd.org/gender/data/genderwagegap.htm (last accessed on 1 June 2017).

[6]WHO, *Violence against Women, Intimate Partner and Sexual Violence against Women*, updated November 2016.

in cases of abuse. Four of the ten ASEAN countries do not criminalise marital rape,[7] whereas Japan still has weak legislation on rape.[8]

Against this backdrop, it is clear that discrimination against women, especially in the economic sector and in the case of violence against women, is still persistent, in every country in the world, and if we investigate further, we would easily understand that discrimination is present in multiple sectors, including the health one. Two major discrepancies between Asia (ASEAN countries) and Europe can be caught from the analysis. The first is related to the fact that de jure discrimination is still present in countries such as Brunei Darussalam and Malaysia, where married women cannot either choose where to live or transmit citizenship to their children.[9] The second discrepancy relates to participation in politics; in Europe, the participation of women is improving. Hence, for example, in Italy, the number of women sitting in the national parliament and in the government are steadily increasing, reaching 30–50% in 2015.[10] Broadening the focus, the United States and Canada still present a low percentage of female participation in politics, between 10 and 30%, whereas in Asian countries like Japan and Thailand, the rate is less than 10%.[11]

1.2 Purpose and Limits of the Analysis

The purpose of this chapter is to provide an overview of the evolution of the protection of women's rights in Europe and Asia. The chapter will focus on violence against women and on trafficking of women, on which two recent conventions, respectively in the European and Asian systems, have been adopted. We are referring to the Council of Europe Istanbul Convention on preventing and combating violence against women and domestic violence, concluded in 2011 and entered into force in 2014 (Istanbul Convention),[12] and to the ASEAN Convention against trafficking in persons, especially women and children (ASEAN Convention against trafficking) , opened to signature in 2015 and only recently entered into force.[13] We will demonstrate that, both in Europe and Asia, significant improvements in the recognition of women's rights and in the promotion of gender equality

[7]Data from the ASEAN Action plan on the Elimination of Violence against Women (ASEAN RPA on EVAW), adopted at the summit of November 2015. http://www.asean.org/storage/images/2015/November/27th-summit/ASCC_documents/ASEAN%20Regional%20Plan%20of%20Action%20on%20Elimintation%20of%20Violence%20Against%20WomenAdopted.pdf (last accessed on 1 June 2017).

[8]Yano (2007, p. 198 ff).

[9]*Women, Business and Law data*, World Bank, 2016, p. 8.

[10]http://datatopics.worldbank.org/gender/country/italy (last accessed on 1 June 2017).

[11]http://datatopics.worldbank.org/gender (last accessed on 1 June 2017).

[12]CETS No. 210. Number of ratifications as of 1 August 2017: 24.

[13]It entered into force on 8 March 2017, after the deposit by the Philippines of the sixth instrument of ratifications (Article 29 of the Convention).

have been registered, although these measures have not been sufficient to guarantee substantial equality, which goes beyond the mere recognition of the principle of non-discrimination against women, and have not eradicated violence against women. The chapter does not purport to compare two systems which present specific characteristics, but rather to show how the protection of human rights, and in particular women's rights, can benefit from a dialogue between regional experiences. We will therefore support the trend toward 'regionalisation' in the protection of women's rights, encouraging, at the same time, a dialogue between the systems themselves. Despite differences in societies and cultures, discrimination against women *does* present a common trend, and, in order to eradicate it, States must undertake specific actions of prevention, protection, and, where relevant, prosecution. We will suggest that the Council of Europe Istanbul Convention should constitute a model for further regional legal instruments on the issue, and that non-Member States of the Council of Europe be encouraged by international bodies, such as the UN Special Rapporteur on violence against women, to ratify it.[14] With regard to ASEAN, we will assess the important step undertaken by member States with the adoption of the ASEAN Convention against trafficking. Nonetheless, we will stress one limit, namely the fact that the text reproduces the provisions enshrined in the 2000 Protocol to prevent, suppress and punish trafficking in persons especially women and children, supplementing the United Nations Convention against transnational organized crime,[15] without taking into account the peculiarities of the phenomenon in ASEAN countries.[16]

The boundaries of our research should be clearly declared at the outset. The first boundary is geographical. We will focus on the Council of Europe and the European Union, on the one hand, and on ASEAN countries plus Japan, on the other hand. It means that other regions of the world, including Southern Asia, will be excluded from the analysis. The second boundary is 'gendered'. We will only refer to the situation of women, although being perfectly aware of the fact that gender discrimination also concerns LGBTQAI.

2 Evolution of Women's Rights at the International Level

In this part we will provide an overview of the main legal instruments in force at the international level for the protection of women's rights before analysing regional instruments in that respect.

As stressed by Charlesworth, 'the major focus of the protection of women's rights internationally has been the right to equal treatment and non-discrimination on the basis of sex.'[17] The equality between the sexes was encapsulated into the UN

[14]The Convention is open to non-Member States of the Council of Europe according to Article 76.

[15]The protocol was adopted and opened to signature in 2000.

[16]Asis (2008, p. 190).

[17]Charlesworth (2009, p. 384).

Charter of 1945,[18] although the issue of the status of women had already been placed on the League of Nations agenda in 1935. As it is known, the Universal Declaration of human rights prohibits discrimination on the basis of sex with regard to the enjoyment of the rights enshrined in the Declaration.[19] The prohibition of discrimination on the basis of sex is also part of the two Covenants on civil and political rights, and on economic, social and cultural rights, respectively at Articles 2(1) and 3, and Articles 2(2) and 3. Since the Covenants do not contain a definition of 'discrimination' or 'equality', and despite the use of the term 'enjoyment' which suggests equality in the outcome, 'many State parties interpreted their obligations narrowly, as requiring formal, rather than substantive, equality.'[20]

Thirteen years later, the UN General Assembly adopted the Convention on the elimination of all forms of discrimination against women (CEDAW), which is considered as the most significant international legal instrument for the protection of women's rights. The legal instrument points out the specificity of women's experience of discrimination, it provides a definition of 'discrimination against women',[21] and promotes substantive equality.[22] It has been ratified by 189 States, including all the member States of the Council of Europe, all ASEAN countries, and Japan.[23] States parties are obliged to implement the provisions of the Convention, also through a modification of their domestic legislation, and to present periodic reports to the Committee established by the Convention itself (so-called 'CEDAW Committee'). A comparable number of ratifications has not been achieved by the optional protocol to the CEDAW, which was adopted in 1999, and only counts 109 parties. The protocol empowers the Committee to receive complaints lodged by individuals against States which have ratified the protocol itself for violations of the CEDAW. Widely accepted by European countries, the protocol was only ratified by Cambodia, Philippines and Thailand (ASEAN countries), and it has not yet been ratified by Japan.[24]

Even though the importance of the CEDAW cannot be denied, it is necessary to stress that women's participation at UN level is still insufficient, in particular as far as the composition of the UN treaty bodies is concerned. The Committee on economic social and cultural rights is composed, as of 20 February 2017, of only 5 women out of a total of 18 experts, and only recently the situation has improved in

[18]Article 1 (4).

[19]Article 2.

[20]Otto (2013, p. 320).

[21]Article 1: 'For the purposes of the present Convention, the term 'discrimination against women' shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.'

[22]Otto (2013, p. 323).

[23]Consider, however, the reservations appended by some countries.

[24]According to Nakashima (2007, p. 45), the primary reason seems to be that 'Japan considers itself to already have an adequate human rights protection system in place.'

the Human Rights Committee, which counts 8 women out of a total of 18 members. As one can easily imagine, in the CEDAW Committee women are widely represented. Chinkin clearly posits that 'the invisibility of women in the national public sphere has been replicated at the international level with very low participation by women in senior positions in international institutions.'[25]

Shifting the focus from the international to the regional level, it should be stressed a trend towards the 'regionalisation' of the protection of women's rights, which responds to the challenges stemming from the peculiarities of the society in which these rights are implemented. Therefore, the Council of Europe Istanbul Convention takes into account, for example, the increasing phenomenon of multiculturalism of European societies by prohibiting any kind of justification for crimes based on honour, culture and religion, which implies, among others, a complete ban of female genital mutilation.[26] The Maputo Protocol to the African Charter on human and peoples' rights on the rights of women in Africa of 2003 stresses the importance of economic, social, cultural and third-generation women's rights, which are not included in the European instrument. Multiculturalism, in the way it has developed in Western countries, differs from the notion of multicultural 'conviviality' as elaborated by some scholars in Japan, a concept which expresses the diversity 'in terms of gender, race, ethnicity, religion, and culture,' that are 'important to contemporary modes of identity and belonging.'[27]

With regard to women's rights, regionalisation can also be considered a way to encounter the accusation of 'imperialism' exercised by women from the North with regard to women from the South.[28]

2.1 On the Principle of Non-discrimination

Compared to other situations, discrimination on the grounds of sex and gender—and sexual orientation[29]—has only recently become high priority at the international level. As posited by Nussbaum, 'brutal and oppressive discrimination on grounds of race is taken to be unacceptable in the global community; but brutal and oppressive discrimination on grounds of sex is often taken to be a legitimate expression of cultural differences.'[30] Furthermore, with regard to women, many violations of women's rights tend to be culturally justified, invoking, in other

[25]Chinkin (2012a, p. 1).

[26]Article 38 of the Convention.

[27]According to Ito Ruri (reported in Tsujimura 2010, pp. 4–5), in North America, multiculturalism developed into a comprehensive human rights policy that 'not only includes ethnicity but also gender, sexual orientation, and differences based on disabilities.'

[28]Orford (2002, p. 285), Bond (2003, p. 72).

[29]See Article 21 of the Charter of Fundamental Rights of the European Union (2000/C 364/01), which provides for the first time the case of discrimination on the ground of sexual orientation.

[30]Nussbaum (2006, p. 260).

words, cultural reasons. As Charlesworth points out 'it is striking that 'culture' is much more frequently invoked in the context of women's rights than in any other area,' and this is caused by the fact that 'dominant cultures tends to be conservative and few encourage the participation of women.'[31]

Going back to the CEDAW, even though it plays a pivotal role in the protection of women's rights at the international level, it presents some limitations due to an understanding of the principle of non-discrimination which is still biased with regard to women. Dianne Otto argues that CEDAW is based on a continuous comparison with men, which means that women are only entitled of 'special measures' as a vulnerable category, and does not include violence against women as a form of discrimination on the grounds of gender.[32]

3 Evolution of Women's Rights and Gender Equality in Europe and Asia

3.1 The European Union

The principle of equal pay for equal work was first included in the Treaty of Rome. Article 157 of the Treaty on the functioning of the European Union (TFEU, former Article 119 (1) ECC and Article 141 EC) reads: 'Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.' The principle of equal pay for equal work was extensively interpreted by the European Court of Justice and considered in both its economic and social dimension as 'part of the foundations of the Community.'[33] Furthermore, Article 153 TFEU (former 137 EC) empowers the EU to 'support and complement' the activities of the Member States in the field of 'equality between men and women with regard to labour market opportunities and treatment at work.' Gender mainstreaming emerges from Article 8 TFEU, under which 'in all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women.' According to Article 19 TFEU, the Council, 'acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.' European Union law aimed at fighting against human

[31]Charlesworth (2009, p. 390).

[32]The recognition of violence against women as a form of discrimination was only achieved in 1992 with General Recommendation no. 19 issued by the CEDAW Committee, and with the subsequent resolution of the UN General Assembly on violence against women of 1993.

[33]*Gabrielle Defrenne v. SA Sabena*, Case 43/75, judgment of 8 April 1976, European Court of Justice, para. 12. The word 'pay' was also extensively interpreted in order to encompass contracted-out pension schemes (*Barber v. Guardian Royal Exchange Assurance group*, C-262/88, judgment of 17 may 1990).

trafficking, in particular women and children, has as legal bases Articles 79 and 83 TFEU, the latter aimed at the adoption of minimum rules concerning the definition of criminal offences and sanctions in 'the areas of particularly serious crime with a cross-border dimension.'

The Lisbon treaty has qualified equality between women and men as one of the five founding values of the European Union (Article 2 of the Treaty on European Union, TEU). Equality is also among the aims of the EU (Article 3 (3) TEU), on which the organisation 'shall develop a special relationship with neighbouring countries' (Article 8 TEU). Since the Lisbon treaty, the Charter of fundamental rights of the EU has the same legal value as the treaties (Article 6 TEU), and contains an entire chapter (III) on equality. According to its Article 23: 'Equality between men and women must be ensured in all areas, including employment, work and pay. The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.'

The protection of women from gender-based violence is neither enshrined in the EU treaties nor in the Charter of Fundamental Rights, a fact that has not prevented the EU from taking action to counteract the offences related to violence against women. The action of the EU has been mainly devoted to the achievement of gender equality, which also encompasses initiatives with regard to the eradication of violence against women.[34] The only reference to violence against women in the EU Treaties can be found in Declaration 19 to the Final Act of the 2007, referring to Article 8 TFEU, which provides that among the efforts to 'eliminate inequalities between women and men,' the Union will aim to combat all kinds of domestic violence in its different policies.[35]

As far as secondary legislation is concerned, several acts have been adopted over the years with regard to equality in employment, starting from Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women.[36] With regard to violence against women, the EU has adopted specific measures aimed at countering the trafficking of human beings, in particular women and children,[37] and the victims of crime, including Regulation (EU) 606/2013 on the mutual recognition of protection measures in civil matters which will play a pivotal role in the recognition of restriction orders; and Directive 2012/29/EU, establishing

[34]See Hervey (2005, p. 307 ff.); and Sümer (2009, p. 67).

[35]Declaration on Article 8 of the Treaty on the Functioning of the European Union, annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007.

[36]Directive 75/117/EEC on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women [1975] L45/19.

[37]Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA [2011] L101/1. For the purpose of our analysis, we have decided to focus on the Council of Europe Istanbul Convention.

minimum standards on the rights, support and protection of victims of crime.[38] The EU addressed the offence of sexual harassment committed in the workplace in Council Directive 2000/78/EC, established a general framework for equal treatment in employment and occupation in Directive 2002/73/EC, and created Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation address harassment, including sexual harassment.[39]

Moving from legal instruments to policies and non-binding acts, it should be acknowledged that the EU has been prolific in the adoption of measures to address different aspects of gender inequality. The European Parliament has been active in combating violence against women and domestic violence since as early as 1979, when it voted in favour of establishing the *ad hoc* Committee on women's rights.[40] The EU Parliament Committee on Women's Rights and Gender Equality continues its activity in present day, dealing with several issues, including the eradication of violence against women. Furthermore, in 2006, the EU established the European Institute for Gender Equality (EIGE) in Regulation (EC) No. 1922/2006, which launched the Gender Equality Index in 2015.[41] The European Commission, along with the support given to numerous awareness-raising campaigns in EU countries, adopted the Women's Charter in 2010,[42] and in June 2015 promoted a 'Forum on the Future of Gender Equality in the European Union.'[43] With specific regard to

[38]Regulation (EU) 606/2013 on mutual recognition of protection measures in civil matters [2013] L 181/4. See also Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA [2012] L 315/57; Directive 2011/99/EU on the European protection order [2011] L 338/2.

[39]Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation [2000] L 303/16; Directive 2002/73/EC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [2000] L 269/15; Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] L 204/23. See also the European Added Value Assessment Combatting violence against women, 'An assessment accompanying the European Parliament's Legislative own-Initiative Report (Rapporteur Antonyia Parvanova, MEP)' (2013) 15 http://www.europarl.europa.eu/meetdocs/2009_2014/documents/femm/dv/eav_violence-against-women-/eav_violence-against-women-en.pdf (last accessed on 1 June 2017).

[40]It should be noted that Simone Veil was at that time the president of the European Parliament and the first woman to be elected for this position.

[41]The progress in gender equality are still not sufficient. See http://eige.europa.eu/news-and-events/news/eige-launches-gender-equality-index-2015-marginal-improvements-gender-equality (last accessed on 1 June 2017).

[42]Communication from the Commission, A Strengthened Commitment to Equality between Women and Men—A Women's Charter: Declaration by the European Commission on the occasion of the 2010 International Women's Day in commemoration of the 15th anniversary of the adoption of a Declaration and Platform for Action at the Beijing UN World Conference on Women and of the 30th anniversary of the UN Convention on the Elimination of All Forms of Discrimination against Women COM (2010) 78 final.

[43]See the Report of 10 June 2015 http://ec.europa.eu/justice/events/future-of-gender-equality-2015/files/report_forum_gender_equality_en.pdf (last accessed on 1 June 2017).

one form of violence against women—female genital mutilation—all EU institutions have clearly taken a position to prohibit the practice.[44] In the conclusions presented by the EU General Affairs Council in 2013, 'An overarching post-2015 framework', the institution particularly stressed the importance of the principle of equality, by acknowledging that the empowerment of women and girls, and the prevention of violence against women, are 'preconditions' for achieving equitable and inclusive sustainable development.[45]

EU measures for the promotion of women's rights are undoubtedly advanced although they have not been enough to reach de facto equality for women in the 27 (after Brexit is completed) Member States. EU directives need implementation at domestic level. Furthermore, the legal framework is fragmented in a panoply of acts which lack unity. Concerning the action to combat violence against women, this unity could be achieved thanks to the ratification by the EU of the Council of Europe Istanbul Convention.[46]

3.2 Council of Europe

The Council of Europe has promoted de jure and de facto gender equality in its 47 Member States since 1980s. Four binding legal instruments must be mentioned in the field of women's rights. Firstly, the European Convention on human rights, dating back to 1950, contains many provisions that can be applied—and have been by the European Court of human rights in its judgments–in order to protect women's rights. Article 14 provides for the prohibition of discrimination on 'any ground', including sex. The protection of women's rights can be also achieved through the application of the provisions on, among others, the right to life, the right to respect for private and family life, the prohibition of torture, and the prohibition of slavery and forced labour. With regard to the latter, the jurisprudence of the European Court of human rights has played a fundamental role in bringing the prohibition of trafficking within the terms of Article 4 of the European Convention.[47]

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[44]See, for example, European Parliament Resolution on Ending Female Genital Mutilation (2012/2684(RSP)); EU Commission, Communication to the European Parliament and the Council Towards the elimination of female genital mutilation COM(2013) 833 final; European Parliament Resolution on the Commission Communication entitled 'Towards the elimination of female genital mutilation' (2014/2511(RSP)); Council of the EU Justice and Home Affairs Conclusions on preventing and combating all forms of violence against women and girls, including female genital mutilation, 5 June 2014.

[45]The Overarching Post 2015 Agenda—Council conclusions, General Affairs Council meeting Luxembourg, 25 June 2013, http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/foraff/137606.pdf (last accessed on 1 June 2017).

[46]See, in that respect, De Vido (2017).

[47]*Rantsev v. Cyprus and Russia*, judgment of 7 January 2010, European Court of Human Rights, paras. 277–278.

Secondly, following a chronological order, the European Social Charter emphasises the importance of equality in matters of employment and occupation (Article 1).

Thirdly, another fundamental instrument is the Council of Europe Convention on action against human trafficking adopted in 2005 and entered into force in 2008. It builds on the UN Protocol to the Palermo Convention,[48] but, compared to the former, it focuses more on the protection of the victim rather than on law enforcement provisions, and provides for higher standards of sanctions against traffickers.[49] The gender-based approach emerges from the very beginning of the text of the Convention. According to Article 1, the main purpose of the legal instrument is to 'prevent and combat trafficking in human beings, while guaranteeing gender equality.' The Convention affirms for the first time that trafficking in human beings constitutes a violation of human rights.[50] The implementation of the legal instrument is guaranteed by a group of experts, called GRETA, which periodically prepares reports in which it analyses and evaluates the measures adopted by a State party to implement the Convention.

The fourth binding instrument which must be mentioned is the Council of Europe Istanbul Convention on preventing and combating violence against women and domestic violence, adopted in 2011, which will be object of analysis in the following paragraph.

Other non-binding instruments (recommendations, action plans, key standards) have been adopted over the years to promote gender equality.[51] The Council of

[48]See the definition of trafficking at Article 4 (a): 'Trafficking in human beings shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.'

[49]See Gallagher and Holmes (2008, p. 322), Pati (2009, p. 335).

[50]The UN Protocol only refers in the preamble to the protection of the victims' internationally recognized human rights.

[51]Council of Europe Key Standards on Gender Equality and Women's Rights (2015); Make equality in law a reality in fact—Compilation of recommendations of the Committee of Ministers in the field of equality between women and men (2011); Recommendation Rec(2007)17 of the Committee of Ministers to member states on gender equality standards and mechanisms adopted on 21 November 2007 and explanatory memorandum; EG (2009) 2 Report: National machinery, action plans and gender mainstreaming in the Council of Europe member states since the 4th World Conference on Women (Beijing 1995); Stocktaking study of the effective functioning of national mechanisms for gender equality in Council of Europe member states; EG (2004) 4 Report: National machinery, action plans and gender mainstreaming in the Council of Europe member states since the 4th World Conference on Women (Beijing 1995); EG (2001) 7 Handbook on national machinery to promote gender equality and action plansGuidelines for establishing and implementing national machinery to promote equality, with examples of good practice; EG-S-PA (2000) 7 Report: Positive Action in the Field of Equality between Women and Men; Recommendation R (85) 2 of the Committee of Ministers on legal protection against sex

Europe also endorsed in November 2013 the Gender Equality Strategy which includes five strategic goals: combating gender stereotypes and sexism; combating violence against women; guaranteeing equal access of women to justice; achieving balanced participation of women and men in political and public decision-making; achieving *gender mainstreaming* in all policies and measures.[52] The strategy counts on a Gender Equality Commission, composed of members appointed by the member States; a network of national focal points in each member State; gender equality rapporteurs within the steering committees and other intergovernmental structures of the Council of Europe; and finally an Inter Secretariat gender mainstreaming team. It should be noted that the gender equality commission does not deal with violence against women, which is part of the mandate of GREVIO, the Committee established by the Council of Europe Istanbul Convention.

3.2.1 The Council of Europe Istanbul Convention

The Council of Europe Istanbul Convention is the most advanced legal instrument in force at regional level to combat violence against women and domestic violence.[53] It is not the purpose here to analyse the Convention article by article; the explanatory notes by the Council of Europe are sufficiently clear to understand the scope and the main provisions of the treaty.[54] A few remarks are however necessary in order to appraise the potential added value of the Convention also for Asian countries, which do not belong to the system of the Council of Europe. The Istanbul Convention clearly differentiates between violence against women and domestic violence which might affect women but also children, men, and elderly people. Violence against women is defined as 'a violation of human rights and a form of discrimination against women,' which include 'all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life' (Article 3.a). The definition of domestic violence does not solely refer to acts committed against women, rather to any kind of physical, sexual, psychological or economic violence 'that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim' (Article 3.b). With regard to States' obligations deriving from

(Footnote 51 continued)

discrimination; Recommendation CM/Rec(2012)6 of the Committee of Ministers on the protection and promotion of the rights of women and girls with disabilities.

[52]http://www.coe.int/en/web/genderequality/gender-equality-strategy (last accessed on 1 June 2017).

[53]At regional level, two other instruments must be mentioned: the Belém do Parà Convention (Inter-American system) and the Maputo Protocol (African system).

[54]Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence Istanbul, 11 May 2011.

treaty provisions, the Convention requires State parties to criminalise several forms of conduct which amount to violence against women and domestic violence, whether these forms of conduct have not yet been included in their respective criminal codes. The types of conduct encompass forced marriage, female genital mutilation, forced abortion, stalking, sexual harassment, physical and psychological violence and sexual violence. The Convention also requires State parties to ensure that in criminal proceedings regarding the acts of violence covered by the Convention, 'culture, custom, religion, tradition or so-called 'honour' are not regarded as justifications of such acts' (Article 42, para 1).[55] The Convention then obliges State parties to take the necessary legislative or other measures to ensure that the offences established in the Convention are punishable by effective, proportionate and dissuasive sanctions (Article 45), taking into account their seriousness and aggravating circumstances, such as the fact that the acts are committed in the presence of a child (Article 46). As for preventive and protective measures, States must promote 'changes in the social and cultural patterns of behavior of women and men with a view to eradicating customs, traditions and all other practices which are based on the idea of the inferiority of women or on stereotyped roles for women and men' (Article 12),[56] and provide support services for victims of violence, including legal and psychological counselling, financial assistance, housing, education, training and assistance in finding employment (Article 20), specialist support services (Article 22), shelters (Article 23), and telephone helplines (Article 24). In order to implement the obligations set out the Convention, States must allocate 'appropriate measures and human resources,' thus creating a precise legal obligation in terms of public expenditure.

Similar to other Council of Europe conventions, including that against human trafficking, the Convention provides for a monitoring system, called GREVIO, composed of independent experts, whose mandate is to assess State parties compliance with treaty obligations.

Despite being the most advanced instrument in force at the international level on combating violence against women and domestic violence, the Convention is not devoid of criticism: the notion of gender, due to pressures by Russia and the Holy See during negotiations, is limited to the two sexes, male and female. Furthermore, the Convention does not address prostitution as a form of violence; finally, it does not take into account new forms of violence such as the ones committed in the cyber world.[57]

It has however a huge potential: to reach universal application. This situation may occur in two ways: either the UN adopts an international convention with

[55]For a more detailed analysis of the Istanbul Convention, let us refer to De Vido (De Vido 2016a, b).

[56]On the concrete actions to be undertaken in order to implement this article, see Marianne Hester, Sarah-Jane Lilley, Preventing Violence against Women: Article 12 of the Istanbul Convention https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168046e1f0.

[57]See in more detail, De Vido (2016a).

regard to violence against women which draws a lot from the Istanbul Convention, according to a draft published in the 2015 report presented by the UN Special Rapporteur on Violence against Women,[58] or the Convention is ratified by the EU, on the one hand, and by an increasing number of non-Council of Europe Members, on the other. With regard to Asian countries, the Convention could become a model to negotiate a new regional convention that takes into account the lesson learnt from the evolution of the European legal instrument, including the monitoring mechanism, or be ratified by ASEAN countries and by Japan, the latter having already ratified Council of Europe conventions in its role as Observer State.[59]

3.3 ASEAN Countries

In order to implement the 1993 Vienna Declaration and Programme of Action, ASEAN countries decided to establish the ASEAN Intergovernmental Commission on Human Rights (AICHR), whose terms of reference were approved by the ASEAN Foreign Minister Meeting in July 2009. Some years later, in 2012, ASEAN adopted the Charter of human rights, which constitutes the only significant (non-binding) comprehensive instrument in the field of human rights for the ASEAN region. The Charter expressly contains the principle of non-discrimination on the basis of 'gender.'[60] The system of human rights protection is still recent and it will take time before assessing its effectiveness.

As of 2015, the ten ASEAN countries have entered a regional cooperation called 'ASEAN Economic Community.' This major achievement reminds us of the history of the then European Economic Communities, started as a process of pure economic integration and then evolved to encompass an increasing number of political issues and to develop a system of protection of human rights. Even prior to 2015, though, ASEAN has considered gender mainstreaming in its policies, and all countries have committed to respect women's rights as a consequence of the ratification of the CEDAW.[61] The Secretary-General of ASEAN, Le Luong Minh, declared in 2013, in his opening remarks at a Gender Mainstreaming Training Session launched by the ASEAN Secretariat, that 'the spirit of promoting gender equality should be an integrated part of ASEAN's policies and programmes towards the ASEAN Community. The goal of gender equality should be central to all three

[58]Addendum to the Human Right Council Thematic Report of the Special Rapporteur on Violence against Women, its Causes and Consequences (A/HRC/29/27/Add. 4), 16 June 2015.

[59]http://www.coe.int/en/web/conventions/search-on-states/-/conventions/treaty/country/JAP (last accessed on 1 June 2017).

[60]Article 2.

[61]However, consider the reservations appended by Brunei Darussalam and Malaysia which refer to Islamic sharia. ASEAN established the ASEAN Committee on women as ASEAN sectoral body in 1976.

pillars of economy, political-security and socio-cultural of ASEAN.'[62] The deputy Secretary-General for ASEAN socio-cultural community, Alicia R. Bala, pointed out that 'the role of ASEAN Secretariat is critical in making gender mainstreaming as a standard practice in ASEAN's policies and programmes across the three pillars.' She then added that 'before we are able to effectively stimulate gender mainstreaming strategy in ASEAN, we first need to understand clearly the concept of gender equality and how gender mainstreaming strategy can be applied in our work.'[63]

With regard to specific initiatives and legal instruments adopted to promote women's rights, ASEAN established in 2010 the Commission on the promotion and protection of women and children's rights (ACWC). The nature of the Commission is intergovernmental, being composed of two representatives from each ASEAN country. According to its terms of reference, its mandate is to promote 'the implementation of international instruments, ASEAN instruments and other instruments related to the rights of women and children' (para. 5.1), and 'to develop policies, programs and innovative strategies to promote and protect the rights of women and children to complement the building of the ASEAN Community' (para. 5.2). Despite acknowledging the importance of a cooperative approach to enhance women and children's rights, the act recognises 'the primary responsibility to promote and protect the fundamental freedoms and rights of women and children rests with each Member State' (para. 3.5). This clause seems to protect the position of countries, such as Brunei, that allow forms of discrimination against women based either on religion or on culture. The Commission presents an annual report to the ASEAN Ministers meeting on social welfare and development. The Commission has played a central role in promoting effective implementation of common issues in the CEDAW and in the 1989 Convention on the rights of the child, however it presents some weaknesses. The first one concerns its composition: independent experts would better guarantee the promotion of women's rights, since there would be no influence on their activity by national governments. The second limit regards its mandate, which does not include either the elaboration of reports on each ASEAN or the analysis of individual complaints. Effective implementation of international provisions requires the possibility for individuals to obtain compensation for alleged violations of their rights.[64] Whether the national system is weak in that respect, a regional independent mechanism could help in pursuing the promotion of human rights.

The ACWC drafted the Declaration on the Elimination of Violence against Women and Violence against Children in ASEAN, which was then adopted by the

[62]ASEAN SG: Gender Equality should be Central in Achieving ASEAN Community, 13 February 2013. http://asean.org/asean-sg-gender-equality-should-be-central-in-achieving-asean-community/ (last accessed on 1 June 2017).

[63]ASEAN SG (2013).

[64]The UN system of human rights treaty bodies is not perfect, though, and requires some reforms, but it has made important achievements. Stoll (2012, p. 12).

ASEAN Summit on 9 October 2013.[65] It develops a former Declaration on the Elimination of Violence against Women which was approved in 2004. With the Declaration, clearly non-binding, ASEAN Member States 'express common resolve to eliminate violence against women and violence against children in the region' through different measures, including through amendments to national legislation. It refers to a 'holistic' and multi-disciplinary approach to promote the rights of women and children, stressing the importance of developing plans and programmes, allocating adequate resources and budgeting. In the list of commitments undertaken by ASEAN countries, it is possible to identify the three main pillars, namely Prevention, Protection and Prosecution which are also relevant for the Council of Europe Istanbul Convention, although the text of the ASEAN Declaration is excessively general. We can indeed find a quite general commitment to adopt measures of protection for victims and survivors, measures to ensure investigation, prosecution, punishment, and rehabilitation of perpetrators, and measures of prevention in the promotion of 'family support services, parenting education, education and public awareness on the rights of women and children and the nature and causes of violence against women and violence against children to encourage active public participation in the prevention and elimination of violence' (para. 3). It is interesting that the declaration condemns 'harmful practices which perpetuate gender stereotyping' (para. 3), although no specific commitment for ASEAN countries, such as, for example, the criminalisation of culturally-motivated acts which amount to violence against women, has been envisaged.[66] Another interesting aspect is the fact that the Declaration invites countries to strengthen the existing national mechanisms in 'implementing, monitoring and reporting the implementation of the Concluding Observations and Recommendations of CEDAW' and other treaty bodies 'as well as the accepted recommendations under the Universal Periodic Review Process of the United Nations Human Rights Council related to the elimination of all forms of violence against women and violence against children.' This affirmation can be seen as a recognition of the international system of protection of human rights.

The Declaration must be read together with the ASEAN Regional Plan of Action on the Elimination of Violence against Women, adopted in November 2015, which is advanced and more detailed compared to the text of the Declaration. It invokes a human-rights based approach to eliminate VAW so as to empower victims and survivors to access information and remedies; furthermore, it provides for due diligence obligations in preventing and combating VAW.[67] Although there is no reference to the Council of Europe Istanbul Convention, the structure that the action plan follows is similar: measures are divided into the three pillars of prevention,

[65]The text of the Declaration is available at http://www.ohchr.org/Documents/Issues/Women/WG/ASEANdeclarationVaW_violenceagainstchildren.pdf (last accessed on 1 June 2017).

[66]On gender stereotyping, see the work by Cook and Cusack (2010).

[67]http://www.asean.org/storage/images/2015/November/27th-summit/ASCC_documents/ASEAN%20Regional%20Plan%20of%20Action%20on%20Elimintation%20of%20Violence%20Against%20WomenAdopted.pdf (last accessed on 1 June 2017).

protection and prosecution. The action plan also envisages an 'accountability framework' aimed at tracking progress towards time-bound targets related to the situation of VAW in the region. At the end of the text, every country has identified initiatives, gaps and challenges with regard to violence against women and children.

The framework is extremely promising, although the action plan is a non-binding act and the implementation relies on an intergovernmental body.

3.3.1 The Convention Against Human Trafficking

The fundamental binding instrument in the field of human rights, and women's rights in particular, in Asian countries is the ASEAN Convention against trafficking in persons, especially women and children, adopted in 2015. Trafficking in persons affects all regions and most countries in the world. As we have anticipated, the Council of Europe adopted, more than ten years ago, a specific convention in the field, which now faces the challenges of recent days, with hundreds of female refugees that are at risk of being trafficked. South-East Asia has always been at the centre of the routes of trafficking. Thailand is both a country of destination of most countries in the sub-region, and a country of origin of women trafficked for prostitution destined to Japan and to Western countries.[68] Furthermore, trafficked persons in Thailand are mostly women and children from Burma, Cambodia, Laos, and Yunnan. States sometimes contribute to trafficking women, by a process of legalisation of activity of 'entertainment'. Hence, for example, the legal migration of entertainers from the Philippines to Japan and South Korea is an example of involvement of the State in trafficking.[69]

All ASEAN countries except Brunei have ratified the UN Protocol to prevent, suppress and punish trafficking in persons, especially women and children, of 2000. The UN Protocol provided for the first time in history a definition of trafficking. The offence is composed of three cumulative elements: an action, consisting of recruitment, transportation, transfer, harbouring or receipt of persons; the means, which include the threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or position of vulnerability, giving or receiving payments or benefits to achieve consent of a person having control over another; a purpose of exploitation, which includes, at the minimum, the exploitation of the prostitution of others, or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude, or the removal of organs.[70] The UN Protocol is a landmark step forward in combating human trafficking at the international level, although it contains 'very little in the way of hard obligations' with regard to the protection of the victims.[71]

[68] Asis (2008, p. 190).

[69] Asis (2008, p. 196).

[70] Gallagher (2001, pp. 986–987); Gallagher (2010, p. 29).

[71] Gallagher (2001, pp. 990–993).

The ASEAN Convention draws a lot on the UN Protocol and the Palermo Convention on transnational organized crime, although in the preamble it reproduces one of the recitals of the Council of Europe Convention of 2005: 'recognizing that trafficking in persons constitutes a violation of human rights and an offence to the dignity of human beings.' The UN Protocol and the ASEAN Convention share the same purposes, namely to prevent and combat trafficking, paying particular attention to women and children; to protect and assist victims; and to promote and facilitate cooperation among States.[72] They both provide for the criminalisation of trafficking in persons, although it seems that the ASEAN Convention is of wider scope, where it refers to offences that are transnational in nature, 'including those committed by organized criminal groups.'[73] In other words, it seems that offences committed by individuals not belonging to organised criminal groups can be brought within the terms of the ASEAN Convention. Compared to the UN Protocol and the Palermo Convention, the ASEAN Convention contains similar provisions on prevention, protection and law enforcement. An interesting difference is that, whereas the UN Protocol requires States to 'consider implementing measures to provide for the physical, psychological and social recovery of victims' (Article 6), the ASEAN Convention obliges each State party to 'provide care and support to victims' of trafficking in persons [Article 14 (10)]. The ASEAN Senior officials meeting on transnational crime is responsible for monitoring the implementation of the Convention.

The Convention, although it has only recently entered into force, significantly contributes to the enhancement of the legal framework against trafficking in persons in the region. However, it has extensively drawn on the generic provisions of the UN Protocol, without taking into consideration the specific situation of ASEAN countries, where women are also legally trafficked through the migration of entertainers.[74] Furthermore, it does not consider that violent abuse is not limited to the act of trafficking into sexual servitude. As observed, 'women sold into domestic servitude may be subject to sexual abuse as well,' they 'may be forced to work long hours without breaks,' and 'may be trafficked into marriage with men they do not want to marry.'[75] The lack of reference to State responsibility was stressed, with regard to the UN Protocol, by Anne Gallagher, who argued that international law requires States 'to be held answerable for their acts and omissions that cause or otherwise contribute to trafficking.'[76] *Mutatis mutandis*, we can argue the same with regard to the ASEAN Convention. Furthermore, according to Article 26 of the ASEAN Convention, States can agree to provide assistance to each other according

[72]Respectively Article 2 and Article 1.

[73]The UN Protocol applies 'to the prevention, investigation and prosecution of the offences established in accordance with article 5 of this Protocol, where those offences are transnational in nature and involve an organized criminal group, as well as to the protection of victims of such offences.' (Article 4).

[74]Asis (2008, p. 196).

[75]Shelley (2011, p. 41).

[76]Gallagher (2010, p. 218).

to other international agreements or the provisions of their respective *domestic* laws. This might undermine the effectiveness of the Convention. The monitoring mechanism is also not comparable to other mechanisms existing at regional level—we are referring here in particular to GRETA within the Council of Europe. It seems therefore significant that on 3 October 2016, the ACWC launched the regional review on laws, policies and practices within ASEAN related to the identification, management and treatment of victims of trafficking, especially women and children, to support the implementation of the Convention against trafficking.[77] This mechanism has huge potential in the future. Hopefully other countries in the region will ratify the Convention, including Japan which is country of destination of trafficked persons and also country of transit to the Americas.

3.3.2 Japan

After the Second World War, Japanese women obtained rights equal to men under the Constitution, therefore they were emancipated from legal subordination under the prior patriarchal household (i.e.) system. Japan ratified the CEDAW Convention in 1985, and, as a consequence, significant changes in Japanese law occurred, starting from the amendment to the Law for Equal Employment Opportunity of Men and Women in 1997. In 1999, the Basic Law for a Gender Equal Society contained the clear commitment by the government to realise 'a gender-equal society'.[78] However, as stressed by Miyoko Tsujimura, 'the reality and praxis of women's lives have not necessarily reflected this,' both in the society and in the legal system.[79] Furthermore, the gender division of labour is still narrowing women's choices.[80] In compliance with legal obligations stemming from the CEDAW, Japan has periodically presented reports to the CEDAW Committee, which published in March 2016 its most recent concluding observations.[81]

We will consider the CEDAW report on Japan only with regard to the two aspects which are object of analysis in this chapter, namely violence against women and trafficking in women.[82] As far as VAW is concerned, in Japanese society domestic violence was identified as a social issue in 1990s. In 2001, Japan adopted the Law for the Prevention of Spousal Violence and the Protection of the Victims, later amended in 2004.[83] Since it refers to spousal violence, the law does not cover

[77]http://asean.org/asean-strengthens-efforts-to-eliminate-trafficking-in-persons/ (last accessed on 1 June 2017).

[78]Tsujimura (2007, p. 8). The Basic Law for a Gender-Equal Society, act no. 78 of 23 June 1999. English translation at www.japaneselawtranslation.go.jp/ (last accessed on 1 June 2017).

[79]Tsujimura (2007, p. 7).

[80]Asakura (2005, p. 187).

[81]CEDAW Committee, CEDAW/C/JPN/CO/7-8, 7 March 2016.

[82]On discrimination against women with regard to the remarriage period after divorce and the couple's surname after the marriage, De Vido (2016c).

[83]Act on the Prevention of Spousal Violence and the Protection of Victims, Act No. 31 of 13 April 2001 http://www.japaneselawtranslation.go.jp/law/detail_main?vm=02&id=113.

cases where violence is perpetrated by boyfriends and short-term cohabitants. Furthermore, sexual crimes provisions contained in the criminal law have never been updated over the past 100 years, 'which demonstrates a lack of consideration of the relationship between violence against women and sexual crimes.'[84] Rape is criminalised in Article 177 of the Japanese penal code, which reads: '[a] person who, through assault or intimidation, forcibly commits sexual intercourse with a female of not less than thirteen years of age commits the crime of rape and shall be punished by imprisonment with work for a definite term of not less than 3 years. The same shall apply to a person who commits sexual intercourse with a female under thirteen years of age.' The provision is clearly discriminatory against women, and also against men, who might be victims of sexual abuse as well. The Supreme Court ruled in 1953 that the text does not violate the principle of non-discrimination enshrined in the Constitution.[85] There are no clauses regarding marital rape, and rape without injury is among the offences that cannot be prosecuted without a complaint by the victim. In that respect, the CEDAW Committee, in its concluding observations, noted that the Ministry of Justice established a committee to review the penal code, and this is a positive step towards the recognition of women's rights. However, the Committee required the State to address violence against women in the penal code, including domestic violence and incest, as a specific crime; to expedite the amendment of the penal code to expand the definition of rape and ensure ex officio prosecution of sex crimes; to amend the penal code to explicitly criminalise marital rape; to expedite the judicial process for issuing emergency protection order; to encourage the victims of all forms of violence to report to the authorities; to endure that the personnel is sufficiently trained to deal with cases of violence against women and girls; and to ensure that the law on domestic violence applies to all family settings.[86] Japan, which holds observer status of the Council of Europe, could ratify the Istanbul Convention on preventing and combating violence against women and domestic violence, also open to non-Member States of the Council of Europe.[87] The treaty would provide a complete legal framework for, among others, the identification of the elements of the crimes, including rape, to be introduced as amendments to the Japanese penal code. Japan has ratified other conventions of the Council of Europe. We are perfectly aware of the fact that the ratification of the Istanbul Convention is a huge challenge, considering the detailed obligations States must comply with, also in terms of public expenditure and of measures to eradicate discrimination against women rooted in the society. The ratification will however effectively implement the policy

[84]Yano (2007, p. 190).

[85]Yano (2007, p. 201). Judgment of 24 June 1953, Supreme Court, Supreme Court Judicial Precedent Collection, Vol. 7 no. 6, p. 1366.

[86]CEDAW/C/JPN/CO/7-8, para. 23.

[87]Article 76 of the Convention.

adopted by the Japanese government in 2013, 'Toward a society in which all women shine.'[88]

Let us now turn to trafficking in persons, especially women. Japan is one of the largest receiving countries of trafficking in women.[89] The country has only recently ratified the UN Palermo Convention and the UN Protocol against trafficking.[90] Before legal obligations derived from the UN legal instruments, Japan started in 2005 a revision of its criminal and immigration laws. Among the most significant improvements to the law, Article 226 of the Japanese Criminal Law was amended in order to prohibit acts of abduction and kidnapping for the purpose of transportation outside the country a person is located. In other words, the provision is applicable to all victims of human trafficking regardless of their nationality or location.[91] Japan also adopted an Action plan to combat trafficking in persons in December 2014, and established the Council for the promotion of measures to combat trafficking in persons.[92] In the Asian region, Japan and ASEAN adopted a common action plan in 2003, where there is a clear commitment to 'intensify efforts to combat people smuggling and trafficking in persons by enhancing their focus on tackling the root causes of such crimes and developing more effective information sharing arrangements,' and to 'promote cooperation among coast guards and competent authorities, through, among other, measures conducting training exercises in combating piracy and preventing and curbing transnational organised crimes such as illicit drug and human trafficking.'[93] Despite the efforts undertaken by the State, the CEDAW Committee observed that 'State party remains a source, transit and destination country for trafficking in persons, in particular women and girls, for purposes of labour and sexual exploitation,' in particular for sexual exploitation in the entertainment industry.[94] The Committee recommended that the State party intensify inspections and monitoring programmes, and 'continue efforts aimed at bilateral, regional and international cooperation to prevent trafficking, including by exchanging information with other countries in the region and harmonizing legal procedures to prosecute traffickers.'[95] An enormous step forward would be the ratification by Japan of the ASEAN Convention against trafficking, which would allow closer cooperation with the countries in the region to combat this crime.

[88]http://www.mofa.go.jp/fp/pc/page23e_000181.html (last accessed on 1 June 2017).

[89]Kamino (2007, p. 83).

[90]Japan ratified the Convention and the Protocol on 11 July 2017.

[91]Kamino (2007, p. 88).

[92]CEDAW/C/JPN/CO/7-8, para. 26.

[93]The ASEAN-Japan action plan, 2013, letter C), paras. 8 and 12. http://asean.org/the-asean-japan-plan-of-action-3/(last accessed on 1 June 2017).

[94]CEDAW/C/JPN/CO/7-8, para. 26.

[95]CEDAW/C/JPN/CO/7-8, para. 27.

4 Regionalisation and Dialogue Between Legal Systems: Some Conclusions

Discrimination against women, which, as defined by the CEDAW, consists in 'any distinction, exclusion or restriction made on the basis of sex' that impairs the recognition, enjoyment or exercise by women of human rights (Article 1), is still persistent in every country in the world. In recent years, in particular, countering violence against women, as a form of discrimination against women, has become high priority at the international level and it is present in all political agendas. The nature of discrimination can differ from country to country. As we have mentioned, in some countries discrimination is still provided by the law, in others the law does not openly discriminate against women, but gender equality has never been completely achieved. Historically, feminists tried to obtain first de jure equality demanding the right to vote, since that was the first level in the recognition that women and men must enjoy equal rights.[96]

In the majority of European and Asian countries, where laws on equality have been adopted, the core of the problem is de facto discrimination. As outlined by the UN Committee on economic social and cultural rights, 'substantive equality for men and women will not be achieved simply through the enactment of laws or the adoption of policies that are gender-neutral on their face,' because 'they do not take account of existing economic, social and cultural inequalities, particularly those experienced by women.'[97] Most countries in the world fail to address 'structural' discrimination, and the data that we have provided on the gender pay gap and on violence against women demonstrate this trend.

As a consequence, the legal instruments that have been adopted over the years both at the international and regional level must be considered as important steps forward in responding to both de jure and de facto discrimination. In the previous pages we analysed the main regional legal instruments in force to promote women's rights, focusing in particular on the two most recent ones, the Council of Europe Istanbul Convention regarding violence against women and domestic violence, and the ASEAN Convention against trafficking in persons, especially women and children. Both conventions must be welcomed, despite some weaknesses that we have briefly explained, since they pursue gender equality by countering criminal acts committed against women *because* they are women.

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[96]Just to mention two examples. In 1792, Mary Wollstonecraft wrote *A Vindication of the Rights of Woman*, where she examined natural rights and stated that since these rights are bestowed by God they should be enjoyed by both men and women. In Japan, Fusae Ichikawa dedicated her whole life to women's involvement in politics. In 1890, Japanese women were legally prohibited from engaging in political activities. Ichikawa emerged as a leader of the Women's Suffrage League, and played a pivotal role in obtaining women's suffrage.

[97]Committee on economic social and cultural rights, General Comment No. 16 on Article 3 of the Covenant on economic, social and cultural rights, E/C. 12/2005/3 13 May 2005, para. 6.

Since gender inequality and discrimination against women are a recurrent pattern in the world, we argue first that regionalisation of the protection of women's rights is positive since it reflects the major challenges of a given society. The prohibition of female genital mutilation, just to show an example, does make sense in societies where girls are forced to undergo this practice, not in others. Regionalisation is also an instrument to avoid too general provisions of law which are not capable of being sufficiently effective.

Secondly, we contend that the dialogue between legal systems could be fruitful in order to ameliorate the mechanisms in force to promote women's rights. The fact that the ASEAN Convention against trafficking reproduces in its preamble a recital taken by the Council of Europe Convention against trafficking, and that the ACWC has started a monitoring mechanism to assess the correct implementation of the Convention are illustrative examples in that respect. Dialogue does not mean imposition of models, but it implies taking the best practices from each experience and make them their own. Therefore, the ratification by the European Union of the Council of Europe Istanbul Convention would be a major achievement in order to provide a coherent framework for the actions in favour of women.[98] The EU ratification would also provide encouragement to its Member States, as well as non-Member States of the Council of Europe, such as Japan, to ratify the Convention.[99] Furthermore, the Istanbul Convention could constitute a model for a future regional ASEAN Convention on women's rights, having as its scope the transformation of non-binding provisions included in the action plan adopted within the ASEAN system into mandatory rules, whose respect would be subject to a monitoring system. The proposal is not far-fetched. In the relations among the European Union and ASEAN, human rights are at the centre of the cooperation. In the joint communication to the European Parliament and the ASEAN of 2015, the EU committed to support the ASEAN human rights mechanism, to host visits of the ACWC, and 'to step dialogue and cooperation with ASEAN on issues such as the rights of migrants and victims of trafficking, business and human rights/corporate social responsibility, torture, women's and children's rights, gender equality and the fight against discriminations.'[100] With regard to Japan, we are convinced that the ratification by the country of the Council of Europe Istanbul Convention and the ASEAN Convention against trafficking would enhance the protection of women's rights on a national level and spur the needed reforms that the State has gradually undertaken over the years.

[98]The process has already started. The EU signed the Convention on 13 June 2017.

[99]On the impact of ratification by the EU of the Istanbul Convention, see De Vido (2017).

[100]Joint Communication to the European Parliament and the Council. The EU and ASEAN: A Partnership with a Strategic Purpose, 18 May 2015, JOIN (2015) 22 final, p. 13.

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Guarantee of the Right to Freedom of Speech in Japan—A Comparison with Doctrines in Germany

Takashi Jitsuhara

1 Introduction: The 2016 World Press Freedom Index

In the Reporters Without Borders' (RWB) 2016 World Press Freedom Index (WPFI), Japan was ranked 72nd.[1] This ranking is next to Tanzania at 71st and South Korea at 70th, and follows Lesotho at 73rd and Armenia at 74th. With regard to the changes in the ranking, Japan was ranked 11th in 2010, and 61st in 2015, which means, "72nd" reflects a downward trend for the Japanese ranking.[2] RWB references the "Act on the Protection of Specially Designated Secrets" (APSDS) as the reason for the drop, and has expressed concerns that many matters—such as the Fukushima nuclear disaster—will be classified as state secrets.

This article deals with the right to freedom of speech as a "human rights issue in Japan." Moreover, it is discussed with regard to the guarantee of freedom of speech not only in recent years, but also formerly, taking note of legal matters that include concrete laws, decisions, and theories. While Japanese theories are influenced by arguments pertinent to freedom of speech in the United States, it will be mentioned that this effect is limited to precedents in the Japanese courts. After discussing the protection of and restrictions on that freedom, I examine some cases and opinions in Germany, which exemplify one country other than the United States, in order to adopt a comparative approach to the study of constitutional law.[3]

[1] https://rsf.org/en/ranking (accessed February 17, 2017).
[2] It was 37th in 2005.
[3] As a prior research, Suzuki (2016b), p. 106.

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2 Freedom of Speech in Japan

The first objective of this paper is to examine Japanese circumstances as they pertain to the guarantee of freedom of reporting. In Japanese constitutional law (the Constitution), Article 21 is the provision most closely related to that freedom. This article points to such concepts as assembly, association, speech, and a free press, and covers all other forms of expression. Although it does not make explicit reference to freedom of reporting, freedom of reporting is thought by constitutional authors, and according to precedent, to be desirable for protection under Article 21. For example, in the 1969 *Hakata Railway Station* case,[4] the Japanese Supreme Court (the Court) said that freedom of reporting came under the guarantee of Article 21 of the Constitution, and freedom of research was also sufficiently reflected in the spirit of Article 21.

Arguments regarding the limits on freedom of reporting or speech are discussed next. Though legal restraints are the main constraints on freedom of speech, "unofficial regulations" are also important factors in Japan.

2.1 Legal Restraints

There are many restrictive acts or articles in Japanese law. Because of the reference made to recent legislation by RWB in relation to Japan's 2016 WPFI ranking, I will deal with recent legal topics.

First, there is the Broadcast Act, which regulates freedom of reporting. Article 3 requires respect for the independence of companies' program broadcasts, but Article 4, Section 1, provides for "editing rules" that note some guidelines for the contents of a broadcast. This article requires that TV programs do not harm public safety or morals, are politically fair, do not distort the facts, and clarify the points at issue from as many perspectives as possible, where there are conflicting opinions on the subject.[5] On the other hand, because no article exists under the Broadcast Act relating to sanctions when violations occur, the legal aspects of the editing rules are a controversial matter.[6] Japanese scholars maintain that the editing rules impose only a moral obligation on broadcasting companies, and even if a company violates the editing rules, the media themselves are responsible for deciding whether a violation has occurred, and, if so, how they should respond to it. In contrast, the Ministry of Internal Affairs and Communications (MIAC), as the competent ministry for broadcasting, has often provided "administrative guidance" in the case of

[4]The Supreme Court Decision, Grand Bench, November 26, 1969, Keishu 23-11-1490.

[5]There is not such a direct legal regulation on the contents of papers or articles of the print media.

[6]Suzuki and Yamada (2011), p. 157 (Shoichiro Nishido).

violations of the editing rules,[7] and considers such violations as possible grounds for suspension of the operation of a broadcasting signal under the Radio Act.

Recently, other controversies have arisen about how the editing rules were interpreted on the occasion of a comment made in the House of Representatives in 2016 by the Minister of the MIAC, Sanae Takaichi. Ms. Takaichi stated that the broadcasting signal might be suspended in the case of violations of political fairness as stipulated in the editing rules. A dispute followed the issuance of this viewpoint, which clarified that there was the possibility of a broadcasting signal being suspended based on violations of the editing rules even in (only) "one" broadcast program.[8]

Furthermore, with regard to the APSDS, as will be explained later, although laws have been passed that protect the secrets held by national public officers, the APSDS is the first act to generally protect government secrets in Japan. This statute raises various issues, such as the lack of a reliable system to end the designations, or the unclear range of specially designated secrets. In addition, Article 25 stipulates punishments for conspiring, inducing, and inciting activities that involve the disclosure of one of the above-mentioned "secrets,"[9] despite Article 22, Section 1, which requires respect for "the freedom of news reporting or news coverage, which contributes to guaranteeing the citizens' right to know."

To this point, the recent acts and topics concerning freedom of reporting or speech have been described. This might imply that infringements on freedom of reporting are only temporary. Therefore, the disputes that were formerly raised over the freedom of speech guarantee are discussed next.

Firstly, regulations on obscene materials are established in ordinary law. Article 175 of the Penal Code regulates obscene documents, drawings, and data (subsequently referred to as the "materials"), and provides punishments for their distribution, sale, and display in public, or dissemination. Moreover, Section 2 provides criminal penalties for those who possess or store the already-noted materials for the purpose of sale. This article, however, in describing the regulated materials exclusively as "obscene," lacks any additional information. That is, Article 175 of the Penal Code triggers issues related to lack of clarity and breadth. In addition, the Customs Act prohibits the importation of books that are "detrimental to public security or corrupt public morals." However, this concerns freedom of speech as the right to receive information from foreign books in Japan. Moreover, in local ordinances, there are statutes that regulate "harmful books"—books that are obscene, cruel, or promote crime (ordinances regarding "the Healthy Development

[7]Recent "administrative guidances" in the name of the Minister: Against Kansai Broadcasting in 2007 and NHK in 2015.

[8]10 min of the 190th Budget Committee of the House of Representatives, February 9, 2016, p. 4. If so, the editing rules could be unconstitutional. Suzuki (2016a), p. 24 writes that, "unless editing rules are interpreted as ethical codes, it is difficult to permit its constitutionality".

[9]There is also the "Security Clearance Assessment," which is to assess people who are going to deal with the specially designated secrets. Its deep invasion into privacy could lead to a violation of privacy.

of Youths," referred to hereafter as "OHDY")—and the sale and means of sale. Concerning OHDY, the lack of clarity and the breadth of local ordinances should be questioned similarly to the provisions under the Penal Code and the Customs Act.

Beyond the prohibitions of obscene materials, articles under the Public Offices Election Act (POEA) regulate campaigns in elections. This statute stringently regulates election campaigns. As a typical restriction, Article 138, Section 1 provides for an across-the-board ban on canvassing door to door. Also, the POEA has articles that strictly regulate the display of election documents.[10] These controls serve to illustrate some problems involving the role of constitutional law, because election campaigns are an example of typical political speech.

In addition, the National Public Service Act (NPSA) might also have the effect of placing a restriction on reporting or speech. Article 100 punishes a national public officer for leaking government secrets, and Article 111 specifies punishments for persons who "instigate" government officers to divulge secrets. Because of its power to penalize journalists who ask a national public officer to provide information, this article has provoked controversy over its constitutional validity with regard to the collection of information as a precursor to preparing reports. Meanwhile, Article 102 of the NPSA bans government officers from political activities provided by the National Personnel Authority. That article plainly refers to "political activity," which, however, might also involve political speech, and, in addition, the NPSA has the further problem of delegating the definition of prohibited acts to an administrative agency.

2.2 *Unofficial "Regulations" and Issues Concerning "Self-restraint" for the Media*

Up to now, observations have shown that Japanese legal restraints and related topics are not just temporary issues, but existed formerly. In Japan, in addition to such legal restraints, there are also unofficial "regulations," described as "self-restraint." For instance, a recent topic that has drawn attention is described as insufficient reporting of the Fukushima nuclear disaster. Since there is no law prohibiting reports about a nuclear disaster, such matters can be categorized as unofficial regulations.

Furthermore, there are problems with the NHK. This is a public broadcasting company with a board of governors. This board has the authority to pass resolutions on matters provided in law. Each member is appointed by the Prime Minister, with the consent of both Houses of the National Diet (Article 31 of the Broadcast Act). When the NHK was given the role of a public broadcasting company, such controls

[10]Accordingly, in Japanese election campaigns, it is usual for candidates to use cars to advertise their names. Such a strange style was illustrated in the film "Campaign" (Director: Kazuhiro Soda, 2007).

by the political sector might have been necessary. The NHK, however, also enjoys freedom of reporting, and, therefore, must not yield to the national government in this regard.[11] Nonetheless, because of some recent appointments of members closely related to the Prime Minister, it is feared that such management might have an influence on the content of the station's TV programs. In addition, the board can appoint the President of the NHK (Articles 51 and 52 of the Broadcast Act). Until January 24, 2017, its President was Mr. Katsuto Momii. However, he made some controversial remarks during his tenure. For example, it was reported that he referenced an international program with regard to territorial issues when he attended a press conference announcing his appointment as President in 2014. According to the media, he said, "we should not say 'left' when the national government says 'right.'"[12] In other news his recent comments on a Disaster Recovery Meeting of the NHK were conveyed. The news noted his desire to report based on governmental official announcements about issues concerning nuclear power plants.[13] Such remarks might reflect NHK's lack of independence from government intentions.

Another issue concerned relations between broadcasting and government. This was a dispute over a comment by, and the behavior of, Prime Minister Shinzo Abe, when he appeared on the news program of a commercial TV station. This program showed scenes and comments from its interview with various citizens, and most of these comments were skeptical of the current government's economic policies. Mr. Abe complained that only critical comments had been conveyed intentionally. However, his claims were criticized as a form of pressure on broadcasting companies. Furthermore, the Liberal Democratic Party of Japan (LDP), as the ruling party, sent each broadcast company a paper requiring "fair and neutral" broadcasting reports in the 2014 general election for the House of Representatives (Shugiin). Although such a statement has no binding power on the media, it raises the fear that government pressure may have some effect on the media. The issue of pressure[14] caused by governmental desires was also mentioned by the Committee for the Investigation of Broadcasting Ethics, which criticized the intervention of a department in the LDP on the NHK in an investigation of a TV program.[15]

The effects of recent unofficial regulations and self-restraint by the media outlined above might create the impression that these effects have occurred only recently. However, such issues have been evident in Japan for some time.

An issue alluded to above was the customary practice under the Newspaper Act before World War II, in which newspaper companies had to give the Ministry of the Interior a copy of their newspapers at the time of publication, after which the

[11]Suzuki and Yamada, *supra* note 6, p. 159 (George Shishido).

[12]The Asahi-Shimbun, January 26, 2014 (Morning-Paper).

[13]The Asahi-Shimbun, April 24, 2016 (Morning-Paper).

[14]At the same time, in recent years, chiefs of reporting companies often dine privately with the Prime Minister, which leads to criticisms of their stances.

[15]Its 23 Opinion (November 6, 2015), p. 27.

Ministry would approve its content or, if there was some problem, order that it not be sold or delivered. Although this rule was a kind of posterior restraint, there was a custom in the media to get the approval of the Ministry before publishing. Therefore, such a custom meant that the media themselves were engaging in "self-prior restraint." This information helps to explain how after the War the Court maintained that the regulation under the Newspaper Act was a "censor *in substantial means* in its operation."[16]

Following Japan's defeat in the war, a "new" Constitution was enacted, which was intended to protect human rights, as well as freedom of speech, more strictly. Nonetheless, the media's self-restraint continued even in the postwar era. The matter of the "press club" being a problem has been mentioned. In Japan, press clubs have been set up in government offices, where members who are reporters are permitted, for example, to use the rooms in city halls to obtain information from administrative officers. On the one hand, setting up a press club might have significance as a kind of professional association, in order to strengthen its power to counter government pressure, but, on the other hand, such clubs might merely become organizations for promulgating governmental announcements. Since many Japanese journalists, as members of press clubs, rely on getting information from the office to which they belong, it is often noted that they avoid criticizing such government offices.[17] In addition, there is also the issue of the variety of reporting agreements in Japan, in relation to press clubs. Such agreements are reached between each governmental office and the press club concerned, and mainly relate to the Imperial Household Agency or the police department in relation to kidnappings. The agreements involving kidnappings certainly have some relevance for safeguarding the lives or physical wellbeing of kidnapped persons, but it is a different case when a press agreement involves the Imperial House for the purpose of preventing a report about a person who might marry a member of the imperial family. Therefore, the appropriateness of reaching such agreements needs to be considered.

2.3 *Precedent in Japan Dealing with Freedom of Speech*

Following the discussion of how freedom of speech has been restricted, there should be some examination of how the Japanese courts have responded to these limits. First, however, a short explanation of the Japanese judicial system is provided.

[16] *Customs Search*: The Supreme Court Decision, Grand Bench, December 12, 1984, Minshu 38-12-1308.

[17] see Yamada (2010), p. 66.

In Japan, there is no constitutional court, and the Supreme Court should also prove constitutionality.[18] Therefore, Japanese judicial precedents and the dominant theoretical framework are regarded as an "incidental" system, and are thought to exist mainly to resolve concrete conflicts and decide on the possibility of providing a remedy that would satisfy the interests of the parties concerned. With regard to decisions made by Japanese courts, there have been some decisions that declared unconstitutional regulations as being unconstitutional, and in recent years, the Japanese Supreme Court has declared more statutes unconstitutional than before.[19] Moreover, it has guaranteed expressions by adopting a restrictive interpretation of the provisions of an ordinary law.[20]

There has, however, been no judgement on the unconstitutionality of the violation of freedom of speech. As already mentioned, Article 175 of the Penal Code has been upheld as being constitutional, despite the controls on obscene materials.[21] In 1957, the Court, in accordance with the definition of the word "obscene," pointed out such issues of public interest as "sexual order" and the maintenance of minimal sexual morals, to justify limits on freedom of speech. Despite a few modifications to the definition of "obscenity," the Court has been consistent in its interpretation of Article 175 of the Penal Code as not being unconstitutional. Moreover, the prohibition on the importation of obscene books has not been regarded as censorious or unconstitutional, because in their judgement, the judges said they were comfortable with protecting the public interest by maintaining and ensuring wholesome sexual morals for the nation.[22] Furthermore, although the statement "books that are detrimental to public security or that corrupt public morals" is an abstract or broad one, the court has perceived it as strictly interpretable, and has stated that the meaning of this provision became clear after taking account of the precedents dealing with Article 175 of the Penal Code. In addition, in testing the correspondence on the materials prohibited from being imported, the Court understood the prohibition to be incidental to the customs-collecting procedure, and it did not regulate the content itself. Although in a later case the prohibition on importing a photography book was rejected by the Court,[23] it has continued to hold that the importation prohibition under the Customs Act is not unconstitutional. Furthermore, the OHDY was also justified as satisfying the constitution, even when it regulates the harmful books.[24]

Apart from obscene materials, prohibitions under the POEA have also been allowed under constitutional law, even when it concerns canvassing door to door.

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[18]Japanese constitutional interpretations also permit the lower courts to judge constitutionality.

[19]see Tonami (2015), p. 6.

[20]see *Horikoshi*: the Supreme Court Judgement, Second Pretty Bench, December 7, 2012, Keishu 66-12-1337.

[21]The Supreme Court Judgement, Grand Bench, March 13, 1957, Keishu 11-3-997.

[22]The Supreme Court, *supra* note 16.

[23]The Supreme Court Judgement, Third Pretty Bench, February 19, 2008, Minshu 62-2-445.

[24]The Supreme Court Judgement, Third Pretty Bench, September 19, 1989, Keishu 43-8-785.

In one case, the Court reasoned that these kinds of election campaigns should be prevented, because they provoked such harmful effects as corruption and disturbance on the calm lives of the voters.[25] With regard to the issue of punishment for breaches, in other cases, while the Court has certainly recognized the significance of freedom of research, it has pointed to the moral problems concerning research activities in that case, and endorsed the conviction of a journalist as not being unconstitutional.[26] There is also a case involving the punishment of a public officer with the national postal service for displaying election documents when not on duty.[27] The Court regarded this act as political activity prohibited under the NPSA, and in its decision, considered the purposes of the prohibitions of certain kinds of political activities, before deciding there was a balance to be struck between the merits and the demerits arising from such prohibitions. As a result, the Court upheld the conviction. According to that judgement, such regulations are indirect and incidental infringements on activities that could engender fear, and damage the political neutrality of public officers.

Japanese judicial practice, thus, has the characteristic tendency of using the balancing test for freedom of speech.[28] Furthermore, the Court has also categorized the regulations for freedom of speech into direct and indirect ones.

2.4 *Conclusions—Guarantee of Freedom of Speech in Japan*

Circumstances concerning freedom of speech have been discussed. It has been made clear that in Japan, although freedoms of reporting and speech enjoy constitutional protections, these freedoms are also governed by regulations in ordinary law. On the other hand, the Court has maintained the stance of declaring constitutional regulations on freedom of speech. Certainly, the legal restraints on freedom of speech allowed have not been unlimited, but a balancing test has often been applied, so that many regulations have come to be justified by the Court. Furthermore, in Japan, there exists the media's self-restraint and other disturbing effects that would be difficult to legislate for in any judicial review.

The Japanese ranking in the WPFI has been decreasing dramatically since 2011. However, the legal and unofficial regulations on freedom of speech are found to have existed much earlier. Therefore, limitations on the guarantee of freedom of

[25]The Supreme Court Judgement, Third Pretty Bench, July 21, 1981, Keishu 35-5-568.

[26]*Reporter Nishiyama*: The Supreme Court Judgement, First Pretty Bench, May 31, 1978, Keishu 32-3-457. In this case, it was regarded as problematic that the journalist and the national public officer were committing "adultery."

[27]*Sarufutsu*: the Supreme Court Judgement, Grand Bench, November 6, 1974, Keishu 28-9-393.

[28]Concerning recent more precise testing, see Watanabe et al. (2016), p. 228 (Gerorge Shishido).

reporting or speech are not only a temporary problem, but have been an important matter of fundamental rights for some time.

3 Doctrines in Japan Relating to Freedom of Speech

Having described the current situation in Japan with regard to its statutes, precedents, and the media, the issue to turn to now is how constitutional lawyers have responded to them.

Even though the Court has not declared the regulations on freedom of speech to be unconstitutional, the absence of any decision declaring unconstitutionality might reflect the high quality of the statutes limiting freedom of speech. As has already been said, however, the Japanese provisions are problematic in that they are both vague and broad. Therefore it is difficult to state unequivocally that the lack of decisions declaring the statutes unconstitutional is due to their high quality.

Japanese constitutional lawyers remain critical of the Court's tendency to use a balancing test so laxly, when considering the constitutionality of the limits on freedom of speech. The Court's conclusions crystallize its difficulties when attempting to emphasize abstract interests to justify the restrictions on freedom of speech, or to fail to suggest a standard for weighing competing values.[29] Moreover, although scholars do not inherently reject the practice of balancing itself, they require that the Court give freedom of speech "dominant status." A standard Japanese textbook on the Constitution holds that it is necessary to distinguish between mental freedom infringements and other types of infringements, and it notes that constitutionality should be stringently tested if mental freedom is limited.[30] Its text describes freedom of speech as important for developing personality and democracy in constitutional rights. This concept is called the "two-tier test" doctrine.

The two-tier test distinguishes between regulated mental freedoms and other regulated freedoms. At the same time, there are a variety of regulations on freedom of speech. As a result, Japanese constitutional scholars distinguish between restrictions on freedom of speech that are content-based, and those that are content-neutral. They argue that constitutionality should be reviewed more stringently, especially with regard to clarity, or at a minimum when this freedom is regulated according to its content. In contrast, the constitutionality of content-neutral regulations might prove to be a little more tolerant ("the middle test"). Content-neutral regulations consist of regulations that designate times, places, or modes, and impose controls on "symbolic speech."[31] Moreover,

[29]Yamakawa (1987 (2012)), p. 323.

[30]Ashibe (Takahashi) (2015), p. 103.

[31]Ibid., p. 196 defines the term "symbolic speech" as "conduct expressing a thought and an assertion thorough some actions," and mentioned, as an example, such conduct as to publicly burn one's draft card for a war. Fallon (2013), p. 54- calls that conduct "expressive conduct."

constitutional theorists also distinguish between prior and posterior restraints, of which the former are regarded as riskier. In addition, many[32] observers hold that the role of censor should be absolutely prohibited.[33]

Japanese scholars, thus, regard mental freedom as being especially important and requiring very restrictive reviews of its constitutionality. These concepts have been influenced by arguments in the United Sates, where, for example, because "actual malice" is required when a conviction is based on defamatory statements made against a public official, such statements are only seldom considered to be illegal.[34] Furthermore, the Japanese Constitution is strongly influenced by the United States, and both countries have similar judicial systems, which might explain the strong influence American theories have had on Japanese academics.

However, circumstances in Japan are different from those in the United States. Firstly, the background to the discussion about the prior status of freedom of speech in the United States is that regulations on economic freedom have often been rejected as being unconstitutional. In *Carolene Products* in 1938, the US Supreme Court (the Supreme Court) implied the two-tier test.[35] In this decision, the Supreme Court, upheld that the challenged regulation on the economic activity was constitutional, while indicating strict reviews for cases of legislatorial regulation of political procedures (its Footnote 4). Japanese arguments on the two-tier test emerged from criticisms of the Japanese Supreme Court too easily justifying the restrictions on freedom of speech based on the public interest. Moreover, the balancing test is understood in the United Sates to be tolerant of the constitutionality of regulations, but in Japan, that test began to be asserted with the claim that regulations on freedom of speech should not be easily justified. Although for some time after World War II the Court said the public interest was sufficient to justify restrictions on freedom of speech, a balancing test was later introduced to more strictly consider the constitutional issues raised.[36]

4 Comparison with German Doctrines

In Japan, the two-tier test has been developed against the background of a critical view being taken of the Court for not sufficiently safeguarding freedom of speech, and with reference to the observation that many theories refer to American theories. There are certainly differences between both countries in how they have begun to use the two-tier test and the balancing test. Indeed, when the Japanese Supreme

[32]Ibid., p. 198 regards it not so.

[33]Sato (2011), p. 257. The Supreme Court also understands that the word censor means absolutely prohibited (*supra* note 16), despite different definitions between jurisprudence and scholars.

[34]New York Times Co. v. Sullivan (1964).

[35]United States v. Carolene Products Co. (1938).

[36]see Yamakawa, *supra* note 29, p. 343.

Court justifies the regulations on freedom of speech, it seems to be a good alternative to commit to the theories in the United States, where strict protections have been established for freedom of speech.

The Japanese Supreme Court, however, has taken a different stance on various issues. The Court has never declared the unconstitutionality of a regulation on freedom of speech. That situation might lead one to ask whether it is also appropriate to refer to doctrines in countries other than the United States, such as, for example, Germany. In fact, many Japanese lawyers refer to German disputes, but they have also been criticized.

4.1 Skeptical Views of German Protection of Freedom of Speech

Firstly, as a matter to be attended to when we introduce a German issue to Japan to review its constitutionality, Professor Tetsuharu Matsumoto[37] notes that in Germany the idea of applying a strict test to the regulations on freely expressing opinions has not been adopted. According to him, there are differences between the thinking in Germany and the United States, since the US Supreme Court has applied a test mainly based on the First Amendment, and judicial reviews are incidental and concrete. In contrast, in Germany, he mentions how, when a review is conducted, it involves human dignity at its core, and, furthermore, the Constitutional Court can also conduct an abstract review.

After adding that he does not have details of Germany's in-depth discussions, Professor Matsumoto speculates that it is difficult under the German approach to describe freedom of speech as a dominant material value, because the concept of human dignity is at its core. In his view, whereas dealing with the conflicts between judicial reviews and democracy has been an issue in the United States, it might not arise in Germany, based on the Constitutional Court's competence in dealing with abstract reviews. The result of that conclusion for him is that, "it might be difficult for the thought to arise that the courts should strictly review freedom of speech, when democracy is accepted as legitimate."

However, his observation is likely to require two considerations. The first question is whether, in Germany, a conflict did not arise between judicial reviews and democracy.[38] The other question, dealt with in this article, is whether there exists a German view on applying a strict test to regulations on the right to freely express opinions. With regard to this question, Professor Matsumoto refers to the views of Professor Shigenori Matsui, which are presented next.

Professor Matsui says that there is no one approach to applying different tests to each aspect of fundamental human rights in Germany, and he asserts that the

[37]Sogabe et al. (2012), p. 20 (Tetsuharu Matsumoto).

[38]Jitsuhara (2013).

two-tier test does not exist there.[39] In his view, although there is also a distinction in Germany between fundamental rights related to, and not related to, human dignity, such a concept does not result in the view that a strict test should be used to assess limitations on freedom of speech.

He also discusses the problems arising from discussions about freedom of the press.[40] According to him, the mass media might be required to take some responsibility for the circumstances related to its social power—a concept that is discussed in Germany under the rubric of "public responsibility" or "public mission." In Germany, the "public mission" of the press is provided for by the press ordinance of each state. As he notes, responsibilities of the press in Germany include registering the collection or supply of information and participating in opinion-building. In contrast, he observes that the German approach, already cited, must trigger serious constitutional questions concerning freedom of speech, and in particular, such problems as a public mission being the media's legal duty, the establishment of legal institutes to test the media's fulfillment of its responsibilities, and its attempts to realize and ensure its responsibilities through legislation.

Professors Matsumoto and Matsui, thus, argue that the German guarantee of freedom of speech reveals problems when viewed from a Japanese perspective. Moreover, Professor Matsui seems to think that there are similar problems with regard to the guarantee of freedom of the press. For them, the question is, firstly, whether fundamental rights in Germany are distinguished exclusively by their relationship to human dignity, and especially whether freedom of speech is not regarded as being related to values other than human dignity. Secondly, it should be asked whether the Federal Constitutional Court of Germany (the Constitutional Court), or German constitutional scholars, think it necessary to rigorous assess constitutionality if freedom of speech is regulated. In Japan, many constitutional lawyers refer to the German approach to examine cases in which freedom of speech is strongly protected.[41] In these cases, a third question arises as to whether Professor Matsui's opinion is really appropriate. His position on freedom of the press in Germany could lead to the impression that the German press is only weakly regulated by the state ordinances. However, it is necessary to show what these ordinances have realized or ensured, in their provision of a public mission as a legal responsibility for the media.

For this reason, considerations of its appropriateness require a description of the German situation. Questions related to how freedom of speech is protected and limited in Germany, how the Constitutional Court tests the constitutionality of regulations on freedom of speech, and how constitutional lawyers address them, are discussed next.

[39]Matsui (2010), p. 300.

[40]Matsui (2013), p. 347.

[41]Mouri (2008), p. 243.

4.2 Freedom of Speech in Germany

First, with regard to protections of freedom of speech, the Basic Law for the Federal Republic of Germany (the Basic Law or the "Grundgesetz" is the constitutional law of Germany), on the one hand, guarantees freedom of communication. Article 5, Section 1, protects "the right to freely express opinions," and the second sentence provides for both freedom of the press, and freedom of reporting by broadcasting or films.[42] On the other hand, Article 5, Section 2 of the Basic Law enumerates some grounds to permit regulations on freedom of communication. In addition to the expressly mentioned general laws (allemeine Gesetze) and human honor, the other constitutional interests are thought to provide the basis for limiting freedom of communication.[43]

It is remarkable that there are provisions in Germany's ordinary laws that punish people who speak or act with the aim of justifying the former Nazi regime, as for example, in Article 86, Section 1, Number 4, and Article 130, Sections 3 and 4 of the Penal Code. Furthermore, most German states have a press ordinance with provisions that could be regarded as imposing restrictions on the freedom of the press. Despite differences in details, the public responsibilities, privileges, and duties of the press are mostly provided for. A typical example is the right to make a counterargument to factual assertions by the press. Article 4 of the Bayern Press Act also provides privileges for the media.

4.3 German Decisions Concerning Freedom of Speech

Thus, in Germany, limits on this freedom exist in ordinary law and local ordinances. The question is how the Constitutional Court considers the constitutionality of such legislative limits. Before moving to that discussion, the German judicial system should be described.

Unlike in Japan, there is a Constitutional Court in Germany. The authority to declare the unconstitutionality (invalidity) of legislation belongs exclusively to the Constitutional Court. For example, besides the well-known "Abstract Judicial Review of Statutes," the Constitutional Court also has the authority to conduct Constitutional Complaint proceedings that have some similarities to those procedures in Japan and the United States. The procedural mechanism for making Constitutional Complaints allows every person to apply directly to the Constitutional Court, which in turn deals with infringements on fundamental rights —not only through concrete legal orders, but also through judicial decisions of the

[42]It is different from the Japanese constitutional law for the German Basic Law to expressly provide freedom of reporting.

[43]Schulze-Fielitz (2013), p. 685.

ordinary courts or the "law itself."[44] Among the procedures dealt with by the Constitutional Court, the Constitutional Complaint procedure has proven to be the most popular in a number of cases.

4.3.1 About Freedom of Speech

As already mentioned, the German penal code that punishes words and acts that support Nazi ideas seems to be well known. Such a regulation is a content-based restraint, and therefore, according to Japanese scholars, such a ban should be categorized as a matter to be strictly tested for its constitutionality.

One decision of the Constitutional Court concerning such speech occurred in the "*Auschwitz lie*" case.[45] In this case, a conflict emerged when permission was granted for a neo-Nazi party to hold a symposium under the condition that it would not be denying the persecution of the Jews that occurred during the Third Reich period. The Constitutional Court accepted this administrative act to be constitutional.

The Constitutional Court has distinguished between the protected acts under Article 5, Section 1 of the Basic Law, considering them as opinion statements and factual assertions. On the one hand, opinion statements should be safeguarded, regardless of the contents, and those protections should cover different types of statements. On the other hand, the Constitutional Court has held that factual assertions, containing obviously untrue facts, lie outside the freedom to form opinions. It reasoned that such assertions could not contribute to the opinion-building assumed by the Basic Law. Accordingly, the Constitutional Court has firstly categorized as a factual assertion remarks that avow the absence of any persecution of Jews, and maintained that it had become clear in many fields that those assertions are evidently untrue. According to this decision, such an assertion does not constitute protection of the freedom of forming opinions.

At the same time, the assembly planned in this case intended to consider whether it could discuss the possibility that history after World War II has had the effect of "extorting" something from the German politic. The Constitutional Court held that expressions dealing with the "possibility of extortion" were the presumption for opinion-building, and regarded them to be constitutionally guaranteed under Article 5, Section 1, Sentence 1. But the interpretations of Article 185 of the Penal Code that stipulates punishments for insults, and Article 5, Number 4 of the Assembly Act, were held to be not questionable, and no constitutional problem was identified in this case, despite the challenges to restrictions on the freedom to freely express opinions. This decision argued that the honor of Jews who live in Germany should

[44]This procedure would be possible for a person who thinks that a law could be applied, and that such application could damage such a person.

[45]BVerfGE 90, 241.

be protected because of their fates, and stated that therefore to deny the persecution of Jews should be regarded as defaming the honor of this group.

When the *Auschwitz lie* case, as a result, justified the restrictions based on the contents expressed, it might be possible to assume that, in Germany, it is easy to justify regulations on freedom of speech. However, the right to freely express opinions has been held to be important by such German judges as the one in the "*Lüth*" Decision.

"Lüth" *Lüth* is an important decision in Germany's postwar constitutional history. In this case, a Constitutional Complaint applicant called for a boycott of a film made by a scriptwriter who had made propaganda films under the Nazi regime. A film company applied to the ordinary court for an injunction against the applicant's request to boycott the film, and this injunction was granted. This decision was challenged through the Constitutional Complaint procedure, and the Constitutional Court refused the injunction.

It has, firstly, been said that the Basic Law formulates an objective order (objektive Ordnung). Despite there being conflicts between private persons, the Constitutional Court has argued that the system of fundamental rights is a value system (Wertssystem) that should be applied in all fields of law, and that it also has a "radiating effect" on the area of civil law. In this regard, the judgement noted that the Basic Law expects the regulations on the freedom to freely express opinions under general laws.

However, the Constitutional Court has maintained that the fundamental right to freely express opinions is just constitutive of liberal and democratic nations, and that freedom of expression should be a principle that is given priority in all legal fields. As suggested above, the Basic Law describes the right mentioned here, to be regulated by the general laws, but the Constitutional Court noted that such laws must be interpreted with respect to their value in a liberal and democratic nation, when the laws regulate fundamental rights, and their infringements need to be limited by the "radiating effects" of the right to freely express opinions (the "interaction theory:" Wechselwirkungstheorie).[46]

These statements in *Lüth* have been referred to repeatedly with regard to the importance of the freedom to freely express opinions within a liberal and democratic national order. This relates to the significance of the right to express opinions, for example, in the determination that concluded it was unconstitutional to prohibit the distribution of leaflets in Frankfurt Airport without prior permission. In this case, the Constitutional Court noted the freedom to freely express opinions that are of constitutive significance for the liberal and democratic order.[47]

[46]BVerfGE 7, 198 <205–209>. Jouanjan (2009), p. 876 explains that the "applicable general law may restrict the freedom of expression, while freedom of expression imposes a restrictive interpretation on the law itself."

[47]BVerfGE 128, 226 <266>.

Chilling Effects Attention needs to be paid to the judicial decisions in relation to the chilling effects of legal sanctions on the freedom to freely express opinions. For example, a conviction for defamation was held to be unconstitutional when leaflets described the past of a new leader of a local branch of the Christian Democratic Union (CDU) party in Germany.[48] In this case, the Constitutional Court pointed to the problem of criminal penalties having "chilling effects" on the normal exercise of the freedom to freely express opinions. The judge said that such chilling effects were particularly problematic when the criminal sanction had been based on defamation.

At the same time, civil sanctions provide legal penalties for defamation by expression as well. In one case, compensation for damages was ordered when broadcast journalists criticized a sculptor by name. When this decision was challenged via a Constitutional Complaint, the Constitutional Court refused the order as being unconstitutional, and reasoned that such an order might create chilling effects, due to the threat of sanctions.[49]

BVerfGE 111, 147 Although the first case presented justified regulations on the assembly of neo-Nazis, another case was presented where the Court declared it unconstitutional to limit the activities of neo-Nazis, after a Constitutional Complaint was brought against refusing the right of neo-Nazis to assemble.

The ordinary courts found the grounds for prohibition of the assembly in Article 130, Section 1, Sentence 1 of the Penal Code. Although this article does not explicitly describe damage to "public order" as a condition for prohibition, the ordinary court's view was that damage to "public order" could be grounds for an unwritten rule for that prohibition. However, the Constitutional Court declared this decision to be unconstitutional, because such unwritten standards could not be sufficient grounds for a prohibition.[50]

Conclusions: The Jurisprudence of the Constitutional Court on Regulations on Freedom of Speech As already mentioned, the *Auschwitz lie* case regarded a regulation to be constitutional even when it was based on expressed content. On the other hand, *Lüth* illustrated the importance of the freedom to freely express opinions. Moreover, the chilling effects of legal sanctions were mentioned in some decisions. In addition, a regulation on an anti-Jewish assembly was refused as being unconstitutional, since unwritten rules had been used, despite an explicit provision being in place. What is more, the *Auschwitz lie* case regarded the planned statements of opinion as not having a low value. In this case, protecting the name of Jews in Germany was especially necessary, and it was an exceptional case in which freedom of communication conflicted with very important interests.

It is certainly difficult to imagine judgments declaring a judicial decision as being unconstitutional in Japan. Furthermore, Japanese constitutional issues have

[48]BVerfGE 43, 130.

[49]BVerfGE 54, 129 <139>.

[50]BVerfGE 111, 147 <156>.

often been argued as legal matters under ordinary laws. Therefore, it might be unfair to assert that the Japanese courts do not protect freedom of speech. Nonetheless, the German Constitutional Court has often declared a challenged administrative order to be unconstitutional. This approach of the German Constitutional Court seems to be different from the approach taken by the Japanese Court.

4.3.2 Freedom of the Press

In the decisions of the Constitutional Court, the right to freely express opinions, thus, has often been estimated to be significant and, therefore, regulations of that right have frequently been refused as unconstitutional. At the same time, as already suggested, German state press ordinances provide a public mission for the media, which could lead to the observation that regulating freedom of the press is easily justified. Below, the issue of how the German Constitutional Court involves the constitutionality of the regulations on freedom of the press is examined.

Firstly, there was a case dealing with the problem of an employer's harsh criticism of the workers' council in a company paper published by the employer.[51] The ordinary courts forbade the uttering of such an expression, but the Constitutional Court held that a company's publication enjoyed the protection of freedom of the press, and it declared the prohibition to be unconstitutional. It was characteristic of the Constitutional Court to adopt a "broad and formal concept of the press" in including a company publication as being part of "the press." In addition, the judgement stressed the institutional understanding of freedom of the press and the importance of communication. Moreover, in this case, the anonymity of the contributors was upheld, also as a result of the institutional concept of the press.

The other case deals with state agents' searching the editorial office of *Cicero* magazine, because it was suspected of receiving leaked national secrets. The Constitutional Court rejected this government act as being unconstitutional, because its objective was to find informants. The Constitutional Court explained that Article 5, Section 1, Sentence 2 of the Basic Law was of objective legal importance, and it argued that the institutional independence of publishing or broadcasting was guaranteed by this objective legal significance. It added that protection was necessary for such interests as keeping secret the identity of information sources, or maintaining trust between the press or broadcasting organizations and informants. Moreover, the Constitutional Court mentioned the possibility of the searching of an editorial office as having chilling effects on the press.[52]

What is more, in "*Benetton Shock Advance II*,"[53] the question was asked as to whether advertising material that had a strong impact on readers should be

[51]BVerfGE 95, 28.

[52]BVerfGE 117, 244 <258f.>.

[53]BVerfGE 107, 275.

permitted. The ordinary court decided the advertisement should be prohibited, to prevent unfair competition. In contrast, the Constitutional Court declared this prohibition to be unconstitutional. The judicial constitutional decision interpreted this case as being a matter of freedom of the press, and mentioned at the same time that the opinions expressed at that time were important for liberal and democratic national order. Moreover, a similar significance was noted in relation to the freedom to freely express opinions.

I have already noted that in Germany each state has an article that assigns a public mission to the press. Although some Japanese scholars have criticized such missions, because they result in various obligations, most concrete obligations are specifically and independently provided separately from a public mission. Even when the press is often required to protect "inner freedom," there is no express article requiring this protection. Therefore, a notice of the decisions concerning the protection of inner freedom might clarify the consequences of state press ordinances. There is a case in which the publisher of a press company did not inform the workers' council when the publisher dismissed an editor.[54] When the publisher must inform such organizations, the competence of such a publisher would be restricted. The Constitutional Court concluded that this case was not related to freedom of the press. As its reason, the judge noted that the conflict arose between the publisher and the workers' council, not between the publisher and the journalists.

As suggested, in Germany, press ordinances articulate the public mission of the press, and it is required to protect inner freedom. Such a situation might imply rigid regulations on the press or on the competence of the publisher, however it has also been shown that the decisions of the Constitutional Court guarantee freedom of the press relatively strictly. Even though it does not apply to all cases, the institutional freedom of the press or its objective legal aspect has often functioned to eliminate the disadvantages of the press. The Constitutional Court, thus, permits not only limitations to the competencies of publishers, but, at the same time, has limited inner freedom to matters between publishers and journalists within a narrowly applied range. Therefore, inner freedom has not played a roll of severely limiting press freedom.

4.4 German Popular Descriptions Concerning Freedom of Speech[55]

Most German scholars seem to favor such decisions. Along with the Constitutional Court, they recognize the importance of the right to freely express opinions. This right is regarded not only as a private value, but also an element of political

[54]BVerfGE 52, 283.

[55]Schulze-Fielitz, *supra* note 43, p. 636.

publications in democratic and constitutional nations. On the one hand, Article 5, Section 1 of the Basic Law is deemed to be rooted in human dignity, and the right to freely express opinions is held to satisfy, individually and publicly, such interests as mental curiosity, the thirst for knowledge, and the desire for participation. Furthermore, the right to freely express opinions is thought to contain an objective guarantee. In this view, the democratic public is regarded as the central institution for controlling government acts, which is related to the significance of the right to freely express opinions. In addition, the "interaction theory" is referred to as the doctrine necessary for consideration of the constitutionality of regulations on freedom of communication.[56] Moreover, German lawyers have described how this significance has been noted in precedents dealing with balancing the public interest, and that the proportionality of burdens should be strictly reviewed in considering their justifications when freedom to communicate is regulated on the basis of content.[57]

Furthermore, in relation to freedom of the press, institutional freedom and the public mission of the press is also mentioned by constitutional scholars. Likewise, practicing lawyers hold that the public mission, with regard to guaranteeing the proper logic (Eigenlogik) of the media, should bind the legislators, despite their intention to organize the institution of the press.[58] German constitutional academics also explain inner freedom as a radiating effect emerging from freedom of the press into labor law.[59] Although inner freedom would be applied in cases where there is a conflict between journalists and editors or publishers, such journalists, in this view, can claim merely minimal independence.[60] According to that view, even when legislators create an institutional guarantee by enacting ordinances, their dispositions should also be limited.

4.5 Considerations

Although many Japanese scholars refer to arguments in the United States, there has been no Japanese judicial decision declaring the unconstitutionality of regulations on freedom of speech. At the same time, despite skeptical views with reference to the German approach, German judgements and scholars never disrespect freedom of speech, as has been demonstrated above.

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[56]Ibid., p. 687.

[57]BVerfGE 124, 300 concluded it was constitutional to prohibit an assembly admiring the Nazi leaders. But the Constitutional Court noted that statutes could be permissible only under strict neutral and equal conditions, if those laws ban and penalize infringements in relation to the contents of expressed opinions.

[58]Schulze-Fielitz, *supra* note 43, p. 707.

[59]Ibid., p. 745.

[60]Such independence of journalists is sometimes understood as a "declaratory Regulation." see Kloepfer (2010), p. 276.

In discussions or decisions concerning the freedom of communication in Germany, certainly some particular aspects are raised. The regulation of any justification of Nazi rule is justified. Furthermore, even when strict proof is required for content-based regulations, there are cases in which such restrictions have been declared constitutional. Nonetheless, only factual—evidently untrue—assertions are held to lie outside the range of the right to freely express opinions, and the justification for content-based regulation of opinions is based on the fate of the Jews who have lived in Germany. In other words, it is exceptional to regulate speech. What is disallowed at most, for the purpose of safeguarding Jews in Germany, is justifications of the Nazi regime, and other decisions point to the chilling effects that result from legal penalties imposed on opinion makers without express legal rules, or, as has often been suggested, the right to freely express opinions is of constitutional significance in a liberal and democratic nation. In fact, the Constitutional Court has often regarded regulations on freedom of speech as unconstitutional. In this practice, it is different from the Japanese courts. Constitutional scholars favor such decisions by the Constitutional Court, and note the link between the freedom to freely express opinions and democratic procedures. Furthermore, academics require a strict review of the constitutionality of its regulation and German judicial decisions. In particular, content-based regulations on expressions are understood to be subject to the strict application of the proportionality test, which indicates its similarities to the views of Japanese authors.

In relation to freedom of the press, state press ordinances contain regulations on the public mission of the press. Despite having its Japanese critics, other regulations independently provide, for example, the right to make statements countering factual assertions by the media as an obligation. Despite the lack of explicit provision, inner freedom results not directly from the public mission of the press, but as a radiating effect arising from the freedom of the press on labor law.[61] In jurisprudence, the range of inner freedom is shaped narrowly, and the Constitutional Court has held the dismissing of an editor not to be a matter of freedom of the press. Observers understand it merely as being indicative of the independence of journalists from editors. Although legislators have attempted to realize and ensure the responsibilities of the mass media in the form of inner freedom by enacting legislation, their power should be restricted. Moreover, freedom of the press is understood broadly as a guaranteed interest, and company publications are regarded as being part of the press. In addition, protection under freedom of the press has such requirements as safeguarding the anonymity of contributors to newspapers, protecting advertisements of materials with a strong impact, and offering protection against having the state search for informants. Therefore, despite German arguments about the institutional freedom of the press or its objective aspects, and despite provisions in state press ordinances involving the public mission of the press, press activities face few restrictions.

[61]In Japan, this idea is found also in the so-called “indirect effect theory.”

With regard to the three questions presented above (4.1), firstly, in Germany, freedom of speech is not exclusively related to human dignity. Secondly, also in Germany, in practice and theory this freedom is thought to be especially important. Although this report has pointed out only some of the doctrines or decisions dealing with freedom of communication,[62] it would be an overstatement to maintain the view, which is often found in Japan, that in Germany no special thought is given to protecting freedom of speech. Such an argument does not hold up, which is the answer to the third question.

5 Closing Remarks

In the context of Japan's recent dramatic decrease in WPFI ranking, this report has discussed freedom of reporting or speech as a "human rights issue in Japan." Its conclusions can be divided into two parts. The first is that the issue of freedom of speech is not only a temporary issue in Japan. Beyond the legal restrictions on freedom of speech, unofficial limitations have also existed since the prewar era. On the other hand, although Japanese scholars have referred to discussions in the United States, there has been no judgement describing infringements on freedom of speech as unconstitutional. Consequently, it might also be reasonable to refer to theories in countries other than the United States, such as Germany for example, though some Japanese scholars seem skeptical of German doctrines involving freedom of speech. However, freedom of speech is relatively strongly guaranteed in Germany, which is this article's second conclusion. In addition, the German Constitutional Complaint procedure has some similarities to the Japanese incidental judicial constitutional review. Therefore, it is difficult to conclude that the strength of protection for freedom of speech depends on the existence of a constitutional court.

I took note of the WPFI's findings. However, the RWB is only an NGO, and, therefore, lacks the elements needed to determine freedom of the press rankings effectively. Nonetheless, it seems significant to reconsider Japan's present circumstances regarding the guarantee of freedom of speech on the occasion of such a ranking. This article has compared Japan's situation with that of Germany. In referring to the arguments presented above with reference to Germany, it would be more appropriate to focus on the differences between Japan and Germany than to emphasize differences between the United States and Germany, and it also seems to be important to take note of other countries' achievements, not only those of the United States, but also those of Germany and the other EU member states, where freedom of speech has been guaranteed more strongly than in Japan. It is also important that we investigate how this freedom is protected in those countries.

[62]Kloepfer, *supra* note 60, p. 305 writes that the Constitutional Court has not decided concerning the matter of "pornographic artwork." Moreover, with regard to German different ways to controls "harmful books," see BVerfGE 83, 130 and 90, 1. In addition, in Germany, there is no specifical provision to regulate election campaigns.

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China's Development Banks in Asia: A Human Rights Perspective

Matthias Vanhullebusch

1 Introduction

China's economic and financial trajectory has entered a new phase in its overseas development agenda. Since the establishment of the New Development Bank, also known as the BRICS-bank in 2014, and the Asian Infrastructure Investment Bank (AIIB) in 2015, China's relationship with its regional counterpart, i.e. the Asia Development Bank of which it is a member since 1986, has been redefined. China's efforts to reshape the international economic order in its own image inevitably affect its development and normative discourses as well as strategic partnerships through those financial institutions. Pursuant to China's 2015 Vision and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road, their creation is inextricably connected with China's geopolitical ambitions to foster economic and development relationships with the nations on its Silk and Maritime Roads towards a community of common development.[1]

China's reassurances however regarding the complementary rather than competing role of its financial vehicles vis-à-vis other development banks have not

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[1]People's Republic of China, Chinese National Development and Reform Commission, Ministry of Foreign Affairs, and Ministry of Commerce (2015). See also Zeng (2016), Ingram and Poon (2013), Griffith-Jones (2014), Schablizki (2014), Abdenur (2015), Abdenur and Folly (2015), pp 66–95, Bob (2015), Griffith-Jones (2015), European Political Strategy Centre (2015), Renard (2015), Callaghan and Hubbard (2016), pp 116–39, Etzioni (2016), Wan (2016).

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entirely convinced Western nations to disregard China's underlying sovereign agenda. Particularly, concerns have been raised in respect of the standards adopted by those new banks in screening, evaluating and monitoring projects/proposals and granting funds for certain investments in Asia. Therefore, environmental benchmarks and labour conditions would be seen as compromised. Conversely, the West's international standards and conditionalities would better protect the livelihood of national and local communities instead. Nonetheless, such attitudes can be an overture for a broader dialogue between those established and new financial development institutions to gradually negotiate and internalize common standards especially given the mixed membership of the AIIB.[2]

Besides such potential grounds for cross-fertilization of human rights norms and strengthening of cooperation agendas across those different development banks, the protection of socio-economic and environmental rights by China's development banks must be conceived in light of its understanding of the developing countries' right to development in the first place. In addition, China's commitment to pursue its rule of law reforms domestically has immediate repercussions upon its international image as well as its resolve to abide to international law in particular in the field of human rights and development. Yet, such adherence has to be contextualized and, as a result, the implementation of human and environmental rights by virtue of the financial practice of China's development banks overseas will be progressive.[3]

This paper will examine those various human rights concerns in China's new multilateral development banks operating within Asia and beyond. It will firstly address how those financial institutions have been justified from the Chinese perspective. It will particularly focus on how the so-called right to development has given legitimacy to China's New International Economic Order by means of the establishment of its own financial development institutions. Secondly, it will contextualize and scrutinize China's past and present contributions to existing multilateral development banks and evaluate how—in spite of its promises towards complementarity of its new institutions—whether such contributions may effectively advance a multilateral and cooperative approach towards financing development in Asia. Thirdly, this paper will examine the prospects for the respect of environmental and social standards in the financing of development initiatives through China's new multilateral development institutions and the possibilities to further coordinate with other regional and global development institutions in the creation, development, interpretation and application of such human rights benchmarks that are fit to guide the financing of development efforts in Asia.

[2]Chen (2013), Lagon and Nowakowski (2015), Ito (2015), Subacchi (2015), Coalition for Human Rights in Development (2016), Evans (2016), Rosenzweig (2016), Sharda (2016).

[3]See more UN Guiding Principles on Foreign Debt and Human Rights (2011), Acharya (2011), pp 95–123, Griffith-Jones (2012), Ruskola (2013), Bohoslavsky (2015).

2 The Right to Development: Giving Legitimacy to China's New International Economic Order

While the right to development was once invoked to emancipate peoples in the aftermath of their struggles for independence against colonialism in various parts of the world ever since the 1960s to bolster their additional claims for a restructuring of the international economic order—as once confirmed with the adoption of the UN General Assembly's Declaration on the Establishment of a NIEO[4] as well as the Charter on the Economic Rights and Duties of States in the early 1970s (those are non-binding instruments or so-called soft law),[5] the right to development had equally become a tool for developed nations to reconnect with and potentially continue to pursue their economic and political dominance vis-à-vis the least fortunate members of the international community yet under the veil of solidarity and development assistance—either through financing development and preferential trade. The latter intervention—in violation of Article 2(7) of the UN Charter—had moved the collective right of development—as once an expression of the peoples' right of self-determination[6]—into the realm of individual human rights protection. In this regard, from the late 1970s onwards, the UN Human Rights Commission and UN General Assembly recognized the dual nature of the right to development, namely one that favours the prerogatives of the state—the entity representing the people—on the international plane and the individual within the domestic order.[7]

From a textual perspective, though, such evolution appears to be in conformity with the UN Charter and the international obligations that are imposed upon all UN member states in respect of Chapter IX on International Economic and Social Cooperation. Indeed, the commitment to improve human rights—social and economic alike—could eventually lead to "higher standards of living, full employment, and conditions of economic and social progress and development".[8] The premise of the realization of such human rights agenda on behalf states and the international community is based on the notion of the universal respect of individual human rights to which all human beings are entitled to without discrimination.[9] As far as the division of responsibilities is concerned to fulfil such objectives, the UN

[4]N GA Res. 3201/2 (S-VI), UN Doc. A/9559 of 1 May 1974.

[5]UN GA Res. 3181 (XXIX), UN Doc. A/RES/29/3281 of 12 December 1974.

[6]1966 International Covenant of Economic, Social and Cultural Rights (ICESCR), Article 1:

"All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence."

[7]UN Commission on Human Rights, Res. 4 (XXXIII) of 21 February 1977; UN GA Res. 34/46, UN Doc. A/RES/34/46 of 23 November 1979.

[8]1945 UN Charter, Article 55(a).

[9]*Ibid*., Article 55(b).

General Assembly's 1986 Declaration on the Right to Development firstly located such with the state on whose territory such human rights are claimed and secondly with the other members of the international community.[10] In practice, however, developing countries—in the interest of their economic and political priorities (domestic and international alike)—have undermined the protection of such human rights and fundamental freedoms under the pretext of the collective nature of the right to development.[11] Conversely, developed nations in their political and economic relations with the former have introduced human rights conditionalities in their trade negotiations to prevent an erosion of the state's primary responsibility to uphold those rights.

Such strategies and institutionalization of human rights protection on behalf of developed vis-à-vis developing nations have further eroded the earlier consensus that once reigned over the dual nature of the right to development and moved the latter back into the policy realm, namely where either defensive or rather assertive claims of developing countries could be advanced to question the veracity of the underlying values that would underpin the so-called new international economic order as it has evolved in the meantime since the end of colonial era. The lack of trust on both sides of the divide has further exacerbated since the global financial crisis of 2007–2008 that had hardly hit the socio-economic conditions of the peoples in both developing and developed countries. The latter's decreasing political and financial commitment to advance human rights protection either through trade and development assistance has changed their geopolitical role. While some new emerging economies had dramatically improved the socio-economic well-being of their peoples, broader discussions on the fulfilment of individual human rights entitlements had not come to fruition within those nations and had made it even more difficult on the longer term to seek a better understanding on both sides to engage in a fundamental human rights dialogue and cooperation that was once envisaged under the UN Charter and consecutive UN General Assembly resolutions.

The problem of leadership and ownership over individual human rights discourses would inevitably rebut claims that hegemonic economic aspirations under the veil of human rights entitlements were ever possible and eventually may reinforce the view of a (cultural) relativist approach to human rights protection in the first place. Those developments are paralleled by a similar division within the realm of international trade negotiations where mutual suspicion about the other's sovereign agendas has further fragmented trade relationships into regional initiatives, including the former Transpacific Trade Partnership (TTP), the (forthcoming?) Transatlantic Trade and Investment Partnership (TTIP), the forthcoming Regional Economic Comprehensive Partnership (RCEP), and even towards more protectionist attitudes as testified particularly in Western nations. How then to (re)connect again and seek cooperation regarding human rights protection in the

[10]UN GA Res. 41/128, UN Doc. A/RES/41/128 of 4 December 1986.

[11]See more Cunliffe (2007), p. 40.

socio-economic realm at the international level when universal rules are giving way for more regional perspectives in particular in the economic field?

In this respect, China's attitude towards economic governance appears to depart from the traditional/Western rule-based international order and has enabled it to profile itself economically and politically in a stronger position as opposed to Western nations that have been self-absorbed in regulating international life through international norms in the socio-economic and human rights arenas. For those reasons, China's relational governance focuses predominantly on the relationships between regional and global actors in various fields. According to Qin Yaqing who developed a theory on relationality—as grounded in a Chinese epistemology—and applied onto China's normative behaviour on the international scene, relational governance aims to create order in an ever-changing international economic and political environment. Furthermore, such understanding of "process of negotiating socio-economic arrangements that manage complex relationships in a community to produce order so that members behave in a reciprocal and cooperative fashion with mutual trust evolved over a shared understanding of social norms and human morality",[12] as Qin defines relational governance, can produce valuable insights in how the current state of economic relations and correlative commitment in the realm of development cooperation to advance the livelihoods of human beings regionally and internationally alike has evolved over the course of time and in space.

This relational governance approach further postulates that "rules, regimes, and institutions are not established to govern or restrain the behavior of individual actors in society, but to harmonize relations among members of society".[13] If one then projects the discontent that mutually governs the relationship between developed and developing countries who respectively defined the right to development as too narrow or broad onto this approach of relational governance, one can notice that China has sought to (re)establish trust not on the mere ground of a common definition around a number of international obligations—on which developed and developing countries fundamentally differ (see discussion on the dual nature on the right to development)—but on the basis of general principles of international relations and law instead. In this regard, China's Five Principles of Peaceful Coexistence—which include mutual respect for sovereignty and territorial integrity, mutual non-aggression, non-interference in each other's internal affairs, equality and mutual benefit and peaceful coexistence—share an important common denominator with other international norms, including the UN Charter and in particular—for the purpose of the discussion before us—in the field of international economic and social cooperation. Thus, Chapter IX of the UN Charter, Article 55—in its chapeau, makes clear reference to the purpose of such cooperation, namely "with a view to the creation of conditions of stability and well-being which are

[12]Qin (2011), p. 133.

[13]Qin (2010), p. 138.

necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples".

As a result, the principle of sovereign equality, mutual benefit and peaceful coexistence can be read together and, accordingly, must govern the relationship so that cooperation and process in this important field can be achieved over the course of time and in space. Respect for those fundamental principles can facilitate on the long-term the restoration of trust in the conflictual relationship between developed and developing countries. Indeed, one the basis of mutual benefit, China has repeatedly argued that such is a prerequisite in its economic and political relationship with its economic and strategic partners. On its turn, this can bring the right to development again to the foreground since it will focus on its policy application rather than human rights connotation in order to establish economic relationships in the first place. Yet, an opening towards a rule-based governance approach remains possible and desirable once the content of the right to development has been properly defined on the basis of sovereign equality too. In this respect, the meaning of the right to development, from the Chinese perspective, is derived from the relationship between the respective international/regional actors that can give content to its rule—both in its collective and individual dimensions. Since that meaning still differs—depending on developed and developing countries, a principle-based approach may transcend such fundamental differences and give sufficient room for trust to gain ground once developing countries are ready to advance individual human rights entitlements in the socio-economic realm.[14]

This approach of relational governance has been clearly manifested in China's 2003 position on establishing a New International Political and Economic Order. The Five Principles of Peaceful Coexistence should constitute the basis for cooperative relationships between developed and developing nations. Differences between the national conditions should not be an obstacle to establishing inter-state relationship nor constitute a reason for intervention in the domestic affairs of states. Instead, countries "should cooperate with one another on the basis of equality and mutual benefit to realize common development. The old *irrational* international economic order should be reformed to serve the rights and interests of the countries of the world, especially the numerous developing countries".[15] Paradoxically enough, irrational and nationalist claims for protectionism across Western nations have similarly been denounced by the Chinese leadership, in particular recently by President Xi Jinping, since it would deny that a relationship could no longer be fostered whenever there is collision or a divergent opinion on socio-economic policies amongst the diverse members of the international community.[16]

[14]See Vanhullebusch (2014), p. 226.

[15]China's Position on Establishing a New International Political and Economic Order (18 August 2003).

[16]Speech of President Xi Jinping at the World Economic Forum Annual Meeting (2017). Some have argued that China's call for a global liberal order departs from its domestic take on liberal dissent. See The Economist (2017).

Therefore, China's approach on an international economic order would inevitably take into account the inherent positive and negative characteristics of any economic relationship between actors on the international plane that over the course of time can change towards mutual benefit and common development as its 2011 White Paper on Peaceful Development indicated.[17] China however had for a long-time asserted that it was not willing to assume a leadership role or represent the developing countries in establishing such new order given its historic anti-imperialist claims against any hegemonic ambitions in particular in light of its own historical experience with Japan in the past and with the US—until more recently. The erosion of the latter's global leadership—involuntary (since the Clinton administration) and willing (since the Trump administration) alike—has, arguably, put China on the spot to assume greater responsibilities in this respect as was testified in the speech of Xi Jinping in Davos at the World Economic Forum on 17 January 2017.

Regionally however such role has been feared by regional and international actors alike. China has been particularly cautious about its initiative to steer a regional economic order in its image. Rather than focusing on a particular regional order in Asia, China has since 2013—with the ascent to power of Xi Jinping, projected and represented its One Belt One Road policy as a historical renaissance of all Asian nations'—not exclusively China's—past economic relationships along the continental and maritime Silk Roads. Subject to the suspicion of smaller nations (in particular those involved in the maritime disputes in the South China Sea) and of larger nations (including India and Japan), China has tried to convince Asian countries to reconnect to those roads and presented the project as an *Initiative* instead giving sufficient room for those countries to cooperate, give input and mutually benefit on the basis of sovereign equality.[18]

While China may be able to shape the new international economic order and its Asian regional Silk Road Initiatives on the basis of its Five Principles of Peaceful Coexistence, in particular sovereign equality, non-interference into the domestic affairs of state and mutual benefit—each of which are reflective of its own anti-hegemonic discourse, and receive support given the aspirations of common development in pursuit of the right to development of all nations—developed and developing alike, China's role and contribution to that effect may still suffer from legitimacy for a number of reasons. Regarding China's geo-economic ambitions, the trade deficit of China's economic partners has consumed much of their internal discussion on how to redefine their trade and political relationship respectively with China in general and the Communist Party of China in particular. Furthermore, China's outbound foreign investment and acquisition of overseas crucial industries —from agricultural, chemical, infrastructure, IT, mining and pharmaceutical sectors to shipping—have added more fuel to the protectionist anxieties reigning in Western countries. Vis-à-vis developing nations in Africa, Asia and Latin America

[17]State Council of the People's Republic of China (2011).

[18]Xi (2014), pp 315–19.

alike, China's strong presence in infrastructure projects in those countries as well as their dependency on the supply chains of raw materials and parts to China's manufacturing base have equally raised concerns about the consequences and dominance of China's economic agenda upon the internal affairs of those nations states. Nonetheless, China's large investment in its own national economy during the financial crisis of 2007–2009 has prevented those trading partners to suffer even more from the global economic downturn.

Those external conditions have put increasing pressure on the principle of sovereign equality. Moreover, China's internal decision-making in the economic and political realm has casted additional worries on how this may affect the relationship with the other members of the international community and the prospects to restructure the international and regional economic orders. In this regard, corruption within Chinese society and government has severely damaged its domestic and international image. While the Chinese top leadership—ever since the ascent to power of Xi Jinping in 2013—has fought corruption at all levels and within all sectors of economic and political life in China through populist purging, it remains to be seen whether this will eventually lead to better and more accountable governance within China in the first place and whether it was purely aimed to consolidate the power into the Chinese presidency instead. These domestic developments towards the rule of law inherently affect the credibility of China on the international plane and in its ability to assume its power responsibly in the realization of its trade and development goals with its political and economic partners within its neighbourhood, the region and the world at large. It is against this background that one must see in the following section how China has over the course of time participated in other international and regional multilateral development banks and how it aims to gain confidence and uphold its legitimacy when building its own institutions that are geared towards financing trade and development within Asia and beyond for the sake of common development.

3 Finance, Development and China: From Participation to Institution-Building

Traditionally, China has been a reluctant participant in international institutions that, in its view, would limit its sovereign interests. Given its exclusion from the UN since the establishment of the People's Republic of China on 1 October 1949—due to the representation by the Taiwan government as the sole representative of the Republic of China instead—until its reinstatement on 25 October 1971,[19] it would take a considerable amount of time before China would find mutual benefits in cooperating with the UN on the one hand and other international and regional institutions in particular multilateral development banks on the other hand. Yet, its

[19]UN GA Res. 2758 (XXVI), UN Doc. A/RES/26/2758 of 25 October 1971.

original concerns regarding the architectural design and operationalization have remained in place until the present day. China has vehemently opposed the use of those institutions to serve the so-called hegemonic interests of the world superpowers, the US and the USSR, during the Cold War and their instrumentalization on behalf of the US in defiance of the existence of a multipolar world after the Cold War that would keep developing countries within a subordinate political, socio-economic, financial and development position. To that effect, the World Bank was seen as the primary example of such old international economic order that was once established after World War II to serve as financial vehicles of Western nations to suppress developing countries in violation of the principle of sovereign equality.

Nonetheless, from the 1980s onwards, China did—since its economic opening-up in 1978—find interest to join the World Bank not only to gain funds in the first place but also later onwards to become an important lender for development projects in other parts of the world. While China was originally a founding member of the bank, its rights were restored when the Executive Board of the World Bank approved its representation at the Bank on 15 May 1980. Ever since, China has strengthened its relations with the Bank and has become a more mature partner in development financing. In this regard, when China marked its 30th anniversary membership in the World Bank, it had assumed more responsibilities in particular as a contributor to the International Development Association—a part of the World Bank Group that supports the poorest nations with low interest loans. China's own economic development had given it sufficient resources to fund such initiatives within the World Bank.

Therefore, China has repeatedly advocated in favour of a balanced representation of the shareholders at the World Bank which required a reform of the voting power system and a reorganization of the management structures.[20] When developed and developing countries share their voting power equally, a recalibration of their relationship that removes distinction and thus discrimination through such institutional intervention could reconcile contradiction between those different members in the operationalization of the World Bank's activities and the negotiation processes that affect its decision-making on the basis of sovereign equality.[21] By promoting reform, the relationships between the members of the World Bank have become more democratized and the internal functioning and environment of the World Bank could create more stability and hence a better prospect to fulfil its essential mandate. As of 13 January 2017, China has 4.60% of the voting power within the International Bank for Reconstruction and Development while it retains 4.84% of the total subscription of shares where its ranks third after Japan (7.12%) and the US (16.47%).[22] Although China still has a disproportionate impact as

[20]International Division of Ministry of Finance of the People's Republic of China (2011), pp 132–133.

[21]Worldbank.org (2010).

[22]Worldbank.org (2017).

opposed to those Western nations, China has sought to use the World Bank to disseminate its own development experience to other developed and developing countries with a view to establishing trust within this multilateral setting. In this respect, China had successfully reduced poverty at home, namely the proportion of poor people in China's rural areas reduced form 73.50% in 1990 to 7.20% in 2014 which contributed to more than 70% of the total of global poverty reduction in that respective period.[23]

China has also participated as a non-regional member in a number of other regional multilateral development banks. In this regards, China joined the African Development Bank in 1985,[24] the Asian Development Bank in 1986,[25] the Caribbean Development Bank in 1998[26] and the Inter-American Development Bank in 2009.[27] Here too, in more recent years in particular during and in the aftermath of the global financial crisis of 2007–2008, China has tried to show-case its developmental trajectory in the proposals for financing development projects in numerous sectors including energy, infrastructure, agriculture, health care, education, training, etc. in order for those developing countries to become in the end economically more self-reliant—this in line with the collective meaning of the right to development, namely to dispose of one's own natural wealth and to determine one's economic policy (more) independently. At the same time, it has also aimed to put the democratization of the multilateral development banks in Latin America and Asia on the agenda and to reform those institutions accordingly. Reducing the dominance of the US in the Inter-American Development Bank (30%) and of Japan (15.6%) and the US (15.5%) in the Asian Development Bank could, from the Chinese perspective, restore trust between the developed and developing countries, confidence in the respective banks to fulfil their mandates and enhance South-South cooperation as well as regional integration.[28]

Needless to say that China's bilateral aid with nations accounts for the majority of its development and financial aid. As opposed to channelling financial support through multilateral international and regional development vehicles/banks, China has found that its bilateral approach has been more efficient and effective when its boils down to the implementation of its development projects. Development aid granted by multilateral development banks may also suffer from such transparency and sustainability as a result.[29] Furthermore, most development banks are dominated by developed nations and China inevitably can exercise limited influence under those mechanisms. Given the latter's composition, China has been cautious about the hidden geopolitical and other hegemonic narratives that drive the

[23]United Nations (2015).

[24]Afdb.org (2017).

[25]Adb.org (2017).

[26]Caribank.org (2017).

[27]Iadb.org (2008).

[28]Ministry of Foreign Affairs of the People's Republic of China (2006), Xie (2008).

[29]Brautigam (2011), pp 203–22.

operationalization of such Western-dominated development banks in the first place. Therefore, China remains convinced that bilateral relationships in the realm of financing development projects are the most suitable way to establish friendly relationships and cooperation between nation states—in accordance with the spirit of Chapter IX of the UN Charter.

In this regard, China's establishment of the New Development Bank in 2014 and the AIIB in 2015 must been seen in this light. Pursuant to its relational governance, the focus on institution-building and its far-reaching (hegemonic) effects on behalf of some commentators could not be the only purpose and source of China's legitimacy. Instead, those institutions would be there to harmonize the relationship between the members of the respective multilateral development banks in addition to the bilateral relationships amongst them, including with China. Certainly, the departure of those institutions from the inherent imbalance between the respective shareholders and founding members have been a cause of anxiety amongst numerous Western and Asian nations that fear that those development banks would be equally instrumentalized by China to advance its geopolitical and -economic interest within its neighbourhood, the region, along the Silk Roads and the world at large. The internationalization of the Chinese Yuan could arguably be another manifestation of such ambitions, namely to compete with the US Dollar and other Western currencies ever since the International Monetary Fund added the RMB to the basket of Special Drawing Rights (from 1 October 2016 onwards).[30] Ongoing currencies wars may add further fuel to such suspicions and as a result those financial vehicles would be a source of conflict rather than cooperation.

Yet, according to the Preamble of the Agreement which established the New Development Bank on 15 July 2014, the parties to the Agreement—Brazil, India, China, Russia and South Africa—have a clear desire to strengthen and deepen their economic cooperation and are determined to use the Bank as a development and policy tool to help other emerging economies and developing countries to give access to financial support which in the current system is denied—especially in light of the financial constraints of international institutions which are experiencing budget cuts from the Western members in the aftermath and a result of the financial, economic and budgetary crises in Western countries. The New Development Bank intends to fill those infrastructure gaps from now onwards.[31] The powers of the Bank however—at least in its present constitutive treaty—do not intend to be competitive to the existing financial and development instruments of other regional and multilateral institutions but rather want to complement those existing efforts and fill the gaps where necessary. On first sight, the financial contributions do not seem to suggest a strong impact upon new development projects—only an initial subscribed capital of US$ 50 billion and an initial authorized capital of US$ 100 billion are at its disposal. The initial subscribed capital shall be equally distributed amongst the founding members (Article 2). Nonetheless, the New Development

[30]Imf.org (2016).

[31]Ndb.int (2016).

Bank's membership—pursuant to the same Article 2—is open to all members of the UN. An increase of members will necessarily augment the capital of the bank and the means at its disposal to invest in development projects. The structure of the New Development Bank is thus built on the principle of sovereign equality where the five founding member countries have equal voting rights. According to Article 6 of the Agreement, an increase of membership shall proportionality affect the voting power of each member that is dependent on its subscribed shares in the total capital stock of the New Development Bank.

Important in terms of fair representation of membership, a (new) member of the Bank may send a representative to attend any meeting of the Board of Directors when a matter especially affecting that member is under consideration. Such right of representation shall be regulated by the Board of Governors (Article 12i). In a similar vain, in order to ensure independence, the Bank, its officers and employees shall not interfere in the political affairs of any member, nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes and functions of the Bank as states Article 13 of the Agreement.

The Articles of Agreement signed by the 57 founding members[32] of the AIIB on 29 June 2015 have laid down similar guarantees as to the cooperative intentions of the new bank with other "multilateral and bilateral development institutions" (Article 1). In this respect, President Jin Liqun of the Bank reassured that the "AIIB appreciates ADB's [i.e. Asian Development Bank] support in this formative phase of its development. We look forward to working together with ADB and other development partners to deliver timely and efficient financing to meet critical infrastructure demand in the Asia Region."[33] The initial authorized capital is US$ 100 billion (Article 4) which may be increased subject to the decision of the Board of Governors but without "reducing the percentage of capital stock held by regional members below seventy-five (75) per cent of the total subscribed capital stock, unless otherwise agreed by the Board of Governors by a Super Majority vote" (Article 5). China however remains the biggest shareholder (33.4%) and has the most voting power (28.7%) of all members of the Bank.[34] Pursuant to Article 31 of the Agreement, the Bank shall further respect the principle of non-interference into the domestic affairs of states and only take into account economic parameters in its decision-making processes in order to uphold its impartiality and carry out its

[32]Aiib.org (2016a).

[33]Jin (2015).

[34]The 57 signatory countries include: Australia, Austria, Azerbaijan, Bangladesh, Brazil, Brunei, Cambodia, China, Denmark, Egypt, Finland, France, Georgia, Germany, Iceland, India, Indonesia, Iran, Israel, Italy, Jordan, Kazakhstan, Kuwait, Kyrgyzstan, Laos, Luxembourg, Malaysia, Maldives, Malta, Mongolia, Myanmar, Nepal, Netherlands, New Zealand, Norway, Oman, Pakistan, Philippines, Poland, Portugal, Qatar, Republic of Korea, Russia, Saudi Arabia, Singapore, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Tajikistan, Thailand, Turkey, UAE, United Kingdom, Uzbekistan and Vietnam.

essential mandate in accordance with the purposes and functions of the Bank as described in Articles 1 and 2 of the Agreement in the first place.

4 Financing Development in Asia: A Prognosis on China's Human Rights Benchmarks

From the perspective of relational governance we have thus far observed that China's participation in existing and institution-building of new multilateral development banks in pursuit of its right to development on the basis of sovereign equality and for the purpose of mutual benefit and common development had led to uncertainties regarding the consequences for the normative and operational principles that govern the activities of China's new financial development vehicles. Fears for an erosion of universal human rights standards in the realm of labour and environmental protection would as a self-fulfilling prophecy become a reality if indeed the right to development in its collective dimension would overturn those existing standards. A relativist take on behalf of China and other developing countries may from such perspective underscore the ongoing erosion of international law towards a greater fragmentation of international norms as equally witnessed in the realm of trade affairs.

While precaution must be taken that relational governance trumps rule-based governance in an absolute manner, one should also try to better understand why such approach could effectively contribute to a stronger normative framework that could potentially be more universally accepted by means of regional practices in the long-run. Moreover, it would be wrong to suggest that leadership and ownership over human rights discourses must be defended by Western and/or developed nations alone. Instead, such biases must be transcended. It is submitted that the theory on relational normativity of international law (TORNIL)[35] could merge a relational and rule-based governance approach that could fit the realities faced by the New Development Bank and the AIIB when funding development projects in cooperation with the World Bank and other regional multilateral development banks, including the Asian Development Bank. This theory argues that without a fertile soil, international norms—in particular human and environmental rights—cannot gain root.

In this regard, as a means to enhance the normativity of such norms, relational governance plays a crucial role to establish long-term trust whereby socio-economic arrangements can be found on the basis of a negotiated process where all stake- and shareholders (decision-makers, recipient states and local communities alike) have a common understanding about the norms and morality that equally underpin the normativity of such norms in the first place. The ultimate goal would be to reach a synthesis in the interpretation and application of certain human rights and

[35]See more Vanhullebusch (2016a), pp 307–348.

environmental standards, yet the complex processes towards such objective may take a considerable amount of time and must inevitably take into various contextual parameters that inform such outcome. While such result cannot be immediately achieved and nor could the very process be described as being tangible, the very membership of, communication, interaction, dialogue and exchange between developed and developing countries in international and regional multilateral development banks as well as on a bilateral basis can keep the relationship alive, improve it, restore it and move it to a next level once the conditions are right so that international standards may effectively resort effect within different regions.

Before we discuss how such relationships within the AIIB can underpin the normativity of human rights and environmental standards within such regional setting, we'll briefly focus on how China in its domestic jurisdiction imposed a number of responsibilities upon the banking sector in incorporating labour and environmental rights in their financial policies and activities. From 1995 onwards, the People's Bank of China and the State Environmental Protection Administration respectively issued their "Announcement on Credit Policy for Environmental Protection" and "Announcement on Making Use of Credit Policy for Promoting Environmental Protection". In reality, the national economic growth targets however have often trumped those measures. Nonetheless, the National Development and Reform Commission, the People's Bank of China and the China Banking Regulatory Commission issued another statement in 2004, namely the "Announcement on Further Strengthening Industrial Policy and Credit Policy to Control Credit Risks". The annex to this document restricted and banned different polluting industries. In 2005 and 2006, the State Council respectively adopted the "Regulation on Accelerating Adjustment of Industrial Structure" and the "Announcement on Accelerating Adjustment of Industrial Structure with Excess Capacity". They only restricted loans for those projects that suffered from heavy pollution. The financial industry was not provided with any guidance nor imposed specific duties to assume due diligence in granting and monitoring loans and to identify environmental hazards.[36] Nonetheless, the Ministry of Environmental Protection adopted in 2007 its first real "Green Credit Policy" which accounted for environmental standards in bank lending. The China Bank Association further advanced such measures in its voluntary codes of conduct ever since 2009. Those "Guidelines on Corporate Social Responsibility for the Chinese Banking Sector" demanded from banks to assume social and environmental responsibility at a time when China was gearing its industrial policies towards innovation in the first place.[37]

In terms of its international climate commitments, in September 2016—prior to the G20 Hangzhou meeting in the same month—China together with the US have also ratified the Paris Agreement which was earlier on adopted within the UN Framework Convention on Climate Change in December 2015. Prior to the

[36]Bai et al. (2014), pp 105–106, Aizawa and Yang (2010), pp 119–144.

[37]Vanhullebusch (2016b), p. 176.

assumption of power of the Trump administration on 20 January 2017, Chinese negotiators of this climate deal had already shown evidence to take a leading role in the fight against climate change which on its turn would improve China's domestic environmental goals but also its international image accordingly.[38] How can then China's domestic financial practices and international environmental obligations reassure developed countries—in particular Western members of the AIIB—of the future observance of human and environmental rights standards in the operationalization of China's new multilateral development banks?

Unlike the New Development Bank that doesn't have thus far any reference to such standards, the AIIB to that effect claims to be committed as evidenced both in its Articles of Agreement that established the Bank in June 2015 as well as the later adoption of its Environmental and Social Framework in February 2016. In this regard, pursuant to Article 13 of the Articles of Agreement, the "Bank shall ensure that each of its operations complies with the Bank's operational and financial policies, including without limitation, policies addressing environmental and social impacts". The Environmental and Social Framework gives a very detailed overview of the purposes of taking into account such standards in the Bank's operational and financial policies regarding the evaluation, granting and monitoring of development projects in close cooperation with other multilateral and bilateral development banks, client states, private actors and local communities.[39] The Bank is particularly concerned about the so-called "operational and reputational risks of the Bank and its shareholders in relation to Projects' environmental and social risks and impacts".[40]

In the fulfilment of its mandate, namely to support interconnectivity by means of infrastructure investments in order to boost economic growth and the livelihood of Asian people, the Bank seeks to integrate in a *balanced* manner the economic, environmental and social dimensions of the new UN Sustainable Development Goals in all its activities.[41] The Environmental and Social Framework further outlines each of those dimensions. Firstly, regarding environmental standards, the Bank is committed to support the aims of the Paris climate deal of December 2015 when financing its client states to achieve their NDCs (nationally determined contributions), "including through mitigation, adaptation, finance, technology transfer and capacity-building".[42] Secondly, in respect of the protection of labour rights, the Bank regards that the protection of the workers in their essential contributions to the sustainable growth in Asia in itself constitutes a guarantee for the quality of the projects that are funded by the Bank in the first place. As a result, proper wages, sanitary and safe working conditions, prohibition of forced/child labour, proper human resources management, non-discriminatory treatment of

[38]Volcovici and Wong (2011).

[39]AIIB Environmental and Social Framework, paras 21, 33.

[40]*Ibid*., preamble.

[41]*Ibid*., para 7.

[42]*Ibid*., para 16.

workers, freedom of association, collective bargaining and access to complaint mechanisms should be in place to ensure the workers' conditions in those projects financed by the Bank. Evidently, the implementation of such sustainability goals by the recipient nation and their evaluation on behalf of the Bank must be balanced too and thus take into account how such norms are consistent with the national law of the client state and thus in respect of the principle of sovereign equality of states and non-interference in the domestic affairs of states—in particular into their domestic legislation and legislative process.[43]

Such contextual approach will inevitably prioritize how environmental and social risks ought to be evaluated. Both the Bank and the client state share "complementary yet distinctive monitoring responsibilities" whose extent "is proportional to the Project's risks and impacts".[44] As a result, the client state may have resort to the use of "strategic, sectoral or regional environmental and social assessments and cumulative impact assessments, where appropriate" and thus adopt a lower standard which the Bank ought to take into account when assessing the environmental and social risks and impacts.[45] Nonetheless, this doesn't forsake the Bank to assume its own due diligence obligations when screening projects on their environment and social risks. Furthermore, it will hold the client state accountable for its compliance with the social and environmental obligations laid down in the legal agreements of the project and may take corrective measures to redress the situation or take other contractual remedies in case of persistent failure.[46] In case people that have been or will be affected negatively by the Bank's failure to enforce its environmental and social policies, they could also seek redress and file complaints with the Bank's oversight mechanisms.[47]

While balancing between the sovereign environmental and social assessment standards and its own procedures towards integrating the sustainable development goals in its operational and financial policies, the Bank had established an Environmental and Social Exclusion List under its Environmental and Social Framework. In this respect, the Bank would not knowingly finance development projects that involve forced/child labour; production/trade in PCBs; production/trade in "pharmaceuticals, pesticides/herbicides and other hazardous substances" which are banned or ought to be phased-out by the 1998 Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade and the 2001 Stockholm Convention on Persistent Organic Pollutants; production/trade in "ozone depleting substances" to be phased-out according to the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer; "trade in wildlife or production of, or trade in, wildlife products regulated under the 1973 Convention on International Trade in Endangered Species

[43] *Ibid*., para 15.

[44] *Ibid*., para 62.

[45] *Ibid*., para 67; Environmental and Social Standard 1, para 4A.

[46] *Ibid*., para 65–66.

[47] *Ibid*., para 64.

of Wild Fauna and Flora"; production/trade in weapons and ammunition; production/trade in alcoholic beverages except wine and beer; production/trade in tobacco; production/trade in asbestos; production/trade in wood from "sustainably managed forests"; "commercial logging operations or the purchase of logging equipment for use in primary tropical moist forests or old-growth forests"; transboundary movements of waste prohibited by the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal; "gambling, casinos and equivalent enterprises"; activities prohibited by national law or in violation of the 1979 Bonn Convention on the Conservation of Migratory Species of Wild Animals, 1971 Ramsar Convention on Wetlands, 1972 World Heritage Convention and 1992 Convention on Biological Diversity; damaging "marine and coastal fishing practices" and especially of "vulnerable and protected species".

As stipulated in Article 1 of the Articles of Agreement, the AIIB would cooperate with other multilateral development banks whose human rights practice may equally inform the operational and financial policies of the Bank. In this regard, the Bank has already in its early projects co-financed at least four infrastructure projects in transport and energy sectors in three different nations, namely with the World Bank for Indonesia's National Slum Upgrading Project[48] and for Pakistan's Tarbela 5 Hydropower Extension Project;[49] with the World Bank, the Asian Development Bank, the European Bank for Reconstruction and Development and the European Investment Bank for Azerbaijan's Trans-Anatolian Natural Gas Pipeline Project (TANAP);[50] and with the Asian Development Bank for Pakistan's National Motorway M-4 Project.[51] Such kind of cooperation can inform the development of national and regional environmental and social standards that can enhance the normativity of international human and environmental rights within Asia in the long-term.

5 Conclusion

The rise of Asia and its emerging economies—China in particular—has dramatically changed the geopolitical landscape of the 21st century and will continue to dictate how their relationship with the West and other developed nations will evolve. Not only politically, but also economically this relationship has undergone tremendous changes. Calls to reshape the international economic order are now finally coming to fruition. Fears that China will dominate such new international and economic and political order have persisted and have undermined to understand how trade and development can be supported and facilitated not only by global

[48] Aiib.org (2016b).
[49] Aiib.org (2016c).
[50] Aiib.org (2016d).
[51] Aiib.org (2016e).

governance institutions but also by regional actors and entities including China's new multilateral development banks, such the New Development Bank and the AIIB. Moreover, the loss of power on behalf of Western developed countries through such regionalization and fragmentation of the old international economic order has equally reinforced their anxieties in respect of the norms that shall govern economic and political life in those new constellations and within regional settings. An erosion of environmental and social standards by China's new financial vehicles may further open the door for defeatism and a human rights fatigue within the minds of Western policy-makers.

Nonetheless, through its relational governance China has sought to maintain the interconnectivity between Asia and other regions—in spite of the multipolar rather than fragmented world order. From its point of view, the world is still and should stay globalized. Its political discourse of mutual benefit and common development aims to give it the legitimacy to shape the international economic order and gradually give content to the right to development that constitutes the latter's legal basis at the same time. While its operationalization leans more towards a collective dimension, over the course of time and in space, close collaboration—in accordance with the principle of sovereign equality—between the members of developed and developing nations within the AIIB could increase trust and confidence in the very processes that are aimed at negotiating socio-economic arrangements that will not only determine the nature of the right to development but also to the scope of their relationship and vis-à-vis outsiders too, such as other international and regional development banks—including the World Bank and the Asian Development Bank.

It is within such set of complex relationships and exchange between share- and stakeholders that cooperation will be indispensable to the discharge of mandates of the respective development banks to finance development projects in Asia and beyond. A genuine dialogue on the operational and financial policies that should guide the implementation of environmental and social standards must equally accept "new cultural and political perspectives" as Kishore Mahbubani would argue.[52] The normativity of international human and environmental rights depends on the evolution of the relationship between the mixed membership of the AIIB that underpins their creation, development and interpretation and application in the first place within a regional setting at a given moment in time. Therefore, according to TORNIL, the universalist v. relativist debate on human rights protection regarding China's new development banks in Asia can be transcended when taking the development of the relationship of the members of the banks rather than their competing interests as the starting point of the discussion—without a dialogue between them there can be no room to find a common understanding on human rights protection in the first place.

[52]Mahbubani (2008), p. 224.

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