

# Impact of International Human Rights Treaties on Fundamental Rights System

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International movement of human rights protection arisen as the complement of domestic protection, among which conclusion of international human rights treaties is one of the most significant components. Under the auspice of United Nations (UN) and other inter-governmental organizations, international human rights treaty system has been quickly established and progressively enriched during the first three decades of UN. Tracing back the evolvement of international human rights treaty system, it is not difficult to find out that early international human rights documents, such as the *Universal Declaration of Human Rights* (UDHR), might be more or less inspired by some thoughts stemming from national constitutions. However, as the intension of “Human Rights” enshrined in later adopted human rights treaties increasingly deepen and widen, and as these treaties have been extensively accepted by countries all over the world, some updated “human rights” thoughts, in return, begin to influence the definition of “fundamental rights” in constitutions and result in related constitutional reforms.

## 1. Introduction

In the middle of 1970s, colleagues from Netherlands launched a comparative research of 142 written constitutions which were published on *Compilation of World Constitutions* before 31 March 1976. One important part of this research involved the comparison of constitutions and UDHR. Grounded on analyzing of the statistics, Dutch colleagues held that similarity of provisions in constitution and in UDHR could not definitely be the result of international influence, but could be inspired by domestic political theories, or by existing constitutions; even UDHR itself was partly derived from constitutions enacted before 1948.<sup>1</sup>

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<sup>1</sup> For more details of the research, see Henry Van Mar Severn & Eagle Van De Tang, "A Comparative Study of Written

The above research was done more than 30 years ago; and samples of the research were all before 31 March 1976. At that time, *International Covenant on Civil and Political Rights* (ICCPR) just came into force a week before;<sup>2</sup> and *International Covenant on Economic, Social and Cultural Rights* (ICESCR) had been in force for less than three months.<sup>3</sup> Other core international human rights treaties which we are familiar today were still in the drafting phase or not yet in force. During the three decades since then, international human rights treaty system has been significantly improved. Meanwhile, many countries have adjusted the fundamental rights system. During this period, great changes have taken place in the aspects of subject of fundamental rights, types of the rights, and their ensuring mechanisms. Considering the time connection, it is worthy of rethinking about the relationship between international human rights treaties and the development of fundamental rights system. Based on empirical study of the development of subjects, types, institutions and remedy approaches for fundamental rights, this essay tries to find out the inherent links between the said development and international human rights treaties, and to analyze whether the latter have indeed influenced the said development, and to what extent the influence taking place.

## **2. International Human Rights Treaty and Fundamental Rights System**

### **2.1. International Human Rights Treaty**

For the purpose of this essay, *international human rights treaty* means the international legal document concluded among States, which declare the human rights of individuals as well as groups, and which obliges State Parties to safeguard these rights. This kind of treaties is the main resource of international human rights law, the legal foundation of international human rights protection, and is also the most important legal basis for international monitoring of State Parties' performance in protection of human rights. It is the treaty bodies, which are composed of independent experts in human rights sphere, to monitor State Parties. Considering members of treaty bodies are all of high moral character and recognized competence in the field of

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Constitutions," translated by Chen Yusheng, Huaxia Press, 1987.

<sup>2</sup> ICCPR came into force on 23<sup>rd</sup> March 1976.

<sup>3</sup> ICESCR came into force on 3<sup>rd</sup> January 1976.

human rights, many of their comments, observations and recommendations are respected by State Parties, and have become the guidelines of implementing human rights treaties in practice, although these comments, observations, or recommendations were never entitled to formal legal binding force.

On UN level, the eight core human rights treaties which have come into force before 31 July 2010 are *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD), *International Covenant on Civil and Political Rights* (ICCPR) and its optional protocols, *International Covenant on Economic, Social and Cultural Rights* (ICESCR), *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW) and its optional protocol, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT) and its optional protocol, *Convention on the Rights of the Child* (CRC) and its optional protocols, *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (ICRMW), and *Convention on the Rights of Persons with Disabilities* (CRPD) and its optional protocol. On regional level, core human rights treaties of Europe, America, and Africa are respectively *European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR), *American Convention on Human Rights* (ACHR), and *African Charter on Human and Peoples' Rights* (ACHPR). This research is mainly based on these documents.

## **2.2. Fundamental Rights System**

Generally speaking, “fundamental rights” could be deemed as the expression of “human rights” in constitutions, but they are not identical in both intension and extension. Subjects and contents of “human rights” confirmed in international human rights treaties are universal, which means that human rights are rights of every human being, regardless of his or her race, color, sex, language, religion, political views, nationality, social origin, property, birth or other status, and human rights are rights in civil, political, social, economic, cultural and other areas. Therefore, human rights in international treaties are deemed as “Universal Human Rights”.

“Fundamental rights” in constitutions, by contrast, are rights of individuals or groups which confirmed by constitutions. In light of the supremacy of constitution in

national legal order, fundamental rights are of ultimate importance for individuals, and are therefore different from ordinary legal rights. Almost all modern constitutions contain a bill of fundamental rights. Bills of fundamental rights may differ from each other in name, but have obvious common places in content. For example, in most countries, for a long time, fundamental rights were merely endowed to citizens, and almost all the bills of fundamental rights were not a complete list but only covered part of the universal human rights in international treaties. In recent years, however, especially since 1990s, many countries have enacted new constitutions or have amended fundamental rights in constitutions. As a result, subjects of fundamental rights have been expanded; contents of fundamental rights have been enriched; institutions and remedies for fundamental rights have been stretched as well, and fundamental rights are on the way towards universal human rights.

### **3. Concrete Manifestations of the Impact**

#### **3.1 International Human Rights Treaties Promoting Expanding of Subjects of Fundamental Rights**

Universality of human rights means human rights are rights of every person. Nowadays, within the territory of a country, besides local citizens, there are lots of foreigners as well as those without nationalities. Fundamental rights of “citizens” prescribed in constitution of the resident country could no longer guarantee the fundamental rights of the residents who are not nationals. Recently, as international human rights treaties are ratified by more and more countries, the idea of universal human rights begin to act on the fundamental rights system, one of the prominent manifestations of which is that subjects of fundamental rights have broken through the boundary of “citizens”, and extended to other “human beings”.

Many constitutions have replaced the “citizens’ rights” by “individual’s rights”. Phrases such as “human rights”, “rights of person”, “individual’s rights” etc are more and more popular in constitutions. For example, Chapter 1 of the *Political Constitution of Peru* (1993) is “fundamental rights of the person”, using “person” instead of

“citizen”.<sup>4</sup> Chapter 2 of *The Constitution of the Russian Federation* (1993) is “Rights and Freedoms of Man and Citizen”, which extends the subject to other men who are not citizens.<sup>5</sup> In Mongolia, her Constitution in 1992 escapes defining the subjects in title of the bill, but directly names the bill of fundamental rights as “Human Rights and Freedoms”.<sup>6</sup> *Constitution Act of Finland* in 1919 was replaced by her new constitution in 2000. In the new constitution, title of chapter 2 has changed from “General Rights and Legal Protection of Finish Citizens” to “Basic Rights and Liberties”, which demonstrates that fundamental rights no longer solely belong to finish citizens.<sup>7</sup>

Some other constitutions contain a general clause in the chapter of fundamental rights, which declares that unless otherwise stipulated, all the fundamental rights in this chapter are the rights of every person within the territory of the State. For instance, Article 15 of Chadian Constitution prescribes that subject to political rights, aliens lawfully within the territory of the Republic of Chad enjoy the same rights and freedoms as nationals.<sup>8</sup> For Czech Republic, *Charter of Fundamental Rights and Basic Freedoms* in 1992 is a part of her constitutional order. Art. 42 (2) of this Charter prescribes that aliens enjoy the human rights and fundamental freedoms guaranteed by this charter, unless such rights and freedoms are expressly extended to citizens alone.<sup>9</sup>

Constitutional cases mentioned above are no longer confined to the traditional understanding of fundamental rights, but gradually expand the subjects of rights to “all human beings”. This is a clear reflection of the idea of universal human rights in international treaties. As these constitutions are all enacted or amended after the *International Bill of Human Rights*, we could optimistically propose that international human rights treaties have promoted, to some extent, the positive development of subjects of fundamental rights. Of course, there are still some constitutions that insist

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<sup>4</sup> Political Const. of Peru, chapter 1, by Congress of the Republic, August 2006. Available at [http://www.congreso.gob.pe/\\_ingles/CONSTITUTION\\_29\\_08\\_08.pdf](http://www.congreso.gob.pe/_ingles/CONSTITUTION_29_08_08.pdf), last access on 31 July 2010.

<sup>5</sup> Const. of Russia, chapter 2, available at <http://www.constitution.ru/en/10003000-01.htm>, last access on 31 July 2010.

<sup>6</sup> Const. of Mongolia, chapter 2, available at [http://www.frc.mn/engnew/index.php?option=com\\_docman&task=cat\\_view&gid=18&Itemid=63](http://www.frc.mn/engnew/index.php?option=com_docman&task=cat_view&gid=18&Itemid=63), last access on 31 July 2010.

<sup>7</sup> Const. of Finland, chapter 2, The Parliament of Finland, the Ministry for Foreign Affairs, and the Ministry of Justice, Vammalan Kirjapaino Oy, 2001.

<sup>8</sup> *République du Tchad Constitution du 31 mars 1996 révisée*, available at [http://www.primature-tchad.org/pdfs/Constitution\\_de\\_la\\_Republique\\_du\\_Tchad.pdf](http://www.primature-tchad.org/pdfs/Constitution_de_la_Republique_du_Tchad.pdf), last access on 31 July 2010.

<sup>9</sup> Charter of Fundamental Rights and Basic Freedoms, art. 42 (2).

on citizens as the main subjects of fundamental rights, and imposing a number of limitations to foreigners' rights. And there are still some gaps between even the examples listed above and the human rights treaties. For instance, in ICCPR, only one item of right is reserved for "citizen", that is article 25 of ICCPR which confers every citizen with the right to take part in public affairs, to vote and to be elected, and to have access to public service. While some constitutions extend the exclusive rights of citizens to right to assembly, right to association, freedom of movement and even the freedom of occupation. This kind of gap should be gradually narrowed with the deepening and spreading of the idea of universality of human rights.

### **3.2. International Human Rights Treaties Promoting Enrichment of Contents of Fundamental Rights**

Universality of human rights also means human rights are rights in every area. In the past, many constitutions placed extra emphasis on civil and political rights, and had no regulations or only a few regulations on economic, social and cultural rights; rights of women, children and minorities were seldom included in constitutions. By comparison, international human rights treaty system from the beginning, gives equal emphasis on human rights in different areas and to different groups, and enshrines these human rights in parallel core human rights treaties. Since "all human rights are universal, indivisible, interdependent and interrelated",<sup>10</sup> they should be the rights of everyone in every fields such as civil, political, economic, social and cultural, instead of rights only in partial fields above. As human rights treaties are extensively accepted by States, the conception of universality of human rights in content has promoted the enrichment of fundamental rights. New constitutions not only strengthen the protection of existing rights but also added some new items and new types of fundamental rights in constitutions.

#### **3.2.1. Economic, Social and Cultural Rights Incorporated in Constitution**

Divergence on what human rights are, for a long period of time concentrates on whether economic, social and cultural rights are human rights. Main viewpoint of the negative is that economic, social and cultural rights should not be regarded as

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<sup>10</sup> UN Doc. A/CONF.157/24, *Vienna Declaration and Programme of Action*, Part I, para.5.

fundamental human rights, but the State's social policies. As demonstrated in the research carried out by Dutch colleagues in 1970s, out of the 142 constitutions investigated, only 10 used the phrase "economic rights" or similar phrase, only 5 used the phrase "cultural rights" or similar words.<sup>11</sup> Today, however, ICESCR has 160 State Parties, that is 80% countries around the world recognize that economic, social and cultural rights are human rights. And as a reflection, more and more constitutions have considered these rights as fundamental rights thereby.

In many constitutions, economic, social and cultural rights are stipulated in an independent part of the bill of fundamental rights, such as Surinamese Constitution in 1987, Colombian Constitution in 1991, *Charter of Fundamental Rights and Basic Freedoms* of Czech in 1992, Polish Constitution in 1997, Albanian Constitution in 1998, Constitution of Mozambique in 2005, etc. In some other countries, economic, social and cultural rights are gradually strengthened through constitutional reforms. In Finland, for instance, Act No. 969 of 17 July 1995 amended the *Constitution Act of Finland* in 1919, and added fundamental rights, including economic, social and cultural rights in the constitution. In 2000, new constitution of Finland came into force, and reconfirmed these rights, such as educational rights, right to one's language and culture, right to work and the freedom to engage in commercial activity, right to social security, etc.<sup>12</sup> As Prof. Nousiainen pointed out, the most significant changes, in comparison with the older provisions of Finland constitution "relate to the extension of the application of the basic rights and liberties to all persons within the scope of the Finnish legal system, regardless of citizenship, and to the inclusion of economic, social and cultural rights in the Constitution".<sup>13</sup> In Brazil, list of "social rights" get longer and longer as a result of constitutional reform. According to article 6 of her Constitution in 1988, social rights include rights to "education, health, work, leisure, security, social security, protection of motherhood and childhood, and assistance to the destitute". In 2000, No. 26 constitutional amendment added "housing" as an item

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<sup>11</sup> See Note 1, p 135.

<sup>12</sup> Const. of Finland, art. 16, 17, 18 and 19.

<sup>13</sup> See Jaakko Nousiainen, "the Finish System of Government: From a Mixed Constitution to Parliamentarism", in *The Constitution of Finland*, by The Parliament of Finland, the Ministry for Foreign Affairs, and the Ministry of Justice, Vammalan Kirjapaino Oy, 2001, p25.

of social rights; in 2010, No. 64 constitutional amendment added “food” in the list.<sup>14</sup> Portuguese Constitution in 1976 has been amended for 7 times until 2005. In the amending process, right of worker, right to health, and right to housing have been strengthened step by step.<sup>15</sup>

Looking through constitutions all over the world today, it is quite easy to read provisions of economic, social and cultural rights in the bill of fundamental rights in constitutions. It indicates that national awareness of universality of human rights in content and of the interrelated, interdependent, and indivisible nature of human rights is building up.

### **3.2.2. Protection of Rights of Specific Group Strengthened in Constitutions**

Core human rights treaties of UN and some regional human rights treaties provide special regulation for rights of women, children, people with disabilities, and ethnic and linguistic minorities. As echo to these treaties, new constitutions highlight special protection of specific groups. It will be elaborated as follows, taking women’s rights and children’s rights as examples.

#### **3.2.2.1. CEDAW Giving Impetus to Special Protection of Women’s Rights**

Although almost all the constitutions stipulate in the non-discrimination clause that no discrimination could be made on ground of “gender”, this understating provision can hardly make any difference to the entrenched discrimination against women. In order to ultimately change this situation, the United Nations drafted CEDAW, intending to fight for equal treatment of women in all areas as of men. After adoption of CEDAW, many constitutions strengthen and enrich the protection of women’ rights according to the convention. Presently, besides the general provision of no discrimination based on gender, some constitutions have further provided guarantee of equal treatment of men and women “in all areas”. For example, on 26 February 2002, Belgium amended her constitution, and added paragraph 3 to article 10, which read as “Equality between

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<sup>14</sup> CONSTITUIÇÃO DA REPÚBLICA FEDERATIVA DO BRASIL DE 1988, which includes 66 constitutional amendments before 13 July 2010. Available at [http://www.planalto.gov.br/ccivil\\_03/Constituicao/Constituicao.htm](http://www.planalto.gov.br/ccivil_03/Constituicao/Constituicao.htm), last access on 31 July 2010.

<sup>15</sup> Comparing Portuguese Constitution in 1976 and the Constitution after 7 times amendment in 2005, it is obviously to find out that there are more individual rights, less individual duties, and more obligation of State to safeguard fundamental rights. See *Portuguese Constitution* adopted on 2 April 1976, in A. Tschentscher (ed.), *International Constitutional Law*, and *Constitution of the Portuguese Republic*, seventh revision [2005] available at [http://app.parlamento.pt/site\\_antigo/ingles/cons\\_leg/Constitution\\_VII\\_revisao\\_definitive.pdf](http://app.parlamento.pt/site_antigo/ingles/cons_leg/Constitution_VII_revisao_definitive.pdf), last access on 31 July 2010.

women and men is guaranteed”.<sup>16</sup> In Germany, No. 42 amendment to Basic Law in 1994 added a sentence after article 3(2), which now reads as “Men and women shall have equal rights. The State shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist”.<sup>17</sup> Article 48 of Paraguayan Constitution in 1992 stipulates that “Men and women have equal civil, political, social, and cultural rights. The State will foster the conditions and create the mechanisms adequate for making this equality real and effective by removing those obstacles that prevent or curtail its realization, as well as by promoting women’s participation in every sector of national life.”<sup>18</sup> Similar provisions in Ugandan Constitution in 1995 have gained positive evaluation by Committee on the Elimination of Discrimination against Women. The committee commended Uganda for the promulgation in 1995 of a new Constitution, which incorporated a gender-sensitive approach to the definition of discrimination on the grounds of sex, in harmony with the Convention.<sup>19</sup>

Considering the disadvantaged status of women, it is necessary to advance women’s status, making men and women stand on the same starting line. For this reason, CEDAW authorizes State parties to take “temporary special measures aimed at accelerating de facto equality between men and women”.<sup>20</sup> This provision has been adopted in many constitutions. For example, for the purpose of promoting women’s rights to participate in political and public affairs, on 20 February 2003, Italy amended article 51 of her 1948 constitution, added the following sentence after paragraph 1 “the Republic shall adopt specific measures to promote equal opportunities between women and men”.<sup>21</sup> Another example comes from Greek Constitution. In 2001, Greece amended article 116 (2) of her constitution as “adoption

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<sup>16</sup> Const. of Belgium, art. 10, translated by Belgian House of Representatives, Jan. 2009.

<sup>17</sup> Basic Law of Germany, art. 3 (2). No. 42 amendment to Basic Law on 27 October 1994 is one of the most important amendments. After amending, Art 3 (2) in fact confirms the obligation of state to take positive measures to protect women’s rights. This stirred a big controversy for its constitutionality then. See Susanne Baer, “The Basic Law at 60-Equality and Difference: A Proposal for the Guest List to the Birthday Party”, in *German Law Journal*, [special issue: the Basic Law at 60], vol. 11 No.01, 2010.

<sup>18</sup> Const. of Paraguay, art. 48, translated from *Constitución de la República del Paraguay. Sancionada y promulgada el 20 de junio 1992* in A. Tschentscher (ed.), *International Constitutional Law*.

<sup>19</sup> UN Doc. A/57/38, para 125.

<sup>20</sup> CEDAW, art.4 (1).

<sup>21</sup> Const. of the Italian Republic, art. 51 para.1, published by Senato della Repubblica.

of positive measures for promoting equality between men and women does not constitute discrimination on the basis of sex. The State shall attend to the elimination of inequalities actually existing, especially to the detriment of women".<sup>22</sup> These provisions provide constitutional basis for States to take temporary special measures to realize actual equality between men and women.

One of the critical reasons leading to ignoring of women's human rights for a long time is that traditional international law and human rights law construed "the civil and political rights of individuals as belonging to public life while neglecting to protect the infringements of those rights in the private sphere of familial relationships."<sup>23</sup> As the private and familial spheres is the main venue of vast majority of women, this kind of artificial division between public and private sphere frees many violations of women's human rights from punishment. CEDAW, however, breaks through this sharp division between public and private life, obliges State parties bearing responsibility as well for infringement of human rights taking place in private sector. A good reflection of this idea in constitution is No. 19 Constitutional amendment of Malta in 1991. After revision, article 14 of her constitution provides that "The State...shall take appropriate measures to eliminate all forms of discrimination between the sexes by any person, organization or enterprise; the State shall in particular aim at ensuring that women workers enjoy equal rights and the same wages for the same work as men."<sup>24</sup> According to this provision, the State has obligation to take proper measures to prevent and eliminate discriminating practice against women by individual persons and enterprises.

Another important reason impeding the realization of women's rights is the traditional culture and conservatives forces, which appear in forms of stereotyped ideas and customs, and which block advancement of women in legal, political and economic fields. Therefore, article 5 of CEDAW obliges State parties to take all appropriate measure to eliminate "prejudices and customary and all other practices

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<sup>22</sup> Const. of Greece, art. 116(2), published by Hellenic Parliament, 2004.

<sup>23</sup> Celina Romany, "State Responsibility Goes Private: a Feminist Critique of the Public/Private Distinction in International Human Rights Law", in Rebecca J Cook ed. *Human Rights of Women: National and International Perspectives*, University of Pennsylvania Press, p 85.

<sup>24</sup> Const. of Malta, art. 14. available at [http://president.gov.mt/constitution\\_malta?l=1](http://president.gov.mt/constitution_malta?l=1), last access on 31 July 2010.

which are based on the idea of the inferiority or the superiority of the sexes or on stereotyped roles for men and women”. Constitution of Ethiopia in 1994 expressly recognizes that there are detrimental practices injuring women’s rights within her society, and the State will try her best to eliminate these practices. In Africa, many other States, such as Chad, Egypt, Gambia, Malawi, Namibia, South Africa, and Uganda explicitly declare in their constitutions the fight against historical customs and traditions based on gender discrimination.

It can be seen from the above examples that, CEDAW has had extensive and profound impact on provisions of fundamental rights of women in many constitutions. It is partly owing to 186 ratifications of the convention by States all over the world, which creates opportunities for CEDAW to have broad domestic influences. None the less, it is undeniable that values of ratification of the Convention are undermined by a number of reservations to the substantive provisions of the convention, hindering the process of fully implementing women’s human rights. It is up to the States in view of changing this situation, to upgrade their understanding and implementation of universal human rights.

### **3.2.2.2. CRC Pushing the Special Protection of Children’s Rights**

CRC, which came into force in 1990, gains ratifications from all member states of UN, with only two exceptions, United States and Somali. Universal acceptance of CRC brings great impetus to protection of children’s rights in constitutions. Of the provisions protecting children’s rights, some directly invoke CRC to define the scope within which children’s rights is guaranteed; some embody the basic principles and content of the convention. For example, in accordance with article 44 of Colombian Constitution in 1991, besides the rights provided in article 44, children “will also enjoy other rights enshrined in the constitution, the laws, and international treaties ratified by Colombia”.<sup>25</sup> One of the core principles of CRC is “the best interests of the child shall be a primary consideration”. Many constitutions embody this principle in the fundamental rights system. For example, after amending in 1997, Portuguese Constitution added article 68 (4): “The law shall regulate the grant to mothers and

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<sup>25</sup> Const. of Colombia, art. 44, para. 1.

fathers of an adequate period of leave from work, in accordance with the interests of the child and the needs of the family unit”.<sup>26</sup> Another example is article 47 (3) of Mozambique Constitution in 2005. It prescribes that “all acts carried out by public entities or private institutions in respect of children shall take into account, primarily, the paramount interests of the child”.<sup>27</sup> This is the example of forthright respond to the “best interests” principle.

Besides economic, social and cultural rights, women and children’s rights, there are many other fundamental rights which have been enriched and strengthened following the model of human rights treaties. For instance, after modified in 1997 and 2005, article 33 (6) of Portuguese Constitution is changed to “No one shall be extradited or handed over under any circumstances for political reasons, or for crimes which are punishable under the applicant state’s law by death or by any other sentence that results in irreversible damage to a person’s physical integrity”.<sup>28</sup> Through the modification, these provisions become more compatible with the requirement of CAT, which stipulates in its article 3 that “No State Party shall expel, return or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture”. For the protection of minority rights, many constitutions have strengthened special guarantees making reference to ICERD and article 27 of ICCPR. For instance, there is an independent part in Venezuelan Constitution in 1999 safeguarding “rights of native people”.<sup>29</sup> In Norway, a new article 110(a) was inserted into the Constitution on 27 May 1988 to ensure the rights of Sami: “It is the responsibility of the authorities of the State to create conditions enabling the Sami people to preserve and develop its language, culture and way of life.”<sup>30</sup>

Since regional human rights treaties and UN human rights treaties have high consistency in content, and since they complement and reinforce mutually, it is always

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<sup>26</sup> Const. of Portugal, art. 68 (4).

<sup>27</sup> Const. of Mozambique, art. 47 (3).

<sup>28</sup> Const. of Portuguese Republic, seventh revision [2005], art. 33(4), (6).

<sup>29</sup> Const. of Venezuela, art. 119-126.

<sup>30</sup> Const. of Norway, art. 110a. Available at <http://www.stortinget.no/In-English/About-the-Storting/The-Constitution/The-Constitution/>, last access on 31 July 2010. Cf. UN Doc. CCPR/C/70/Add.2, para. 206.

difficult to distinguish which improvement of fundamental rights is influenced by UN treaties or by regional treaties. Nevertheless, it is not complicated to tell that some unique provisions in constitutions are quite obviously resulting from certain original contents of regional human rights treaties. The *African Charter on Human and Peoples' Rights* (ACHPR) is famous for its comprehensive coverage of three generations of human rights, and its emphasis on unity of rights and obligations. In addition to economic, social and cultural rights, ACHPR at the same time prescribes some collective rights, such as right of self-determination, right to development and right to environment. During the first decade of ACHPR, most African countries have laid down new constitutions with a list of fundamental rights. And these new constitutions, by and large, reflect the characteristics of ACHPR. Many constitutions in their preamble refer to ACHPR as the foundation for ensurance of human rights by the States. A survey as of 2003 shows that out of the 53 African constitutions, only five have not the bill of fundamental rights. The constitutions containing bills of fundamental rights cover most rights embraced in ACHPR. Taking economic, social and cultural rights into account, 43 of 53 constitutions provide freedom of trade; 49 provide right to property; 40 provide right to education, 40 provide right of workers or working related rights; 32 provide right to social security; and 34 provide right to health. In addition, many constitutions of Africa stipulate collective rights, among which 30 constitutions stipulate right of self-determination, 25 stipulate the right to development, and 28 recognize the right to environment.<sup>31</sup> Therefore, impact of regional human rights treaties on fundamental rights is sometime even more notable and more direct than that of UN treaties.

### **3.3. International Human Rights Treaties Promoting Development of Institutions of Fundamental Rights**

It is the traditional model for safeguarding fundamental rights by public powers. However, since “power” itself tends to expand and to be abused, sometimes the process of exercising powers could not safeguard but infringe fundamental rights. Therefore, realization of fundamental rights should not depend solely on operation of

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<sup>31</sup> See Christof Heyns, (ed.) *Human Rights Law in Africa* (Vol.2), Martinus Nijhoff Publishers, 2004.

public powers. Consequently, a new way to protect human rights comes into being, that is “a human rights-based platform for dialogue and exchanges between State and society.”<sup>32</sup> This platform is the special institution for human rights protection aside from public authorities. In 1991, at the end of the International Workshop on National Institutions for the Promotion and Protection of Human Rights, *Principles relating to the status of commissions and their advisory role* (“Paris Principle”) was adopted.<sup>33</sup> In 1993, General Assembly encouraged Member States to establish and strengthen National Human Rights Institutions (NHRIs), and it recognized that every State had right to choose the framework for their national institutions to be best suited to its particular needs at the national level.<sup>34</sup> According to *Paris Principle*, national institutions shall have broad mandate, such as submitting to the government opinions, recommendations, proposals and reports on any matters concerning promotion and protection of human rights, encouraging State to ratify international human rights treaties, ensuring harmonization of national legislations with the international human rights instruments, urging the State to fulfill its obligations under international treaties, and launching program for the teaching of and research into human rights, etc.

Literally, international human rights treaties do not call for State Parties to establish NHRIs. However, taking into account of the significant role of NHRIs in promotion and protection of human rights, some treaty bodies definitely support the establishment of NHRIs in their general comments. For example, No. 10 general comment of Committee on Economic, Social and Cultural Rights points out the important role of NHRIs in protecting economic, social and cultural rights, and recommends State Parties to establish NHRIs as a significant measure to fulfill their obligations under ICESCR.<sup>35</sup> No.17 general comment of Committee on the Elimination of Racial Discrimination recommends State parties to set up “national institutions to facilitate implementation of ICERD”.<sup>36</sup> Committee on the Right of Child

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<sup>32</sup> See Han Dayuan, “States’ Obligation to Protect Human Rights and Functions of National Human Rights Institutes”, in *Legal Forum*, No. 6, 2005.

<sup>33</sup> UN Doc. E/CN.4/1992/43, para.254.

<sup>34</sup> UN Doc. A/RES/48/134, paras 11&12.

<sup>35</sup> UN Doc. E/1999/22, No. 10 General Comment of CESCR, *the role of national human rights institutions in the protection of economic, social and cultural rights*.

<sup>36</sup> UN Doc. A/48/18, No.17 General Comment of CERD, *Establishing of National institutions to facilitate implementation of*

confirms that independent national human rights institution is an important mechanism in the promotion and protection of the rights of the child.<sup>37</sup> Considering the advocacy and promotion by UN and treaties bodies, many States have built up NHRIs that are suited to their own circumstances, and ensure their status and mandate in the constitutions. Constitution of Philippine in 1987, Constitution of Malawi in 1994, Constitution of Albania in 1998, Constitution of Hungary in 2003, and many other constitutions such as of Romania, Fiji, Argentina, Ghana, Zambia, Colombia, Venezuela, etc through special chapter or provisions provide the establishment and mandate of NHRIs.

Since 1990s, establishing NHRIs has become the common practice among countries. As far as March 2010, 65 out of more than 100 NHRIs established all over the world have been identified by the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights as fully meet the standards under *Paris Principle*.<sup>38</sup> As social mechanisms outside of traditional public powers, NHRIs have played and are still playing significant roles in domestic implementation of international human rights treaties collaborating with the States.

### **3.4. International Human Rights Treaties Pushing Extension of Remedy for Fundamental Rights**

Fundamental rights never matter if there are no effective measures for remedy. Generally speaking, there are two approaches available for victims of claimed human rights violation to gain constitutional remedy. One way is victim suing directly before constitutional court or the supreme judicial bodies for reparation. Another way is reviewing constitutionality of legislations or administrative acts by constitutional review organs. Recently, more consideration has been given to international human rights treaties in the process of the above two procedures.

#### **3.4.1. International Human Rights Treaties as Legal Basis for Fundamental Rights related Litigation**

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*the convention.*

<sup>37</sup> UN Doc. CRC/GC/2002/2, No.2 General Comment of CRC, *The role of independent national human rights institutions in the promotion and protection of the rights of the child.*

<sup>38</sup> Resource of the data is "National Human Rights Institutions- the Critical Links", available at <http://www.ohchr.org/EN/NewsEvents/Pages/NHRICriticalLinks.aspx>, last access on 31 March 2010.

As mentioned above, languages and contents of fundamental rights in constitutions are following the model of international human rights treaties. At the same time, human rights treaties are more frequently invoked by the judiciary as the ground for construction of fundamental rights. For example, on 9 December 2000, Supreme Court of Iceland decided that a new legislation aiming at declining the budget of social security for the disabled was unconstitutional, because the new law infringed article 76(1) of the Constitution. In concluding this judgment, the Supreme Court invoked article 9, 11 and 12 of ICESCR to interpret the rights to social security in the Constitution.<sup>39</sup> In some constitutional courts, judgments are directly based on international human rights treaties. For instance, on 14 February 1991, Spanish Constitutional Court invoked the full text of article 40 (2) (b) of CRC to decide that procedures adopted by a Juvenile Tribunal were unconstitutional.<sup>40</sup> Another case took place in 1992 in Colombian Constitutional Court, which decided that housework should be paid according to article 11 of CEDAW.<sup>41</sup>

The above cases demonstrate that thoughts enshrined in international human rights treaties not only be absorbed by fundamental rights in constitutions, but also be vividly construed by constitutional courts in real lawsuits, and as a result directly applied on the fundamental rights remedy for individuals.

### **3.4.2. International Human Rights Treaties as Standards of “Constitutional” Review**

In recent years, some constitutions list international treaties, especially international human rights treaties ratified by the State as one of the standards for “constitutional” review, and confer the mandate of “treaty compatibility” review to constitutional court. According to article 149 (1) (d) of Bulgarian Constitution, the Constitutional Court shall “rule...on the compatibility of domestic laws with the universally recognized norms of international law and the international instruments to which Bulgaria is a party”.<sup>42</sup> Article 131 of Albanian Constitution in 1998, article 160 of

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<sup>39</sup> UN Doc. E/1994/104/Add.25, para. 9.

<sup>40</sup> UN Doc. A/51/41, para 270.

<sup>41</sup> UN Doc. A/50/38, para. 606.

<sup>42</sup> Const. of Bulgaria, art. 149 (1) (d).

Slovenian Constitution in 1991, and article 16 of *Constitution Court Law* of Latvia in 1997 have similar regulations.

“Treaty compatibility” review by constitutional court, once again displays that the State parties take more seriously with their international obligations, and have sufficient confidence of the compatibility between fundamental rights enshrined in constitutions and universal human rights in international treaties.

### **3.4.3. Remedy for Fundamental Rights Extending to International Level**

Recently, more and more human rights treaties have set up complaint procedure. Meanwhile, more and more countries have opted into the procedure, and have approved expressly in constitutions that individuals have right to appeal to international institutions after exhausting all the domestic remedies. This constitutional provision extends fundamental rights remedy from domestic territory to international level. For example, in Venezuela, “Everyone has the right, on the terms established by the human rights treaties, pacts and conventions ratified by the Republic, to address petitions and complaints to the intentional organs created for such purpose, in order to ask for protection of his or her human rights.”<sup>43</sup>

In addition, some countries further regulate in their constitutions or related legislations the way of implementing decisions from international human rights organs. For instance, Czech Republic showed her good faith for respecting human rights treaties as well as decisions of treaty bodies. According to her constitution, the Constitutional Court is obliged to rule on “measures essential for the implementation of a ruling by an international court, which is binding the Czech Republic.”<sup>44</sup> *The Act on the Constitution Court* of Czech provides a detailed interpretation on proceedings concerning measures necessary to implement a decision of an international court.<sup>45</sup>

## **4. Patterns of Impact of International Human Rights Treaties on Fundamental Rights System**

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<sup>43</sup> Const. of Venezuela, art. 31.

<sup>44</sup> Const. of Czech, art. 87 (1) (i).

<sup>45</sup> Act on the Constitutional Court of Czech Republic, art. 118 (1), available at [http://angl.concourt.cz/angl\\_verze/act.php](http://angl.concourt.cz/angl_verze/act.php), last access on 31 July 2010.

After World War II, especially after the adoption of *International Bill of Human rights*, people worldwide witness some significant developments of the Fundamental Rights System. Numerous examples illustrated in this essay show that the evolvement of fundamental rights system to much extent is inspired and influenced by international human rights treaties.

First of all, it is clear that international human rights treaties setting benchmark for new constitutions enacted after *International Bill of Human Rights*, especially those enacted in the recent two decades. The bill of fundamental rights covered in these new constitutions clearly follows the model of human rights treaties, for some clauses in recent bill of fundamental rights are the same as or even identical with languages used in international human rights documents. Besides, some old constitutions before *International Bill of Human Rights* have been amended recently, and they apparently follow the guidance of the treaties. Due to the driving of human rights treaties, constitutions strengthen the guarantee of fundamental rights of women, children, minorities and other special groups.

In the second place, comparing with global human rights treaties, regional treaties exert more direct and more evident impact on constitutions of State parties. This is not only because of adjacent location, similar cultural traditions among the States, and existence of closely structured regional organizations, which make it much easier for States located in the region to adopt and apply regional documents, but also because implementation mechanisms stipulated in regional human rights treaties are much more stringent than those in global treaties. Taking ECHR as an example, acceptance of individual complaint procedure is mandatory for all State parties to ECHR, while the procedure under global human rights treaties are optional, leaving the States to choose acceptance or not. Decisions of treaty body under global human rights treaty are recommendatory in nature, and whether they could play a role mainly depend on the willingness of State parties. By comparison, ECHR sets up monitoring procedures to supervise the implementation of treaty bodies' decision by State parties, which effectively safeguard domestic fulfillment of the treaty.

In the third place, impact of international human rights treaties on different aspects of fundamental rights system is to different extents. First, bills of fundamental rights vigorously echo human rights treaties. In Western Europe, incorporating a bill of fundamental rights is one of the typical characteristics of their constitutions. New democracies in Central and Eastern Europe, “with the desire of integration into Europe”,<sup>46</sup> all incorporate a comprehensive bill of fundamental rights in their new constitutions. In America, countries enacted or amended constitutions after the *American Convention on Human Rights (ACHR)* also incorporate bill of fundamental rights. And all 53 African countries except 5 have bill of fundamental rights in their constitutions. By contrast, although institutions of fundamental rights protection are developing in a plural way under the guidance of international human rights movement, and nearly half of the countries worldwide have established their own NHRIs, only a small number of these institutions manage to operate effectively. As to fundamental rights remedy, many countries have made a commitment to accept remedies of fundamental rights offered by international institutions, but less minority countries would like to confirm this commitment in their constitutions.

## **5. Reasons Contribute to the Impact of International Human Rights Treaties on Fundamental Rights System**

### **5.1. Influential Monitoring Mechanisms in International Human Rights Treaties Binding State Parties on both International and National Level**

Most of the core international human rights treaties have come into force since 1980s. These treaties not only impose substantial and procedural obligations on State Parties, but also stipulate treaty bodies and procedures through which the bodies could monitor compliance of obligations by State parties on international level. Taking State report procedure on UN level as an example, States’ periodically reporting to treaty bodies for reviewing is a common arrangement for all the core human rights treaties, and is also compulsory for all State parties. Through preparing the report, States could periodically self-evaluate, find out strengths and short comings in

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<sup>46</sup> See Nihal Jayawickrama, *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence*, Cambridge University Press, 2002, p110.

protection of human rights, and could avoid weaknesses and insist on good practice in the future. Treaty bodies have developed some State report guidelines to harmonize the methodology, contents, and formula of the report. The treaty bodies also deliver concluding observations to every State report after reviewing, in view of giving recommendations to State parties for further better fulfillment of the treaties. In recent years, some treaty bodies have developed the follow-up procedure to concluding observations, which require State parties in the next report to illustrate special measures for carrying out the previous concluding observations. Taking the State report procedure as a whole, it has international legal ground based on treaties, and it is safeguard by treaty bodies and relevant mechanisms. It could surely have effective impact on national level as long as it can be fully applied, and could lead the improvement of fundamental rights getting more and more close to universal human rights.

As to regional human rights treaties, taking ECHR as an example, after the adoption of Protocol 11 to ECHR, a new, single, full time, permanent European Court on Human Rights was established in 1998, and the new Court is granted of sufficient mandates to have decisive influence on the development of the treaty system without little possible interference by State parties. It comes from article 32 of the Convention, which authorizes the Court to extend its jurisdiction to “all matters concerning the interpretation and application of the Convention and the protocols thereto which are referred to it as provided in article 33, 34, 46 and 47”, and “in the event of dispute as to whether the Court has jurisdiction, the Court shall decide”.<sup>47</sup> It means, in fact, that the Court could ultimately decide its own jurisdictions. And according to article 46 of the Convention, State parties “undertake to abide by the final judgment of the Court in any case to which they are parties”, and the Committee of Ministers will supervise the execution of judgment.<sup>48</sup> This systematic arrangement compels State parties to implement ECHR and the judgment by the Court earnestly, and to adjust the fundamental rights system accordingly in case it is necessary. Mandates of the Court

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<sup>47</sup> ECHR, art. 32.

<sup>48</sup> ECHR, art. 46 (1) (2).

can only be undermined through amendment to the Convention, which is of little possibility.

## **5.2. Overwhelming Ratification of Human Rights Treaties by States Offering Real Opportunity for the Impact**

International human rights treaties are overwhelmingly ratified or acceded to worldwide; therefore they have extensive legal binding force on most of the countries. As far as 31 March 2010, 88 percent out of 192 UN member States have ratified one or more conventions of the 6 core human rights treaties, that is ICESCR, ICCPR, ICERD, CEDAW, CAT and CRC. When it comes to individual complaints procedure, 113 States accept the procedure under ICCPR, which accounts for 68 percent of all Parties to this Covenant; and 99 States accept the procedure under CEDAW, which accounts for 53 percent. These numbers are in condition of growing.

As the regional human rights treaties are concerned, up to 31 March 2010, 47 Member States of Council of Europe have all ratified ECHR; all the 35 Member States of Organization of American States are State parties to *Charter of the Organization of American States*, which establishes the Inter-American Commission on Human Rights, and 24 of them are parties to ACHR; in Africa, all the 53 Member states of African Union have acceded to ACHPR. Therefore, regional human rights treaties obtain even higher rate of ratification comparing with global treaties. Besides, individual complaints procedures under regional treaties possess more advantages. Explosive cases before the regional Human Rights Courts provide them with broad room to review and influence fundamental rights protection in their States parties.

## **5.3. Status of International Human Rights Treaties Highlighted in Constitutions Providing Guarantee for Their Domestic Impact**

In recent years, due to the impact of international human rights treaties, and the popularization of the idea of universal human rights, more and more constitutions specially stipulate the status of international human rights treaties in national legal order, and the way to apply the human rights treaties domestically. Some countries recognize that human rights treaties ratified by the States equivalent to constitutions. Many other constitutions entitle the human rights treaties ratified by the States

supra-legislative but infra-constitutional status. And still some countries take international human rights treaties as the basis for construction of fundamental rights. It provides good opportunity for constitutional court to enrich the meaning of fundamental rights according to human rights treaties. In Colombia, Peru, Fiji and Romania, constitutional provisions concerning individual's rights and liberties shall be interpreted and enforced in conformity with UDHR, with the covenant and other human rights treaties the State is a party to.<sup>49</sup> Confirming the hierarchy of international human rights treaties within the national legal order lay down firm foundation for proper enforcement of treaties within a country.

## **6. Conclusion**

During the first three decades of UN, and since the birth of UDHR, international community kept striving on drafting various human rights instruments in order to expand normative system of human rights protection, but most of these instruments were put on the shelf. Since 1990s, however, the situation has apparently changed. As proved in this essay, norms of human rights treaty have been incorporated into constitutions; treaties, decisions and recommendations of treaty bodies have been used as the ground for judicial practice; tremendous judgments delivered by regional human rights institutions have been invoked in national courts all over the world. There are numerous indications showing that international human rights treaties have been developed from "declaratory" norms to "implementable" norms, and even to "mandatory" norms for some clues.<sup>50</sup> Consequently, fundamental rights system is getting more and more close to universal human rights treaties.

It is undeniable that there might be many other impetuses encouraging the development of fundamental rights system, such as learning from neighbor countries, fostering a good image on international stage, impelled by internal and external pressures, etc. Among these impetuses, the profound impact of international human rights treaties on fundamental rights system is impressed. Evolvement of fundamental rights system is taking place when international human rights treaties are almost

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<sup>49</sup> Eg, Const. of Romania, art. 20 (1).

<sup>50</sup> See Jack Tonaly, "International human rights- a regime analysis", in *International Organization*, Autume 1986, p599.

universally ratified by overwhelming number of countries. Expanding of the subjects of and enriching of the contents of fundamental rights during the evolvement process strongly echo the idea of universal human rights embodied in international human rights treaties.

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