Human rights and fundamental freedoms:

the relationship of international, transnational and national catalogues in the 21st century

Basic considerations and starting points

With the exception of countries outside the continental legal system, European countries have laid down a number of rights and freedoms in their various stages of development which they consider to be of such importance that they put them above other rights, duties and values. The primacy of these rights over other values and interests of the state has also been reflected in their formal expression, that is, in a summary list of such rights and freedoms in a document with the highest legal power. Such a document is most commonly the constitution of the state; for countries with a poly-legal constitution – such as the Czech Republic – it is a special catalogue with an autonomous normative character, but it is comparable with the Constitution in terms of its legal force and system hierarchy.

If the nineteenth century was the age of national catalogues of human rights, then the 20th century was marked by international catalogues. The fundamental difference between the fundamental rights contained in national constitutional documents and the fundamental rights derived from international documents is the question of their origin. The primary justification for the existence of human rights was based on their immanent nature, that is, the self-evidentness that became an axiom. The iusnaturalist concept of the existence of human rights disturbed this truism. While national constitutional interpretation of human rights can be based on the idea of their natural origin, international human rights are not defined by the prism of their natural origin but by the consensus of the parties, which is in principle amendable by another consensual act.

Similarly to how the positions of fundamental rights and freedoms have been highlighted in national constitutional documents, international human rights documents contain provisions whose non-mandatory character, i.e., the possibility to deviate, have been ruled out. Despite the fact that international human rights instruments are mostly older than the institution of "ius cogens" itself, which was not expressed in the positive sense until in Article 53 of the 1969 Vienna Convention on the Law of Treaties, human rights documents contain provisions on the non-derogatory character of certain rights guaranteed by their provisions.

Therefore, national catalogues of human rights are similar to international ones in that they contain a similar list of rights, at least a similar amount of basic rights, and also the fact that higher demands are generally placed on their permanence – inviolability.

The protection of fundamental values, constituting the essence of the rule of law, is entrusted to constitutional courts or equivalent court authorities in modern constitutional democracies. If these authorities are given the authority not only of the abstract control of constitutionality but also of the subsequent protection of human rights and freedoms, it is also necessary to address the question of the source of human rights and freedoms and the normative expression of such a source. There is no doubt that constitutional courts primarily apply their national catalogues of human rights, but at the same time they are the judicial authorities of the state that has committed itself to respecting, complying with and protecting human rights derived from international documents.

International human rights documents, mostly in the form of treaties, have been influencing, conditioning and determining the decision-making process of constitutional courts in the area of human rights for decades. However, their approach to the use of international human rights documents is not uniform as it is subject to the national setting of the reception of international law sources. The above mentioned approach can therefore be reflected in three basic regimes:

1) First, acceptance of international human rights documents as subsidiary catalogues that can only be applied when national catalogues are inadequate in terms of the degree of protection or scope of protected rights and freedoms;
2) Second, a balanced position of national and international catalogues, which can be in fact interchanged, blended and combined in a monistic system that is not hierarchical, but is inherently consistent;
3) Third, an *a priori* use of international documents that have application priority over national human rights catalogues, either because of the transfer of a part of state sovereignty to a supranational body with its own legal system, or because the national catalogue is below the international document in the hierarchical system.

The results of the Congresses of the Conference of European Constitutional Courts in Paris and Vienna have already touched upon the application of other legal orders and the relationship between national and European law. However, with progressing European integration it would be useful to map and analyse the use not only of legal orders but also of individual catalogues which often have an autonomous way of their use.

The debate, which has intensified over the past decade across European constitutional courts, European institutions and academia, has reduced the issue of pluralism of legal systems to a conflict between national constitutions and primary EU law. However, the scope of application of human rights catalogues is much wider. Even if the question of human rights catalogues was reduced to maximum, there is still what some academics call the “Bermuda Triangle of Human Rights”. In short, the decision-making processes of courts that determined themselves as courts of last resort and of the last word (the national constitutional court, the European Court of Human Rights and the Court of Justice of the European Union) can get in contact with the catalogue and application of the other two authorities of protection of rights in protecting the fundamental rights and freedoms guaranteed by their own “human rights” catalogue. Due to the fact that some constitutional courts may use more than one catalogue, according to different criteria or in parallel, a wide-ranging analysis of this problem at the European level seems to be an important and crucial task.

The theme itself – Human rights and fundamental freedoms: the relationship of international, transnational and national catalogues in the 21st century – should be divided into two basic blocks for use in the XVIIIth Congress of the Conference of European Courts.

The first block would be a general part of the problem, focused on the theoretical justification of application of individual human rights catalogues. It would examine, in particular, the essence of their normative enshrining in the national legal order, the number of their kinds, their possible hierarchical position, their mutual relationships, the frequency of application in the case law, and the importance attached to the particular catalogue of human rights by a particular constitutional court.

In the second part, it would be desirable to shift the focus of the problem to particular human rights and the modalities of their protection in proceedings before the constitutional court. It is important that the fundamental rights and freedoms examined be essential ones, i.e., those that are common to most international and national catalogues. Although it would be interesting to deal more with specific human rights (typically the third generation), all member states could not refer from the same position or using an equally wide catalogue portfolio.

Below are six fundamental groups of human rights and freedoms enshrined in international human rights documents and with a high degree of probability also in all national constitutional catalogues.

These are the following:

FUNDAMENTAL RIGHT OR FREEDOM	THEIR ENSHRINING IN AN INTERNATIONAL CATALOGUE*
Right to life	Art. 2 of the ECHR, Art. 1 of the Charter, Art. 3 of the UDHR, Art. 6 of the ICCPR, Art. 4 of the ACHR
Freedom of expression	Art. 10 of the ECHR, Art. 11 of the Charter, Art. 19 of the UDHR, Art. 19 of the ICCPR, Art. 13 of the ACHR
Right to privacy / right to respect for private life / right to private life	Art. 8 of the ECHR, Art. 7 of the Charter, Art. 12 of the UDHR, Art. 17 of the ICCPR, Art. 11 of the ACHR
Freedom of religion	Art. 9 of the ECHR, Art. 10 of the Charter, Art. 18 of the UDHR, Art. 18 of the ICCPR, Art. 12 of the ACHR
Prohibition of discrimination	Art. 14 of the ECHR, Art. 21 of the Charter, Art. 7 of the UDHR, Art. 26 of the ICCPR, Art. 24 of the ACHR
Right to freedom	Art. 5 of the ECHR, Art. 6 of the Charter, Art. 3 of the UDHR, Art. 9 of the ICCPR, Art. 7 of the ACHR

*Explanatory notes:
ECHR – European Convention on Human Rights
Charter – Charter of Fundamental Rights of the EU
UDHR – Universal Declaration of Human Rights
ICCPR – International Covenant on Civil and Political Rights
ACHR - American Convention on Human Rights