TOPIC: LAW- RIGHTS, DUTIES, RESPONSIBILITIES

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1. Introduction

The issue of international protection of human rights is of increasing importance. The emergence of a global conscience has given the incentive for a closer co-operation of national states towards the enactment of binding rules and reliable procedures via international conventions. For many years Europe has possessed the most effective framework for the protection of human rights, the European Convention on Human Rights (ECHR) established in 1950 by a number of European countries and since joined by almost all The European states as well as the Russian Federation. The topical and ongoing adoption of a European Constitution marks a key stage in the field of the protection of rights in the context of the European Union (EU).

This essay deals with the protection of human rights in an international context. It also has to do with pieces of international law (basically international conventions) and the way they contribute to international protection of human rights. At first, short definitions of the concepts of law and rights are given and the relation between law and rights is discussed. We will then attempt to provide a definition of human rights along with an overview of their basic characteristics. We will focus on the crucial concept of rule of law, discussing its legal and philosophical aspects when it comes to human rights in a European context. The essay will investigate the historical and essential link between the question of protection of rights and the significance of national constitutions with a specific reference to the European Constitution that is in the process of possible adoption. The relationship between rights, duties and responsibilities is then examined. However, as rights have a direct reference to the concept of citizenship, this concept is also examined in more details. Finally, there is a presentation of the basic treaties that refer to the international protection of human rights and the mechanisms of protection of human rights enacted by them.

2. Human Rights, the Law and the Rule of Law

2.1. Law and (Human) Rights – Definitions, Characteristics

We may define the law as a set of rules **with binding force** in the context of a certain society that are intended to regulate the social life of the members of this society. In this context, it is obvious that law is not only present at the time that one has full conscience of participating in a legal procedure (for example in a court or when one gets married) but also in any everyday activity. When one buys a bottle of milk in the super-market or when (s)he takes a bus for anywhere, (s)he participates in procedures whose rules are defined by law. In this sense, law is everywhere. What makes the rules of law different to other everyday life rules (e.g. rules of politeness) is the fact that they are protected by institutions and procedures and they are compulsory for all members of a society. Nobody might put you into trial for being rude to the bus-driver, but if you're found to drive a car without a driving license, then you are in some kind of trouble.

A right is a condition or a possibility that the law recognizes as important and protects via certain provisions and procedures. A right might be exercised by an individual or by a group of people (e.g. the right to form a union). Not all rights might be characterized as human rights. For example, it is difficult to say that the right of the shareholders of a company to check the activities of the managers of the firm is a human right, although of course it is a lawful demand.

We might say that human rights are the concepts whose protection could guarantee **dignity** and **equality** for all human beings. They are the rights that are directly linked to the values of **Freedom, Respect for others, Non-discrimination, Tolerance, Justice and Responsibility**[1]. Those fundamental values have to be guaranteed by a society by taking positive action or refraining from activities that might endanger their respect for any individual member of the society. After many decades of controversial discussion in the context of academic community and international organisation, certain key principles have been recognised today as fundamental and compulsory for all states.

These key principles underlying human rights are:

1. **Human rights are inalienable.** This means that they are attached to the human existence. A person is considered to be born with them and cannot ever lose them entirely. However, some human rights may be restricted under very particular circumstances (e.g. imprisonment).

2. **Human rights are indivisible, interdependent and interrelated.** This means that the enjoyment of one right depends on the enjoyment of the others and no condition of protection of human rights can be found as satisfactory, if there is an infringement of even one human right.

3. **Human rights are universal,** which means that they apply equally to all people everywhere in the world without distinction of race, ethnic origin, sex, language, religion, political or other opinion.

2.2. Law, Rights and the Rule of Law - Legal Aspects

In everyday talk people are used to think about law as a means to limit rights. Still this is only partly true. It is quite clear that the freedom of the individual is sometimes limited by rules that regulate certain sections of social life and require him/her to act in a certain way or to abstain from certain actions and to respect certain procedures. On the other hand, though it might sound strange, law is the only way to safeguard rights. If there were no legislation to protect certain rights and to impose that they should be respected in a certain way, the exercise of rights would be a question of force. The people with the ability to impose the respect of their rights onto others would be in a dominant position, while those who would not have such a force would be obliged to suffer the violation of their rights. Law exists in order to safeguard equal and basic rights for all members of a society and to impose (via certain procedures and mechanisms of protection) that everyone respect the rights of other people.

The concept of Rule of Law is fundamental for any democratic order. The European Constitution (Article I-2) declares that *"… the Union is founded on the principles of respect to human dignity, freedom, democracy, equality, the rule of law and respect to human rights …".* While all other terms sound very familiar, the concept of rule of law seems to be a bit vague. So what does it imply?

[1] See www.eycb.coe.int/compass/en/

As we have already seen, the rule of law at a first level means a rule that has been enacted by a lawful procedure, is destined to regulate human and social relations and its violation bears some legal consequences. In this sense, the constitution, an international treaty, an act or even a custom might be a rule of law. Indeed this is one of the possible meanings of the term, perhaps the closest to the meaning of the words “rule” and “law” considered separately. Still, the term “Rule of Law” means more than that and constitutes a fundamental concept of constitutional law in general.

In this sense, the rule of law means that any authority (government, judicial or other) may only be exercised in accordance with written laws, which have to be enacted via a lawful procedure. The concept of rule of law implies that no state decision or action of any kind can be regarded as legitimate if it is not founded on a law already enacted before it.

The concept of rule of law consists of more specific characteristics and provides for several important consequences. A legal order based on the rule of law might necessarily incorporate the following principles:

- **the supremacy of law**, meaning that all institutions and individuals are subject to it.
- **The independence of the judiciary** which safeguards the application of essential law and procedures. The courts should follow a public process and should justify their decisions on reasons based on law.
- **Legal equality**. The legal system must guarantee equality before the law for all individuals without distinction based on grounds of social status, race, religion, ethnic origin etc. Rules are applied in the same way to all citizens.
- **The distinction of powers**. The legislative power should be exercised by the Parliament. The executive power should be restricted to legislate.
- **Clarity of law.** The legal text should be certain as much as possible and clearly expressed avoiding vague concepts. Its wording should restrict the exercise of discretionary power by the authorities.
- **A system of effective and accessible means of legal recourse** for all citizens[2].

At another level, that of penal justice, where the question of restriction of authoritative power is perhaps more intense, the concept of rule of law is associated with several other concepts, like:

- **prohibition of retroactive force of penal law**. Legislation should be prospective and not retrospective. Nobody should be sentenced to any punishment without a law in force before the act that should define its elements (in Latin: *nullum crimen nulla poena sine lege*).
- **Presumption of innocence**. Every person accused of any act is presumed to be innocent until a lawful proof of his/her guilt beyond any reasonable doubt (*in dubio pro reo*).
- **Ne bis in Idem**. Another Latin term that means “Not twice for the same thing”. Its meaning is that any individual may only be punished once for a specific crime committed.

[2] See http://en.wikipedia.org/wiki

- **Habeas Corpus**. In Latin it means “you have a body”. Its essence is that every person arrested has the right to know what the accusation and evidence against him/her is. (S)he also has the right to be led before a judge or a court within a short period of time. Long-term arrest and detention is a threat to human rights.

Is a state founded on the Rule of Law a “just” state? In this point, after having defined the concept of rule of law and having described its basic characteristics, it is important to clarify this question. The concept of rule of law has nothing to do with the content of the laws or the politics of the executive power. As mentioned above, what the rule of law requires is that the authority is exercised according to written laws regardless of their content (with the exception of the general clauses stated above). Many authoritative regimes might reasonably claim to operate according to the rule of law.

If this is the case, what is the value of the concept of rule of law? The rule of law (with its characteristics and specifications mentioned above) remains a very important concept, as **an effective democratic system cannot be conceived without respect to the aspects of rule of law listed above**.

2.3. The Rule of Law - Philosophical Aspects

Aristotle – more than two thousand years ago – was astute enough to declare that “*the rule of law is better than that of any individual*”[3]. However, he conceived the rule of law not as a dynamic creation of human societies, but as a system of rules that is inherent in the natural order.

The end of the classical era and the centuries of authoritative power did not encourage such thoughts. Only in the beginning of the era of British Republic, in 1610, Lord Chief Justice Coke had the courage to say that “*the King itself ought … to be subject to God and the law, because the law makes him King*”[4].

Today’s discussion on the concept of rule of law is radically different. There is much criticism on the concept of rule of law based on the ground that it is a useless and deceiving concept. According to those critical theorists, adherence to the issues of procedures undermines the most essential issue, that of the content of law. In its more radical version this criticism advises that the rule of law is a concept that justifies the possession of power by the ruling classes of society to enact the law.

In the opposite direction, liberal theorists advocate that the rule of law is a useful and necessary concept for an open liberal society, as it restrains the governmental and judicial power and widens the limits of possibilities and activities of the active individuals.

It would be unfair to expect a theoretical concept to safeguard essential justice. The concept of rule of law provides a framework to guarantee the function of institutions in a way that is most possible to protect the constitutional citizen’s rights. The questions of essential justice and real equality are issues that relate to the dynamics of society transformations. Texts and theoretical concepts may never provide full answers to that.

3. Constitutions and Rights

[3] quoted in Atkinson, P., *A Theory of Civilisation*, in www.ourcivilisation.com , chapter 18 (The Rule of Law)
[4] quoted in Atkinson, P., *A Theory of Civilisation*, in www.ourcivilisation.com , chapter 18 (The Rule of Law)

3.1. Definition, national constitutions and human rights

The term “constitution” bears a double meaning, a typical and an essential one. In the typical sense a constitution is, generally, a written fundamental law of a state which is usually of increased force and validity. The essential meaning of the term includes the whole of the legal rules that define the form of a state, its policy, its basic institutions and the way they operate, and the relations between the state and the individuals.

The adoption of a constitution, in history, has always been a matter of struggles against totalitarian regimes. The people fought for a constitution, because they thought that a number of fundamental rules are necessary in order to restrict the absolute power of an authoritarian leader (a dictator, a monarch or a king).

The historical process of adoption of constitutions by modern states has created some common points, although in the international scene, as we shall remark, there are certain differences in the way a state faces its constitution that clearly reflect different political traditions.

Still, it is a rule without exception that **a constitution always refers to a certain state**. Sometimes, however, this state may be just a part of a federal country and thus does not possess an independent international personality. This is why the ratification process of a European Constitution is of a historical importance. It is the first time in history that an entity of independent states, that do not – for the time being – declare the foundation of a new federal state, recognize the need to adopt a text as a fundamental framework for the relations between them and proceed by naming this text a constitution.

A constitution may be written or oral. Today most of the modern states have got a written constitution. Countries of a different tradition (the United Kingdom is often cited as an example of an oral constitution state) found their constitutionalism on customary rules of law that have been formed through long-term practice by citizens who are aware that in doing so, they obey compulsory rules of law.

In the constitutional theory of every modern democratic state the source of the power of the state is **the people**. All powers of a state originate from the people and are being exercised (through the institutions of representative democracy) by the people. They also have to be exercised for the benefit of the people. Still, a constitution of a modern state does not face the people just as a group; it also has to recognise the rights of the person as an individual or as a part of a group, which could be a professional, political or even a minority group (cultural, racial, national). It is unacceptable for a modern constitution not to include a certain bill of rights that forms an ideal place where the individual may freely develop his/her activities and the intervention of the state is excluded.

The rules of law set by a constitution are – as previously stated – the fundamental rules of the state. This is why they cannot change easily. For example, a constitutional provision cannot be revised by a single act of the Parliament. The procedure of revision of the constitution is described in the text of the constitution. Usually the constitution provides that it has to be known prior to the elections that the next parliament will go on to a constitutional revision. In this way the electorate may approve (though in an indirect way) the constitutional changes.

Is it possible to abolish the constitutional provisions about human rights? Can a parliamentary majority decide that, for example, freedom of religion is not useful anymore? We cannot ignore that there exists (all over the world) constitutional texts whose provisions in this issue (freedom

of religion) are rather debatable. However, modern constitutional theory advocates that the provisions of constitutions that refer to human rights cannot be abolished as they refer to inalienable rights of every human being. A change in these issues would mean a totally different form of a state, a practical abolition of the constitution itself.

3.2. The European Constitution

The discussion about a European Constitution was launched at the beginning of the 80's when the idea of a political union between the countries that formed the European Economic Community (EEC) emerged. The new model of co-operation between the countries in many new sectors of policies, apart from the economy, required, thus, a new framework.

3.2.1. Why was this new framework named a constitution?

Was it not sufficient for the EU countries to accede to and adopt another treaty (like those of Maastricht, Amsterdam or Nice)?

Even today, there is still much debate about the legitimacy of the use of the term "constitution" for this latest European convention. Some say that the new convention is nothing more than another treaty. They also argue that there cannot be a "constitution" without a reference to a certain state. This is clearly not the case for the EU, as the national states remain in their place.

There is definitely some truth to this criticism. Nevertheless, the EU is not anymore a single congregation of countries that collaborate in the economy sector (competition, finance, commerce etc). The EU countries have decided to adopt common policies with respect to the environment, agriculture, social policy, transports, public health, **justice** and creation of a place of safety, asylum, **immigration policy** and – last but not least – **foreign policy**. By accepting this process, the national states **have resigned from part of their sovereignty** in order to follow the road of extended co-operation. Although they remain independent states (that have an exclusive competence in certain domains of policies such as education, culture, industry and so on, and retain the right to opt-out or even to completely retire from the EU), an important part of their policies can no longer be exercised by themselves alone. This is why, although the EU may not yet be characterized as a federal state, it does have certain of its features.

It has also been clear that the European Union needed a bill of rights. The new convention includes such a list, namely the Chart of Fundamental Rights of the European Union. This fact gives a certain "constitutional" status to the new convention. Finally, the use of the term "constitution" attributes to the new convention a symbolic meaning and contributes to the re-enforcement of a common European identity.

3.2.2. What is the relation between the European Constitution and the national constitutions of the countries of the EU?

It is crucial to know that, according to Article I-6 of the European Constitution, the European Constitution and the rules of law enacted by the institutions of the EU are considered as dominant compared to any national provisions, **national constitutions included!** It is a significant evolution -one that does not have any other historical paradigm- that a national state accepts that rules of law enacted by international institutions may override even its own constitution. Perhaps it is not so risky to claim that if the European Constitution is ratified, this provision will mean the beginning of the formation of a European federal system.

3.2.3. What are the rights of a European citizen? Who is a European citizen?

The European Constitution – apart from the Chart of Fundamental Freedoms – attributes certain rights to “the citizens of the Union”. Thus, the EU citizen may reside in any national state of the EU, may vote or even stand as a candidate in the European Parliament or any local elections. In case of lack of diplomatic representation (s)he may be represented by diplomats of any other EU country and refer to any EU embassy; finally, (s)he may refer to the European Parliament (EP), the European Ombudsman or any other EU institution in his/her own language and expect a reply in the same language.

However the enjoyment of these rights is dependant to the possession of an EU member-state nationality. If you’re not an EU national, then, sorry, these rights are not for you! The status of the third country nationals who are legal residents of the EU remains inferior compared to that of the EU nationals and for a Union “…*based on the values of human dignity, freedom, democracy, equality*….” (Article I-2 of the European Constitution) this is definitely not something to be proud of.

4. Rights, duties and responsibilities of the state and a citizen

Most of the national constitutions refer to “equal rights and duties (or responsibilities)” of their citizens. What is the meaning of a responsibility towards the state? Is there any bill of duties parallel to the bill of rights?

It may sound striking but somehow many constitutional texts do include a minor bill of responsibilities. Compulsory army service, the responsibility to obey the law, the obligation to pay taxes are provisions often met in constitutions. Still responsibilities do not carry the same burden as rights. They must not be conceived as the symmetrical opposite of rights. No reciprocity is recognised in the exercise of rights. In the hierarchical scale, rights do matter more. A citizen has, thus, always got the right to claim the protection of his/her rights, although (s)he may have violated the law in the most appalling way.

The state and the individual do not start from the same point. The State is stronger; it has got history, powerful institutions and complicated ideological and repressive mechanisms. The citizen is usually alone and powerless. This is why a democratic conception of citizenship emphasises the rights and the obligation of the state to protect them.

However, the conception of “**abusive exercise of a right**” is very familiar in most legal orders. This term has often been criticised because of its vagueness and the potential danger of its “abusive exercise” by the state! However, it is still a valid term that signifies, what is commonplace in everyday discourse, that one’s rights have a certain limit, which is the violation of somebody else’s rights. It is useful to think in these terms, when talking, for example, about competition law and the abuse of dominant position in the market.

In conclusion, although the concept of citizen’s duties and responsibilities are not without any content, it is rather unsuccessful to accept a theoretical model of a “nice pair” of rights and responsibilities. Emphasis on duties and responsibilities has always been the favourite of

authoritarian regimes. Rights are binding rules of law that might be defined, while duties are usually vague and abstract carrying the foetus of abuse by the state.

5. Citizenship: Definitions and dimensions

5.1. Discussing the concept

The word "citizen" is very familiar to everybody, although it is doubtful whether any one who uses it is able to define its meaning. Nevertheless, it does usually have a positive sense. When one claims to be a "citizen", (s)he demands from somebody, who might be the state, some respect. It seems that in everyday language the term is closely linked to rights.

This is not a groundless assumption. Rights do consist of a basic dimension of the concept of citizenship. Still it is accepted today that citizenship is something more than enjoyment of rights. It is a bond between the individual and the community; or according to Kymlica and Norman's definition it is "*an identity, an expression of one's membership in a political community*"[5]. The elements that form the community may not only be political in the strict sense, but also cultural, such as a shared moral code, a reference to a common cultural heritage.

Thus, citizenship is not just a "passive" status where the absence of the state from certain spheres of life of the individual is demanded; it is an active demand for political (in the broader sense of the term) participation. According to Janowiz citizenship refers to the political relations between the individual and the State[6]. We could go on with long quoting of definitions. It is, however, more useful to say that the crucial words with which to understand "citizenship" are *rights, community, obligations, identity*.

It may sound very contradictory to some, but the birth of the concept of "citizenship" comes together with the formation of modern national states. The "Enlightenment" movement that developed the ideas of human liberation has also been the incentive for modern nationalism. Thus, human rights and citizenship are closely linked with the "Nation – State" phenomenon.

This is not to say that the recipients of the right to citizenship have always been the whole of the population. Although the movements of the 18th and 19th century were revolutionary in terms of their method and content, they did not aspire to grant citizenship to the whole of the national population. It was only in the 19th century that the right to vote was attributed to every male regardless of his property. Moreover, the 20th century is characterized by the intense struggle for human and political rights of women and the black population. Thus, the concept of citizenship has historically been not only an identity of rights, but also a means of exclusion of minority groups.

Today citizenship remains a term that may signify exclusion, especially in Europe. Western European societies face the new reality of mass immigration from the countries of Asia, Africa and Eastern Europe. European national constitutions attribute to non-nationals many fundamental rights that form part of the concept of citizenship. Still, immigrants are totally excluded from political participation. They are not entitled to vote, they are not eligible for any public power (with the exception of some states as Germany or the Slovak Republic that offer them the right to vote and run as candidates in local elections after some years of permanent

[5] Lopez et al, *T-Kit on European Citizenship: Under Construction, Citizenship, Youth and Europe*, Strasbourg: Council of Europe Publishing, 2003, p.20

[6] Janowiz, M., *The Reconstruction of Patriotism, Education for Civic Consciousness*, Chicago: The University of Chicago Press, 1983

legal residence). It is definitely a paradox that a part of the society (and usually a very active one in economic terms) is deprived from political participation. Still, this is the ultimate consequence of the fact that – as it has been said – citizenship has historically been (and remains) tied to the concept of nationality. In many countries the two terms mean exactly the same or sometimes there is not even a separate term for citizenship.

It is true that many countries tend to facilitate the criteria for awarding the nationality status to an immigrant with a long-term stay in their territory. It is however somewhat early to foresee whether this trend will signify an important transformation of the concept of nationality in the future.

5.2. Dimensions of citizenship

As has been cited, citizenship is not a term with a unique meaning. It is made up of different components that reflect the various dimensions of the concept of citizenship. Can we imagine a citizen to whom full participation in the control and exercise of political power is granted but – at the same time – (s)he is alienated from his/her right to privacy? Can somebody take advantage and participate in cultural life when (s)he is unemployed? Therefore, it is useful to accept and declare that the right to citizenship has several dimensions[7]:

- **The Civil Dimension**: it consists of the rights that safeguard a sphere of personal freedom to the individual. Although the concept of the citizen is tied to the community, the liberal assumption that no active citizenship is possible without a core of rights and freedoms is unquestionable nowadays.

- **The Political Dimension:** it comprises the right to participate actively in the exercise of political power, either as an elector or as a representative. In a modern sense, the political dimension of citizenship means more than a demand towards the state to respect the procedures (set usually by the constitution) that define the way political rights are exercised. It is the state's duty to promote citizens' participation by any means. According to this way of thinking a citizen has a right to demand from a state to raise the level of knowledge and conscience on politics by providing education and adequate information with respect to political structures, important political issues, voting systems, ways of direct participation in decision-making. Without these pre-requisites, citizenship often tends to become an empty word. For example, who can deny that the French state displayed a praiseworthy sensitivity by setting the European Constitution under the approval of its citizens via a referendum?

- **The Social and Economic Dimension:** it is not seriously disputed that the economic status of the individual is decisive in his/her ability to take advantage of all his/her possibilities of participation to community life. Without a minimum standard of living or an environment of a certain level of quality, the value of other rights is fainting. The state is thus required to safeguard through active policies the right to labour (a key - right for the life of the individual), to social security, to environment. It might also ensure full and equal access to social benefits such as education institutions, health care etc, or even a minimum of income. The active citizen may claim these rights through his/her participation to pressure groups, trade unions etc.

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[7] Lopez et al, *T-Kit on European Citizenship: Under Construction, Citizenship, Youth and Europe*, Strasbourg: Council of Europe Publishing, 2003, p.33.

- **The Cultural Dimension**: the citizen has the right to know his/her past, the history and the overall cultural heritage of the society (s)he was born in. Participating to a satisfactory level in the basic cultural instruments of a society (e.g. language, music traditions) is a way to combat social exclusion. Still, the cultural dimension might not be confined to the right to participate (and integrate) in the dominant culture. Cultural (lingual, national etc) minorities should be encouraged through active initiatives to maintain their cultural heritage. Although the concept of "multiculture" is much disputed, it is unquestionable that modern societies may not be founded on a single cultural paradigm.

In the context of the contemporary discussion on citizenship, there is quite often a reference to the "civil society". The term has existed for a long time, while its meaning has developed through the years. Today the civil society is a quite useful concept that basically refers to Non-Governmental Organisations (NGOs) and other associations of self-initiative of the citizens that claim the right to participate in politics independently from the traditional institutions of political participation (political parties, trade unions). The "civil society" provides a paradigm of a new form of citizenship grounded on the ability of the individual – when acting within groups – to invent new ways of participation and to stress the public interest on new issues. Citizens that participate in the "civil society" do not conceive political participation as a question of a given balance between individuals and the state; they claim for more space for their political activity, as they do not conceive the state as the only active player in policy – making.

6. Generations of human rights

Have all human rights been internationally recognized as such at the same time? The answer is negative. Historically speaking, the term "generations of human rights" is a creature of the imagination of Professor Karel Vasak[8], while there is no reference to it in any international or domestic text of law. Still, the principle of "generations of human rights" is quite helpful to understand the evolution of human rights.

6.1. First generation: Civil and Political Rights

The impact of the revolutions of the 18th century (American Independence War, The French Revolution) has been very significant on the legal thought of these times. The legal texts produced by the new regimes (American Declaration of Independence – 1776, French Declaration of Rights of the Man and the Citizen – 1791) refer to the "physical and inalienable" rights of every human being. The concept of civil and political rights has been established.

Civil Rights provide the individual with the freedom to develop his/her personality into a certain circle of activities without restrictions and state interventions. They refer to the basic principles of human value, personality, private and family life, freedom of conscience, speech, religion etc. The Right to Life, the Right to Personal Liberty and Safety, the Right to Equality, the Freedom of Thought, the Freedom of Speech, the Right to Privacy, the Prohibition of Torture and Slavery are basic expressions of civil rights. Their characteristic is that their preservation requires the state to **refrain** from any intervention against their exercise. Civil rights have been characterized therefore as "negative" rights.

Political rights provide the individual with the freedom to participate in the political life of the community and the society. The Right to Vote, to Found and Join Political Organisations, the

[8] Roukounas, E., *International Protection of Human Rights*, Athens: Estia, 1995, p.15

Right to Found and Join Unions, the Right to Assemble are typical political rights and reflect different aspects of political participation (parties, unions, local administration, pressure groups).

It is important to stress the point that political rights – like civil rights – are basically safeguarded only for the country nationals (citizens) but not for the aliens (migrants). Every modern state provides – for example – the right to vote on national elections only to its citizens and excludes all non-nationals legal residents. Still with the passing of time things tend to change. Today in many – mostly European – countries a number of political rights (the Right to Join Unions, the Right to Assemble) is recognized for all legal residents of the state.

The countries that form the European Union have gone further than that. The concept of European Citizenship provides every EU national with the right to vote or stand as a candidate in local elections in the country (s)he resides permanently. However this right is usually not recognized for third-country (non EU) citizens.

6.2. Second Generation: Economic, Social and Cultural Rights

In the case of economic, social and cultural rights, unlike civil and political rights, the state is required not to abstain but to intervene in social life positively, efficiently and systematically in order to guarantee the access of its citizens and legal residents to labour, social and economic goods and services. The Right to Labour, the Right to Health and Social Security, the Right to Education, the Right to Housing, the Right to Fair Working Conditions and Collective Negotiations, are typical of that kind. They are characterized as “second generation rights” because they emerged and were adopted in legal texts in the beginning of the 20th century. The ideological background for this discussion has been the idea of essential social justice and equality. It is not by accident that this discussion became more vivid at a time when the working class had become a vast majority in the industrial societies of Western Europe and North America and the ideas of socialism had a prominent influence on politics through the foundation of socialist and communist parties, the development of trade unionism and the victory of the Bolshevik revolution in Russia.

It is generally accepted that **the economic, social and cultural rights do not provide the individual with a right to oblige the state to guarantee them an adequate level of goods and services**. Nobody can apply to the court and request that the state offer him/her a proper job or a nice house. Therefore it has been disputed whether in this case it is even useful to talk about “human rights”. Still in the passing of the years it has been recognized that the guarantee of economic, social and cultural rights has been useful, as often courts have issued judgments accepting citizens claims and annulling certain laws and provisions on the ground that a government should legislate in order to meet and not to endanger these economic, social and cultural aims. Therefore it is nowadays widely being accepted that there cannot be an adequate enjoyment of civil and political rights without a sufficient level of economic, social and cultural rights.

6.3. Third Generation: Rights of Solidarity

This third category of rights differ significantly from the rights included in the previous two “generations” as they do not refer to individuals but to groups of populations. They are **“collective rights” of society or peoples**. The individual human being remains of course the core value that needs to be protected, but it is impossible to imagine a personal exercise of this kind of rights. They cannot be enjoyed individually, only collectively by groups of people or

entire societies. The Right to Development, the Right to Peace, the Right to a Healthy Environment is characteristic of this approach.

The social context for the introduction of this “third generation” rights has been the increasing interest during the 50’s and the 60’s in the huge problems of the developing countries, the so-called “third world”, such as extreme poverty, war, ecological disasters. Movements emerging from the underdeveloped countries have given the incentive for the introduction of a group of rights whose aim would be to ensure appropriate conditions for “handicapped” societies found in the “wrong” side of the planet. It is not by chance that the first major international treaty to introduce these “third generation” rights was the African Chart for the Rights of the Man and the People in 1981.

As it has been said with respect to economic, social and cultural rights, this third category of rights does not have a direct implication. No one may ask for judicial protection to safeguard for example the right to peace. From this point of view, the protection of rights of this kind remains totally **imperfect**. Still their introduction in international conventions is important and characteristic for a most global perspective on the issue of human rights.

Today, there is some discussion on the so-called “fourth generation” of human rights. The context of this discussion is about the **Right to Difference or Divergence** meaning that the future generations should be protected against genetic engineering. This has led to the adoption of a convention on bioethics.

7. Basic International Treaties on Human Rights, Mechanisms of Protection

The end of World War II signified an increasing desire for an international recognition of basic human rights. The violation of rights in the period before and during the war especially in the countries under a fascist regime and the appalling memory of the racist ideologies of Nazism and fascism, made it clear that the international community should declare in a definitive way that there is a common share on values that should be protected efficiently. Therefore it is by no means accidental that the first important international treaty on human rights, the United Nations Chart (the Chart), was adopted on 1945.

Today however there are hundreds of international texts (treaties, conventions, declarations, protocols) referring to human rights. We may distinguish between global texts, texts that have a regional application and texts that provide protection to specific rights or to specific group of people.

Before going to a brief investigation of the basic international documents, it is important to stress the point that not all international texts impose on the states that have acceded to them a duty to respect rights on the national level. There are **binding** and **non-binding treaties**, which means that some of the (even basic) international documents on human rights are merely declarations of intentions without creating a legal obligation and without a mechanism of implementation. Still even non-binding treaties are of major symbolic importance as they reflect the level of international discourse on human rights and quite often they become a point of reference for people that demand their national state to respect their rights.

On the contrary, it is of the same significance to acknowledge that there are binding international texts of major importance. The states that accede to them may be checked for the way they implement their provisions and even be condemned in case they are found to violate

their obligations, although in fact the national states always seek and often do succeed in escaping effective control on the way they implement their commitments.

The ECHR possesses the most adequate mechanism of protection of rights recognised by it. The jurisdiction of European Court of Human Rights (ECtHR) has historically been an efficient means of protection of human rights in Europe, a lever of development of the scope of the text of the ECHR.

7.1. Global Documents

7.1.1. The United Nations Charter (1945)

Although it includes mostly declarations with non-binding force, it remains an important text; not only because it signifies the emergence of the United Nations Organization, but also because it has been the first text after the war to declare the need to safeguard human rights for all men and women everywhere in the world without any discrimination. According to its preamble, the state – members of the UN Organization are dedicated to declare their faith in the fundamental rights of the man, in the dignity and value of the man, in equality of rights between men and women and between nations[9]. Furthermore, respect to fundamental freedoms is declared without any discrimination based on grounds of race, sex, language or religion (Article 55). There are some traces of binding force on Articles 55 and 56 of the Charter, as the state – members of the UN are demanded to act together with the UN organization in order to safeguard the global and effective respect to human rights, to improve living conditions and solve international problems. Still, history has proved that little could be done in these grounds due to political reasons.

Perhaps the most important result of the Charter has been the foundation (Article 68) of the Commission on Human Rights (CHR) that during the years has elaborated a number of important documents including the Universal Declaration of Human Rights (UDHR) on 1948.

7.1.2. The Universal Declaration of Human Rights (1948)

In 1948, the General Assembly of UN adopted the first in history International Bill of Rights that remains until today the most important global human rights instrument. The UDHR refers mostly to Civil and Political Rights, but there are provisions that refer to the “second generation” rights as well. Though an extended analysis of the bill of rights included in the UDHR is impossible in the present text, it is interesting to remark that – besides the “classical” civil rights – the UDHR recognised a right to Asylum (Art.14), a ban of retroactive force of penal law (Article 11)[10], a right to a fair trial (Art.10), a right to free movement and selection of place of residence (Art.13), a right to nationality (Art.15) and a right to free elections and participation on political life of a state (Art.21).

The question of the binding character of the UDHR has been a matter of great controversy both in its time and today. The prevailing initial opinion that the UDHR had a clearly non-binding character is nowadays widely challenged mainly on the basis that its provisions express principles of customary international law[11]. The practical importance of this discussion is that the

[9] in http://www.un.org/aboutun/charter/

[10] On the concept of prohibition of retroactive force of penal law, see page 4

[11] Unwritten international law founded on long-term practices (customs)

protection of the rights included in the text of the UDHR might be the cause of an UN action or intervention.

7.1.3. The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (1966)

The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) were both adopted in 1966 by the UN Assembly after a long period of elaboration by the CHR. Their legally binding character is indisputable, as the national states that accede to them bear the obligation to introduce domestic laws in order to implement their provisions. Implementation is controlled by committees founded for this reason. Despite that, throughout the years, appeals by individuals have been rather scarce (about four hundred concerning the ICCPR and none with respect to the ICESCR) compared to the impressive dynamics of the ECHR institutions. The fact that the "decisions" or opinions of both committees are not accompanied by an effective mechanism of enforcement towards states – violators is surely the main reason for this poor result.

As far as content is concerned, the ICCPR contains the vast majority of rights already included in the UDHR. There are though at least two very interesting new entries:

a) Article 10 founds the right of prisoners to humane treatment. The Committee of the ICCPR has produced "decisions" according to which certain maltreatment of prisoners (food deprivation, isolation) has been found to constitute "torture", while in the case of *Dieter Wolf v. Panama, 1988*, it has ruled that it is unacceptable for prisoners who have been remanded in custody to be in the same cells with those already convicted.

b) In Article 27 there is a specific reference to the rights of "…*individuals that belong to minority groups*…". It was the first reference ever to minority rights in an international legal text and its importance is understandable in the light of the discourse of later years.

Generally speaking, the ICCPR has a broader scope compared to the UDHR, both in terms of content and on the ground that accession to it signifies a legal obligation of implementation of its provisions. As mentioned above, with respect to the "second generation rights", the provisions of the ICESCR mostly establishes an obligation on covenant states to develop policies and legislation in order "… *to safeguard* ***gradually*** *full application of the rights recognised*…". However, the ICESCR refers to important issues and contains provisions that establish a right to Labour, a right to Strike, a right to Free Education, to Social Security etc.

7.2. Regional Documents - Europe

Although there are several systems of regional protection for human rights covering the whole of the globe (with the exception of Asia), we will insist on a European perspective, because it is generally accepted that the system founded by the ECHR provides an international ideal for the effective protection of human rights.

7.2.1. The European Convention on Human Rights (ECHR) (1950)

The ECHR was adopted in 1950 in the context of the Council of Europe (CoE). Today 45 European countries (Turkey and the Russian Federation included) have acceded to the

convention which includes basically the “first generation rights” (civil and political rights). However, what makes sense is that in this case there is efficient protection of the rights recognised. The main innovation of the ECHR system **is the right of the individual to petition** before the ECtHR.

The ECtHR (residing in Strasbourg) is the main control mechanism for the implementation of the Convention provisions. Throughout the years its jurisprudence has developed the content of certain civil or political rights, on a number of occasions it has obliged the state members of the CoE to reform their domestic legislation, their politics or their administrative routine in order to meet the terms of protection of rights set by the ECtHR.

As previously stated, an individual has the right to petition before the ECtHR if (s)he claims an infringement of his/her right has occurred by a state – member of the Convention. It is important to mention that a state might be sued before the ECtHR not only by its nationals or a national of another state member of the ECHR, but by any individual whose rights have been abused. However it is necessary before appealing to the ECtHR to exhaust all legal remedies at the national level and to invoke the human right that is supposed to have been infringed before the national courts. Cases can only be heard by the ECtHR once all routes of appeal at a national level have been exhausted. It is of great practical importance that in case of a successful appeal before the ECtHR, the individual has a right to “a fair indemnity” towards the state that violated his/her rights (Article 50, ECHR).

There is nothing so original with respect to the rights protected by the ECHR. As mentioned above, they are basically civil and political rights of the “first generation”, such as the right to Life (Article 2), the Prohibition of Torture (Art.3), the Right to Personal Freedom and Security (Article 5), the Right to a Fair Trial (Art.6), Freedom of Thought, Conscience and Religion (Article 9), Freedom of Speech (Article 10). But the point here is not the text itself but the possibility for one to turn to it and claim its implementation.

Because of the mass approval of the institution of the ECtHR, the number of appeals is increasing each year. This has given the ECtHR the incentive for a further elaboration of the concept of a human right. This might also give us the chance to understand how this concept tends to evolve through the years.

For example, in which cases may we say that there is a violation of freedom of religion? It is understandable that such a violation exists when a state totally prohibits a certain religion or church or when it sets obstacles to its members. These cases are (fortunately) very rare today. Still is this the only way to violate one’s right to freedom of religion?

The ECtHR has judged that there is an infringement of freedom of religion when a state requires an approval by its administration in order to consider as legal the operation of a church of a religious dogma (*Manoussakis v.Greece*); or when one is denied assignation to the public sector because he had been sentenced to imprisonment for escaping military service for reasons of religion (*Thlimmenos v.Greece*); or when one is sentenced to imprisonment because he claims the right of the Muslim minority to elect its religious leading priest without state intervention (*Ibrahim Serif v. Greece*); or finally, when it imposes a prison sentence to somebody because he tried to proselytise[12] a person by means that could not be characterized as abusive (*Kokkinakis v.Greece*).

In the same context – with respect to the Freedom of Speech - the ECtHR has ruled (case of *Feldek v. Slovakia*) that restrictions on political speech constitute a major limitation to freedom of expression and therefore limits of acceptable criticism in politics are wider than for a private

[12] to persuade somebody to change his/her religion

individual. In this context it found that a Slovakian's newspaper condemnation for defamation based on the publication of a text, based on facts, on the "fascist past" of a government minister constituted an infringement of Freedom of Speech. It also ruled (case *Kadubec v.Slovakia*) that the absence of any judicial review of a decision imposing a fine constituted a violation of the right to a hearing by an independent and impartial tribunal established by law (Article 6§1 ECHR).

Finally, it is important to examine the jurisprudence of the ECtHR with respect to the rights of prisoners. The rights of prisoners are recognised not only by the Convention, but also by international conventions such as "the fundamental rules of prisoners' treatment" of the United Nations (1955) or the ICCPR. But, as mentioned above, the ECtHR has been the favourite "place" for a prisoner to appeal.

Most of the appeals of prisoners have been brought before the ECtHR, in the form of denunciation for a violation of Article 3 of the ECHR concerning torture, inhuman or humiliating treatment or punishment. Thus, the ECtHR has ruled in a rather well-known case (*Ireland v. UK, 1978*) that the methods of inquisition used by the UK (loud noise, sleep deprivation, lack of food and water) should be characterised as inhuman treatment. In recent years the ECtHR investigated an increasing number of cases on the ground of humiliating treatment, as the concept of torture is rather more restricted. On this basis it has been ruled that there is a case of violation of Article 3 of the ECHR when somebody is imprisoned in a very narrow and warm cell together with another prisoner during summer; when the cell does not have a separate toilet; or when the cell is dark and is not ventilated properly. Furthermore, it has been ruled that provisional arrest under these conditions (100 persons arrested in 20 cells, lack of beds, blankets and sheets, lack of warm water, limited or non-existing access to medical care, lack of place to walk and train) also constitutes inhuman and humiliating treatment in the sense of Article 3 of the ECHR.

Although in other cases of political interest the ECtHR has been more reluctant to recognize a violation of Article 3 (for example, in the *Baader – Enslinn v.Germany* case, it ruled that isolation in special cells might be justified on the grounds of anti-terrorist policy and protection of the interest of the whole of the society), it is obvious that, as the jurisprudence of the ECtHR evolves, it becomes even more sensitive to issues regarding conditions of treatment of prisoners. In this way, it defines a specific content and guarantees the implementation of the general principles of the humane treatment of prisoners included in the various texts.

7.2.2. The European Social Charter (1961)

The ECHR did not include any provisions of direct implementation of economic, social and cultural rights. The "second generation rights" were adopted eleven years later (1961) by the state – members of the Council of Europe. The European Social Charter includes an extended list of economic and social rights. There is a certain emphasis on issues of labour (right to collective negotiations, right to found a trade union etc), but also a series of innovative provisions with respect to rights of handicapped persons and the rights of children were included.

The European Social Charter is supposed to be a binding document and its implementation is supervised by an experts' committee while the covenant states are obliged to submit yearly reports. Still, the procedure of control is quite slow and today its value is questionable.

7.2.3. The Charter of Fundamental Rights of the European Union – The policy of the EU towards Human Rights

When the EU was founded in 1957 (at that time the European Economic Community) its scope was merely economic, mainly aiming at the integration of economies of the European countries, to the weakening of protectionism. This is why no bill of rights can be found in the EEC or EU texts, until the beginning of the 90's when the project of a political union of the European states came into force. It is obvious that there cannot be a political union without a policy towards human rights and without a bill of rights to which it shall refer.

The Maastricht (1992) and the Amsterdam (1997) Treaties declared that the Union was founded on the principles (shared by all its members) of freedom, democracy, the rule of law and respect of human rights and fundamental freedoms. They also established the concept of the "European citizen". Still the EU did not owe loyalty to any (binding or not) bill of rights as the possibility of accession of the EU to the ECHR was rejected by the Court of the European Communities.

This is why the heads of European governments decided in 2000 (in Nice conference) to adopt a Charter of Fundamental Rights of the European Union. The Charter included many innovations introducing many new rights with respect mainly to minorities and handicapped groups. Today, the Charter has been fully attached (under procedure of approval by national states) to the European Constitution and forms its second part (Part II). That means that for the first time the EU establishes a system of effective protection of rights within its borders.

The Charter (already Part II of the draft for a European Constitution) is divided in six parts, each referring to a certain value, such as **dignity, freedom, equality, solidarity, citizen's rights and justice**. The bill is rather impressive as it includes protection for rights never recognised before. For example, there is specific reference to protection of personal data (Article II-68), freedom of Art (II-73), freedom of enterprise (II-76), protection against expulsion (II-79), cultural and lingual diversity (II-82), rights of the aged (II-85) of individuals with special needs (II-86), of the consumer (II-98).

The bill of rights of the Charter incorporated into the draft for a European Constitution is clearly representative of the evolution of the concept of human rights and of the dynamic character of the legal discussion about them. What yesterday was a secondary issue today might be recognised as a basic human right.

When (and after the French and Dutch referendums we might also say if!) the ratification procedure of the European Constitution ends, the Charter (as a part of the European Constitution) will become a primary source of European Community Law binding for all EU members. This means that there might be sufficient protection of these rights at the EU level either by individual petition before the European Court of Justice (ECJ) that lies in Luxembourg or by a Commission's initiative when an infringement of one of these rights is observed. Until then, the legal value of the Charter is being questioned and in fact remains rather doubtful, although many advocate that its provisions should already be implemented as general principles of European Community law.

7.3. Specific Documents

During the years after the formation of the United Nations there has been a great activity concerning the adoption of texts of international law (international treaties) that refer to particular issues or rights of specific groups of the population. These treaties often have a major

impact in the cause of protection of human rights, as the adhering parties are subject to ratify them by enacting domestic legislation that has to be compatible to them. It is also quite normal that these treaties do provide for a mechanism of supervision of their implementation. In this context, some of these treaties have proved to be very influential in international politics. The Geneva Convention Relating to the Status of Refugees (1951), the UN Convention against Slavery (1956) and Torture (1984), the UN Convention on the Rights of the Child (1989) are characteristic documents of that kind. They all have introduced important and useful terms (as - in the latter case - "the child's best interest") and have influenced in a positive way the adoption of domestic legislation that might incorporate all those new issues and sensitivities.

8. Conclusion

There is little doubt that the development of the international dimension of the protection of human rights signifies a new era. There are many potential positive points on this road, as the experience of the ECtHR has shown. The international dimension has helped new concepts on human rights (even new rights!) to develop and has been an incentive for national states to take the issue of respect to human rights more seriously, as many times they found themselves subject to international control and sentence. However, the situation is far from ideal, as many countries – even today – obviously act as if they were not subject to any international control due to their economic or military force. The examples of human rights violation by countries that feel strong enough to do so are many and striking.

To bring an end to that situation is a political rather than a legal issue. Still, it is important to be aware of the fact that the demand for effective international protection of human rights signifies a step forward in the development of a global solidarity conscience. Thus, the real question is not to deny this international dimension of protection of human rights, but to make it more effective by promoting the development of its institutions and mechanisms of protection.

9. Glossary

act: a law, usually enacted by the parliament

convention: a treaty; **an international convention:** a text of law signed by two or more countries with essential or procedural provisions

customary law: unwritten rule of law founded on a long-term practice and a conscience that its violation has legal consequences

denunciation: complaint for a violation of a rule of law

discretionary power: when the law leaves more than one option to the person or the institution competent to decide

electorate: the electoral body, the voters

executive power: the institutions that are competent to govern a state, usually the government (the prime-minister and the ministers), but also (in some cases) the King or the Queen, the Monarch etc.

infringement: a violation

jurisprudence: the collection of rules of law formed by judicial decisions

ombudsman: an independent institution that has the mission and the power to exercise control to the state for any infringement of its legislation that might harm its citizens. The head of the institution is the person that has the title of the Ombudsman. Every country – member of the EU has got a national Ombudsman and there is a European Ombudsman competent to exercise control to the actions of the EU institutions

petition: an application**,** a demand

proselytise: to try to persuade somebody to change his/her opinions on religion, politics etc

reciprocity: a relation of mutual dependence

remand (in custody): when somebody is send to jail before his/her trial; the remand is justified on the ground of public safety (when the person accused is supposed to be dangerous) or in order to safeguard that (s)he will not escape to be led into trial.

sovereignty: supremacy of authority or rule as exercised by an independent (sovereign) state

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