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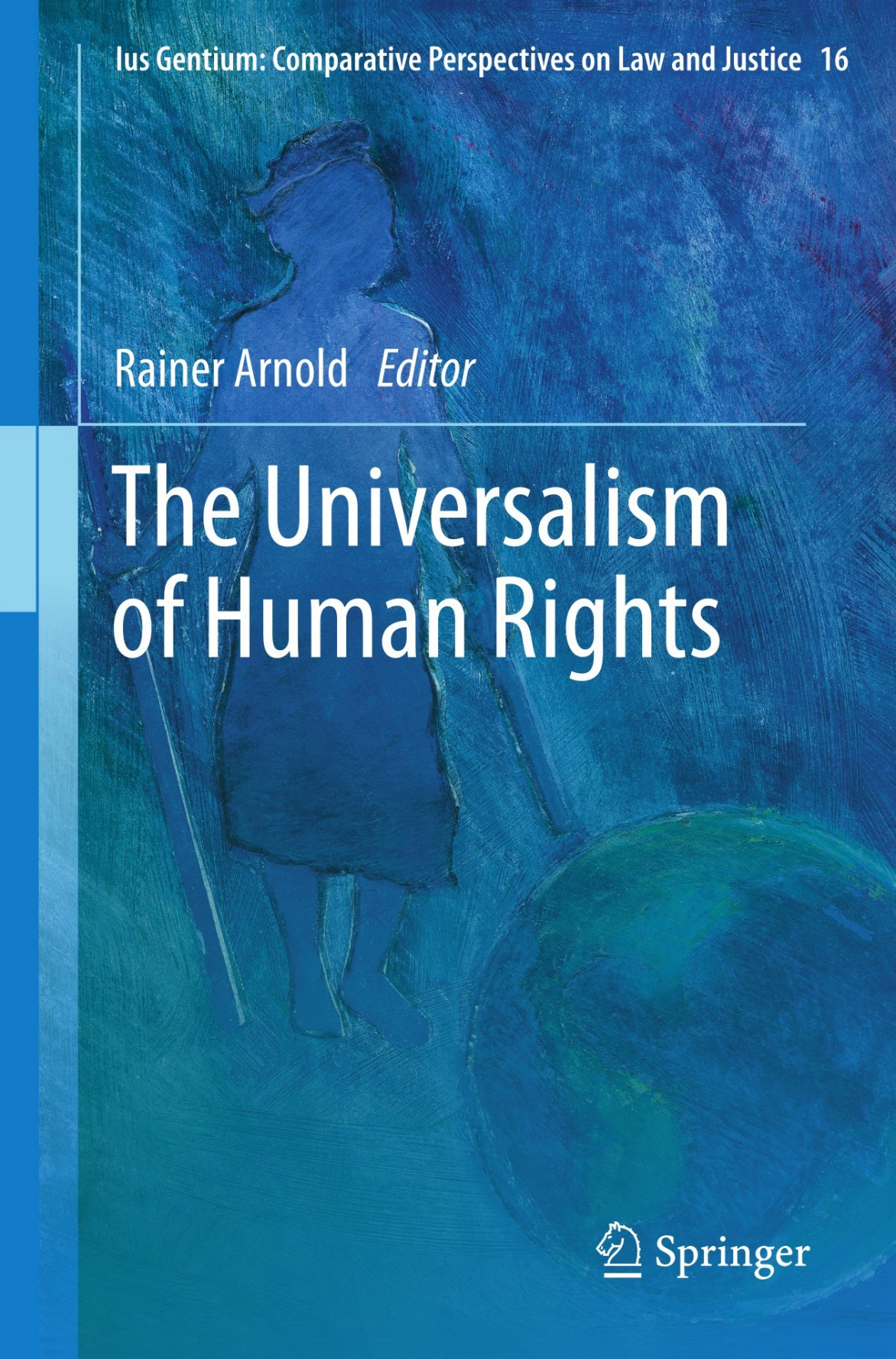
Rainer Arnold *Editor*

The Universalism of Human Rights



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The Universalism of Human Rights

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Rainer Arnold
Editor

The Universalism of Human Rights

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Foreword

This book presents a discussion on the universalism of human rights from national perspectives across the world. Universalism is often contrasted with cultural autonomy. The question of to what extent the idea of human rights is accepted and practiced as a universal concept arises. This includes a further question of the nature of the human rights' normativity.

The book is based on the national reports of 23 countries submitted to the XVIIIth International Congress of the International Academy of Comparative Law, held from July 25th to August 1st, 2010 in Washington, DC.

The great interest in the questions of universalism of human rights was confirmed by a vivid debate on this topic during the Congress' session. In this respect, special gratitude is expressed to the Session's Chairman Prof. Patrick Glenn of the McGill University Faculty of Law, Montreal (Canada).

I am very grateful to the Springer International Publishing House for their continuing support in helping to realize this book.

I owe particular thanks to Dr. Anna Lytvynyuk for her valuable assistance in this project.

Regensburg Rainer Arnold

Préface

La protection des droits de l'homme est aujourd'hui une tâche primordiale des États et de la communauté internationale. En Europe, la garantie des droits fondamentaux existant au niveau national est complétée par la Convention européenne des droits de l'Homme, instrument régional de haute influence juridique et politique, qui est un instrument de l'ordre public européen pour la protection des êtres humains. Depuis plus de soixante ans qu'elle existe, la Convention a fortement contribué à l'évolution d'un standard commun de droits au sein des quarante-sept États-membres du Conseil de l'Europe, standard qui a été un exemple pour le développement des droits de l'homme dans d'autres régions du monde.

Les droits humains, en tant que garants de la dignité, de la liberté et de l'autonomie de l'homme, sont par nature universels. Bien que l'on doive reconnaître aux États, dans un degré assez limité, une certaine marge d'appréciation, l'efficacité de ces droits doit être nécessairement assurée.

L'obligation de respecter les droits humains, garantis au plan national par des Constitutions et au plan international par des Conventions multilatérales ou par le droit coutumier, fait partie du *jus cogens*, au moins en ce qui concerne les plus fondamentaux de ces droits. Quant aux arrêts d'une juridiction comme la Cour européenne des droits de l'homme, ils ont force obligatoire, comme le dit l'article 46 de la Convention.

Le pouvoir supranational de l'Union européenne, pour sa part, ne s'exempte pas de la protection des droits humains mais travaille au respect des droits fondamentaux. Cette activité a été exercée initialement de manière jurisprudentielle, la Cour de justice ayant placé les droits fondamentaux parmi les principes généraux du droit communautaire (droit de l'Union) dont elle a la charge. Elle est exprimée aujourd' hui par une Charte, texte fortement influencé par les traditions constitutionnelles nationales ainsi que par la Convention européenne des droits de l'Homme. Afin de perfectionner son système de protection, l'UE va, dans un futur proche, adhérer à cette Convention. Ceci est prévu par le Traité de Lisbonne et confirmé par le Protocole 14 à la Convention.

Ce livre réunit les rapports nationaux de 23 pays, présentés au Congrès mondial de l'Académie internationale de droit comparé qui a eu lieu à Washington en 2010

sur le thème: “Les droits humains sont-ils universels et obligatoires?” Il est en effet important de connaître les perspectives des pays de divers continents et de cultures différentes, mais cela tout en visant une finalité unique: l’Homme.

Il m’est agréable de préfacer un tel ouvrage, fait de rapports aussi impressionnants. Je remercie et félicite le Professeur Rainer Arnold, rapporteur général du Congrès, et éditeur de cet ouvrage qui aura, je l’espère, tout le succès qu’il mérite.

Président de la Cour européenne des droits de l’homme Jean-Paul Costa
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Introduction

Rainer Arnold

Human Rights and Peace

The protection of dignity, autonomy and freedom of the individual is a vital aspect of national, regional and international communities. Not only are human rights indispensible as instruments for the protection of human beings, they are also primordial elements of safeguarding peace in the World.

There is peace neither within the borders of a state, nor beyond them, when human rights are disrespected. The two main obligations of the World community are keeping peace and respecting human rights. Both are closely interconnected: international peace is threatened when human rights are violated; internal peace can only be upheld if democracy, rule of law and, in particular, human rights are observed.

Contemporary Developments

It corresponds to the contemporary developments of both national and international law that the protection and the promotion of human beings, in their basic rights, have become increasingly significant. Constitutional law of today is regularly anthropocentric, placing men on top of the constitutional guarantees. In the national sphere human rights are connected to the rule of law as a basis of a democratic state. The modern state, in its finalities, has to promote personal, social and economic welfare of the individual, and has three interconnected foundations: democracy, rule of law and human rights. Democracy means political self-determination of the individual. Rule of law makes law the very basis for public power activities, however, not in a formal, but in a value-oriented sense including a third element: human rights.

A failure of one of these elements affects the other two. Democracy cannot exist without rule of law and rule of law would lack real substance should it not concentrate on a human being. Thus, constitutional law of today accepts emancipation of men, the result of a long enduring historical process. The disregard of human beings

during the first half of the twentieth century, accompanied by two World Wars, opened the way to recognizing the need to efficiently and internationally ensure the protection of human rights. The developments of national constitutionalism and individual-oriented internationalism from the second half of the twentieth century on has been characterized by the promotion of fundamental rights on the national level and by a strong reinforcement of human rights on the international level. World-wide covenants and efficient regional charters have been drafted for this purpose, making human rights part of *jus cogens* and a matter of concern of the whole world community. However, it is evident that manifold violations of human rights which have occurred in the past and occur today could not, and may not, be fully averted. National constitutional courts have been created with the necessary instruments to effectively protect the individual and raise awareness of the crucial importance of the protective function of a state. Not only universal but also regional protection systems have appeared, introducing a plurinational level of control of national systems.

Plurinational Level of Protection

The idea of fundamental rights protection appears on various interconnected levels. In order to appreciate the efficiency of a human being's protection it is necessary to analyze the interdependencies of these levels and identify divergences, as well as convergences, between them. In this respect, it is not merely coincidental that one of the subjects of the International Congress of Comparative Law in Washington in 2010 was the question of whether human rights are universal and binding. The more protected human rights are by the instruments of different legal orders, the greater is their normative and political complexity.

Universality means the recognition of human rights in a world-wide scale. Two dimensions of universalism can be distinguished: *horizontal* and *vertical*. A horizontal dimension presupposes that the idea of the efficient human rights protection is accepted and realized by most, if not all, states of the international community. Vertical dimension can be said to exist only if all the levels of public power (national, regional, supra- and international) offer such efficient mechanisms of protection.

Universalism has also a *functional* dimension which means that the values, or at least the core of these values, expressed by human rights, are recognized in a same way by the totality of countries, regions and cultures.

Universalism can be *absolute* or *relative*. It is absolute if assumed that the international community agrees on the core values of human rights. It is relative if such uniformity is incomplete through the exceptions reserved by certain cultures. In this respect: should the international community accept such divergent cultural approaches? If so, how differently do the states (or groups of states) resolve this issue?

Instruments and Mechanisms

The instruments and mechanisms of human rights protection are different. These are judicial and political safeguards which can diverge from one state to the other. The modern tendency is to entrust constitutional courts with the protection of fundamental rights. Regional systems, however, have a broader understanding of what human rights are and how they must be observed by national state powers. Here specific questions arise: how far is the impact of regional and multinational instruments of protection on the national practices, and how are national and regional orders influenced by universal covenants?

Questionnaire

These and a number of other topic-related questions were collected into a form of a Questionnaire and were distributed amongst the national reporters representing various countries and all the continents of the World. This book is a selection of 23 national perspectives on the main issues raised for the discussion in Section: "Are Human Rights Universal and Binding? The Limits of Universalism" originally presented at the: XVIIIth International Congress of Comparative Law held in Washington, USA, in 2010.

There were two major types of questions of the Questionnaire: the first one related to the theory of universalism of human rights (e.g. a national reporter's approach and/or predominant view in a country). The second block of questions was directed at identifying the current situation on both the substantial reach of human rights on national, regional and universal levels and the evaluation of the factual situation against the concepts of 'culturalism vs. universalism', the binding effect of universal human rights and the convergence of the three levels of human rights protection.

Results

The idea of the necessity of human rights is global and further confirmed by the universal covenants to which most countries formally adhere. The contents are more and more converging in regions (such as Europe) where a common democratic legal culture can be found. Similar convergences exist in Latin America.

There is a great extent of convergence with regards to the content. If universalism also means regional convergence and a form of rights identity—it is more present in regions (as Europe) where there are Charters, and courts applying this multinational Charters in addition to coherent legal and political cultures.

There are also transfers of these concepts from one region to another. The ECHR concepts, for example, are transferred from Europe to South American courts. Convergence is not so far-reaching in a universal perspective when compared to this regional context.

Whereas on a universal level, international covenants form the basis for universal convergence in human rights, they reflect the influence of culturalism more than the regional documents. One can only speak of relative universalism. An element of subsidiarity in a human rights context, reflecting particular cultures, may be introduced. A margin of appreciation of how fundamental rights are understood, and how a conciliation (weighing up with other values) can be achieved, must be respected. However, the core elements of human rights must be universally recognized and understood uniformly. The interpretation of the universal covenants must, therefore, be based upon it.

The binding force of human rights is the second dimension of the Questionnaire. The classical type of binding force is normativity, which does not exclude certain autonomy. One may also speak of relativism here, especially in the interpretation of courts. However, the existence of a strong ideological force of human rights may be asserted, which is based on the idea and the fact of emancipation of a human being. In addition, many other instruments of human rights protection, even non-normative, appear and have a great impact on political behaviour. They give incentives and impulses which are similar to normative concepts.

There is a rich body of jurisprudence interpreting the normative concepts, and adapting them, corresponding to the task of the judge, to the social changes**.** This is needed because wordings in the constitutions are often general and must be duly interpreted: the transformation of culture and social progress into normativity is realized through such interpretation.

There is, however, also a large body of non-normative concepts which are much more flexible than the normative ones, weaker and stronger at the same time. If normative concepts cannot be realized because of non-conformity to the common political will, soft law is then more easily accepted. It forms the consciousness of people and has a direct impact on legal culture. The function of binding force concepts is, in a growing way, substituted by non-normative documents.

Evaluation

As an overall assessment it may be stated that universalism of human rights is well founded in the consciousness of the people all over the world, despite the many violations which continue to take place. This orientation corresponds to the indispensability of recognizing the human being's dignity and autonomy, on which human rights are based. A growing scale of international documents contributes to safeguarding universal values in relation to a human being. However, it cannot be denied that cultural diversity has a certain influence on the understanding and interpretation of the contents and restrictions of human rights. A certain margin of

appreciation should be accepted. Culturalism in this sense must not lead to the human rights' relativism. The core elements of these rights must be universally upheld.

Furthermore, it corresponds to the importance of human rights that their guarantees should be normatively binding. Notwithstanding this assumption, it is observed that even a non-normative political behavior and the growing number of soft law are able to favor the respect for human rights and contribute to the formation of a World consciousness taking adequate account of the protection of the individual.

Chapter 1
Reflections on the Universality of Human Rights

Rainer Arnold

1.1 Are Human Rights Universal?

1.1.1 How to Define Universality?

It is difficult to define universality. It is a complex concept which incorporates geographical, cultural, historical and political dimensions (Solomon Islands, Chap. 6). As yet, there is no generally accepted notion of universality of human rights.

Firstly, universality of human rights can be understood as a *propensity towards global acceptance* of human rights. This is a *territorial* or *outer dimension*.

One may identify, in this territorial dimension, a *vertical* and a *horizontal* acceptance of human rights.

Vertical acceptance of human rights takes place on three levels: national (local), regional and international. This cross-level perspective is important for universality in order to give a comprehensive insight into the interactions of these levels.

Horizontal dimension implies a tendency towards the acceptance of human rights in all the geographical parts of the world.

Universality also has an *inner dimension* which is related to the qualities of universality as such. Universality also touches on the questions: who is entitled to human rights, who has to respect human rights, what scope do human rights have,[1] do they function efficiently?

[1] See Poland, Chap. 20.

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A distinction can be made between a *substantive* and a *functional* aspect in this context:

The substantive aspect of this dimension includes:

(a) human rights are inherent to all human beings – *active aspect;*
(b) human rights must be protected against all encroachments (by public and private powers) – *passive aspect;*
(c) the basic values such as dignity, freedom and autonomy of an individual must be explicitly or implicitly protected – *objective aspect*.

The functional aspect of the aforementioned inner dimension of human rights embraces the following requirements:

1. Necessary limitations must respect the *principle of optimalization* of human rights.
2. Intervention by public power must be founded on law, be backed up by a legitimate reason, be necessary for the needs of the democratic society (Canada, Chap. 3; Hungary, Chap. 22; Greece, Chap. 17) and be the sole adequate means of achieving such a legitimate reason *(principle of proportionality).*
3. The core (the very nature, the essence) of human rights must not be affected.
4. Efficient judicial protection is indispensable.

It can therefore be stated that universality of human rights has (1) horizontal and vertical geographical dimensions as well as (2) the inner, quality-related dimension with the substantive, matter-related and the functional, efficiency-related aspect.[2]

1.1.2 The Human Rights Idea, the Political Transformation of This Idea Into Normative Structures, and the Gap Between Normative Claim and Reality

Universalism of human rights is an *ideological concept* which presently constitutes a pillar of public awareness in the world, despite the many reported and unreported human rights violations. Such public awareness results in manifold political initiatives to ameliorate the legal protection of human rights on all three levels (national, regional and international). Judicial activism in promoting effective protection of human rights also plays an important role in this cause.

Whilst the idea of universalism of human rights is widely shared, its political and normative reality bears serious shortcomings, in particular, with regard to the mechanisms of control and sanctions on the international level (Great Britain, Chap. 11).

[2] See also Brazil, Chap. 5 (“universalism of confluence”).

1.1.3 Normative Claim and Normative Reality

Universalism of human rights can be considered from various perspectives.

Firstly, universalism of human rights can be understood as an *idea* or *concept*.

Secondly, it can be understood as a *normative reality* (normative requirement and normative fact (Slovakia, Chap. 19)).

Universal human rights protection is an *ideological concept* deeply rooted in American history with impact on the formulation of the international key instruments,[3] the UN Charter and the Declaration of 1948. The universality formula has been affirmed in the Vienna Declaration of the UN World Conference on human rights expressing the opinion of 171 states[4]– a quasi-universal opinion – that human rights derive from "dignity and worth inherent in the human person"[5] and are "universal, indivisible, interdependent and interrelated" and must be treated by the international community "globally in a fair and equal manner, on the same footing, and with the same emphasis".

This ideological concept has been transformed into *normative structures*, on the international level, in particular, in the form of the UN Covenants and specific human rights instruments, on the regional level with guarantee systems in America, Africa, and – deemed as the most efficient and influential of them – with the European Convention of Human Rights (ECHR) (Great Britain, Chap. 11; Slovakia, Chap. 19; Ukraine, Chap. 24; Netherlands, Chap. 14; Scotland, Chap. 12; Taiwan, Chap. 9). In the beginnings of state constitutionalism national rights developed autonomously, but have later received considerably reinforcing incentives from the human rights internationalization process. The autonomy of the national level still exists, but is characterized, as one of the consequences of globalization, by a growing "internationalization" or, in EU Europe, with even more external impact by the tendency towards "supranationalization" in the field of fundamental and human rights. The EU Charter, in force with the Lisbon Treaty since December 1 2009, also applies to state action to a great extent, in the frequent cases where national administration executes EU law. This is also influential on the remaining national field of action and promotes conceptual convergence. Regional human rights stemming from the ECHR, which enjoys high authority for its elaborated jurisprudence and long human rights experience, are respected as convincing sources of inspiration both for national and supranational judges.

The influence of international law can be realized in various ways: through interpretation of internal laws in light of international human rights, on the basis of a principle of a "friendly attitude towards international law" or even through the *presumption* of the willingness of national organs to conform to international law, or, by means of filling up national discretionary power clauses with international law contents, etc.

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[3] See USA, Chap. 2.

[4] See Germany, Chap. 15.

[5] See Hungary, Chap. 22; Japan, Chap. 7.

In *monist systems* international law, including human rights, constitutes an integral part of the state order and prevails regularly over ordinary national laws (Greece, Chap. 17; Belgium, Chap. 13) – kind of highly effective impact of the international standards on the state level. Such impact is even stronger in the case of EU law, which enjoys primacy over national ordinary and – in the opinion of the ECJ[6] – even constitutional law.

Thus, the human rights idea has become a legal reality in many parts of the world but does not fully satisfy the ideological claims, particularly on the international level. State sovereignty, the coordination structure of mutual relations, the lack of a sufficient legal position of the individual in the state-related international community, deficient complaint, control and sanction mechanisms have created a rather weak human rights protection system. Neither the rudimentary elements of individualization in this context, set up by Optional Protocols to the human rights treaties, nor the modest beginnings of an evolving objective, *jus cogens* value order with *erga omnes* effect especially in the field of international human rights, can be regarded as adequate.

Thus, normative reality does not correspond in many respects to normative claim. In regard to the aforementioned three levels, it can be said that the more legally and socially integrated a system is (state, region), the higher the chances are of legal claims being approximated to reality. The least integrated system, the international community, shows the most striking deficiencies of all the three levels in the human rights protection mechanisms.

1.1.4 Universality v. Relativism[7]

Are there limits to the idea of universal human rights? This question seems to be crucial in the current context. This global problem is particularly significant in regions where "clashes of culture" are imminent. However, in countries with marked cultural diversity and distinct political decentralization, such as Canada, culture-related divergences in interpreting human rights texts are also visible (Canada, Chap. 3). It must also be briefly mentioned that interpretation of normative texts in any country is interdependent with local and regional culture (Ukraine, Chap. 24; Great Britain, Chap. 11; Taiwan, Chap. 9; Russia, Chap. 10; Belgium, Chap. 13); what is decisive is the readiness of the interpreter to objectivize her/his culture-shaped mindset and to duly respect the international obligations. Thus, the need for universality is satisfied, and cultural particularity is observed to the extent that the universal documents explicitly or implicitly allow it.

We can roughly distinguish three approaches to the above mentioned question of conflict of relativism v. universalism:

[6] ECJ, Case 11/70, Rep.1970, 1125.

[7] Netherlands, Chap. 14.

(a) *absolute relativism* – a rather seldom-used approach, which, for whatever conflicting cultural reasons, would totally deny the universal, or at least quasi-universal, normative effect which results from the human rights treaties. This approach cannot be upheld.
(b) *relative, limited, moderate universalism* which upholds the treaty-based human rights as such, or at least the core of them,[8] but allows consideration of particular cultural aspects when interpreting the – often vaguely formulated – human rights, when filling up a "margin of appreciation" (Slovakia, Chap. 18); or, more importantly, when weighing human rights and public interests (Belgium, Chap.13, Japan, Chap. 7; Croatia, Chap. 23). Collectivism could prevail over individualism in the judicial assessment process.[9]

    With this approach a conciliation of the universality claim with cultural diversity could be reached. The core of a human right, however, must remain intangible. It remains doubtful whether, for example, "patriarchal attitudes" can be regarded compatible with the universal human rights claim for gender equality (Japan, Chap. 7).
(c) "*Universality through culture*" approach which confirms an inner link and not a contrast between both dimensions saying that cultural adaptation increases or even creates sociological acceptance of the normative prescription and therefore gives real efficiency to human rights.[10] This (rarely formulated) approach is not far from the first mentioned one and is subject to the same objections.

1.1.5 Human Rights and National Constitutional Law

Fundamental and human rights were initially a purely internal matter, progeny of a long political-cultural evolution centered in the Anglo-American sphere[11] and in revolutionary France. The emancipation of an individual has become a predominant characteristic of the national legal orders and is an achievement of modern constitutionalism – a process in Europe with a far-reaching impact also on non-European countries and which started in its particularly significant phase after the Second World War. In three sub-phases[12] (the immediate post-war period with the influential anthropocentric model of the German *Grundgesetz*, the 1970s with the post-authoritarian constitutions in Spain, Portugal and Greece, and the last and most advancing period of the turn from the 1980s to the 1990s with the transformation of communist

[8] See Netherlands, Chap. 14; Great Britain, Chap. 11; Portugal, Chap. 18; Ukraine, Chap. 24; Slovakia, Chap. 19; Solomon Islands, Chap. 6.

[9] See Taiwan, Chap. 9.

[10] See also Netherlands, Chap. 14; Taiwan, Chap. 9; Russia, Chap. 10.

[11] See USA, Chap. 2.

[12] See Arnold (2006, 41–45).