

International Human Rights Law in National Legal Systems

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Three Issues to Consider

1. Human rights in national law;
2. Relationship between international human rights law and national law;
3. Implementation obligations under international law.



* With thanks to K. Larsen for most of the slides.

Questions (1)

1. What is monism and dualism? Does your country use to the legislative or the automatic incorporation technique when it comes to implementing international human rights treaties?
2. There seems to be a tendency to mirror the UN treaty bodies system in the national system (CERD, CRC, CPT). Is this a positive development?
3. What are some of the limiting and enhancing factors for the implementation of international human rights law/ treaties?
4. What is the legal status of international treaties which have been ratified but have not been included in domestic legislation? Do you have any examples of such treaties from your own country?
5. Do you recognize Scheinin's five methods in your country's practice: adoption; incorporation; transformation; passive transformation; and reference?



Questions (2)

6. What is the *Charming Betsy* canon of interpretation? Any case law from your country using this legal technique?
7. What are some of the practical difficulties for national courts in applying international human rights law provisions (or general rules and principles)?
8. What types of NHRIs do you have in your country?
9. What are some of the powers of these NHRIs? What is a proper role for them?
10. What is your take of the Presidential Executive Order (p. 174)?



Part 1: Human Rights in National Law



Human Rights in National Law

- Different sources of human rights in national law:
 - Constitutions and Bills of Rights
 - Legislation
 - Regulations (on different levels)
 - Provincial and local laws
 - Jurisprudence/ case law.
- Remember the hierarchy of legal sources.



National Law and Human Rights

- Human rights recognition may be explicit or implicit
- Standards, procedures etc. for the protection of human rights often not linked to express human rights



Constitutional Developments

- Most radical changes in constitutional rights come after state formation or various revolutions;
- During regime stability: Wide variance in scope of amendments or of judicial activism in implying rights;
- Form of constitutional incorporation subject of debate (length and detail of catalogue of rights, rights vs. principles, rights or obligations, etc.).



Judicial Review

- Most controversies over powers of judicial review;
- Courts and politicians traditionally uncomfortable with ‘judicial review’: i.e. the assessment of the constitutionality of legislation or state action/omission on the basis of the constitutional text;
- US Supreme Court: *Marbury v. Madison* (1803): “It is emphatically the province and duty of [the judiciary] to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret that rule. If two laws conflict with each other, the Courts must decide on the operation of each.”



Part 2: International Human Rights Law and Domestic Law



A Variety of Relationships

1. Monism (IL and NL one system);
 2. Dualism (IL and NL two separate systems);
 3. And everything in between (see and compare the practice of different countries).
- Constitutional provisions or basic laws usually create a hierarchy of legal sources:
 - Constitutional provisions (minimum guarantees);
 - International human rights treaties;
 - Domestic/national laws;
 - Regulations, etc.
 - [Comparative Constitutions Project \(CCP\)](#).



Legal Status of Treaties

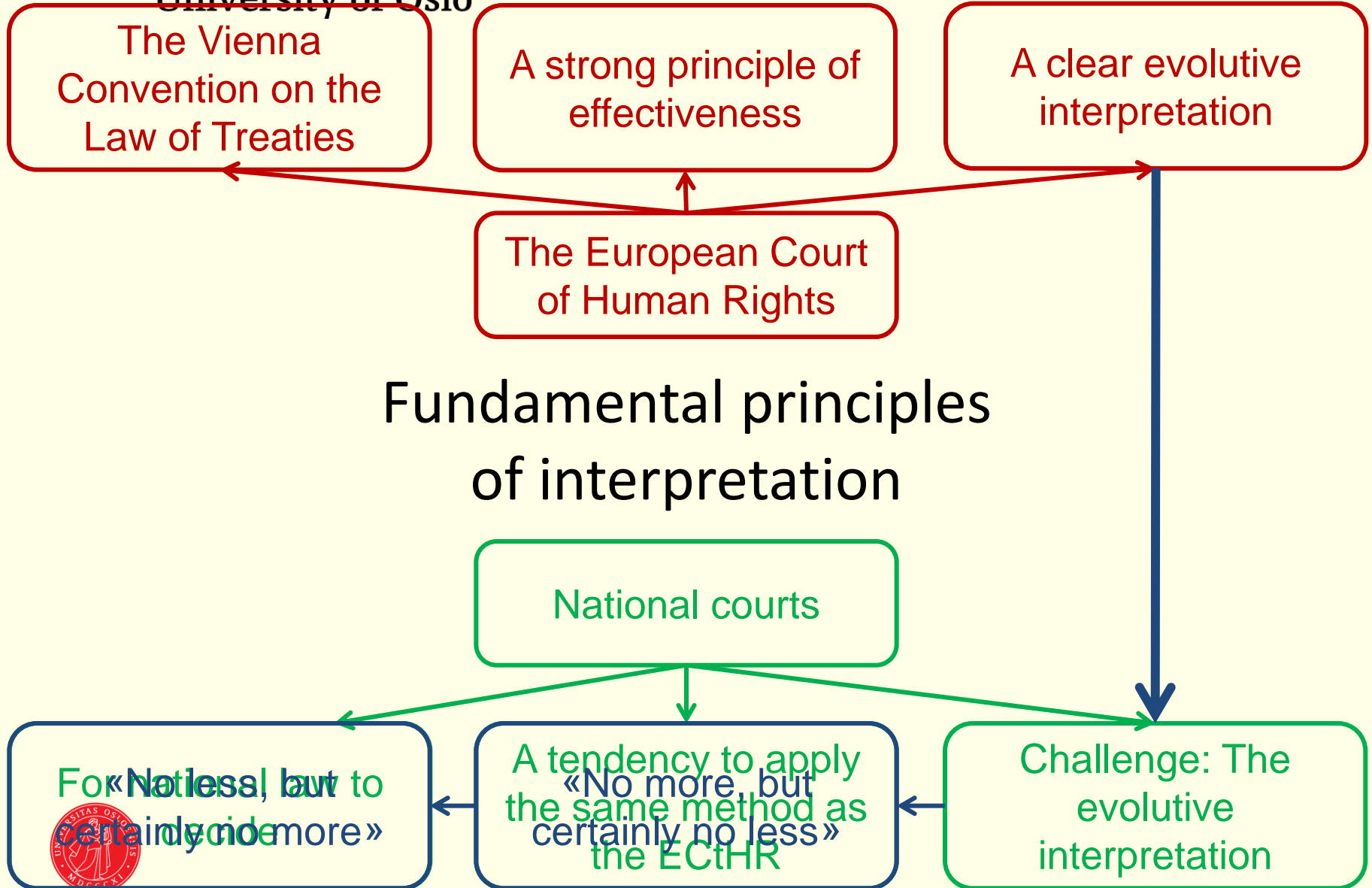
- Automatic incorporation (monism) versus legislative incorporation (dualism);
- Difference in practice?
 - Monism requires interpreting treaty as ‘self-executing’.
 - Monism requires interpretation of international treaty.
 - International law in dualist systems used as interpretive device.
- Relationship between monism/dualism and judicial activism/restraint.



Interpretivism

- Growing trend: To interpret domestic law in accordance with international law
 - Norway: The «principle of presumption».
- Might concern the interpretation of rights which are recognised in both domestic and international law, or whether a domestic practice or law is consistent with international human rights;
- Increased use of case law of international courts (and other adjudicatory mechanisms);
- Remaining problem: What to do if a conflict of norms cannot be avoided through interpretation?





Fundamental principles of interpretation

National courts

For national law to certainly not be more

A tendency to apply the same method as the ECtHR
«No more, but certainly no less»

Challenge: The evolutive interpretation

«Clawback Clauses» and Other Referrals to National Law

- Limitations to human rights may be «prescribed by law»;
- Europe: «necessary in a democratic society»;
- The principle of subsidiarity;
- The margin of appreciation;
- [The Brighton declaration.](#)



Part 3: Implementation Obligations Under International Treaties



Obligations for Implementation (1)

- Is there an obligation to incorporate international law?
- Articles 26 and 27 VCLT;
- ICCPR: Article 2.2 “Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.”
- ICESCR: Article 2 “by all appropriate means, including particularly the adoption of legislative measures.”
- CESCR, [General Comment No. 9](#);
- HRC, [General Comment No. 31](#).



Obligations for Implementation (2)

- Arguably, five main obligations (Boerefijn):
 1. General duty to implement;
 2. Legal protection;
 3. Obligation to protect against acts of private parties;
 4. Obligation to provide an effective remedy;
 5. Education and awareness raising.



CEDAW, Article 5

States Parties shall take all appropriate measures:

(a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;



Monitoring Implementation

- Formal monitoring:
 - Judicial oversight;
 - Ombudsmen;
 - National Human Rights Institutions.
- Informal monitoring:
 - Media;
 - Human rights defenders.



Implementation of Case Law

- Art. 46 ECHR: States «undertake to abide by the final judgment of the Court in any case to which they are parties». (Also Art. 68 ACHR, Art. 30 ACHPR Prot.)
- UK defying the Court: Voting rights for prisoners -
<http://www.bbc.co.uk/news/uk-politics-20053244> (Background cases: *Hirst v. UK* (74025/01) and *Scoppola v. Italy* (no. 3) (126/05)).



Territorial Scope of Application

- Where do human rights treaties apply?
- Three categories of human rights treaties;
- Treaty texts: «Jurisdiction»; Recall VCLT Art. 31;
- «Jurisdiction» in international law;
- «Jurisdiction» in human rights law: Primarily territorial;
- Two exceptions: Intraterritorial non-application and extraterritorial application;
- Object and purpose: General considerations;
- Case law – ECtHR, HRC, ICJ;
- Standard: Authority and control;
- Over territory or over individual;
- Scope of applicable obligations.



Derogation

- Define derogation!
- Legal basis: Three categories of treaties;
- Requirements:
 - Public emergency which threatens the life of the nation;
 - Officially proclaimed, duty to inform;
 - Proportionality: Strictly required by the exigencies of the situation.
- Non-derogable rights;
- Temporary nature: Duty to reconsider;
- Effect of derogation vs. effect of non-derogation;
- Explain why derogations are rarely used;
- Particular question: Extraterritorial derogation.



Customary Law

- What is international customary law? Recall ICJ Statute
- *Usus* and *opinio juris* – content of these requirements in general international law;
- Some particular questions: Jus cogens – instant custom – persistent objectors – regional/bilateral custom;
- Human rights: Any particular features? The role of individuals;
- Reduced threshold for evidence of practice or *opinio juris*?
- Do non-state actors contribute to development of custom?
- Impact? (Define «impact».) Divide between content and implementation. All international mechanisms linked to treaties (except ICJ);
- UDHR: Considerable impact. Otherwise: Uncertain.



Concluding Remarks

- Monism, dualism and everything in between: the impact of models chosen on the implementation of international human rights standards;
- Importance of constitutional parameters and legal practice for the interaction between IL and NL;
- The case-law of national, regional and international courts very important in clarifying the relationship between international human rights law and national laws;
- Incorporation, transformation, harmonisation and avoidance techniques used by national courts;
- Persisting legitimacy and hierarchy issues in the interaction between IHRL and NL!
- The general reluctance and circumspection of the legal profession and instances of judicial activism (judicial creativity).



Additional Materials

- [Audiovisual Library of International Law:](#)
National Law:
 - [The Relationship between International Law and Municipal Law](#), by Judge Sir Christopher Greenwood;
 - [The Role of International Law in National Law](#), by Judge Kenneth Keith.
- [Oxford Reports on International Law in Domestic Courts](#)

