RESCUING OUR INALIENABLE RIGHTS

RESCUING OUR INALIENABLE RIGHTS

Conference Book on the 75th Anniversary of the Adoption of the Universal Declaration of Human Rights

MCC PRESS
Budapest, 2024

Rescuing Our Inalienable Rights: Conference Book on the 75th Anniversary of the Adoption of the Universal Declaration of Human Rights

Edited by Lénárd Sándor

ISBN 978-963-644-105-0

Published by MCC Press in Hungary.

Managing director: Tamás Novák
Managing editor: Borbála Mariska
Proofreader: The Pro Book Editor
Layout and typesetting: György Madarász
Cover design: Rita Papp

Printing works: Generál Nyomda Kft., Szeged
General manager: Ágnes Hunya

CONTENTS

FOREWORD

An international conference is always an ambitious endeavor. It reflects intellectual initiation, encouragement to innovative spirit as well as the responsibility toward one's community. It provides a unique forum for learning various approaches and serves as a framework for intellectual dialogue and scientific enrichments. This is especially true in the case of an international legal conference that aspires to explore a specific segment of the law, constitution, or legal thinking. Learning various approaches and comprehending different visions are challenging and demanding exercises in the field of law, since law is much more than a pile of rules, complex system, or thick codes. It is an integral and core part of each nation or political community's culture: the law is indeed a living reality among its people as it connects their past to the present and expresses their future aspirations and how they wish to give meaning and purpose to living together in their national community. The law is inseparably attached to sovereignty embodied in constitutional order. Accordingly, a constitutional document carries the specific characteristics of the historical struggles, legal culture, and the soul of a country. Exploring a particular domain of the law therefore presupposes the understanding of its underlying culture, history, and heritage. The two cannot be detached and this is what makes this intellectual exploration always unique and challenging.

Hungary is a "nation of lawyers"—so goes the well-known maxim that every law student learns in the first months of their legal studies. The statement is true because the country not only has traditionally put a great emphasis on legal education but also has demonstrated an ability to preserve the Hungarian way of life and the country's freedom.

Our stormy historical experiences showed and taught us that we could pursue our own way of life only when we have been able to adopt and shape our own constitutional and legal arrangements. Our first king, Saint Stephen, made great efforts to create a Hungarian statehood that is independent and stands on its own constitutional and governmental traditions. In this respect, the former Hungarian Justice Minister, Ferenc Deák, during the run-up of the Austro-Hungarian Compromise of 1867, in his notable Easter articles aptly pointed out that Hungary can be best governed according to its own constitutional tradition and arrangement. The true importance of our legal culture becomes understandable in light of those historical experiences. This is part of the reason why we call the legal profession a mission. It is our own constitutional and legal traditions that have allowed us to retain the ability to safeguard our own way of life and point to a sense of common destiny. This is among the primary reasons why a unique "legal identity" has developed and permeated Hungarian history. This atmosphere makes Hungary an ideal place to host international conferences that aim to commemorate, explore, and delve into questions of law and legal thinking.

Rescuing Our Inalienable Rights is based on such an international conference organized by the Center for International Law of the Mathias Corvinus Collegium—in cooperation with the Barna Horváth Law and Liberty Circle—that commemorated the 75th anniversary of the adoption of The Universal Declaration of Human Rights (hereinafter, "UDHR"). Lénárd Sándor is inviting the readers of this volume on an exceptional and rare exploration that aims to reveal the drafting process, adoption, heritage, and current debates of one of most influential international legal documents of the modern word, the UDHR. At the time of its adoption, the document reflected a consensus and vision across countries and legal cultures by rejecting

the excess of both individualism and collectivism. However, partly because of its wide acceptance and popularity along with its prestige and moral force, various interest groups wish to use and distort the meaning this founding document for their own particular purposes. This development increasingly separated the document from its original basis. *Rescuing Our Inalienable Rights* provides uniquely rich and vivid insights into the heritage and current debates that are revolving around the UDHR. Through the lenses of world-renowned law professors, justices, and political scientists from Japan, Singapore, Kenya, Israel to various European countries and then to the United States of America, the conference book collects the honest and revealing insights and wisdom of nearly every legal culture. Against the backdrop of the original debates and the difficult albeit fascinating negotiations of the drafting process of the UDHR, the book aims to shed light on the evolution of fundamental human rights and address some of the contemporary challenges around them. In doing so, it explores the essential balance between fundamental rights and responsibility toward one's community, the current proliferation of claims regarding false rights, or the misconceptions about role of political communities and national sovereignty that remain prerequisite for human rights. The discussions in the volume also underline that fundamental rights are necessarily embedded in the traditions of communities and can be enjoyed only in a social field. Furthermore, the dangers of increasing secularization or the cutting-edge challenges of globalization are also addressed by the book.

The lessons and conclusions of *Rescuing Our Inalienable Rights* are especially timely and relevant in today's world, which severs the ties between the normative rights and their intellectual foundations or origins. This unique volume, which consists of collected panel discussions, offers instructive insight into the contemporary challenges

of the heritage of the UDHR. However, one further lesson is the international scientific conference the book is based upon. This is a testament that with hard and diligent work, the Mathias Corvinus Collegium can bring together a diverse range of world-renown professors and scholars from the most prestigious universities around the world to explore and discuss one of the most challenging legal questions of today. The conference and this book both presented inimitable dialogues among legal cultures, leaving a mark around world. By becoming an internationally recognized hub of scientific communities that can formulate serious intellectual massages, the Mathias Corvinus Collegium discharges its talent management mission on a world-leading standard. This unprecedented conference provided a truly unique opportunity for law and other students across the country and beyond. I hope that these legal conferences not only contributed to the enrichment of our legal cultures, but over time they become an integral part of it.

Budapest, 25 January 2024

Balázs Orbán
Political Director of the Prime Minister of Hungary
Chairman of the Board of Trustees of the Mathias Corvinus Collegium

FOREWORD

The *Rescuing Our Inalienable Rights* international scientific conference organized by Lénárd Sándor has explored the drafting process, the historic journey, and the current challenges and impacts of the 1948 UDHR. While the conference commemorated the 75th anniversary of this landmark international document, it also aimed to shed light on and discuss the controversies surrounding its interpretation and application. To place the UDHR and its impact in its proper context, it is worth recalling the early intellectual debates around this document and the United Nations Educational, Scientific and Cultural Organization (UNESCO) Constitution of 1945.

In late June of 1947, UNESCO convened an expert committee in Paris to evaluate the responses and produce a report to be sent to the UN Commission on Human Rights (CHR) so that it could use UNESCO's findings as the basis for the eventual human rights declaration. On July 25, 1948 (six months before the adoption of the UDHR), UNESCO published the resulting *Human Rights: Comments and interpretations*, with an introduction by the French-Catholic philosopher and French ambassador to UNESCO, Jacques Maritain.

In his main intervention in the UNESCO volume, Maritain warned that, although men may apprehend "a certain number of practical truths about their life together, on which they can reach agreement," those truths "derive, according to types of mind, philosophic and religious traditions, areas of civilization and historical experience, from widely different, and even absolutely opposed, theoretical concepts." In Maritain's view, though it would be possible to arrive at a joint statement of the various human rights, there would be "the danger either of seeking

to impose an arbitrary dogmatism, or of finding the way barred at once by irreconcilable divisions."[1] He wrote: "[w]hile it seems eminently desirable to formulate a universal Declaration of Human Rights which might be, as it were, the preface to a moral Charter of the civilized world, it appears obvious that, for the purposes of that declaration, practical agreement is possible, but theoretical agreement impossible, between minds." For Maritain, the UDHR could only be an aspirational *preface* to a global moral charter, not the *blueprint* for global human rights governance. In his view, the idea of human rights must be rooted in the concepts of the nature of man and human society. Only in such a context can human rights "impose moral requirements universally valid in the world of experience, of history and of facts, and can lay down, alike for the conscience and for the written law, the permanent and the primal and universal norms of right and duty."[1]

When it came to the philosophy that should underpin any universal declaration of human rights, Maritain's *integral* humanist view of the nature of man and human society stood in sharp contrast to the *evolutionary* humanism theories that propagate social transformation and, as the historian and policy analyst John Fonte highlighted, transnational progressivism leading to world political unity and the transfer of sovereignty from nation states to a world organization.

Since the adoption of the UDHR in 1948, and especially after the human rights covenant came into force in 1976, transnational progressivism has gained space—to the detriment of national sovereignty and democratic evolution—and has used the human rights documents to advance supranational corporatism and technocratic

[1] Jacques Maritain, "Philosophical Examination of Human Rights," Human Rights: Comments and interpretations (1948), 59, available at: https://e-docs.eplo.int/phocadownloadpap/userupload/aportinou-eplo.int/Human%20rights%20comments%20and%20interpretations.compressed.pdf.

internationalism that threatens the democratic process and national sovereignty. They have built a system of universal values to facilitate evolutionary progress in opposition to national values systems. This effort undermines national sovereignty and democratic evolution and relies on bureaucracies, non-governmental organizations, and various transnational bodies that are accountable only to themselves or other transnational bodies.

It seems that, for now, an activist-driven political humanism is ascending. Frustrated by conservative resistance at the national level, transnational progressives are expanding and circumventing the intended scope of the UDHR and human rights covenants and treaties to pressure governments, businesses, and supranational institutions to adopt their agenda and to build a global welfare state spreading progressive social and cultural values throughout the world. Fortunately, many young lawyers, law students, policymakers, and lawmakers now recognize this reality and are organizing at the national level in order to embrace the intellectual heritage of Jacques Maritain and his *integral* humanist vision.

The *Rescuing Our Inalienable Rights* conference organized by the Center for International Law at the Mathias Corvinus Collegium and the Barna Horváth Hungary Law and Liberty Circle, as well as the conference book, have offered a rare and insightful source into how the debates of these rival theories unfolded and the challenges it poses to the legacy of the UDHR. From the debates around the drafting to interpretation, to the role of sovereignty, to the question of the principle of subsidiarity, to globalization and human rights, the conference explored various topics that are presented by the speakers in this volume.

The International Law and Liberty Society ("ILLS"), which includes Law and Liberty Circles around the world, was established as a means for promoting national sovereignty and democratic evolution.

Even though the political, constitutional, and legal challenges and, thus, the objectives of the participating "ILLS" Circles may vary from country to country, one important common denominator is "the need to safeguard, cherish, and transmit the respective cultural and constitutional heritage that includes a certain way of life, its virtues, and fundamental principles." Keeping this common denominator in mind, the fundamental principles in the UDHR should be used to respect and protect human rights in the national context—not to undermine national identity and sovereignty.

James P. Kelly III.
Director of the International Law & Liberty Society

FOREWORD

The UDHR is among the most impactful legal documents of modern times. It is considered as the founding declaration and thus the guiding principles of the human rights treaties and adjudication that provide the dominant mode of public discourse today. The UDHR has also opened a novel era after the Second World War and is therefore considered a visionary document that originally repelled the excess of both individualism and collectivism and is grounded in respect for human dignity and in the idea of rights that are linked to responsibilities and entrenched in a community. As the chair of the drafting committee, Eleonor Roosevelt once noted, *"[w]here, after all, do universal human rights begin? In small places, close to home—so close and so small that they cannot be seen on any maps of the world. (…). Unless these rights have meaning there, they have little meaning anywhere."*

At the time of its adoption, the UDHR reflected an exceptional and rare moment of worldwide consensus-seeking and consensus among various nations and peoples with diverse historical, religious, political, and cultural traditions that certain fundamental principles are so widely shared that they may be viewed as intrinsic in the nature of humans as members of a society and as members of a political community.

On the occasion of the 75th anniversary of this landmark document, the Mathias Corvinus Collegium, in collaboration with the Barna Horváth Law and Liberty Circle, organized an international scientific conference to commemorate this exceptional and remarkable achievement. The *Rescuing Our Inalienable Rights* conference aimed to explore the drafting process as well as the historical importance of the UDHR as a civilizational and cultural heritage. Renowned law

professors, political philosophers, and judges of various constitutional and international courts from every legal culture and from every corner of the world shared their own approaches and unique insights on these fundamental questions. This volume comprises their distinctive readings and instructive visions on the UDHR.

At the same time, the *Rescuing Our Inalienable Rights* conference, as its name suggests, also aimed to carry out a "rescue mission" since the widely shared consensus around the UDHR has grown weaker over the past decades. The international recognition and safeguarding of universal principles and inalienable rights also aimed to overcome the division and discontent across communities and peoples by emphasizing its role in connecting different communities. However, just like the biblical story of the Tower of Babel showed, the idea of human rights has its dangers. The increasing belief in the omnipotence of human rights will lead people astray instead of providing safeguards and solid guidance. The increasing reservations being expressed in relation to the universality and indivisibility of human rights, as well as the individualistic promise that freedom can be achieved by eliminating the cultural heritage, their historical contexts and the role of communities, now threaten the human being itself.

The conference book therefore gives rare insights into the contemporary challenges of the human rights system including the principle of subsidiarity, the role of sovereignty, and the place of the community in the UDHR system, along with the emergence of various new claims of rights. The unique contributions of the authors help the reader comprehend the current debates and controversies behind human rights, as well as provide guidance on the consensus around the UDHR. They reflect the mission of the Barna Horváth Hungary Law and Liberty Circle, "*Nanos gigantum humeris insidentes*"—the reason that one generation is able to see farther than its predecessor is because

they stand on the shoulders of giants. Our hope is that the exceptional conference, along with this volume, will help those interested see farther and more clearly when it comes to the contemporary challenges of international human rights.

Lénárd Sándor
Head of the Center for International Law, MCC
Head of the Barna Horváth Law and Liberty Circle

Setting the Stage

THE HERITAGE OF THE UDHR

THE MODERATOR'S FOREWORD

Celebrating such an important anniversary as the UDHR calls for a few historical reminders. The first panel placed the UDHR in its historical context. The text was adopted in 1948 in an exceptional historical context. From a European point of view, it is at the end of the calamitous "European civil war" (1914–1945). For the United States, it is the taking of leadership in the Western world, despite the European colonial empires, and in the face of the considerable power of communism promoted by the USSR.

The panel is made up of well-respected professors from both the West and Asia: Professor Charles Kesler from the Claremont Graduate University, Professor Thio Li-ann who teaches at the National University of Singapore, Professor Renée Lerner from the George Washington University and Professor David Tse-chien Pan who teaches at the University of California. Such a diversity of intellectual backgrounds made it possible to engage in a fascinating and illuminating debate on the universality of human rights conceived in the mid-twentieth century, and to compare the Asian heritage with the Western conceptions that were hegemonic at the time.

Our discussion went through the philosophical and intellectual traditions at the origin of the UDHR. There is a great deal at stake in measuring the extent to which the UDHR is part of a certain political and cultural tradition, whether each culture can reach the conclusions and principles contained in the document, and whether it can protect or level out the traditions of multiple political communities.

The dynamism and enthusiasm of the various speakers made my task much easier. The guests from across the Atlantic were truthful

in highlighting the contradictions that America faces in its role as the world's leading power and de facto guardian of the international order, while the expert from Asia underlined the intense relation between rights and the traditions of political communities. The panel opened up rich perspectives for the audience and other debates, whether addressing the endurance of the UDHR in recent decades or the rising forces challenging the 1948 document, both within and outside the West.

Thibaud Gibelin
Visiting Fellow
Mathias Corvinus Collegium

RENÉE LERNER

Donald Phillip Rothschild Research Professor of Law at George Washington University Law School

Education: Princeton University, AB, 1990
Magdalen College, Oxford University, M. Litt., 1993
Yale Law School, J.D., 1995

"Aggressive Invention of Rights Is Apt to Backfire: to Deepen Conflicts Rather Than to Unite Societies"

The UDHR was adopted in 1948, in an exceptional historical context. From a European point of view, it is at the end of the calamitous "European civil war" (1914–1945). For the United States, it is the taking of leadership in the Western world, despite the European colonial empires, and in the face of the considerable power of communism promoted by the USSR. What do you think is the historical matrix of this UDHR and how did this context give a particular orientation?

The Charter of the United Nations, signed in San Francisco on June 26, 1945, just weeks after the German surrender and as bombs were still flying in the Pacific, announces the context for the UDHR. The first words of the preamble of the Charter are "We the peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind…." The sentiment "Never again" is understandable after two worldwide catastrophic wars. And yet, the goal of preventing future wars is a high aspiration indeed. How is everlasting peace to be achieved in this fallen world? The preamble to the UDHR explains that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world…"

The earliest writers about international rights—Grotius, Pufendorf, and Vattel—did not think it was possible to prevent war altogether; they aimed to control it. They came from a Christian background that recognized mankind's sinful nature and the impossibility of eradicating armed conflict. They set out a system of rights that applied to nations, not to individuals. Other nations were not justified in interfering with the actions of sovereigns toward their citizens occurring on their territory. It was difficult enough for international law to maintain rules among nations, let alone within them.

After revelations of atrocities committed within Germany before and during the war, the reluctance of international law to interfere with the internal affairs of nations appeared to influential actors to be inadequate. They wanted to provide a legal basis for international condemnation and to set international standards going forward. Attention shifted to the rights of individuals, which were declared to be universal.

But if individual rights are to be made operational, and not mere high-minded aspirations, someone must define these rights in particular contexts, weigh them against competing rights, and enforce them. These tasks require institutions that are perceived as legitimate, and they require force—including physical force, if necessary. In short, individual rights require government.

The founders of the United States understood that individual rights depend on government. Immediately after the stirring declaration that "all men are created equal" and that "they are endowed by their Creator with certain unalienable Rights" including "Life, Liberty and the pursuit of Happiness," the Declaration of Independence states, more prosaically: "That to secure these rights, Governments are instituted among Men." The American founders recognized the difficulty of constructing a new government that could secure rights, and they

worked hard at it. They engaged in lengthy oral and written debates about the structure of government: what institutions were needed, what powers to distribute among them, and what were to be their relations with each other. The result was a complicated system of separation of powers within the federal government and of federalism, the division of power between the federal government and the states.

As a vigorous participant in the debates over the structure of government, Alexander Hamilton was skeptical of the whole idea of enumerating individual rights. In *The Federalist* No. 84, he asked, "What is the liberty of the press? Who can give it any definition which would not leave the utmost latitude for evasion?" He concluded: "I hold it to be impracticable; and from this I infer, that its security, whatever fine declarations may be inserted in any constitution respecting it, must altogether depend on public opinion, and on the general spirit of the people and of the government." He asserted that the structural constitution, with its allocation of power, was itself a bill of rights.

In contrast, the drafters of the UDHR paid almost no attention to how rights were to be defined in specific contexts or enforced. They ignored the question of establishing international bodies with power to secure rights. Establishing an international government with effective enforcement mechanisms would have been virtually impossible, then or now. This reality casts doubt on the enterprise of universal rights.

It is not enough to say that the drafters assigned these tasks to sovereign nations. The entire point of the UDHR is that these rights are supposed to be universal; they are supposed to apply whether or not a particular nation respects them. If a nation does not respect these rights, there is no enforcement mechanism. The rights are purely aspirational, not operational.

Because they did not have to worry about precisely defining these rights or enforcing them, the drafters were liberated from practical

constraints such as limited resources. They were free to dream up all sorts of desirable situations and declare them to be rights. Good intentions were all that was needed. Signatory nations, with full understanding that the rights could not be enforced, were happy to agree. Article 26 declares that "higher education shall be equally accessible to all on the basis of merit." Article 24 declares a right to "periodic holidays with pay." And Article 25 declares that everyone has the right to "a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services …"

China signed the UDHR and also played an important role in its drafting. The vice-chair of the drafting committee was Dr. Peng-Chun Chang, who represented the Republic of China. Since then, the People's Republic of China has repeatedly endorsed the UDHR. In 1958, ten years after the signing of the UDHR, the Chinese Communist Party under Mao Zedong launched the Great Leap Forward. Despite the right declared in Article 25 to "an adequate standard of living…including food," an estimated thirty million Chinese starved to death. The good intentions of the UDHR could not and did not save them.

> **On what specific philosophical and intellectual traditions is the UDHR based? Is it rooted in one particular tradition or does each political and cultural tradition have the potential of arriving at their conclusions? Was it designed to protect or alter the traditions of various political communities?**

A clear inspiration for the UDHR was the 1789 French Declaration of the Rights of Man and of the Citizen. Drafted and approved by the Constituent Assembly, it was intended to precede a new constitution. The French Declaration embodied eighteenth-century Enlightenment ideals, which were declared to be universal.

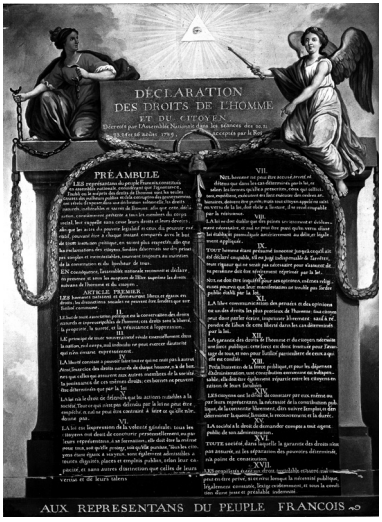
In its purported universality, the French Declaration departed from earlier English declarations of rights. The English Petition of Right in 1628 and the English Bill of Rights of 1689 were most definitely not intended to be universal; they were lists of specific provisions meant to limit the king's power in the particular English political context. These documents repeatedly refer to uniquely English institutions and procedures: Parliament, the Privy Council, the writ of habeas corpus, the jury. That these rights are not universal is clear throughout; a striking example is the Bill of Right's provision that the right to keep arms is limited to Protestant subjects.

The Americans professed universal ideals—the "inalienable rights" of "Life, Liberty and the pursuit of Happiness"—but in fact their founding documents closely follow the English model of specific rights based on English traditions and institutions. "The rights of Englishmen," the American revolutionaries called them. The Declaration of Independence contains a long list of grievances that is notably similar to the list of grievances in the English Bill of Rights. The Americans complained about being deprived of traditional English political institutions, including the right to trial by jury. The body of the US Constitution is full of references to specific English legal and political procedures, including the writ of habeas corpus, equity jurisdiction, bills of attainder, and so on. This reliance on technical English legal procedures and institutions is especially concentrated in the so-called American Bill of Rights, the first eight amendments to the US Constitution. Even the rights that could be considered most universal, and that departed most from English tradition—the First Amendment's rights to freedom of speech, the press, and exercise of religion—are couched in specific institutional terms. "Congress shall make no law" prohibiting or abridging them. That meant the federal Congress. The states were free to do what they liked respecting these

matters. Many of the rights could not be considered universal by any stretch of the imagination, such as the Seventh Amendment's right to jury trial in certain civil cases in which the amount in controversy exceeds twenty dollars.

The Anglo-American method of drawing heavily on specific traditions and institutions has been, by and large, a success. These societies managed to maintain a substantial degree of prosperity, order, and freedom for a long time. (Black slavery in the United States, of course, was an exception to the general rule of freedom.) It would seem that a thick, shared background of political and cultural traditions is necessary for a successful society and legal regime.

In contrast, purported UDHRs of rights have not been so successful. The French were eager to invest their new UDHR with the authority of ancient religious obligation. Article 17 of the Declaration were printed in two columns, resembling the two tablets of the Ten Commandments. Above them, an angel points to the all-seeing Eye of Providence in a triangle, originally representing the Holy Trinity.



Yet within a few years, the Committee of Public Safety sent thousands of French citizens to the guillotine, and thousands more were summarily shot, stabbed, or drowned in brazen defiance of the Declaration.

During the Second World War, as German and Japanese brutalities became known, interest in UDHRs revived. In the summer of 1943, the US Office of War Information asked Justice Robert Jackson of the US Supreme Court to write a public statement about the French Declaration to mark its anniversary. Jackson had served in numerous high positions in the government, including as US Attorney General. After the war, he would serve as a key prosecutor at the Nuremberg Trials. In his statement, Jackson praised "the progressive spirit" of the French Declaration, which marked "the dawn of a dazzling new age" and was part of a "great human movement forward." The Office of War Information transmitted Jackson's statement around the world for publication and broadcast.

This touching faith in human secular progress proved infectious. It helped inspire the UDHR on human rights.

What are the main forces that have maintained or extended the authority of the UDHR over the past 75 years? How does the document influence today's thinking and political discourse and how do the different new and emerging ideologies—such as the woke ideology—seek to capture and utilize the prestige of the UDHR?

The language of rights carries with it a sense of moral entitlement. It suppresses gratitude and the recognition of corresponding duties. If I have a right and you deny it to me, you have committed a major wrong. On the other hand, if you give it to me, you are merely giving me what I am owed. There is no reason to be grateful for that, or to think

that I have to earn it in some way. The discourse of rights exacerbates the tendency of modern persons to focus on individual private good and entitlements rather than the common good. Society loses its sense of give-and-take, and of personal responsibility. It becomes a cacophonous arena of competing assertions of right.

As the drafters of the UDHR demonstrated, the language of rights can be expanded indefinitely and applied indiscriminately. The drafters declared a right to adequate food, clothing, and housing. Unconstrained by traditional religious beliefs and cultural understandings, the language of rights could equally apply to the projects of endless sexual experimentation, drug use, physical changes to the body, and ending one's life. The possibilities are infinite.

Of course, within this crowded multitude of asserted rights, some are bound to clash with others. But the language of rights, with its sense of moral imperative, blocks the willingness to compromise that is needed to resolve conflicts. The idea "I want" is more likely to lead to compromise and peaceful resolution than "I have a right to." The notion of rights sharpens divisions in society, fosters resentment, and encourages long struggles.

How do you see and assess the overall legacy of the UDHR today? What are the current trends that challenge the UDHR? What ideologies or historical narratives might undermine its authority? How would you restore its intellectual foundations?

Courts, especially, have a strong tendency to find new rights. They, like the drafters of the UDHR, are free from the obligation to fund these new rights, which may involve imposing unpopular taxes, or to balance competing interests, or to preserve law and order.

Lacking these responsibilities, courts are free to be creative, to follow their own sense of justice. An example is the 2018 decision

by the US Court of Appeals for the Ninth Circuit in Martin v. City of Boise. That decision interpreted the Eighth Amendment to the US Constitution to hold that it is "cruel and unusual punishment" to impose any criminal penalties for sleeping outdoors on public property, when there are more homeless persons than available beds in shelters. The number of homeless persons sleeping in streets and public parks has been soaring, not only in large cities such as Los Angeles and San Francisco, but also in small- and medium-sized towns. Without the ability to use criminal penalties, cities and towns are unable to remove homeless persons from public areas. Parents avoid taking their children to public parks, where there is a constant danger of stepping on human feces or needles used for drugs. Unfortunate persons whose houses or apartments are near major homeless encampments are moving.

In effect, the Ninth Circuit in the Martin case has declared a right to sleep on public property. But, to the contrary, one could assert a right to visit public parks and to walk down the street without dodging human feces, drug needles, and disorderly or menacing persons. Or the right of a homeless person not to be left on the street. Indeed, in 2019, the Hungarian Constitutional Court upheld a provision providing criminal penalties for sleeping on public property and set out a different view of human rights and dignity. "It would cause harm if the state left the individual alone without taking care of him, as the right to human dignity is seriously violated by the exclusion of a person from human society."

Courts are necessary to enforce rights and obligations. But courts also pose the danger of inventing new rights that undermine order and foreclose better solutions. Courts need to exercise self-restraint, and societies need to monitor courts to make sure they are staying within bounds, playing their proper role in the separation of powers. Aggressive invention of rights, including in the UDHR, is apt to backfire—to deepen conflicts rather than to unite societies.

CHARLES R. KESLER

Professor of Government at Claremont McKenna College and Claremont Graduate University

Education: Harvard University, AB, 1990
Harvard University, PhD

"The UDHR Represents a Crisis of American Liberalism and a Reconsideration of Individual Rights for the Whole World"

The UDHR was adopted in 1948, in an exceptional historical context. From a European point of view, it is at the end of the calamitous "European civil war" (1914–1945). For the United States, it is the taking of leadership in the Western world, despite the European colonial empires, and in the face of the considerable power of communism promoted by the USSR. What do you think is the historical matrix of this UDHR and how did this context give a particular orientation?

What you alluded to, that the UDHR comes after the horrors of the Second World War and the Holocaust, had begun to be understood around the world. It means that the UDHR is the occasion for some serious second thoughts about human rights and the relevance of human rights. In the American context and in the context of American liberalism, there is a sense in which Eleonor Roosevelt who headed the UN Human Rights Council, the body that prepared the draft of the UDHR and moved it to the UN General Assembly for its final passage, was in fact continuing her husband's project to rethink human rights and the relevance of human rights in the American context and extend it to an international context.

Look at the history of American liberalism, and look also at Woodrow Wilson, who was Franklin Roosevelt's boss when he was younger and served at the Wilson administration and also was his political ideal.

Wilson held a PhD in political science, still the only president with a PhD in American history, and he was part in a movement in political science that was concerned to reinterpret the American Constitution and the political science behind the Constitution. Part of this transformation meant tossing out the notion of individual natural rights as the basis of the American constitutional system and integrating individual natural rights into a theory of group rights or social rights. This was a continuation of German political science from Hegel and, to a certain less extent, from Kant. What Wilson really wanted was to reinterpret the whole political science foundation of the Constitution along these new lines. That meant that the salience of individual rights and inviolability of individual rights was called into question. There was still going to be individual rights and progress would consist of unfurling more examples of individual rights. However, your possessions of an individual right came from your membership in your group where the group meant modern, Western societies. The most advanced societies on Earth had more rights and there was a degradation down the level of development.

So rights were capable of being possessed only if the socioeconomic along with the philosophical or spiritual conditions of each state would support them. That theory, confident in human progress and in the Western dominance of the world, had suffered many injuries by the time that the Second World War had come to an end. In a certain way, the UDHR represents a crisis of American liberalism: a reconsideration of individual rights and an attempt to re-ground the individual rights for the whole world including, of course, the United States as the principal mover of this doctrine. I think the question for us was whether the attempt to redefine human rights and to re-dignify human rights had been successful or coherent over the long term.

On what specific philosophical and intellectual traditions is the UDHR based? Is it rooted one particular tradition or does each political and cultural tradition have the potential of arriving at their conclusions? Was it designed to protect or alter the traditions of various political communities?

If the Roosevelt revolution in American politics stand for anything, it is the addition of social and economic rights to civil and political rights. So, in 1944, four years before the adoption of the UDHR, there was the second Bill of Rights proposed by an ailing President Roosevelt in his annual message. In this message, he argues that the right to a job, the right to health care, the right to a decent home, etc., are as important as the rights contained in the first actual Bill of Rights that was added to the US Constitution in 1791. They were really needed in order to rescue the original Bill of Rights from historical irrelevancy because the natural law basis of the civil and political rights are from an age that is dying or already dead. They need to be made living again by adding to them and updating them to these new social and economic rights. The right to private property, for example, does not mean much at all if you do not have any private property. It becomes a purely formal right. It was a Marxist argument, and it was adapted to some extent by the Roosevelt administration. But it was an ongoing project of the Roosevelts to update liberalism. It seems to me that it was clearly carried over into the UDHR.

The very language of rights is a Western, European, Enlightenment language no that it does not have some predecessors. Therefore, one can see the Western fingerprints on the notion of universal rights. It is, of course, adoptable to other cultures and much of the drama of the enactment and writing of the UDHR was how to combine the various religious, political, and moral cultures into a document that is going to be based, however, on the language of some kind of individual rights. That

was remarkably successful. But it came at the costs of some openness and open-endedness. There was really no final account of where these rights came from exactly, as everyone on the committee had recognized. There was not much of an alternative for that because it was an international committee and the United Nations. They did the best they could and they did a creditable job of stating principles for which many different justifications might be found but in the language of a set principles attached to the idea of human rights. It proved to be very important in the West and all around the world because the indeterminacy of the philosophical explanation of rights opened the door to a certain kind of relativism, which was not the intent of the UDHR. It was able to be applied to many different cultures. But concerning the development of the doctrine in the years since, the notion of human rights has continued in a way become groundless or self-grounding and therefore open for almost anything. The language of dignity, I am afraid, does not really help very much to specify what the ground of rights is or what those rights are. In my view, the dignity of language comes in reaction to a tribute to the dramatic moral philosophy of Immanuel Kant. Kant is the great author of moral dignity, and he also came up with the idea of a "Federation of Nations" that would help to ensure human dignity. But that federation was a "Federation of Republican Nations." There is no regime criterion in the United Nations. There are many states that are not republics: of course, the entire communist block was in it at the time, and other kinds of tyrannical regimes have also been in it since then. So, Kant's version of dignity was not really the same as the UN version's of dignity or Roosevelt's version of dignity, even though they are all concerned to tie human rights back to the idea that man is worthy of rights and is worthy of dignity.

What are the main forces that have maintained or extended the authority of the UDHR over the past 75 years? How does the document influence today's thinking and political discourse and how do the different new and emerging ideologies—such as the woke ideology—seek to capture and utilize the prestige of the UDHR?

In part, it is because violations of human rights continue to occur: there is no shortage of bad government in the world. I think that the same version has remained—namely, to call attention to certain fundamental facets of human equality, liberty, and dignity, and to remind the world of them. There is also a certain international inertia as well that is attached to international organization and international law, which should not be discounted. But the open-endedness of it is, to some extent, both an advantage and disadvantage in terms of its perdurance. The open-endedness allows new influences to be presented and absorbed at the same time, meaning that, over time, it is difficult to maintain a consensus as new elements arrive.

How do you see and assess the overall legacy of the UDHR today? What are the current trends that challenge the UDHR? What ideologies or historical narratives might undermine its authority? How would you restore its intellectual foundations?

Human rights could give rights to various and, some of the time, to opposing judicial interpretations. From a certain point of view, if you look at this politically, the UDHR has been a convenient mechanism by which the farther part of the American Left and NGOs can export their agenda internationally as well. There is a certain kind of Americanization of world politics that has gone on that causes sexual liberation and racial justice, which have crossed over the ocean into many countries all over the world. This is a convenient export mechanism to frame these

questions in terms of human rights, universal human rights, and dignity. Either intentionally or inadvertently, helping to create the UDHR had the effect of opening a pathway to export the more ideological aspects of US politics into the world stream of politics. One should also notice that one is being cynical, that the effect on the balance of power on the world of the universal human rights doctrine has been to shatter all the old empires of our former allies and some enemies with whom we were competing and thus advance us as the only superpower for a while in the world. It was useful not only in toppling the empires in Western Europe after the Second World War, but it was also useful in toppling the Soviet Union too. The Helsinki Accords and the tradition of the UDHR were very helpful in helping to liberate millions of people in Eastern Europe. So, it is not all negative, but of course the effect of the fall of the Soviet Union was also very beneficial for American foreign policy and the balance of power as well.

THIO LI-ANN

Professor of Law at the National University of Singapore

Education: Keble College, Oxford, BA
Harvard Law School, MA
University of Cambridge, PhD

"The Rights in the UDHR No Doubt Protected the Traditions of Various Political Communities"

The UDHR was adopted in 1948, in an exceptional historical context. From a European point of view, it is at the end of the calamitous "European civil war" (1914–1945). For the United States, it is the taking of leadership in the Western world, despite the European colonial empires, and in the face of the considerable power of communism promoted by the USSR. What do you think is the historical matrix of this UDHR and how did this context give a particular orientation?

Beyond the Anglo-European setting, I think it is very important to remember that a primary force shaping the historical matrix was not just the horror of the Holocaust, but the horror of Japanese occupation in Asia and, indeed, the importance of decolonization (end of Empire) and the incipient peoples' right to self-determination.

The smaller and medium-sized states, including from Africa and Latin America, played a large role in getting "human rights" into the text of the UN Charter. The Big Three (Soviet Union, USA, UK) wanted to bury a singular reference to human rights somewhere in the international cooperation chapter, but Third World states lobbied hard and included human rights into more prominent parts of the text. The USSR was receiving criticism for press and religious freedoms, the US for racial discrimination, i.e., Jim Crow laws.

Decolonization had not quite taken off yet, this would only accelerate in the 1950s–1960s, but there was an expectation that if human rights were to be truly universal, they should apply regardless of geography, that is to non-self-governing territories or colonies. This is reflected in Article 2 of the UDHR, to the reluctance of some colonial powers.

While many Asian states were not yet in existence, there were some prominent Asians who made their mark in the drafting of the UDHR text, most notably, PC Chung of China. India and Pakistan also made their mark, as did delegates from the Philippines and Thailand/Siam. So the world was awakening to the Third World and grappling with what it truly means to be "universal," recalling that public international law, of which human rights law is a part, has historically been Eurocentric, espousing a standard of civilization based on civilizational superiority/inferiority. This was starting to be challenged.

The UDHR was completed just before the outbreak of the Cold War, but you could see the tensions between the US and USSR. The US championing religious freedom, the USSR insisting that the UDHR be a secular document and championing racial discrimination—all as part of a weaponizing form of rhetoric to delegitimate each other. This is reflected in the compromises in the drafting, e.g., the Article 17 property rights clause, where property could be owned communally as well as individual—at that stage, the concerns of the fourth world (indigenous people) had yet to surface, not surprisingly, given the individualistic tenor of the UDHR. Notable was the absence of minority rights clauses, given the bias against ethno-cultural minorities who were seen as fifth columns, destabilizing to the state, e.g., as the Sudenten Germans in Czechoslovakia were perceived to be.

So certainly, the frigid air of the coming Cold War and the heated passions of national liberation movements cannot be forgotten as factors contouring the historical matrix. The fear of minorities and the infancy

of the then principle of self-determination made this an individual rights document, rather than a group rights one (along the lines of the minority treaty regime underwritten by the League of Nations).

On what specific philosophical and intellectual traditions is the UDHR based? Is it rooted one particular tradition or does each political and cultural tradition have the potential of arriving at their conclusions? Was it designed to protect or alter the traditions of various political communities?

There were at least two lines of tension: first, between whether it should refer to religious values or be purely secular. Brazil and the Netherlands at one stage wanted to insert something along the lines of the "immortal destiny" of man, and a reference to God, but the atheistic Soviet representative rebuffed this. Eventually, there was no reference to God, even if there was a leftover hint of "natural rights" theory, particularly in Article 1, even if very watered-down. The foundations of human rights were kept deliberately vague, even agnostic. It was a question to be deferred.

Secondly, was it a liberal, communitarian, statist document? It was dignitarian, without the formulation of absolute rights, with a limitation clause in Article 29 that referred to duties and public goods; it was dignitarian because rights are stated as general norms, followed by a singular limitation clause. Human beings are not atomistic individuals but are situated in communities: families, trade unions, even the social and international order.

There was some disagreement over whether to include socio-economic rights. While this was common, for example, to Latin American constitutions, it was alien to the English sensibility, and so they thought it was non-justiciable. That both civil-political rights and socioeconomic rights were included shows a compromise

or accommodation between liberal individualism and social welfarism.

Because the foundations are ambiguous, or based on watered-down natural rights theory, we still argue over foundations. It is not a settled question. The rights in the UDHR no doubt protected the traditions of various political communities, e.g., democratic elections, or a right to participate in the cultural life, but it also challenged other norms, particularly in the field of family law and religious freedom, e.g., polygamy, and the right to convert out of a certain religion.

What are the main forces that have maintained or extended the authority of the UDHR over the past 75 years? How does the document influence today's thinking and political discourse and how do the different new and emerging ideologies—such as the woke ideology—seek to capture and utilize the prestige of the UDHR?

Today, all UN members are subject to the Universal Periodic Review and have signed up to some human rights treaties—part of the accepted corpus of human rights is the UDHR, which is seen as a baseline.

Accordingly, the concept of human rights may be seen as internationalized, universally accepted. The debate is over the scope and content of human rights. States not present at the drafting in 1948 have had a chance to affirm the UDHR, e.g., at the regional conferences before the seminal 1993 Vienna World Conference on Human Rights. It has been domesticated insofar as it has shaped the drafting of the bill of rights and been invoked in public law arguments before national courts, and most would agree that many UDHR provisions embody customary international law, e.g., Article 5, which prohibits torture and cruel and inhuman treatment.

Because of a lack of formal law-making processes in international relations, activists have sought to utilize the success of human rights language to present political claims as legal rights in the name of "living instruments," which is a useful technique to treat open-textured words as empty containers into which the preferred political ideology du jour is poured. This raises claims of legitimacy or the lack thereof. This includes expansive conceptions of "equality," which parallels juristocratic systems where courts insert their personal preferences into the ideological task of deciding what should be equal to equal. Other courts reject this sort of activism and direct such claims to legislative bodies. Some might argue that inherent in the right to live is the right to die (euthanasia), which is a radical interpretation of the text. Or there are attempts to redefine marriage (Article 16 refers to a man and woman union) to encompass unisex unions, which is very controversial and an issue lacking in consensus globally. Too many politicized claims can actually undermine the currency of human rights in general, but there is clearly both selectivity in emphasis as well as attempts to advance bold interpretations to create new rights or expand how an existing right is understood. In trying to hitch their agenda to the UDHR wagon, human rights is seen to be a contested political site rather than a universal legal claim. But therein lies the problem: you cannot evade foundational questions ultimately in deciding what is or is not a human right—for how can you know what a human right is, until you first know what a human being is? Nowadays, people are even scared of defining women in biological terms as they are likely to be screamed at. But this attempt by a category of men to define themselves as women is deleterious to the rights of women; it is anti-woman, but the woke elites forbid you to have diverse or differing viewpoints. Thus, free speech is under siege, including in so-called liberal democracies. Liberal states that pretended

to be neutral in the past (there is no neutral state but there are states that are more interventionist and active in defining the common good) are now thoroughly remoralised and, sadly, human rights are sometimes invoked to silence and censor political and moral opponents. This is the dark side of what has been called "human-rightism."

How do you see and assess the overall legacy of the UDHR today? What are the current trends that challenge the UDHR? What ideologies or historical narratives might undermine its authority? How would you restore its intellectual foundations?

Can you actually restore its intellectual foundations when this is not agreed upon? It is a watered-down form of natural rights, but ideas of objective natural law are wildly unpopular in a plural and postmodern age. If human rights are subject to ideological capture, they lose legitimacy as an international law norm—but what does that legitimacy that rest on? Morality? Consensus? A kind of global ethics?

Perhaps the best way forward is to distinguish between "core" rights, e.g., in the UDHR because it has broad acceptance, and "contested" rights, which elicit controversy. Moreover, one must understand that a universal right can to some extent be variably implemented in domestic settings—i.e., a global margin of appreciation, without collapsing into an apology for power.

The legacy of human rights is to introduce a moral tongue into the otherwise political expedient realm of international relations. It is not perfect, it has contradictions and inconsistencies, but it gives expression to our moral sense, to right and wrong and rejects cultural relativism—Nazism was bad. It rejects the totalitarian state or totalitarian non-state powers (woke elite, for example, or social media companies, etc.), and it foregrounds the importance of the individual and encourages us to continue the sometimes fraught but necessary dialogue on what

constitutes human flourishing and the good life. Perhaps it is better suited to catastrophe prevention than to utopia building in practice, but it can be a relevant factor in shaping good governance, e.g., aligning policy with the right to housing, which includes planning in the short-, medium-, and long-term.

DAVID TSE-CHIEN PAN

Professor of German at the University of California, Irvine

Education: Stanford University, BA, English and German
Columbia University, MA,
Germanic Languages
Columbia University, PhD
He was a member of the the Commission on Unalienable Rights.

"The Defense of Human Rights Must Be Grounded in One's Own Traditions and History"

The UDHR was adopted in 1948, in an exceptional historical context. From a European point of view, it is at the end of the calamitous "European civil war" (1914–1945). For the United States, it is the taking of leadership in the Western world, despite the European colonial empires, and in the face of the considerable power of communism promoted by the USSR. What do you think is the historical matrix of this UDHR and how did this context give a particular orientation?

The experience of the turmoil and atrocities of World War II provided a sense that progress in creating a better world could not be taken for granted and that concerted action would be necessary in order reduce violence and oppression. But as Mary Ann Glendon has demonstrated, the primary impetus for creating a UDHR did not come from the large and powerful nations but from small countries, many of which were living under the shadow of colonialism. Consequently, the Declaration can be seen as an anti-colonialist document, and this aspect of its origins helped to ensure that it was designed to avoid privileging particular peoples or cultural conceptions. Because it attaches universal rights to all individuals, the Declaration is most significant to those who are either not attached to a group or have little standing within their group. This sense of a need to maintain protections for the least powerful also extended to the philosophical aspects of the Declaration. While the

United States took a leading role in developing it, the drafters took care not to privilege US or European philosophical foundations for human rights. The Declaration attempted to maintain a culturally neutral language in terms of the foundations for human rights. The focus lay instead with enumerating rights in such a way that they could gain the broadest possible consensus among all the nations of the world. This consensus-based approach remains one of the key strengths of the UDHR.

> **On what specific philosophical and intellectual traditions is the UDHR based? Is it rooted a single tradition or does each political and cultural tradition have the potential of arriving at their conclusions? Was it designed to protect or alter the traditions of various political communities?**

Because the UDHR took the form of a declaration, it referred most clearly to both a US and a European tradition in which the primary predecessors were the US Declaration of Independence and the French Declaration of the Rights of Man. Such declarations had a particular status in which they were neither embedded within a religious tradition nor were they formal legal documents. Instead, they laid out a set of moral and political aspirations that called for universal application without any concrete mandate about the way in which such ideals should be realized. This ambiguous status with respect to a specific tradition continues to be a key strength of the UDHR.

Rather than attempting to establish the primacy of any particular tradition, it was structured as a document that attempted to find the common elements of all the world's moral and religious systems and present them as a set of universal aspirations for how people should treat each other. Consequently, rather than attempting to replace the world's moral and religious traditions, the UDHR depends upon them

to provide the foundations for the realization of its goals. It calls upon all the world's traditions to look to themselves to find and emphasize the aspects of their own histories that affirm human rights. This orientation toward local traditions is crucial for the implementation of a human rights agenda. Human rights can only be realized at the local level in every case, and this local orientation requires every tradition to be able to affirm itself in the support of human rights.

This local orientation is also key to the nonlegal status of the Declaration. If it were a legal document, it would have to derive its authority from some prior philosophical or cultural foundations that would precede the legal rules. But such foundations would undermine the universality of a legal system of human rights. Instead, the UDHR, as a legally nonbinding set of aspirations, can only be realized through the workings of sovereignty.

This means that human rights depend on how all peoples might of their own accord and through their own convictions develop the moral and political will to defend and maintain human rights in their own contexts. Human rights do not involve simply the obeying of a set of rules but more importantly the active engagement to do what is necessary to oppose violations of human rights. Such actions require not just obedience but moral and political will to forgo privileges and also to take risks. Such actions cannot be a matter of law but are grounded in a sense of agency and of sovereignty. Because they come from one's deepest inner convictions, they can only be justified based on one's own sense of identity and belonging. Therefore, the defense of human rights must be grounded in one's own traditions and history.

Yet, the UDHR also does not represent a blanket affirmation of all traditions and ideologies. There are clear ideological enemies of human rights, and the UDHR is not a completely neutral document.

The primary ideological aspect of the Declaration is that it opposes all attempts to establish different classes of humanity, in which some classes would be granted rights and privileges that are not available to all. In that sense, the Declaration is clearly directed against all racist ideologies such as Nazism. Since attempts to gather special privileges for select groups has been a common danger in all cultures, the UDHR's ideological focus is not directed at specific cultural traditions but at the nonegalitarian aspects of any tradition.

What are the main forces that have maintained or extended the authority of the UDHR over the past 75 years? How does the document influence today's thinking and political discourse and how do the different new and emerging ideologies—such as the woke ideology—seek to capture and utilize the prestige of the UDHR?

The goals of the UDHR have been supported by international institutions such as the United Nations and the instruments of international law, nongovernmental organizations, and nation-states in their relations with each other.

Nongovernmental human rights organizations have played a key role in documenting and calling out human rights abuses. But like international treaty organizations, they are limited in their ability to act directly. Their main function has been to influence nation-state politics in a way that would encourage states to take actions to enforce human rights norms. Their involvement in nation-state politics has had the unfortunate consequence, however, that human rights organizations have become involved in political battles over the definition of human rights. Such disputes, for instance over whether reproductive rights are human rights or an attack on human rights, have damaged human rights

advocacy by impairing the consensus on definitions of human rights that was carefully crafted by the UDHR.

The United Nations has been helpful in maintaining a forum for different nations to address human rights issues. Unfortunately, the structure of the United Nations allows egregious human rights violators to sit as equal partners on the United Nations Human Rights Council, hampering the ability of the United Nations to take clear stands on human rights abuses. Considerable progress has been made in establishing an international legal framework for human rights, most prominently with the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights. Such treaties and the resulting framework of international law have established detailed procedures for managing human rights abuses on an international level. This system functions best when the signatories ratify the treaties after domestic laws have been passed that accord with the treaty obligations. Such a process requires domestic political legitimacy before advancing to an international level. In this way, international law will not be perceived as an imposition on, but a consequence of, domestic law. Such an approach would maintain the focus on sovereign action over legal obligation as the primary impetus for the defense of human rights. Because the US has maintained a strict adherence to this approach, it has been more cautious in ratifying certain human rights treaties. When the US does ratify a treaty, however, it is generally more scrupulous in adhering to it than other nations that more quickly ratify such a treaty but then are not as consistent in carrying out its provisions. Such voluntary support of treaties is crucial because there is no overarching enforcement mechanism for international law. Enforcement will depend on voluntary decisions by sovereign nations to either abide by international legal decisions or to pressure other nations to do so.

The key support for human rights has come from nation-state actions, either to limit their own behavior or to use their power and influence to prevent, censure, or punish human rights violations in other parts of the world. Such a merging of human rights enforcement with nation-state politics has been criticized for allowing conflicts of interest that undermine human rights when they become part of foreign policy. However, since a single overarching sovereign that would be the guarantor of international law would also be subject to this same political dynamic in a more unaccountable way, the current situation of multiple nation-states that enforce human rights principles in terms of their own national interest is still the best alternative. One of the key supports for this system is the rules-based international order of independent and sovereign nation-states. In spite of the inherent problems with this approach, the nation-state framework allows weak states and strong states to coexist with an understanding of the basic obligations and rights that each individual state holds. These obligations and rights, grounded in the goals of the UDHR, can provide the most effective moral and political support for human rights both within states and in relations between states.

This system limits the extent to which one state would be able to intervene directly in the affairs of another state. While such limits might allow human rights abuses within a state to go on uninterrupted, they also place responsibility for upholding human rights at the nation-state level. On the one hand, this system recognizes that state sovereignty is a prerequisite for human rights, as failed states have led demonstrably to the most egregious deteriorations in human rights protections. On the other hand, the principle of nation-state sovereignty has been generally held to entail specific responsibilities, with particularly bad state actors subject to sanctions and exclusions from the international community. Consequently, the efforts by the US and other nations to maintain the

nation-state system of international order have been a major support for human rights.

How do you see and assess the overall legacy of the UDHR today? What are the current trends that challenge the UDHR? What ideologies or historical narratives might undermine its authority? How would you restore its intellectual foundations?

There are three main trends that threaten the UDHR today: challenges to the idea of state sovereignty, a rise in authoritarianism, and a proliferation of rights claims beyond those enumerated in the UDHR. A proper response to these threats requires an elaboration of the principles and structures that are embedded in the UDHR. Here, it is important to remember that, while the rights enumerated in the UDHR need to be taken as a whole, and none can be ignored, there is a hierarchy in which human rights can be divided into three categories, each with its own characteristics in terms of how they should be protected. There is a primary emphasis in the UDHR on the rights of *jus cogens* that protect against torture, slavery, and murder. They must be protected at all costs because without these non-derogable rights, there can be no meaningful civil and political rights nor economic, social, or cultural rights. In addition, the UDHR indicates that economic, social, and cultural rights should be protected "in accordance with the organization and resources of each state," allowing for variations in the mode of realization of these rights. Because there is variation in ways to protect economic, social, and cultural rights, there should be less of an ideological emphasis on how they should be protected.

The different categories of rights lead to different ideological commitments that are implied by the provisions of the UDHR. Because a functioning state is necessary, though not sufficient, for protecting the rights of *jus cogens*, there should be a primary emphasis on maintaining

state sovereignty, even when the state in question commits human rights violations. At the same time, the key civil and political rights that the UDHR enumerates—including popular sovereignty based on free elections, freedom of expression and religion, the rule of law, and equality before the law—make up the basic principles of liberal democracy. Consequently, there is a preference for liberal democracy embedded in the UDHR. As a consequence, the most dangerous enemies of human rights are on the one hand those actors and forces that undermine the stability of state sovereignty and on the other hand those governments that oppose liberal democracy and its attendant freedoms and rights.

These two different concerns can sometimes conflict with each other, as in the case when the defense of civil and political rights might undermine an authoritarian state and with it state sovereignty in general, leading to a breakdown of order. But because it is more important to protect the non-derogable rights against torture, slavery, and murder that would proliferate in the absence of order, there would be a preference for protecting state sovereignty, even in cases where authoritarian governments use the idea of state sovereignty to shield themselves from criticism of their human rights violations. The difficulty is that opposition to the authoritarian governments that violate civil and political rights can also lead to the catastrophic destruction of state sovereignty itself, as in Libya. In general, it would be preferable to have an orderly transition away from authoritarian toward liberal democratic government, as in South Africa and many Eastern European states.

Finally, to maintain an enduring international consensus in support of human rights, there should be a limitation of rights to the ones enumerated in the UDHR, at least until a genuine new consensus emerges about additional rights. Attempts to expand human rights, particularly reproductive and gender rights and the rights of the

unborn, threaten to erode the consensus around human rights that was established with the UDHR. Such elevation of political positions to rights can turn human rights into a politicized arena that undermines the authority of the idea of human rights as a universal standard.

The Proliferation of Rights' Claims

THE MODERATOR'S FOREWORD

As the first panel discussion pointed out, human rights have become "the victim of its own success." Throughout the 75 years after the adoption of the UDHR, human rights have become the lingua franca of almost every discussion of justice and common good as well as of the proper boundaries of individual liberties and of what responsibilities we owe to one another in society. In the words of the late Lord Jonathan H. Sacks, human rights have become the dominant mode of discourse of today. Based on historical experience, people express and defend their views, make their claims about ethics including the question of justice, public policy, or cultural norms, in the dominant discourse of the day. Whenever people seek to achieve a public policy goal today, they will defend the putative right to it in the language of rights. As a result of this evolution, competing theoretical views and justifications on the nature of human rights have emerged and seek to capture and use the language of human rights to their own ends.

Furthermore, with the proliferation of UN agencies, specialized organizations, regional human rights systems, and courts, along with the multiplication of human rights treaties, new claims of rights have expanded. This runs the risk of transforming political, ideological, and public policy preferences into claims of rights that often circumvent domestic constitutional process, national consensus or even traditions or diminish the role of democratic deliberations. This, however, severs the essential tie between the communities and rights or, as Eleonor Roosevelt pointed out, unless these rights have meaning in small places, close to home, they have little meaning anywhere. Consequently, there is good reason to worry that the proliferation of rights claims has

weakened, rather than strengthened, the idea of inalienable fundamental rights and has been undermining the universal consensus behind the basic need to safeguard them.

This panel of the conference, cosponsored by the Barna Horváth Law and Liberty Circle, had the important task to reveal this evolution and identify intellectually sound ways to distinguish valid from invalid claims of human rights. Renowned professors and experts from the United States and from various European countries helped understand this process, the "interdependent and indivisible" characteristic of rights, the essential complementary role of responsibilities, the impacts of the proliferation of rights claims on the near-universal consensus of the UDHR as well as to investigate and address this overarching challenge. In the illuminating and rich discussion, Craig Lerner from the George Mason University and Stephen Hayward from the UC Berkeley cautioned against the burgeoning of new rights claims that show no relationship to natural rights while Gergely Deli from the University of Public Service and Thibault Mercier from the French Cercle de Droit et Liberté stressed the social and cultural dimensions of fundamental rights. Luca Pietro Vanoni from the University of Milan highlighted the harmful consequences of the continuous decline of political and democratic discourse and the ensuing increase of rights' claims.

The fascinating and engaging panel discussion highlighted the importance of converging around valid rights distinguishing them from false political claims. This is also key to uphold the remarkable achievement of the UDHR, the ability to continue to forge consensus among various political and cultural traditions.

Lénárd Sándor
Head of the Center for International Law, MCC
Head of the Barna Horváth Law and Liberty Circle

CRAIG S. LERNER

Professor of Law at the George Mason University

Education: Harvard University, AB
University of Chicago, MA
Harvard University, JD

"The Proliferation of Rights Promotes the Idea That 'Rights' Are a Sham"

In retrospect, the UDHR served as a starting point for a "revolution" that has resulted in a continuously increasing number of international treaties, human rights control mechanisms, and courts. On the other hand, it has become the lingua franca of almost every discussion of justice, of the proper boundaries of individual liberties and the contours of the common good, and of what responsibilities we owe to one another in society. In the words of the late Jonathan Sacks, it is the dominant mode of discourse. What are, in your view, the consequences of this evolution? How do you see this development in your country?

The statement that the UDHR is the "dominant mode" or "lingua franca of almost every discussion of justice" rings, to an American lawyer, untrue. I did a search of the Westlaw database, which collects the hundreds of judicial opinions generated daily in the United States. Only rarely do they mention the Declaration, and in almost all instances, the passing reference consists of a curt rejection of a claim that the Declaration creates a private cause of action or is marginally relevant to the issues presented. Courts regularly hold that the UDHR is "non-biding" in American courts, and claims based under it are "frivolous."

Only eight times has the United States Supreme Court referred to the Declaration—all but twice in passing mentions or in footnotes.

A case from 2021 quoted a treatise that stated that the UDHR had "become part of a growing body of human rights law that made how a state treats individual human beings a matter of international concern." Nonetheless, it is worth recalling this statement from a 2004 opinion: "the Declaration does not of its own force impose obligations as a matter of international law." That 2004 opinion is regularly cited by American courts in rejecting claims based on the UDHR. If a plaintiff in a US court is citing the UDHR, one can safely assume he doesn't have much of a case.

There are, nonetheless, over 10,000 law review articles that refer to the UDHR. Academics find the UDHR more interesting when they reflect upon justice in the abstract than do judges when they have to decide concrete cases generated by actual parties.

Of course, several international treaties inspired by the Declaration have been adopted by the United States Senate and signed by the president, so they are part of American law and regularly cited. However, in the absence of formal treaty ratification, there is a lively debate over the appropriateness of courts even mentioning foreign laws and UN conventions, let alone relying upon them. Some Supreme Court Justices have cited human rights conventions, although others have inveighed against the practice. In a 2005 case, involving the constitutionality of executing convicted murderers for crimes committed as juveniles, a dissenting Justice Scalia rejected the majority's reliance upon conventions never ratified as treaties and criticized "the basic premise… that American law should conform to the laws of the rest of the world."

This is not to deny that, as retired US Supreme Court Justice Anthony Kennedy told an interviewer in 2008, "lawyers and judges have come to believe that basic principles of human rights are common to the peoples of the world." In his judicial opinions, Justice Kennedy occasionally referred to "human rights" and "human dignity," as do

some American judges in their opinions today. But it is often unclear whether these references are to be understood as compelling the resolution of actual cases or as merely decorative.

Since human rights have become the dominant mode of discourse, one increasingly faces with the emergence of new rights claims. However, the increasing number of false claims of rights can weaken the moral force and prestige of the human rights. How do you see this side of the coin and what is your experience in your country?

As suggested by my previous answer, the language of "human rights" is far more common in Europe than in the United States. The same could be said of the correlative phrase, "human dignity," although the latter concept has seeped into American discourse. In general, the political left in America is more likely to speak of "human dignity" than the political right. American liberals deploy the concept of "human dignity" in various contexts, such as opposition to capital punishment.

Curiously, American conservatives invoked the concept of "human dignity" in the 1990s, in opposing various medical innovations, such as cloning and stem cell research. Liberals responded by pointing out how amorphous the notion of "human dignity" is. Professor Steven Pinker, of Harvard University, wrote an article entitled, "The Stupidity of Dignity," in which he argued: "The problem is that 'dignity' is a squishy, subjective notion, hardly up to the heavyweight moral demands assigned to it." Of course, the same could be said today when the concept of "human dignity" is cited by liberals. One can argue that human dignity forecloses capital punishment, because it is to respect the human worth of the criminal. Or one can argue that human dignity requires capital punishment, as it the only punishment consistent with respect for the criminal's agency and the victim's worth.

Although American law is less steeped in the language of "human rights" than European law, the concept is not entirely alien to the American tradition. Indeed, many provisions in the UDHR are familiar to Americans. The UDHR consists of a preamble and thirty articles, and many of these articles, although phrased differently, have counterparts in the US Constitution, including its Bill of Rights. For example, UDHR Article 1, referring to freedom of "reason and conscience," can be analogized to the US Constitution's First Amendment, which protects freedom of speech and religion. UDHR Article 2, foreclosing discrimination on the basis of race or sex, can be analogized to the Fourteenth Amendment requirement of equal protection under the laws. UDHR Article 4, forbidding slavery, matches the Thirteenth Amendment, which does the same thing. UDHR Article 9, forbidding "arbitrary arrest [or] detention," also matches the Fourth Amendment prohibition of "unreasonable searches and seizures." And UDHR Article 17, prohibiting "arbitrar[y] deprivation of property," is similar to the "takings" clause of the US Constitution's Fifth Amendment.

However, there are many other articles in the UDHR that have no counterparts in America's legal tradition. Some of these "rights" are so ambiguous and aspirational that one is uncertain about what is intended and whether they can be operationalized as predictable, binding law. For example, Article 6 of the UDHR provides: "Everyone has the right to recognition everywhere as a person before the law." Article 12 provides: "No one shall be subjected to…attacks upon his honor and reputation." And Article 29 provides: "Everyone, as a member of society…is entitled to realization…of the economic, social, and cultural rights indispensable for the dignity and the free development of his personality."

These are interesting ideas, and worthy of reflection, but what is the scope of these rights? For example, does the "realization…of dignity"

require the Ecuadorean embassy to provide Julian Assange, founder of Wikileaks, with a "fundamental right" to sunbathe, as was urged by the Foreign Minister of Ecuador? Is Assange's right in this regard further guaranteed by Article 24, which provides that everyone has a "right to rest and leisure." It is obvious that speaking of a "human right to sunbathe" can make the very idea of human rights laughable.

That said, "human rights" are still invoked in America today, but typically by the political left. For example, Senator Bernie Sanders, during his 2020 campaign for the Democratic Party nomination for president, argued that guaranteed housing and education were "human rights." This may be regarded sympathetically by some Americans, but for others it is likely to foster the impression that "human rights" is simply code for left-wing agenda.

American conservatives also tend to be wary of invocations of "human rights" by international organizations. For example, Human Rights Watch and other international organizations have repeatedly declared that the right to an abortion is a "human right." An American conservative responded by observing that "the entire world does not share [this] moral and policy perspective."

> **How, in your view, can one distinguish between true and false claims of human rights? What are the criteria that a right claim should meet to be legitimately recognized as a human right? What role, if any, do cultural, historical, and political traditions of political communities play in this process? What is the dominant view in your country?**

The modern philosophical idea of "rights" began with Hobbes and Locke and was focused on the core ideas of life, liberty, and property. As "rights" stray farther from that core, it is difficult to regard them with the same sacredness. The rights to rest and leisure, if they exist

at all, are of a different status than the right to property; and calling all of them "rights" masks the qualitative difference. The proliferation of rights promotes the idea that "rights" are a sham.

It is interesting that the American revolutionaries spoke of "natural rights," as well as the "rights of Englishmen." It is clear that they were appealing not only to a concept of universal rights that all men enjoyed because of their humanity, but also to a very particular set of rights that Englishmen enjoyed because of their heritage.

Consider the Declaration of Independence. After the famous opening, announcing that "all men are created equal," the document eventually moves on to very specific complaints about King George III, including that he had deprived the colonists of "the benefits of Trial by Jury." One cannot, and the authors of the Declaration of Independence did not, claim that there is a human right to a jury trial, but it is a right deeply embedded in the English tradition. Many continental European judicial systems do not provide for a jury trial right, except in extraordinary cases, and no one would suggest that this is a denial of a human right.

There are echoes of this idea in American law even today. The question sometimes arises whether the Fourteenth Amendment of the US Constitution "incorporates" certain rights, which would have the effect of applying those rights to all state governments. The test the Supreme Court adopted focuses on whether those rights are "necessary to *an Anglo-American* regime of ordered liberty." Applying that test in a case called *Duncan v. Louisiana*, the court concluded that the right to a jury trial, even for a relatively minor crime, qualified as such a right. The court acknowledged that it was possible to imagine schemes of ordered liberty that did not include a right to a jury trial. Indeed, very few countries in the world would have required a jury trial in the circumstances presented in that case. But the right to a jury trial does

not arise from nature, but from a particular tradition. It may be helpful to distinguish between a small core group of rights that are universal and other more peripheral rights that may have a particular historical basis. The UDHR seems to ignore this distinction. Even with those core "human rights," it may be very difficult to operationalize them as legal rights in identical ways, notwithstanding differences in culture, religion, and history.

> **The UDHR was constructed as an integrated document and the rights as well as the responsibilities contained in it were meant to be "interdependent and indivisible." Why is important in the face of the emergence of new rights claims and how can it provide guidance to human rights courts and institutions?**

An official document of the United Nations explains what is intended by the claim that all human rights are "interdependent and indivisible." "This means," it says, "that one set of rights cannot be enjoyed fully without the other. For example, making progress in civil and political rights makes it easier to exercise economic, social and cultural rights. Similarly, violating economic, social and cultural rights can negatively affect many other rights."

An economist might react to this with the cliché that there is no such thing as a free lunch. The recognition or invention of one right, especially the more far-reaching and amorphous ones that festoon various UN conventions and proclamations, almost inevitably constrains other rights. To put this in terms any lawyer would understand: If my neighbor has a right to the quiet enjoyment of his property that constrains my right to use my property as I wish, i.e., my ability to build a concrete factory in my backyard. If a homosexual couple has the right to be treated the same as a heterosexual couple, that

constrains a religious person's ability to deny that couple his services, i.e., to refuse to make a wedding cake for them or allow them to use his ballroom for the nuptials.

To put this in more general terms, rights are regularly in conflict. And what courts do is resolve those conflicts according to the promulgated laws of the nation or jurisdiction where they sit. The pattern of judicial opinions then provides guidance as to what the law is, and there is no reason to expect that every nation or jurisdiction will or should strike the same balance.

THIBAULT MERCIER

President of the Law and Liberty Circle on France

Education: University of Nantes, Licence Degree
in Foreign Languages, 2006
Paris Cité University,
MA in Business Law, 2011

"Freedom Is Not Just an Individual Power; Freedom Needs a Social Field in Order to Be Exercised"

In retrospect, the UDHR served as a starting point for a "revolution" that has resulted in a continuously increasing number of international treaties, human rights control mechanisms, and courts. On the other hand, it has become the lingua franca of almost every discussion of justice, of the proper boundaries of individual liberties and the contours of the common good, and of what responsibilities we owe to one another in society. In the words of the late Jonathan Sacks, it is the dominant mode of discourse. What are, in your view, the consequences of this evolution? How do you see this development in your country?

First of all, I would like to thank the MCC and Lénárd Sándor for their kind invitation. It is a privilege for me to speak at this conference, together with so many professors and judges from all over the world. It is also a joy to be able to speak in Hungary, a country with a historical and cultural heritage that goes back more than a thousand years, a country that is fighting with skill and courage to preserve this heritage and continue to exist.

As you may have noticed, I am a lawyer. I am not a judge. I am not a law professor. I will make sure my remarks are as serious as possible from an academic and legal point of view, but as a lawyer, I am more of a fighter than an academic. As a consequence, my remarks will also be engaged.

But let us go back to the initial question: the language of human rights has indeed become the dominant discourse in law schools and legal circles. of course, but also in political and media circles. Human rights have even become an ideology, and there even exists a French word for it: *"droit-de-l'hommisme,"* which would be translated as "human-rightism."

If we go further, we could even say, with Jean-Louis Harouel, Professor Emeritus of Legal History at the University of Paris II Assas, that the West has turned human rights into a kind of state religion—a religion with a set of beliefs and dogmas that escape debate.[1]

The application of this new ideology in Western countries has several important consequences. First—and this is a point that was made as early as the French Declaration of Human Rights in 1789, notably by Edmund Burke—human rights are universalist. In other words, they consider that a human being is the same at any point on the globe and at any time. Regardless of their history, geography or culture, all human beings must have the same rights.

But does Man, with a capital H, really exist? The famous French counterrevolutionary thinker Joseph de Maistre wrote that there was "no such thing as 'man' in this world," and that he had "seen in his life Frenchmen, Italians, Russians, and so on. But as for man, he declared he had never encountered him."

The universalist vision of such a "Man" is certainly beautiful on the surface, but experience has shown that this vision favors the disappearance of cultural particularisms, which will then give way to abstract and uprooted rights that are universally applicable at any time, in any situation and on any territory.

[1] Jean-Louis Harouel, *Les Droits de l'homme contre le peuple* (Desclée de Brouwer, 2016).

Jean-Louis Harouel explains that the ideology of human rights is now undermined by a kind of obsession for the nondiscrimination principle. This obsession prohibits any distinction made between individuals, and in particular between "men" and "citizens." He describes the universalism of human rights as "tyrannical." In his view, the dogma of human rights has placed the West in a position of weakness in relation to other civilizations, which appear to have little interest in the project of a unified humanity. This professor notes a drift in the contemporary application of human rights, which have become moralizing, compassionate, and infantilizing. According to him, this vision of human rights risks that all European people will take advantage of these rights to ensure that their way of life and values prevail, to the detriment of those of the historical community.

To illustrate this point, in 2018, the European Court of Human Rights ruled against the French state for hastily deporting a jihadist without offering him full rights of defense.[2] Far be it from me to undermine hard-won rights of defense. However, we can ask ourselves in this case whether the rights of defense of the French people were indeed respected by the European judge?

Another example is a 1978 ruling by the Conseil d'Etat (France's highest administrative court), which imposed family reunification basing its decision on the right to respect for private and family life.[3] Of course, it is important to defend such a right. But on closer

[2] ECHR, 1er February 2018, M.A. v/France.

[3] Conseil d'État, December 8, 1978, Gisti, invited to do so by international law, in particular Article 8 of the European Convention for the Protection of Human Rights, which also recognizes the right of everyone to respect for their family life.

examination, is it not possible that this "private and family life" can also be exercised in the applicant's country of origin?

Another notable consequence of this new human rights ideology that I would like to address is the overcoming of state sovereignty, both from above and from below. Human rights ideology recognizes only two political and legal realities: humanity and the individual being. As such, the nation, which is in the middle of those two realities, is no longer recognized as legitimate when it comes to human rights.

The second question of this round table will allow me to address the consequences of individualism in more detail. So now I would like to talk about the overcoming of state sovereignty from above: whether by European judges or international institutions such as the United Nations Human Rights Committee. It can be noticed that these judges and institutions generally use a type of human rights that is disconnected from the cultural realities of nations.

I will not talk much about European judges, and you are going to tell me that national judges remain sovereign and that European courts were set up by democratically voted treaties. This is true, but I would simply like to point out that these judges have a great deal of arbitrary power when it comes to interpreting human rights.

I prefer to focus now on the decisions and opinions of the United Nations Human Rights Committee. It is often said that such opinions are "nonbinding," and this is true. However, it is an illusion to believe that they have no impact on national jurisdictions. The First President of the French *Cour de Cassation*, the highest judiciary court in France, Bertrand Louvel, stated in this sense in 2018 that the United Nations Human Rights Committee has also been given "the mission of guardian of fundamental rights which enables the Committee to express divergence with the French *Cour de cassation*" and that "Even if the

opinion of the Committee is nonbinding, the moral authority that it has constitutes a new factor which can destabilize French national jurisprudence."

This statement was made just after the release of an opinion from the UN committee, which stated that France had violated the principles of religious freedom and nondiscrimination by validating the dismissal of a worker who wore the Islamic veil in a nursery even though the internal regulation of the nursery imposed the principle of religious neutrality.

The French judge issued such a decision in 2014, four years before the UN committee's opinion. In the light of Bertrand Louvel's statement, we can legitimately wonder whether the French judge's decision will be upheld in a similar case in the future…

> **Since human rights have become the dominant mode of discourse, one increasingly faces the emergence of new rights claims. However, the increasing number of false claims of rights can weaken the moral force and prestige of the human rights. How do you see this side of the coin and what is your experience in your country?**

As stated in the written presentation of this panel, the UDHR has presented a vision that repels the excesses of both individualism and collectivism. Unfortunately, it seems to me that this was wishful thinking with regard to the excesses of individualism.

In France at least, we are witnessing the development of a radical individualism that allows individuals to use the discourse of human rights only for their own satisfaction. As Louis-Frédéric Pignarre, law professor at the University of Montpellier, writes, individuals are demanding "legal recognition of their smallest desires. Their desires

become demands. The individual is placed at the center of the system, and the group is relegated to the background.[4]"

The purpose of politics has been turned upside down. It is no longer about ensuring the common good, but about providing individuals with as many freedoms and rights as possible. As a result, right claims have become instruments of personal satisfaction.

The desire for a child has, for example, been transcended into a "right to" a child, which has notably justified the development of surrogate motherhood,[5] i.e., the purchase of newborn babies.

Following this logic, if we accept this "right to a child," could we then also create a "right to a spouse?" After all, if there is anything sadder and more painful than the impossibility of having children, it is the loneliness of celibacy. Should a progressive society tolerate the fact that the ugly are not as attractive as the beautiful? Should the state not also pass a new law allowing the purchase of paid companions in the Third World to compensate for this prejudice of "loneliness?"

According to the French philosopher Pierre Manent,[6] the claims of right have reached the end of their extension and have now acquired sufficient legitimacy to oppose any collective rule. The law has thus become the slave of the rights of each individual, rights that express both enjoyment and suffering. The individual now commands all to recognize the said suffering or enjoyment, i.e., to grant it a binding value against the law.

This belief in the omnipotence of human rights is encouraged by a welfare state that is constantly extending its arm over civil society to

[4] In *Précis de culture juridique,7th edition,* Lextenso, 2023.

[5] ECHR, June 26, 2014, Mennesson v/France and ECHR, January 24, 2017, Paradiso and Campanelli v/Italy.

[6] Pierre Manent, *Le Droit naturel et les droits de l'homme* (*Natural Law and Human Rights)* (Presses Universitaires de France, 2018).

regulate every aspect of it. Constitutional law professor Anne-Marie Le Pourhiet writes that the government has become a "normative self-service," a "lex-shop." The state is yielding to the infantilization of its citizens and has become the servant of particular interests, forgetting that the general interest is not the sum of categorical and personal interests. These personal and categorical interests are necessarily opposed to the transcendent search for the common good.

We might also ask ourselves whether the proliferation of these rights is really effective and possible? According to the French legal philosopher Michel Villey, "this superabundance of rights serves above all to satisfy a stream of unfulfillable claims which, when brought down to Earth, leave people disappointed and bitter, whereas human rights promise to make them happy and prosperous."

Alain Supiot, Professor of Law at the University of Nantes and member of the Institut Universitaire de France, writes that today "rights are distributed like weapons, and may the best man win!"[7] Knowing that each of these *rights* comes armed with legal action. Who can judge the interests of others when we know that desire can be extended indefinitely? The judge therefore finds himself arbitrating a debate between selfish individuals and has had to develop principles of necessity and proportionality. Such principles will allow the judge to reach a decision, but will necessarily allow the parties to accept such a decision…

To conclude on this question, I would like to point out that human rights, including right claims, were conceived as tools for preserving or achieving freedom.

Now we see that some of these claims of rights can justify the worst restrictions on our freedom. As proof of this, during the Covid

[7] Alain Supiot, *Homo juridicus*, Seuil, 2005.

crisis, a few lawyers—not enough in my opinion, including the Cercle Droit & Liberté, which I lead—challenged the French government's acts imposing the various restrictions we have known during that time (lockdown, curfews, Covid passes, etc.). Each time, the administrative or constitutional judge has based its decisions on "right to health" to justify these restrictions.

And then, to counter what I noted above, it was rather an unlimited collectivism that was made possible by the right claim…

> **How, in your view, can one distinguish between true and false claims of human rights? What are the criteria that a right claim should meet to be legitimately recognized as a human right? What role, if any, do cultural, historical, and political traditions of political communities play in this process? What is the dominant view in your country?**

One of the main problems with right claims is that they can become monetary rights when their effectiveness cannot be guaranteed.

Originally, they were more of a moral claim against the government. Today, they are linked to a financial claim. The beneficiary of this right can thus take the government or the local administration to court to obtain compensation.

In France, for example, some fifteen years ago, a so-called "enforceable" right to housing was introduced, meaning that citizens can take legal action to ensure that this right is effectively implemented. Since then, some French local administrations have been fined more than a million euros for failing to enforce this right.

One might say that this enforceability is salutary and will really encourage the government to make this right effective. But is it really fair to introduce rights that nobody feels they owe to anybody and that only the government will enforce? After all, the debtor of these

rights is not all other citizens, but the state, funded by the taxpayer. And introducing a new right claim is like giving a blank check to the current and future taxpayers who will have to fulfill this obligation in the future.

To avoid this pitfall, the law professor and lawyer Hubert de Vauplane[8] simply suggest that these right claims should be reduced to simple political commitments, to objectives to be achieved. In his view, all financial compensation should be rejected by the courts.

Another avenue that I believe should be explored is to reserve these rights only for citizens. Rights claims can only exist if an individual evolves within a particular group (in Europe, these groups are the nation-states). There seems little justification for granting such rights claim to individuals who pays no economic or historical tribute to the nation-state, and thus offering them a right for which there is no quid pro quo.

We also need to ensure that these rights are clearly defined. This will leave very little room for arbitrary interpretation by judges. I am thinking, for example, of the UN resolution of July 2022 that declared a human right to a clean, healthy, and sustainable environment. In France, this right has been established by a constitutional amendment, but how will it be applied? What is a clean, healthy, and sustainable environment? Does a judge really have the political, technical, and scientific skills to apply such a right?

The final avenue to be explored regarding the legitimate recognition of rights claims is that such a right should necessarily be democratically voted for and not either proposed by an unelected international organization or "discovered" by some judge (national or international) in the course of one of his decisions—sometimes based on a biased interpretation of the constitution or questionable human rights.

[8] Hubert de Vauplane, *Endettez-vous, plaidoyer pour une dette juste* (Editions Première Partie, 2020).

The UDHR was constructed as an integrated document and the rights as well as the responsibilities contained in it were meant to be "interdependent and indivisible." Why is it important in the face of the emergence of new rights claims and how can it provide guidance to human rights courts and institutions?

The UDHR did indeed refer to responsibilities, but where are they now? In practice, I can only see rights. It is worth noting that even illegal immigrants have rights in Western countries, although they have no responsibilities (such as paying taxes or respecting the history and culture of the host country).

A right can only be effective if it is linked with a responsibility. Human rights judges, as well as individuals, need to be reminded that a right cannot exist without duty and responsibility.

With respect to responsibilities, we also note that the development of human rights has led to a change in the concept of freedom. We have moved from a positive vision of freedom, which implied the citizen's participation in public action, to a negative vision of freedom: a vision in which the government is necessarily seen as the enemy, a vision that allows the individual to withdraw from society and live there as a stowaway. His freedom thus becomes independent of any participation in political affairs. As mentioned above, everyone now seeks to maximize their own self-interest and to make the nation bend under the weight of their own selfish desires. In the end, we have arrived at a principled opposition between the individual and society as a whole.

It is important to remember that freedom is not just an individual power; freedom needs a social field in order to be exercised. A social field that must also be protected! I said earlier that national sovereignty

was being overcome from above and from below, because human rights recognize only two political realities: humanity and the individual. Yet politics is based on what lies between these two concepts: peoples, cultures, families, and nations.

First of all, it is important to remember that while it is necessary to protect individual rights, it is also necessary to protect the institutions that enable those rights to be defended and those institutions are the nations and cultures of each people.

International texts and treaties already exist to help us in this endeavor. Take, for example, the Declaration on the Rights of Indigenous Peoples, adopted by the United Nations on September 13, 2007. This declaration recognizes "the right of all peoples to be different" and affirms "that all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind." Article 3 states that "indigenous peoples have the right to self-determination. By virtue of this right, they freely determine their political status and freely pursue their economic, social and cultural development," and Article 8 states that "indigenous peoples [...] have the right not to be subjected to forced assimilation or to the destruction of their culture." I would also recall Article 13, which states that "indigenous peoples have the right to revitalize, use, develop and transmit to future generations their history, language, oral traditions, philosophy, writing systems and literatures."

It is quite astonishing that such a declaration cannot be applied to Western peoples. Why is that? It seems to me that the vision of human rights that now prevails in the West, and in particular its individualism and obsession with anti-discrimination, are the main causes.

Secondly and finally, it is high time for the individuals to relearn how to live in a society, without choosing only those elements that suit

them. The common good, like any structuring order, necessarily implies limits for the individuals. These limits should not be seen as constraints, but as the very first conditions to live in society. As Solzhenitsyn said in his famous Harvard speech in 1968, "It is time, in the West, to defend not so much human rights as human obligations."

STEVEN F. HAYWARD

Resident scholar at UC Berkeley's Institute of Governmental Studies, and a visiting lecturer at Berkeley Law

Education: Lewis and Clark College, BS
Claremont Graduate School, MA and PhD

"Legitimate Human Rights Are Natural Rights: Welfare Rights Dressed Up As Human Right Are Not"

In retrospect, the UDHR served as a starting point for a "revolution" that has resulted in a continuously increasing number of international treaties, human rights control mechanisms and courts. On the other hand, it has become the lingua franca of almost every discussion of justice, of the proper boundaries of individual liberties and the contours of the common good, and of what responsibilities we owe to one another in society. In the words of the late Jonathan Sacks, it is the dominant mode of discourse. What are, in your view, the consequences of this evolution? How do you see this development in your country?

The UDHR might be said to express both the "common sense" and "common nonsense" of the idea of human rights in our era. On the one hand, it is tacitly built upon the recognition of a common humanity as the fundamental ground of individual rights that exist always and everywhere, regardless of borders or the character of the national regime. The ground of common humanity is found in human *nature*, and as such the idea of "universal" human rights is merely a modern update of a core idea of the ancient natural law tradition. It is entirely harmonious with the understanding of Cicero, for example: "And there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for

all nations and all times." In other words, human rights did not begin with Grotius.

The UDHR also represents a solution to a contingent practical problem: establishing a basis for extending and solidifying the reach of international law amidst the shadow of the Holocaust and oppressive rogue regimes that trample the human rights of their citizens. It has helped to strengthen a jurisdictional basis for protecting human rights claims, and it helps to legitimize international tribunals to enforce actions against human rights abuse (think of the general charge of "crimes against humanity" at the Nuremberg Trials of 1946), though this aspect of the international human rights regime has significant remaining difficulties both in principle and in practice.

While the discourse of human rights was instrumental in the relatively benign end of the Cold War and has been useful in bringing pressure on abusive regimes, it has also become the engine of confusion about individual rights—the locus of "common nonsense." The UDHR itself reflects the problem. It contains a mix of what were once understood as *natural* rights and purely positive or civil rights. Its opening paragraphs resemble a modern-day version of the American Declaration of Independence, with its language about the "equal and inalienable rights of all members of the human family," and affirming "a recourse, as a last resort, to rebellion against tyranny and oppression." The individual rights enumerated in the first twenty articles resemble the American Bill of Rights, the British common law tradition, and other due process protections central to liberal democracy in its various forms. These natural rights form the basis of limited government and require government to treat all individuals equally and consistently. There are other specific protections for property rights, copyright, and patents similar to the enumerated protections found in the US Constitution.

But later enumerations elide into "positive rights," that is, rights that create a duty of government provision whose scope and limits are unclear. For example, Article 22 reads in part:

> Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State…

This article is ambiguous, as the clause "in accordance with the organization and resources of each State" implies that the basic economic fact of scarcity of resources might limit the enjoyment of this "right." Does an individual possess a "human right" if its enjoyment or protection depends upon the relative availability of public resources?

Likewise, Article 24 reads:

> Everyone has the right to rest and leisure, including reasonable limitation of working hours and *periodic holidays with pay*. (Emphasis added.)

"Holidays with pay" presumes that someone is employed at a remunerative job in the first place, which is clearly not the case with lesser developed nations where hundreds of millions of people live in dire poverty, with no steady, organized work from which to enjoy a paid vacation. Is having a job a fundamental human right? The UDHR calls for precisely this, along with other welfare state guarantees, in the immediate sequel, Article 25:

> Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food,

> clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

Nearly every modern industrialized nation has a "social safety net" with provisions for most or all the deprivations mentioned here, but their level and extent varies widely, and it is widely accepted that ill-designed programs can sometimes do more harm than good. Is scaling back a social program a human rights violation? Is there a principle by which the inadequacy of government provision constitutes a human rights violation? There is no guidance on this question from the UDHR, nor can there be, for reasons explained in answers to questions 2 and 3 below.

One hint can be offered, however: neither the UDHR, nor similar contemporary rights declarations, call for a "right to transportation." Most modern cities provide mass transit—buses and trains chiefly—to one degree or another, and yet none of them can possibly meet the mobility needs of everyone. Why is there no "human right" to mass transit?

> **Since human rights have become the dominant mode of discourse, one increasingly faces the emergence of new rights claims. However, the increasing number of false claims of rights can weaken the moral force and prestige of the human rights. How do you see this side of the coin and what is your experience in your country?**

The popular domain of human rights has become a field of promiscuous special interest demands that any and every particular benefit that can

be conceived should be considered a "human right." A good example of the promiscuous use of human rights claims in the United States can be seen in San Francisco, whose government about twenty years ago declared free, citywide Wi-Fi to be a "fundamental human right." But when the city government investigated the cost and complications of providing free citywide Wi-Fi, this human right was quietly dropped, as the cost and security challenges of such a system were found to be prohibitive at that time. The idea was quietly dropped, though as broadband costs have fallen San Francisco and other California cities have extended some free Wi-Fi to many poor neighborhoods. But it is far from universal, and it is no longer considered a "human right."

The unrestrained and ill-defined domain of human rights has encouraged its extravagant overuse, as declaring something to be a "human right" is thought to put the matter beyond debate. Human rights claims create a de facto duty of governments to realize the new human right through positive or active provision. Human rights claims are usually described as a matter of some urgency, this having the effect of removing policy responses from the realm of deliberation and debate.

> **How, in your view, can one distinguish between true and false claims of human rights? What are the criteria that a right claim should meet to be legitimately recognized as a human right? What role, if any, do cultural, historical and political traditions of political communities play in this process? What is the dominant view in your country?**

There are three ways of distinguishing true from false human rights claims.

First, a clear revival of the old vocabulary and understanding of *natural* rights—such as freedom of speech, freedom of conscience, and so forth—as distinguished from positive (contractual) rights

or civil rights, such as a right to a pension, a right to health care (in many countries), offers a helpful distinction. The natural rights foundation orients government to protecting individual rights chiefly by *not* interfering with the—what Isaiah Berlin stigmatized as "negative liberties." In other words, natural rights prescribe limited government. Positive rights create duties and obligation for government to provide resources to satisfy human rights claims.

The difficulty with the unconstrained version of human rights that is dominant today can be grasped by noting that while old-style natural rights (such as freedom of speech, conscience, assembly, etc.) can be secured by the simple step of the government not interfering with the choices of free individuals, human rights to the provision of welfare state goods are inherently insecure. Human desires are infinite, and the list of goods that can contribute to the happiness and flourishing of individuals is equally expansive, while resources are not infinite. The tacit premise of much of our human rights discourse shares with classical Marxism the idea that scarcity is not inherent. Thus, treating human rights claims for welfare provisions as both possible and necessary is essentially to promise Heaven on Earth. This mode of thinking about human rights represents the emancipation of the human will, unconstrained by any material or moral necessity.

This leads to the second usable distinction. The promiscuous overuse of demands for any good thing that can be reconceived as a fundamental human right confuses *ends* and *means*. The *end* of legitimate government, as the UDH—following the Declaration of Independence—implicitly includes, is to secure the natural rights of individuals. Health care, housing, pensions, paid vacations, and other material benefits are all good things, but are *means* to the proper ends of government. While natural rights are absolute or unequivocal (or nearly so—Aristotle would qualify this statement), the means of the

welfare state are subject to deliberation, debate, tradeoffs, and prudence. Put differently, there is no tradeoff between the right of conscience as opposed to the right to health care or housing, which will always be constrained by limited government resources and competing policy priorities.

This leads to the third usable distinction: any claim of a "human right" that requires government to transfer resources from one party (generally taxpayers) to another is not a fundamental human right, but a welfare state benefit. The policy may well be laudable and contribute to improving overall social welfare, but this is an evaluation that should be conducted as an exercise of democratic deliberation rather than as a categorical human right that, by definition, attempts to raise the claim above democratic deliberation and accountability.

In one sentence: legitimate human rights are natural rights; welfare rights dressed up as human right are not.

> **The UDHR was constructed as an integrated document and the rights as well as the responsibilities contained in it were meant to be "interdependent and indivisible." Why is it important in the face of the emergence of new rights claims and how can it provide guidance to human rights courts and institutions?**

The UDHR and its cognates can retain their usefulness if they are applied in a more restrained manner and, moreover, consistently. Paradoxically, the reorientation of human rights toward a more solid grounding requires that it be truly *universal*. In practice, the concepts of human rights are applied very inconsistently. The French political philosopher Pierre Manent observed in his book *Natural Law and Human Rights*, "On the one hand, we are told that human rights are a rigorously universal principle, valid for all human beings without

exception; on the other, we are told that all 'cultures,' all ways of life, are equal and any tendency that would even consider the possibility of ranking them according to some moral standard, would be a form of discrimination, and thus that any judgment in the full sense would be an attack on human equality." For example, many human rights activists attack Western nations that do not have what they regard as sufficiently robust protections for LGBTQ rights, but they are silent about the conscious oppression of LGBTQ people in Islamic nations.

This familiar cultural relativism represents the transmutation of the understanding of equality in the older natural rights tradition; today, equality has yielded to "equity," understood as equal outcomes. This is an impossible project, and it risks the trivialization of human rights properly understood.

GERGELY DELI

Professor of Law and Rector of University of Public Service

Education: Eötvös Loránd University (Budapest), JD
Péter Pázmány Catholic University (Budapest), PhD

"Within the EU the Minority Rights Within Are Simply Swept Under the Carpet"

In retrospect, the UDHR served as a starting point for a "revolution" that has resulted in a continuously increasing number of international treaties, human rights control mechanisms, and courts. On the other hand, it has become the lingua franca of almost every discussion of justice, of the proper boundaries of individual liberties and the contours of the common good, and of what responsibilities we owe to one another in society. In the words of the late Jonathan Sacks, it is the dominant mode of discourse. What are, in your view, the consequences of this evolution? How do you see this development in your country?

First, I would like to talk about the starting point because in my view, if we want to examine in any meaningful way the consequences of development, and of Hungarian development in particular, then understanding that is essential.

People are unaccustomed to considering the contextual aspect I am now focusing on because it seems so natural. The UDHR was delivered into a rather black-and-white context following a great victory at the end of a World War. On the one side were the mighty victorious powers, and on the other the losers, who had capitulated unconditionally. On one side, human rights stood triumphant, while on the other there were horrendous, inhuman violations of rights. In my opinion, this

incontrovertible duality has in some regard had a negative impact on the subsequent development of human rights. On the one hand, it has motivated and continues to motivate individual political actors to dress their own needs and interests as human rights, because in such a way they are sometimes able to endow unquestionable legitimacy to what are in truth particularistic aspects. On the other hand, human rights gained an imperialistic flavor by emerging from domination in World War. In consequence, those in positions of power have the ability to enforce certain aspects of power through a subtle reorganization of the hierarchy of individual human rights, that is, by shifting their emphasis. This can be seen when, within the European Union, the more difficult issues concerning ethnic and minority rights are simply swept under the carpet and the focus is placed instead on other types of human rights and legal needs.

As far as Hungarian development is concerned, while it is quite individual, it does to some extent share the main tendencies of all former COMECON states. One thing that this region shares is the experience of citizens living for decades under a regime in which human rights were supposedly promulgated, yet in reality the opposite was often the case. As a result, in the societies affected there is greater distrust of solutions that refer to human rights, and a kind of distance-keeping and critical attitude prevails. This naturally means a more conservative stance is taken, which is not a problem in my view, indeed it is an important key to healthy, organic development. Another important characteristic feature of Hungary is that during the change of the political system in the early 1990s, the imposition of the rule of law excluded any opportunity in public life of peaceful confrontation between the accumulated social tensions.

The fact that a small elite body of lawyers, the Constitutional Court, came to decide on a number of very important issues (such as the

crucial matters of restitution and accountability for the wrongs that had been done) contributed to the division and seemingly intractable political difficulties present in Hungarian society today.

Since human rights have become the dominant mode of discourse, one increasingly faces the emergence of new rights claims. However, the increasing number of false claims of rights can weaken the moral force and prestige of the human rights. How do you see this side of the coin and what is your experience in your country?

As I mentioned above, one consequence of strengthening human rights after World War II is that particular interest groups seek to assert their otherwise legitimate interests universally within the context of the discourse on human rights. They take advantage of the triumphant expansion of human rights, both geographically and materially (guaranteeing our human rights in an increasing number of areas of life), which is an achievement in human history of singular importance. It is perfectly natural that many people want to sail on the same wind as that triumphant achievement. That, in itself, is not a problem; however, we should recognize that we do not necessarily have to ensure each and every group's interest through the means of human rights.

As far as Hungary is concerned, the fact that ethnic minority rights have become marginal in EU human rights discourse certainly does not help in strengthening EU identity, for example. The courage to deal with the real ethnic problems at the EU level is lacking. The political cost of this would be too great: just think of the Spanish government's resistance to the aspirations of regional autonomy there. This is particularly painful in the case of Hungary, which stands out as one of the few nations for which there has been very little mitigation of the unjust consequences of the end of the World War. Slovakia and

the Czech Republic gained their independence, the artificially created Yugoslavia disintegrated into separate sovereign successor states (partly nation-states), Ukraine became independent, and German unity was achieved. In contrast to these things, no substantive, large-scale political adjustments were made in connection with the situation of the Hungarian minorities abroad. Indeed, in Slovakia, for example, the *Beneš Decrees*—severely discriminatory against Germans and Hungarians— remain in use as legal bases in court proceedings. One of the big promises of Hungary's accession to the EU was the "opening of borders," which could have peacefully contributed to the settlement of the situation of the oppressed Hungarian minorities. This dream has not been realized, a source of great pain for us Hungarians, and for anyone who respects human rights, a source of shame.

How, in your view, can one distinguish between true and false claims of human rights? What are the criteria that a right claim should meet to be legitimately recognized as a human right? What role, if any, do cultural, historical, and political traditions of political communities play in this process? What is the dominant view in your country?

Here again I would like to refer to my earlier comments. As a result of the black-and-white start of human rights, it is very difficult to distinguish between "true" and "false" human rights, both in theory and in practice. The theoretical difficulties are caused by the false appearance of unquestionable truth surrounding all claims that can be articulated as prima facie human rights issues. The recognition of all new interests as human rights seems to be a natural, new step in the triumphant expansion of human rights. After all, human dignity is theoretically the common, natural basis for all human rights and other human needs. Kant's conception of human dignity (the prohibition

of the objectification of humans) is so abstract that any human impulse can easily be assumed to be a human right.

In practice, the distinction is terribly difficult because human rights' needs always prevail in a specific, social, political, and economic context. In this sense, human rights are not universal, since they can only acquire their true, actual content in a specific life situation. As a result, it is not necessarily a problem if the actual content of a particular human right differs slightly in two different countries, even within the European Union. In order for law, and more specifically for human rights, to be effectively enforced in any given community, it is useful to take into account the cultural and social differences between legal systems when legislating and applying that law.

I see that the dominant political view in our country represents a more cautious attitude, and it endeavors to ensure that new needs can be organically integrated into the legal system. The focus is currently on the human rights protection of the earlier constitutional institutions (marriage, parent-child relationship, etc.). This more cautious perception is partly due to the factors I mentioned earlier: Hungarians are more sensitive to new legal demands from external power centers, as a result of their bad historical experiences.

This is further influenced by the fact that, over several centuries, Hungarian sovereignty was only able to exist partially in the form of a kind of legal separation, for example within the Habsburg Empire. For this reason, the external change of the fundamental legal and constitutional order is still a more sensitive topic in Hungary than perhaps elsewhere in Europe.

The UDHR was constructed as an integrated document and the rights as well as the responsibilities contained in it were meant to be "interdependent and indivisible." Why is important in the face of the emergence of new rights claims and how can it provide guidance to human rights courts and institutions?

This is an extremely important question. I am convinced that the spirit of the UDHR and the new Hungarian Fundamental Law [constitution] are very close to each other, both in terms of human dignity and human rights

Article 29 of the UDHR states that the individual has obligations toward the community and that the free and full development of personality can only be conceived within a community framework. Article O of the Hungarian Fundamental Law echoes this, according to which "Every person is responsible for himself or herself and is obliged to contribute to the performance of state and community tasks according to his abilities and opportunities."

It is my belief that the emphasis on the role of the community and the embedding of the enforcement of human rights within the community correctly indicates the direction of the court's application of law, even if it does not provide truly substantive help in specific cases. After all, while it makes the courts sensitive to the consideration of community aspects, and calls for a kind of consideration, it fails to record any specific test or objective content. I think that is right, because this regulation gives the courts sufficient room to maneuver to prevent new human rights claims appearing in the legal code as a result of lobbying by interest groups, but rather as a result of genuine social expectation or acceptance.

LUCA PIETRO VANONI

Associate Professor of Comparative Public Law, University of Milan

Education: University of Milan, JD, 2001
University of Pavia, PhD, 2005

"The Pursuit of New Rights Arises from a Decline in Robust Political Discourse on Contentious Legal Issues"

In retrospect, the UDHR served as a starting point for a "revolution" that has resulted in a continuously increasing number of international treaties, human rights control mechanisms, and courts. On the other hand, it has become the lingua franca of almost every discussion of justice, of the proper boundaries of individual liberties and the contours of the common good, and of what responsibilities we owe to one another in society. In the words of the late Jonathan Sacks, it is the dominant mode of discourse. What are, in your view, the consequences of this evolution? How do you see this development in your country?

In my opinion, the issue does not stem from the language of human rights itself: especially after the Second World War, the UDHR and the doctrine represented significant achievement that have contributed to decades of peace and prosperity in Western societies.

The true challenge within the human rights revolution lies in the transformation of the grammar and vocabulary of political and legal doctrines that we have witnessed/experienced over the decades, and particularly in our current postmodern times. I will try to address this issue in three steps that generally concern constitutional systems, including the Italian one.

The first step concerns the individualization of human rights doctrine. Over 30 years ago, Mary Ann Glendon cautioned that a new language of human rights emerged at the end of the twenieth century, placing individualism at the heart of the human rights doctrine and promoting the individualist legal claims as the main driver of legal change. This was not the original understanding of the UDHR. As highlighted in the summary of this conference through Eleanor Roosevelt's words, "the universality of Human Rights is rooted in small towns, villages, and local communities." This implies that the universality of human rights was initially founded on the sense of community that people share, rather than on the role of isolated individuals within society. However, this is no longer the prevailing perspective, and Roosevelt's original sentiment seems to have been lost: the universality of human rights is now anchored in individualistic claims and a distorted notion of nondiscrimination.

The transformation of the fundamental core of the human rights doctrine has yielded at least two noteworthy consequences. First, it has resulted in the impoverishment of political discourse, as Mary Ann Glendon noticed. Secondly, it has given rise to legal and political theories, namely cosmopolitanism and supranationalism. And this brings me at the second step.

Cosmopolitanism, supranationalism, and globalism swiftly emerged as cornerstones of the postmodern era, signifying a transition from "solid" to "liquid" times. Consequently, this shift led to the waning influence of traditional structures and institutions, resulting in the diminishing significance of families, communities, and even nations as the customary sources of "proper identity recognition," to borrow a term from Charles Taylor. This political transformation also gave rise to a psychological fragmentation of collective identities. In the postmodern understanding of identity, there is a strong emphasis on

inner voices and authenticity, concepts intimately linked to individuals' perceptions of reality.

An illustrative example can shed light on this transformation: when I was a child, my dream was to own the soccer jersey of my favorite team, Inter Milan, because I aspired to be a part of the team's identity. However, today's children exhibit a different attitude. They are less concerned about supporting specific teams and more interested in owning the jerseys of renowned players. Their allegiance is not just to Inter Milan or Ferencváros, but rather to individual players like Cristiano Ronaldo or Messi. They no longer celebrate their city's team victories but focus on the personal achievements of the most famous players. Their sense of belonging has shifted from team victories to personal individual gains.

From a sociological point of view, this postmodern revolution has given rise to the postmodern motto that forms the core of the identity politics phenomenon: "be yourself, and reclaim your identity in the public space, marking your difference from others." A new grammar of human rights stems from this postmodern conception, altering the concept of nondiscrimination and the quest for inclusion into a broad political community.

Another example from the US could help us to understand the political outcomes of this sociological change. During the 1960s, the American Civil Rights movement leveraged human rights doctrine to advocate for equality and social justice for African Americans. This aspiration for inclusion was epitomized by Martin Luther King's famous speech "I Have a Dream" at the Lincoln Memorial. Today, the Black Lives Matter (BLM) movement continues the struggle against brutality and violence targeting Black individuals; however, while Martin Luther King aimed for the inclusion of Black people in American society, BLM emphasizes the distinct identities of its members, demanding

recognition of their differences from the broader society. This shift fundamentally alters the concept of equality as inclusion within a wide political context. This differing approach becomes evident when we consider some BLM activists' calls for the removal of Thomas Jefferson's university statues due to his history as a slave owner while, in contrast, Rev. King famously quoted Thomas Jefferson's words from the Declaration of Independence to advocate for equality and liberty across the nation.

This brings us to the third step. Addressing this perspective, Cosmopolitanism aims to establish a fresh foundation for the global political order, rooted in liberal constitutionalism and in a new grammar of rights, transplanting the *thick normative* theory of human rights into a *thin political and sociological* context. Moreover, the emergence of identity politics in the contemporary global landscape, within the context of the postmodern world, poses a direct challenge to the foundational principles of liberal constitutionalism. By emphasizing the distinctiveness of specific groups in the pursuit of equality and nondiscrimination, the alliance between identity politics and human rights has led to a shift of power from representative institutions to both domestic and supranational judiciaries. This phenomenon has led to the emergence of what is commonly referred to as *Juristocracy* or *Courtocracy*, resulting in two significant consequences. First, it transforms the theory of liberal constitutionalism into neo-constitutionalism, unsettling the established balance of powers enshrined by the principle of the separation of powers. Secondly, it reshapes the language and decision-making approach of judges, who now consider the psychological and emotional impact of the human rights doctrine.

> **Since human rights have become the dominant mode of discourse, one increasingly faces the emergence of new**

rights claims. However, the increasing number of false claims of rights can weaken the moral force and prestige of the human rights. How do you see this side of the coin and what is your experience in your country?

In my perspective, the challenge of rights claims, including those related to new rights, extends beyond merely determining what is true or false. It revolves around the fundamental question that constitutional law confronts within a liberal democracy: who decides? As observed previously, in the postmodern era, the language of human rights, particularly when it pertains to new rights claims, is predominantly articulated through the voices of judges. But as Justice Scalia argued several years ago, "Why we judges are expert of this questions? What did I learn in Harvard Law School that gives me more insight than other ordinary citizens? Judges have not special qualification for that. I believe in natural law. But I believe that in a democracy is up to the people, not judges, to decides if abortion, or euthanasia, or homosexual marriage could become law of the land."

In other words, the pursuit of new rights, whether valid or not, arises from a shift in the language of human rights and a decline in robust political discourse on contentious legal issues. This transformation becomes evident when we consider the prominence of specific legal mechanisms in our present-day systems.

First, since the advent of new constitutionalism, the judiciary has been promoted as the primary arena for effecting changes in the legal system. As a result, some of the most pertinent and contentious political controversies that a democratic society can face are now resolved by constitutional and sometimes supranational judges. This theory has given rise to the legal phenomenon of strategic litigation, as creating a robust body of case law has proven to be more effective than seeking votes in the political arena. This phenomenon has also made use of the

so-called "Judicial Dialogues," a mechanism through which legal arguments are transplanted from one legal system to another, providing national judges with new arguments to decide disputes. Consequently, this shift has redirected legitimate demands for public recognition away from the democratic political process and toward constitutional adjudication, contributing to the "litigation boom" in our society.

Secondly, new interpretative theories emerge. Constitutions are no longer seen merely as rigid legal boundaries for political discourse; instead, they are regarded as a set of general principles that judges can adjust to align with the evolution of social consciousness. By employing modern legal instruments like proportionality and reasonableness tests, judges are advocating for judicial supremacy over constitutional supremacy. This phenomenon is referred to as living constitutionalism in the United States, but it has also gained prominence in Europe, as underscored by the former president of the Italian Constitutional Court in 2019: "Yesterday, in the modern era, judge's job was to adapt the fact to the legal rule using a logic-deductive syllogism. Today, in the postmodern legal era, the judge has to understand the facts behind the case law (…) and adapt the legal rule to these facts of life, looking for the more adjust solution. The judge's job is therefore materializing into a process of *invention* [in-ventio, which in Latin designs the act of "finding in the reality"] that is opposite to a syllogism because it involves not only the logic and rational abilities of the judge, but especially his axiologic abilities such as intuition, perception, comprehension."

It becomes clear why, as I mentioned earlier, judges are now taking into account the psychological and emotional ramifications of the human rights doctrine. By seeking public acknowledgment of differences, identity politics are shifting the court's legal arguments away from tangible injuries to the rights of the applicants and toward the subjective perception of a wounded identity.

An illustrative example from my country could provide valuable insights into this transformation. In the well-known case of *Lautsi v. Italy*, the Second Section of the European Court of Human Rights (ECHR) argued that displaying the crucifix in Italian classrooms was deemed unlawful because it "may be emotionally disturbing for pupils of other religions or those who profess no religion." Although this ruling was later overturned by the Grand Chamber a few years later, it serves as an example of how deeply the narrative of identity politics has influenced the legal reasoning of judges. This case introduced into the legal arena the notion of the right not to be offended, a concept not explicitly established by any constitution. As Michael Sandel has pointed out "Judicial narratives are capable of flattening questions of meaning and identity into questions of equality and fairness."

> **How, in your view, can one distinguish between true and false claims of human rights? What are the criteria that a right claim should meet to be legitimately recognized as a human right? What role, if any, do cultural, historical, and political traditions of political communities play in this process? What is the dominant view in your country?**

Once again, from my perspective, the issue does not revolve around the validity of claims but rather on the increasingly blurred lines between the political process and judicial adjudication. New constitutionalism and juristocracy present a significant challenge to one of the foundational principles of liberal democracy: the separation of powers. Those theories have turned judges from being the "bouche of the lois" into active participant of the political arena, shifting them from negative legislator to positive ones. As Pierre Manent noted, "The democratic system which rested on a certain equilibrium between executive power and legislative power tends to be substituted by a system which is

dominated by a scattered and diffused judicial power which derives its legitimacy from itself."

I would like to provide an example from Italy where the Constitutional Court has encroached upon the realm of legislative power, notably in the well-known Cappato Case (ICC, 207/2018). Marco Cappato, an Italian deputy, assisted a severely injured person in ending their life by driving them to a Swiss clinic that performs assisted suicide. Upon his return to Italy, Cappato faced indictment because, under the Italian penal code, assisting someone in taking their own life is considered a crime (art. 580 c.p.).

The case reached the Constitutional Court that ruled for the unconstitutionality of art. 580 of the Italian Penal Code. Since constitutional judges could not find a specific clause in the Constitution, they adopted a subjective-individualistic approach, deducing from the self-determination principle (as general and vaguely defined right to liberty) a constitutional right to die under certain conditions. Furthermore, constitutional judges called upon the Parliament to pass a bill amending the criminal code, defining in their decision the conditions and the procedures for this new right. In doing so, the constitutional judges invoked the vague principle of "loyal collaboration between powers," not established by the Italian Constitutions, even creating a new decision-making technique. In sum, ICC a) introduced a new right into the legal system; b) delineated the conditions and procedures for enforcing this right; and c) called upon the Italian Parliament to formalize its decision through a new piece of legislation. The ICC decision suggests that the role of constitutional judges has evolved from being the guardians of the constitution to becoming the guardians of the parliament: paraphrasing Chief Justice Roberts's famous dissenting opinion in *Obergefell v. Hodges*, "who do [you] think [you] are?"

The UDHR was constructed as an integrated document and the rights as well as the responsibilities contained in it were meant to be "interdependent and indivisible." Why is important in the face of the emergence of new rights claims and how can it provide guidance to human rights courts and institutions?

To reestablish the human rights doctrine, I think it is essential to heed the words of Roosevelt that you highlighted in your summary: "universal rights begin in small places close to home (…) Unless these rights have meaning there, they have little meaning anywhere."

This implies that at the supranational level, we should employ legal tools such as subsidiarity and the margin of appreciation to assist judges in restoring the proper balance between the universality of rights and the historical traditions that each member state follows in their enforcement. As Mary Ann Glendon has argued, "after all, rights emerge from culture; rights cannot be sustained without cultural underpinnings; and rights, to be effective, must become part of each people's way of life."

On the domestic level, it seems imperative to restore the proper and clear boundaries between political discourse and constitutional adjudication. Postmodern liberalism suffers a form of "constitutional presbyopia" because, in its pursuit of emphasizing the universality of rights, it has lost sight of the boundaries of powers. By shifting the arena of conflict resolution from the realm of powers to that of rights, new constitutionalism has favored a predominantly dialectical approach over a dialogic one. Through court's rulings, it establishes the supremacy of one perspective over others, often at the expense of a dialogic reconciliation of disagreement. But in the democratic interplay of powers, different positions should have the opportunity to coexist within a common frame, debating their arguments in

a political arena. Restoring the separation of powers, therefore, involves ensuring the independence of the judiciary, as it is impossible to sustain a constitutional democracy without independent judges. However, it also entails curbing the powers of the Constitutional Court, reverting them to their original job: to say what the law is, not what is ought to be.

National Sovereignty, Subsidiarity and Human Rights

THE MODERATOR'S FOREWORD

Reflecting on the 75th anniversary of the adoption of the UDHR, this profound conference panel explored the intricate, albeit essential interplay among national sovereignty, subsidiarity, and human rights. Featuring well-respected panelists from three continents, the discussion delved into the historical, contemporary, and future dimensions of these pivotal concepts and their interrelations.

During the discourse, the panelists delved into the significance of national sovereignty and the essential role of nation-states in upholding human rights. They also examined how the interpretations of subsidiarity and national sovereignty have evolved over the 75-year lifespan of the UDHR. Furthermore, the experts contemplated the notion of universality and speculated on the evolving understanding of subsidiarity and national sovereignty in the years ahead.

The engaging and insightful panel discussion yielded several noteworthy insights: the intricate connection between national sovereignty, subsidiarity, and human rights emerged as a central theme. Effective governance necessitates a delicate equilibrium between respecting the sovereignty of nations and safeguarding the inherent rights of individuals. But human rights shall not be perceived as a binary structure between the state and the individual: it requires the understanding of the relationship of humans within a community and society that ultimately enables the personal development and liberty of all individuals. Among the major conclusions of the panel discussion was that these fundamental concepts must remain of utmost importance to ensure an effective response to the evermore challenging global landscape.

The conference panel on the 75th anniversary of the UDHR, exploring national sovereignty, subsidiarity, and human rights, served as a platform for a diverse array of voices to participate in a thought-provoking discourse. The wisdom shared by the panelists underscored the enduring relevance of these concepts in an ever-evolving world and amidst new challenges. As we navigate the complexities of the twenty-first century, the nuanced interplay between sovereignty and subsidiarity should continue to illuminate our path toward the genuine recognition and realization of human rights.

Gabriella Érdi
Student of MCC

HAJIME YAMAMOTO

Professor of Law at Keio University

Education: J. S. D., University of Tokyo, Tokyo (1992)
LL. M., University of Tokyo, Tokyo (1987)
B. A., Political Science, Waseda University, Tokyo (1984)

"In Reality, the State Is Necessary to Realize Human Rights"

The theme of today's conference is "*Rescuing Our Inalienable Rights*." Needless to say, it is our very basic and common recognition that everyone in the world has certain inalienable rights. We are all born with certain fundamental rights no matter where we are born because these rights are universal.

Today's conference is held to commemorate the 75th anniversary of the adoption of the UDHR that took place in 1948. After the indescribable tragedies of World War II, including Hiroshima and Nagasaki, that occurred in many parts of the world, it was none other than this Declaration that was adopted to confirm these inalienable rights. As is known, Article 1 stipulates that "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act toward one another in a spirit of brotherhood." Yet, there is no disagreement that, while these rights are extremely important, every right is not considered to be absolute or completely unlimited. For example, freedom of expression is an indispensable right for the realization of a democratic society; however, it is evident that this right comes with certain limitations. In fact, Article 19 paragraph 3 of the *International Covenant on Civil and Political Rights* emphasizes the restrictions on freedom of expression and specifically enumerates the following reasons: "(a) For respect of the rights or reputations of others" and "(b) For the protection of national security

or of public order, or of public health or morals." It should be noted that the latter reasons are, by nature, asserted and invoked by those who exercise public power under the name of state sovereignty for the interests of the political community. We must always be vigilant against the abuse of state power from the constitutional point of view. Violations of human rights as universal rights can occur anywhere, as Eleanor Roosevelt remarked in 1958 as follows: "do universal rights begin? In small places, close to home—so close and so small that they cannot be seen on any maps of the world." We must candidly acknowledge that very often, voices seeking human rights protection in small places are not easily heard by those who exercise state power.

Jacques Maritain and human rights: how to relate human rights to the state and the political community is the most fundamental theoretical issue when contemplating human rights protection. I would like to refer to Jacques Maritain's thought on the individual, state, and the political community in order to reflect on the issue. Jacques Maritain was a French Catholic intellectual and a neo-Thomist philosopher of the twentieth century.

It is well known that Jacques Maritain's humanist idea based on personalism played an important role in the drafting process of the UDHR. The foundational draft for Article 1 of the UDHR was presented by the French legal scholar René Cassin, who served as a member of the drafting committee of the UDHR chaired by Eleanor Roosevelt. Cassin was awarded the Nobel Peace Prize in recognition of his contributions in 1968. It is remarked that "It appears that Maritain's intellectual influence on Cassin was marginal, without diminishing Cassin's support and esteem for his fellow countryman and Christianity" (Pedro Pallares-Yabur). Maritain's central idea was a "politics of common good and fraternity," with human dignity and rights at its core.

As for the relation between individual and society, unlike Immanuel Kant's perspective, Cassin did not start with the isolated individual, but rather, he assumed the social nature of humans and took as a central starting point the unity of the human family, understanding the relationship of humans within society. According to Cassin's viewpoint, the purpose of society is to enable the personal development of all individuals. He did not perceive human rights as a binary structure between the state and the individual; instead, he regarded humans as members of intermediate groups such as diverse communities in the society, demanding that these entities play a significant role alongside the state (Yuko Osakada).

In his book titled *Man and State* published in 1951, Jacques Maritain engages in a comprehensive framework concerning sovereignty, state, society, community, and governmental institutions, and positions human rights within this framework. Therefore, it is worth referring to his work for a comprehensive perspective to engage with the questions given by the conference organizer.

First, he draws a distinction between "community" and "society" in the following way. "Both community and society are ethico-social and truly human, not mere biological realities. But a community is more of a work of nature and more nearly related to the biological; a society is more of a work of reason, and more nearly related to the intellectual and spiritual properties of man." And he remarks that "the Nation is a community, not a society. The Nation is one of the most important, perhaps the most complex and complete community engendered by civilized life."

Secondly, as for his classification about "society," he says: "In contradistinction to the Nation, both the Body Politic and the State pertain to the order of society, even society in its highest or "perfect" form." By "Body Politic," or according to his alternative phrasing

"Political Society," Maritain is probably referring to what is more commonly expressed as "Political entity or collectivity," and state is "governmental organizations." For him, "Not only is the national community, as well as all communities of the nation, thus comprised in the superior unity of the body politic. But the body politic also contains in its superior unity the family units, whose essential rights and freedoms are anterior to itself, and a multiplicity of other particular societies which proceed from the free initiative of citizens and should be as autonomous as possible."

The crucial point of Maritain's argument is the question of where authority comes from. He explains, "Since in political society authority comes from below, through the people, it is normal that the whole dynamism of authority in the body politic should be made up of particular and partial authorities rising in tiers above one another, up to the top authority of the State." So, the state he envisions is a pluralistic and multilayered one. "State" in his argument, "is a set of institutions combined into a topmost machine." In a common expression, "State" is a set of governmental organizations. Furthermore, Maritain explains that the state is "an agency entitled to use power and coercion, and made up of experts or specialists in public order and welfare, an instrument in the service of man." He contrasts "instrumentalist" theory and the "despotic notion of the State" and criticizes the latter and supports the former. Under the "instrumentalist" theory, the state is only "an instrument of the body politic, subordinate to it and endowed with topmost authority not by its own right and for its own sake, but only by virtue and to the extent of the requirements of the common good" while under the "substantialist" or "absolutist" one, "the State is a subject of right, i.e., a moral person, and consequently a whole."

Maritain's thoughts on "sovereignty" are a very radical: "Sovereignty means independence and power which are *separately* or *transcendently*

supreme and are exercised upon the body politic *from above*." "In the eyes of a sound political philosophy, there is no sovereignty, that is, no natural and inalienable right to *transcendent* or *separate* supreme power in political society. Neither the Prince nor the King nor the Emperor were really sovereign, though they bore the sword and the attributes of sovereignty. Nor is the state sovereign; nor are even the people sovereign. God alone is sovereign."

In place of the notion of sovereignty, he makes use of the notion of "autonomy." "The *body politic* has a right to full autonomy. First, to full *internal* autonomy, or with respect to itself; and second, to full external *autonomy*, or with respect to the other bodies politic." Though body politic has supreme independence and power under the notion of full autonomy, their nature is only comparative and relative.

As for human rights, his theory is based on natural law. "[I]n its ontological aspect, natural law is an ideal order relating to human actions, a divide between the suitable and the unsuitable, the proper and the improper, which depends on human nature or essence and the unchangeable necessities rooted in." He remarks that "Man's right to existence, to personal freedom, and to the pursuit of the perfection of moral life, belongs, strictly speaking, to natural law."

About the relation between natural law, the common good and human rights, he explains that "Just as every law—notably the natural law, on which they are grounded—they are aims at the common good, so human rights have an intrinsic relation to the common good. Some of them, like the right to existence or to the pursuit of happiness, are of such a nature that the common good would be jeopardized if the body politic could restrict in any measure the possession that men naturally have of them. Let us say that they are absolutely inalienable. Others, like the right of association or of free speech, are of such a nature that the common good would be jeopardized if the body politic could not

restrict in some measure (all the less as societies are more capable of and based upon common freedom) the possession that men naturally have of them. Let us say that they are inalienable only substantially.

With the much-quoted words of Eleanor Roosevelt: universal rights start at small places, close to home. This shines a light on how the principle of subsidiarity has a key role in ensuring the protection of human rights. Some voices, however, consider human rights as a threat to national sovereignty. Why do you see a conflict between these two notions? Can human rights be realized without states and political communities? Can you explain the importance of the nation-states and national sovereignty in defending human rights?

Recognizing that Maritain's ideas form the foundational principles of the UDHR, the answer to question 1 regarding sovereignty and human rights might be as follows: sovereignty should be understood as the right to full internal and external autonomy. The body politic or political society is pluralistic and multilayered. Therefore, the state should carefully respect the various elements of society. Of course, in reality, the state is absolutely necessary to realize human rights. It should be ensured that the state as an instrument for realizing the common good, including the protection of fundamental human rights, is not an end in itself. And the internal autonomy that the state maintains and administers is only a relative power over the people, and its authority does not come from above but from below. That is why the exercise of such a power is not to be automatically justified. In an exceptional situation, for example, the activities of the mass media may be restricted for reasons of national security. However, in order to confirm whether there is an abuse of state power, such restriction of human rights by the state must be reviewed by an impartial third party, such as a court of law.

One can think of the case of the "failed state" regarding the importance of nation-states and national sovereignty in defending human rights. If there is no state in a certain region that can effectively govern and maintain security, an anarchic state could emerge. This could endanger the lives of the people living in that area.

Do you see a difference in how the role of the principle of subsidiarity and national sovereignty was interpreted at the time of proclamation of the UDHR and how it is interpreted currently? Could you illustrate this?

Regarding the evolution of the role of subsidiarity and national sovereignty between the time of the proclamation of the UDHR and the present, it is well known that the UDHR is not a legally binding document; such obligations were later entrusted to the human rights treaties adopted by the United Nations. Jacques Maritain noted that "no declaration of human rights will ever be exhaustive and definitive. It will always go hand in hand with the state and moral consciousness and civilization at a given moment in history" ("On the Philosophy of Human Rights"). Certainly, the international community has witnessed grave human rights violations that have gone unaddressed, demonstrating that relying solely on nation-states to resolve them is insufficient to bring about improvement. Action has been taken to remedy such situations. In the 1960s, two human rights covenants were adopted: the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights. In addition, from the 1960s to the present, human rights treaties have been adopted to protect persons belonging to certain categories (race, gender, children and disabled persons) and to prohibit certain acts through human rights treaties, and optional protocols have been introduced under each human rights treaty to impose additional

obligations on states. It is obvious that the development of such international human rights treaties means the increasing legal constraints on national sovereignty. Nowadays, seven of the nine so-called core treaties of international human rights "represent a broad international consensus on legally binding human rights which, in many respects, are broader or more specific than provided by the 1948 Declaration," as Douglass Cassel points out. Recently, the issue of "business and human rights" has become of paramount importance. While this issue is not explicitly addressed in the UDHR, there is a growing demand for proactive engagement. In addition, the protection of indigenous peoples has also become an important issue from an international human rights perspective.

These phenomena imply the international community is becoming more active in human rights issues, as part of the requirement stemming from the "principle of subsidiarity." It should not be overlooked that the reason for the emergence of such a situation lies precisely in the fundamental ideals of the UDHR. The UDHR was given such a title not because it considers human rights issues to be a matter solely between nations, i.e., international issues, but rather as concerns of the global community of humanity. It is precisely for this reason that the title of this Declaration is "Universal" rather than "International." The UDHR does not grant exclusive jurisdiction over human rights to sovereign states alone. In other words, while the role of sovereign states in ensuring human rights is crucial because of their eminent powers and capacities compared to other social actors, the perspective of the UDHR emphasizes that sovereign states are not the exclusive entities responsible for the protection of human rights. Sovereign states often find it difficult to escape the tendency to privilege majority cultures or interests. Individuals in need of human rights protection within their own countries are often composed of political or social

minorities. Therefore, ensuring adequate human rights protection for them through the political processes in the domestic parliament can be quite challenging by the very nature of the issue. Especially in cases where prejudice-based discrimination is widespread in society, it becomes difficult for the domestic population to recognize and reflect on it as discrimination. Therefore, in such cases, the use of international human rights treaties is required to ensure human rights protection.

What is the rationale behind having a universal document if, as in the words of Jacques Maritain (one of the framers of the UDHR) "many different kinds of music [can] be played on the document's thirty strings?" What does universality mean?

It is well known that the idea of the universality of human rights, which is assumed by the UDHR, has been challenged from the perspective of cultural relativism. The idea of the universality of human rights based on modern human rights declarations in the USA and France is sometimes criticized for being fundamentally rooted in Western-centric human rights standards. This trend can be observed not only in Asian countries, but also in Arab, African, and Latin American countries. It is argued that the idea of universal human rights, which rapidly gained prominence after the Second World War, is an embodiment of the values of the Western countries that spearheaded it. According to this perspective, its essence is nothing more than a manifestation of cultural imperialism and neocolonialism.

In Asia, against the backdrop of rapid economic development since the 1980s, even within the label of "Asia," there is an extremely diverse range of religions and cultures. There has been a problematic discourse that tries to justify the nonacceptance of the idea of universal human rights. This discourse is known as the "Asian values" discourse. While Western countries sought democratization and compensation for

human rights from Asian countries, these countries strongly asserted their national sovereignty and vehemently resisted any interference in their internal affairs. It suggested that because of cultural differences between Asia and the West, concepts such as human rights and democracy, which are taken for granted in the West, are not necessarily readily applicable in the Asian context. It is well known that Lee Kuan Yew (former Prime Minister of Singapore) asserted that a good government for the people of Asia is not a state that prioritizes human rights, but rather a government that provides the necessities of clothing, food, shelter, education, and security for its citizens, while also pursuing economic development.

It is important to note that among the so-called "Asian values" there are phenomena not uncommon in other regions of the world. Ji Weidong points out that "Chinese individualism" envisions individuals with a sense of solidarity, considering the situational logic, specificity, concreteness, and the overall significance of everyone, without neglecting the entirety of their lives. It has also been pointed out that today there is a surprising consensus across cultures on many of the values we seek to protect through human rights (Jefferson Plantilla). Moreover, as Mushakoji Kinhide pointed out, the introduction of Western concepts such as "nation," "freedom," "democracy," and "human rights" into Japan and East Asia mobilized dissident intellectuals and other social strata in each country at different times. Ruling elites also sought to bolster their legitimacy through their own interpretations of these concepts, borrowed from European notions. In their cases, concepts such as "nationalism," "the people," "equality among nations," and "cultural identity" were emphasized. National, social, and political discussions, whenever they took place, were grounded in some form of modern Western cultural values.

In Bangkok in March 1993, ministers and representatives of Asian states adopted the "Final Declaration of the Asian Regional Meeting of the World Conference on Human Rights." This so-called "Bangkok Declaration" emphasized "national and regional specificities and different historical, cultural and religious backgrounds" in the protection of human rights, as well as "the principles of respect for national sovereignty and territorial integrity, noninterference in the internal affairs of States and the non-use of human rights as an instrument of political pressure." However, the "Vienna Declaration and Programme of Action" adopted by the World Conference on Human Rights three months later in July 1993 countered the strong skepticism about the universality of human rights raised by the "Bangkok Declaration" and instead emphasized its importance. Nationalism, associated with notions of national, regional, historical, cultural, or religious uniqueness, has served as a driving force for the establishment of sovereign states in Asia. However, such nationalism can have oppressive effects domestically and, when used to colonize other countries, in those regions as well. The historical path that modern Japan followed until World War II is a clear example of this dynamic. During that time, Japan imposed a policy of promoting Japanese culture centered on the emperor within its borders and enforced a policy of imposing Japanese culture in its colonies as well.

ASEAN, the organization for regional integration in Southeast Asia, has gradually emphasized the values of human rights and democracy since the 1990s, but it willingly acknowledges the differences based on region and country in the realization of human rights. Moreover, up to the present day, there is no effective method for human rights redress.

The issues that arise in the relationship between culture and human rights are complex, and it is important to approach the reconciliation of culture and human rights in accordance with the specific circum-

stances of the issue. In many human rights cases, government officials in authoritarian regimes appeal to regional specificities such as culture. Moreover, in such cases, it is important to note that these government officials arbitrarily select the culture and traditions they appeal to (Mitsunori Fukada). Based on these considerations, the following observations can be made. First, as a matter of human rights protection, protecting the cultures of minorities such as indigenous peoples within a country is an important task; the Declaration on the Rights of Indigenous Peoples in 2007 emphasizes the significance of safeguarding the rights of indigenous populations. Secondly, it is undesirable to treat culture as something fixed and static, based on "cultural essentialism." Culture should be understood as dynamic, open to multiple interpretations, and subject to change as it evolves into the future. Interpreting culture as something static can potentially lead to culture taking on oppressive functions. Thirdly, using culture as a pretext to repress citizens who exercise their freedom of expression to criticize a culture from within or without is unacceptable in a democratic society. Moreover, it is imperative not to undermine the dignity of individuals who do not belong to a national culture or a particular culture within it.

As for Jacques Maritain's statement that "many different kinds of music can be played on the thirty strings of the document," one can interpret the UDHR as follows. Article 19 of the UDHR guarantees freedom of religion. Its concrete meaning varies greatly depending on the religious context of each country, for example, whether most people adhere to a single religion or people hold diverse religious beliefs, or whether a country has an established religious system or practices separation of religion and state.

In India, there is the concept of "Social Action Litigation." In this type of litigation, the subjects of rights are the poorest individuals such

as street dwellers, bonded laborers, and those incarcerated in prisons. While the formal process involves social activists initiating the legal proceedings, they do so on behalf of individuals who lack access to the judicial system. This framework involves distinct groups that are different from both the state and the individual, being recognized as bearers of rights. It is evident that the content of their rights claims is significantly different from the human rights demands put forth by people in advanced nations.

The Japanese international legal scholar Yasuaki Onuma has thoroughly criticized the conventional "universalist perspective on human rights" and, in opposition to it, has put forward the concept of "transcivilizational perspective on human rights." Onuma explains the reasons why one must adhere to a concept of human rights that is rooted in the Western cultural sphere as follows: The overwhelming majority of the world's population, living in Third World countries characterized by different cultures, religions, and historical contexts from those of Europe, where the concept of "human rights" originated, have sought to encapsulate and formalize their most pressing demands, such as independence from colonial rule (national self-determination), escaping poverty, and achieving economic development, within the framework of "human rights." This fact testifies not only to non-Western people, but also to individuals around the world, that human rights are a tempting way to crystallize urgent human desires, aspirations, wishes, and expectations. In his opinion, not the Bangkok Declaration but "the Vienna Declaration should be construed as the most authoritative—internationally, transnationally and transcivilizationally legitimate—expression of human rights, agreed by humanity at the end of the twentieth century."

How do you see the future of the principle of subsidiarity and national sovereignty? What treaty and institutional reforms would you consider necessary to better implement these principles throughout the human rights system?

Views on the principle of subsidiarity and that of state sovereignty vary considerably in different regions of the world. In Europe, where the binding force of human rights on state sovereignty is particularly strong, reconciling the demands of human rights protection with the protection of the principle of state sovereignty continues to pose complex challenges. Conversely, in Asia, where there are neither regional human rights treaties nor human rights courts, the dynamics of this reconciliation are very different from those in Europe. Beyond the differences in circumstances between Europe and Asia, the Report for the Commission on Unalienable Rights remarks that "State sovereignty…should not be an alibi for neglecting or abusing human rights."

I would like to present the Japanese experience. Although Japan has ratified major international human rights treaties, the reality remains that the Japanese government and judiciary have not been particularly proactive in embracing the framework of international human rights treaties. In the past, despite the established understanding that the superiority of treaties over legislation is recognized in the Japanese legal system, it was rare for the human rights guaranteed by international human rights treaties to be invoked by the Japanese judiciary, on the grounds that they closely parallel the rights enshrined in the Japanese Constitution. Today, there is a greater tendency to refer to international human rights treaties than in the past, but it still cannot be said to be consistently sufficient. It is hard to deny that there is a lack of understanding of the international human rights protection system among Japanese judges. In this regard, the Japan Federation of Bar

Associations has expressed the view that two issues in particular are of paramount importance. The Japan Federation of Bar Associations is a federation of local bar associations composed of lawyers who are members of bar associations in all regions. It has played a role in representing the opinions of Japanese lawyers and voicing their concerns.

The first issue concerns the introduction of an individual complaints procedure for human rights treaties. International human rights treaties provide for an individual complaints procedure, which allows individuals whose rights guaranteed by the treaties had been violated and who have exhausted domestic remedies without obtaining the restoration of their rights to petition the human rights treaty bodies directly for redress. This procedure can be established by ratifying the optional protocols to the ratified treaties. However, the Japanese government has maintained the position that the implementation of such a procedure would jeopardize the independence of the judiciary protected by state sovereignty, and as a result, this procedure has not been implemented in Japan to date.

The second is the establishment of a national human rights institution, which has been established in many countries around the world in accordance with the "Paris Principles" adopted in 1993. Such an institution operates independently of government agencies and is responsible for providing human rights assistance, making recommendations on human rights policies to legislative and administrative organs of the central and local governments, conducting human rights education programs, and acting as an agency for international cooperation in human rights matters.

JOSEPHAT KILONZO

Lecturer at Strathmore Law School, Nairobi, Kenya.

Education: Centre for Human Rights,
University of Pretoria (South Africa), LLM

"National Sovereignty Is Important When It Comes to Defending the Rights Against Threats from Foreign Actors"

With the much-quoted words of Eleanor Roosevelt: universal rights start at small places, close to home. This shines a light on how the principle of subsidiarity has a key role in ensuring the protection of human rights. Some voices, however, consider human rights as a threat to national sovereignty. Why do they you see a conflict between these two notions? Can human rights be realized without states and political communities? Can you explain the importance of the nation-states and national sovereignty in defending human rights? Considering the legal history of your country, what is your own experience?

Foremost, human rights should not be seen as a threat to sovereignty. Often, those who view human rights as a threat to national sovereignty are individuals who have or are likely to infringe on human rights. In any case, states are established to protect fundamental rights and freedoms. Essentially, states and political communities are central to the realization of human rights and fundamental freedoms. As it stands, states bear the primary responsibility when it comes to human rights protection. And they are an important vehicle for protection of human rights from private actors.

Nation-states and national sovereignty are particularly important when it comes to states defending the rights of their citizens or

nationals against threats from foreign actors, be it against other states or multinational organizations. This is actually important in Africa where there are multinationals committing human rights violations, especially in the minerals and extractives sector.

Do you see a difference in how the role of the principle of subsidiarity and national sovereignty was interpreted at the time of proclamation of the UDHR and how it is interpreted currently? Could you illustrate this?

I wish to start with a disclaimer, namely that during the drafting and adoption of the UDHR, only four African States were present: Ethiopia, Liberia, Egypt, and South Africa, which at the time was under the apartheid regime.

In the late 1950s and 1960s when many African States attained their independence, the main concern was focused more on sovereignty and territorial integrity than on human rights. When the Organisation of African Unity was established in 1963, it was thus more concerned with the sovereignty and territorial integrity of its member states than with human rights. This left little space for subsidiarity. The notion of noninterference was adopted by the OAU under its Charter. Because African States during the postindependence era believed and argued for noninterference with their internal affairs, many blatant human rights violations were committed without accountability.

With the concerns that arose following the blatant violations of human rights, in 1980 the African Charter on Human and Peoples' Rights was adopted in 1980. The African Commission was established under the Charter to hear and determine complaints relating to violation of rights under the Charter. Based on this, the notion of subsidiarity found good footing under the Charter. Later, the African Court on Human and Peoples' Rights was established to complement the

protection mandate of the African Commission, further foregrounding the notion of subsidiarity.

In 2002, the OAU was replaced by the African Union (AU). Under Article 4(h), the AU Constitutive Act, 2000, the noninterference approach under the OAU was replaced with nonindifference. Thus, the AU increased interest in internal affairs of its member states and, where necessary, there can be an intervention within member states following a sanction by the AU. The notion of nonindifference strikes a blow for the principle of subsidiarity.

> **What is the rationale behind having a universal document if, as in the words of Jacques Maritain (one of the framers of the UDHR) "many different kinds of music [can] be played on the document's thirty strings?" What does universality mean?**

The fact that many kinds of music can be played on the thirty strings of the UDHR encourages the acceptability of the document across different cultures in the world. Despite the varied and nuanced understandings of the meaning and interpretations of different rights in across cultures, the UDHR still forms a kind of "universal" basis for the protection of human rights and fundamental freedoms. Due to this, the UDHR is a sort of compromise document that creates an important foundation for protection of rights across the world.

"Universality" can be interpreted to mean "based on common understanding, belief, culture, knowledge, etc., and legitimate and acceptable across different cultures." However, the notion of universality when it comes to human rights is contested because to some, Eurocentric approaches or Western ideologies are presented as universal while they are not. Third World approaches to International Law (TWAIL) presents one of the robust critiques of the notion of universality.

How do you see the future of the principle of subsidiarity and national sovereignty? What treaty and institutional reforms would you consider necessary to better implement these principles throughout the human rights system?

With states becoming more insular, placing a foot on the brake pedal regarding globalization and regionalism, they are likely to exert national sovereignty over subsidiarity.

To enhance subsidiarity within the African Continent, AU member states must grant AU supranational powers like EU member states have done with the EU. The ongoing AU reforms aimed at making the AU more effective are commendable.

ANIKÓ RAISZ

Associate Professor of Law at the University of Miskolc

Education: Faculty of Law, University of Miskolc, JD
Centre Européen Universitaire (Nancy, France) DEA (Master, LLM) and DESE (Droit communautaire)
Institut International des Droits de l'Homme (Strasbourg, France) Degree in Comparative Human Rights
University of Miskolc, PhD

"Our History Is Teaching Us That National Sovereignty Shall Not Be Considered as Something to Be Erased but Rather Something to Be Used for Good Purposes"

With the much-quoted words of Eleanor Roosevelt: universal rights start at small places, close to home. This shines a light on how the principle of subsidiarity has a key role in ensuring the protection of human rights. Some voices, however, consider human rights as a threat to national sovereignty. Why do they you see a conflict between these two notions? Can human rights be realized without states and political communities? Can you explain the importance of the nation-states and national sovereignty in defending human rights? Considering the legal history of your country, what is your own experience?

First of all, I would like to make a statement. For me, human rights are completely compatible with national sovereignty. So, in my view human rights are no threats to national sovereignty. However, I also see certain efforts that try to curtail national sovereignty based on human rights claims. The main point here is to be able to differentiate between genuine human rights claims and claims that only seem to be human rights claims or not yet have the status of it. But I also think that it is a difficult question to differentiate between these categories. It is one of the major challenges of human rights today for our societies. In

this regard, it is worth referring to one of the most important engines of human rights development that is the European Court of Human Rights. No prejudice to the other instruments, but we think that the European Court of Human Rights truly contributed to human rights worldwide.

This court uses an approach called the "living instrument" approach. This approach shows the conflicts that this question asks from us. The "living instrument" approach tries to serve as a guidance or helping hand for the court to interpret the Convention, which is in a retired age: the judges have to work with a text that is more than seventy years old. They do this by trying to adapt it to the current circumstances. But, in itself, this can also comply with national sovereignty. It is not only the European mechanism that uses it but other institutions too. If we take an example from another continent, I would like to refer to "continuing violation doctrine" or "continuing situation doctrine." This doctrine might be considered to a threat to national sovereignty. The Blake v. Guatemala is one of its most well-known cases and one of its most emblematic examples for this. The case was about a journalist who was killed by paramilitary forces in Guatemala but, at the time of the killing, the state was not yet party to the Inter-American Convention on Human Rights. Later on, when the state entered, the Inter-American Court of Human Rights held that Guatemala was responsible for not having investigated, persecuted, and punished in the actual case. This perception might be considered as a threat to national sovereignty but, in the end, the concrete case was a good compromise as the basis of the violation was the nonaction of the state.

On the other hand, there are more problematic cases and approaches, especially in regard to religious and symbolic questions. The so-called red star cases are well known in Hungary. The meaning of the red star is obvious in the eastern part of Europe, at least for my generations and

the generations before me. A red star is the symbol of an oppressive dictatorship. Therefore, it is a question of national sovereignty, insofar as it is necessary to be able to judge and rule sovereignly on this issue, rather than make it a question of human rights, because for us it is ultimately a human rights question. For my generation and the generations before me, human rights are related to the nation-state because human rights violations on a massive scale ceased when there was a change of regime and a sovereign state materialized that was ready to act a nation-state. Therefore, for us, it is obvious that nation-states are compatible with the idea of human rights, and the community that shares the same values can easily protect the genuine human rights as long as they deem them to be human rights.

Do you see a difference in how the role of the principle of subsidiarity and national sovereignty was interpreted at the time of proclamation of the UDHR and how it is interpreted currently? Could you illustrate this?

International law is and should continue to be based on national sovereignty. I do not share the view that says that international law is going to swallow the states. Sovereign states are actively contributing to the world order. It is true that there is a difference between how states and the role of the states were regarded before the two World Wars and after that period, and it is also true that there was a shift in the conception of sovereignty in an international legal sense during this period. I do also see that states are now more willing to take compromises than they were in the aftermath of the shock of the Second World War. The question is why they are ready to do that and to what extent. This is different for each state, and this cannot be typified, not even by individual continents. The question is how far the state is willing to go and what it deems as the ultimate red line. The European

example is of a fast-forwarding integration. There are certain red lines, but they are different for each state. Our history is teaching us that national sovereignty shall not be considered as something to be erased but rather something to be used for good purposes.

What is the rationale behind having a universal document if, as in the words of Jacques Maritain (one of the framers of the UDHR) "many different kinds of music [can] be played on the document's thirty strings?" What does universality mean?

This question really takes us to the beauty of law. A legal text is nothing without application; it is basically lifeless. The application of the law cannot be conducted without interpretation. When we are reading a legal text, we are necessarily interpreting it. I think we just have to put the antagonism on the table: universalism on the one side and cultural relativism on the other. It can be imagined as two endpoints, but it is actually a line and there are several positions on that line. My view is closer to the universalist end of this line but also with certain compromises. I truly believe that, based on our experiences, we are all convinced on certain positions on that line. For instance, I believe it is acceptable if a community uses only the concept of communal property. On the other hand, one could easily see that as a pretext to discriminate. Still, if viewed from the perspective of different circumstances, we may have much to discuss about it. For me, what is interesting—given that I have been teaching for more than two decades now—is to see the shift in the mentality and the approach of the Western European students whom I have taught. When I started teaching, the students from Western universities were convinced universalists. However, over the past twenty years, many of those students are now much more open to cultural relativism than were their predecessors. It clearly shows that

European societies have challenges that, while legal in nature, may have deep societal roots, and so have to be addressed with that in mind.

How do you see the future of the principle of subsidiarity and national sovereignty? What treaty and institutional reforms would you consider necessary to better implement these principles throughout the human rights system?

In my view, in the twenty-first century, it is very hard to convince states to take more obligations. States would be willing to take more obligations only if they offer improvement in terms of efficiency. For example, only a quarter of the European states adopted Protocol no. 16 of the European Convention on Human Rights that would introduce an advisory opinion procedure. On the other hand, one of the inspirations of this protocol was the efficient functioning of the advisory opinion in the American continent. But it also has its roots and reasons, which lay in the different system.

To sum up, in my view, employing the current system where it exists and where it works is preferrable to using human rights as a tool to standardize everything, only to find the acceptable common minimum based on the values we all share.

Religious Liberty: The Keystone in the Arch of Freedom

THE MODERATOR'S FOREWORD

The preamble of the UDHR was inspired by the natural law tradition of Neo-Thomism and drafted by Jacques Maritain. Learning from the cataclysm of the Second World War not only brought about a fundamental change in matters of human rights, but it also gave rise to a personalistic comprehension of humanity that Christianity and Maritain also professed. The fourth panel discussion of the *Rescuing Our Inalienable Rights* conference offered a profound overview of the role of religious liberty in the system of human rights as well as in our societies.

As the Papal Documents of Saint John Paul II and Pope Benedict XVI have underlined, religious liberty shall be considered as a core value of humanity: it functions as the keystone in the arch of freedom. Theodor Heuss, the first president of West Germany, said that Europe rests on three hills: the Acropolis, the Capitolium, and Golgotha. Religion not only plays a crucial role in defining European and global cultural values, but it also reveals a higher meaning of life from which human rights intrinsically stem. To comprehend humanity through this personalistic philosophy, religious tolerance must be revered at all times.

The panelists, all excellent professors of legal academia, all agreed that there is a need to reiterate the importance of religious liberty through linking it closely to human dignity. Professor Elyakim Rubinstein from the Hebrew University of Jerusalem—Israel's former Attorney General and former Vice President of the Supreme Court—emphasized that Article 18 of the UDHR is also in close connection with freedom of thought and freedom of conscience. Professor Javier

Martínez-Torrón from the Complutense University in Madrid, who is the current Vice President of the Section of Canon Law and Church-State Relations at the Spanish Royal Academy of Jurisprudence and Legislation, underlined how the false interpretation of secularity and the degrading of religious freedom may pose threats. Professor Szilvia Köbel from the Faculty of Law at the Károli Gáspár University of the Reformed Church, where she conducts research in constitutional law and the regulation of churches, pointed out on a historical note the absurdity of the socialist country Hungary joining the United Nation in 1956 while oppressing religious liberty and many more human rights.

Professor Balázs Schanda, Professor of Law and former Dean of the Pázmány Péter Catholic University, where he teaches constitution law and canon law, drew attention to Christianity as it shaped the face of Europe and enriched the lives of millions. He also noted that the best way to uphold religious freedom is to live religion in its integrity.

This panel aimed to illustrate the diverse array of thoughts on religious liberty. Remembering the 75th anniversary of the adoption of the UDHR proves to be an excellent occasion to reflect to the core values of humanity as they stem from our inherent nature.

Márk Dudás
Student of MCC

JAVIER MARTÍNEZ-TORRÓN

Professor of Law Complutense University (Madrid)

Education: University of Navarra, JD, 1977
University of Navarra, JCL, 1982
University of Navarra, PhD, 1984
University of Navarra, JCD, 1999

"The Protection of Freedom of Thought, Conscience and Religion Concerns Every Person and Not Only Religious People"

The freedom of religion occupies an important place in the UDHR. Article 18 of the document recognizes various aspects of this freedom. What is the complex purpose and function of religious liberty as it is recognized in the UDHR? To what extent is it a value or virtue in itself and to what extent is it a mean to achieve other or even higher purposes?

We may connect Article 18 UDHR with another document of almost 20 years later: the Declaration *Dignitatis Humanae* of the Second Vatican Council. According to *Dignitatis Humanae*, every person has the moral obligation to seek the truth and such obligation can only be accomplished if a person is free to pursue his search for the ultimate truths. We may argue whether all human beings have such a moral obligation, but definitely we all have the right to find our own answers to the crucial and ultimate questions: Who are we? Where do we come from? Where are we going? Was the universe created by God? What is our place in this universe? Is there a life after death? What is the meaning of the universe and our role in it? In other words, we all have the right to try to find the meaning of our lives.

Religions and beliefs try to provide an answer to those questions, which may receive "institutional" responses from religious communities, or individual responses (theistic or not). Art. 18 UDHR is a recognition of that reality, and hence the recognition—and protection—of the

individual and collective dimension of freedom of thought, conscience, and religion. Answers to the ultimate questions that concern human beings may be more or less rational or emotional; they may be the product of deep personal reflection or perhaps just inherited or the result of a social environment, etc. In any event, we all have the right to make our own choices in this area and the right to have our choices respected by the state and by the rest of members of society.

Our answers to those questions—i.e., our religion, belief, or moral conscience—are part of our identity, of who we are. And we have the right not only to find our answers but also to conduct our life in accordance with them. This is reflected in the terminology of Article 18 of the UDHR—"thought, conscience, and religion"—which covers theistic as well as nontheistic beliefs, the freedom to believe, and the freedom to act. In any event, the identity factor is crucial for understanding the true importance of freedom of religion or belief. This is a distinctive characteristic of this right in comparison with other fundamental rights—it protects the freedom to be oneself and not only the freedom to do something.

This is the reason why religious freedom has been often considered a sort of test bench for a democratic legal system; if it is not well protected, it is a sign of a malfunction in the system. Building truly inclusive societies entails respecting every person's religious and moral choices unless there is a prevailing incompatible public interest; and any limitation on freedom of thought, conscience, and religion requires strict proof of the existence of such prevailing interest, as well as of the impossibility—not just the difficulty—to make it compatible with some religious or moral choices of people. Taking freedom of religion or belief seriously does not imply agreeing with people's religious or moral choices, but it requires giving space in our societies to every person, irrespective of whether we share their views. It is essentially

unfair —and the opposite of inclusiveness—to use our personal notion of religion or belief, or our own view on the role of religion and beliefs in society, as a weapon against the religious or moral choices of people we profoundly disagree with. Weaponizing human rights is totally against the spirit of the UDHR, which conceived them as an element of social peace, cohesion, and harmony.

> **Some scholarly opinions consider religion as a great *public common good* in a society as it has public value, not just private amenity. How can religious freedom protect the religion as a *public common good*? What legitimate roles do religion and religious commitment have in public life? What are the major models that countries and societies pursue in this regard?**

One of the direct consequences of the fact that religion, belief, and moral conscience are part of our identity is that they cannot be treated as a hobby. Ethical duties derived from our beliefs (theistic or not) have the nature of supreme rules, which may occasionally conflict with legal duties. This is often the case when some laws are inspired by moral principles that differ from our own; this is happening more and more, as we live in pluralistic societies and states and legislation increasingly regulates (and sometimes invades) our personal lives. These conflicts cannot be seen as the desire to get rid of legal obligations out of trivial or whimsical reasons. For people who take their conscience seriously, such conflicts create a drama: the need to choose between loyalty to their conscience and loyalty to their duties as a citizen. Such persons should be treated by legislators and governments in a proper way and not as infractions of the law. Conflicts between conscience and law should not be seen as a problem but as a necessary challenge and opportunity for societies that aspire to be inclusive. They should be addressed by making every possible effort to accommodate the

religious and moral obligations of every citizen and every religious community. It is unacceptable—and definitely against the spirit and the letter of the UDHR—to permit that a legal system becomes for some citizens a hostile habitat where they cannot but feel excluded or discriminated, especially considering that people experiencing such conflicts are normally a minority.

On the other hand, when looked at from the perspective of a collective phenomenon (i.e., churches or religious communities), religion is often considered as something positive for society; in other words, something that is part of the public common good. Such consideration is present—explicitly or implicitly—in almost all European constitutional or legal systems, irrespective of the formal definition of their model of relations between state and religion. This is the consequence of two interrelated factors. First, religion is always a positive reality as it is the expression of the exercise of a fundamental freedom, and we all probably will agree that exercising fundamental freedoms is something to be praised and encouraged in society, among other reasons because it reveals an attitude of active participation in social life. Second, experience demonstrates that religions—i.e., religious communities and religiously inspired institutions—contribute to welfare in society, spiritually as well as materially (e.g., through educational and charitable activities, fostering a sense of moral responsibility and social commitment in citizens, etc.).

I must add two important nuances to the foregoing. First, this does not mean that everything religions do is necessarily good; some bad or even terrible things are sometimes done in the name of religion. However, most often it is not religion per se to be blamed but people who instrumentalize or misuse religion for their own purposes (fanaticism, political or ideological manipulation, economic benefit, etc.); and when we put things on the balance, the positive side of religion is more

significant, by far, than the negative side. The second nuance is that considering religions as a positive reality—part of the public common good—does not imply that atheism is a negative reality. Establishing an opposition between religion and atheism is artificial and misleading. They are intellectually opposed but not legally or socially. Both atheism (or, more precisely, a diversity of atheistic beliefs or understandings of reality) and religion (or, more precisely, a diversity of theistic beliefs or understandings of reality) are expressions of the search for the truth, and they normally materialize in a sense of ethical and social responsibility. Supporting religion does not imply attacking or undermining atheism.

> **One of the paradoxes is that even though there has been an explosion of human rights in terms of international treaties and apparatus, we have been experiencing an erosion of religious freedom around the world. This is partly due to an increasing secularization, especially in the West, that aims to drive religion out of the public discourse. How do you see this trend and why, in your view, can we experience this contradiction?**

There are various reasons for that phenomenon in Western countries. Among them, I could mention, in the first place, a misunderstanding of what secularity means. The notion of secularity appears in our world on the hand of the so-called "Christian dualism," inspired by Jesus's famous sentence "render unto Caesar the things that are Caesar's, and unto God the things that are God's," which was historically understood as pointing out the differentiation between the secular and spiritual spheres. In this sense, secularity is essential to our understanding of social and political life, and it implies the state's neutrality and impartiality vis-à-vis religion, as well as a recognition of the reciprocal

autonomy of religious communities and state institutions. However, some person—including members of governments, legislatures, and the judiciary—consider that the notion of secularity is attached to a distancing or "liberation" from religion, which would be seen as a sort of irrational approach to reality. Sometimes, people who, for personal reasons, have a nonreligious understanding of life, or are just indifferent to finding answers to the ultimate questions, think that religion is not important; and they transfer such personal attitude to the public realm. In other words, they take for granted that what is not important for them should not be important for anyone—at least anyone rational — and, above all, should not be part of the public life or the public space.

It also happens that some of these people assume—often not openly—that freedom of religion is a sort of "second rate freedom." Of course, they accept that it had to be recognized in international documents because of its significant historical meaning but is not comparable to the "truly essential freedoms," such as freedom of expression, freedom of association, or the right to privacy (which lately has been enlarged more to include the protection of virtually every personal decision about people's private life, especially when related to sexuality or sexual identity; curiously, the "intangibility" of personal decisions is easily denied if they are grounded on religion). Some of them even think that freedom of religion or belief is redundant, that it could be subsumed under those other "classical" freedoms, forgetting that freedom of religion and conscience is the most "classical" of all freedoms, as it was historically the first one to be affirmed in Western culture.

In my opinion, such an approach to religion and freedom of religion reveals a lack of empathy, arrogance, and a lack of realism. A lack of empathy, because it fails to understand the position and the reasons of worldviews inspired by religious values. Arrogance, because

it assumes that those religious positions are irrational or at least not sufficiently rational—as if they knew better what is good for society, a sort of new version of "enlightened despotism." A lack of realism, because such condescending attitudes about religion are typical of Western countries, and they ignore that religion is something that truly matters to the largest part of the world's population (and this applies also to the most cultured people in non-Western countries).

Against these patronizing approaches, it is important to remember that the protection of freedom of thought, conscience, and religion concerns every person and not only religious people, for it refers to one's own ethical identity, as indicated above. And such freedom must be guaranteed irrespective of the model of relations between the state and religion existing in each country. Moreover, the understanding and functioning of those models may be nuanced by the effective guarantee of religious freedom, which protects the manifestation of religion and beliefs—by individuals and groups—in the public sphere and not only in the private realm.

Some of the papal writings have emphasized that religious liberty is strategically central to any functioning system of civil liberties: they call it the keystone in the arch of freedom. How can thinking about human rights be renewed in this spirit? How, in your view, does Jacques Maritain's view on personalism help to achieve this renewal?

It would probably be a good idea to connect the spirit of *Dignitatis Humanae* with the spirit of the UDHR. This implies understanding that human rights—including religious freedom—are not just isolated pieces of a catalog of rights that is just the result of political consensus (and, as such, changeable with no point of reference other than political consensus). Human rights reflect an understanding of the human

person who is endowed with irreplaceable value and dignity, should be the owner of his own destiny and, precisely because of that, has responsibility for his actions also.

Neither blind consensus nor a radical individualistic notion of human rights is a good choice, not only for the future of religious freedom but also of human rights in general. There is an obvious link here with philosophical personalism. Persons are not isolated individuals who live totally independent lives and call on the state only when they have a problem. Persons live in society and have the responsibility—and therefore the moral obligation—to care about all members of society, even when they have opposite views of life. Indeed, the American Declaration of the Rights of Duties of Man (of 1948, before the UDHR was proclaimed) emphasized the need to balance the recognition and protection of human rights with the recognition and encouragement of every person's duties toward society. And the same idea is present in Article 1 UDHR, when it mentions that "all human beings are born free and equal in dignity and rights," and that they "are endowed with reason and conscience and should act toward one another in a spirit of brotherhood."

In addition, philosophical personalism is useful for an adequate understanding of religious freedom in the sense that it helps accept the spiritual and moral dimension of human beings. It is not necessary to have a religious belief to accept it; even for atheists and agnostics, the nature of human beings is involved in an aura of mystery that cannot be dealt with exclusively from a materialistic perspective. Only when such a nonmaterial dimension of persons is recognized is it possible to comprehend the implications and consequences of the right to freedom of religion or belief, which is a condition for the pursuit of happiness. And happiness, in turn, should not be mistaken for welfare; the state can provide for our welfare, but the pursuit of happiness is an irreplaceable

endeavor of each of us. The area of the relation between spirituality and rights, as the relation between spirituality and law, deserve much attention.

The foregoing requires continued reflection and unbiased thinking. Hence, a large part of the responsibility for the much-needed reinvigoration of the true meaning of religious freedom—and human rights in general—resides on intellectuals, who should conduct their work with political independence, open mind, and academic freedom. In contemporary times, this certainly may require some courage, but intellectuals should be willing to pay the price implicit in carrying that name.

ELYAKIM RUBINSTEIN

Associate Professor of Political Studies and Public Policy at the Hebrew University of Jerusalem

Education: Hebrew University of Jerusalem, BA, MA

"Religious Freedom Would Be the Domain of Democratic Societies and the Role It Fulfills Could Be Positive"

Let me first thank and congratulate the Mathias Corvinus Collegium for convening this important international conference on the 75th anniversary of the UDHR. The adoption of the Declaration was a major step in recognizing human rights as a critical element in the conduct of both domestic and international governance. It was the dawn of a new era.

Obviously, the adoption of the Declaration, continuing the message and spirit of the United Nations Charter, was a direct result of the atrocities of the Nazis and their allies, including, of course, the Holocaust, in which a third of the Jewish people were exterminated, including my father's family, shot in a mass grave together with all the Jewish inhabitants of their little town in what is now Belarus, formerly Russia and at the time Poland. For humanity, for the Jewish people, for the State of Israel, and for me personally, the Declaration symbolizes a noble promise and a major leap toward a better future. That humanity is still, at large, far from applying and fulfilling its contents and promise does not derogate from the Declaration's deep message and hope.

The freedom of religion occupies an important place in the UDHR. Article 18 of the document recognizes various aspects of this freedom. What is the complex purpose and function of religious liberty as it is recognized in the UDHR?

To what extent is it a value or virtue in itself and to what extent is it a mean to achieve other or even higher purposes?

Religion has been a major factor in human existence from times immemorial. It has taken various forms—from idolatry to polytheism to monotheism. Coming from the Jewish ethos, which is also a part of the Judeo-Christian ethos, my religion is based in the Bible—Old Testament, the "mother of monotheism." In our tradition, we find Abraham the forefather who smashed the idols and recognized the one Almighty. We believe that religion is a tool of compassion, the Almighty being the falter of orphans, the helper of widows, the supporter of the needy.

However, religion has been used throughout history in many cultures as a tool of violence, war waging and oppression. We hardly need examples for that.

This is obviously the background of Article 18 of the UDHR, accepted after serious deliberations. Article 18 is not limited to the freedom of religion. It includes the freedom of thought and of conscience, as well as the freedom to change a person's religion or belief, alone or with others, in public or private, and "to manifest his religion or belief in teaching, practice, worship and observance." Of course, Article 18 did not appear in a vacuum. The persecution of believers in certain religions by other religions as well as by various states has been a sad and permanent element in human history, and specifically it found its bitter expression throughout the Nazi era and the Stalinist era in the Soviet Union. Being Jewish for the Nazis meant being a nonentity, dust, somebody subhuman to be wiped away, eliminated, exterminated. The results are well known: six million Jews died just for being Jewish, whether you name Judaism a religion or a national entity (it is both).

And as for the Stalinist Soviet Union, a decade ago I spent a short sabbatical at Stanford University's Hoover Institute. I found there, in

the archives of the former Polish army, two memoranda written by my late father as a soldier in the Polish army after being a prisoner of war with the soviets. One of them dealt with the Soviet attitude toward the Jewish religion, which was harsh and abusive: synagogues closed, Rabbis persecuted. It was not very different from the altitude toward to the Russian Orthodox Church, but with a measure of anti-Semitism.

In Iran, the Baha'i faith had been persecuted by the regime for a long time.

These are only examples that are especially close to my heart. There are other examples from other historic situations.

The idealism reflected by Article 18 meant to change the course of history, to create a better future, of spiritual and fair values being promoted, trying to turn religion into a tool of tolerance, which it could indeed be. The reasons, sadly, are not nearly as good as the authors of the Declaration had hoped. Far from it—in some cases, they are devastating.

> **Some scholarly opinions consider religion as a great *public common good* in a society as it has public value, not just private amenity. How can religious freedom protect the religion as a *public common good*? What legitimate roles do religion and religious commitment have in public life? What are the major models that countries and societies pursue in this regard?**

Is religion a public common good? The answer is highly complex. Religion can be a blessing if it promotes moral values and social justice, and it can—God forbid—be a curse if it is abused by hatred, violence, and war. Religious freedom, in practice, would be the domain of democratic societies, and there the role it fulfills could be positive. Much depends on leading personalities who are dedicated to the religious idea, their educational abilities and their social awareness, their moderation and

compassion. As we all know, democratic societies could have different models of the state-religion relationship. The United States with the separation of state and religion and Britain with its combined model, whereby the monarch is also the head of the church, are two examples at hand. In my country, Israel, the Jewish religion has a statutory standing, and there are social processes in both directions—more religiosity and more secularization. In our Declaration of Independence of May 14, 1948, six months before the UDHR—and I am proud to mention it as a religious Jew—the freedom of religion is specifically enshrined together with other values such as the freedom of conscience and education and the safety of the holy places of all religious. It should be noted that, even in the British mandatory period, Article 83 of the Palestine Order in Council of 1922 enshrines the freedom of worship.

> **One of the paradoxes is that even though there has been an explosion of human rights in terms of international treaties and apparatus, we have been experiencing an erosion of religious freedom around the world. This is partly due to an increasing secularization, especially in the West, that aims to drive religion out of the public discourse. How do you see this trend and why, in your view, can we experience this contradiction?**

May I take issue with the language—and of course, substance—of the question posed. First, there is indeed an explosion of treaties and international institutions dealing with human rights. All the documentary instruments are well-meaning, but there are a lot of shortcomings in their implementation. From my country's point of view, the Human Rights Council in Geneva is an ample example. It has been clearly and extremely biased against Israel and I will not enumerate the occurrences, which could occupy all our space and time. I am not

sure that the erosion in religious freedom in various countries is necessarily connected with a lack of human rights documents and treaties. It is connected with growing secularization, a process that has grown for the last century, though its roots connect to earlier periods. The expanding of technologies that may globalize even the most remote villages cause young people, in particular, to abandon their traditional upbringing and chose new ways, secular rather than religious, that would, in their eyes, open for them new horizons, free of constraints such as religion. But that is only one aspect: another one—in the opposite direction—is more local or regional. It is the strengthening of fundamentalist religious tendencies, which may become, and do become indeed, violent and even murderous. The acts of ISIS ("the Islamic state (of) Iraq (and) Syria") is a well-known example. Fundamentalist Islam (not all Islam, of course) has been persecuting, inter alia, Christianity in the Middle East, including the demolishing of churches. My own religion, Judaism, has been experiencing persecution throughout its history. The name is anti-Semitism.

So, we are speaking of wide and varied phenomena. There are no magic solutions. There are short-term ideas and long-term concepts. The first means courage, to stand up against the wicked, as well as rigorous law enforcement, by showing their character both in the media and the social networks, by shaming them when shaming, usually an undesired phenomenon, is justified. Leaving them in the gutter is necessary. As far as the long term, education is a key goal. It is a long, arduous journey, and many a time it may seem futile. But it is a must. It is critical.

Some of the papal writings have emphasized that religious liberty is strategically central to any functioning system of civil liberties: they call it the keystone in the arch of freedom.

How can thinking about human rights be renewed in this spirit? How, in your view, does Jacques Maritain's view on personalism help to achieve this renewal?

It is not surprising that religious leaders in all religions would emphasize religious liberty and put it in the forefront of civil liberties. While I understand this point of view and agree with its importance, sometime the centrality of religious liberty is a key part of a series of liberties that must be promoted. I would underline the ethical and human values (emphasized by Jacques Maritain as well as Emanuel Levinas, preaching the human attitude to the other person). In the Jewish ethos, the doctrine of humanity and compassion has extensively been developed by religious scholars, such as Rabbi Israel Salanter of the nineteenth century in Lithuania. The wickedness of anti-Semitism could have shrunk had more people looked at Jews as human beings. Religious writings could have an influence on various directions. Let us hope, with God's help, that religion will find its proper place within the realm of human rights.

In conclusion, I would like to note the important and positive changes in the relationship between Christianity and Judaism. There are now full diplomatic relations between the Holy See and Israel. This gives us all a measure of optimism. It is my hope that it would happen with Islam too. There are beginnings. Thank you.

BALÁZS SCHANDA

Professor of Law at the Pázmány Péter Catholic University

Education: Eötvös Loránd University (Budapest);
JD, PhD

"All Societies Need an Underlining Cultural and Moral Consensus and This Cultural Fundament Is Essentially Religious"

The freedom of religion occupies an important place in the UDHR. Article 18 of the document recognizes various aspects of this freedom. What is the complex purpose and function of religious liberty as it is recognized in the UDHR? To what extent is it a value or virtue in itself, and to what extent is it a mean to achieve other or even higher purposes?

By now the formula used by the UDHR is not unique. Numerous international human rights documents and constitutions follow a similar wording. What makes the UDHR special is its claim for universality that has made it a turning point in human rights law. In fact, the Declaration as a whole is characterized by a solemn, almost a religious language. The preamble recalls the UN Charter that reaffirmed the "faith in fundamental human rights." Matters of law and matters of faith seem to meet at some points.

The drafters were aware of their historic responsibility, and they shared a belief that the cataclysm humanity had survived could lead to a cathartic, new beginning. Whereas church-state relations are shaped by historical compromises, and proposed solutions vary from state churches to radical separation of church and state, religious liberty should be universal and, at least in the Western world, it is generally recognized.

Some scholarly opinions consider religion as a great *public common good* in a society as it has public value, not just private amenity. How can religious freedom protect the religion as a *public common good*? What legitimate roles do religion and religious commitment have in public life? What are the major models that countries and societies pursue in this regard?

All societies need an underlining cultural and moral consensus, and this cultural fundament is essentially religious. Without a fundamental cultural and moral consensus, the social coexistence is hardly possible. The most visible part of the contribution of religion to common good is the service of individuals and religious communities inspired by their faith toward those in need. Even the secular state is interested by the "side-effects" of religion: religious people may live in more solid family relations, may have more children, they would care better for others, would use less drugs, they would be more loyal taxpayers and may cause less traffic accidents (exemptions happen), and religion can help the mourning process. However, the contribution of religion to the common good surpasses individuals and communities behaving well and engaging into social services. Religion determines the cultural identity of people—even those who reject religion. "In Europe also atheists are Christians" as prime minister József Antall used to say in the early 1990s, being much in line with the statement of the agnostic humanist philosopher Benedetto Croce who, responding to Bertrand Russel in 1942, stated that we cannot define ourselves as non-Christians, as inevitably Christians.

Church-state relations are usually shaped by the denominational history of countries—centuries of tensions and conflicts created the constitutional compromises that serve as a legal framework for church-state relations. Beyond a general acceptance of religious freedom in several issues, national traditions play a determinative role, even in

Europe today. In one country, there would be a crucifix in all classrooms of public schools; in another country, there would be no religious symbols in any public institution at all. In one country, religious education in public schools would be compulsory for all who do not opt out; in other countries, it would be optional or even nonexistent. In some countries, religious weddings would be accepted by the public authorities; in other countries, only civil marriage would be recognized by the state. With many common elements and also a kind of convergence, there are obvious differences in many issues of religious law. There is an obvious tendency toward a better recognition of individual choices and more equality. After the fall of the Berlin Wall, countries in the eastern part of Central Europe had to reshape the church-state relations. No country in the region opted for extreme solutions. State churches were not re-established (not even in dominantly Orthodox countries), but no country followed the French way of laicism either. One could say that, besides national traditions, German and Italian concordatarian solutions were endorsed with regard to religious education, the place of theology at universities, marriage law, or the funding of religious communities. Church and state are separated in all countries in the region, but there is a cooperation between (mainstream) religious communities and the state. When we look at the indicators of church-state relations, Hungary seems to lay more emphasis on the separation of church and state (e.g., marriage law is entirely separated in Hungary since 1894, there are no theological faculties at state (public) universities since 1950; this has become unique in Central Europe, but it would be the normal case for most parts of the world). On the other hand, the cultural role of the Christian tradition enjoys a constitutional protection in Hungary. The service of churches in education and social care is essential and well recognized (social and sometimes governmental expectations even exceed the possibilities of churches). But the social

role of mainstream churches goes way beyond running kindergartens, schools, universities, hospitals, and various other institutions of social care. Mainstream religious communities provide for the identity of the nation, even if the majority would not be a devout believer. Certainly, religion is not there to serve the nation—in fact, Christianity is by its nature universal. But willingly or unwillingly, Christianity has shaped the identity of European nations. Not recognizing this fact would deny a cornerstone of our history. The national day of Hungary is the feast of Saint Steven, the state founding king. Public, religious, and family traditions are interlinked in a natural way. What was originally the feast of the local patron saint has often become the solemnity of the local community transcending any religious boundaries.

One of the paradoxes is that even though there has been an explosion of human rights in terms of international treaties and apparatus, we have been experiencing an erosion of religious freedom around the world. This is partly due to an increasing secularization, especially in the West, that aims to drive religion out of the public discourse. How do you see this trend and why, in your view, can we experience this contradiction?

In a growingly secular social setting, religious expression is increasingly disappearing from the public sphere. In a peculiar way, we can also speak about a phenomenon of "self-secularization" of religious communities: religious communities and faithful believers hardly speak about faith—they speak about deeds and morals, spiritual well-being and love toward neighbors, but they do not address questions of faith in public. The public discourse is limited to values, actions, and traditions, but the background and motivation remain hidden. What is hidden today may be forgotten tomorrow. The less religious expression is present,

the less it is understood. A faith lived in integrity can help understand different religions. The lack of an encounter with one religion makes religion as such more suspicious than mysterious. The consequence is that judges and journalists (not to mention that with social media everyone is a journalist and public statements become judgments) lack the appropriate sensitivity for religious expression.

Just one example: a few years ago in Germany, there was a criminal case where courts regarded male circumcision as a crime, an infringement of personal integrity. In the given case, it was obvious that the circumcision of the infant was motivated by the religious belonging of his parents. Obviously, in a society where the determining majority or a significant minority has undergone this procedure, no police, public prosecutor, or judge had come to the same end, even if the criminal code had the same wording. They, their fathers and sons, would be circumcised as well.

Instead of exchanging gifts, gifts and identities in a pluralist society shaped by religion are increasingly hidden. In Hungary, the communist regime has contributed to a generally shy attitude toward religion as well. Hungarian society is characterized both by a strong cultural homogeneity and a general acceptance of customs (e.g., major festivities, like Christmas), but also by individualism and a lack of communities. Stronger than "average" religiosity is the least likely to be publicly expressed—e.g., in a workplace environment, colleagues are more at ease to share sensitive health information than their religious beliefs.

Rights that are not exercised will perish. The best way to uphold religious freedom is to live religion in its integrity.

Some of the papal writings have emphasized that religious liberty is strategically central to any functioning system of civil liberties: they call it the keystone in the arch of freedom.

How can thinking about human rights be renewed in this spirit? How, in your view, does Jacques Maritain's view on personalism help to achieve this renewal?

The reflection of the Magisterium of the Catholic Church on the freedom of religion has changed over the decades. *Dignitatis humanae* of Vatican II is a milestone, a sign, a consequence, and a result of this change. Besides an original reflection on human dignity, a set of practical issues could have contributed to this new approach. In an increasingly pluralist world, the traditional doctrine of *ius publicum ecclesiasticum*, which states that the Church is a *societas perfecta* and underlines the ideal of a Catholic state endorsing the true faith (tolerating minorities for reasons of the common good if necessary), is not convincing in most part of the world. Freedom of religion provides equal freedom to religion and from religion. Conscience shaped by religion and conscience determined by any other source are equally protected. This way, religious liberty is a value for all.

A critical point needs to be added. Whereas we all accept human rights in general, we have no consensus on their fundamental principles and we disagree on the details. The famous statement of Jacques Maritain is well known: "We agree about the rights but on condition no one asks us why!" Both questions may be valid: Do human rights need a foundation? Can rights exist without a foundation? As Janne Haaland Matláry puts it, "the central political question today, when we debate human rights, is not the concept of right but the concept of human." To follow this line of thinking, we can refer to another central figure shaping the Declaration, Charles Malik: "When we disagree about what human rights mean, we disagree about what human nature is." Can we really disagree about what human nature is? The human person seems to be central; more so, the human person seems to be the central issue when human rights are discussed. Placing the human person into the

center enables a new theological reflection as it provides for a common fundamental element both for theology and for human rights law.

We witness in our very days that, on the one hand, unexpected aspects of the life of the human person become uncertain, while on the other hand the human rights language becomes stronger. We face a situation when the notion of human rights is increasingly detached from its fundamental principles and human rights become more controversial: human rights detached from their fundamental principles become like a "loose cannon" on the boat. We must safeguard all aspects of human life that keep it human. Natural law and natural reality can help in this regard.

SZILVIA KÖBEL

Professor of Law at the Károli Gáspár University of the Reformed Church

Education: Eötvös Loránd University (Budapest); JD, PhD.

"This Right Allows the Church to Do Quality Work That Could Serve the Common Good"

The freedom of religion occupies an important place in the UDHR. Article 18 of the document recognizes various aspects of this freedom. What is the complex purpose and function of religious liberty as it is recognized in the UDHR? To what extent is it a value or virtue in itself, and to what extent is it a mean to achieve other or even higher purposes?

The UDHR is a milestone in the history of human rights, and so is the fundamental rights declaration on freedom of thought, conscience, and religion. The complexity of this concept of this fundamental right has undoubtedly opened a new era, because the declaration contains three conceptual elements: freedom of thought, conscience, and religion. Thought and conscience are linked to the individual. Guaranteeing this freedom is a precondition for the protection of private autonomy, which is not in the interest of any dictatorship. As I see it, religious freedom is incomplete without freedom of thought and conscience. Without an individual fundamental right, there is no religious community fundamental right, because religious communities are formed by individuals. The thought and conscience of the individual are untouchable by the state and the law. Freedom of conscience is the free, independent, conscious, responsible forming, accepting, and expressing of convictions; conscience is the faculty by which we exercise moral judgment over our own thoughts and actions.

Freedom of religion is a variant of freedom of conscience named by its subject (Antal Ádám). We choose our beliefs, whether religious or nonreligious, based on the freedom of conscience. In my view, this part of the fundamental right is absolute and cannot be limited. But if it is manifested, it can be restricted in both its individual and collective form, under the necessity-proportionality test. Today, in practice, the borders between freedom of expression and freedom of religion are increasingly common. There are overlaps between some elements of the two fundamental rights (e.g., freedom of thought, freedom to disseminate views), and there are also examples of conflicts between the two fundamental rights, where one or the other must be restricted in order to guarantee one or the other of the two fundamental rights. In this sense, the declaration of religious freedom can certainly have a function beyond itself.

The UDHR of freedom of thought, conscience, and religion was born in the shadow of dictatorships, and I consider its complexity to be a value and strength (virtue) in itself. The UDHR of freedom of thought and conscience has opened a new dimension in the horizontal relationship between fundamental rights, such as human dignity, freedom of expression, the right to self-determination, the right to the free development of personality, or the nondiscrimination. At the same time, the detailing of the individual and collective aspects of religious freedom has already placed a greater obligation on the state, because it must ensure, for example, the right to education, teaching, and the legal framework for community religious practice. The active role of the state is necessary in this regard.

Some scholarly opinions consider religion as a great public common good in a society as it has public value, not just private amenity. How can religious freedom protect the

religion as a public common good? What legitimate roles do religion and religious commitment have in public life? What are the major models that countries and societies pursue in this regard?

The question does not specify which scholars are meant, so it is difficult to give an answer. If we think of Walter Lippmann's *The Philosophy of the Common Good,* we can see that the author does not directly link religion to the common good. In Lippmann's view, religious freedom is one of the most important criteria of democracy, and from this can be derived the prominent role of the churches in the public affairs.

Article 18 of the UDHR has been taken over almost textually by other international human rights conventions (European Convention on Human Rights, Charter of Fundamental Rights of the European Union) and national constitutions. We can therefore say that the community aspect of religious freedom provides a strong basis for the free operation of religious communities. This gives religious communities not only the right to practice their religion collectively in the strict sense, but also to participate in public services. Traditionally, for example in the social and educational fields, I believe that church institutions can do a lot for the society. However, in my view, this requires that the individuals who form the religious community are individually committed to helping (serving) others. This allows the church institution to do quality work that could serve the common good. However, it is useful to note that the definition of the common good needs to be clarified. The terms "public good" and "public interest" are often confused, and the concept of the public good has different meanings in different understandings and in different time periods. I think that the statement in *Rerum Novarum* that the state must act in the interest of all social groups, and therefore must create a system of laws and institutions that allows for the development of the members of the community and the well-

being of individuals and communities, is significant. However, I think it is important to emphasize that bodies and persons exercising public authority and institutions fulfilling public functions must respect the freedom of conscience and religion of others, of individuals. History gives us plenty of examples of how the forcing or forcible prohibition of religious (or other) beliefs leads to suffering, disunity (discord, schism), hypocrisy, and ultimately does not serve the common good. Among historical models, socialism is a good example: both the oppression of religion and the pushing of the ideology of Marxism-Leninism through the means of authority led to dramatic results. In the rule of law models, on the other hand, whether or not there is a constitutional separation between church and state, there is no place for coercion; the complex declaration of the UDHR was born precisely in answer to the repression and violations of human rights. In its early decisions after the fall of communism, the Hungarian Constitutional Court emphasized the close link between the freedom of religion and human dignity, and interpreted the freedom of conscience as a right to the integrity of the person: "The State may not force any person into a situation which would bring him into conflict with himself, that is to say, which is incompatible with an essential conviction which defines his personality. The right to freedom of conscience and freedom of religion, which are also specifically mentioned, recognizes that conscientious conviction and, within this, religion, where appropriate, are part of the human quality, and that their freedom is a condition of the exercise of the right to the free development of personality."

At the same time, the European Union's Employment Directive (Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation) contains a very important guarantee, stating that in the case of churches and other public or private organizations based on

religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or the context in which they are carried out, a person's religion or belief is a genuine, legitimate, and justified occupational requirement, having regard to the spirit (ethos) of the organization. This creates a balance so that churches and religious communities can fulfill their public functions in accordance with their identity and work for the common good.

> **One of the paradoxes is that even though there has been an explosion of human rights in terms of international treaties and apparatus, we have been experiencing an erosion of religious freedom around the world. This is partly due to an increasing secularization, especially in the West, that aims to drive religion out of the public discourse. How do you see this trend and why, in your view, can we experience this contradiction?**

I believe that the development of human rights and the development of an international system for the protection of human rights have a very important guaranteeing role. Many scholars believe that the atrocity of the Second World War and the human rights violations might have been avoided if an effective international system of human rights protection had been in existence at the time. In his speech to the US Congress on January 6, 1941, Franklin Delano Roosevelt spoke of four fundamental rights: first, freedom of speech throughout the world; second, the freedom of every man to worship God in his own way, wherever he may be in the world; third, freedom from want and need; fourth, freedom from fear. Until that time, the protection of the rights of the individual was marginal, which is why the UDHR has put the emphasis on the "individual," "all human beings," "human dignity."

The building of an international protection mechanism has become necessary because mass human rights violations can be more effectively stopped if human rights are not the only subject of a state's domestic jurisdiction. If you think about it, there was a big contradiction even then, because the victorious powers themselves had serious human rights problems: the gulag in the Soviet Union, discrimination against Blacks in the United States of America, and Britain and France had colonial empires. Yet this does not call into question the legitimacy of the international human rights protection system. As an example of this, Hungary has been a member of the United Nations since January 1956, and thanks to this UN membership, the UN Committee of Five came to Hungary in early 1957 to do an investigation. As a result of the UN report, the whole world learned what happened (revolution) in Hungary in the autumn of 1956, and the violations became transparent. Its effect was also manifested in the legal recognition of a religious denomination in Hungary in 1957 (the Seventh-day Adventist Church), and in 1977 of another religious denomination (the Congregation of the Nazarenes in Christ). I would like to emphasis that the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights adopted by the United Nations General Assembly in December 1966, were proclaimed in Hungary in 1976. Membership of the UN, the promulgation of the Covenants, and international attention have all had a softening effect on the Cold War dictatorship, promoting religious freedom and limited human rights violations. From 1988, the individual right of complaint became an important instrument in the process of regime change. In the meantime, the UDHR and the Covenants have followed a different path of development in the West.

The questioning establishes as a fact the erosion of religious freedom today, and states as a fact that this is partly because increasing

secularization (especially in the West) is pushing religion out of the public discourse. If we draw a historical parallel, we can see that in the earlier models of the state church, religion was not only part of public discourse, but also of public law itself. Yet we cannot speak of complete religious freedom, since the Reformation had to fight its own wars for religious freedom. Secularization, the neutrality of the state in relation to ideology, is capable of guaranteeing rights (including religious freedom) for all (individuals and communities) without discrimination. However, in today's world, with the accumulation of multiple crises (pandemics, wars, migration, economic crisis, environmental degradation), the third generation of human rights is also becoming an increasingly dynamic part of the human rights system. Therefore, the traditional understanding of human rights, including freedom of conscience and religion, must also stand the test of new dimensions. A more complex analysis of the causes of the contradiction would be necessary to answer the question, and an in-depth analysis of the history of the churches in the twenieth century is also unavoidable. I would be hesitant to say that there is an erosion of religious freedom, but I would call attention to a paradigm change.

Some of the papal writings have emphasized that religious liberty is strategically central to any functioning system of civil liberties: they call it the keystone in the arch of freedom. How can thinking about human rights be renewed in this spirit? How, in your view, does Jacques Maritain's view on personalism help to achieve this renewal?

In 1895, the legal theorist Georg Jellinek proposed the thesis that freedom of religion is the oldest fundamental right, from which other fundamental rights developed, and that it can therefore be considered a fundamental right of fundamental rights. This is also the dominant

view in Protestant literature. As a lawyer, I can strongly agree with this statement. I would like to return to the first question, which presented the complex definition of fundamental rights as set out in the UDHR: the three elements of the fundamental right, freedom of thought, conscience, and religion, support the idea that this fundamental right can be the keystone of the arc of freedoms. Conscientious choice, religious conviction, is not only an essential aspect of a person's personality, but also pervades the whole of his individuality (personality). I believe that, in practice, the original concept and purpose of a fundamental right can and, where appropriate, should be carefully and responsibly limited by the tests of necessity and proportionality under contemporary human rights law doctrine. This fundamental right is also complex in that it provides for both individual and collective rights. Therefore, it is an integrative fundamental right, which considers the aspects and characteristics of both the individual and the community. Jacques Maritain's views on personalism synthesize these two. Several researchers consider that Maritain's "communal personalism is still relevant today." Maritain also points out the limits of secular society and formulates the "personalistic conception of the state": the state is "not some kind of collective superman, but merely a means to serve man." According to Maritain, "the aim of the body politic is to improve the conditions of human life itself and to provide for the common good, so that each person—not only a privileged class, but the whole mass of the people—may in fact achieve the independence which is the mark of civilized life."

National Sovereignty, Subsidiarity, and Human Rights

THE MODERATOR'S FOREWORD

In the early 1940s, the groundwork was laid for the establishment of postwar institutions. Following WWII, the formation of the United Nations (UN) and the Bretton Woods institutions marked a concerted effort to promote international peace and security. These bodies advocated for principles of cooperation, nondiscrimination, the rule of law, free trade, investment, and social welfare, thereby contributing to a rules-based international order crucial for postwar reconstruction and development.

The adoption of the UN Charter in 1945 signaled a significant shift in international relations, emphasizing the importance of human rights as a foundational pillar for global harmony. The UN General Assembly's adoption of the UDHR in 1948 further solidified this focus, establishing a universal human rights standard and elevating it to the sphere of international law. Its preamble eloquently asserts that recognizing the inherent dignity and equal, inalienable rights of all is fundamental to global freedom, justice, and peace. The document warns that disregarding human rights can lead to atrocities that offend the conscience of humanity and envisions a world where freedom of speech and belief, along with freedom from fear and want, are universal. The UDHR has been instrumental in inspiring numerous subsequent human rights treaties.

Concurrent with the UN's inception, the Bretton Woods institutions were created. The International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (IBRD) commenced operations in 1946. These key financial and economic bodies reflected a shared belief that international economic stability and

growth should be central to the new emerging world order. While the International Trade Organization (ITO) was envisioned, it never came into existence. Nevertheless, its foundational ideas gradually matured through the evolution of the General Agreement on Tariffs and Trade, culminating in the establishment of the World Trade Organization (WTO) in 1994.

In a similar vein, the European Union's origins were rooted in economic collaboration among its founding member states. The Preamble of the 1957 Treaty of Rome declared that the founding states were establishing a "combination of resources" in order to "safeguard peace and liberty."

With a few exceptions, human rights were not a primary focus for most post-WWII international organizations working on economic regulation. Human rights were perceived as varying across different cultures and regions and were considered a domain of internal affairs, best addressed by individual states. Moreover, the objectives of economic regulation in the fields of trade and investment and those of international human rights law were seen as quite distinct. While the latter aimed at achieving substantive equality and addressing structural biases leading to discrimination, economic regulation was primarily about reducing protectionism to improve conditions for international trade and investment.

Therefore, aligned with the doctrine of "separation of policy instruments," the emphasis in the sphere of economic regulation was on fostering international liberalization and integration to promote global growth and prosperity. The newly established economic world order not only played a crucial role in facilitating rapid postwar reconstruction, but it also ushered in a period of unprecedented growth and development, which, in turn, contributed to enduring peace and security in many parts of the world.

Over time, however, the quest for economic advantage in a growth-oriented, globalized economy began to increasingly clash with the fundamental requirements of human rights. International economic regulations designed to attract foreign investment and foster competitive markets sometimes led to deregulation or lax enforcement, causing exploitation, poor working conditions, and environmental degradation in certain regions.

In response, international human rights instruments and institutions inspired by the UDHR started working alongside economic bodies to embed human rights considerations into economic policies. These organizations also exercised a form of "soft power" on their member states, encouraging them to align with human rights standards in the context of economic regulation.

As economic globalization progressed, multinational enterprises emerged as prominent actors in the international economic order. They became major players in international trade and investment, often exploiting regulatory loopholes in pursuit of profit maximization. Consequently, it became clear that multinational companies also needed to be regulated and held accountable for their role in upholding human rights. This led to the adoption of the OECD Guidelines for Multinational Enterprises in 1976, which provided recommendations on responsible business conduct, including anti-bribery, environmental standards, and labor rights. Notably, a chapter on human rights was added in the 2011 revision.

Human rights considerations began to be more explicitly integrated into the text of economic regulations and factored into the interpretation and application of regulations, even when they did not explicitly contain human rights references. For instance, the 1994 WTO agreement included general exception clauses to give members the flexibility needed to meet their human rights obligations. In the

field of international investment law, arbitral tribunals started to pay more attention to investor misconduct, particularly concerning human rights violations, in their decision-making processes.

The EU too has evolved significantly over time, transitioning from a focus primarily on economic cooperation to a more comprehensive approach that includes the consideration of fundamental rights in the development of EU legislation and action. In 2000, a landmark development occurred when the European Parliament, the European Commission, and the Council proclaimed the EU Charter of Fundamental Rights. This document outlined the fundamental rights and freedoms recognized by the EU.

The significance of the Charter was elevated with the entry into force of the Treaty of Lisbon in 2009. With this treaty, the rights, freedoms, and principles detailed in the Charter became legally binding on the EU and on member states when implementing EU law. Moreover, the Lisbon Treaty called for the EU to accede to the European Convention on Human Rights, ensuring that both the EU and EU law adhere to the same human rights standards as its member states.

The EU not only upholds fundamental rights within its own territory but also actively promotes human rights in its external relations. This involves advocating for human rights in interactions with non-EU countries and international institutions, as well as in negotiating international agreements. For instance, the EU is working on adopting an EU supply chain law. This law will require companies to manage social and environmental impacts throughout their global supply chains carefully. The aim is to foster the green transition and protect human rights both within Europe and globally, by establishing a corporate sustainability due diligence duty to address negative human rights and environmental impacts. Similarly, the new generation of EU free trade agreements links human rights with trade liberalization. This

approach demonstrates that the EU is committed not just to respecting but also to promoting human rights and democracy through its external actions.

As a result of these developments, economic regulation and human rights are no longer viewed as indifferent or contradictory to each other. Instead, economic regulation is increasingly being used as a tool to enhance the enjoyment and protection of human rights both in the EU and globally. The panel discussion that included well-respected professors from around the world provided detailed insights into these challenges.

Veronika Korom
Professor at ESSEC Business School, Paris

STEFFEN HINDELANG

Professor of Law at the Uppsala University.

Education: Philipps-Universität Marburg, Law School, JD
University of Sheffield, LLM
Eberhard Karls Universität, Tübingen, PhD

"The 'Zeitgeist' Clearly Bears Restrictive Traits, Explained by a Partial Turn Away from Neoliberalism"

Let us first put the panel discussion into context. One of the legacies of the adoption of the UDHR is the increasing use of the human rights discourse. The other dominant tendency of the past half century is the rise of economic globalization along with transnational business operations. How do you see the past evolution and current relationship and interactions between economic globalization and human rights?

The Zeitgeist—formerly characterized by a certain *laissez-faire* toward international trade and investment—now clearly bears restrictive traits, explained by a partial turn away from (neo)liberalism toward what is often termed today as geoeconomic[1] competition.

After the end of the Cold War, (neo)liberalism, underpinned in particular by distributed private ownership and separation, or at least a larger distance, between the state and private enterprise, gained track in the 1990s and continued to flourish until the current century. The

[1] Although there is no singular definition of the term "geoeconomics," it can be approached as "the use of economic instruments to promote and defend national interests, and to produce beneficial geopolitical results; and the effects of other nations" economic actions on a country's geopolitical goals.' (B. Constant, 'What is Geoeconomics?' in R. Blackwill and J. Harris (eds), *War by other means: Geoeconomics and Statecraft* (The Belknap Press of Harvard University Press, 2016) 19, 20.

period was characterized by multipolarity, the win-win proposition of free trade, and international cooperation.[2]

Yet, other economic governance models have gained increasing significance with the rise of China, resembling some type of state capitalism.[3] They depart from the aforesaid characteristics of a liberal market order by relying on considerations of a "zero-sum game" of international politics,[4] strategic competition, and economic statecraft.[5]

Governments, not just the Middle Kingdom, increasingly rediscover economic policy as a tool to unilaterally pursue national security and other noneconomic interests. Instead of choosing to maximize global growth and absolute gains, such (neo)mercantilist approaches aim for "relative gains," focusing on increasing the (economic) power of one state relative to its partners and rivals. An example of such policy is provided by the strategic buildup and use of foreign exchange reserves

[2] N. Crafts, "The world economy in the 1990s: a long-run perspective," in P. W. Rohde and G. Toniolo (eds), *The Global Economy in the 1990s* (Cambridge University Press, 2010) 21–22.

[3] Y. Zhang, *China's Economic Reform* (Routledge 2017) 1–74; X. Hou, *Community Capitalism in China* (Cambridge University Press, 2013) 121–34.

[4] The term "Zero-sum-game" in international politics describes a situation which involves two sides where the result is an advantage for one side and an equivalent loss for the other. Cf. S. Bowles, *Microeconomics: behaviour, institutions and evolution* (Princeton University Press, 2006) 33–36; *Cambridge business English dictionary* (Cambridge University Press, 2011).

[5] The term "economic statecraft" describes the use of economic means to pursue national policy goals. Especially the use of foreign aid, trade, and the governing of the flows of capital is considered the most common form of economic statecraft. D. A. Baldwin, "economic statecraft" (Encyclopaedia Britannica, 21 January 2016), <https://www.britannica.com/topic/economic-statecraft> accessed 29.08.2022; Idem, *Economic Statecraft* (Princeton University Press 1985) 29–51.

generated by trade surpluses.[6] Geoeconomic rivalry puts states that can exercise control over such and other critical "assets" in the global economy, among them information, technology, reserve currencies, mature capital markets, etc., at an advantage.

In the area of cross-border capital movements, geoeconomic competition has manifested itself most obviously through the rise of sovereign-driven investments (SDI), i.e., investments by sovereign wealth funds (SWF) and state-owned enterprises (SOE), as well as "strategic" investments that are otherwise enjoying state support from its country of origin, for example, by way of state aid.[7]

While political and economic fundamentals and the perception of foreign trade and investments have changed significantly over the course of the past years, the provisions in international investment

[6] The European Central Bank and the (US) Federal Reserve Bank of New York described the potential risks as follows: A continued reserve accumulation harbours risks for the conduct of monetary policy and the financial sector. Concretely, excessive reserve accumulation may entail conflicts between the exchange rate stability and inappropriate easing of monetary conditions which will eventually result in inflation and/or overinvestment and/or asset bubbles. Possible consequences may also be difficulties for central banks in managing the money market and, more generally, in implementing monetary policy as well as a segmentation of the public debt market, thus impairing its liquidity. Finally, a continued reserve accumulation may entail a concrete market (i.e., currency and interest rate) risk, resulting in potentially sizeable capital losses on the balance sheet of the monetary authority. European Central Bank, *The accumulation of foreign reserves* (43 Occasional Papers Series 2006) 8, 16, 36–37; M. Higgins and T. Klitgaard, "Reserve accumulation: Implications for global capital flows and financial markets," in *Federal Reserve Bank of New York, Current Issues in Economics and Finance* (2004): 5, 6.

[7] The EU has responded by adopting the Regulation 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union, O.J. L 79 I 1. Most recently: Commission, "Proposal for a regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market" COM(2021) 223 final as well as "Proposal for a regulation of the European Parliament and of the Council on the protection of the Union and its Member States from economic coercion by third countries" COM(2021) 775 final.

law—the area of law I would like to focus on—remained largely unchanged. It is to some degree a "relic" of time wholeheartedly embracing globalization.

International investment law provides a legal framework for the protection of foreign investments and the resolution of disputes that may arise between foreign investors and host states. It has played an important role in economic globalization. While globalization has brought about significant benefits, such as economic growth, it has also led to tensions with human rights in several ways. Similarly, international investment law, essentially serving the protection of private property abroad, sometimes competes or conflicts with a host state's obligations to protect human rights.

Investment tribunals have been criticized for not sufficiently paying attention to or even for prioritizing investors' interests over a host states international human rights commitments. Overall, it is a key challenge for governments and international organizations to balance economic interests and human rights. To remain economically competitive, some states had to yield to deregulatory pressures from their competitors, with the result that, for example, workers' rights have been diminished.[8]

[8] From 2014 to 2017, the labour cost ratio of South Korea's 500 largest companies increased by 0.5 percent, while their sales declined by 1.9 percent over the same period. Meanwhile, rising labour costs led General Motors to close a major plant in South Korea, among other reasons. The fact that labour costs continue to rise is largely due to the bargaining power of workers in South Korea, which has grown rapidly since the late 1980s . A fundamentally favourable development for the human rights situation can consequently result in economic disad-vantages. *See* Kwack Jung-soo. 2017. "Labor Cost Ratio Rises At South Korean Firms." Hankyoreh. http://english.hani.co.kr/arti/english_edition/e_business/807251.html; Zhiyuan Wang, "Thinking outside the Box: Globalization, Labor Rights, and the Making of Preferential Trade Agreements," *International Studies Quarterly*, 64.2 (2020): 343–55, https://doi.org/10.1093/isq/sqaa001.

However, the relationship between economic globalization, international investment law, and human rights is dynamic and evolving. Some international initiatives seek to address these tensions: the United Nations Guiding Principles on Business and Human Rights outline the responsibilities of states and businesses to respect and protect human rights in the context of economic activities. There is a growing recognition of the role of transnational corporations in respecting and promoting human rights. Many businesses are adopting corporate social responsibility practices, which include commitments to human rights, environmental sustainability, and ethical business conduct. Furthermore, international investment treaties are reformed to include human rights clauses and to ensure that their interpretation by tribunals does not impede a host state's ability to regulate in the public interest.

In the end, striking a balance between economic interests and human rights is essential to ensure that globalization benefits all and does not come at the expense of those who are particularly vulnerable or the environment. International cooperation and dialogue are crucial for addressing these complex issues and promoting sustainable development that respects the principles of the UDHR.

> **Focusing now on the legislation and rule setting: what are the advantages and drawbacks if human rights aspects are introduced into economic regulation? Is there any need for interaction between human rights and international economic regulation and if so what type and intensity of interaction would be desirable in your respective fields of expertise?**

The perception of the effect of integrating human rights considerations on economic regulations and on foreign direct investment has changed over the past decades. In the 1970s, nonengagement with or even low

human rights standards were assumed to be favorable to foreign direct investment, but from the 2000s onward, studies began to accumulate showing a positive effect of human rights considerations on foreign direct investment.

In the 1970s, it was argued by some scholars[9] that multinational corporations benefit by investing in countries with repressive mechanisms. Governments that use such mechanisms can maintain order and business activity in the country[10] and, by conceding a low level of organization and mobilization of the workforce[11], guarantee cheap labor, which attracts investment.

However, more recent studies suggest that human rights violations deter foreign direct investment.[12] Studies showing that a good human rights record attracts foreign direct investment can be classified into two groups differentiating between indirect and direct effects of human rights violations on the deterrence of foreign direct investment.[13] Indirect effects of human rights compliance are cited as a reduction in violence, political instability, and social conflict.[14] Other studies stress a more direct impact of human rights violations in host countries on investors'

[9] Stephen Hymer, "The Multinational Corporation and the Law of Uneven Development," in *Economics and World Order from the 1970's to the 1990's*, ed. Jagdish N. Bhagwati (New York, NY: Macmillan, 1972), 113-40.

[10] Peter B Evans, *Dependent Development: The Alliance of Multinational, State, and Local Capital in Brazil* (Princeton, NJ: Princeton University Press, 1979).

[11] Guillermo O'Donnell, *Modernization and Bureaucratic-Authoritarianism* (Berkeley, CA: University of California Institute for International Studies, 1973).

[12] Ana Carolina Garriga and Brian J. Phillips, "Foreign Aid as a Signal to Investors: Predicting FDI in Post-conflict Countries," *Journal of Conflict Resolution* 58.2 (2014): 280–306.

[13] Ana Carolina Garriga, "Human Rights Regimes, Reputation and Foreign Direct Investment," *International Studies Quarterly* (2016): 160–72.

[14] Sorens, Jason, and William Ruger, "Does Foreign Investment Really Reduce Repression?" *International Studies Quarterly* 562 (2012): 427–36.

incentives.[15] Investments in countries that violate human rights can damage companies' reputations.[16] Such reputational damage should not be underestimated in its implications for a multinational corporation. In a more recent study, one scholar speaks of a "reputational umbrella" that the host country's participation in human rights regimes provides for investors.[17] The participation of a state in human rights regimes has a positive effect on foreign direct investment.[18] This effect is particularly important for countries with higher levels of human rights violations, where participation in human rights regimes has a stronger positive effect.[19] Consequently, human rights aspects and economic regulation seem inherently interrelated.

> **Let us turn now to the application and enforcement of legal rules. Both domestic and international forums, such as the WTO, ISDS, or the European institutions are increasingly expected to take into account human rights considerations in their decision-making processes. What are the tools of domestic and international procedural law used in the enforcement of human rights? What are the limits of human rights considerations in these cases?**

The enforcement of human rights encounters difficulties in international investment law due to the often broad and unspecific provisions relating to human rights considerations. The precise scope and effectiveness

[15] Ana Carolina Garriga, "Human Rights Regimes, Reputation and Foreign Direct Investment," *International Studies Quarterly* (2016): 160–72.

[16] Id.

[17] Id., 3.

[18] Id.

[19] Id.

of human rights arguments in investment disputes, however, depend heavily on the treaty text.

There are many ways in which human rights aspects can be given greater consideration in international investment law. At present, around 90 percent of investment treaties and arbitral awards do not even mention human rights.[20] However, there is an emerging trend to take human rights aspects into account when concluding new investment agreements[21]. Some investment treaties refer to nonbinding international standards—such as the OECD Guidelines for Multinational Enterprises, the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, and the United Nations Guiding Principles—to encourage companies to voluntarily adopt business practices that are more inclusive of human rights.[22]

Furthermore, so-called "legality" or "in accordance with the law of the host State" clauses in international investment treaties oblige foreign investors to comply with the national laws of the host state, including those protecting human rights interests other than those of the investor.[23] A method not used often would be to incorporate directly human rights obligations of investors into treaties, as in the 2016 bilateral investment treaty between Morocco and Nigeria.[24]

[20] S. Steininger, "The Role of Human Rights in Investment Law and Arbitration: State Obligations, Corporate Responsibility and Community Empowerment," in I. Bantekas and M. Stein (eds.), *The Cambridge Companion to Business and Human Rights Law* (Cambridge Companions to Law (Cambridge: Cambridge University Press, 2021), 406–27 doi:10.1017/9781108907293.019.

[21] Id.

[22] Id.

[23] Id.

[24] Id.

The 2016 case of *Urbaser v. Argentina* can be used as an example of a parallel development in arbitration practice[25]. For the first time, an arbitral tribunal affirmed its jurisdiction over a human rights counterclaim and found a violation of international law obligations, in particular human rights, by the investor.[26] Another effective strategy for honoring human rights considerations suggested by Philippe Sands in his Separate Opinion in 2017 in *Bear Creek v. Peru* is that a human rights violation by an investor could affect the number of damages awarded by the tribunal.[27]

> **Taking into account the novel challenges in your respective fields of expertise, what would be, in your view, the desirable and healthy balance between human rights considerations and economic regulation in an increasingly globalized, digitalized, and interconnected world?**

In the forthcoming decades, climate change will present us with challenges that we cannot yet imagine in detail. The livelihoods of millions of people will change dramatically. In the regions most affected by climate change, many people will be deprived of their livelihoods, leading to devastating humanitarian consequences. To take more account of human rights in our globalized world, we must first ensure that we maintain a living environment that makes these human rights possible in the first place. I am convinced that international investment law could play a very important role in the future in taking greater account of human rights aspects in international economic relations. However, despite its potential, international investment law

[25] Id.
[26] Id.
[27] Id.

cannot bring about anything that has not previously been initiated by a legislative or political decision in the host state.

Starting in the 1990s, preambles and specific provisions of international investment agreements increasingly have stated their state parties' "right to regulate," which can be conceptualized as "an affirmation of States' authority to act as sovereigns on behalf of the will of the people."[28] Among the first concerns addressed were health, labor rights, and better living conditions.[29] In more recent international investment agreements, there is a growing connection between international investment law and such international legal regimes that relate to sustainable development, responsible business conduct, and human rights standards.[30] However, there are still diverging approaches to the inclusion of references to human rights.[31] Most international investment agreements that explicitly mention human rights are clustered around specific contracting parties being involved, particularly the European Union and Canada.[32] Africa might be on its way to becoming another "hub of human rights references" in international investment agreements, the 2016 Morocco-Nigeria bilateral investment treaty exemplifying that trend.[33]

If the right to regulate to achieve other public interests (than those of the investor) is, in this way, mentioned in an international investment

[28] Steffen Hindelang, Patricia Sarah Stöbener de Mora, and Niels Lachmann, "Risking the Rule of Law? The Relationship between Substantive Investment Protection Standards, Human Rights, and Sustainable Development," in August Reinisch and Stephan W. Schill (eds), *Investment Protection Standards and the Rule of Law* (Oxford, 2023; online edn, Oxford Academic, 23 Feb. 2023), https://doi.org/10.1093/oso/9780192864581.003.0014, accessed 26 Sept. 2023.

[29] Id.

[30] Id.

[31] Id.

[32] Id.

[33] Id.

agreement, especially if not only in the preamble but in a specific provision, it forms part of elements to be considered when interpreting the substantive protection standards according to Article 31(1) of the Vienne Convention on the Law of Treaties.[34] Hence, arbitral tribunals would have to consider it as a limitation on the interpretive unfolding of international investment law's substantive protection standards.[35]

Where international investment agreements further operationalize the right to regulate, e.g., by defining what would qualify as unfair treatment or an indirect expropriation, the balancing process eventually to be undertaken by arbitral tribunals is pre-structured in even more detail.[36] Therefore, there is less risk of decisions that do not account appropriately for other human rights or sustainability concerns and, hence, also reduced the risk of loosening the bonds of the rule of law.[37]

If an investment tribunal fails to account in such a balance of interest for all a host state's human rights or sustainable development obligations, this would be methodologically unsound[38] It may also create a risk for an arbitrary reconfiguration of the normative foundations of the rule of law, thereby delegitimizing certain interests pursued in regulation.[39] However, it must be stressed that, while one can be critical of the outcome in individual cases if the relevant investment tribunals faithfully follow the methodology provided in public international law, particular in the Vienne Convention on the Law of Treaties, there is no issue with

[34] Id.
[35] Id.
[36] Id.
[37] Id.
[38] Id.
[39] Id.

the normative foundations of the rule of law.[40] Such a critique would then be of a political rather than legal nature.[41] Investment tribunals do not need to address any issue somehow related to the case but only issues necessary to decide on the admissible claims presented before it; otherwise, it would risk acting *ultra petita*.[42]

An analysis of selected decisions by arbitral tribunals where human rights and sustainable development concerns were at stake shows that more and more of those decisions demonstrate that arbitral tribunals are mindful of rights and obligations stemming from other international legal regimes, protecting human rights and other aspects of sustainable development.[43] This is true also for disputes based on international investment agreements that do not mention explicitly the right to regulate and/or rights and interests that compete with those of investors.[44] While various public interests, in particular human rights, have figured in arbitral decisions in different ways, systemic integration and harmonious interpretation of various legal regimes involved in an investor-state dispute, as required by the Vienne Convention on the Law of Treaties Article 31(3)(c), are becoming increasingly commonplace among arbitral tribunals.[45] More "classical" human rights, such as the right to life, are more easily and more favorably considered by tribunals than issues like the rights of indigenous peoples and the right to water.[46] Indeed, other scholarship has likewise found that economic and social

[40] Id.
[41] Id.
[42] Id.
[43] Id.
[44] Id.
[45] Id.
[46] Id.

rights as well as third-generation human rights play a more limited role in investment arbitration.[47]

However, one needs to keep in mind that regarding these rights the corresponding states' obligations are anything but clearly established and, it is to be recalled, that investors are not obliged in the same way as states, if at all, to protect these rights, even less if human rights addressing economic, cultural, and social concerns are in question.[48]

[47] Id.
[48] Id.

KRISZTIÁN KECSMÁR

Judge at the Court of Justice of the European Union

Education: Paris-Sud University (Paris XI, France)
JD, 1998
Paris-Sud University (Paris XI, France)
MA in International and EU Law, 1999
Paris-Sud University (Paris XI, France)
MA in Business and EU law in 2000

"It Seems Clear That Economic Globalization and Fundamental Rights Are Indivisible"

Let us first put the panel discussion into context. One of the legacies of the adoption of the UDHR is the increasing use of the human rights discourse. The other dominant tendency of the past half century is the rise of economic globalization along with transnational business operations. How do you see the past evolution and current relationship and interactions between economic globalization and human rights?

- Contextual approach

Against the backdrop of several crises, it seems clear that economic globalization and fundamental rights are indivisible. For instance, the various austerity plans adopted because of the economic crisis that hit the continent in the 2010s have significantly weakened access to education, social protection, and even to justice by abolishing legal aid in some member states.

However, the protection of fundamental rights against economic globalization always been a well-known issue, which the UDHR and EU seem to have taken into account since the postwar period because of their belief in a "rules-based multilateralism." We have to admit that the challenges that existed when the UDHR was adopted are no longer the same as they are today, particularly in view of the digitization and the acceleration of trades.

The United Nations General Assembly drafted the UDHR at a time when it was intended to create a roadmap that guarantees people's rights anywhere and at any time, in response to the tragic events in the first half of the twentieth century.

- Economic rights granted by the UDHR

At first sight, the text adopted in 1948 seems to opt for a reserved position on the relationship between economic globalization and fundamental rights, as the priority was the need to put an end to war crimes.

Nevertheless, Article 22 of the UDHR offers an interesting prospect that implements economic rights granted to the citizen by means of social protection, which is essential to avoid discrimination.[1]

This article of the UDHR provides a pretaste for the integration of fundamental rights into EU law. The Treaty of Rome of 1957, which created the ECC, was not intended to protect fundamental rights but to establish a common market and gradually bring the economic policies of the member states closer together. Only the freedoms of movement are protected in the founding treaties of the EU, an approach that had already been provided by Article 13 of the UDHR, which guaranteed everyone the right to move freely by leaving a country, including his own, and by allowing him to choose his residence within a state.

- The beginnings of economic regulation through fundamental rights in the EU

In the silence of the founding treaties, the CJEC took over by stating, on the one hand, that it ensures respect for fundamental human

[1] CJEC, Judgement of 22 November 2005, *Werner Mangold v Rüdiger Helm*, C-144/04, ECLI:EU:C:2005:709, § 65.

rights[2] and, on the other hand, that respect for fundamental rights is an integral part of[3] the general principles of EU law. Furthermore, the court added an important reference to international human rights instruments because member states' constitutional traditions did not provide a sufficient guidance to determine the content of the general principles of EU law.[4]

Building on this, the EU adopted the Charter of the Fundamental Social Rights of Workers in 1989, which can be compared to Articles 22 and 23 of the UDHR that enshrines the prerequisites of the relationship between economic globalization and fundamental rights within the EU legal order.

With the advent of the European Union created by the Maastricht Treaty in 1992, the EU saw the need to have its own catalog of fundamental rights. For this purpose, the Charter of Fundamental Rights (hereinafter the "Charter") was proclaimed in 2000, which became binding with the entry into force of the Lisbon Treaty in 2009 on 1 December 2009, and gave it the same value as primary legislation under Article 6 (1) TEU.

This text reaffirms, drawing on both the constitutional traditions and the obligations of the member states bound by international conventions, the economic rights enshrined in a Title IV named "*Solidarity*," which include the right to social security, consumer protection, collective bargaining rights and, more generally, workers' rights.

[2] CJEC, Judgement of 12 November 1969, *Erich Stauder v City of Ulm*, C-29/69, ECLI:EU:C:1969:57, § 7.

[3] CJEC, Judgement of 11 December 1970, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, C-11/70, ECLI:EU:C:1970:114, § 2.

[4] CJEC, Judgement of 14 May 1974, *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission des Communautés européennes*, C-4/73, ECLI:EU:C:1974:51, §12.

- Conclusion

To sum up, the postwar period has shown that economic globalization cannot take place independently of human rights guarantees.

While the UDHR spearheaded this initiative, the EU also brought human rights closer to its purely economic concept, which is still protected by the freedom to conduct a business[5] as a fundamental right.

The whole point of this interaction is to make fundamental rights that did not necessarily provide for an economic approach to coincide with the needs of our time. For this purpose, the Charter and ECHR seem to be useful to the case law by a more assertive immersion of human rights into economic regulation.

> **Focusing now on the legislation and rule setting: what are the advantages and drawbacks if human rights aspects are introduced into economic regulation? Is there any need for interaction between human rights and international economic regulation and, if so, what type and intensity of interaction would be desirable in your respective fields of expertise?**

- Contextual approach

Globalization has led to the intrusion of international law into the relationship between the regulatory space and the economic area, owing in particular to the establishment of multinational firms in developing countries, which have required a minimum level of protection, bringing together the rights to which every human being can enjoy on a transnational scale.

For these reasons, the Charter seems to have the advantage of guaranteeing the protection of individuals in the exercise of their

[5] Article 16 of the Charter.

work, thus offering social stability resulting from an economic regulation that respects human rights by protecting citizens from inequalities.

- Balance between economic rights granted to companies and human rights

The interaction between human rights and economic regulation must be understood as closely as possible in order to strike a balance between fundamental rights and economic development.

That balance is an important issue since the interference of fundamental rights for individuals must not hinder the person who benefits from the freedom to conduct a business in Article 16 of the Charter.[6] Indeed, even though the wording of Article 16 may seem less impactful than other fundamental rights, it is a vehicle for structuring the internal market and remains a powerful and useful freedom that has a decisive influence on economic initiative at the heart of our legal system.

For example, the CJEC recognized that the exercise of social rights in order to induce a company to conclude a collective agreement could be contrary to the freedom of establishment if it was likely to dissuade a company from doing so.[7]

This is an example that shows that the fundamental rights reserved for individuals are not likely to apply systematically to economic regulation. It means that the way that fundamental rights apply to economic regulation must not lead to human rights necessarily taking precedence over economic freedoms as a "frozen principle" but must

[6] Dubout, É., "Qui est le sujet des droits de la Charte ? De l'être universel à l'être relationnel" in Iliopolou Penot, A. et Xenou, L. (dir.), La charte des droits fondamentaux, source de renouveau constitutionnel européen?, 1e édition (Bruxelles, Bruylant, 2020), 279–96.

[7] CJEC, Judgement of 11 December 2007, *International Transport Workers' Federation et Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*, C-438/05, ECLI:EU:C:2007:772 § 88.

result from a proportionality check. In that regard, according to the settled case law of the court, the principle of proportionality requires that acts of the EU institutions be appropriate for attaining the legitimate objectives pursued by the legislation at issue and do not exceed the limits of what is appropriate and necessary in order to achieve those objectives.[8]

- The convergence of protection as a guarantee of proportionate interaction

On the other hand, the interaction between human rights and regulation should be universally understood to avoid disparities in the effective protection of individuals and companies, especially as this could have a negative impact on business competitiveness if human rights are applied differently in different states.[9]

On this point, the European Union faces a major challenge with its accession to the ECHR, which evokes the need for convergence in the practice of fundamental rights, something that has not been self-evident in recent years. However, Article 52 (3) of the Charter already provides a mechanism for cooperation between the two legal systems when the rights guaranteed by the Charter correspond to those provided by the ECHR.[10]

Therefore, we can be optimistic about the progressive harmonization of fundamental rights in Europe, which seems to be on the right track in

[8] CJEU, Judgment of 8 July 2010, *Afton Chemical Limited v Secretary of State for Transport*, C-343/09, ECLI:EU:C:2010:419, § 45.

[9] Fatin-Rouge Stefanini, M., Gay, L. et Vidal-Naquet, A., "Débats et discussions" in L'efficacité de la norme juridique, 1e édition (Bruxelles, Bruylant, 2012), 331–45.

[10] Tinière, R. et Vial, C., "Section 4 - L'articulation des protections" in Manuel de droit de l'Union européenne des droits fondamentaux, 1e édition (Bruxelles, Bruylant, 2023), 335–65.

view of the resumption of negotiations, and which would significantly facilitate the interaction of economic regulation with human rights as part of a single approach.

> **Let us turn now to the application and enforcement of legal rules. Both domestic and international forums, such as the WTO, ISDS, or the European institutions, are increasingly expected to take into account human rights considerations in their decision-making processes. What are the tools of domestic and international procedural law used in the enforcement of human rights? What are the limits of human rights considerations in these cases?**

- Contextual approach

Such instruments like the UDHR seems to have served as a general framework and inspired all fundamental rights texts, including the Charter, which can be seen as a constitutional rather than an international instrument regarding the value that Article 6 (1) TEU conferred him.

If sometimes it is asserted that the CJEU is not very open to international human right instruments, the UDHR seems to be an exception[11] because it played an important role that led the court from time to time to quote directly the UDHR.[12]

[11] Allan Rosas, "The Charter and Universal Human Rights Instruments" in Peers, S., Hervey, T., Kenner, J., Ward, A., *The EU Charter of Fundamental Rights*, 2nd edition, Beck Nomos Hart, 2021, 1757–71.

[12] CJEC, Judgement of 28 October 1975, *Roland Rutili v Ministre de l'Intérieur*, C-36/7, ECLI:EU:C:1975:137, § 32.

- Application of the Charter

The limits of circumstances in which the Charter is applicable are set in Article 51 of the Charter.[13] Pursuant Article 51 (1), the field of application concerns institutions, bodies, offices, and agencies and ensures that all EU measures are to be interpreted in conformity with the fundamental rights as set in the Charter. Moreover, member states are to comply with the Charter whenever they are implementing EU law[14] under the Article 51 (1) of the Charter.[15]

Nevertheless, it happens that the court has applied the Charter in situations, which do not necessarily constitute an implementation of Union law but without extending EU competences. For example, this was the case with the requirement of the principle of nondiscrimination guaranteed by Article 21 (1), which did not fall within the scope of the 2000/78/EC directive on the general framework for equal treatment in employment and occupation.[16]

- Tools granted to companies through competition law

It emerges that in regulatory sectors where the EU has completely determined the way in which member states must act, the Charter displaced national fundamental rights.[17]

[13] Picod, F., "Article 51. - Champ d'application" in Picod, F. et al. (dir.), Charte des droits fondamentaux de l'Union européenne, 3e édition (Bruxelles, Bruylant, 2023), 1313–40.

[14] CJEC, Judgement of 11 July 1985, *Cinéthèque SA and others v Fédération nationale des cinémas français*, C-61/84, ECLI:EU:C:1985:329, § 26.

[15] CJEU, Judgement of 26 February 2013, *Åklagaren v Hans Åkerberg Fransson*, C-617/10, ECLI:EU:C:2013:105, § 18.

[16] CJEU, Judgement of 19 January 2010, *Seda Kücükdeveci v Swedex GmbH & Co. KG*, C-555/07, ECLI:EU:C:2010:21, § 22-26.

[17] CJEU, Judgment of 26 February 2013, *Stefano Melloni v Ministerio Fiscal*, C-399/11, ECLI:EU:C:2013:107, § 25.

In terms of economic regulation, competition law seems to be a good example that offers guarantees to undertakings through the Charter of Fundamental Rights[18] or the ECHR[19] due to the legalization of European competition law. For instance, the presumption of innocence, which is a general principle of Union law and set out in Article 48 (1) of the Charter of Fundamental Rights, applies to competition proceedings insofar as they are likely to result in the imposition of fines or periodic penalty payments.

This explains the standards that are more demanding given the quasi-criminal nature of EU competition law[20] and the necessity to strike a balance between competition rules based on the protection of economic public policy and efficiency, on the one hand, and the protection of the rights of the defense, on the other.

- Member States' inability to invoke the Article 41 of the Charter

Nevertheless, if the Commission has a "discretionary power" to decide whether to act against a member state on the basis of Article 258 TFEU, the possible importance of pecuniary penalties at the end of proceedings based on Articles 258 and 260 TFEU may raise the question of whether it does not confer a possible "penal" character on the said proceedings. Such an observation opens up the debate as to whether a member state could invoke Article 41 of the Charter but the court did not assimilate members states to a "person" within the meaning of Article 41 of the Charter.

[18] General Court, Judgement of EU General Court, 15 June 2022, *Qualcomm Inc v EU Commission*, T-235/18, ECLI:EU:T:2022:358, § 158.

[19] ECHR, Judgement of 27 September 2011, *A. Menarini Diagnostics v Italy*, n° 43509/08, § 42.

[20] CJEU, Judgement of 22 November 2012, *E.ON v Commission*, C-89/11 P, ECLI:EU:C:2012:738, § 73.

More recently, the General Court of the EU estimate that Venezuela does not enjoy the right to be heard protected by Article 41, considering it applies to individual measures taken against a person and cannot be invoked in the context of the adoption of measures of general application such as European regulation.[21]

Such an approach shows that, while the Charter effectively protects human rights and regulates the economy, offering guarantees to companies at the same time, there is still room for progress by giving the invocable nature of Article 41 of the Charter to member states or other entities falling under EU law.[22]

Taking into account the novel challenges in your respective fields of expertise, what would be, in your view, the desirable and healthy balance between human rights considerations and economic regulation in an increasingly globalized, digitalized, and interconnected world?

• Data protection as a guarantee to individuals fundamental rights UDHR has not been able to keep up with the digital challenges of taken into account its age. Meanwhile, and just to mention the latest achievements, the EU Parliament and Council adopted "GDPR" regulation in 2016, which provides that any person in the Union whose personal data are processed is protected in accordance with Article 8 of the Charter and Article 16 TFEU, which deals with rights data personal protection. As of May 2nd, 2023, the Digital Markets Act (DMA) aims to prevent from the anticompetitive practices of the

[21] Judgement of EU General Court, 13 September 2023, Bolivarian Republic of Venezuela v Council of the European Union, T-65/18 RENV, ECLI:EU:T:2023:529, § 44.

[22] Kecsmar, K., "Les États membres sont-ils des sujets de droit privilégiés ou mal aimés en droit de l'Union ?" in Blumann, C. et Picod, F. (dir.), Annuaire de droit de l'Union européenne 2022, 1e édition (Paris, Éditions Panthéon-Assas, 2024), 1313–40.

internet giants and correct the imbalances of their domination of the European digital market.

Once again, in order to benefit from this protection under Article 8 of the Charter, data processing must take place in the Union; it must be linked to the supply of goods or services to that person in the Union; it must be linked to the analysis of that person's behavior in the Union.

The CJEU has also taken action against EU citizens, notably when it ruled that the obligation for communication services to store data according to an EC directive was contrary to the Charter,[23] but also with a decision, which ruled against national legislation requiring undifferentiated storage of metadata.[24]

At the same time, the CJEU developed a strong protection of our data regarding worldwide exchange. For instance, it was considered one time for Canada[25] and two times that for the USA[26] that they do not have the same standards of data protection as the European Union, which means that data transfers to those countries were prevented on the grounds of citizen privacy protected by Article 7 of the Charter.

Such a decision shows the extent to which the balance between fundamental rights and the digital age needs to be understood restrictively, even if we have to bear in mind the attractiveness of the European Union.

[23] CJEU, Judgment of 8 April 2014, *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others*, Joined Cases C-293/12 and C-594/12, ECLI:EU:C:2014:238, § 65.

[24] CJEU, Judgement of 21 December 2016, *Tele2 Sverige AB v Post- och telestyrelsen and Secretary of State for the Home Department v Tom Watson and Others*, C-203/15, ECLI:EU:C:2016:970 § 125.

[25] CJEU Case opinion, 26 July 2017, *PNR-Canada*, 1/15, ECLI:EU:C:2017:592, § 232.

[26] CJEU, Judgement of 16 July 2020, *Data Protection Commissioner v Facebook Ireland Ltd and Maximillian Schrems,* C-311/18, ECLI:EU:C:2020:559, § 170.

- Consumer protection regarding economic globalization

Another important aspect of the digital age is the consumer protection[27] against companies' behavior, which is at the heart of economic regulation through fundamental rights, in addition to being an objective of the internal market and guaranteed by Article 38 of the Charter.

On this point, the General Court has responded to such a challenge by condemning the new forms of abusive behavior observable in the digital economy about a case in which a major digital platform had abused its dominant position by favoring its own comparator over competing product comparators.[28]

Always on this topic of platforms that contribute to the globalization of the economy, the CJEU has recognized "the right to be forgotten," ironically mentioning not less than 15 times the name of the applicant having fought for being "forgotten" [29] without explicitly enshrining it but based on the right to privacy and data protection protected by the Charter.

These examples demonstrate the crosscutting nature of fundamental rights and their ability to be easily introduced into digital issues, which is why the Charter is fitted to be one of the tools mobilized to find a proportionality in the apprehension of these new issues and the protection of human rights at least at EU level.

[27] Ilieva, M., "Chapitre I - L'affirmation progressive des droits fondamentaux en matière de protection des consommateurs" in La protection des consommateurs et les droits fondamentaux dans l'Union européenne, 1e édition, Bruxelles, Bruylant, 2021, 81–134.

[28] General Court of the EU, Judgment of 10 November 2021, *Google LLC, formerly Google Inc. and Alphabet, Inc. v European Commission*, T-612/17, ECLI:EU:T:2021:763, § 703.

[29] CJEU, Judgment of 13 May 2014, *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, C-131-2, ECLI:EU:C:2014:317, § 2, 14, 15, 23, 47, 65, 91 or 97.

MICHELLE ZANG

Senior lecturer of law at the Victoria University of Wellington and a Borrin Foundation Justice Fellow

Education: Fudan University, Shanghai, BA, 2004
Durham University, UK, LLM, 2006
Durham University, UK, PhD, 2010

"Sustainable Development Beyond Economic Prosperity"

Let us first put the panel discussion into context. One of the legacies of the adoption of the UDHR is the increasing use of the human rights discourse. The other dominant tendency of the past half century is the rise of economic globalization along with transnational business operations. How do you see the past evolution and current relationship and interactions between economic globalization and human rights?

The two regimes of international law, or international governance, on human rights and economic globalization, respectively, started at around the same time after the II World War with however varying focuses and priorities. But the discussion of each other regime, as well as the attention being paid to each other's development, also started at the same time. For example, there are explicit exceptional clauses under the original GATT agreement 1947 allowing states to take measures to protect public morals, human life or health, and public order. Arguably, recognizing international human rights norms in this way would help to dispel some of the perceived drawbacks of trade liberalization. It would also enable states to comply with both their human rights obligations and their WTO commitments. This is what happened at the beginning.

However, the world, our lifestyle, the climate, the political dynamics have been through significant and critical changes in the last seventy years. We moved away from some old difficulties, and we started facing

new challenges, expectedly or unexpectedly. However, the difficult part is that the laws that launched in 1949 have not been changed; consequently, the question becomes whether the current normative frameworks for economic integration remain sufficient or effective for the new and current world we are dealing with.

> **Focusing now on the legislation and rule setting: what are the advantages and drawbacks if human rights aspects are introduced into economic regulation? Is there any need for interaction between human rights and international economic regulation and, if so, what type and intensity of interaction would be desirable in your respective fields of expertise?**

The interaction between human rights and international economic regulation is a must. There are, nevertheless, two qualifiers of this "must": first, it does not refer to the whole entirety of the human rights that have been recognized under the UDHR but those that are involved and impacted during the economic integration process. Second, the policy design around this "must" is of ultimate importance. This refers to the questions of how we should introduce or add such human right elements into the current trade and investment regimes, and to what extent should we do so.

In the trade domain, pressing needs as well as challenges have already appeared in the fields of public health, cultural heritage, labor standards, gender equality, and indigenous interests. There have been initiatives and negotiations on these matters at various forums but progress at the "major player," such as the WTO, remain minimum. In terms of the official treaty language, the official recognition of the abovementioned elements is "preamble-only" and, in most cases, is incorporated into the so-called exception clauses. This is, as I address it, an "unhealthy regulatory exercise" that unfortunately places

economic integration and human right protection on the opposite side conceptually: states' actions in protection of, for example, public health or indigenous interests, would most probably intervene the trade liberalization process and can be accommodated only under the current system as an exception to trade liberalization. The right question to be asked should be: how could we anticipate states' actions that can strike the balance between both policy values?

> **Let us turn now to the application and enforcement of legal rules. Both domestic and international forums, such as the WTO, ISDS, or the European institutions are increasingly expected to take into account human rights considerations in their decision-making processes. What are the tools of domestic and international procedural law used in the enforcement of human rights? What are the limits of human rights considerations in these cases?**

Rule application and enforcement are heavily dependent upon the related judicial mechanism available under the respective regime. As we look at the dispute settlement mechanism at the WTO, direct application of other international treaties and/or conventions is very limited, which is mainly used as an interpretative tool in clarifying the meaning of WTO rules. In other words, there is no direct application of human rights norms, the enforcement of which is therefore "squeezed" into the exceptional clauses that might be used to justify states' violation of trade obligations for the listed purposes and aims, inter alia, public moral, public health, and environment protection, etc. As lawyers, we would all appreciate the demanding liability arising out of the so-called "burden of proof," as well as the restrictive interpretative approach under the exception clause.

The situation is different at the ISDS where protection of the right of foreign investors is at the center of the regulatory focus. International instruments on human rights are often tabled to the arbitral panels. However, due to the ad hoc nature of the ISDS, it is also not a surprise that there is no consistent judicial approach in this regard, to date.

A number of tools have been used so far in the caselaw, which are mainly based on the interpretation rules as enclosed in Article 31 and 32 VCLT. The efforts and attempts to take into account various human right considerations are thus obvious but with significant limits.

What are the limits then? To start with, the trade and investment regime do not have sufficient substantive human right rights and obligations provided in the treaty text. There are some but not enough and they are protected as exceptions and exceptions only. Then, the question becomes one of applying to the cases the vast body of existing human right instruments.

The concerns are thus different: it is a cross-regime application between two sessions of public international law. Bear in mind that most of the adjudicators, the WTO dispute settlement and ISDS, have regime- or treaty-specific jurisdictions only. In other words, there are inherent adjudicatory boundaries for human rights consideration under international economic regimes and in other words, it is very much up to debate whether the adjudicators have the right to apply international laws outside the regime they are based.

> **Taking into account the novel challenges in your respective fields of expertise, what would be, in your view, the desirable and healthy balance between human rights considerations and economic regulation in an increasingly globalized, digitalized and interconnected world?**

To start with, the world has changed and has never stopped changing. We are facing plenty of novel challenges compared to what we were facing a decade ago: climate changes, cultural heritage, labor standards, just to name a few of them. These matters are discussed everywhere nowadays in our life, but that was surely not the case ten years ago, at least not to the same extent as today.

A desirable and healthy balance is a difficult thing to propose. Any proposal will be made based on research and data, but only operation and experience will be able to tell us whether it the proposal was the correct. In my view, such a balance can only be drawn on the basis of high transparency and wide consultation in policy design. The point of departure, conceptually, should be actions in pursuit of the protection of human rights, and it should not be considered inherently as an obstacle to economic integration. It is because our goal of economic integration and globalization nowadays is not simply "more trade, more investment, more wealth creation"; instead, we want more sustainability in our economic development. Such sustainability should not only enrich us with prosperity—and not just our own prosperity, but also prosperity throughout our culture, for our next generation, for our globe, and for people of different genders, races, and beliefs.