1. Introduction

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1. THE PURPOSE AND APPROACH OF THIS VOLUME

Courts play an important role in protecting constitutionalism and the fundamental rights of the individual. However, in fulfilling this role many *challenges* arise, for instance as a result of counter-terrorism measures, ubiquitous surveillance, democratic transitions, or the changing role of the nation state. The aim of this book is to discuss these challenges with specific emphasis on *diversity*, both geographical and institutional diversity. Hence, through the sixteen chapters of the book we will examine courts and the challenges they face in different parts of the world, ranging from traditional and stable democracies to countries in transition. In the twenty-first century the protection of constitutionalism and human rights is a matter for national (including constitutional) courts as well as for regional and international courts including human rights courts. Unavoidably and to the benefit of the quality of judicial reasoning, a complex interplay between different courts and legal systems takes place. This gives rise to further challenges, and this dimension will also be examined in our book. One important aim of the book is to facilitate a *dialogue* between judges from different jurisdictions, continents and institutions, and furthermore to facilitate a *discourse* between judges and academics. Hence, the authors of our book include judges as well as academics, and the judges represent experiences from a range of different national, regional or international courts around the world.

Obviously, it is not possible to cover all challenges, every country in the world or all institutions. Therefore, we have chosen to examine some general aspects of courts as guardians of human rights (see, the first thematic section of the book, Chapters 2 to 4), then a number of specific challenges for courts arising from counter-terrorism measures, the surveillance state and democratic transitions (the two following sections, Chapters 5 to 12), and finally specific challenges connected to international and regional courts (the final section, Chapters 13 to 16). In all parts of the book we will include different jurisdictions from diverse

parts of the world. The first general section 'Judges as guardians of the fundamental rights of the individual' draws upon among others European, United States, Israeli and South African experiences when discussing general aspects such as the legitimacy of courts, the role of public opinion, constitutional identity, legal reasoning, constitutional interpretation, judicial lawmaking, and balancing. In the second section on 'Judges and judging in times of terrorism and surveillance' not only European, including European Union level, and American experiences but also global perspectives are discussed. The third section on 'The judiciary in times of transition' focuses on experiences from the Middle East, Europe (including Russia) and China. Finally, the section on 'Judges as guardians beyond the nation state: regional and international perspectives' draws upon experiences from among others the International Criminal Court, the Inter-American Commission and Court of Human Rights, and the European Court of Human Rights.

One might ask why we have chosen such a broad comparative approach and whether it is even possible to compare so different legal systems around the world and across the national, regional and international levels. We do think that the exercise was proven useful in working towards this volume.

First, most of the chosen legal systems are democracies, whether established or emerging. This naturally limited the comparative challenges we had to face.

Second, each thematic section of the book can be viewed on its own as a comparative study in which the involved legal systems have been carefully chosen (though the different sections of the book and chapters across them also intersect). As the first thematic section of the book will show, most judges face some common challenges related to for instance legitimacy, interpretation and balancing when protecting national constitutions and rights of the individual. There might be different solutions to these problems in different legal systems. However, all democratic legal systems must reflect over these problems. In the two following sections our authors address some topical challenges for courts when protecting constitutionalism and human rights, namely vis-à-vis counter-terrorism, surveillance and democratic transition. As regards counter-terrorism we have chosen a specific case-study on the United Kingdom, where counter-terrorism measures have recently been further strengthened, and in general this part of the book draws upon experiences from liberal democracies in the western world including other European countries and the United States. As regards surveillance we have selected Germany and Ireland as specific case studies but the two chapters also focus on European and international aspects. Germany is chosen because it has a

long tradition of weighing freedom and security against each other in relation to surveillance, starting with the times of the Red Army Faction and later on as a result of the terrorist attacks of 9/11 2001. The German Federal Constitutional Court has developed very interesting and highly influential case law concerning the protection of individual rights in respect of counter-terrorism measures including surveillance. Ireland was also a natural choice because of the recent judgment by the Court of Justice of the European Union on the Data Retention Directive. The final chapter in the section on terrorism and surveillance includes a global and more general perspective on both challenges. When discussing democratic transitions over the past decades, especially the Arab Spring and the democratic developments in Central and Eastern Europe spring to mind. Though other parts of the world could also have been included, we have chosen to focus on the Middle East and Eastern Europe with a specific focus on Egypt and Russia. The ongoing painful democratization process in Egypt is especially interesting, and so is Russia, being the former heart of the Soviet Union and a major international actor. However, this section also includes discussion on other countries in Europe, the Middle East and China. In the final section of the book we focus specifically on regional and international courts even if the earlier parts of the book have also to a certain extent covered such courts, for instance the European Court of Human Rights and the Court of Justice of the European Union. Once again a choice has had to be made, and we have chosen the International Criminal Court, the Inter-American Commission and Court of Human Rights, and the European Court of Human Rights as case studies. Other case studies could also have been interesting and hence in the final chapter of this section a more general discussion including more regional and international courts is offered.

This way, even though the book in total covers a broad range of legal systems across the world, the chosen case studies of legal systems in each part of the book are especially representative and comparable in relation to the specific challenge(s) discussed in each respective section. Besides the chosen case studies each section includes a broader regional and international framework, drawing upon regional and international treaties and case law from regional and international courts.

Furthermore, the broad comparative approach and the inclusion of national courts as well as regional courts and international courts could also be viewed in light of the current trend of 'internationalization of constitutional law' focusing on 'constitutional transplants' and 'migration of constitutional ideas'. This also goes well hand in hand with the fact that one of the purposes of the book is to promote dialogue among judges in different settings and between judges and academics. This way the

book actively *engages in and promotes* the process of constitutional dialogue – whereas much of the existing legal literature merely describes constitutional dialogue as a phenomenon from an external perspective. This aspect might be seen as one of the main strengths of the chosen approach.

As regards regional and international courts, because of the processes of multi-level governance and judicial dialogue it is no longer possible to discuss national legal systems in isolation from regional and global legal frameworks. This is reflected in the book in several ways. Hence, all parts of the book and almost all chapters provide references to the impact of regional and international courts, even the specific national case studies. Furthermore, the importance of regional and international courts is reflected in our inclusion of a specific final section focusing especially on these courts.

This way, even though one purpose of the book is to discuss the challenges facing courts when protecting constitutionalism and human rights with emphasis on both geographical and institutional diversity, some common patterns emerge alongside the differences. This is not just the case inside each section of the book but also across the entire book, demonstrating how the questions must be framed across national legal systems around the world, across different regional/international courts and across national and regional/international courts. In the following we are going to show this by discussing a number of common (and sometimes interrelated) themes which transgress the divisions of the book set by sections and chapters. Below, we will discuss the following topics: Judicial independence, the role of public opinion and the legitimacy of courts, interpretative techniques, hierarchy of norms, difficulties of transition, and the judiciary in a specific context – from exceptionalism to common standards.

2. JUDICIAL INDEPENDENCE

Judicial independence is normally viewed as one of the most important features of courts, and also as an essential element of the universal human right to a fair trial. This is the case as regards national courts, regional courts and international courts. Whereas judicial independence at the national level primarily relates to the national political institutions (the legislature and the executive), judicial independence at the regional

and international level will normally relate to possible political institutions in that particular regional/international setting (for instance the political institutions in the EU) and the nation states of the participating countries.

Judicial independence is especially important in relation to courts' protection of constitutionalism and the rights of the individual since the courts act as controllers of the actions of the state (the legislature and/or the executive) and their cases may concern a possible abuse of state power and/or a violation of individual rights. Furthermore, judicial independence is especially under pressure in times of crisis caused by for instance war or terrorism. At the same time independent court control is a fundamental cornerstone of a democratic society and of a separation of powers, since a truly free and democratic society presupposes strong protections of, for instance, the political freedoms of expression, assembly and association.

In this book the importance of judicial independence in the protection of human rights is among others emphasized by Lord Hope of Craighead. According to him the British judges' ability to act as guardians has been reinforced, *inter alia*, by the enactment of the Human Rights Act 1998 and the decision of the House of Lords in *A and others v Secretary of State for the Home Department* which pointed out that the function of independent judges charged with interpreting and applying the law is universally recognized as a cardinal feature of the modern democratic state, and is a cornerstone of the rule of law itself.¹ Many authors throughout the book emphasize the importance of judicial independence in protecting individual rights and constitutionalism. While the authors mainly focus on the impact of judicial independence in relation to the 'substantive' protection of individual rights, David Jenkins introduces a 'procedural' perspective. According to him it is very important to focus on the introduction by political institutions of procedural changes or shortcuts since such initiatives can undermine the independence of the judiciary. Procedural fairness is an essential part of the protection of the rule of law in a liberal democracy.²

Judicial independence is furthermore an important part of the legitimacy of courts. Interestingly, two former judges, Lord Hope of Craighead and Wolfgang Hoffmann-Riem, emphasize that even though the UK

¹ See Chapter 5, Lord Hope of Craighead, 'Judges as guardians of constitutionalism and human rights: the judiciary and counter-terrorism in the United Kingdom', pp. 110–111 and p. 115.

² See Chapter 8, David Jenkins, 'Procedural fairness and judicial review of counter-terrorism measures'.

Supreme Court and the German Federal Constitutional Court might be met with critique by politicians sometimes, at the end of the day their decisions are in general respected and given effect to.³ According to Lord Hope of Craighead ‘the UK judges, for their part, treat such protests as just part of the process of politics and are unmoved by them’.⁴ Hoffmann-Riem even states that ‘nearly all of the cited decisions of the Federal Constitutional Court have been greeted with great acclaim by the media, the majority of the academia and many politicians’ and ‘this has obviously resulted in greater confidence in the judiciary, especially the Federal Constitutional Court.’ We shall return to the question of court legitimacy below.

Judicial independence is not enough for securing an efficient fence against abuse of state power and violations of human rights, though. For instance Aharon Barak, Lord Hope of Craighead and TJ McIntyre all mention the importance of procedural standing.⁵ Independent courts are not a sufficient guarantee of a democratic state free of any abuse of state power or of violations of human rights if the rules concerning standing are very narrow. By its nature this is a procedural issue but also a very important one, since it has a direct effect on the possibilities for actual substantive review that would protect constitutionalism and human rights. Interestingly, many old democracies such as Denmark have no constitutional court and maintain quite limited rules on standing which require that an individual must have a specific legal interest in a case, in order for a court to engage in review. The impact of this is that no abstract court review can take place. This does not necessarily mean that such countries are characterized by abuses of state power and violations of human rights, though. Other factors such as political culture also play an important role. However, independent courts with the competence to review actions by political institutions are an efficient tool in preventing

³ See Chapter 5, Lord Hope of Craighead, ‘Judges as guardians of constitutionalism and human rights: the judiciary and counter-terrorism in the United Kingdom’, p. 104 and Chapter 6, Wolfgang Hoffmann-Riem, ‘The judiciary and the surveillance state: general trends and German experiences’, pp. 134–135.

⁴ See Chapter 5, Lord Hope of Craighead, ‘Judges as guardians of constitutionalism and human rights: the judiciary and counter-terrorism in the United Kingdom’, p. 104.

⁵ See Chapter 2, Aharon Barak, ‘On judging’, pp. 44–45, Chapter 5, Lord Hope of Craighead, ‘Judges as guardians of constitutionalism and human rights: the judiciary and counter-terrorism in the United Kingdom’, p. 99 and Chapter 7, TJ McIntyre, ‘Judicial oversight of surveillance: the case of Ireland in comparative perspective’, p. 143.

abuses, and this requires a reasonable room for the standing of individuals. Another problem in relation to standing which arises in the post-9/11 'surveillance state' is that individuals who would formally have legal standing before the courts do normally not know that they are subject to surveillance. This way, even though the courts have the competence to review any actual cases of surveillance for violations of human rights, no complaints will reach them. This problem and the solution chosen by the German Federal Constitutional Court are discussed by Wolfgang Hoffmann-Riem.⁶ The Court reacted by expanding the ability to seek legal relief for these kinds of constitutional grievances. Furthermore, TJ McIntyre emphasizes that even though standing rules vary at the national level in Europe, the possibility of recourse to the European Court of Human Rights exists and the Court has adopted quite a pragmatic approach to standing in the sense that the simple fact that a person is kept unaware of a violation of his/her rights should not remove the enjoyment of a right guaranteed by the Convention.⁷

Another example of how judicial independence, though being an important feature, might not in itself be enough is the question of how intensively the courts can conduct their review. For instance, how far do their competences go in relation to questions of a 'political' character. This is discussed in Aharon Barak's chapter in which he argues that courts have the jurisdiction to engage in any dispute and to decide the case according to legal standards. At the same time, according to Barak, the courts have no competence to refuse to do so.⁸ Likewise, Wolfgang Hoffmann-Riem touches upon the role of courts in relation to 'politics'. According to him when a court corrects the legislature in respect to its attempt to balance freedom and security, it is intervening in politics. However, this always occurs in the exercise of the constitutional authority of courts, and even a decision that does not overturn a law as unconstitutional has political implications.⁹ And even where constitutional courts must be guided only by constitutional law, in cases on for instance surveillance, values will play an important role and the courts will have

⁶ See Chapter 6, Wolfgang Hoffmann-Riem, 'The judiciary and the surveillance state: general trends and German experiences', pp. 123–124.

⁷ See Chapter 7, TJ McIntyre, 'Judicial oversight of surveillance: the case of Ireland in comparative perspective', p. 143 with a reference to *Klass v. Germany*, para. 36. For a recent affirmation of the same principle, see the 4 December 2015 Grand Chamber judgment in *Roman Zakharov v. Russia*, paras. 174–179.

⁸ See Chapter 2, Aharon Barak, 'On judging', pp. 43–44.

⁹ See Chapter 6, Wolfgang Hoffmann-Riem, 'The judiciary and the surveillance state: general trends and German experiences', pp. 134–135.

substantial discretion in regard to the interpretation of norms.¹⁰ The (claimed) distinction between legal and political decisions is a classic discussion in relation to the power balance between political institutions and courts. Not all national institutional systems recognize as active a role for the constitutional/supreme courts as expressed by Aharon Barak and Wolfgang Hoffmann-Riem. The line between law and politics is drawn more in favor of the political institutions for instance in the Nordic countries. As regards the Russian Constitutional Court, Bakhtiyar Tuzmukhamedov states that the Court will stay away from political questions.¹¹

Interestingly, where to draw the line between legal and political decisions is also relevant in relation to regional and international courts. This is the case no matter whether the court is an integral part of an institutional setting involving strong and even competing political institutions (such as the Court of Justice of the EU) or less involved in resolving tensions between regional or international political organs (such as the European Court of Human Rights). In both cases national political institutions might nevertheless react if they consider that the regional/international court is too activist, dynamic and lawmaking. In relation to the European Court of Human Rights this became very clear recently when the national politicians in the Council of Europe aimed to stop further developments through dynamic interpretation by the European Court of Human Rights with the Brighton Declaration of 2012 and subsequent Protocol 15 that implemented those political statements. Among other amendments, the principles of subsidiarity and the margin of appreciation have now been added into the preamble of the European Convention of Human Rights – even if, somewhat paradoxically, the fact that Protocol 15 has not yet entered into force might under normal means of interpretation defeat the very purpose of its initiators.¹² It would, however, appear that the European Court of Human Rights has not picked up the challenge but that its case law already reflects a new more ‘careful’ approach that may tone down the dynamic potentials of the Convention, at least for some time. This development is discussed in the

¹⁰ Ibid, p. 134.

¹¹ See Chapter 11, Bakhtiyar Tuzmukhamedov, ‘The Russian Constitutional Court in international legal dialogues’, p. 231.

¹² As of January 2016, no more than 24 of the 47 parties to the Convention had ratified Protocol 15, see <<http://www.conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=213&CM=8&DF=&CL=ENG>> accessed 7 January 2016.

chapters by David Thór Björgvinsson and Helle Krunke.¹³ One might ask whether such restraints upon dynamic interpretation imposed through treaty amendment, if taken far, can in reality threaten the independence of the Court. Or is judicial independence only a procedural question limited to the courts' area of competence as defined by the political institutions and/or the Constitution? Either way, the less competence there is for the courts, the less effective independent courts can be in curtailing abuse of power and violations of the rights of the individual.

Another question is whether courts are the only or even best-suited institutions to conduct oversight of, for instance, surveillance measures. TJ McIntyre discusses this important question in his chapter in the book. In *Klass v. Germany* the European Court of Human Rights stated that other systems than courts can provide sufficient safeguards if the supervisory bodies are independent of the authority carrying out the surveillance, objective and vested with sufficient powers and competences to exercise an efficient and continuous control.¹⁴ United Nations human rights mechanisms have recommended a 'mixed model' combining administrative, judicial and parliamentary oversight, since judicial review of surveillance and intelligence services in a number of countries has turned into rubber-stamping.¹⁵ According to TJ McIntyre there are significant limitations to judicial control especially in the field of national security and therefore judicial control should not exist in isolation but be part of a wider system of accountability including specialized oversight institutions.¹⁶ Both the Venice Commission and Martin Scheinin in his capacity as the former UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism have recommended an oversight system which covers all aspects of the work of intelligence agencies including interaction between different agencies and the police.¹⁷

¹³ See Chapter 15, David Thór Björgvinsson, 'The role of judges of the European Court of Human Rights as guardians of fundamental rights of the individual', and Chapter 4, Helle Krunke, 'Courts as protectors of the people: constitutional identity, popular legitimacy and human rights', pp. 88–91.

¹⁴ *Klass v. Germany*, application 5029/71, 6 September 1978, para. 49.

¹⁵ Office of the United Nations High Commissioner for Human Rights, *The Right to Privacy in a Digital Age*, June 30, 2014, 12–13, and Chapter 7, TJ McIntyre, 'Judicial oversight of surveillance: the case of Ireland in comparative perspective', pp. 137–138.

¹⁶ See Chapter 7, TJ McIntyre, 'Judicial oversight of surveillance: The case of Ireland in comparative perspective', p. 139.

¹⁷ *Ibid.*, p. 140.

Yet, another interesting aspect in relation to judicial independence is how this concept might not necessarily appeal in all countries and cultures going through a democratic transition. Ebrahim Afsah discusses how concepts such as ‘rule of law’ and ‘independent courts’ are connected to a western line of thinking. Whereas among European transitional countries the necessity of an independent judiciary for the functioning of an efficient market economy and a free society was never in doubt, the situation was quite different in Egypt (and many other countries in the Middle East). According to Afsah the self-understanding among the judges in the new European constitutional courts was to act as guardians, guides and servants of a constitutional order that went beyond the national borders. Strict judicial neutrality allowed the incorporation of former communists onto the bench in some Eastern European countries because the courts explicitly did not see themselves as protagonists in the ongoing societal disputes. In Egypt however, the courts were already perceived to be closely linked to the ancient régime in terms of composition and ethos and they made no attempt to stay above party politics. Afsah states that instead the judiciary became a self-interested institutional actor which prevented it from playing a more constructive role during the aborted constitutional process. The point is that the socio-political context in the Arab world is different from the European or western socio-political context and this among other factors affects the self-perception of judges in the Arab world and the possibilities of a transfer of concepts such as ‘judicial independence’.

As mentioned, the principle of judicial independence also applies to international/regional courts. In this context judicial independence will normally include possible political institutions in a particular regional/international setting (for instance the political institutions in the EU) and political institutions at the national level in the participating countries. Anita Ušacka discusses the importance of upholding the principle of judicial independence also at international courts. With an eye on the International Criminal Court and the European Court of Human Rights she raises a concern whether political considerations might sometimes weigh too much when judges are appointed to international/regional courts. She emphasizes the importance of a transparent and objective appointment system which focuses on ensuring the quality of judges rather than allowing for any political considerations.¹⁸

¹⁸ See Chapter 13, Anita Ušacka, ‘Constitutionalism and human rights at the International Criminal Court’, pp. 288–291.

3. THE ROLE OF PUBLIC OPINION AND THE LEGITIMACY OF COURTS

Many chapters of this book focus on the impact of public opinion upon courts. Throughout the chapter by Aharon Barak public confidence in the courts is an underlying theme. Aharon Barak served as President of the Israeli Supreme Court in 1995–2006. Domestic public confidence played an important role for the legitimacy of the Israeli Supreme Court in the 1980s and the early 1990s, and the Court itself often referred to public confidence in its judgments. However, the public confidence in the Court was weakened after this period, exposing the vulnerability of court legitimacy building upon public opinion. When it comes to the US Supreme Court, Or Bassok states that with the invention of public opinion polls and the rise of a public opinion culture it is now common sense in the American discourse that the Supreme Court's legitimacy is to be understood in terms of public support.¹⁹ In the European context and discourse, public confidence in courts has traditionally not played as dominant a role. Helle Krunke explores whether this is changing and under which conditions courts might gain legitimacy building upon popular support.²⁰ She shows how contradictions between the majority of the elected politicians and the popular opinion, for instance as regards EU integration, might provide courts with increased democratic legitimacy as protectors of the people.²¹

Public support does not only play a role in relation to the legitimacy of national Supreme Courts and Constitutional Courts. David Thór Björgvinsson emphasizes that the legitimacy of the European Court of Human Rights as an international court 'in the mind of the public at large is based on the way in which the judges at the Court have exercised their power and the social acceptance thereof'. The Court has built a 'moral capital' which according to Björgvinsson is a major factor in grounding its claim for legitimacy.²²

Hence, public support can build court legitimacy, strengthening the courts at least temporarily as the Israeli case shows. However, one might

¹⁹ See Chapter 3, Or Bassok, 'The changing understanding of judicial legitimacy', pp. 59–60.

²⁰ See Chapter 4, Helle Krunke 'Courts as protectors of the people: constitutional identity, popular legitimacy and human rights', pp. 81–93.

²¹ Ibid, pp. 81–93.

²² See Chapter 15, David Thór Björgvinsson, 'The role of judges of the European Court of Human Rights as guardians of fundamental rights of the individual', p. 388.

pose the question whether there also exist dangers in courts relying too strongly on their legitimacy building upon public opinion. In the protection of human rights and especially in times of crisis or war, courts will be challenged, also in the face of public opinion. TJ McIntyre emphasizes that in the context of terrorism the executive and the legislature can be prone to hasty reactions and hence the judiciary that is removed from the political cycle and is 'less directly influenced by popular opinion' can be better placed to consider whether counter-terrorism measures are in accordance with the law and the longer term interests of a democratic society.²³ Along the same lines Aharon Barak states that democracy ensures judges' independence against the fluctuations of public opinion because of their political non-accountability. The real test for judges' independence comes in times of war and terrorism where the significance of judges' (direct) non-accountability becomes clear.²⁴ Does this mean that judicial independence is more important than legitimacy building upon public support in the protection of human rights, at least in times of war and terrorism? Or Bassok stresses two important aspects of court legitimacy based on public support. First, sociological legitimacy must be understood as *enduring* public support.²⁵ Second, understanding the US Supreme Court's legitimacy in terms of enduring support does not mean that the Court has to *follow* public opinion.²⁶ However, can such long-term public support in reality be obtained? And can it survive to such an extent that public support is not affected by judgments that are in contradiction with opinions expressed by the majority in opinion polls? Does this hold true even in times of crisis when human rights are especially under pressure? Furthermore, can concrete cases be separated from the public's general confidence in the courts? Is it possible to argue for long-term popular support that is independent of the outcome of concrete cases and only based on the public's general confidence in the courts? Finally, how do we know that judges are not in fact influenced by opinion polls on concrete political topics? In the US case, for instance, almost all judgments are in line with the public opinion. These are some of the questions raised in the chapter by Helle Krunke, and they point in the direction that it is difficult to eliminate a risk of weaker protection of fundamental rights if courts rely too heavily on their legitimacy built

²³ See Chapter 7, TJ McIntyre, 'Judicial oversight of surveillance: the case of Ireland in comparative perspective', pp. 138–139.

²⁴ See Chapter 2, Aharon Barak, 'On judging', p. 34.

²⁵ See Chapter 3, Or Bassok, 'The changing understanding of judicial legitimacy', p. 51.

²⁶ *Ibid.*, p. 52.

upon public support.²⁷ Courts have to rely also on different sources of legitimacy in order to secure efficient and stable protection of fundamental rights.²⁸

4. INTERPRETATIVE TECHNIQUES

Judges face a number of challenges in their daily work adjudicating the cases laid before them. Several of the judges contributing to this book touch upon these challenges and address how they can be resolved using the instruments available to judges, such as interpretative techniques.

One of the main challenges is how to ‘bridge the gap between law and life’s changing reality’,²⁹ especially if the constitutional text is old and/or the text does not directly cover the present legal problem facing the judges in the actual case. As Barak puts it, the judges must balance the need for change with the need for stability.³⁰ With which weight these two considerations/values should be balanced is a classical dilemma in constitutional law. Different legal systems and different Supreme Courts/Constitutional Courts have different approaches to this balance. Even among the judges at the same court there can be differences of opinion on this fundamental question. For instance this would often be the case in the US Supreme Court.³¹ However, the judges all share the same challenge. No matter where the different courts and judges strike the balance between the past and the present, they also share the techniques available to them to handle the challenge, including those related to interpretation. For instance technological innovations can challenge judges in relation to old constitutional provisions guaranteeing fundamental rights so that a new open question emerges.

Some of the contributors to this book offer us their view on how to interpret a constitution in a present context. Aharon Barak argues that the aim of interpretation is to realise the law’s purpose and hence he is in favour of a purposive (teleological) theory of interpretation.³² This of course raises the question how to balance the subjective-historical purpose and the subjective-modern purpose. Barak’s answer to this

²⁷ See, Chapter 4, Helle Krunke ‘Courts as protectors of the people: constitutional identity, popular legitimacy and human rights’, pp. 87–89.

²⁸ *Ibid.*, pp. 87–89.

²⁹ See Chapter 2, Aharon Barak, ‘On judging’, p. 31.

³⁰ *Ibid.*

³¹ *Ibid.*, p. 39.

³² *Ibid.*, p. 36.

question is that one should take both the subjective and objective elements into account when determining the purpose of the constitution.³³ The original intent and public understanding must however exist alongside the fundamental views and values of modern society at the time of interpretation since the constitution according to Barak is intended to solve the problems of contemporary people and to protect human dignity.³⁴ Synthesis and harmony must be sought between the past understanding and the present principles.³⁵ If they pull in different directions greater weight should be given to the objective modern purpose according to Barak.³⁶ As he states: 'The past influences the present, but it does not determine it. The past guides the present, but it does not enslave it.'³⁷ He mentions the Canadian Supreme Court, the Australian High Court, the Israeli Supreme Court and the German Federal Constitutional Court as courts which have issued opinions in the same spirit as he proposes.

As regards the German Federal Constitutional Court we are offered a more detailed view into how these interpretative techniques are carried out in practice. Wolfgang Hoffmann-Riem shares his experiences from the Court with us in a chapter on 'The judiciary and the surveillance state'. He emphasizes a number of challenges for a present day interpretation of fundamental rights under the German constitution. First, new technologies challenge a constitution which dates back to the age of analogue communication.³⁸ Second, the protection of fundamental rights in the constitution was designed aiming at state actors.³⁹ In resolving these challenges the German Federal Constitutional Court has expanded the understanding of procedural standing before the Court, and it has interpreted fundamental rights protection provisions to embrace modern technology. According to Wolfgang Hoffmann-Riem since fundamental rights norms often work with values, constitutional courts have substantial discretion regarding the interpretation of norms. When the Court has to adjust the interpretation of unchanged constitutional norms to meet

³³ Ibid, p. 36.

³⁴ Ibid, pp. 36–37.

³⁵ Ibid, p. 37.

³⁶ Ibid.

³⁷ Ibid, p. 37.

³⁸ See Chapter 6, Wolfgang Hoffmann-Riem, 'The judiciary and the surveillance state: general trends and German experiences', pp. 119–120.

³⁹ Ibid, pp. 120–121.

changed circumstances, and no legislative preliminary decisions or judicial precedents exist, its discretion for the specification of the content of the constitutional norm is accordingly broad.⁴⁰

International and regional courts function in a different context. However, like national courts they need to balance different considerations/values when interpreting human rights provisions, in this case international and regional human rights conventions. Importantly, a dialogue takes place between the international/regional courts and the national courts, and interpretation is an important tool in this dialogue. In his chapter on the Inter-American human rights system, Carlos Ayala states that ‘this dialogue takes place in the area of interpretation of fundamental and constitutional rights in general where national courts look to harmonize their own interpretation with the interpretation provided by the respective regional international court’.⁴¹ However, the dialogue goes both ways and the international/regional courts must also be willing to listen to the constitutional courts in the nation states.⁴² Examples of national constitutional courts which have actively engaged in such a dialogue with an international/regional court are the Constitutional Chamber of the Venezuelan Supreme Court of Justice and the Russian Constitutional Court.⁴³ The need for a ‘multi-layered and inclusive discussion between national judges, international judges and academics focusing on constitutionalism and international law and practice as well as international human rights’ is also emphasized by Anita Ušacka.⁴⁴ In the last chapter of the book by Marina Aksenova and Geir Ulfstein which also serves to provide some general conclusions, judicial dialogue involving different actors and taking place at different levels is analysed: dialogue between judges and other branches of government, dialogue between international courts, dialogue between national and

⁴⁰ Ibid, p. 134.

⁴¹ See Chapter 14, Carlos Ayala, ‘The judicial dialogue between international and national courts in the Inter-American human rights system’, p. 306.

⁴² Ibid.

⁴³ Ibid, p. 320, and Chapter 16, Marina Aksenova and Geir Ulfstein, ‘The task of regional and international courts in guarding constitutionalism and human rights’, pp. 359–361.

⁴⁴ See Chapter 13, Anita Ušacka, ‘Constitutionalism and human rights at the International Criminal Court’, pp. 293–296.

international courts, dialogue between international courts and civil society, and dialogue between individual judges and their own courts.⁴⁵

5. HIERARCHY OF NORMS

The hierarchy of norms is a classic and central aspect in relation to the protection of human rights. Human rights can be protected by national constitutions as well as by regional/international treaties. The hierarchy and interplay between these different norms are essential. Hence several chapter authors touch upon these topics.

In many western countries human rights have traditionally been protected by national constitutions. The rise of international/regional treaties on human rights was traditionally often viewed from a dualistic point of view still having the nation state as the focal point. However, increased international cooperation, dynamic interpretations by courts such as the European Court of Human Rights combined with (in some cases quite old) national constitutions with very few provisions on human rights has gradually increased the importance and weight of international conventions. This way international treaties can in reality play a more important role than the constitution in the protection of human rights, even though formally the constitution has a higher hierarchical rank in that legal system. When such situations become common, the whole concept of hierarchy of norms and the distinction between dualism and monism have lost some of their traditional importance. National courts will see as their obligation to secure substantive compliance with international human rights treaties, instead of being obsessed by formalistic constructions of normative hierarchy. Judicial dialogue between different international courts and between international courts and national courts contributes to this process of strengthening the effect of international human rights treaties. Many of the contributions in this book focus on judicial dialogue. Another important factor is supra-national cooperation such as EU-cooperation in the field of human or fundamental rights. Yet another trend is that the protection of fundamental rights nowadays cannot only be secured by one nation state, even for its own inhabitants. If a country wants to protect the fundamental rights of its citizens it simply has to engage in international cooperation, since for instance communication networks have become global and the

⁴⁵ See Chapter 16, Marina Aksenova and Geir Ulfstein, 'The task of regional and international courts in guarding constitutionalism and human rights', pp. 359–361.

enjoyment of human rights depends on multiple actors, including foreign states.⁴⁶ This also strengthens the importance of regional/international human rights protection.

In many parts of the world such as Latin America which has the Inter-American Commission and Court of Human Rights, we see a similar trend of cross-fertilization and, as Carlos Ayala calls it, constitutional pluralism or network constitutionalism.⁴⁷ Interestingly, the constitutions of several countries in Latin America have granted constitutional supremacy to human rights treaties, e.g. Argentina, Venezuela, Brazil, Dominican Republic and Ecuador, and in some cases like Venezuela the Supreme Court/Constitutional Court has played a role in this development.⁴⁸ The described tendency in some European countries of human rights treaties in reality sometimes playing a more important role than the domestic constitution has in the Latin American context been taken one step further when the American Convention on Human Rights formally gains constitutional status.⁴⁹

Moving to yet another part of the world namely Russia, Bakhtiyar Tuzmukhamedov gives us an insight into the approach of the Russian Constitutional Court to international law. Unlike Russian courts of general jurisdiction or arbitration, the Constitutional Court is not bound by the Constitution or its own governing statute to apply any instrument other than the Constitution. However, the Court has from the beginning looked for arguments in support of a conclusion based on the Constitution and on international sources.⁵⁰ Furthermore, the Court has over time developed an approach to certain principles and norms in international law, and sources thereof, which it has described as constitutionally valid and hence as an integral component of the Russian legal system.⁵¹ A treaty does not repeal national law but benefits from the prevalence of a treaty norm over national law within the ambit of its application. Should

⁴⁶ See Chapter 6, Wolfgang Hoffmann-Riem, 'The judiciary and the surveillance state: general trends and german experiences', pp. 119–122.

⁴⁷ Chapter 14, Carlos Ayala, 'The judicial dialogue between international and national courts in the Inter-American human rights system', p. 308.

⁴⁸ *Ibid.*, pp. 317–320.

⁴⁹ Notably, this is not an oddity even in Europe but known traditionally from Austria, followed by some other European constitutions that in one way or another refer to the European Convention of Human Rights (e.g. Sweden) or human rights treaties in general (e.g. Finland) as part of the domestic constitutional framework.

⁵⁰ See Chapter 11, Bakhtiyar Tuzmukhamedov, 'The Russian Constitutional Court in international legal dialogues', pp. 225–226 and 232–233.

⁵¹ *Ibid.*

an international treaty allow curtailment of human and citizens' rights and freedoms established by national law, such a treaty may lose this privileged status in a collision with applicable domestic law.⁵² According to Tuzmukhamedov, the Court may have been rather inconsistent in its use of international sources, making international citations in some case and ignoring them in others.⁵³ This can be explained partly by predilections of individual judges and their assistants who draft the decisions and partly by the overarching Prevalence Clause of the Russian Constitution under which the Constitution prevails over all normative acts including international treaties that are effective in Russia.⁵⁴ Like many other authors in this book, Bakhtiyar Tuzmukhamedov emphasizes the importance of judicial dialogue among international and national courts. Specifically in relation to Russia, a recent judgment by the Russian Constitutional Court should be mentioned here since it is directly related to the question of the hierarchy of norms as regards national law and international treaties.⁵⁵ The judgment emphasizes the principle of state sovereignty and concludes that Russia can refuse to execute international judgments that contradict its constitution. The judgment establishes a national review procedure of whether judgments by the European Court of Human Rights should be enforced. The full consequences of the judgment in the Russian legal system as well as for the enforcement of the ECHR in other member states are yet to be seen. However, the relatively open approach in relation to international law developed by the Russian Constitutional Court and described by Bakhtiyar Tuzmukhamedov in his chapter appear to be moving in a different direction in the aftermath of the recent judgment.

In conclusion, despite some current political misgivings in Europe, we see a long-term trend of increased constitutional and judicial importance of international human rights treaties. In many countries traditional formal hierarchies of law are in reality slowly being broken down, facilitated by judicial dialogues between different courts/legal systems and in the face of outdated constitutions with old and insufficient human rights catalogues. Furthermore, formally more constitutions than ever before give international human rights norms constitutional or quasi-constitutional rank. Courts often play a role in the process of such

⁵² Ibid, p. 233.

⁵³ Ibid.

⁵⁴ Ibid, pp. 233–234.

⁵⁵ Ruling by the Russian Constitutional Court of 14 July 2015 on the applicability of the European Court of Human Rights judgments in the territory of the Russian Federation.

developments, for instance by paving the way for a constitutional amendment.

6. DIFFICULTIES OF TRANSITION

In the above discussion on judicial independence we already touched upon difficulties of transferring concepts such as judicial independence and rule of law to, for instance, Arab countries because of the different socio-political environment. An entire section of the book is dedicated to the judiciary in times of transition because of the special challenges for courts and judges which occur in such conditions. The chapters by Bakhtiyar Tuzmukhamedov and Antoni Abat i Ninet offer us interesting insights into two specific countries which have been through a transition process though at different moments and in different socio-political contexts: Russia and Egypt. The third chapter in the same section, by Ebrahim Afsah, in turn, provides a comparative analysis of a number of democratic transitions in Europe, China and the Middle East, with a special focus on the impact of different socio-political contexts. However, many chapters in other sections of the book contribute to the discussion of the judiciary in times of transition, for instance the chapter by Carlos Ayala that focuses on Latin America.

The chapters by Carlos Ayala and Bakhtiyar Tuzmukhamedov both show how international (human rights) law in periods of transition can be promoted towards constitutional rank by the judges of the Supreme Courts and Constitutional Courts. Carlos Ayala shows how the Venezuelan Supreme Court of Justice in the 1990s – when Venezuela was undergoing a political and economic crisis – by building on international human rights instruments was very active in strengthening human rights protections, for instance by making a contribution towards the establishment of the right to political participation.⁵⁶ In 1961–99 the Court managed to establish a judicial evolution which finally in 1999 was constitutionalized in the Constitution of the Bolivarian Republic of Venezuela of 1999 that affirmed the establishment of constitutional rank and status for international treaties related to human rights matters.⁵⁷ Bakhtiyar Tuzmukhamedov shows how the Russian Constitutional Court moved from making mere references to international sources or using

⁵⁶ See Chapter 14, Carlos Ayala, ‘The judicial dialogue between international and national courts in the Inter-American human rights system’, pp. 318–320.

⁵⁷ *Ibid.*

them as ‘a rhetorical flourish rather than a basis for the decision’ to an approach in respect of certain principles and norms of international law and the sources thereof and their interpretations, that describes them as constitutionally valid and hence as an integral part of the Russian legal system.⁵⁸ He emphasizes the importance of the multidimensional dialogue of courts, and their judges and judgments, in this process.⁵⁹ As regards the future, once again, the recent July 2015 judgment by the Russian Constitutional Court (mentioned in the immediately preceding section of this Introduction) must be borne in mind.

Not all transitions will necessarily promote international human rights and not all courts and judges will be active in such a process. The socio-political context will play an important role, as noted by both Ebrahim Afsah and Antoni Abat i Ninet. An important question raised by Antoni Abat i Ninet is whether courts should be activist or show judicial restraint in times of transition. In order to answer this question he divides the transition period into different phases, arguing that the role of triggering democratization and other extraordinary attributes are not jurisdictional and it would be paradoxical and somehow disturbing to ask the activation of democratization from a non-democratic non-elected branch. According to him it is better to show judicial restraint in a transition period in order to safeguard the necessary independence of judges. Once the transition is over, the judiciary may be an active guardian of constitutionalism and human rights.⁶⁰

In the chapter by Antoni Abat i Ninet we also learn more about which role the Supreme Constitutional Court of Egypt and its judges played in the transitions taking place in Egypt. Abat i Ninet describes the different stages: The transition, Morsi’s mandate and the aftermath of the military regime. According to him the role that the Court played in the transition was consistent with its historical struggle against Islamism and congruent in the defense of its own political and institutional power and the connivance with the Supreme Council of the Armed Forces and the Presidency.⁶¹ On this background it would have been unrealistic to ask judicial restraint in the transitional period from the Court but the political bandwagoning of the judiciary to support Sisi’s repression has according

⁵⁸ See Chapter 11, Bakhtiyar Tuzmukhamedov, ‘The Russian Constitutional Court in international legal dialogues’, p. 226.

⁵⁹ Ibid.

⁶⁰ See Chapter 10, Antoni Abat i Ninet, ‘The role of the judiciary in Egypt’s failed transition to democracy’, p. 208.

⁶¹ Ibid, p. 223.

to Abat i Ninet been unexpected and has affected the prestige of the Egyptian judiciary.⁶²

There is no doubt that courts and judges face a very difficult challenge when a country undergoes transitions, especially political transitions. How they act during such a period for instance in relation to promoting human rights and democracy will to a large extent depend upon the socio-political context of that particular country. Some courts will choose judicial restraint while others will choose a path of activism. A transition can be the start of a new era of stronger protection of human rights and democracy. International treaties on human rights can be the lever for such a development. They can be a tool available to judges to promote higher human rights standards in a country which has undergone a period of transition.

7. JUDICIARY IN SPECIFIC CONTEXTS – FROM EXCEPTIONALISM TO COMMON STANDARDS?

How can judges act as guardians of constitutionalism and human rights in times of terrorism and surveillance? How can we secure that rights are protected even in times of crisis? If we characterize a period of, for instance terrorism, as an exception, we at the same time signal that the situation is not normal and that special (emergency) measures might be necessary. In a global perspective, states have rarely declared a state of emergency and derogated from their constitutional provisions or from human rights treaties when facing the threat of terrorism. That said, it has been much more common that terrorism is treated analogously with officially declared emergencies, resulting in departures from ordinary laws and ordinary procedures, for instance through the use of military or special courts or through curtailing the otherwise self-evident rights of the accused. Often, the judiciary has stood up against such temptations. In his chapter TJ McIntyre mentions how the Irish Supreme Court has for instance not adopted the view of terrorism exceptionalism.⁶³ Even though the exceptionalism rhetoric implies that the situation should at some point be normalized it raises many critical questions. What is the response of the law and of judges when such periods become so long that they turn into ‘normality’ in the daily life of the citizens? What is the proper approach when counter-terrorism measures are no longer focused

⁶² Ibid.

⁶³ See Chapter 7, TJ McIntyre, ‘Judicial oversight of surveillance: the case of Ireland in comparative perspective’, p. 146.

on people under concrete suspicion but take the form of mass surveillance affecting all members of a society? And do we not want to protect the rights of all individuals, including the ones under suspicion for terrorism, in any case? How do we handle the exponential advances in modern technology? How do we handle internationalization and globalization, not the least in the fields of counter-terrorism and surveillance? All of this calls for thoughts on common methods and some common standards for the protection of fundamental rights and constitutionalism in relation to terrorism, surveillance and emergencies.

The first method which courts/judges can utilize is the toolbox of interpretation and not least the means of interpretation that relate to a present context. Wolfgang Hoffmann-Riem gives some very good examples in his chapter on how the German Constitutional Court has managed to interpret the German Constitution in a way which keeps pace with modern technology.

A second tool is to extend procedural standing before the courts in order to capture cases in which the objects of surveillance are not aware of the surveillance being carried out because of security and secrecy considerations. Also in this case Wolfgang Hoffmann-Riem gives some very good examples from the German Constitutional Court.⁶⁴ Extension of standing can also be seen as a general tool as regards mass surveillance.

Third, international treaties on human rights and decisions from international courts and oversight bodies can help to set common standards and to maintain red lines that must not be crossed.

Fourth, international treaties can at the same time contribute to solving the challenges of globalization and internationalization. It is not a coincidence that the quest for extraterritorial reach of human rights treaties has since 9/11 become one of the most interesting – and most controversial – themes of human rights adjudication and scholarship.

Fifth, ‘best practice’ can play a role in reaching common standards as a complement to a purely interpretative approach. In his chapter Martin Scheinin explains how he applied a ‘best practice approach’ when serving as United Nations Special Rapporteur on human rights and counter-terrorism. ‘Best practice’ falls under the notion of soft law – or ‘soft sources’ as Scheinin prefers – and though not in itself legally binding it can contribute by clarifying the correct understanding of binding sources of law.

⁶⁴ See Chapter 6, Wolfgang Hoffmann-Riem, ‘The judiciary and the surveillance state: general trends and German experiences’.

Through this construction, not only political institutions but also the judiciary can benefit from and apply ‘best practice’.⁶⁵

Sixth, in his chapter Martin Scheinin also presents a multidisciplinary methodology developed in the EU-funded research project SURVEILLE⁶⁶ for assessing surveillance technologies simultaneously for their effectiveness and efficiency, ethical hazards, and intrusiveness into human rights. One of the main points made in the chapter is that such an approach can help judges in resisting what the author calls ‘the pull of deferentialism’.⁶⁷ The proposed methodology guides the judge to a holistic overall assessment and secures that a final proportionality assessment can be made on the basis of concrete circumstances and a controllable assessment of the degree of the human rights interference, instead of an abstract ‘balancing’ between societal values in which case deference to national security and the privileged position the executive enjoys in determining it easily trump all other considerations and in reality prevent a proper process of balancing.⁶⁸ As other authors confirm, balancing is one of the fundamental problems that judges need to confront in terrorism and surveillance cases.⁶⁹

Why is it especially important for the judiciary to uphold the protection of human rights and constitutionalism during times of crisis or terrorism? The answer to this question can be found through a quote from one of Aharon Barak’s judgments:

If we fail in our task in times of war and terror, we will not be able to carry out our task properly in times of peace and calm. From this viewpoint, a mistake by the judiciary in a time of emergency is more serious than a mistake of the legislature and the executive in a time of emergency. The reason for this is that the mistake of the judiciary will accompany democracy even when the threat of terror has passed, and it will remain in the case law of the court as a magnet for the development of new and problematic rulings. This is not the case with mistakes by the other powers. These will be cancelled and usually no-one will remember them.⁷⁰

⁶⁵ See Chapter 9, Martin Scheinin, ‘The judiciary in times of terrorism and surveillance: a global perspective’, p. 189.

⁶⁶ Surveillance: Ethical Issues, Legal Limitations, and Efficiency, see <<http://www.surveillance.eu>> accessed 27 November 2015.

⁶⁷ See Chapter 9, Martin Scheinin, ‘The judiciary in times of terrorism and surveillance: a global perspective’, p. 196.

⁶⁸ *Ibid.*, pp. 196–197.

⁶⁹ See for instance Chapter 5, Lord Hope of Craighead, ‘Judges as guardians of constitutionalism and human rights: the judiciary and counter-terrorism in the United Kingdom’, p. 101.

⁷⁰ See Chapter 2, Aharon Barak, ‘On judging’, p. 34.

8. INTRODUCTORY CONCLUSION

These introductory reflections on a number of themes drawing upon a range of chapters across different sections of this volume have sought to show common threads, similarities and differences between various challenges that judges face in different legal systems, and how they can be overcome. Next, we invite the reader on a journey around the world through studying the separate chapters of the book. Here the reader will find detailed insights by judges as well as academics. As mentioned in the beginning of this chapter, with this book we hope actively to engage in and promote the process of constitutional dialogue among judges from different countries and legal systems, including regional and international courts, and between judges and academics as regards the theme 'judges as guardians of constitutionalism and human rights'.

Our co-editor Marina Aksenova will take over in the final chapter of the book, co-authored with Geir Ulfstein. Their contribution is both the final part of the section on regional and international courts and at the same time a concluding chapter of the whole book. We wish the reader a rewarding journey.