MECHANISMS FOR HUMAN RIGHTS PROTECTION IN
SUDAN

BY
NASREDEEN HUSSEIN HASSAN

SUPERVISED BY
PROFESSOR AKOLDA MAN TIER

A Thesis Submitted in Partial Fulfillment of the
Requirements of the LL.M. Degree of the University of
Khartoum

2005
# Table of Contents

<table>
<thead>
<tr>
<th>Contents</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Contents</td>
<td>i</td>
</tr>
<tr>
<td>Dedication</td>
<td>vi</td>
</tr>
<tr>
<td>Abbreviations</td>
<td>vii</td>
</tr>
<tr>
<td>Acknowledgements</td>
<td>ix</td>
</tr>
<tr>
<td>Preface</td>
<td>x</td>
</tr>
<tr>
<td>Table of Cases</td>
<td>xi</td>
</tr>
<tr>
<td>Sudanese Cases</td>
<td>xii</td>
</tr>
<tr>
<td>Foreign Cases</td>
<td>xiv</td>
</tr>
<tr>
<td>Abstract in English</td>
<td></td>
</tr>
<tr>
<td>Abstract in Arabic</td>
<td></td>
</tr>
</tbody>
</table>

## CHAPTER ONE

### HISTORICAL ROOTS OF HUMAN RIGHTS

1. **Introduction** ........................................................................ 1

2. **The concept of a Right** .................................................. 1
   
   (i) Rights of Action and Rights of Recipience ........................... 2
   
   (ii) Rights and Correlative Obligations ................................. 3
   
   (iii) Elective and Non-Elective Rights ................................... 5
   
   (iv) The Concept of Human Rights ......................................... 5

3. **Theoretical Bases of Human Rights** ................................... 6
   
   (i) Positive Rights Theory ............................................... 6
   
   (ii) Natural Law Theory ................................................... 8
   
   (iii) Positive law and Natural Law Rights ............................. 9
   
   (iv) The Modern Concept of Human Rights ............................... 10
      
      (a) Basic Properties of Human Rights ............................... 11
      
      (b) Human Rights and Human Dignity ................................ 12
      
      (c) The Main Characteristics of Contemporary Human Rights .... 14
4. Objections to the Idea of Human Rights..........................18
5. Religion and Human Rights.............................................21
   (i) Human Rights in Islamic Jurisprudence........................21
   (ii) Human Rights and Christianity...............................23
6. Conclusions...............................................................24

CHAPTER TWO
CLASSIFICATION OF HUMAN RIGHTS
1. Introduction..............................................................26
2. Division of Human Rights into Three Categories.................26
   (i) Arguments against this Classification..........................27
   (ii) The Importance of Distinction between Different Categories of
        Human Rights..........................................................30
3. Civil and Political Rights...............................................31
   (i) The Right to Life......................................................34
       (a) Abolition of Death Penalty..................................36
       (b) Prohibition of Abortion......................................37
   (ii) Political Rights.....................................................38
4. The Diversity of the World and the Future of Civil and Political
   Rights............................................................................40
5. Economic, Social and Cultural Rights (ESCRs)....................43
   (i) What are Economic, Social and Cultural Rights?.............43
   (ii) Arguments against Economic, Social and Cultural
        Rights.......................................................................44
   (iii) Importance of ESCRs..............................................44
   (iv) National Origins of ESCRs......................................46
   (v) Marginalization of ESCRs.......................................48
   (vi) Realization of ESCRs..............................................49
6. Third Generation Rights

(i) What are Third Generation Rights?

(ii) Adoption of the Declaration on the Right to Development

7. Conclusions

CHAPTER THREE
PROTECTION OF HUMAN RIGHTS THROUGH NATIONAL COURTS

1. Introduction

2. International Law before Domestic Courts

(i) The United States of America (Monism Theory)

(ii) The United Kingdom’s Approach (Dualism School)

(iii) International Law before Sudan Courts

3. Arguments for and against Empowering Courts to Protect Human Rights

(i) Arguments for Empowering Courts to Protect Human Rights

(ii) Arguments against Protecting Human Rights through Domestic Courts

4. Judicial Review of Legislation

5. Protection of Human Rights in other Countries (decided Cases)

6. Remedies for Human Rights Violations

(i) Declaratory Judgments

(ii) Compensation

(iii) Punitive or Exemplary Damages

(iv) Non-Monetary Damages

(v) Habeas Corpus and Amparo
CHAPTER FOUR
THE ROLE OF NATIONAL HUMAN RIGHTS INSTITUTIONS
1. Introduction.................................................................................................................96
2. Definition of National Human Rights Institutions........................................... 96
3. The Role of the United Nations in the Field of National Institutions..................................................98
4. Types of National Human Rights Institutions............................................100
   (i) National Human Rights Commissions..............................................102
       (a) National Human Rights Commission in Sudan.........................103
       (b) National Human Rights Commissions of Some Other Nations..................................................112
       (c) National Human Rights Commissions and Internal Displacement..................................................116
   (ii) The Ombudspersons or Ombudsmen..........................................118
       (a) What is an Ombudsman?..........................................................118
       (b) The Core Principles for Ombudsmen.........................................119
       (c) Functions and Powers of Ombudsmen........................................121
5. Differences between NHRIs and NGOs................................................124
6. Conclusions...............................................................................................................125
CHAPTER FIVE
CONCLUSIONS AND RECOMMENDATIONS........................127

(i) Bibliography.................................................................135

(ii) Appendix.................................................................140
DEDICATION

To my beloved mother and all human rights defenders and activists
all over the world
ABBREVIATIONS

ABA: American Bar Association
BPL: Below the Poverty Line
CCPR: International Covenant on Civil And Political Rights
CEDAW: Covenant on the Elimination of all Forms of Discrimination against Woman
CESCR: International Covenant on Economic Social and Cultural Rights
ECHR: European Convention on Human Rights
ECOSOC: United Nations Economic and Social Council
EU: European Union
NGOs: Non-governmental Organizations
NAACP: The National Association for the Advancement of Colored People
NHRIs: National Human Rights Institutions
NHRC: National Human Rights Commissions
PUCL: The Peoples’ Union for Civil Liberties
SLJR: Sudan Law Journal and Reports
SAHRC: South African Human Rights Commission
S. G.: Sudan Government
UHRC: Uganda Human Rights Commission
U.K.: United Kingdom
U.S.A.: United States of America
UDHR: Universal Declaration of Human Rights
UN: United Nations
ACKNOWLEDGMENTS

I am very much indebted to my supervisor, Professor Akolda Man Tier, without whose sincere advice and guidance this work would not have been accomplished. I owe a special note of gratitude to him because he was always ready to read and correct the chapters without delay pointing out frankly and clearly what I should avoid and what I should do. I am also indebted to him for providing me with books, articles and publications and for helping during the early stages of the research. He cheerfully directed me to omit some issues that I had decided to discuss.

I would like also to send my warm thanks to Dr. El Rasheed Hassan Sayed, Head Department of Private Law, Ustaza Seham Samir, and Ustaz El Tigani Ahmed Mohamed who were always encouraging me to do my research.

My thanks are also due to the staff and librarians of the Federal Supreme Court library for their cooperation during my research. I’m grateful as well to the staff of the library of the Faculty of Law, University of Khartoum, especially to Mr. Mohamed Babikir, Murtada Elsir and Abdulgadir Hagu.

Finally my thanks are due to my colleagues Atif Sadalla, Ustaz El Hadi Mansour, Ustaz Abubakr Abdulrahman (Tambol) and Noha El Haj for helping me in typing up this research.
PREFACE

The world is witnessing important and epoch-defining changes. The United Nations is increasingly intensifying its efforts to promote and protect human rights. Regional organizations and institutions enhance their work in the same field and the awareness by individuals and groups of their rights is increasing continuously. What we are witnessing today, in short, is an international human rights revolution. These efforts need to be supported by sophisticated research on human rights.

This research is intended to play some role in the anticipated human rights revolution at the national level. It basically concentrates on mechanisms for human rights protection, which are of vital importance. It derives its importance not only from the importance of human rights but also from the fact that protection of human rights obviates armed conflicts and political instability. The main reason behind political instability in many third world countries is the gross human rights violations. The protection of human rights is also significant because it creates more opportunities for unity in a diverse country like Sudan. Human rights may be our strongest bonds of unification. Culture, language or religion for example cannot unite us. What unites us perhaps more than anything else is our belief in human rights.

This research shows how human rights can be promoted and protected in Sudan through national human rights institutions and domestic courts and explains the contributions that they can make to the improvement of human rights conditions in this country.
TABLE OF CASES

1. Sudanese Cases
   Joseph Garang and others v. Supreme Commission and others (1968)
   SLJR, 1.

2. Foreign Cases (American, Canadian, Indian and South African)
   Stalla Costa v. Uruguay (Comm. No. 198/1985)
   People of Saipan ex Rel-Guerro v. United States Department of Interior
   (denied 420 us.1003 (1974)
   Fujii v. State. 38 cal. 2d718, 242p.2d617 (1952)
   Plessy v. Ferguson. 163 u. s. 537 (1897)
   Eldridge v. British Columbia. Supreme Court of Canada (Attorney
   The Peoples’ Union for Civil Liberties’ Case (Supreme Court of India
   2001 unreported, 2 May 2003)
   Olga Tellis v. Bombay Municipality Corporation. 1987 LRC (cons.) 351
   (Supreme Court of India)
   Oposa v. Secretary of the Department of Environment and Natural
   Grootboom v. Oostenberg Municipality et. al. (Constitutional Court of
   South Africa, case CCT 11100, 4 October 2
ABSTRACT

The idea of modern human rights was born after the World War II when crimes were committed against humanity with the authorization of law. But the roots of these rights can be traced back to the days of Greeks and Romans. The American and French revolutions played an important role in the final formulation of these rights.

The states of the world do not need to clarify the idea of human rights or to emphasize their significance in the political, economic and social development of the nation, but to illustrate the mechanisms that could be adopted in the promotion and protection of human rights.

This research tries to explain the role that such mechanisms can play in promoting and protecting of human rights. Chapter One discusses the historical roots of human rights by shedding light on the concept of right generally and the concept of human rights in the positive law school, natural law school and modern school of human rights in particular. In addition, it criticizes the objections raised against the idea of human rights.

Chapter Two clarifies the types of human rights. It concentrates on both civil and political rights, which are necessary for establishing a democratic society, and economic, social and cultural rights upon which any economic or cultural advancement depends.

Chapter Three explains the role of national courts in protecting human rights, mainly by the power of judicial review. It also states the remedies that the courts can grant to victims of human rights violations and
includes some suggestions for developing new and more effective remedies for violations of socio-economic rights.

Chapter Four concentrates on national human rights institutions; namely national human rights commissions and ombudspersons as modern mechanisms for human rights protection. It analyses and evaluates the National Human Rights Commission Act 2004 and compares it to the experiences of some countries, particularly Uganda and South Africa.

The final chapter (Chapter Five) concludes the research. It summarizes the important findings of the research. It also offers some recommendations about how to contribute to the human rights movement in this country and in any other country which is politically and economically similar.
الخلاصة

على الرغم من أن فكرة حقوق الإنسان ترجع جذورها إلى عهد الرمان والإغرق، إلا أن النظرية الحديثة لحقوق الإنسان هي وليدة المآسي التي شهدتها الإنسانية إبان الحرب العالمية الثانية، حيث كانت الدول ترتبط جزئياً ضد الإنسانية وتتخويل من قوانين كتبتها هي بيدها. وقد لعبت الثورتان الفرنسية والأمريكية دوراً هاماً وحساساً في صياغة حقوق الإنسان بصورةها النهائية كما هي مطروحة اليوم.

إن دول العالم اليوم ليست بحاجة إلى توضيح أو تأكيد أهمية حقوق الإنسان في النهضة السياسية والاقتصادية والاجتماعية والثقافية لأي مجتمع يتطلع إلى التقدم، وإنما هي بحاجة إلى بيان الآليات التي يمكن أن تساعد في عملية تعزيز وحماية حقوق الإنسان.

إن هذا البحث يحاول توضيح الدور الذي يمتد بعض المؤسسات أن تلعبه في تعزيز وحماية حقوق الإنسان، وهو مقدم إلى فصول خمسة تناول الأول منها الجذور التاريخية لحقوق الإنسان وذلك بتسليط الضوء على مفهوم الحق بوجه عام ومفهوم حقوق الإنسان في المدرسة الوضعية ومدرسة القانون الطبيعي والمدرسة الحديثة لحقوق الإنسان، بوجه خاص، كما يستعرض بالنتيجة الاعتراضات والمخاوف التي يبديها بعض الرافضين لفكرة حقوق الإنسان.

أما الفصل الثاني، فهو يوضح التصنيفات المتعددة والمتباينة لحقوق الإنسان، ويركز على الحقوق المدنية والسياسية والحقوق الاجتماعية والثقافية والاجتماعية، حيث تلعب الحقوق المدنية والسياسية دوراً كبيراً في بناء المجتمع الديمقراطي، بينما تتعين ضرورة الحقوق الاجتماعية والثقافية والاقتصادية من أنها شرط النهضة الثقافية والاقتصادية للمجتمع.
أما الفصل الثالث، فقد تناول دور المحاكم الوطنية في حماية حقوق الإنسان، خاصة بمارساتها لأهم سلطة في يدها، ألا وهي سلطة الرقابة على دستورية القوانين. كما أن الفصل يتناول الجزاءات المتاحة أمام المحاكم الوطنية لكل من وقع ضحية انتهاكات حقوق الإنسان، ويتضمن اقتراحًا بإبداع جزاءات فاعلة خاصة بالحقوق الاقتصادية والثقافية والاجتماعية.

أما الفصل الرابع من هذا البحث، فيركز على المؤسسات الوطنية، وتحديداً المفوضيات الوطنية لحقوق الإنسان وأمناء أو هيئة المظلوم، والتي تعتبر الآلية الحديثة لحماية وتعزيز حقوق الإنسان. هذا الفصل يحلل ويقيم قانون المفوضية الوطنية لحقوق الإنسان لسنة 2004م، مقارنةً ذلك بتجارب بعض الدول في هذا الصدد خاصة تجريبي بوجندا وجنوب أفريقيا.

وقد حوى البحث فصلاً خامساً خاتماً يلخص أهم النتائج ويجمع الخواتيم التي جاءت في ذيول الفصول الأربعة، كما أنه يشمل على بعض التوصيات التي يمكن أن تساهم في دفع حركة حقوق الإنسان في هذا البلد أو أي بلد آخر يشابهه في الظروف السياسية والاقتصادية.
Chapter One
The Historical Roots of Human Rights

1- Introduction

This chapter in general examines the concept of a right and human rights, the theoretical bases of human rights in conjunction with their history, objections to the idea of human rights, and the main characteristics of the modern human rights, and finally discusses the concept of human rights in Christianity and Islamic jurisprudence.

2- The Concept of a Right

It is important first of all to discuss and analyze the concept of a right. The word right means “entitlement”. To say that you have a right to something is to say that you are entitled to it: for instance, to vote, to receive an old-age pension, to hold your own opinion and to enjoy domestic privacy. Entitlement to something means that either the person who is entitled or someone else on his behalf must be able to answer the question, what entitles you to it? This presupposes that there are ways of becoming entitled to things and three ways immediately come to mind: law, custom and morality1.

If someone is entitled to something, for him to be denied it by the action or the failure to act of someone else is wrong. It is also wrong for other people to penalize him or to make him suffer for having that to which he is entitled. This follows from the meaning of 'entitlement'. If it is not

wrong for other people to deny you something, then it cannot be something to which you are entitled. It is therefore appropriate for 'entitlements' to be called rights. If you are entitled to something it is right for you to have it. The role of other people in protecting a right is crucial. No wrong is done to you if you are denied that to which you are entitled not by the action or failure to act of other people, but by a natural event. If illness keeps you from a meeting which you are entitled to attend, that is unfortunate, but no one is to blame. Not so if someone forcibly prevents you from attending. He is violating one of your rights and thereby doing wrong to you. No one can have a right to fine weather on holiday, or to have a talented son. These are cases of good fortune, not of entitlement.  

(ii) Rights of Action and Rights of Recipience

A distinction is drawn between two types of rights; rights of action and rights of recipience. To have a right of action is to be entitled to do something or to act in a certain way. To have a right of recipience is to be entitled to receive something, or to be treated in a certain way.

A right of recipience is violated when someone from whom you are entitled to receive something refuses to provide it, or when someone fails to accord you the treatment to which you are entitled, for instance, if you are refused your old-age pension, or treated with discourtesy. There is also a violation if you are to suffer for demanding what you are entitled to receive, or abused and threatened for protesting against being denied the treatment to which you are entitled. A right of action is violated when

---

2. There cannot be a right if it is not possible to say what action or failure to act would constitute a violation.
someone stops you doing what you are entitled to do, or threatens you with dire consequences if you do it, for instance, if someone forcibly prevents you from voting, or tries to intimidate you into remaining silent when you are entitled to speak.³

(ii) Rights and correlative obligations

Everyone is under a general obligation to refrain from doing anything which would violate anyone else's rights. It follows that at least one obligation is correlative to every right. This is an obligation that falls equally on every one. It is the only obligation which is necessarily correlative to every right of action. The same obligation is correlative to rights of recipience.

It is, however, also wrong for anyone to do anything which prevents anyone else from meeting an obligation or which impedes or interferes with his meeting it. Equally, it is wrong for anyone to be penalized or made to suffer for meeting an obligation. It is right for people to meet their obligations. The difference between peoples' right to have what they are entitled to and to meet their obligation is that when you are under an obligation you must meet it unless a more pressing obligation intervenes, in which case you must meet the latter. Subject to this qualification, you do not have choice about whether or not to meet an obligation. Not so in the case of a right. When you have a right, you are not obliged to exercise it, which is to say, you have a choice.

To say that there is no choice about whether or not to meet an obligation is not to deny that it is physically possible not to meet it. In most

³. Milne, Supra note 1 at 90.
countries the law imposes an obligation upon car-owners to insure their cars. It is possible for a man to drive his car without insuring it, but if he does so he does wrong. The obligations legally exclude choice but cannot physically exclude it. No human law can do that. By the same token, if I have made a promise, I am under a moral obligation to keep it. It is physically possible for me to break it but that would be wrong.4

To say that to have a right is to have a choice is straightforward in the case of rights of action, and it is also true of most rights of recipience. If I have made a promise, not only am I under an obligation to keep it, but you have the right to demand that I should. However, your right entitles you, if you choose, to release me from my obligation. It does not oblige you to insist that I do what I promise.

But this is not so in all cases. The right of children to be looked after by their parents is a right of recipience from which choice is normatively excluded. Children are not entitled to decline parental care and protection. Even if they do not want it, they must put up with it. They have no choice, morally or legally, about whether or not they will accept the parental care, or the arrangements made for them. They must be looked after either by their parents, or other competent adults. This means that, strictly speaking, children do not have a right to be looked after, they have an obligation to submit to it. But this is at variance with ordinary language. We do not say the children have an obligation to accept parental care and protection, but that they are entitled, that is, they have a right to it.5

---

4 Choice is normatively excluded in the sense that a right action is one which must done and a wrong one which must not be done.
5 Milne, supra note 1 at 92
(iii) Elective Rights and Non-elective rights

Rights can also be divided into elective and non-elective. Elective rights normally confer choice. Every right of action is an elective right, because the right-holder is entitled not only to do but also to refrain from doing what he has a right to do. The same holds for every right of recipience which entitles the right-holder not only to receive but also to decline what he has a right to receive, or to acquiesce in not receiving it without protest. Non-elective rights normatively exclude choice. They are those rights of recipience which entitle the right-holder to receive something but do not entitle him to decline it. There is however, a difference between non-elective rights and obligations. Non-elective rights are essentially passive in character. There is nothing which the right-holder is required to do. He is simply the beneficiary of certain treatment which others are under an obligation to accord him.6

(iv) Concept of Human Rights

The very term "Human Rights" is problematic. It straddles several universes of discourse. Moral philosophers signify by it a set of ethical imperatives that contribute to making the basic structure of society and state to be and remain 'just', overall. International lawyers regard the term as a set of norms and standards produced juridically (as having some sort of binding effect on the behavior of state and regional and international organizations). Architects and administrators of regional governance (such as the European or African Unions) regard 'Human Rights' promotion and protection as symbolic of the syndrome of shared sovereignty. For national power-elites, 'Human Rights' provide

6. Ibid
vocabularies of legitimization of governance. For those who regard practices and structures of governance as deeply unjust or morally flawed, 'Human Rights' represent a cry against oppression. These different viewpoints of people in different fields of our modern life make it necessary to discuss the human rights concept from a purely academic point of view. To do this let us state the theoretical bases of human rights.

3. Theoretical bases of Human Rights

There are three prominent bases for justifying human rights: the idea of positive law, the idea of natural law, and in recent times, the idea that human rights are based on human dignity. I will discuss each in turn.

(i) Positive Law Rights

The tribal societies that conquered Rome were in no sense democracies, but their kings were generally, at least in principle, elected to that status usually from among the members of a particular family deemed to be of quasi-divine origin, and it could be said that they ruled with the rough and ready consent of their (male) subjects. Things could hardly be otherwise in a context in which ‘the people’ were, in effect, a war-band. Briefly stated, during the middle ages these elements of consensual rule were, in some places, combined with the legal notion, central to Roman law, of a ‘contract’, with the result that political authority came to be understood as being based on, and limited by, a bargain struck between the rulers and the ruled. For the English speaking world the most important such bargain is the 'Great Charter' (Magna Carta) agreed between king John and the barons in 1215, but European history provides a number of similar examples of systems of rights and duties being established by the
political equivalent of a contract between the rulers and those subjects in possession of real bargaining power.\textsuperscript{7}

An Analysis of these 'charter rights' leads us to conclude that they have a number of features which we can note as follows: first, they come out of a contract. They involve reciprocal rights that are always accompanied by correlative duties. Secondly, they are usually quite specific; for example much of Magna Carta is taken up with details about subject such as wardship, or the taking of woods by royal officials. Thirdly, the parties who hold rights and owe duties are specified.

These features are carried forward into the theory and practice of rights in modern times. Theories of political obligation based on a notional 'social contract' work in much the same way, and the 'positive law' of rights established by modern western liberal democracies shares the same features. Indeed some analysts argue that these features are essential to the very notion of a right; the only true rights are specific and correlative “claim rights”.\textsuperscript{8}

It is clear that if this is so, there cannot be genuine 'human rights,' that is to say, rights that adhere to an individual simply on the basis of his or her humanity. If the only real rights are those created as part of a legal system by an explicit contract between the rulers and the ruled, then those who are not parties to such a contract cannot be rights bearers, or bound by reciprocal duties.


\textsuperscript{8} Id. at 37.
The idea of deriving rights from a social contract was revived by Rawls who suggested that if hypothetical individuals were devising a structure for future society where they were ignorant of what sort of individuals they were or what positions in society they would occupy, those individuals would agree that each person should have an equal right to the most extensive total system of equal basic rights which are compatible with a similar system of liberty for all.9

(ii) Natural law school

The supporters of natural law say that rights are derived from 'natural rights' which individuals possessed in a 'state of nature'. Thus Locke regarded it as a fundamental law of nature that 'no one ought to harm another in his life, health, liberty or possessions' so that when individuals consented to having political authority imposed on them, they nevertheless retained their natural rights. Both the American Declaration of Independence and the French Declaration of the Rights of Man and the Citizen assume that the government role is to safeguard natural rights and that where the state violates natural rights, it loses its right to rule and might be legitimately overthrown.10

The natural law idea as a basis for rights emerged in the middle ages. The idea of natural law can be traced to the classical Greeks and early Christians, but it was medieval catholic theology that turned these beginnings into an elaborate set of ideas. The natural law traditions hold that human beings have an essential nature which dictates that certain kinds of human goods are always and everywhere desired as necessary.

10. Ibid.
for human flourishing; because of this essential nature we can think of there being common moral standards that govern all human relations, standards which can be discerned by the application of practical reason to human affairs. Practical reasoning tells us that these moral standards can generate rights and duties which, crucially, are not justified by reference to, or limited in application by, any particular legal system, community, state, race, creed and civilization. In principle, every human being is subject to and capable of discerning the contents of natural law.11

(iii) Positive law and natural law rights

The comparison between positive and natural rights can be drawn on the ground of the politics of these two positions. Their politics are different. This difference can be summarized as follows: first, from the positive law point of view, individuals possess the rights they do because they are citizens of a particular state and the law of that state endows them with these rights. If they live in a state governed by the rule of law, they will be able to exercise these rights, and will have the support of the judicial system in so doing. This is all well and good, but the down side is that this state of affairs only pertains in those societies which are governed by the rule of law in the full sense of that term. This limitation does not exist when it comes to natural as opposed to positive law; here, to recapitulate, rights rest on general moral standards established by the use of practical reasoning and apply in all relevant circumstances. The problem here is that precisely because rights derived from natural law are not associated with particular forms of society or government and therefore can be genuinely “Human ”, they are also not associated with any particular enforcement mechanism. Secondly, whereas within a system of positive

11. Chris Brown, supra note 6, at 37.
law the content of rights can be described with some accuracy and precision, the rights that are actually mandated by general universal moral standards are quite likely to be a matter of controversy. The exercise of practical reasoning clearly does not lead to everyone coming to the same conclusion on many important matters.

(iv) Modern Basis of Human Rights

At present human rights are understood as rights which belong to an individual as a consequence of being human, independently of acts of law. Every human being, simply because he or she is a human being, is entitled to some things. Awareness of the existence of this type of rights finds its expression in the output of various cultures at various times. However the real concept of the category of human rights was developed only after the Second World War. It became a common category in disputes of a practical kind, not only in the area of law, but also in politics, morality and religion. The modern concept of human rights is rooted in the experiences of legal authorization of rights, and the tragic consequences that followed when some human beings were denied their status as such. The answer to these experiences was the emergence of the international law of human rights. The concept of human rights adopted then nowadays provides the paradigm for understanding human rights not only in international law, but also in other areas of culture. This conception embraces attempts at explication of the reasons for the immense violations of fundamental rights, and proposals of solutions to ensure that such violations will not recur in the future. The solutions incorporate both standards of conduct as well as postulates referring to the conceptions of a human being, the state and positive law. The international community's appreciation of the unique worth of every
human being led not only to a concern for the elimination of elements destructive of the individual but also to a concern for the creation of the conditions which would enable him or her to develop and flourish.\textsuperscript{12}

(a) Basic Properties of Human Rights

The first, identical, sections of the preamble to the Universal Declaration of Human Rights (UDHR) and the international covenants on human rights mention that the "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 preambles to the covenants add in the second section: “these rights derive from the inherent dignity of human person”. These identical sections of the preambles fix inherent dignity as the original source of human rights and state the main characteristic of human rights. It is useful to deal with each one separately.

(b) Human Rights and Human Dignity

The Universal Declaration of Human Rights of 1948 and the International Covenants on Human Rights of 1966 do not speak of natural or positive law. Instead, they mention human dignity and dignity of human person as the foundation of freedoms and rights. These phrases are used today as an expression of a basic value accepted in a broad sense by all people.

As far as I know, there is no explicit definition of the expression "dignity of the human person" and "human dignity" in international instruments or

national law of Sudan. Its meaning has been left to intuitive understanding, conditioned in large measure by cultural factors. When it has been invoked in concrete situations it has been generally assumed that a violation of human dignity can be recognized even if the abstract term cannot be defined. Everyone knows it when he sees it even if he cannot tell you what it is.

An analysis of dignity may begin with its etymological root; the Latin "dignitas" translated as worth (in French, 'valeur'). One lexical meaning of dignity is 'intrinsic worth'. Thus when the UN Charter refers to the “dignity and worth” of the human person, it uses two synonyms for the same concept. The other instruments speak of “inherent dignity”, an expression that is close to “intrinsic worth”.

What is meant by “respect” for the “intrinsic worth” or “inherent dignity” of a person? “Respect” has several nuanced meanings; “esteem”, “deference”, “a proper regard for”, “recognition of”. These terms have both subjective and objective aspects. Both are helpful in determining the meaning of “human dignity”, but it seems more useful to focus on the latter aspect.

One general answer to our question is to treat every human being as an end, not as a means. Respect for the intrinsic worth of every person should mean that individuals are not to be perceived or treated merely as instruments or objects of the will of others. This means that a high priority should be accorded in political, social and legal arrangements to individual choices in such matters as beliefs, way of life, attitudes and

---

13 Several decisions have applied the concept of dignity without attempting to define the concept in general terms. The constitutions of many countries speak of the concept of dignity without determining its meaning e.g. Art. 1 of the German Constitution.
conduct of public affairs. We may give it more specific content by applying it to political and psychological situations. In political context, respect for the dignity and worth of all persons and for their individual choices leads, broadly speaking, to strong emphasis on the will and consent of the governed. It means that the coercive rule of one or the few over the many is incompatible with a due respect for the dignity of the person. It also means that governments are not to use coercion to impose beliefs and attitudes on those subjects.14

The concept of respect for dignity suggested above can also be given more specific meaning by applying it to actions of psychological significance. Indeed, nothing is so clearly violative of the dignity of person as treatment that demeans or humiliates them. This includes not only attacks on personal beliefs and way of life but also attacks on the groups and communities with which individuals are affiliated. Official statements that vilify groups or hold them up to ridicule and contempt are a form of psychological aggression resulting in a lack of respect by others for such groups and, perhaps even more insidious, destroying or reducing the sense of self-respect that is so important to the integrity of every human.15

(c) Main Characteristics of Contemporary Human Rights

Modern human rights are universal, that is, they belong to each and every human being, no matter what he or she is like. Universality is rooted in the inherent human dignity and the inherency of rights. Although universality and inherency are decisive defining characteristics of human

15 Ibid.
rights\textsuperscript{16} they are those characteristics which are most often contested by philosophers and legal theorists. Some members of these groups view the declaration of human rights as one that purports to be universal, but actually reflects idealistic European political traditions.

In spite of this hot debate it should be underlined that both universality and inherency are definitely recognized and emphasized at the level of practical discussion.

The universality of human rights is not recognized in the universal declaration and international instruments only, but in the Islamic Jurisprudence as well. In the Quran it is clearly indicated that “sons of Adam” are honored by God! “We have honored the sons of Adam; provided them with transport on land and sea; given them for sustenance things good and pure; and conferred on them special favors, above a great part of our creation”\textsuperscript{17}. It is noted that using the phrase “sons of Adam" and not the phrase "human person" brings up a new positive dimension to human rights by showing that human beings are brothers irrespective of differences of religion, race, or language. Another positive dimension which widens the scope of human rights is found in the Quran since “mercy” is required for all “creatures” and not only for the “sons of Adam”. “We sent thee not, but as a mercy for all creatures”.

Equality is another major element of the conception of human rights. Article 1 of the Universal Declaration of Human Rights states: ‘All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another

\textsuperscript{16} Marek Piechowiak, \textit{supra} note 11, at 5.
\textsuperscript{17} Surat al Isra verse 70.
in a spirit of brotherhood.’ Equal dignity refers to the fact that there are no human beings which are more human than other human beings. Equal dignity requires equal respect for an individual as an end in him / herself, which means equal concern for the individuals’ protection, possibilities and means of developments. If no one may be treated as a mere means, then both public burdens and public goods should be distributed in a proportionally equal way. Proportionally, because respect for equality does not mean equal treatment in the sense of imposing equal aims and equal circumstances of action on individuals. Differences are desirable if there are well–grounded reasons justifying them.

If we recognize that equal and inherent dignity is a source of human rights, we have to accept as a consequence that human rights are not based on any particular, contingent characteristic of a human being: ‘everyone is entitled to all the rights and freedoms set forth in this declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’. If the justification of human rights were related to any such characteristic, then the absence of that characteristic would have to mean a deprivation of the rights based on it. Therefore possession of human rights is not a consequence of, for example, being able to exercise free will or to think logically. It should also be noted that, in accordance with the quoted Article 1 every human being is recognized as free and national so being free and national are not properties related to some functional abilities but are inherent and may be regarded as an element of the foundation of uniqueness and dignity of human rights.

---

18. Universal Declaration of Human Rights, Art. 1; CESCRI. Art. 2, Para. 2; CCPR, Art. 2, Para. 1.  
It should be noted that the principle of non-discrimination, adopted in international law of human rights, refers to the relation between an individual and human rights. It expresses an idea that the differences between people do not matter as far as possession of human rights is concerned. Therefore, different treatment of individuals is discrimination only when it infringes on human rights.

Another important feature of the contemporary conception of human rights is the recognition of the indivisibility and interdependency of different rights. The Vienna Declaration states that ‘All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis’.20 Each of the different aspects of a human being (physical, psychological, moral, spiritual, social, etc.) deserves attention. Individual development requires appropriate social, political, economic, cultural, and ecological conditions. Moreover, ensuring a minimum in one of these is usually indivisible for developing or preventing degradation in another; for example, ensuring minimal social standards is necessary for enjoyment of political rights. However, it seems to be impossible to define, for all cases and in general terms, a means for the prevention of the degradation of a human being or for ensuring his/her development should be distributed. The point of departure is a specific person living in unique circumstances. The aim of formulated law is the well-being of a human being, and not abstract values. Acknowledgment of inherent dignity as the source of the rights is also an acknowledgment of the fact that rights are secondary to an individual and exist for the benefit of an individual as whole.21

---

20. 1993 part 1, Para, 5; see also Para, 3 of the preamble of CESCRI and the CCPR
21. Marek Piechowiak, supra note 11, at 9
James Nickel in 1987 identified three specific ways in which the concept of human rights differs from, and goes beyond that of natural rights. First, he argues that contemporary human rights are far more inclined to view the realization of equality as requiring positive action by the state, via the provision of welfare assistance, for example. On the other hand, advocates of natural rights, he argues, are far more inclined to view equality in formalistic terms, as principally requiring the state to refrain from 'interfering' in individual's lives. Second, he argues that, whereas advocates of natural rights tend to conceive of human beings as mere individuals, advocates of contemporary human rights are far more willing to recognize the importance of family and community in individual's lives. Third, Nickel views contemporary human rights as being far more ‘internationalist’ in scope and orientation than was typically found within arguments in support of natural rights, that is to say, the protection and promotion of human rights is increasingly seen as requiring international action and concern. The distinctions drawn by Nickel between contemporary human rights and natural rights allow one to trace the development of the concept of human rights.

4. Objections to the Idea of Human Rights

There are objections to the idea of human rights which can briefly be indicated as follows: First, the idea of human rights upon which the UN Declaration of Human Rights is based is an ideal standard. The present economic and cultural condition of the so-called (Third World) precludes

---

peoples and governments within that world to be like liberal-democratic industrial societies in promoting and protecting human rights.  

Secondly, human rights embody or reflect values and institutions which have their roots in the western tradition of culture and civilization. But the western tradition of culture and civilization is not the only one. There are a number of other such traditions e.g. Buddhist, Islamic, and Hindu, each of which is based upon a great religion. Western civilization may be pre-eminent in science and technology, and in industry and commerce. But that does not justify erecting certain of its values and traditions, with their associate rights, into a universal standard.  

Thirdly, the human rights focus ignores the very real threats to human well-being wrought by non-governmental agents and foreign states. By this logic, in non-ideal situations, such as civil war or non-compliance by other states, any human rights obligations of states are canceled. 

Fourthly, human rights protests ignore the risk of global instability created by foreign intervention in the domestic affairs of other states. 

Fifthly, respect for individual does not require respect for their "human rights" but instead, requires that foreigners do not interfere with the society which individuals accept. This means that the tacit consent of individuals to be ruled should be respected, even when their government fails to respect human rights. 

Addressing these objections one can say that a rejection of (Western) human rights on the basis of saying "we are not westerners" or on the ground that they reflect western liberal-democratic industrial societies values is unfortunate, for several reasons. We should not reject ideas or things because they are western; this is not a good reason for rejecting

23. Milne, supra note 1, at 3. 
24. Ibid.
ideas, values or things. There are values which are agreed upon between all civilizations. Moreover many theories of human rights and moral traditions condemn the behavior which human rights serve to protect against. This is one point.

Secondly, if human rights are inappropriately based on a western conception of the individual as self-interested and atomized, there are some arguments for individual rights that have appealed to an ideal of human flourishing which prized individual autonomy, or which focused on the individual as agent. However, they do not assume that individuals are fundamentally self-interested, nor do they dismiss the importance of social institutions in insuring the human good.

Third, the western focus on violations of civil and political rights, rather than on the whole panoply of rights may be due to the fact that violations of social and economic rights are difficult to ascertain. In addition, it is not clear that media attention in the west about violations of economic and social rights is an effective way to improve the situation. Lack of criticism is therefore no indication that western ideologies regard social, economic, and cultural rights as less important.

Fourth, the actual compliance with the laws of the land is not the final word regarding the legitimacy of social institutions. More would need to be said about reasons for actual acquiescence before accepting that this constitutes tacit consent in a significant sense- where basic liberties, freedoms and basic needs are not protected, silence can easily be due to fear. We would not agree with a totalitarian government’s interpretation of silence and acquiescence as tacit consent, if those who criticize the government risk immediate death or imprisonment.

Fifth, objecting to domestic and international protests against human rights violations by appealing to importance of respecting culture begs

25 For instance, Immanuel Kant.
several important questions. It must be made clear whose culture is to be respected: that of the government or that of the citizens. Reasons should be presented for why culture should be respected when significant interests of individuals are at stake.

Sixth, in so far as a government claims internal sovereignty over a territory and a population, it takes on a responsibility as the primary protector of that population against threats from third parties. On the other hand, international law acknowledges governments’ responsibilities may be different in times of crisis and non-ideal situations such as civil war.26

Seventh, as regards sovereignty, human rights violations are not properly regarded as 'internal' affairs of those states that are signatories to the international convention of human rights. The treaties have clearly moved human rights violations into sphere of international concern. Further, some legal scholars hold that some human rights have strong claim to the status of customary law binding regardless of signature.

5. Religion and Human Rights

Under this title we will discuss human rights in Islam and Christianity only. Other religions have views on human rights but they will not be discussed here.

(i) Human Rights in Islamic Jurisprudence

In traditional Islamic Jurisprudence many rights are granted in accordance with a strict classification based on faith and gender and are not given to

---

26. But even in like these situations there are some rights which are not derogable e.g. procedure for death penalty.
human being as such. People are classified in terms of their religious beliefs; Muslims, ahl-alkitab (believers in a divinely revealed scripture, mainly Christians and Jews), and unbelievers. In modern terms Muslims are the only full citizens of Islamic state, enjoying all the rights and freedoms granted by Sharia, which are subject to the limitations and restrictions imposed on women.  

In the Islamic traditional jurisprudence Muslims who repudiate their faith in Islam whether directly or indirectly, are guilty of an offence punishable by death. This law of apostasy can be used to restrict other human rights such as freedom of expression. Muslim sects which are deemed to be apostates from Islam may be punished with the death penalty and their rights are actually violated.

The gist of this argument is that granting human rights on the basis of religious beliefs is contrary to the right of all people to equality. Punishment for apostasy is against freedom of religion and conscience, and may be exploited against freedom of expression. However writers on contemporary Islamic jurisprudence emphasize that there is no contradiction between Islamic principles and modern human rights. According to them rights are given to everyone in the Islamic state on the basis of humanity. They always mention verses from the Quran to support their viewpoint e.g.: “we have honored the sons of Adam provided them with transport on land and sea; given them for sustenance things good and pure; and conferred on them special favors above a great part of our

28. This was applied in Sudan as recently as 1985. When Mahmoud Mohamed Taha was executed.
29. Abdullahi An-Na’im, supra note 26, at 262.
creations.”30 “No coercion in religion …”31 They often refer to a subsequent verse and many other verses from the Quran and Sunna to say that there is no crime in Islam called “apostasy.” Another reason they do not recognize it is because the "Hadith" that says he who repudiates his religion must be killed came to organize the relationship between Muslims who repudiate their religion and join non-believers in a war against Muslims and those who still embrace Islam and believe in its principles.32 In addition, some writers see no difference between natural law (which is the permanent law of God) and Islam (which is the permanent and last law of God).33

(ii) Human Rights and Christianity

There is a common ground on human rights. This emerged as part of the World Council of Churches study on human rights. The proposed list of human rights begins with the right to life. Then comes the right to cultural identity, followed by democracy, the right to dissent, personal dignity and freedom of religion. There is general consensus among Christian churches on these rights.34

From a theological perspective, human rights have to do with the realization that all people are created in the image of God, enjoying equal human worth. In order to realize and fulfill their destiny as the bearers of God’s image, all people must claim and realize their fundamental rights,

30 Supra note 16.
31 Surat al Isra, supra note 16.
33 Dr. M. A. Mufti and Dr. Sami Salih, the Islamic Political Theory of Human Rights, 42 Kitab Alomma No.25.
in recognition of the fact that without certain basic rights people cannot realize their full God-given potential.\textsuperscript{35}

Some Christian writers consider it a primary task of the church to help Christians to promote and appropriate the values of human rights culture. Christians emphasize that the doctrine of human rights is strongly connected to Christianity. In the words of Winston Ndungane: “The doctrine of human rights is man's attempt at exercising his responsibility as God's steward on earth in that it seeks to challenge all the injustice that distort the image of God in man. It is an attempt to establish a social condition where there are harmonious and peaceful relation among the people of the world, and where people are able to realize their full potential as God created them. There is some kind of relation that exists between the notion of human rights and the Christian doctrine of man…..”\textsuperscript{36}

According to sources I have come across, recognition of human rights at least theoretically is not a problematic issue in Christianity, as we have seen above, or in the original sources of Islam, i.e. the Quran and Sunna. This is not surprising since these two religions are revealed from God who is the creator of human beings.

\textbf{6-Conclusion}

The idea of human rights as it is understood today is a result of many developments in the history of mankind. The most important ones are natural law thinking and the trend of basing the concept of human rights

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{35} Id., at 126
\item \textsuperscript{36} Charles, Id., at 127.
\end{itemize}
\end{footnotesize}
on human dignity. The discussion among the philosophers of these two schools led to one outcome, which is the conclusion that there are rights which can properly be called human rights. The strict respect of these rights plays a significant role in ending many of our problems and conflicts.

The objections to the idea of human rights arise from the political conflict between East and West and between South and North. This conflict will disappear if cultural and civilized dialogue is made at academic and strategic institutions and foundations. I have a strong conviction that the idea of human rights is going to be increasingly acceptable to many inhabitants of the world. Religions and local cultures can positively be exploited to promote and protect human rights; if it is not possible now to exploit some cultures and religions in realizing this aim, then the followers of these cultures and religions need to reform the existing concepts which are contrary to our modern concept of human rights. Unless they do that peacefully, it is to be expected that revolutions will be staged by persons whose human dignity is not protected and susceptible to violation.
Chapter Two

Classification of Human Rights

1. Introduction

The previous chapter analyzed and discussed the historical roots of human rights. This chapter will discuss the different categories of human rights. If one gives a glance at the various documents that together form the codified body of human rights, one can identify and distinguish between three categories of human rights, namely; civil and political rights; economic, social and cultural rights, and new or third generation human rights. These categories, particularly the first two, are the main topics of this chapter.

2. Divisions of Human Rights into Three Categories

Internationally recognized human rights are often divided into different categories. One well-known distinction is between what is sometimes referred to as three generations of human rights, namely; civil and political rights (eighteenth century rights), economic, social and cultural rights (late nineteenth and early twentieth century rights) and a new set of rights such as the right of self-determination, the right to development, and the right to peaceful coexistence (late twentieth century rights). There are arguments for and against this classification. It is useful to discuss some of them here.
(i) Arguments against this Classification

Those arguing against this method of classification would argue as follows: this classification does not adequately reflect recent developments in the real world, legal practice of human rights, or human rights doctrine. Let us illustrate this by constructing the following case for consideration:

Mr. X is a European Union citizen visiting relatives in another European Union country. Owing to an explosion in a chemical plant, he suffers from serious health problems, which later prove to have partially incapacitated him. He and the relatives he visited were forcibly evacuated after the explosion by the police from the house where they were living and they have had to seek accommodation in a hotel. X’s health problems were greatly aggravated by the fact that he, as a foreign national, was denied medical treatment in a local health centre run by semi-public health authorities and later also by a private clinic, as X did not have means to pay for the fees charged (X later returned to his own country where he received medical treatment, but this was too late for his complete rehabilitation). The local health care authorities claimed that the relevant national health legislation should be interpreted as granting only the states own citizen a subjective right to health care under the national health care and health insurance schemes, and that private health clinic had no obligation to treat foreign nationals. X brought a case before an administrative court challenging this interpretation and also arguing that it constituted a violation of EC law. The administrative court held that it lacked jurisdiction in such cases, which could not be brought before the court (other than as a liability claim for compensation under tort law). There was no appeal against this judgment. X subsequently started to
make enquiries as to whether his human rights had been violated because of the actions of the national legislators, the local health authorities, the private clinic and the administrative court. In his contacts with state authorities, they denied that any internationally recognized human rights had been violated, adding that exclusion of foreigners from the national health care system had been made as part of a policy to cut health and social costs, demanded by the European Bank for Reconstruction and Development as condition for loans and assistance.

The case cannot be easily fitted into the simplistic categorization referred to above. Human rights which can be plausibly invoked in this context (not necessarily implying that they could be invoked successfully) include the right to health, the right to social security, the right to protection against inhumane or degrading treatment, the right to freedom of movement, the right to privacy, the right to a fair trial, the right to effective domestic remedies, the right to protection against discrimination, including discrimination on the basis of nationality in a specific EU context, and finally environmental rights. This bundle of rights thus includes rights from all the three generations.37

Another situation illustrating the indivisibility and interdependence of human rights is the case of armed conflicts. In such conflicts, international humanitarian law offers an additional source of law which may be applicable in a given situation. International humanitarian law, notably the four Geneva Conventions of 1949 and their Additional Protocols of 1977, contains a great number of provisions providing for the human treatment of individuals hors de combat. No specific

distinction is made here between civil and political rights on the one hand and economic social and cultural rights on the other. Both categories of rights are covered by the humanitarian instruments.\textsuperscript{38}

Furthermore, there are some rights which are difficult to classify according to the traditional categories. A good example is property rights, which from a historical and ideological point of view are often conceived as civil rights, but which in the preparation of the 1966 covenants were considered in the context of the International Covenant on Economic Social and Cultural Rights (CESCR) and not the International Convention on Civil and Political Rights (CCPR), only to be finally left out of the covenants altogether. Because of this controversial character the right to property is subject to particularly far-reaching limitation clauses. States enjoy a wide ‘margin of appreciation’ to restrict this right in the public interest, in the interest of society, or in the general interest of the community. The restriction might even entail the total expropriation of private property if it is seen as being in the public interest, as is often the case in the construction of motorways and railways. Only article 21\textsuperscript{(2)} of the American convention on human rights explicitly provides for just compensation in case of deprivation of property.\textsuperscript{39}

(ii) The Importance of Distinction between Different Categories of Human Rights

Firstly, we should not put aside the usefulness of human rights classifications. It is useful to classify human rights into different groups for analytical convenience. Furthermore the characteristic of each

\textsuperscript{38} Id., at 51.
\textsuperscript{39} Id., at 101(2000).
category shows certain aspects of rights more or less commonly shared by all the rights in that category. Secondly, treating all human rights as of equal importance prohibits any attempts to resolve the conflicts which can and do occur between rights. Take the example of a hypothetical developing country with severely limited financial and material resources. This country is incapable of providing the resources for realizing all of the human rights for all of its citizens, though it is committed to doing so. Some sort of prioritization could be helpful. Thirdly, government officials wish to know which human rights are more pressing than others, which fundamental human rights should it immediately prioritize and seek to provide for? This question, of course, cannot be answered if one sticks to the position that all rights are of equal importance. It can only be addressed if one allows for the possibility that some human rights are more immediate than others.

It should be admitted, however, that there is an important difference between civil and political rights on the one hand and most economic, social and cultural rights on the other, when it comes to international monitoring and implementation mechanisms.

While reporting systems normally apply to economic, social, and cultural rights as well, only a limited number of these rights can be brought before international bodies in the form of complaints. The main exception consists of the economic, social and cultural dimensions of the European Convention on Human Rights (ECHR) (e.g. the right to education) and the CCPR, including the possibility of applying the general non-discrimination clause in Article 26 of the CCPR to economic, social and cultural rights as well, which can be brought before the European Court of Human Rights and the Human Rights Committee, respectively. There
is an on-going discussion about an Additional Protocol to the CESR, establishing a complaints system for this covenant. In European community law, certain social rights (conditions of work, social security, etc.) may come before the Court of Justice of the European Communities mainly within the framework of the prohibition of discrimination (on the grounds of nationality or sex). In the future, there will probably be fewer differences between the two categories of human rights when it comes to international implementation as well.

3. Civil and Political Rights

Civil rights are rights necessary for the establishment of individual autonomy, including liberty of the person; freedom of speech, thought and faith; the right to own property and to enter into contracts; and the right to be treated equally with others before the law. Political rights are rights empowering individual participation in political processes of a country. The right to elect and to be elected, equal access to civil service, and related civil rights such as freedom of association and speech are human rights without which no democratic political system can thrive.40

The generally subscribed characteristics of this category are that the rights in this category are (a) negative and (b) immediately enforceable. They are negative in the sense that the rights of this kind are most often violated by positive actions of governments and that the best way to ensure the enjoyment of such rights is to require the governments to refrain from interfering with the life and freedoms of individuals. The rights in this category are also said to be immediately enforceable. If such

rights are violated (most likely by government), the victims may bring the matter to an appropriate authority (commonly a court) for immediate and effective relief and redress.\textsuperscript{41}

Civil and political rights are the most important and lasting achievements of the American and French revolutions in the late eighteenth century and of other bourgeois revolutions in the nineteenth and twentieth centuries. Based on the rationalistic doctrine of natural law, according to which human beings are born free and equal in dignity and inalienable rights, civil and political rights are the legal expression of two different concepts of freedom; the ancient democratic concept of achieving collective freedom through active participation in the political decision-making process, and the modern liberal concept of achieving individual freedom by creating a private sphere for every human being which is to be protected against any undue interference by the state and other powerful actors, such as religions. In this sense political rights are the individualistic expression of democracy, the civil rights of liberalism. In the various bills of rights formulated following the American Revolution of 1776 and the French Declaration of the Rights of Man and of the Citizen of 1789, both concepts of freedom are represented. With the rise of liberalism and capitalism in the nineteenth century, the democratic or political element of the first generation gradually lost ground, and the bourgeois concept of human rights seemed to be reduced to mere claims against state intervention.\textsuperscript{42}

Typical examples of political rights are the right to vote, to have equal access to public service and to take part in the government of one’s


\textsuperscript{42} Symonides, \textit{supra} note 3, at 70.
Civil rights are somewhat more complex and range from the protection of the individual’s physical, spiritual, legal and economic existence (right to life, physical integrity, privacy and dignity, freedom of thought, conscience, religion and opinion; right to nationality and recognition as a person before the law; right to own property) via classical freedom rights (liberty of person, freedom of movement, prohibition of slavery, freedom of expression) to highly detailed procedural safeguards relating to fair trial and the rule of law in general. The category of "political freedoms" (freedom of expression, media, arts, assembly, association and so on) serves both concepts of democratic and liberal freedoms and thereby constitutes the link between civil and political rights.

The rights and freedoms enumerated above are too difficult to be stated here. Let us discuss the right to life and political rights, as illustrations of civil and political rights.

(i) The Right to Life

The right to life is the supreme human right from which no derogation is permitted, even in time of war or public emergency. Nevertheless, it is not an absolute right such as, for example, that pertaining to the prohibition of torture. Many articles in many conventions prohibit arbitrary deprivation of life, without defining which type of killing would be non-arbitrary. Article 2 of the European Convention of Human Rights prohibits intentional deprivation of life unless it results from the use of force which is no more than absolutely necessary in defense of any person from unlawful violence, in action lawfully taken for the purpose of quelling a riot or insurrection, or to prevent the escape of a person
lawfully detained. In a case against the United Kingdom the European Court of Human Rights ruled by a majority of 10:9 that the intentional killing by members of the British security forces of three persons suspected of involvement in a bombing mission in Gibraltar violated Article 2 of the European Convention of Human Rights. The court held that, even when dealing with dangerous terrorists, operations to prevent the explosion of a car bomb must be organized in such a manner that the use of lethal force does not become unavoidable.

An example of a violation of the right to life is the arrest or abduction, and subsequent arbitrary or summary execution, of a political opponent by members of the army, intelligence or police, as unfortunately happens on a systematic level in many countries of the world, in particular in military dictatorships as well as in the context of international and internal armed conflicts.

Article 6 (1) of the International Covenant on Civil and Political Rights states, for example, that the right to life of every human being shall be protected by law. The inherent right to life means that nobody should be arbitrarily killed by a state agent, by starvation, epidemics, poverty and similar natural or human-made disasters, or by ordinary crime. Of course, murder, homicide and similar crimes occur in every society and states cannot be held responsible for every assassination, but have an obligation to protect all human beings under their jurisdiction against such acts by enacting relevant criminal legislation with appropriate penalties and by

---

44. These violations occur massively in the third world countries where there is no supremacy of the rule of law.
establishing sufficient police, judicial and other law enforcement organs to prevent such criminal acts and bring the perpetrators to justice.

There are two controversial matters relating to the right to life; abolition of the death penalty and the question of abortion. Let us discuss them in turn.

**A. Abolition of Death Penalty**

Despite a clear trend towards abolition of the death penalty in international law and in the practice of many states, the execution of a person who has been sentenced to death for a capital offence after a fair trial by a competent court does not amount to a violation of the right to life. While Article 2 (1) of the European Convention of Human Rights plainly excludes the death penalty from the application of the right to life, the provisions of Article 6 of the International Covenant on Civil and Political Rights and Article 4 of the American Convention on Human Rights took certain developments into account and, therefore, contain a number of limitations; the death penalty may be imposed only for the most serious crimes; it shall not be re-established in states which have abolished it; it shall not be imposed for crimes committed by persons under 18 years of age; it shall not be carried out on pregnant women; and every person sentenced to death shall have the right to apply for amnesty, pardon or commutation of sentence.\(^45\)

There is an international campaign for the abolition of the death penalty by Amnesty International and other non-governmental organizations. This campaign led to the adoption of the second optional protocol to the

\(^{45}\) Symonides, *supra* note 3. at 76.
International Convention on Civil and Political Rights in 1989. The states parties to this protocol are under the legal obligation, at least in time of peace, not to apply the death penalty and not to introduce it in the future. Unfortunately, only 40 states, mostly from Europe and Latin America, have ratified this protocol in 1999, whereas in other countries, such as China, Iran, Saudi Arabia and the United States, the death penalty is applied in a huge or even increasing number of cases.46

According to my own viewpoint most of the Islamic states such as Iran have refused to ratify this protocol for religious reasons. The death penalty is a punishment of many crimes in Islamic criminal law. The state under the Islamic system is under a religious obligation to apply this penalty strictly because it is provided for in the Holy Quran which is a supreme source of legal provisions. International organizations will find it increasingly difficult to abolish this penalty in Islamic states. The possible solution is to renovate the present Islamic jurisprudence in the light of the general principles of Islam or otherwise to require a number of limitations such as those of the International Covenant on Civil and Political Rights and the American Convention on Human Rights.

(b) Prohibition of abortion

Another controversial issue related to the right to life, which can shortly be discussed in this chapter, is the question of abortion. What can be said here is that article 4(1) of the American Convention on Human Rights protects the right to life, in general, from the moment of conception. The Inter-American Commission of Human Rights found that the decision of

the United States Supreme Court legalizing abortion until the end of the first trimester did not constitute a violation of the right to life, because Article 6 of the International Covenant on Civil and Political Right does not expressly determine the point at which the protection of life begins. From the travaux préparatoires of the covenant, it becomes clear that the unborn child was not to be protected from the time of conception. Even if the fetus is protected by the right to life, its rights have to be balanced against the rights of the mother.47

As has been stated above, the protection of the right to life goes beyond the protection against arbitrary killing by state agents and the criminal prohibition of homicide offences. The obligation to ensure the right to life also extends to other threats to human life, either natural or human-made.

(ii) Political rights

Political rights constitute the very essence of democracy in terms of subjective rights. The right to take part in the conducting of public affairs, directly or through freely chosen representatives, is the most direct expression of political freedom, as distinguished from the concepts of liberal or socialist freedom. Since democracy usually functions by means of representative participation, the most important political rights are the right to vote, the right to be elected and the right of equal access to public service.

The right to vote and to be elected is a good illustration of the interdependence of states’ obligations to respect, to ensure and to protect. First of all, states are under an obligation to ensure that elections are held

47. Symonides, supra note 3, at 78.
at periodic intervals, at least for parliaments and other bodies exercising legislative functions. The duty to ensure the right to vote includes the obligation to provide for free, fair and secret elections on the basis of universal and equal suffrage, by means of positive state action. This also includes the duty to guarantee that all persons who are entitled to vote, including the elderly, the sick, the disabled and persons deprived of their liberty actually have an opportunity to exercise this most important political right.

Secondly, states shall refrain from interfering with free and fair elections by privileging certain political parties in their electoral campaigns, by committing electoral fraud or by arbitrarily excluding voters or political parties. Only reasonable and non-discriminatory restrictions are permissible, such as the exclusion of aliens, minors, the mentally ill or persons convicted in court for certain crimes. Only in exceptional cases may certain parties be prohibited from participating in elections. Exclusion is not permitted with regard to illiterate persons, civil servants, pre-trial detainees; nor is exclusion on any discriminatory grounds such as sex, race, religion, property, social origin or political opinion permitted.

Thirdly, states have a positive duty to protect voters from undue pressure from private individuals and groups. In particular, the principle of free and fair elections means that voter and candidates shall not be intimidated, harassed or threatened by powerful parties and pressure groups. During elections, the strict observance of a secret ballot is the best guarantee of free elections.
The right of equal access to public service obliges states to provide for minimum procedural guarantees, such as publicly announcing vacant positions and ensuring a selection procedure which grants all applicants equal chances of access according to objective criteria. In Stalla Costa v. Uruguay, the Human Rights Committee held that reasonable measures of affirmative action (preferential treatment of persons who had been arbitrarily dismissed during the military regime) did not constitute discrimination. The rule in this case can be extended by analogy to be applied to temporary measures aimed at realizing equality between men and women such as CEDAW provisions.

It is clear from what has been discussed that political rights are basic to democracy. It is necessary to guarantee them if we are to witness real political life in a free and democratic society.

4. Diversity of the World and the Future of Civil and Political Rights

States, like the societies they represent, are unequal. The principle of sovereign equality mitigates only some of the effects of this factual inequality. In this context a distinction can be drawn between three different categories of states existing side by side in the contemporary world: pre-modern, modern, and postmodern. Prominent examples of pre-modern states are Afghanistan, Liberia, and Somalia, but many others, like Sudan, are struggling in this post-colonial chaos also. Most states still belong to the modern world with its balance of power politics, its noninterference principle, and other traditional attributes of sovereignty. The post-modern world, to which the Western European states belong, is characterized by a breakdown in distinctions between domestic and

foreign affairs; by mutual interference in traditional domestic affairs; by
the rejection not only of the use of force but of the very idea of the use of
force to resolve disputes among themselves; by the growing irrelevance
of borders; by security based on transparency, openness, and
interdependence. In postmodern states human rights problems are quite
different from those found in modern or pre-modern states. An important
way of advancing civil and political rights in postmodern societies as well
as in many modern societies is not so much to create new rights or even
deepen the interpretation of existing rights but to create the conditions
that are conducive to the de facto enjoyment of declared rights by all
citizens and non-citizens alike. It is not sufficient for governments simply
to abstain from interference in the civil rights and liberties of individuals.
Approaching civil and political rights as negative rights does not
guarantee their full and equal enjoyment by all individuals. The poor, the
illiterate, and the unemployed are not able to enjoy civil and political
rights to the same extent as their rich and well-educated fellow citizens,
because there is a mutual interdependence between civil-political and
socio-economic rights.49

Other human rights issues that may become topical in advanced post-
modern states are the further extension of rights to immigrants, special
attention to the delicate problems of ethnic and religious minorities, and
concern for human rights in other parts of the world. Processes of
economic globalization have exacerbated the problem of immigration in
as much as free capital movement and restrictions on the movement of
laborers do not fit well together. As one writer writes, “current
immigration policy in the highly developed countries is increasingly at
odds with other major policy framework in the international system.

49. Mullerson supra note 4, at 242.
There is a combination of drives to create border-free economic spaces yet intensify border control to keep immigrants and refugees out”.⁵⁰ The European Union’s experience may show the way for other post-modernizing states. Giddens believes that the “citizenship laws need to be changed and major cultural shifts made”.⁵¹

In modern states, where material conditions for civil and political rights usually are significantly evolved, the development of human rights cultures and democratic traditions will be the most important tasks. In some of these societies, human rights must compete with religious and historical traditions hostile to human rights culture. There are countries, especially in the Middle East, which are rich in monetary terms, but socially and politically backward. The exhaustion of their oil resources may quite possibly be accompanied by a social explosion that could negatively affect human rights.

In pre-modern states, the main task should be the creation of elementary conditions for the introduction of basic civil and political rights. In some cases, this will mean trying to end civil wars and inter-ethnic conflicts. Without the eradication of extreme forms of poverty, the elevation of education standards, and the resolution of the most acute health problems, it will be impossible to speak of real civil and political rights. At the same time, it would be wrong to justify all the violations of human rights by reference to poverty. The corruption of local political elites and repressions are also responsible.

5. Economic, Social and Cultural Rights

(i) What are Economic, Social and Cultural Rights?

There is no clear-cut definition of economic, social and cultural rights. Looking at the Universal Declaration of Human Rights 1948 and the International Covenant on Economic Social and Cultural Rights 1960 we can see that they include the right to an adequate standard of living, the right to property, the right to work, the right to education, the right to take part in cultural life, the right to enjoy the benefits of scientific progress and its applications, and the right to social security.

Economic, Social and Cultural rights are often described as (a) positive and (b) programmatic or promotional. They are considered positive because the role of governments has to be positive in order to realize these rights. For instance, the right to education, one of the typical examples of economic, social and cultural rights, cannot be realized unless governments provide school buildings, teachers and textbooks. The rights in this category are also said to be programmatic in the sense that they represent aspirations or policy objectives rather than justiceable rights whose violations can be remedied immediately.\(^5\) These three overlapping categories of rights are sometimes treated in a similar way; in relation to civil and political rights, for example, all are marginal.\(^6\)

---


\(^6\) Marginalisation of economic, social and cultural rights will be discussed in detail in this chapter.
(ii) Argument against ESCRs

One argument often used against economic, social and cultural rights from a legalistic point of view is that they are not justiceable. This means that they are not suitable for handling by courts or similar institutions. Several arguments can be made against this.

First, many aspects of economic, social and cultural rights can be made justiceable, as can be seen in many domestic legal systems. Second, the concept of justiceability is in itself very fluid and reflects differences in legal traditions and in philosophical views about the relationship between courts and the state. Third, human rights can still be human rights even when they are not in all aspects justiceable. Furthermore, rights which are not initially justiceable can gradually become so by concretization both through practice and through more detailed standard-setting at the international level and by legislation at the national level.

(iii) The Importance of ESCRs

There is an historical and practical reason for emphasizing the importance of economic, social and cultural rights.

First, despite a rhetorical commitment to the indivisibility and interdependence of human rights, the international community including the international human rights movement, has treated civil and political rights as more significant and has consistently neglected economic,
social, and cultural rights. Consequently, in the debates particularly under the item "violation of human rights" both at the Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities, most accusations of serious human rights violation, often made by Western-based human rights non-governmental organizations are related to civil and political rights. The pleas made by the delegates or experts coming from the developing world to focus more on the tragic situations of violations of basic economic, social and cultural rights, often stemming from extreme poverty, are largely ignored.

Secondly, because of their relative novelty, economic, social and cultural rights have not yet been well defined. As we have mentioned at the outset of this section, there is no clear-cut definition. Gomez writes that “the norms of economic, social and cultural rights are vague and lack the precision of their counterpart in the Civil and Political Rights Covenant. The norms are vague because they have not yet received sufficient attention from the courts, academics, or other agencies. Civil and political rights, on the other hand, have long been the subject of interpretation by courts and other agencies, and have thus acquired a degree of clarity”.

It is interesting to remember here that the Universal Declaration of Human Rights does not explicitly make a distinction between civil and political rights, on the one hand, and economic, social and cultural rights on the other. The UDHR includes traditional human rights, largely

54. Gomez, supra note 16 states at 160 that “violations of civil and political rights have continued to be treated as though they are far more serious, and more patently intolerable, than are massive and direct denials of economic, social and cultural rights.
55. Yotoka, supra note 5 at 205.
56. Gomez, supra note 16 at 161.
categorized as civil and political rights, and it also includes six further articles to provide for economic, social, and cultural rights.

(iv) National Origins of ESCRs

The formulation of economic and social rights in the Universal Declaration is significantly influenced by the experience of industrialization in Western countries. Economic, social and cultural rights emerged for the first time in some European states since the eighteenth century. At this time three different systems of welfare capitalism emerged and, consequently, three different approaches to economic and social rights: the welfare state is a system of social stratification which actively orders social relations. The earliest model, which still has its followers, developed poor laws and provided poor relief, but at extremely low levels. This had the effect of maintaining a social stigma for those who were given relief, with a view to preventing persons from wanting to obtain social assistance. It was based on an extreme reliance on the market and on contractual relations, coinciding with the elimination of the feudal system which pushed large numbers of people off the land where they had previously made their living as serfs and, later, as peasants without property. Having lost their means of livelihood, they became a cheap commodity for the emerging capitalist society. Only those who could not be employed even at the lowest possible wages mainly in mining and in the budding industries, were given a modicum of poor relief in order to keep them from dying of starvation. This was an extreme reliance on the market, and any kind of action which could interfere with labour as a cheap commodity was ideologically resisted. Remnants of this still exist in means-tested social
assistance approaches, in societies where to be ‘on welfare is still considered a stigma’.

A second approach was promoted by conservative reformers through the social insurance model. It sought to achieve two simultaneous results in terms of stratification. The first was to consolidate divisions among wage-earners by legislating distinct programs for different class and status groups, each with its own conspicuously unique set of rights and privileges which was designed to accentuate the individual's appropriate station in life. The second objective was to tie the loyalties of the individuals directly to the monarchy or to the central state authority.

The third approach is the universalistic system. Under this system, all citizens are endowed with similar rights system irrespective of class or market position. The system is meant to cultivate cross-class solidarity, a solidarity of the nation.

From the above, it can be seen how economic and social rights emerged as a consequence of industrialization.

(v) Marginalization of ESCRs

One of the most striking features of contemporary human rights is the juridical marginalization of social, economic and cultural rights. At the national level, a variety of institutions, procedures and constitutional arrangements, free and fair elections, bills of rights, habeas corpus human rights commissions, ombudsmen and so on have evolved over generations to promote and protect civil and political rights. Although these devices remain inadequate and flawed, they are considerably more widespread
and sophisticated than legal arrangements designed to implement social and economic rights. This does not mean that there are not jurisdictions in which some of these devices, like human rights commissions, extend to both categories of rights, but in practice even these exceptional cases devote most of their resources to civil and political rights.57

The same discrepancy–between civil and political rights on the one hand and economic social and cultural rights on the other-- is also apparent at the international level. Although only in its infancy, international human rights law is evolving procedures which, in some circumstances, effectively protect civil and political rights. Consider, for example, the numerous cases heard by the UN Human Rights Committee. By contrast, comparable international procedures for the legal protection of economic, social and cultural rights are weak and underutilized. The African Charter on Human and Peoples Rights establishes what amounts to a complaints procedure in relation to social rights, yet relatively few complaints alleging the violation of economic, social and cultural rights have been submitted to its monitoring body. The discrepancy between these two categories of rights is not only institutional and procedural, but normative. In relation to civil and political rights, a considerable body of jurisprudence has evolved to elaborate what these rights mean. Although incomplete and sometimes inconsistent, the jurisprudence is detailed. Much is known for example about the contemporary meaning of the right to a fair trial. The same cannot be said for second generation human rights. In many cases, their normative content remains obscure. We know

---

relatively little, for example, about what the international right to health protection means.\textsuperscript{58}

It has become clear from what is mentioned that second generation rights are marginalized both at the national and international level. The UDHR as we have seen before does not distinguish between civil, political, economic, and cultural rights. So, if the letter and spirit of the declaration are to be respected, social and economic rights must to be brought from the margins into mainstream human rights promotion and protection.

**(vi) Realization of Economic, Social, and Cultural Rights**

The central issue that dominates the study of the international law of human rights is that of enforcement.\textsuperscript{59} This is as true of civil and political rights as it is of economic, social and cultural rights. Many economic, social, and cultural rights are often not easy to realize, and enforcement, such as through court decisions which are workable in many cases involving the violations of civil and political rights, does not work well to achieve a high level of enjoyment of such rights. The reasons for this particular difficulty in realizing economic, social, and cultural rights are multiple.

First, to realize economic, social and cultural rights, concerned governments must have the necessary resources, which many in the developing countries do not possess at all or in any significant quantity. The irony is that many governments in the developing world do not always make the best use of the available resources, which are very

\textsuperscript{58} Ibid.

limited, for improving the general living conditions of people under their rule. Instead, they often misallocate their scarce resources for unnecessary large military expenditure and personal luxury, and waste them also by corrupt practices. Thus the excuses often given by the governments of the developing countries, to the effect that they cannot provide adequate food, housing, and clothing to their people for lack of funds and resources, need to be studied and analyzed carefully. In some cases, the governments genuinely need such funds and resources for carrying out a sensible policy to improve the living conditions of the public, particularly the poorest sectors. In these cases it is the responsibility of the international community in general and the developed countries in particular, to provide such governments truly in need with necessary funds and resources. On the other hand, if governments of the developing countries are not making sincere efforts to ensure the basic human needs of the people, but instead respond by wasting their resources, the responses of the international community and the developed countries should be cautious.60

A second reason for the difficulty of realizing economic, social, and cultural rights springs from the bureaucratic and institutional complexity of implementing the policies necessary to realize these rights. Whilst there are only limited governmental ministries and departments traditionally involved in civil and political rights, such as the courts, ministries of justice, the police, the military and ministries of foreign affairs, there are many diverse ministries and departments involved in the realization of economic, social and cultural rights. In addition to courts, ministries of justice, and ministries of foreign affairs, which are concerned with both categories of human rights, ministries of finance,

60. Yokota, supra note 5, at 215.
labor, education, economic development and trade, and health and welfare are also involved in respect of economic, social, and cultural rights. The complexity and diversity of the institutions best places to safeguard economic, social, and cultural rights is problematic for the following reasons: (a) many of these concerned ministries have not been hitherto involved in human rights affairs and therefore are human rights ignorant or insensitive; (b) because of compartmentalization, the officials in these ministries tend to show an attitude of evading responsibility by saying that the realization of economic, social, and cultural rights is not within their jurisdiction or mandate, a typical bureaucratic trait found all over the world; and (c) there is no central governmental office or minister in charge of formulation and implementation of a coherent and integrated national policy for economic, social, and cultural rights. This last point leads to the conclusion that there should be a national institution at the ministerial level to coordinate the activities of various ministries and department concerned with the realization of economic, social, and cultural rights.

A third difficulty is related to the diversity and complexity of the organizations and agencies involved in the realization of economic, social, and cultural rights. They differ in nature and have different mandates, power, functions, and resource bases. This is a good thing in a way because it helps that there are so many different actors working for the realization of economic, social, and cultural rights. However, it also causes a problem of coordination of their activities. Especially in international society where a central governing authority is lacking, the

---

61. Most of such ministries in most countries do not have a section or desk responsible for human rights matters.
62. Yokota, supra note 5, at 216.
63. At global level there are many and different types of institutions and bodies concerned with this category of human rights e.g. The General Assembly, ECOSOC and UNDP.
coordination of the activities of actors so diverse and independent is not an easy task. It seems that the United Nations, particularly the General Assembly and the ECOSOC, could play a major role in the coordination of such activities.

In order to overcome the difficulties mentioned above, national and international efforts should be done not only by governments and UN, but by peoples and NGOs as well.

**6- Third Generation Rights**

(i) **What are third generation rights?**

The final set of rights to be discussed in this chapter is what is called “third generation rights”. The rights of the third generation are really seen as collective rights, based on notions of international solidarity and relating to global structural problems rather than individual cases.

Examples of this generation rights are the right of self-determination, the right to development and the right to peaceful coexistence.

The third category rights are different from the first and second category rights in that the first and the second category rights are individual rights whereas the rights in the third category are said to be people's rights and group rights. For example, the right of self-determination and the right to development, two typical rights in this category, belong to peoples rather than individuals. While admitting that such collective rights are rights clearly recognized and established under international law, it is not yet

---

64. These rights are not discussed in detail, what this section tries to do is to shade light on them only.
65. Rosas and Scheinin, *supra* note 1, at 49.
generally agreed whether they belong in the category of human rights. Human rights stem from human dignity. Groups are not seen as sharing the same dignity as individuals. It is absolutely correct to talk about peoples’ rights, but in order to argue that they are a part of human rights, more theoretical elaboration may be needed in order to obtain general support.

Rights of solidarity such as the right to peace, the right to development and environmental rights are new rights which are not expressly recognized by the 1966 covenants. Sometimes rights that are indeed recognized under the covenants, such as the right of self-determination or the right to food, are added to the list of third generation rights as it is noted from the example I mentioned at the outset of this section. It is assumed that these rights should benefit not only individuals but also groups and peoples and that their realization requires global cooperation based on international solidarity.

(ii) Adoption of the Declaration on the Rights to Development

A landmark in the enunciation of new human rights occurred when, on 4 December 1986, the General Assembly adopted the Declaration on the Right to Development. The right to development had been in gestation since at least 1981, when the Commission on Human Rights established a working group of experts which had also received very substantial inputs from non-governmental organizations. Of all the various new rights which have been proposed, the right to development has attracted the greatest scholarly and diplomatic attention. The peoples and states of the
world have a duty to find concrete ways and means to develop the right to development.66

It is important to mention that article 22 of the African Charter provides that all people shall have the right to their economic, social and cultural development with due regard to their freedom and identity and the equal enjoyment of the common heritage of mankind. Furthermore the Charter puts an obligation on the states party to it to ensure the exercise of the right to development. This obligation, according to the provisions of the Charter, can be achieved individually or collectively.

The right to development and other similar new rights should not be seen in isolation. While they are disputed as true human rights per se, they at least relate to a number of internationally recognized human rights. The right to development can, in fact, be seen as an umbrella concept which covers most of the existing human rights, including civil and political rights. The right to peace can be tackled in the context of the right to life. The right to a satisfactory environment can be broken down into more specific environmental rights which can be dealt with in the context of rights such as the protection against inhuman and degrading treatment and the right to privacy.

7- Conclusions

The emergence of the different categories and generations of human rights into existence related, generally, to different stages in the history of mankind and the European nations in particular. The various

---

circumstances under which individuals and peoples lived had their effect, and played a serious role in the appearance of what are today called generations and categories of human rights. Where there was need to liberate individuals and societies from the oppression of kings and empires, civil and political rights had come into being. The fixation of those rights was through the International Covenant on Civil and Political Rights. Since that time states have fallen under a universal obligation to respect civil and political rights. When the industrial revolution took place in the West, the need for economic and social rights came into existence. The rights that governments recognized and protected after the industrial revolution were the first seeds of rights written down in the International Covenant on Economic, Social, and Cultural Rights. The third generation rights which are in the throes of birth and not yet completely agreed upon reflect a new historical stage in the life of at least many peoples and nations. There is need for much more international cooperation and solidarity, and since there is such a need I expect that new international conventions on collective rights will be adopted in the near future. At that time I hope that new rights will appear. People may see a fourth generation of human rights.

In short, the various types and categories of human rights are a consequence of important turning points in our history as human beings. The existence of these different rights simultaneously does not necessarily mean that they carry the same importance to all people. Europeans for example do not need to emphasize or to claim the right to development, but most Africans and Asians urgently need it.
Chapter Three
Protection of Human Rights through National Courts

1. Introduction

The previous chapter dealt with the various categories of human rights. This chapter will go further to analyze and clarify the role the judiciary can play in protecting these rights. It will discuss the implementation of international law in domestic courts, the judicial review of legislation, the arguments for and against protecting human rights through national courts, the protection of human rights in the courts of some countries and finally it will state the remedies that national courts grant for human rights violation.

2- International Law before Domestic Courts

There is wide gap between practices of different states on domestic implementation of the norms of international law, especially international human rights norms, which need to be narrowed down. There are two basic theories adopted mainly by the United Kingdom and the United States of America. Let us illustrate the position in each country separately.

(i) The United States of America (The monism theory)

The constitutional position of domestic implementation or application of international law in the United States is found in article 6, section 2 of the U.S. Constitution which provides that "....all treaties made, or which shall be made, under the authority of the United States, shall be the supreme
law of the land; and the judges in every state shall be bound thereby ...."
However, division of treaties into self-executing and non-self-executing and discretion of the organs of the state to declare any treaty non-self-executing has substantially narrowed the constitutional scope for direct application of treaties.67

The doctrine of non-self-executing treaties is, in fact, an aspect of the doctrine of “political question”. It affirms that certain treaty provisions, like certain provisions of customary international law and certain provisions of the constitution, are of such a character that the court leaves their interpretation and application to the political organs of the government - the President or Congress - and applies whatever decision these organs may make. In practice, the doctrine of non-self-executing treaties has been applied only to preserve the constitutional rights of the political organs of the Federal Government-- the President, the Congress, and especially the House of Representatives which does not normally participate in treaty-making in matters which for historical or practical reasons have been considered within the competence of these organs. One of the examples for this is the treaty provisions which require appropriations. These provisions can only be executed by Congress. Treaty provisions referring to tariffs, to the use of military forces, to the organization of tribunals, and to the establishment of criminal jurisdiction have usually been regarded as non-self-executing.68

Looking at the issue of incorporation, the United States courts are likely to look to international law in deciding cases coming before them in

---
several kinds of situations: First: under article VI of the United States Constitution, treaties are the "supreme law of the land". Consequently, a United States court will directly apply a rule provided in what it regards as a “self-executive” treaty without any necessity for further statutory implementation. However, if the court decides that the treaty or treaty provision is not self-executing, it will not directly apply the rule, absent implementing legislation. In determining whether a treaty or treaty provision is to be interpreted as self-executing, the court will look at various factors, including the nature of the treaty or treaty provision, whether the treaty establishes individual rights which are capable of judicial interpretation and enforcement without further implementing legislation, the language of the treaty and so forth. Secondly, customary international law will be treated by American courts as part of “the law of the land”. Thirdly, domestic legislation may in some cases expressly or impliedly refer to or direct the United States courts to apply international rules, definitions, or standards, and courts will of course have to look to international law to implement these statutory directives. Fourthly, even where United States courts do not regard a particular rule of international law as directly incorporated into domestic law, they may nevertheless look to international law for expressions of government policies or interests widely accepted standards, or experience relevant to their decisions. In particular, the courts recognize the existence of United States international obligations to other nations under treaties and customary international law and if possible, will seek to interpret ambiguous statutes or reach decisions in ways which are consistent, rather than in conflict, with such international obligations.

69. This was established by the Supreme Court 1900 decision in The Paquete Habana, 175 u.s. 677 (1900).
In practice, there is a case in which a United States court has held a human rights-type obligation in a treaty to be “self-executing” and thus directly applicable without the need for implementing legislation - the 1974 decision of the United States Court of Appeals for the Ninth Circuit in People of Saipan Rel. Guerro. v. United States Department of Interior.\(^7\) That case involved a challenge by certain Micronesian citizens to a lease executed by the United States High Commissioner for the Trust Territory of the Pacific permitting an airline to construct and operate a hotel on public lands in Saipan. The plaintiffs argued that the lease violated the provision of the United States-United Nations Trusteeship Agreement under which the United States held the Trust Territories, which, \textit{inter alia}, obliged the United State to promote the economic advancement of the inhabitants and protect them against the loss of their land and resources. The court held that the Trusteeship Agreement was self-executing and constituted a source of rights enforceable by individuals in a domestic court. There are other cases that have gone the other way. The leading case is Sei Fujii V. State\(^2\), in which plaintiffs challenged the constitutionality of certain Californian laws discriminating against the ownership of lands by aliens ineligible for citizenship (principally Japanese and Chinese aliens) on the ground, \textit{inter alia}, that these laws were contrary to the human rights provisions of the United Nations Charter. This contention initially met with success in a lower California court, which in 1950 held the Charter provisions to be self-executing. However, in 1952, this decision was reversed on appeal by the California Supreme Court, which expressly held the human rights provisions of the Charter to be non-self-executing, but went on to strike

\(^7\) 502f.2d90 (9th cir. 1974), cert. denied420U.S. 1003 (1974).
\(^2\) 38Cal.2d718, 242 p.2d 617 (1952).
down the laws as violative of the “equal protection” clause of the United States Constitution.

As regards the direct incorporation of customary international human rights law into United States domestic law, experience has again been sparse. The most relevant case is Rodriguez v. Wilkinson. The case involved a habeas corpus petition by a Cuban who came to the United States in June 1980 seeking admission as a refugee. At the time Rodriguez left Cuba, he was serving a sentence for attempted burglary and had prior convictions for theft. On this basis, the immigration authorities determined he was an excludable alien and ordered him deported to Cuba. Upon Cuba’s refusal to accept him, he was detained, pending deportation to Cuba, in a maximum security federal penitentiary at Fort Leavenworth, Kansas. He sought release on the grounds that this continued indefinite detention under these circumstances violated prohibitions against arbitrary imprisonment in both the United States Constitution and customary international human rights law. The District Court found that since Rodriguez had not been admitted into USA he was not entitled to constitutional protection against arbitrary imprisonment. However, the court, clearly seeking some basis for relief, went on to hold that the customary international law of human rights, as evidenced by a variety of international agreements, declarations, and other sources, accorded everyone the right to be free from arbitrary detention or imprisonment; that this rule was part of the law of “the land”; and that, consequently, it provided a basis upon which the court could order the prisoner’s release, which it did. To lawyers interested in using international human rights standards to broaden domestic human rights

---

74 The court reluctantly constructed certain Supreme Court opinions as seeming to require this holding.
protection, this was a groundbreaking and exciting decision. It suggested that individuals within the United States could invoke not only the rights expressly guaranteed by the constitution, but also such additional protections as might be regarded by the courts as part of customary international law.

According to what is mentioned above incorporation may be direct or indirect. Recognition of the direct integration of human rights standards for judicial decision-making will guarantee more adequately both the fulfillment of international obligation and the effective implementation of constitutional rights. The direct incorporation of human rights law into US Constitutional law has occurred through article VI, clause 2 of the Constitution. Indirect incorporation of human rights law into US constitutional law has occurred through use of human rights as relevant standards of constitutional rights and rights content. Thus, human rights law has been utilized either to identify the existence of rights or, as an interpretive guide, to further identify or clarify the more detailed content of constitutional rights. In several cases there has been an express reference to the Universal Declaration of Human Rights, although it is not clear whether the justices intended to apply the Declaration as a guide for interpreting the U.N. Charter and were thus using, indirectly, the direct incorporation approach or as a relevant set of standards for the determination and application of constitutional rights and were thus integrating the Declaration into judicial decision-making through an indirect incorporation approach. What is perhaps more important is the fact that the Universal Declaration has been used, although it is also significant that the phrase “human rights” has appeared in constitutional decisions even before the U.N. Charter (i.e. Before 1945) and the Universal Declaration of Human Rights (i.e. before 1948).
(ii) The United Kingdom’s approach (the dualism school)

The United Kingdom’s approach towards implementation of international law is dualistic. Treaties in the UK are never self-executing. They are applied through transformation, i.e. specific adoption by enabling legislation, when necessary. So far as it concerns human rights, the government in UK has always insisted that “the very rights and freedoms recognized by other systems are inherent in the United Kingdom’s legal system and protected by it and by Parliament”. However, there has been growing criticism of UK’s human rights performance of standards contained in the European Convention on Human Rights. In view of this development and pressure both from inside and outside, the UK adopted European Human Rights Convention Act in 1998 incorporating the provisions of the European Convention. It is considered a major development and progressive shift in its human rights implementation policies. Customary international law, on the other hand, is considered part of common law, but to the extent that it is not conflicting with statutes. In principle, they are to be directly applied by the courts.\footnote{Maxwell Cohen and Anne Bayefsky, “The Canadian Charter of Rights and Freedoms and Public International Law in 61Can. B. Rev 289(1983).}

If no implementing legislation is enacted, international conventional law may still be relevant to the interpretation of domestic law, through the operation of the presumption that the Parliament does not intend to violate its international obligations, or that statutes will be interpreted as not violating international law, where possible.\footnote{Alam, supra note 1 at 4.}
The question is, when is domestic legislation to be considered as implementing a convention so that the treaty is in whole or part the law of the land? There are a number of possibilities including the existence of legislation implementing a treaty but containing no reference to it. According to Ian Brownlie, a statute may directly enact the provisions of the international instrument, which will be set out as a schedule to the Act. Alternatively, he says, the statute may employ its own substantive provisions to give effect to a treaty, the text of which is directly enacted. In latter situation, the international convention may be referred to in the long and short titles of the Act and also in the preamble and schedule.\(^77\)

(iii) International Law before Sudan Courts

Sudan has ratified a number of international and regional instruments in which human rights are expressly provided for. It has ratified the African Charter on Human and Peoples Rights on 21 October 1987, which contains economic and social rights as well as civil and political rights; thus the individuals in Sudan have the right to enjoy all rights set out in that Charter. At the international level our country in 1986 ratified the International Convention on Civil and Political Rights and the Protocol attached to it and the International Convention on Economic, Social and cultural Rights. Therefore, these two conventions have become a part of our national law and we, as nationals, have a right to enjoy the rights stated there. Sudan has, within the provisions of the international and regional instruments mentioned above, agreed to guarantee the rights set out in all these instruments.

In practice there are no human rights cases raised before the courts and as far as I know there is no clear viewpoint on whether our judges can directly protect the rights included in the international conventions. I have met more than two of the Appeal Court judges and they did not provide me with information. But the Supreme Court in the case of *Joseph A. Garang and others v. The Supreme Commission and others* 78 stated that in the view of the new constitution, fundamental human rights were not created by the state, but are eternal and universal institutions, common to all mankind and antedating the state and founded upon natural law. Unlike the old constitution based on legal positivism, the new constitution has a natural law foundation. The supra constitutional character of natural law is clearly expressed in its preamble, declaring that this (referring to the principle of democracy) is a universal principle of mankind upon which this constitution is founded. The judges stated that they reject and revoke all constitutions, laws, ordinances and prescripts in conflict herewith. The sanctity of natural law is carried a step further by conferring upon the courts, especially the Supreme Court, the power of Judicial review. Fundamental rights derived from natural law are written into the constitution and the constitution provides the court with power to review any act violating those rights. The Supreme Court is popularly called the guardian of the constitution and it is in fact not unreasonable to regard the Supreme Court as a bulwark of human rights.

There are other cases such as the case of *Asma Mahmoud Mohamed Taha v. S.G.*, 79 in which reference was made either to natural law or international conventions. Furthermore, Judges in many cases refer to the human rights as Zaki Abdurrahman J. did in the case of *Khalid Mohamed*

78. (1968) SLJR, 1.
79. (1986) SLJR, 163.
Khier v. S. G. This reference means that Judges apply to some extent the principles of international human rights law even if there has been no complete theory on the position of international human rights law in Sudan. The Judges and lawyers generally would formulate a complete and appropriate theory on this issue if many cases are based on the ground of international human rights law principles.

3. Arguments for and against Empowering Courts to Protect Human Rights

There are many arguments which are relied upon to justify or deny the granting of power to national courts to protect human rights. In this section we will discuss these arguments in detail.

(i) Arguments for Empowering Courts to Protect Human Rights

The argument for empowering courts to protect human rights is not a case against empowering non-judicial governmental institutions and officials to protect human rights too, though it is an argument against empowering only non-judicial governmental institutions and officials to protect human rights.

The principal argument for empowering politically independent courts to protect human rights begins with the premise that incumbency is a cardinal value (not the only value, but nonetheless a cardinal one) for electorally accountable government officials: such officials typically want to preserve their own incumbency and / or the incumbency of as many other members of their party as possible. Therefore, such officials want to make popular decisions; at a minimum they want to avoid making

---

unpopular decisions. But the optimal resolution of a human rights controversy (a controversy about what an indeterminate human rights means) may well be unpopular. They also want to make decisions that will please their most powerful constituencies; at a minimum they want to avoid making decisions that will displease those constituencies. But the best resolution of a human rights controversy may well displease some of their most powerful constituencies. Moreover, such officials want to be identified with high profile issues, issues that concern the well-being of a large number of citizens. But a human rights issue may well be low profile; it may concern the well-being only of a relatively few, marginal – and perhaps marginalized – citizens; indeed; it may only concern the well-being of non-citizens. Therefore, many articulated human rights are not likely to be protected in a democracy unless politically independent courts play a significant role in protecting them. The non-judicial, electorally accountable branches of government frequently have insufficient political and institutional incentive to attend to a claim that government has violated, or is violating, articulated human rights. Indeed, they sometimes have powerful incentives to ignore or at least to discount such claims. These observations are grounded in the shared historical experiences of liberal democracies and are widely endorsed in liberal democracies. If you are going to protect people who will never have political power, at any rate in the foreseeable future (this includes not only individuals but also minority groups with their own properly treasured social customs, religion and ways of life), it will not be done in parliament. They will never muster a majority. It has got to be done by the courts and the courts can do it only if they have got the proper guidelines. There are ample grounds, based on experience in countries with constitutional human rights protection, to suggest that entrenchment of bills of rights can contribute significantly to the empowerment of
disadvantaged groups, by providing a judicial forum in which they can be heard and seek redress, in circumstances where the political process could not have been successfully mobilized to assist them.\textsuperscript{81}

On the other hand human rights, in the first instance, must be enforced through domestic courts. The reasons are firstly that while most human rights treaties provide for independent supervisory procedures and organs, few state perhaps with the exception of the parties to the European Convention for the Protection of Human Rights and Fundamental Freedoms have accepted the optional clauses or protocols concerning the right of individuals to have recourse to such organs (the American system, however, is different). Moreover, even where contracting parties have allowed such individual rights, the role of domestic courts remains critical, since as a general rule, the route to international remedies remains blocked until full exhaustion of domestic remedies has occurred.\textsuperscript{82}

As far as common law is concerned, three additional reasons may be given for protecting human rights through courts. One is the impartiality and competence which is associated with courts functioning in the common law tradition. Despite frequent attacks and attempts to denigrate the qualities they remain real in the public eye. Public confidence in the judicial system, as demonstrated by surveys, (notwithstanding academic and political attacks) surpasses its confidence in political institutions, the bureaucracy, the media and academia. This confidence itself encourages and promotes the impartiality and dedication of the judiciary. A second


factor is that unlike political institutions, the common law courts have no license to arbitrary action. Judicial discretions unlike political discretions, are strictly limited to the application or adjustment of already established norms and standards. Thus there are inbuilt restraints in the judicial method which ensure a greater degree of certainty and fairness. A third factor is that the common law itself is a product of reasoned disputation where individual rights and duties are claimed and evaluated. No comparable process exists in the political system in which ideological considerations often prevail and aggressive pressure groups exercise influence without regard to reason, justice or community values.83

(ii) Arguments against Protecting Human Rights through Domestic Courts

The fundamental argument against empowering courts to protect human rights, which we may call the democracy argument, is twofold: firstly, it is undemocratic for courts to protect human rights, by which is meant entrenched, indeterminate human rights; moreover, it is hostile to the practice of democratic deliberation, and therefore subversive of the citizen as the basic unit of political-moral judgment, for courts to do so. The serious argument is not that it is undemocratic for courts to protect human rights. It is easy to bat that argument away. Democracy is not the same as unrestrained majoritarianism. We are talking about liberal democracy, and no democracy is truly liberal if it violates certain human rights. Rather, the serious argument is that it is undemocratic for courts to protect human rights that, as articulated, are indeterminate. More precisely, the serious argument is that it is undemocratic for a court to

83. The common law and Human Rights. See www.ourcivilisation.com/cooray/ rights/chap3.htm
impose on a government that court’s own judgment about what an indeterminate human right mandates and forbids. This is because that decision enables the court to make a judgment according to which government is violating the right, when according to a different but nonetheless reasonable judgment about what the right forbids, government is not violating the right. Democracy requires that the reasonable judgment of electorally accountable government officials about what an indeterminate human rights forbids, trump the competing reasonable judgment of politically independent judges. Democracy means government not by judiciary but by electorally accountable government officials.84

How is it not only undemocratic, but hostile to the practice of democratic deliberation and therefore subversive of the citizen as a community of political-moral judgment, for courts to protect human rights? Because by imposing on government their own judgments about what indeterminate human rights forbid (or require) government to do, politically independent courts necessarily discourage citizens and their representatives from themselves deliberating about what specification of indeterminate human rights norms to adopt, what shape to give the norms, in particular context in which the norms are invoked. In a democracy, such judgments, like other reasonably contestable political-moral judgments, should be the yield not of judicial self-assertion but of democratic deliberation.85

This argument against empowering courts to protect entrenched, indeterminate human rights is undeniably strong. But so is the argument

84. Michael Perry. Supra note 15, at 32.
85. Id., at 33
for doing so: to choose not to empower courts to protect human rights is unattractive, because, again, human rights are not likely to be optimally protected in a democracy unless politically independent courts are empowered to protect them. If a citizen in a liberal democracy had to choose between (a) giving courts no power to protect (entrenched indeterminate) human rights and (b) giving them the kind of power exercised by the Supreme Court of the United States, that citizen would be in a bind. Choice (a) is extreme; it in effect denies the truth of the case for empowering politically independent courts to protect human rights. But choice (b) is extreme too- it is at the other extreme from choice (a) - because it in effect denies the truth of the case against empowering politically independent courts to protect human rights. Happily, (a) and (b) are not the only choices; there are other, more moderate choices. These include choices that accept the truth of the argument for empowering courts to protect human rights without denying the truth of the argument from democracy.

4. Judicial Review of Legislation

The judiciary may play a critical role in defending human rights through the power of judicial review. With the rise of formal constitutions and their guarantees of individuals’ rights, there has been an accompanying rise in perceived need for some formal mechanism to check whether the laws and rules issued by the legislature conform to the constitution. The human rights protection is nominal if no power is granted to courts to

---

86. If that generalization is too broad, let us say that human rights are not likely to be optimally protected in most democracies unless politically independent courts are empowered to protect them. This, at any rate, is the position widely accepted in most liberal democracies, because in most liberal democracies, some human rights are both constitutionally entrenched and judicially protected.

87. Other choices are found in Canada where the Supreme Court’s opinion is subject to overruling by ordinary political means. In the United Kingdom’s Human Rights Act of 1998 the judiciary’s opinion is only hortatory; it is up to Parliament to decide whether to accept the judiciary’s position.
enforce human rights by means of constitutional review of rights. In this section we will focus on judicial review of legislation only and will not discuss the judicial review of administrative acts. The review of legislation is more important as far as human rights concerned. In addition the scope of this research does not allow us to concentrate on both of them.

Written constitutions need a final interpreter in most countries with written constitutions. This role is assigned to the judiciary and the judiciary in most countries has power to declare any legislation void. This role is what is termed judicial review. The doctrine has its origin in England but because of the principle of the parliamentary supremacy it does not prevail there at present.

One of the most important functions of the power of judicial review generally, is that it largely contributes towards the establishment of the constitutionality of the government. It is in fact the main bulwark of constitutionalism.

It is a limitation on the government power for the interest of her people. The power of judicial review enables an aggrieved party to invoke courts' jurisdiction, provided he can establish a *locus standi* entitling him to challenge the administrative or legislative act. The doctrine is also significant as it connotes the existence of the rule of law as a part of the system of government in a system where the rule of law prevails.88

It is comparatively rare for the courts to have jurisdiction to review legislation except in federal states, such as Switzerland and the federal

members of the Commonwealth, where some check is necessary to preserve the respective rights of the federation and its competent members. The United States of America is the classic example of a federation in which each state as well as the federation has a completely rigid constitution. Here the state courts have jurisdiction to declare state legislation repugnant to the state constitution; and federal courts have jurisdiction to declare provisions of state constitutions, state legislation and federal legislation repugnant to the Federal Constitution. It is not strictly accurate to say that the courts declare legislation void: when cases are brought before them judicially, they may declare that an alleged right or power does not exist or that an alleged wrong has been committed because a certain statute relied on is unconstitutional. Under the influence of Chief Justice Marshall the American Supreme Court first assumed the power of declaring Federal Legislation unconstitutional in Marbury v. Madison.89

John Marshall was Secretary of State in the Adams administration when he took office as Chief Justice on January 31, 1803. He continued as Acting Secretary of State until the last day of the Adams administration, March 3, 1801. William Marbury was one of a number of persons who were appointed justices of the peace in the District of Columbia and who were confirmed by the Senate on March 3. His commission remained in Marshall's office undelivered when the new administration took over. President Jefferson directed his Secretary of State, James Madison, to withhold several commissions, including that of Marbury. Marbury then brought a suit against Madison, taking the unusual step of starting the

action in the Supreme Court, invoking its original jurisdiction. The following observations of Chief Justice Marshall are pertinent to note: "the powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. It is a proposition too plain to be contested, that the constitution controls any legislative Act repugnant to it, or that the legislature may alter the constitution by an ordinary Act. Between these alternatives there is middle ground. The constitution is either a superior paramount law unchangeable by ordinary means or it is on a level with ordinary legislative Acts, and like other Acts is alterable when the legislator should please to alter it. If the former part of the alternative be true, then a legislative Act contrary to the constitution is not law. Certainly all those who have framed written Constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently, the theory of every such government must be that an Act of the Legislature contrary to the constitution is void.

For more than a century after Marbury v. Madison, judicial review of legislation was largely an American phenomenon. The Twentieth Century, particularly the years following World War II has seen an explosion of the concept both on the national and international levels. A comparison of judicial review in the United States and in Western Europe is particularly instructive. Austria, Italy and Germany have specialized constitutional courts to determine the constitutional validity of legislation. Ordinary courts cannot decide whether laws are constitutional or not, although they can refer those questions for decision to the constitutional courts. This system of "centralized" judicial review is often contrasted

---

91 Marbury v. Madison supra note 23
with the "decentralized" system represented by Marbury v. Madison. The theory of Marbury requires every court, even the most inferior, to decide whether laws are constitutional.

There are many writers who give different justifications for judicial review. Some writers' defenses of judicial review derive from the theory of limited powers that underlies many political systems. In order to maintain the legitimacy of government, some institution must be authorized to decide whether or not governmental action transgresses constitutional limits. They suggest that an independent, precedent-respecting, learned tribunal could best carry out this function. Not surprisingly, they view the Supreme Court as such an institution. Others argue that, due to the counter-majoritarian nature of judicial review, the practice can be justified only if it serves a function distinct from legislative and executive activities that are consistent with the basic democratic principles upon which the system of government in the United States is based.\(^\text{92}\)

There are two sorts of judicial review-- interpretive review and non-interpretive review. The legitimacy of non-interpretive review is the central problem of contemporary constitutional theory. The distinction between interpretive and non-interpretive review can best be elaborated in terms of a particular conception of the United States Constitution. The Constitution consists of a complex collection of value judgments the Framers wrote into the text of the Constitution and thereby constitutionalized. Such important judgments fall into two categories. One category defines the structure of American government by specifying the division of authority, first, between the federal government and the

government of the states and, second, among the three branches of the federal government—legislative, executive, and judicial. The other category defines the limits of governmental authority vis-à-vis the individual; this category of value judgment specifies certain aspects of the relationship that shall exist between the individual and government. The Supreme Court engages in interpretive review when it ascertains the constitutionality of a given policy choice by reference to one of the value judgments embodied, though not necessarily explicitly, either in some particular provision of the text of the constitution or in the overall structure of government ordained by the constitution. Such review is "interpretive" because the court reaches its decision by interpreting the textual provision or the aspect of the governmental structure that embodies the determinative value judgment. Interpretive review is a hermeneutical enterprise; the effort is to ascertain, as accurately as available historical materials will permit, the character of a value judgment the Framers constitutionalized in the past. The court engages in non-interpretative review when it makes the determination of constitutionality by reference to a value judgment other than the one constitutionalized by the Framers. Such review is "non-interpretive" because the court reaches its decision without really interpreting, in the hermeneutical sense, any provision of the constitutional text (or any aspect of government structure). Although, to be sure, the court may explain its decision with rhetoric designed to create the illusion that it is merely "interpreting" or "applying" some constitutional provision.93

"Interpretivism" refers to constitutional theory that claims that only interpretive judicial review is legitimate and, in particular, that all non-interpretive review is illegitimate. Non-interpretivism describes

93. Id., at 18.
constitutional theory that claims that at least some non-interpretive review – non-interpretive review with respect to at least some categories of constitutional questions, with the categories specified by the interpretivist theory in question-- is also legitimate.

In adjudicating a person's claim that government has violated his human rights when no value judgment constitutionalized by the Framers is determinative, the court in effect submits the challenged governmental action to a moral critique. In striking down such action, the court assumes a prophetic stance, opposing itself to established conventions. But that does not end the matter. The relationship between non-interpretive review and electorally accountable policymaking is dialectical. The electorally accountable political processes generate a policy choice that typically reflects some fairly well established moral conventions. In exercising non-interpretive review, the court evaluates that choice on political-moral grounds, in the end either accepting or rejecting it. If the Court rejects a given policy choice, the political processes must respond, whether by embracing the court's decision, by tolerating it, or, if the decision is not accepted or is not accepted fully, by moderating or even by undoing it.94

As far as Sudan is concerned, judicial review can effectively be used to protect human rights. The Transitional Constitutional of 1964 granted the power of judicial review to the High Court. Article 8 stated that constitutional remedy in respect of any of the rights conferred by Chapter 11 of that Constitution was vested in the High Court. Article 99 provided that “the Judiciary shall be the custodian of the Constitution, and shall have jurisdiction to hear and determine any matter involving the interpretation of the rights and freedoms conferred by Chapter 11”. The

94. Ibid, at 22.
two articles 8 and 99 vested in the High Court the power of judicial review over legislative and executive authorities in Sudan, so that they could not exceed the boundaries and limitations prescribed by the constitution. This is the same principle applied in India and the United States of America in contrast with the United Kingdom where parliament is supreme and its legislation is not subject to judicial review.95

The Supreme Court of Sudan has explained in the case of Nasr Abdurrahman v. The Legislative Authority,96 that although the courts are bound to apply what the legislature enacts as law, they are bound, in the first place, to observe and apply the provisions of the constitution. Consequently, should the law be inconsistent with the constitutional provisions, the courts must refrain from applying that law. If the dispute is laid before the Supreme Court, it is bound to declare such law unconstitutional, and as such it should not be applied. This is because the constitution which emanates from the people is distinguished from ordinary legislation. Its peculiar features cast upon it the quality of supremacy and reference, and dictate that it shall prevail over legislation not only enacted after the constitution was promulgated, but also over pre-existing enactments, if they are still in force and contrary to the provisions of the constitution.

It is apparent now that our Supreme Court has been exercising review over legislation to protect the fundamental rights and freedoms guaranteed by the constitution. But the Constitution of 1998 grants the powers to protect human rights and fundamental freedoms to the Constitutional Court established by the provisions of that Constitution. It

states that the Constitutional Court is the custodian of the constitution, and has jurisdiction to consider and adjudge any matter relating, *inter alia* to claims by the aggrieved for the protection of freedoms, sanctities or rights guaranteed by the Constitution.\(^97\) Thus the power of judicial review of legislation is vested in the newly established Constitutional Court.

The protection of human rights through judicial review of legislation exists in countries where there are written constitutions, such as the United States of America. In states that do not have written constitutions, ordinary courts use ordinary laws to protect human rights. A good example for this system of protection is the United Kingdom which in 1998 passed a specific Human Rights Act to be applied by the ordinary courts in addition to other Acts which protect human rights.

The most significant laws that can be used by the courts in the absence or presence of constitution are the criminal law and criminal procedure law. In criminal codes of many countries the well-known principle in the criminal law *nulum crimen* and *nula poena sine lege* has been strengthened. This principle enables the protection of human rights and at the same time decreases arbitrariness amongst state bodies. The special part of the criminal codes of many countries provide for legal and criminal protection for a large number of human rights. The most important human rights enjoying such protection are: the right to life and bodily integrity, fundamental rights and freedoms, honor and prestige, dignity of the personality, marriage and family and the health of people.\(^98\)

\(^98\) See for instance, ss. 130 (murder), 135(causing miscarriage), 70(pollution of environment), 159(defamation), 149(rape), 166(invasion of privacy), 165(wrongful confinement), 163(forced labour) and 139(punishment of voluntary causing of wounds) of the Sudanese Criminal Act 1991.
The courts in Sudan can use the criminal codes to protect human rights as well as the power of judicial review.

5. The Protection of Human Rights in Other Countries (decided cases)

Courts in different parts of the world play various roles in protecting human rights. The judgments those courts grant to victims and rules they lay down can be considered as guidelines for courts in countries where process of protecting of human rights through domestic courts is still in its infancy.

Litigation involving property rights issues has emerged as one of the most important areas in which human rights issues have been brought to court, and has been a frequent feature in the American legal system. The United States Supreme Court plays a central role in defining the parameters of this evolving constitutional concept. The US Supreme Court, for instance, has found several categories of cases where the government's obligation to compensate exists.99

The United States Supreme Court had in 1954 discussed one of the most important human rights cases in the history of the United States of America; that is the case of Brown v. Board of Education.100 In that case African-American community leaders took action against the segregation in America's schools. Aided by the local chapter of the National

99. One of these categories is what is considered as regulatory taking or “categorical” taking cases. In these cases, the Supreme Court applies two tests to determine whether a taking has occurred. The first test addresses the relatively rare situation in which a land use regulation deprives the owner of all of his or her property. A second test applies if the regulation does not deprive the owner of all economically beneficial use of his or her property.

100. 347 u.s. 483(1954).
Association for the Advancement of Colored People (NAACP), a group of thirteen parents filed a class action suit against the Board of Education of Topeka Schools on May 17, 1954. The Supreme Court ruled in a unanimous decision that the "separate but equal" clause was unconstitutional because it violated the children's 14th Amendment rights by separating them solely on the classification of the color of their skin. Chief Justice Warren delivered the Court's opinion, stating that "segregated schools are not equal and cannot be made equal, and hence they are deprived of the equal protection of the laws". This ruling in favor of integration was one of the most significant strides America has taken in favor of civil liberties.

The decision brought an end to the legal doctrine of “separate but equal” enshrined by the same court nearly sixty years earlier in Plessy v. Ferguson. In Plessy, the Supreme Court held that segregation was acceptable if the separate facilities provided for blacks were equal to those provided for whites.

Courts in Canada also have been playing a significant role in protecting human rights, for instance, in Eldridge v. British Columbia. The appellant in that case sought a declaration that the failure to provide sign language interpreters as an insured benefit under the Medical Service Plan violates their right to the equal protection and equal benefit of law without discrimination (S.15(1) of the Canadian Charter of Rights and Freedoms). The Supreme Court of Canada found that the failure to provide sign language interpretation to deaf patients in medical institutions deprived them of their ability to "benefit equally from

101 163 U. S. 537(1896).
102 Supreme Court of Canada, (Attorney General) 1997 2 S. C. R. 624. The full text of the decision can be downloaded from: http://www.canlii.org/ca/ca/1997 Scc89.html.
services offered to general public”. When the government sought to justify this failure on the basis that it had insufficient resources, the court confirmed the long standing position in Canadian constitutional rights jurisprudence that “financial consideration alone may not justify Charter infringements”.

In India, starvation deaths occurred in Rajasthan despite excess grain being kept for official times of famine. Various schemes throughout India for food distribution were also not functioning. In 2001, the Peoples Union for Civil Liberties (PUCL) petitioned the court for enforcement of the Schemes and the Famine Code. The PUCL based their arguments on the right to food, deriving it from the right to life. The court, noting the right to life, stated "Would the very existence of life of those families which are below the poverty line not come under danger for want of appropriate schemes and implementation". They found systematic failure by the government to implement and resource various food schemes. The court ordered that: (a) the Famine Code be implemented for three months; (b) grain allocation for the food for work scheme be doubled from 5 to 10 million tons and increased financial support for schemes; (c) ration shop Licensees must stay open and provide the grain to families below the poverty line (BPL) at the set price; (d) the government publicize the right of BPL families to grain to ensure all eligible families are covered; (e) all individuals without means of support (older persons, widows, disabled adults) be granted an Antyodaya Anna Yozanaration card for free grain; and (f) state governments progressively implement the mid-Day Meal Scheme in schools.103

103. Peoples Union for Civil Liberties case, Supreme Court of India 2001 unreported, 2 may 2003. Full text of decision can be downloaded from: www.righttofood.com.
Since India is a country whose economic and social circumstances are similar to Sudan’s, these judgments can be copied and applied in our courts to fight famine. Human rights are universal, and should be upheld everywhere.

A second case relating to the protection of human rights in Indian Supreme Court is Olga Tellis. V. Bombay Municipality Corporation.\(^{104}\) In this case, the state of Maharashtra and the Bombay Municipal Council in 1981 moved to evict all pavement and slum dwellers from Bombay city. The pavement dwellers claimed this was a violation of their right to livelihood, which is comprehended in the right, guaranteed by Article 21 of the constitution that no person shall be deprived of his life except according to procedure established by law. The court held that the constitutionally enshrined right to life encompasses the right to livelihood. This is supported by constitutional directive principles concerning adequate means of livelihood and work. It was held that the authorities’ action amounted to a deprivation of the citizens’ right to livelihood as they required housing for their livelihood in order to secure their right to life. But the court also held that deprivation of the right to livelihood could occur if there was a just and fair procedure undertaken according to law. The action must be reasonable and persons affected must be afforded an opportunity of being heard. The court found that this condition was satisfied by the Supreme Court proceedings.

Different cases relating to human rights were brought before the Philippines Supreme Court by victims claiming protection of their rights. A good example is the case of Oposa vs. Secretary of the Department of  

\(^{104}\) (1987) LRC (cons.) 351 (Supreme Court of India). The full text of decision can be downloaded from: http://www.elaw.org/resources/text.asp?ID=1104.
In that case an action was filed by several minors represented by their parents against the Department of Environment and Natural Resources to cancel existing timber license agreements in the country and to stop issuance of new ones. It was claimed that the resultant deforestation and damage to the environment violated their constitutional right to a balanced and healthful ecology and to health. The petitioners asserted that they represented others of their generation as well as generations yet unborn. The court stated that the petitioners were able to file a class suit both for others of their generation and for succeeding generations as "the minors’ assertion of their right to a sound environment constitutes, at the same time, the performance of their obligation to ensure the protection of that right for the generations to come".

Housing rights, land rights, and positive obligations were actually protected in South Africa in Grootboom V. Oostenberg Municipality et al[106] in which 900 persons were evicted and settled on a sport field. Members of the community approached the court on the basis of their constitutional right to have access to adequate housing. The court held that the constitution does not oblige the state to go beyond its available resources or to realize the socio-economic rights contained in the constitution immediately. However, the state must give effect to these rights and, in appropriate circumstances, the courts can and must enforce these obligations. The court held that the question to be considered by the court is whether the measures taken by the state to realize socio-economic rights under the constitution are reasonable. Those whose needs are the

most urgent and whose ability to enjoy all rights is most in peril must not be ignored. If the measures, though statistically successful, fail to make provision for responding to the needs of those most desperate, they may not pass the test of reasonableness. The court held that, although the measures in this case had been statistically successful, the failure of the state housing programme to provide any form of temporary relief to those in desperate need, with no roof over their heads, or living in crisis conditions meant that the programme was not reasonable and failed to satisfy the state's obligation to achieve the progressive realization of these rights. The court issued a declaratory order\textsuperscript{107} that required the state to devise and implement a programme that included measures to provide relief for the desperate people whose needs had not been provided for in the State.

In Sudan, courts have been dealing with cases involving human rights with fear. They have been trying to avoid the discussion of any such cases. Such fear normally prevents the judiciary from being involved in political problems and issues and this is all good and well, but the downside is that citizens may not be satisfied with the judiciary's ability to protect their rights and fundamental freedoms. This trend appeared for the first time in the case of Building Authority of Khartoum V. Evangellos Evangellides\textsuperscript{108} where the majority of the Appeal Court members insisted that constitutional issues cannot be discussed in the case unless they are applied in a separate application. This was also the decision in Nasr Eldin Elsayed Leadings case.\textsuperscript{109} This was the position until November 1958. The period from 1964 – 1969 witnessed some

\textsuperscript{107}. Declaratory orders are one of the most important remedies that can be granted by courts. S. 6 in this chapter.

\textsuperscript{108}. (1958) SLJR, 16.

\textsuperscript{109}. (1961) SLJR, 80.
developments in the field of human rights protection. One of the most important cases decided at that time is Joseph Garang’s\footnote{110} case relating to the disbanding of communist party. The decision in that case was based on the fact that the Transitional Constitution as amended 1964 did not contain machinery for constitutional amendment. Therefore, any amendment is unconstitutional. The case emphasized fundamental freedoms and rights and stated that fundamental human rights are natural rights which came into being before the existence of man-made constitutions. The most important case in our history as to the protection of human rights is Mahmoud Mohammed Taha’s case. The decision in that case did not only overrule a decision which was against natural principles of justice but opened and paved the way for bringing more constitutional actions for protecting human rights.\footnote{111}

It is apparent that the protection of human rights in Sudan is not effective. The cases are very few and there has been little or no open discussion on the issues relating to these rights, whereas cases we mentioned from other experiences show us how deeply and hotly some judges in other countries make their arguments not on civil and political rights only but on economic, social and cultural rights as well.

6. Remedies for Human Rights Violations

The International Covenant on Economic, Social and Cultural Rights puts all states parties to it under an obligation to ensure that victims of human rights violations shall have an effective remedy even if those violations have been committed by persons acting in official capacity. Remedies

\footnote{110, Supra note 12, at1}
relating to human rights may either be social and political or judicial. Since we are discussing the protection of human rights through national courts, only judicial remedies will be illustrated here.

The violations may be committed by the state, an individual, or a group of persons. Where the state is liable for the violation of human rights, remedies range from the relatively non-intrusive declaratory judgment to damages to injections and affirmative orders. Many courts have fashioned innovative remedies in order to ensure that the public interest in the rule of law is fulfilled, as well as to provide redress to the individual whose rights were violated. The following are the remedies which can be granted by any national court.

**(i) Declaratory Judgment**

Courts generally have the right to declare the status of rights and other legal relations whether or not further relief is or could be claimed. A declaratory judgment is the broad form of non-coercive remedy for resolving uncertainty in legal relations. It merely pronounces particular practices or conditions to be illegal, leaving officials free to choose whether and how to remedy the situation. As such, it is normally used as an anticipatory device to obtain a judgment before harm has occurred, when it is immediately threatened.112

**(ii) Compensation**

States uniformly use money awards to reimburse out-of-pocket expenses and to compensate for provable future direct and indirect losses resulting

---

from the injury. Many states award damages that further compensate for pain and suffering resulting from physical injury, under the heading “pecuniary harm”. Other states consider pain and suffering as part of intangible losses, compensated by moral rather than monetary damages. Compensable injury includes the same basic elements in virtually all legal systems: medical and other expenses; loss of or injury to property, including lost profits; pain and suffering and injury to health; funeral expenses in wrongful death case and loss of the services of the deceased.113

National legal systems vary in the methods they use to assess the recoverable elements and the amount awarded. This is not surprising given the differing economic conditions around the world and the differing weight given to the compensatory and deterrent functions of damages.114

(iii) Punitive or Exemplary Damages

Punitive or exemplary damages are neither new nor limited to a few countries, but instead are found in legal systems throughout the world. According to some authors, the very antiquity of such a remedy is something of a prima facie case for its usefulness. In most common law countries, punitive or exemplary damages may be awarded in cases of egregious wrongdoing. They are, as their names imply, damages by way of punishment or deterrence, given entirely without reference to any proved actual loss suffered by the plaintiff. The courts of some countries

113. Art. 21 of Philippine civil code provides that “any person who willfully causes loss or injury to another in a manner that is contrary to morals, good customs or public policy shall compensate the latter for damages. S. 138 of the Sudanese Civil Transaction Act 1984 also provides for compensation to be paid to any injured person.
114. Shelton, supra note 43, at 70.
enhance damages for egregious government misconduct. In other legal systems, punitive damages can be awarded against individual officials for flagrantly wrongful acts, but government entities cannot be subject to such awards on the grounds that punitive damages would punish taxpayers who took no part in the misconduct. It is also posited that the deterrent function served by punitive damages is less necessary in the case of a government entity, because the government is likely to sanction an offending official even without the award of damages.115

(iv) Non-monetary Remedies

Money as a substitute for the exercise of guaranteed human rights is particularly problematic, leading many victims and their representatives to seek other remedies. Many legal systems allow courts to issue specific orders of restitution or other acts by the wrongdoer to repair the harm caused. Other forms of non-monetary remedies include acts of rehabilitation, punishment of the wrongdoers, and restitution of right or property.116

(v) Habeas Corpus and Amparo

The writ of habeas corpus has its origin in English law, being mentioned in the Magna Carta. A writ of habeas corpus protects individuals against arbitrary and wrongful imprisonment or confinement. It has been viewed as the great writ of liberty. A common law right to habeas corpus exists in many states, in others it is provided by statute or constitutional provision. Many Latin American countries recognize amparo, a broader remedy than

115. Shelton, id, at 77.
116. This remedy can largely be granted under criminal law.
habeas corpus. It is a procedure whereby individuals who are deprived of or threatened with deprivation of constitutional right may seek redress from the Judiciary. Habeas corpus and amparo are particularly important remedies when evidence is in the hands of the state.117

(vi) Attorney’s Fees and Costs

There is considerable difference in the treatment of fees and costs from one country to another. The English rule is that the prevailing parties recover fees as a matter of course from the losing party. This is followed in most common law countries including Sudan and in Western Europe. The rule in the USA is that each side pays its own costs and fees unless the court is authorized by statute or recognized equitable exception to shift payment of the fees to the opposing party. Japan follows the same rule as the USA. Two reasons are given for not awarding fees and costs to the prevailing party. First, fee-shifting could discourage the poor from bringing law suits out of fear of having to pay the other side’s fees. Secondly, and probably more important, fee-shifting would impose too great a burden on judicial administration due to the inherent difficulty in computing fees. Unfortunately, the vast majority of human rights cases are brought by the poor, who cannot afford legal counsel to challenge wrongdoing. As a result, even where attorney’s fees and costs normally are not awarded for private litigation, domestic law often allows their recovery in public interest cases such as human rights. In federal civil rights litigation in the USA, the law allows reasonable attorney’s fees to ensure effective access to the judicial process for those seeking vindication of civil rights.118

117. It had been previously used in Sudan, now—in practice—it is not used under this term.
118. Shelton, supra note 43, at 80.
7. Developing New and more Effective Remedies for Socio-economic Rights

Some writers on human rights emphasize that the litigation around socio-economic rights often presents issues which call for the development and creation of new and more effective remedies. 119 Two suggestions regarding the development of the remedies of damages and mandamus can be stated here.

(i) Preventative Damages

Preventative damages can play a good role in remedying victims. A remedy such as compensatory damages directed only at the discrete violations of the past does not address the threat of existing and ongoing violations posed by a delinquent state institution. Preventative damages, on the other hand, recognize and address the existing threat and seek to remove it from society to prevent future violations rather than merely to give solace to their victims.120

(ii) Reparation in Kind

A conventional award of damages in delict seeks to compensate the victim in cash for the injury inflicted on his person or his property. Such an award may often be inappropriate to compensate the victims of past

---

119 E.g. The litigation is undertaken in the interests of communities or classes of people and not only in the interests of specified individuals. Those people are usually poor and politically and socially weak. They are the ones who are dependent on the state for the provision of basic socio-economic services and who lack the political and social power to get it without judicial intervention.

violations of socio-economic rights because the harm done by the violation may be too diffuse or amorphous. For instance, how does one compensate the victims of unfair race-discrimination in the provision of education, pervasive throughout a town, region or province over a long period of time? One way of addressing the problem would be to order the state to provide appropriate remedial services for the benefit of the victimized class as a whole, rather than to resort to individualized awards of damages in cash.\textsuperscript{121}

These two suggestions and others demonstrate attempts to find more deeply rooted solutions to the problem of human rights violations by extending the effect of remedies to the whole society and to the existing as well as to future violations.

8. Conclusions

The protection of fundamental rights and freedoms through national courts is not entirely new. Courts all over the world and throughout history were originally established to protect the rights of individuals. What is new is the protection of these rights in modern times. The courts can, in actuality, achieve this highly important task effectively by exercising judicial review over all legislations in the state. By having that power, courts are in a prophetic stance which enables them to distinguish the good legislation from the bad one basing their decisions on the human rights doctrine. The incorporation of international human rights law into domestic law plays an additional role in this field. Courts can also achieve their role by using the ordinary laws such as criminal law and criminal procedure law which are strongly connected to human rights

\textsuperscript{121} Ibid.
protection. This method is normally used in countries which do not have written constitutions. Judicial review is, however, the main weapon in the hands of the judges to be used for the purposes of rights protection process and in the process of preventing the occurrence of human rights violations.

In short, the courts play the most important role in the protection of human rights through a variety of methods. The most significant one is the judicial review. It should be noted that perfect protection of human rights cannot be achieved unless there is a real democratic system, a system which has a strong conviction and creed that human rights should be protected. A political system that has this conviction will take all necessary steps and measures to realize the principles of a democratic system in which promotion and protection of human rights occupies a central position.
Chapter Four

The Role of National Human Rights Institutions

1. Introduction

Human Rights and fundamental freedoms are protected through national courts as well as through national human rights institutions. This chapter will clarify the definition of these institutions, and provide a short historical background in the light of the role of the United Nations in the field of national institutions, and the types of the national human rights institutions, namely, human rights commissions and ombudspersons. Finally, it will state the differences between these institutions and NGOs.

2. Definition of National Human Rights Institutions

It is appropriate first of all to define the term "national human rights institutions" (NHRIs). Despite the existence of comprehensive standards relating to practice and functions, an analysis of activities conducted both within and outside the United Nations system reveals that there is not yet an agreed definition of the term “national human rights institutions”. The conceptual framework for early United Nations activities in the area was flexible enough to include virtually any institution at the national level having a direct and indirect impact on the promotion and protection of human rights. Accordingly, the judiciary, administrative tribunals, legislative organs, non-governmental organizations (NGOs), legal aid offices and social welfare schemes were given equal attention, along with national commissions, ombudsman offices and related structures. This
broad formulation, however, has been gradually pared down by the subsequent work of the United Nations on the subject to the point where a narrower group of institutions has emerged, on the basis of particular common functions. These functions include educational and promotional activities, the provisions of advice to government on human rights matters, and the investigation and resolution of complaints of violations committed by public (and occasionally also private) entities. However, while operating to exclude previously included institutions such as judiciary, the legislature and social welfare structures, this functional approach to categorization has not yet resulted in an ultimate definition of what constitutes a national institution for the promotion and protection of human rights. The Paris Principles (1991) relating to the status of national institutions represent an important step in the evolutionary process. The principles attempt to clarify the concept of a “national institution” by providing standards on the status and advisory role of national human rights commissions. If these standards are applied to the general class of national institutions, not only those designated as “commissions”, then a national institution must be a body established in the constitution or by law to perform particular functions in the field of human rights. This process will then operate to exclude only governmental instrumentalities with more general functions (such as administrative tribunals), but also all organizations not founded in law. Despite these refinements, it is evident that the concept of national institution is not yet fully evolved. At the same time, the practical utility of establishing boundaries, however flexible, has been recognized. For the purpose of United Nations activities in this field, therefore, the term "national institution" is taken to refer to a body which is established by a government under the
constitution, or by law or decree, the functions of which are especially defined in terms of the promotion and protection of human rights.\textsuperscript{122}

Accordingly, a National Human Rights Institution can be defined as an independent organization that is established by the government, according to specific legislation, in order to promote and protect human rights at the national level.\textsuperscript{123} Within this meaning many countries have set up NHRIs, including, \textit{inter alia}, Australia, Canada, Denmark, France, Ghana, India, Indonesia, Ireland, Jordan, Mauritius, Nepal, Mexico, Morocco, Nigeria, New Zealand, Norway, Palestine, South Africa, Uganda, The Ukraine, and Sudan.

3. Role of the United Nations in the field of National Institutions

The question of national human rights institutions was first raised and discussed by the Economic and Social Council (ECOSOC) in 1946, two years before the General Assembly proclaimed the Universal Declaration of Human Rights as "a common standard of achievement for all peoples and nations". At its second session, in 1946, ECOSOC invited member states to consider the desirability of establishing information groups or local human rights committees within their respective countries to collaborate with them in furthering the work of the commission on human rights. Fourteen years later the matter was raised again, in a resolution which recognized the important role national institutions could play in the promotion and protection of human rights, and which invited Governments to encourage the formation and continuation of such bodies.

as well as to communicate all relevant information on the subject to the Secretary-General.

As standard-setting in the field of human rights gained momentum during the 1960s and 1970s, discussion on national institutions became increasingly focused on the ways in which such bodies could assist in the effective implementation of these international standards. In 1978, the Commission on Human Rights decided to organize a seminar in order, *inter alia*, to draft guidelines for the structure and functioning of national institutions. Accordingly, the seminar on National and Local Institutions for the Promotion and Protection of Human Rights was held in Geneva in September 1978 resulting in an approved set of guidelines.

Throughout the 1980s, the United Nations continued to take an active interest in this topic and a series of reports prepared by the Secretary-General were presented to the General Assembly. It was during this time that a considerable number of national institutions were established, many with the support of the United Nations Centre for Human Rights. In 1990, the Commission on Human Rights called for a workshop to be convened consisting of national and regional institutions involved in the promotion and protection of human rights. The workshop was to review patterns of cooperation between national institutions and international organizations, such as the United Nations and its agencies, and to explore ways of increasing the effectiveness of national institutions. Accordingly, the first international Workshop on National Institutions for the Promotion and Protection of Human Rights was held in Paris from 7 to 9 October 1991. Its conclusions were endorsed by the Commission on Human Rights in resolution 1992/54 as the principles relating to the status of national institutions (the "Paris Principles") and subsequently endorsed by the
General Assembly in resolution 43/1134 of 20 December 1993. These principles affirm that national institutions are to be vested with competence to promote and protect human rights and given as broad a mandate as possible, set forth clearly in a constitutional or legislative text.\textsuperscript{124}

4. Types of National Human Rights Institutions

As we have found out from the definition of NHRIs at the outset of this chapter, the concept of NHRI should not be confused with other entities acting at the national level with a human rights mandate, such as the judiciary, administrative tribunals, legislative organs or NGOs. The work of the UN in the field of NHRIs makes clear the difference between NHRIs and other similar institutions. The Paris Principles, in particular, have intended to provide a specific technical meaning to the NHRIs. For the purpose of this chapter, a NHRI is a domestic organization that includes the following five elements: it is established by state; it acts in accordance with the constitution or other legislation; it is independent; it provides advisory opinions; and it has a mandate to promote and protect human rights. Thus, NHRIs are administrative or "quasi-judicial entities", with neither judicial nor lawmaking capacities. With this in mind the majority of NHRIs might be identified as belonging to one of two broad categories; "human rights commissions" and "ombudsmen". Furthermore, there is a third type referred to as specialized institutions. The first type, i.e. national human rights commissions, have a general mandate to perform all of the NHRIs functions, while the second have a specific mandate to oversee fairness and legality in area of public administration, to receive complaints from individuals or groups, to investigate alleged

\textsuperscript{124}. Center for Human Rights, \textit{Supra} note 1, at 4-5.
human rights violations and to act as a mediator between individuals and
the government. Nonetheless, these two types of NHRIIs are capable of
performing some similar functions. It is possible to find commissions
with general mandates, or with specific areas of specialization that
correct certain groups, which might differ from one country to another,
such as racial discrimination, political rights, children, women, disabled
persons, refugees or indigenous peoples. Likewise, the ombudsmen
sometimes have a general mandate to investigate and receive complaints,
or can deal specifically with specific matters or groups. Also most of
the commissions have, inter alia, an ombudsman mandate, and some
ombudsmen have educative, information, or legislative review functions
which are quite similar to the work of commissions. Thus there are no
definitive forms of NHRIIs, and each state is free to choose the NHRI
framework which best suits its needs.

The different forms of national human rights institutions play different
roles in promoting and protecting human rights. In order to illustrate these
different roles let us highlight two of the three main types of NHRIIs.

(i) National Human Rights Commissions

Creating human rights commissions has become a fashionable endeavor
for many of the world’s governments. Over the past twenty years national
human rights commissions have sprung up across the globe and are now an intrinsic part of the institutional landscape. Encouraged by international actors and pressed forward by domestic ones, countries with varying social and political backgrounds have moved to set up these institutions.

A national human rights commission is a state sponsored and state-funded entity that enjoys (or is supposed to enjoy) considerable autonomy. The first human rights commission was set up in Canada in 1947, and in some other parts of the world the institution of the ombudsman has been vested with a human rights jurisdiction. Human rights commissions have emerged as the international community has recognized that reactive strategies alone are not sufficient to adequately protect human rights. While human rights monitoring and litigation have an impact in some cases, lack of human rights protection is related to a lack of capacity within government. Governmental institutions in some cases may be unaware of the human rights implications of their actions and policies. In other cases they may lack the knowledge and skills to be able to address human rights concerns. Human rights commissions, because of their location within government, have the potential to build this human rights capacity within other governmental structures. The national human rights commissions cannot at all play this rule unless they are established and composed in a certain way and granted powers that enable them to carry out their functions perfectly. In order to illustrate this let us put a spotlight on our newly established National Human Rights Commission here in Sudan and some human rights commissions of other nations.

(a) National Human Rights Commission in Sudan

The National Assembly of Sudan passed on 2 May 2004 the Human Rights Commission Act which establishes an independent National Human Rights Commission.\textsuperscript{130} The Commission of course will be closely linked to the state, but there are protective safeguards in the law which are expected to allow it to act with a fair degree of independence. These protective safeguards in different parts of the Act should prevent the state from interfering with most functions of the Commission. Section 13 states that the Chairperson of the Commission’s Council will head the meetings of the Commission’s Council, represent the Commission, and appoint the officials of the general secretariat of the Commission. This safeguard exists in the laws of many nations.\textsuperscript{131} The NHRC Act of Sudan provides generally that the Commission shall be independent in carrying out its work and functions and that nobody is permitted to influence it either through inducements or through terrorist tactics.\textsuperscript{132} The Commission will have full control over its finances. Section 20 of the Act provides for the allocation of an adequate budget for the Commission. This budget should be prepared annually by the Commission and be submitted to the National Assembly directly to ratify or approve it and include it in the general budget of the state. In some countries such as Thailand this budget is submitted through the speaker of the National Assembly to the cabinet for consideration and inclusion in an appropriations bill.\textsuperscript{133}

\textsuperscript{130} Section 3(1) of \textit{The National Human Rights Commission Act 2004}
\textsuperscript{131} For example S.17 of Thai National Human Rights Commission Act states that the Chairperson of the Commission will supervise the office of the Commission
\textsuperscript{132} Section 9.
\textsuperscript{133} Section 20 (1) of the Sudanese NHRC Act; and Section 21 of Thai National Human Rights Commission Act 1999.
Independence throughout the appointment process, as we mentioned, is one of the means which the Act provides for. The Act does not precisely define the qualifications of potential commissioners nor does it disqualify individuals who may be corrupt or have a conflict of interest, although it generally requires the same conditions of the National Assembly member to be satisfied by a commissioner.\textsuperscript{134} It also states that the commissioner must have experience in the field of human rights for not less than five years. The Thai Act is much clearer in this point. It sets out a list of qualifications and prohibitions, most of which are aimed at preventing individuals who are not independent-minded from being appointed. For example, persons who have been removed from their jobs because of corruption and politicians and members of political parties are disqualified.\textsuperscript{135}

In many countries election may be the best method for determining members of the national commissions. An Act which contains such a provision safeguards a highly democratic appointment process which in turn strengthens the independence of the commission. Sudan National Commission Act contains an article which states that the members of the Commission’s Council will be determined through election. This is all well and good, but the downside of the article is that it enables the government to appoint all or some of the 27 members of the Council of the Commission.\textsuperscript{136}

The independence of the national commission can be guaranteed also through the composition of the commission. The Sudanese Act states that the Council of the Commission will be

\begin{flushright}
\textsuperscript{134} See Article 68 of the Constitution of 1998.  \\
\textsuperscript{135} Section 6.  \\
\textsuperscript{136} Section 8 of the NHRC Act 2004.
\end{flushright}
composed in a way that ensures the commissioners are reasonably representative of society. This will play an important role in safeguarding the independence of the commission. According to the Act the Commission should be from the following circles: six advisor members to represent governmental bodies concerned with human rights, who will be chosen by the Council of Ministers, and 21 selected members to equally represent: nongovernmental national organizations and social and professional civil society organizations concerned with human rights and registered in accordance with the law; university academic staff and experts specialized in the field of human rights; national assembly; and finally women’s organizations and associations. The third of the selected members will be selected by the National Assembly of its members who have an interest in human rights.\textsuperscript{137} The members of the National Assembly are normally representatives of political parties. It would have been better if the members selected from the National Assembly to work in the National Commission had been required not to be members in any of the political parties. Persons who are politicians or members of political parties should be not be qualified to stand as members of the National Commission.

In addition to these safeguards, the Act clearly defines the Commission's areas of jurisdiction. According to section 4 of the Act, the Commission will generally work to promote and protect human rights, monitor and raise the awareness of the public on human rights. The section states that the Commission will in particular work as a source of information for the government and the public in the field of human rights, assist in raising and promoting the awareness of culture of human rights; assist in preparing and implementing research programmes and education of

\textsuperscript{137} Ibid.
human rights; discuss and study any matter concerning human rights referred to it by the government and give recommendations on it; advise the government with regard to any matter concerning human rights referred to it by the government; examine any legislation, decision and arrangement that concern human rights and prepare reports on them to the concerned authorities or bodies; submit recommendations, proposals and decisions to the government, the national assembly, or any other relevant authority with regard to any matter of human rights including requests to revise legislative and administrative provisions and any violations of human rights. In order to achieve these aims, the Commission has a right to receive complaints from individuals and bodies and recommend or propose appropriate remedial measures.

The Commission also has a duty to undertake any other task related to the government obligations under international human rights instruments to which Sudan is party, which the government sees fit to make part of the Commission’s function. These obligations include the need to encourage the state to ratify the international instruments relating to human rights; to encourage the harmonization of national legislation, regulations and practices with the international human rights norms; to publicize awareness among the different sectors of Sudanese people about human rights and contribute to efforts to combat all forms of discrimination, through advertisement, education, and available mass media; and to contribute to the periodic reports which states are required to submit. According to Paris Principles such reports should be submitted to the United Nations bodies and committees and to regional institutions, pursuant to their treaty obligations.
Another group of duties that the Act confers on the newborn institution is to assist in formulation of programmes for the teaching of, and research into, human rights and to take part in the execution thereof in schools, universities and professional circles; to cooperate with the United Nations and any other organizations in the United Nations system, the regional institutions, human rights centers and similar national nongovernmental institutions that are competent in the areas of the promotion and protection of human rights. The Commission should, in addition, conduct consultations with other bodies responsible for promotion and protection of human rights or which have connection to the promotion and protection of human rights within or out of Sudan. In this respect the Commission must create strong working relations with Employees Justice Chamber and Public Grievances and Corrections Board.

The final function that the Commission must carry out is to cooperate with national nongovernmental organizations devoted to promoting and protecting of human rights, to economic and social development, to combating racism and to protecting vulnerable groups.

In order to realize these functions the National Commission has power to establish appropriate bodies to guarantee the smooth implementation of its activities. It can establish committees and working groups and appoint a human rights officer or anybody or person temporarily or permanently to assist it in discharging its task, and it can appoint a human rights officer for inquiries and investigations or to assist it in preparing reports. The National Commission also has power to demand statements, information and documents and require the attendance of witnesses for hearing. In performing this task, the National Commission has been granted the powers of inquiry commissions as stated in Commissions of
Inquiry Act 1954 except the power to arrest; it has the power to freely consider any matters falling within its competence, whether they are submitted by the government or taken up by it without referral to a higher authority on the proposal of its members or any petitioner; power to address public opinion directly or through any press organ particularly in order to publicize its opinions and recommendations; and finally power to refer any person who refuses to do anything demanded by the Commission according to its Act to the Attorney General on the ground of contravening the Commission of Inquiry Act 1954.\textsuperscript{138}

The functions and powers which are stated in the Act of National Human Rights Commission are declared in the Paris Principles. These principles set out the powers that NHRIs (such as national commissions) are entitled to undertake and the functions that they are supposed to perform.

NHRIs, according to the Paris Principles, shall have the authority to provide advice to governmental bodies. They may submit, upon the request of competent authority or upon their own initiative opinions, recommendations and reports on any matter concerning the promotion and protection of human rights. These matters include reviewing draft legislation and administrative actions; suggesting measures to improve the human rights situation or to stop certain violations, by means such as making amendments to the existing legislation or initiating new drafts; preparing reports on the national situation with regard to human rights; and drawing the attention of the government to situations in any part of the country where human rights are being violated and thereby making proposals to put an end to such situations.\textsuperscript{139} In addition, NHRIs should

\textsuperscript{138} See section 5.
\textsuperscript{139} The Paris Principles. Section 1 пара.3 (а).
have the mandate to promote and ensure the harmonization of national legislation and governmental practices with the international human rights instruments to which the state is a party; to encourage ratification of, or accession to, these instruments, and to ensure their implementation; to assist in formulating programs for teaching and research on human rights and to take part in their implementation in schools, universities, and professional circles; and to publicize human rights and activities combating all forms of discrimination.\textsuperscript{140} Finally, the Paris Principles contain special provisions on the mandate exercised by some NHRIs to receive complaints and investigate individual human rights violation. In this case, NHRIs may seek to settle a dispute by consultation or mediation between the individual and the governmental body; they may inform the alleged victims of their rights; and they may undertake the hearing of their complaints, or alternatively transmit them to another competent authority.\textsuperscript{141}

The provisions of the Sudanese National Human Rights Commission Act are largely similar to those of the Paris Principles. In fact, most of the sections are taken word by word from them and others with some cosmetic changes. For example the section stipulating that the Commission "should cooperate with national nongovernmental organizations devoted to promoting and protecting human rights, to economic and social development, combating racism and to protecting vulnerable groups", is provided for in our Act in the section which relates to functions of the Commission, whereas, in Paris Principle it is mentioned as one of the methods of operation. Furthermore the principles mention the expression "all forms of discrimination" instead of "racism".

\textsuperscript{140} Ibid. para. 3(b-g)
\textsuperscript{141} Ibid. Section 4.
which is mentioned in our Act. Therefore, the Paris Principles sections are much broader and clearer than ours. However combating "all forms of discrimination" is provided for in another place in the Act (subsection 4(2)(m)).

The Paris Principles determine a number of specific vulnerable groups that deserve to be protected such as children, migrant workers, refugees, and physically and mentally disabled persons. The Sudanese Act does not mention specific vulnerable groups that need to be protected. It only states generally that the vulnerable groups should be protected by the National Commission.

The Paris Principles, as many human rights commission Acts, determine expressly the method of dealing with the complaints. In this context the Sudanese Act does not contain any provision granting power to the commission to transmit a complaint to another competent authority. But since the Commission can expect to face some complex cases, it is understood that it has such power, because no case stays without receiving resolution.

The National Human Rights Commission is empowered to deal with cases from all over the country. It will have one principle office in Khartoum and it is permitted to open branches in any state in Sudan. It would have been better and more practical if it had been clearly set out that it should establish branches or even separate state human rights commissions in any of the states. The provision as it stands gives the commission a highly centralized system of operation. A centralized system of operation is not compatible with the trend towards governmental decentralization as well as with nature of human rights
issues. There are local customs and history affecting human rights issues which are difficult to appreciate when viewed from a distance. The major fear is that a National Human Rights Commission with inaccurate perceptions of human rights will make protection of human rights ineffective throughout the country. Therefore we suggest that there should be state human rights commissions with the authority to provide appropriate and affective remedies to human rights violations.

Relatively speaking, the Act minimizes the seriousness of human rights violations by public officials. It lumps the violations committed by private persons together with those of the public officials. There are not special procedures that deal with cases involving the latter. A separate treatment of cases involving officials is necessary considering that they exercise power and lack a high degree of transparency in their operation. In other words, their human rights violations should be seen as serious cases requiring a different treatment.

**(b) National Commissions of Some Other Nations**

Uganda has established an independent constitutional body to promote and protect human rights called Uganda Human Rights Commission (UHRC). It was created upon the realization by the government that after independence Uganda suffered massive abuses of human rights, and many innocent Ugandans lost their lives, were harassed, detained without trial, tortured or discriminated against, displaced or forced into exile. The Constituent Assembly of Uganda created a permanent Human Rights Commission taking into account the report of the Commission of Inquiry

---

into Violations of Human Rights (1962-1986) and the recommendations of the Uganda Constitutional Commission.

The Commission is composed of a chairperson and not less than other three persons appointed by the President of the Republic with the approval of Parliament. The chairperson and members of the Commission have to be persons of high moral character and proven integrity. These serve for a period of six years and are eligible for reappointment.

The Commission is made up of five departments: Complaints and Investigations Department, responsible for receiving and processing complaints, conducting inspections, including prison visits, and carrying out timely and impartial investigations; the Legal and Tribunal Department, responsible for providing legal service for the Commission, and providing redress to victims of human rights violations through mediation and tribunal hearing; the Education, Research and Training Department, responsible for civic education with the goal of fostering and creating a culture of human rights and constitutionalism in Uganda; the Finance and Administrative Department, responsible for maintenance and administration of office premises, development of media strategy and establishment of regional offices; and the Monitoring Department, responsible for monitoring reports on human rights situation in Uganda and monitoring government compliance with international treaty obligation.

The Commission's principal objective is to uphold, protect and promote human rights in Uganda. It has the following functions set down in the Constitution: to investigate, at its own initiative or on a complaint made by any person or a group of persons against violation of any human
rights; to visit jails, prisons, and places of detention or related facilities with a view of assessing and inspecting conditions of the inmates and make recommendations; and to establish a continuing programme of research, education and information to enhance respect of human rights.

The UHRC has some of the powers of a court: it is able to summon any person to appear before it and produce any document or record relevant to any investigation by the Commission. If satisfied that there has been a violation of human rights or freedoms, the Commission may order the release of a detained person, or payment of compensation or any other legal remedy or redress. The UHRC is not, however, a substitute for the courts; it is an additional organ available for citizens and it complements the work of the judiciary. The UHRC is barred from investigating any matter which is pending before a court or judicial tribunal, or a matter involving the relations or dealings between the government of Uganda and the government of any foreign state or international organization, or a matter relating to the exercise of the prerogative of mercy.

All complaints about violations of human rights can be brought to the Commission except cases that are before a competent court of law. Complainant testimonies are received by the Complaints and Investigations Department, after which the respondent is contacted to give their side of the story. After they respond, the complainant is contacted for a response. If there are disparities in their stories, the Commission will carry out investigations to find out the truth. When the investigations are completed, the matter is referred to the Legal and Tribunal Department for further action. If Legal and Complaints Department is not satisfied with the findings, then the file will be referred back to complaints and investigations for more and better details. If they
are satisfied with the facts presented then they will determine whether the case should be heard in a tribunal or whether it can be settled through mediation. In India, the commission, when inquiring into complaints of violations of human rights, may call for information from the central government or any state government or other authority. Provided that the information is not received within the time stipulated by the commission, it may proceed to inquire into the complaint on its own. On the other hand, if, on receipt of information or report, the commission is satisfied either that no further inquiry is required or that the concerned authority has taken the required action, it may not proceed with the complaint.143

Another example of other nations’ human rights commissions is the South African Human Rights Commission (SAHRC).144 The SAHRC is a national institution which derives its powers from the constitution and the Human Rights Commission Act of 1994. The SAHRC works with government, civil society and individuals, both nationally and abroad, to fulfill its constitutional mandate and serves as both a watchdog and a transparent route through which people can access their rights. While the handling and management of complaints concerning human rights violations lies at the heart of the SAHRC’s work, it also aims to create a national culture of human rights through its advocacy, research and legal functions. It also implements, monitors and develops standards of human rights law.

While attempting to resolve most matters referred to it through negotiation, mediation and conciliation, the SAHRC has extensive powers in dealing with cases of human rights violations. These include

---

search and seizure, the power to hold formal hearing and the power to litigate on behalf of complaints or in its own name. The SAHRC has also established links with other independent institutions to which some matters are referred if these institutions are better placed to deal with them.

The objectives of the SAHRC are similar to those of any other human rights commission. The SAHRC deals with complaints deemed to be in violation of a right included in the Bill of Rights.

Generally speaking, national human rights commissions of other countries are similar in mandate and powers to ours. The differences between the commissions mentioned above and the Sudanese Commission are slight. The Ugandan National Human Rights Commission has the power of the court to for example, and so may summon any person to attend before it and produce any document or record relevant to any investigation by the commission. Such power is not expressly provided for in our Act. The national commissions in many countries including the SAHRC have power to litigate on behalf of complaints or in its own name. It is not clear why our Commission has not been granted that power.

(c) National Commissions and Internal Displacement

Internally displaced persons are one of the vulnerable groups that should be protected by national commissions. The Sudanese National Human Rights Commission Act provides, as most human rights commissions’ Acts, that the Commission should protect vulnerable groups. The location of national commissions within the state, their status as national
institutions and their procedural flexibility suggests that they do have the potential to make a difference in the lives of internally displaced persons. Their comparative advantage lies in their location within government and the access this gives them to a wide range of actors who are either involved in the conflict or in providing relief and assistance to the displaced. It also comes from their ability to engage in a wide range of intervention strategies, both on their own and in combination with other actors. It comes from the support they can draw from other institutions worldwide and the regional networks of national institutions that are slowly beginning to emerge. The resources that human rights commissions are increasingly beginning to attract from donors give them another strong advantage. Their status as national institutions and the impact of their findings give them added strength. Their location within government gives them the opportunity to use both strategies of shame and strategies of negotiation to advance the rights of the displaced. Their status as a national institution enables them to critique government policy and to go public with their findings. Their public pronouncements are likely to have more of an impact than the pronouncements of NGOs. Public criticism can change policy and action as human rights groups well know, having frequently relied on the power of shame to change state behavior. Human rights commissions because of their status as national institutions also have the potential to negotiate and engage with both government and nongovernmental actors to ensure that the rights of the displaced are respected. With regard to internal displacement, there are a number of activities that human rights commissions are well positioned to do: for example, they can monitor access to the displaced and their ability to receive basic supplies such as food and medicine; visit camps and other places where the displaced are located to obtain accurate assessments of the conditions under which they live; conduct broader
field surveys on a periodic basis, which would include gathering information on how the displaced populations are interacting with the local population, the state of basic service in those areas etc.; assist policy-makers in framing policy that takes into account the rights and needs of the displaced; and engage with the military to ensure that the civilian populations are spared the consequences of the conflict and military imperatives do not prevent assistance from reaching IDPs.¹⁴⁵

(ii) The Ombudspersons or Ombudsmen

(a) What is an ombudsman?

An ombudsman, or ombuds, is a dispute resolution practitioner who receives complaints, concerns, and questions from individuals, works to resolve these issues, making recommendations on individual matters where appropriate, and brings to entity's attention chronic or systemic problems regarding which it makes recommendations for improvement. A key feature distinguishing ombuds from other dispute resolution practitioners is the ombuds’ focus on systemic issues and on developing conflict prevention strategies.¹⁴⁶

There are two kinds of ombudsmen. Traditionally, an ombudsman has been described as an individual who handles concerns and inquiries from the public—a person in this position is often referred to as an "external" ombudsman. For example, the United States Environmental Protection Agency has ombudsmen who serve as points of contact for members of

¹⁴⁵. Gomez Supra note 8 at 31.
the public who have concerns about Superfund activities.\textsuperscript{147} Over time organizations—governmental and nongovernmental alike—have also established ombudsmen to deal with workplace issues. Workplace ombudsmen provide an informal alternative to existing and more formal processes to deal with conflicts that arise in the workplace and other organizations climate issues. Because an ombuds does not have to follow formal processes, he or she can exercise flexibility to resolve issues.

\textbf{(b)The Core Principles for Ombudsmen}

The core principles as determined by the Ombuds Association, the American Bar Association (ABA) and other American organizations such as the United States Ombudsman Association and the University and College Ombuds Association are independence, neutrality and confidentiality.

The Ombudsman Association Standards of Practice define independence as functioning independent of line management, with the ombudsman having a reporting relationship with the highest authority in an organization. According to ABA Ombudsman Committee's Recommended Standards for the Establishment and Operation of Ombudsman Offices, the ombudsman must be independent in its structure, function, and appearance and free from interference in the legitimate performance of duties to be credible and effective. According to the recommended standards, in assessing whether an ombudsman is independent, the following factors are important: whether anyone subject to the ombudsman's jurisdiction or anyone directly responsible for a

\textsuperscript{147} The superfund program provides support to locate, investigate and clean up hazardous waste sites in the U.S.A.
person under the ombudsman's jurisdiction can control or limit the ombudsman performance of duties, eliminate the office, remove the ombudsman other than for cause, or reduce the office's budget or resources. The recommended standards also state, among other things, that the ombudsman position should be explicitly defined and established as a matter of organization policy and that the ombudsman should also have access to all information within the organization, except as restricted by law.148

The Ombudsman Association Standards of Practice define neutrality as not advocating for any one person in a dispute within an organization but advocating for fair processes and the fair administration of those processes. The recommended standards of the ABA Ombudsman Committee state that the ombudsman does not represent complainants nor does the ombudsman defend the entity complained against. The ombudsman conducts inquiries and investigations in an impartial manner, seeking resolution for a fair outcome and making recommendations where appropriate. In addition, according to the recommended standards, the ombudsman should be an advocate for change when investigation or inquiry identifies a systemic problem. The University and College Ombuds Association standards add that an ombuds should have no interest or personal stake on issues handled.

As to confidentiality, the Ombudsman Association standards define it as communications that are intended to be held in secret. The Ombudsman Association standards assert that there is a privilege regarding communications that allows individuals to come forward in a confidential setting without the risk of reprisal. The recommended standards of ABA

148. Supra note 25, at 10
Ombudsman Committee state that confidentiality must extend to all communications with the ombudsman; including all notes and records maintained in the performance of the ombudsman duties. The Ombudsman's Association Standards also state that the ombudsman must not keep case records for the organization and that any written notes the ombudsman records in handling a case should be destroyed. The University and College Ombuds Association standards require that when seeking systemic change, an ombudsman should not reveal the identity of a singular situation that could be associated with a particular individual.149

(c) Functions and powers of Ombuds

The primary function of this institution is to oversee fairness and legality in public administration. More specifically, the office of the ombudsman exists to protect the rights of individuals who believe themselves to be the victims of unjust acts on the part of the public administration. Accordingly, the ombudsman will often act as impartial mediator between an aggrieved individual and the government. The institution of ombudsman in all countries follows similar procedures in the performance of their duties. The ombudsman receives complaints from members of the public and will investigate these complaints provided they fall within the ombudsman's competence. In the process of investigation, the ombudsman is generally granted access to the documents of all relevant public authorities and may also be able to compel witnesses, including government officials, to provide information. He or she will then issue a statement or recommendation based on this investigation. This statement is generally transmitted to the person

149 Ibid. at 11.
lodging the complaints as well as to the office or authority complained against. In general, if the recommendation is not acted on, the ombudsman may submit a specific report to the legislature. This will be in addition to an annual report to the same body, which may include information on problems which have been identified and contain suggestions for legislative and administrative change. The complainant at first is required in many countries to exhaust alternative legal and administrative remedies. There may also be time-limits on the filing of complaints. Moreover, while the ombudsman's authority usually extends to all aspects of public administration, most ombudsmen are prevented from considering complaints involving members of the legislature or the judiciary. Access to the ombudsman also varies from country to country. In many countries, individuals may lodge a complaint directly with the ombudsman's office. In other countries complaints may be submitted through an intermediary, such as a local member of parliament. Complaints made to the ombudsman are usually confidential and the identity of the complaint is not disclosed without that person's consent. The ombudsman is not always restricted to acting on complaints and may be able to begin an investigation on his or her own initiative. As with human rights commissions, self-initiative investigations by ombudsman offices often relate to the issues which the ombudsman may have determined to be of broad public concern, or issues which affect group rights and are therefore not likely to be the subject of an individual complaint.150

In many respects, the powers of the ombudsman are quite similar to those of human rights commissions with competence to receive and investigate complaints. Both are concerned with protecting rights of individuals and,  

150. Center for Human Rights, supra note 1, at 9.
in principle, neither has the power to make binding decisions. There are nevertheless some differences in the functions of the two bodies which reveal why some countries establish and simultaneously maintain both types of institutions. As explained above, the primary function of most ombudsmen is to ensure fairness and legality in public administration. In contrast commissions are more generally concerned with violations of human rights, particularly discrimination. In this respect, human rights commissions will often concern themselves with the actions of private bodies and individuals as well as the government. In general, the principle focus of activity for an ombudsman is individual complaints against public entities or officials. However, distinctions are becoming more and more blurred as ombudsman offices engage in a wide range of activities for the promotion and protection of human rights. Increasingly, offices of the ombudsman are assuming responsibilities in the area of promoting human rights, particularly through educational activities and the development of information programmes.\textsuperscript{151}

Sudan has an experience in the field of ombudsmen. The Constitution of 1998 establishes an institution which is exactly like any ombudsman in any country. This body is independent and is known as the “Public Grievances and Corrections Board”. Its president and members are appointed by the President of the Republic with the approval of the National Assembly and must be persons of efficiency and propriety. The Board is responsible to the President of the Republic and the National Assembly. The Board, without prejudice to the jurisdiction of the judiciary, works at the federal level to clear away grievances, assure efficiency and purity in the practice of the state and in systems, or the final executive or administrative acts, and also to extend justice after the

\textsuperscript{151} Ibid.
final decisions of the institutions of justice. The Constitution also states that the Board shall work in coordination with the various organs of the state and submit its recommendations to the President of the Republic, the National Assembly or any public organ. This public organ according to our view may be The National Human Rights Commission which is, in many countries, supported internationally. The Constitution finally states that there shall be established public grievances and corrections board in the states by state law observing in accordance with the above mentioned provisions. In actuality there is an Act regulating the work of the Public Grievances and Corrections Board passed in 1998 the same year in which the Constitution was passed.152

5. Differences between NHRIs and NGOs

In practice, some of the functions of NHRIs are similar to those of NGOs. For example, both organizations conduct human rights education activities, public awareness campaigns, and oversee government performance in relation to human rights. However, as state bodies, NHRIs are essentially different from NGOs. NHRIs are established by the state, according to special legislation (normally enacted by parliament) and have a wide officially-adopted mandate, especially in investigating governmental actions related to human rights. NGOs are part of the civil society and, as they are separated from state institutions and regulate their own program of work, ideally without state intervention, the state does not necessarily adopt their mandate.

In their dealings with the UN, in particular, NHRIs and NGOs converge on some points and diverge on others. For NGOs, legal relations with the

UN are clear generally, NGOs can participate within the UN Charter-based human rights bodies through their consultative status at the ECOSOC. The rules of procedure of the various UN treaty-bodies permit NGOs to report to and participate in the meetings of the treaty-bodies. In contrast, the NHRIs' relationship with the UN's human rights system needs more clarification. Furthermore, NGOs can play an important role in encouraging governments to establish NHRIs, particularly if the state has not developed such an institution. NGOs have the capacity to work with both the government and NHRIs to increase the effectiveness of existing institutions. In addition, the composition of some NHRIs allows for the inclusion of representatives from human rights NGOs. Finally one of the emerging functions of NHRIs involves coordinating the work of local NGOs in reporting to the UN human rights treaty-bodies.

6. Conclusions

NHRIs were established in the past to realize specific human rights. The NHRCs were set up for the first time to combat all forms of discrimination. It was not one of their objectives, for example, to undertake any particular task with regard to the government obligations of international human rights instruments. The ombudsperson's original purpose was to oversee fairness and legality in public administration. The work and jurisdiction of these institutions, happily, have been increasingly wider and wider because of the continuous and increasing care and attention paid to human rights. People are now more serious about seeing their rights implemented.

The Public Grievances and Corrections Board is now playing an important role in protecting human rights, especially the rights of
workers. The problem with this institution as with National Commission is that most of the citizens do not know anything about it. They do not know that there are means other than their national courts through which they can seek rights protection and redress for violations, and therefore the National Commission is obligated to further publicize its efforts. The National Commission and the Public Grievances and Corrections Board should cooperate and coordinate their work with other national human rights institutions.

NHRIs, in short, are expected to have a greater role in facilitating the way the victims find remedies. They, as a recent study on national human rights institutions pointed out, provide an accessible, low-cost means of redress for the most vulnerable sections of society, who will have particular difficulty gaining access to conventional legal means of resolving their problems.
Chapter Five
Conclusions

Throughout the history of mankind there has always been some awareness of rights. In general, people have long insisted that they have power to do some things and that other things ought to be done for them and that no one can prevent them from doing that or from claiming their rights. This clear and simple concept of a right has been developing over time until the modern concept of fundamental rights and freedoms or human rights came into being. The concept of human rights is based on different theoretical bases adopted by three different schools which appeared in different historical periods in the legal and political development of the world. The first school is the school of positive law which emerged in the middle ages. Under the positive law theory, rights are a result of a contract or bargaining made by the rulers and the governed. The most important example is the English Great Charter (Magna Carta) agreed upon between King John and the barons in 1215. He committed himself as well as heirs for ever to grant the rights and liberties enumerated in the Magna Carta to all freemen of the kingdom and not to impose major taxes without permission of a "great council" representing the barons, and agreed to stop hiring mercenaries (who had to be paid) if barons refused to fight. The Magna Carta led to many constitutional developments in the centuries that followed, especially with regard to the history of human rights. But the rights that are enjoyed in accordance with the positive law view cannot genuinely be called human rights. The second school that tried to justify rights was the school of natural law which had its origins in the classical Greek and early Christian thought and was eventually strengthened and elaborated as a set
of ideas by the medieval Catholic theology. The natural law school concentrates on human flourishing and so requires recognition of certain kinds of human goods. These human goods are declared to be necessary everywhere for human beings to flourish. This led to the thinking that there are common moral standards, which can be discerned by application of practical reason to human affairs. This reasoning, in turn, revealed that these moral standards can generate rights and duties which are not justified by reference to, or limited in application by, any particular legal system, community, state, race, creed or civilization. According to supporters and writers of natural law trend, any person has ability to discern the content of natural law. The rights which were set out in the French Declaration of the Rights of Man and the Citizen were clearly attributed to natural law. The modern human rights were based on a concept of human dignity which is, according to this school, the only source of fundamental rights and freedoms. This new trend is now widely recognized and defended by all supporters and protectors of human rights. The rights according to this school are neither a result of a contract or bargaining between the rulers and the governed nor are they derived from natural law. But the natural law school and the modern school of human rights reach the same conclusion-- that human rights are not derived from the rulers or man-made authorities. They also agree that every individual has right to enjoy these rights irrespective of his religion, colour, social status, political creed or any other discriminatory bases.

Human rights can be divided into three categories; political and civil rights (first generation rights), social, economic and cultural rights (second generation rights) and collective rights (third generation rights). These three generations reflect three different but connected stages in mankind's struggle against the enemies of humanity and freedom. The
political and civil rights are a fruit of great revolutions staged by the governed in different European countries and in the United States of America. The rights that were laid down after the fall of dictatorial regimes were the basis of political and civil rights set out in 1948 in the Universal Declaration of Human Rights (UDHR). The economic, social, and cultural rights came into being after the industrial revolution and are now embodied in the International Covenant on Economic, Social and Cultural Rights (CESCR). The workers as individuals and groups find themselves in an urgent need for some rights in order to improve their economic and social situations. The rights that were recognized at that time have later become the basis of economic, social and cultural rights. However, these rights have been marginalized both at the international and national levels.

This research suggests two factors that need to be taken into account if economic, social and cultural rights are to be placed in a more central position in international human rights discourse and accordingly in the national discourse. We need to draft a new declaration or convention on specific provisions of the CESCR or the relevant provisions of the UDHR. We also suggest that the international institutions concerned specifically with economic and social rights develop a list of targets for each economic, social or cultural right and begin talks with each state party to the CESCR to agree on a schedule of achievement for each right. The actual target for a particular right for a particular country should be different. The international community must provide assistance to the third world countries to achieve their actual targets. The third generation rights are now in throes of birth and they reflect another stage in our history in which groups and peoples need these rights. There is no jurisprudence developed by jurists on rights of this category. What the
world needs today as far as these rights are concerned is adoption of an international convention on collective rights. I expect that 10 to 20 years from now we will find in ourselves an urgent need for rights which one cannot imagine now.

The protection of human rights through national courts is not entirely new. The judiciary in any country is the protector of people's rights. The courts in Sudan have not dealt with many human rights cases because the culture of human rights is not widespread among the citizens and lawyers. Human rights are viewed by many lawyers and citizens as a strange culture and cases that involve human rights are seen as of political nature. The international human rights provisions have not yet been incorporated completely and expressly into the domestic law of Sudan. But there are good judgments made by the High Court and the Supreme Court in some cases, such as Joseph Garang v. The Supreme Commission and Asma Mahmoud Mahamed Taha v. S.G. The courts in Sudan use the power of judicial review to invalidate any legislation which is inconsistent with the constitution. Although the judicial review has been criticized as against democracy, there are various ways to refute those assertions. In the United States, Justice Marshall did so when he spoke of enforcing, on behalf of the people of the United States, the limits that they have ordained for the institutions of a limited government. Judicial review does not constitute control by an unrepresentative minority of an elected majority because the people are superior to both; and where the will of the legislature, declared in it is statutes, stands in opposition to that of the people declared in the constitution of the country, the judges ought to be governed by the latter rather that the former. Judicial review of legislation is followed in countries with written constitutions, such as the United States, whereas in the United Kingdom which has no written constitution
the ordinary laws are used to protect human rights. In addition to that, courts can benefit from international human rights by referring to them in cases of interpreting and determining the content and extent of rights guaranteed by the constitution or domestic laws.

Whatever method or theory is used or adopted, courts have certain capacities for dealing with matters of human rights. Judges have or should have the leisure, the training, the insulation, the independence and the neutrality to enable them to protect human rights. Judges in Sudan must not be ashamed to benefit from the experiences of other states, and in particular the experience of the United States of America, to effectively protect the human rights and fundamental freedoms of the people.

National Human Rights Institutions are the modern method of human rights protection. They are not established in any country to replace the other organizations such as NGOs and national courts, but to cooperate with them. The work of the United Nations in the field of human rights has included a focus on the subject of national institutions for the protection and promotion of human rights. The national human rights institution plays a significant role at the national level in promoting and protecting human rights and fundamental freedoms and in developing and enhancing public awareness and observance of those rights and freedoms.

The passing of the National Human Rights Act in Sudan is a consequence of an international wave of interest concerning human rights promotion and protection. I hope that the Commission which is established by the Act would go further to make human rights idea a part of our creed and deepen, by its work, the belief of the citizens in its role in protecting
human rights. In order to implement or carry out this anticipated task and role completely, we need to put the NHRIs at a highest possible level.

Many countries in the world have established human rights commissions with broad mandates and strong powers but still there are serious and gross human rights violations in those countries. In my view, such countries establish human rights commission only to proudly demonstrate in international conferences and meetings that they are doing their best to protect human rights. In order to avoid this we need to give our Commission more and stronger powers, especially the power to litigate on behalf of the victims either at their request or at the commission's own initiative. We also need to strengthen the ties of the Commission with international human rights institutions. The newly born institution needs to acquire the trust and confidence of the international community if it wants to win the international financial support and recognition. The commissioners should, finally, be really independent, non-politicians and not members of political parties. They must be persons who have no ideology but the ideology of human rights.

I want to conclude by stating that the promotion and protection of human rights in Sudan require, in particular, the following:

First, the international human rights law should be expressly incorporated into our domestic law by provisions directly in the constitution that the human rights treaties are part of our law, or by passing a Human Rights Act by the parliament as was done in the United Kingdom in 1998. Such an act would enable lawyers, in particular judges and advocates, to be more active in the field of human rights protection. Secondly, the judiciary must prepare periodic courses to raise the awareness of the
judges on human rights. Thirdly, the NHRIs must coordinate and cooperate with international organizations which are ready at any time to help national institutions in promoting and protecting human rights. To carry out this and other duties effectively our country should establish independent and separate state human right commissions. Each commission must be empowered with a strong and broad mandate for the purposes of protecting human rights at the state level. The establishment of state human rights commissions is consistent with the trend towards government decentralization as well as with the nature of human rights issues. In addition, the cooperation that must exist between the national and state commissions will have a positive effect in helping the national commission and the government to make new and more active politics for the benefit of human rights protection.

In short, national courts and national human rights institutions have the ability to spread, deepen and protect human rights and fundamental freedoms. The effectiveness of human rights promotion and protection depends, largely, upon the assistance and the support that international and national authorities as well as civil society organizations grant to national courts and national human rights institutions.