

A Historical Study of Contemporary Human Rights: Deviation or Extinction?

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Abstract: Human rights is a core issue of continuing political, legal and economic relevance. The current article discusses the historical perceptions of the very essence of human rights standards and poses the question whether the *Realpolitik* of the changed world and Europe can justify the deviation from the “purist” approach to human rights. The EU Charter, as the most eminent and contemporary “bill of rights”, is chosen as an example of the divergence from “traditional values”. The article does not offer solutions but rather focuses on the expansive development in the doctrinal approach of interpreting human rights that has not been conceptually agreed upon by historians, philosophers and legal scholars.

Keywords: *EU charter, generations of human rights, history of human rights, individual values, international legal standards, theoretical framework, state sovereignty*

¹ Ondrej Hamulák participated in the work on this paper on behalf of Jean Monnet Centre of Excellence at the Faculty of Law, Palacký University Olomouc, which is sponsored by the Jean Monnet Programme (Project No. 565445-EPP-1-2015-1-CZ-EPPJMO-CoE).

Introduction

Human rights has been one of the most intrinsic issues of international and domestic law since the end of the Second World War, and the issue continues to be most topical today. These days we are facing huge human rights problems all around the world. The lasting conflicts in Syria, Iraq, Afghanistan or Yemen; continuous totalitarian regimes in some African states; exploitation of labour forces in the developing economies; the perpetual exploitation and vanishing of natural resources; natural disasters causing societal disorder and mass forced migration caused by all the abovementioned reasons threaten the global legal and political order. Even in “the rich North” and Western societies, we are facing serious human rights problems, such as the rise of radicalism and chauvinism; the danger of terrorist attacks and stricter public security policy as a reaction to it; austerity measures as a reaction to the financial and economic crisis endangering the welfare of individuals. All these tremendous problems lead us to the conclusion that the golden age of human rights, that is, the second half of the 20th century, has not led us to the “promised land”. The reasons are very complex and range between economic, political, legal, ideological and natural. The aim of this paper is not to cover the problems but to use the foundations of the human rights movement to turn the attention and the debate to the core of the global human rights code and unveil its disputable portions. We will cover the doctrinal aspects of the concept of human rights at the international level and use the example of the Charter of Fundamental Rights of the European Union (as the most current “bill of rights” adopted at the international level) to illustrate the theoretical developments on the living instrument.

The disputes related to the content and implementation cover both political and legal areas. These words are often (mis)used by politicians, visionaries, ideologists, diplomats and representatives of lobbyists. In the eyes of lawyers, international human rights are mostly a “product” of the Second World War. Another important critical situation emerged with the collapse of the Soviet bloc, which multiplied legal personalities in the international sphere. The decline of a bipolar world brought along constitutional revolutions in many nation states all around the world—especially in post-Soviet countries (Sadurski, 2008) and on the international stage it made room for the notion of the universalization of human rights.²

² The concept of the universality of human rights was approved by the Vienna Declaration and Programme of Action Adopted by the World Conference on Human Rights in Vienna on 25 June 1993.

Our current study explores the issue in the European context, although it refers to universal (legal) thinking on human rights in order to unveil the legal basis of the emerging global human rights system. We use the EU examples to put to test selected issues of the international human rights doctrine in the most recent catalogue of human rights, which emerged within the supranational legal order. Human rights became a measuring stick for the evaluation of the countries' democratic nature and its commitment to the concept of rule of law. The developed standard of protection and mechanisms to enforce human rights stand as the basis for the growing international constitutional order (De Wet, 2006). Human rights certainly can be regarded as one of the basic "tests" of political power and thus of integration with others (states–nations–individuals). Integration is a term which is nowadays linked with the phenomena of the European Union. The process of integration is not linked only to the interstate relations, but also (or even rather) it is focused on building even closer ties between the peoples of Europe, as it was proclaimed in the Preamble of the Treaty on European Union. Somewhat technical and functional (economic) integration has accompanied and is being slowly replaced by the process of autonomous constitutionalization of the EU (Hamulák, 2016), where the concept of human (fundamental) rights plays a crucial role (see Table 1). This serves as evidence of the vertical impact (shining through) of the human rights requirements on every system claiming to have constitutional character.

Table 1. Human rights forming the EU constitutionalization

Nowadays, the key provisions which define the Union as a constitutional community based on respect for human rights are included in the Treaty on European Union. The most important of these are Article 2 of the TEU (which defines the values of the European Union and presents human rights as the fundamental core of integration), Article 6 of the TEU (which defines or summarizes the sources and several instruments of the human rights protection within the European Union), and Article 7 (which introduces the mechanism of control and sanctioning of the Member States in the cases of grave violation of fundamental rights by them). The central provision is the second aforementioned provision (Article 6 of the TEU) which defines the three cornerstones of the protection of fundamental rights at the supranational level.

These three totems seem to provide the Union with the most complex system of the promotion of fundamental rights which shall work as

one body of instruments with three different heads—like a Cerberus guarding the mythical underworld.

Moreover, this strong impetus on the role of fundamental rights within the supranational legal order serves as an indirect tool of defence of supranational (Court's) view on the nature of the legal system of the Community and Union, respectively (Craig, 2010). The recognition of fundamental rights as an immanent part of supranational law and establishment of the complex system of their protection rendered to the supranational legal system the nature of the constitutional order. Therefore, it was suitable to be accepted by the national courts in their practice as the law applicable in their judicial decision-making.

The recognition of human rights and the introduction of a system that monitors their observance are not only important for individual citizens and their protection but represent also certain sign of autopoiesis of the EU's constitutionalism (Torres Pérez, 2009). Only the recognition of the possibility to protect fundamental rights, only their recognition as an immanent component of the supranational legal system, gave this system the nature of a legal system. First and foremost, the case law of the Court of Justice and the subsequent adoption of the EU Charter of Fundamental Rights drew human rights into the system of EU law and they became the criterion of the legitimacy of EU institutions. The introduction of human rights protection also serves as a strong unification tool, because shared values bond the European integration project (Dutheil de la Rochère & Pernice, 2003). The failure to test the conformity of supranational law with fundamental individual rights would result in low legitimacy of this legal system and could jeopardize its emancipation and domination. Historical development confirms this because actual and potential human-legal deficits of the European Communities became key arguments against the obligation to accept supremacy of supranational law over national law. A standard-bearer of this approach was the German Federal Constitutional Court (Kirchhof, 1999), which in a doctrine formed by its decisions in the so-called 'Solange saga' referred to the human-legal deficit of the Communities and its position became a catalyst for progress in this area on the supranational level. The Court's support of general legal principles not only resolved the deficit in the protection of human rights, but its doctrine also served as an indirect defence of its view regarding the nature of the EU legal system.

Of course, human rights are an issue of interdisciplinary nature. Despite of our intention to avoid specific legal issues, it seems inappropriate to leave out the legal frame of the discussion. The treatment of human rights in the legal context enforced us to make references to the linked areas of general international law such as governmental responsibility, individuals' legal personality, enforcement measures, etc. It must be recognized that there are many controversies and antinomies in this field and the human rights law is not the ideal construction at all.

The essence of human rights

According to Adda B. Bozeman, “words often assume an existence of their own, separate from the ideas in conjunction with which they first appeared” (Bozeman, 1971, p. 3). While there is widespread acceptance and recognition of the idea of human rights in international politics, there is still considerable confusion as to their precise nature and role in international relations. From the legal point of view, it is a branch of international law, the sum total of the various treaties, procedures, common law and case law in the field. However, studying the relationship of international law and human rights, we cannot avoid studying legal and political theories and history.

Thus, it is commonly claimed that

international human rights is also the world's first universal ideology. Religious, political, philosophical and economic ideas have adherents in various parts of the world, but human rights represent an idea that now has world-wide acceptance. Origins of those rights belonged to early philosophical and legal theories of the “natural law”, a law higher than the positive laws of States. (Davies, 1988, p. 1)

Up until the end of the Second World War, the universally accepted doctrine in international affairs suggested that how a state treated its own citizens was a matter entirely of its own sovereign determination, and not the legitimate concern of anyone outside its boundaries. The traditional (“Westphalian”) understanding of sovereignty was rigid, static and étatic. Sovereignty here was defined as an immanent characteristic of a state and no other unit, higher or lower, could become a sovereign but a state. The classical approach to sovereignty left states room for autonomous behaviour not subject to be tested by international

standards. However, the second half of the 20th century brought along a major shift in the concepts of natural law and heralded the golden age of human rights. The basis as well as the structural position of human rights within the legal system was interconnected with the notion of supra-positive law.³ So far, sovereign state power became limited by the rights of free individuals. Human rights do not limit state (state power) only negatively (by prohibiting interference with the inviolable spheres of individuals), but also positively (though they anticipate certain systemic actions, the active role of the state in securing certain rights and also active protective function). In the decades following the end of Hitler's ferocities, dozens of international human rights instruments were introduced which commit states to clear obligations to respect individual rights and establish specific, autonomous control mechanisms and therefore limit the autonomy and sovereignty of the states (Henkin, 1999, pp. 3–4). For since the times of Hitler and Stalin there has been a change so significant that it can properly be called a revolution. According to Paul Sieghart, the formal product of that revolution is a detailed code of international law "laying down rights of individuals against the States which exercise power over them, and so making these individuals the subjects of legal rights under that law, and no longer the mere objects of its compassion" (Sieghart, 1986, pp. 2–3).

International human rights law has its historical antecedents in several international political doctrines. The most important of these are humanitarian intervention, state responsibility for injuries to aliens, protection of the minorities, the League of Nations' mandates and minorities systems, and international humanitarian law.⁴

However, human rights, as we have seen, are not created by law, but reflect certain moral standards. Still, to say that these rights are universally recognized is not to say that they are static and incapable of change. Rather, the concept is dynamic, reflecting the changing needs and aspirations of humankind and being claimed to meet new problems as they may arise. The dynamics of the human rights system is twofold. New issues and threats are necessarily covered by the developing case law of international (and national) bodies. The language of human rights is basic and general, therefore leaving room for evolutionary interpretations. The other way is normative expansion where international society (or regional organizations) react to the developments and cover new types of rights with innovative documents. Thus new spheres are thoroughly

³ Based on the famous Radbruch's formula on the "übergesetzliches Recht" (Radbruch, 2006).

⁴ For an overview of historical antecedents see Buergenthal, 1988, pp. 1–16.

covered by new catalogues such as the UN Convention on the Rights of Persons with Disabilities (2006) as a special instrument to promote equality, dignity and social inclusion of the disabled persons or the EU Charter of Fundamental Rights, which is based on a completely original approach to human rights covering a wide range of rights, freedoms and human rights principles and aspirations, including the protection of the physical and mental integrity of individuals in the sphere of medicine (informed consent), science (prohibition of reproductive cloning of humans), social engineering (prohibition of eugenic practices), etc. (see Table 2).

Table 2. The originality of the EU Charter of Fundamental Rights.

The Charter is a very complex and quite an ambitious document. It includes tens of human rights from all generations (classical division of human rights to the three generations of rights: civil and political; economic, social and cultural; the modern = solidarity rights). It has its own special structure which does not follow the classical division of human rights into types or generations. The ‘body of Charter’ includes 50 material and 4 horizontal provisions (plus explanations which are attached to the catalogue). It is internally structured into seven titles:

- The first title, called ‘Dignity’ (Articles 1–5), is inspired by ‘Kantian’ ideal concepts, i.e. human dignity in the first place. It includes the “hard core” rights such as right to life, protection of personal integrity, prohibition against torture, etc.
- The second title, entitled ‘Freedoms’ (Articles 6–19), deals with various examples of personal liberties such as personal freedom, protection of private spheres, freedom of thought and expression, freedom of association and assembly, etc.
- The third title, called ‘Equality’ (Articles 20–26), stresses the fact that anti-discrimination policy is one of the most important fields of activity of the Union. There is a large variety of equalities, general anti-discrimination clause, equality between men and women, special protection of vulnerable groups—children, the elderly and people with disabilities, etc.
- The fourth title, marked ‘Solidarity’ (Articles 27–38), includes mainly the economic and social rights, e.g., collective bargaining and action, fair and just working conditions, access to health care, etc.

- The fifth title, called ‘Citizens’ rights’ (Articles 39–46), is inspired by the Treaty provisions on Union’s citizenship. It repeats the classical group of rights of Union’s citizens (electorate rights, free movement, political rights and diplomatic protection) and adds quite a detailed provision on the right of good administration.
- The sixth title is identified as ‘Justice’ (Articles 47–50) and includes the procedural safeguards such as the right to fair trial, presumption of innocence, legality and proportionality of criminal justice, *ne bis in idem* principle).
- The seventh title includes so-called horizontal provision which determines the general rules of application and interpretation of Charter and presents the sources of inspiration for the adoption of this document (Articles 51–54).

As V. Mathien makes clear, “human rights provide, as it were, a lowest common denominator of the world’s moral values” (Davies, 1988, p. 133). According to Shaw, those rights that reflect the values of a community will be those with the best chance of successful implementation (Shaw, 1991, p. 188). The contemporary philosopher Simone Weil reminds us in *The Need for Roots: Prelude to a Declaration of Duties Towards Mankind* that

The object of any obligation, in the realm of human affairs, is always the human being as such. There exists an obligation towards every human being for the sole reason that he or she is a human being, without any other condition requiring to be fulfilled, and even without any recognition of such obligation on the part of the individual concerned. (Weil, 1952)

Human rights bear similarity to legal rights, but these two terms are not synonymous. Whilst human rights may be confirmed by legal instruments, the law is not their source. They are rights inherent to all persons by virtue of their birth and human dignity. They derive from the essential nature of humankind, and law cannot deprive humans of their fundamental human rights. Initially, human rights law was created to avoid conflict situations. However, there are differences between ordinary social interactions and conflicts involving fundamental values such as human rights. So, in traditional theory there is distinction between conflict at different social levels. After human rights violation, there are two separated conflicts. One at the domestic level (breach of a human right) and another at the international level (breach of an international

obligation). Conflicts involve interests and needs. At the domestic level it seems to be individual's right or freedom (as a need), at the international level—the values of international community (as an interest).

The concept of human needs states that the individual cannot be socialized into behaviour that is inconsistent with human needs. These needs are essentially the needs associated with development, identity, recognition, security and all that is implied in these terms. Human behaviour cannot be isolated into compartments of life—family, communal, national and global (Burton, 1988, pp. 49–53). Taking the concept of human needs into consideration helps us understand the nature of possible conflict and the means by which it can be avoided. Experience and theory suggest that conflict cannot be avoided through an exercise of power by authorities within the states, or by great powers in the international system. (Burton, 1988, p. 56) This kind of theoretical framework presumes the idea of universal human rights ideology, connected with social approach to law as such. However, in many places of the world human rights were and continue to be violated, sometimes on a massive and tragic scale. Historically known examples are the Nazi and South-African countries, Central Asia, the totalitarian regimes in Africa or regions suffering terrible conflicts of war (Syria, Iraq, Yemen). The global crises (financial and migratory) and security threats (ISIS) lead to the rise in discrepancies between the acceptance of human rights as the expression of human needs—the promises—and social facts—the reality (Carey, 2010).

The abovementioned international legal code (the abstract concept according to which international treaties have priority in the protection of human rights) is a general safeguard against following violations. The code consists of nine general instruments on three levels—global, regional and specialized. The global instruments are the United Nation's Charter, the United Nation's Covenant on Economic, Social and Cultural Rights and the United Nation's Covenant on Civil and Political Rights. The regional instruments are the European Convention for the Protection of Human Rights and Fundamental Freedoms, the European Social Charter, the American Convention of Human Rights, and the African Charter on Human and People's Rights. We must add to that list also the EU Charter of Fundamental Rights which on the one hand stands somehow outside this international code (as being an internal catalogue of autonomous community) but on the other hand should have significant impact on the development of the human rights protection at least within the regional (European) space. The Charter is of course the supranational (EU Constitutional bill of rights) but

must we acknowledge also its role as a new international catalogue? (Kerikmäe, 2014, pp. 5–20).

There are also more than twenty specialized treaties. Non-binding instruments are declarations which are also components of the international legal code of human rights. The Universal Declaration of Human Rights is a global instrument and the American Declaration of the Rights and Duties of Man enjoys regional importance. In substance, these components of the so-called legal code have their own similarities and differences. The most notable difference relates to the control mechanism. It seems that regional instruments have much stronger system of enforcement than global instrument.

Historical features of the international human rights law

Like there are many systems of municipal law, there also are many systems of international law. Why has it taken so long for international law to protect human rights? Certainly, the idea of state sovereignty has justified not establishing international agreements to protect human rights. Under international law, human rights are binding only if contained in international agreements, that is, only for the states that have adopted such agreements. However, some guarantees are considered to be part of other sources of international sources of law, including common law as well. Until the end of the Second World War, the question of how to treat own citizens was the responsibility of the sovereign state—regarding the right to self-determination, which has been the main principle of contemporary international law. By today, human rights has become not only the affair of the state concerned, it is also a matter of legitimate concern for the entire international community.

The impression that the issues of human rights are essentially domestic is erroneous. The term “international human rights” is a code for a number of different initiatives. It can be understood as:

- An attack upon the concept of state sovereignty as traditionally conceived (see Hamulák, 2015b);
- A goal-setting agenda for global policy;
- A standard for assessing natural behaviour and therefore for judging political legitimacy; and as

- A spirited movement of concerned private individuals and groups that transcends political boundaries which is an increasingly significant factor in international relations. (Claude & Burns, 1989)

The issues of law and state interest (or will) in the field of human rights can be easily misinterpreted. It is clear that the reason why the internationalization of human rights depends on politics of the member states of the international community. However, the politicization of international human rights “only confirms their international character, and human rights have become important counters in international politics.” (Meron, 1989, p. 27) The political aspect of human rights is seen by the historical formulation and definition of different rights (the “first generation” *versus* the “second” generation) (Osiatyński, 2009). So, international human rights are also a set of certain political values and state, ratifying international norm takes obligation to recognize the special status of certain ideals, “with the political expectations which it creates” (Robertson & Merrills, 1989, p. 296).

As it was mentioned, historically international law developed an exception from the principle of state sovereignty. So, one of the most important motive for the internationalization of human rights was to protect own citizens abroad. This international principle was indeed not part of the universal human rights concept. This concept requires the states to be responsible for violations of human rights within its territory and jurisdiction, even in the absence of the state that could invoke a remedy for an injustice. In 1948, the United Nations General Assembly adopted the Universal Declaration of Human Rights which is not an international treaty⁵ but a “common standard of achievement” to respect and secure human rights in every society. However, it was only a basis for establishing legally binding norms of human rights.

Today, the international law of human rights derives mostly from international agreements. The precise contours of common law in this field are quite uncertain. However, its accepted by the international community that a state’s practice of genocide, slavery, torture, racial discrimination and perhaps other consistent patterns of gross violations of internationally recognized rights are violation of international law (Meron, 1989, p. 21). Human rights might come into international law also in another way, as “general principles of law recognized by civilized nations”. Since national legal systems now generally outlaw the enumerated practices, arguably these practices may be deemed

⁵ Under discussion here is the argument that UNCR is part of common law today.

prohibited by international law as “general principles”.⁶ In international human rights law, individuals themselves can make claims and the state can just afford it. It is assumed that states are willing to enter human rights agreements but are unwilling to have them enforced among the parties. This is probably one of the most crucial contradictions in protecting human rights and freedoms. The reluctance in general seems to react on the encroachment of the independent control and monitoring mechanism to the concept of state sovereignty. It is also worth noting that the development of the international human rights code between the 1950s and 1990s was strongly influenced by the bipolar division of world politics (West–East) and the political battle between generations—first, civil and political and, second, economic and social (Edmundson, 2012). The cautious approach to social rights in the present time is often connected with their potential negative impact on the state policy in social issues and increased budgetary expenses (Bartoň *et al.*, 2016). The vigilance of the states vis-à-vis human rights control mechanisms was confirmed also in recent developments within the EU. The democratic welfare Member States of the European Union were not prepared to accept the full application of this supranational catalogue to their actions in general and they had limited the range of application of the Charter only to the situations where they are “implementing the Union law” according to Article 51/1 of the Charter (Sarmiento, 2013). This cautious approach has a clear rationale. Even though the Charter clearly strengthens the scope of protection of individuals within the whole system of application of EU law, it is problematic since it brings the federalization question in the scene. The question of the existence of common (central) standard of fundamental rights protection, which is binding to all Member States (peripheries), is clearly interconnected with the dominance of the EU law. Another evidence of the cautious approach of the Member States towards the universal catalogue of human rights emerged within the European integration in connection with the inclusion of economic and social rights into the EU Charter (Title IV ‘Solidarity’). The documentary inclusion of these rights into the EU bill of rights was accompanied by the whole set of limits and conditions. We expose these features in Table 3.

⁶ Statute of the International Court of Justice, Article 38.

Table 3. The cautious approach towards the social rights within the EU Charter

Having in mind the differentiated traditional approach to the social rights (conditionality, political wariness, second-generation position), one must accept that the Charter of Fundamental Rights of the EU (by including all rights together into the one document) provides the distinctive formal turnover. The Charter of Fundamental Rights of the EU is certainly an ambitious project, an effort to (at least documentary) universal approach to human rights. But the project which gathers in one place the rights of all generations and types, has a priori raised doubts and some resistance, especially on the part of the Member States. Therefore the main question is whether such a formal (documentary) turnover can also be associated with any change in a material view on the rights of the second generation and whether—in terms of protection—it equalized the social rights with the core part of the human rights system? It was claimed that inclusion of the social rights into the Charter has a rather symbolic value (Hamulák, 2015a). The form of anchoring social rights in the Charter has some critical points that undermine the hypothesis of universal access to fundamental rights. Our rather critical opinion is based on the following assumptions, which we see as the main factors decreasing the quality of protection of social rights in the framework of the EU Charter of Fundamental Rights:

- The first reason is certain incompleteness. Inclusion of social rights into the Charter was not precise enough and overlooked some categories of these rights as they are recognized in other international instruments. Moreover, there are some doubts about possible reduction in the standards of protection of social rights in Europe identified in the European Social Charter and its revised form via application and interpretation of the Charter in the future.
- The next problem is connected with a wide use of so-called national conditionality clauses in connection with most of the rights contained in Title IV of the Charter which brings the question whether any supranational approach to these rights is even possible.
- An important factor is also potential schematic understanding of Title IV of the Charter as a chapter containing mainly (only) the principles within the meaning of Art. 52 Para. 5, i.e. only unenforceable,

secondary provisions unable to offer directly applicable individual rights.

- The last problem is connected with the adoption of the Protocol (No. 30) on the application of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom, which specifically affects the rights contained in Title IV ('Solidarity') of the Charter.

Generally speaking, the positivist internationalization of human rights is influenced by the constitutional rights of sovereign states. All the basic international texts on human rights have been prepared taking into account the main human rights and freedoms within state jurisdiction. Evidently, the main reason for the emergence of new type of international rights has been the atrocities of the Second World War. However, the history of human rights is even older than the history of contemporary international law. As human rights seems to be an interdisciplinary issue, we can indicate here several concepts such as *ius naturale*, *ius cogens*, etc. This topic of the history of human rights concerning the evolution of internationalized rights of mankind has been under discussion by many authors, experts and international lawyers to this day (Sieghart, 1986).

The difference between guarantees of human rights under domestic legislation and under international law lies in the issue of realities, evidently the most important factor taking into account the implementation process of these rights and freedoms. There has been and probably always remains tension between the sovereignty of states and international concern. Thus, international human rights are to be distinguished from these rights under national legal systems. As the domestic constitutional and other legislative guarantees (under terms of law and politics) are often inadequate and deficient, international human rights were designed to induce states to remedy those deficiencies (Henkin, 1963, p. 17). International law has established certain international standards preventing the national standards to be too narrow or wide.

The EU Charter can be seen as an attempt to deviate from the historical understandings of human rights standards and constitutionalize basic rights for the EU population. The content of the Charter is a mixture of fundamental rights, principles and values, and ideas, some of which have clear frames and history of application, whereas others are novel concepts that have not yet

found their clear place in the *espace juridique Européen* (Kerikmäe, 2014, pp. 5–20). On the one hand, there has been deviation from the historical standards and the concept of universal human rights has been interpreted ambiguously. The very aim of the human rights protection is a human being. Therefore, the success of an unorthodox approach depends on the European Union, its Member States, and the individuals themselves.

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