

5-1-2013

# The Metamorphosis of International Human Rights in Domestic Constitutions: South Africa and Kosovo as Case Studies

Kristina Marie Hon

Follow this and additional works at: [https://scholarship.shu.edu/student\\_scholarship](https://scholarship.shu.edu/student_scholarship)

---

## Recommended Citation

Hon, Kristina Marie, "The Metamorphosis of International Human Rights in Domestic Constitutions: South Africa and Kosovo as Case Studies" (2013). *Law School Student Scholarship*. 237.  
[https://scholarship.shu.edu/student\\_scholarship/237](https://scholarship.shu.edu/student_scholarship/237)

**THE METAMORPHOSIS OF INTERNATIONAL HUMAN RIGHTS  
IN DOMESTIC CONSTITUTIONS:  
SOUTH AFRICA AND KOSOVO AS CASE STUDIES**

Kristina Hon  
INTL 9606 – Riccio  
Comparative Constitutional Law  
5 December 2012

## I. Introduction

In the spring of 2001, the European Court of Human Rights (ECHR) handed down judgment in *Z and Others v. the United Kingdom*.<sup>1</sup> Z was a young child who, along with her four younger siblings, had been severely physically, mentally, and possibly sexually abused for over four years.<sup>2</sup> In the original case before the House of Lords, Z had alleged that the public authorities had negligently fulfilled, or entirely failed to carry out, their duties to protect children from child abuse.<sup>3</sup> Finding no statutory provision that allowed for damages, the House of Lords also declined to find a common law duty of care “for failure to protect the weak against the wrongdoer.”<sup>4</sup> The case was thereafter submitted to the ECHR, to whose jurisdiction the United Kingdom had acquiesced—and to whose decisions it is bound—when it signed and ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms (Convention).<sup>5</sup> The Court found that, contrary to British domestic law, the United Kingdom had an international law obligation under the Convention to protection against “torture or . . . inhuman or degrading treatment or punishment.”<sup>6</sup> By failing to protect the five children from abuse at the hands of their parents and by failing to provide a domestic remedy, the UK had breached its obligation.<sup>7</sup>

Inherently, the outcome of this case feels just. Yet were it not for the Convention that provided those protections—and which superseded the protections granted by the United

---

<sup>1</sup> HENRY J. STEINER, PHILIP ALSTON & RYAN GOODMAN, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 352 (3d ed. 2008).

<sup>2</sup> *Id.*; *Z and Others v. the United Kingdom* 29392/95 [2001] ECHR 333 (10 May 2001), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59455>.

<sup>3</sup> *X (Minors) v. Bedfordshire County Council*, [1995] 3 WLR 152 / UKHL 9, page 2, available at <http://www.bailii.org/uk/cases/UKHL/1995/9.html>.

<sup>4</sup> *Id.* at 28.

<sup>5</sup> *Human Rights: The European Convention*, BBC NEWS (Sept. 29, 2000), [http://news.bbc.co.uk/2/hi/uk\\_news/948143.stm](http://news.bbc.co.uk/2/hi/uk_news/948143.stm).

<sup>6</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 13.

<sup>7</sup> *Z and Others v. the United Kingdom*, 29392/95 at ¶¶ 69–75.

Kingdom's own domestic law—the children would have had no legal remedy. This case serves to illustrate well the consequences of the ever-increasing application of international law, and specifically human rights law, to domestic constitutional and statutory law.

National constitutions have always addressed aspects of foreign affairs and international law, if by no other means than by delegating to a particular governmental branch the power to conclude international treaties.<sup>8</sup> The last century, however, has seen a growing influence of international law on domestic law; one prominent manifestation of this has been the “wave of introducing references to international law in national constitutions,” particularly human rights.<sup>9</sup> Refinement of constitutional provisions to reflect international law has made viewing international law and “municipal law as almost wholly separate . . . inappropriate in our era.”<sup>10</sup> The traditional interplay between domestic and international law was such that “national constitutional principles [were] . . . exported to the international level.”<sup>11</sup> The national principle of democracy was slowly transferred to the international scene, transformed, and developed into the now well-established international notion of self-determination.<sup>12</sup> Yet now the transpositions are exactly opposite—from the international level to the national level.

This clear evolution of the interaction between international and domestic constitutional law has its origins in the two world wars. After all, “every devastating war [has given] rise to hopes, that due compliance with international law, both domestically and internationally, could serve as a guarantee against the repetition of the scourge of war.”<sup>13</sup> The horrors of World War I

---

<sup>8</sup> Anne Peters, *Supremacy Lost: International Law Meets Domestic Constitutional Law*, 3 VIENNA J. INT'L CONST. L. 170, 171 (2009).

<sup>9</sup> Vladlen S. Vereshchetin, *New Constitutions and the Old Problem of the Relationship between International Law and National Law*, 7 EUR. J. INT'L L. 29, 29 (1996).

<sup>10</sup> Peters, *supra* note 8, at 171; Michael Kirby, *International Law—The Impact on National Constitutions*, 21 AM. U. INT'L L. REV. 327, 329 (2006).

<sup>11</sup> Peters, *supra* note 8, at 173.

<sup>12</sup> *Id.*

<sup>13</sup> Vereshchetin, *supra* note 9, at 30.

and World War II gave rise to new developments of international criminal law, humanitarian law, and human rights law. A multitude of international legal instruments were created that dealt with the concerns that arose during and following the wars.<sup>14</sup>

Simultaneously, new constitutions were adopted for Germany, Italy, and Japan, which duly reflected these emerging principles.<sup>15</sup> International human rights particularly played—and continue to play—a special role in the “‘penetration’ of international law into domestic legal orders and national constitutions.”<sup>16</sup> Countries such as Greece, Spain, and Portugal that were overcoming totalitarian or authoritarian regimes whose dictators had displayed brutal disregard for international obligations and common human values also sought to incorporate universal international principles into their constitutions to address past deficiencies.<sup>17</sup> While the incorporation of international law into a constitution does not presuppose immediate compliance, it is “a minimum condition for improvements.”<sup>18</sup>

The end of the Cold War and the disintegration of the Soviet bloc opened the floodgates to another massive restructuring of domestic constitutions.<sup>19</sup> Human rights, again, played an important part as Central and Eastern European countries sought to give binding force to international and human rights law.<sup>20</sup> Human rights treaties were put on equal footing with other constitutionally-provided rights, at times being given primacy over national law.<sup>21</sup>

---

<sup>14</sup> *Id.* at 31.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 30–31.

<sup>17</sup> *Id.*

<sup>18</sup> Peters, *supra* note 8, at 172.

<sup>19</sup> *See id.* at 173; *see generally* Vereshchetin, *supra* note 9.

<sup>20</sup> *See* Peters, *supra* note 8, at 172.

<sup>21</sup> Vereshchetin, *supra* note 9, at 32–33. Slovakia, the Czech Republic, Moldova, and Romania have constitutions that make human rights treaties supreme over national law. *Id.* Implicit supremacy can be deduced from provisions on the applicability of general international law and international treaties in the constitutions of Armenia, Belarus, Bulgaria, Estonia, Kazakhstan, Russia, Tajikistan, Turkmenistan, and Uzbekistan. *Id.* at fn.19. International treaties generally have primacy over national law in Armenia, Bulgaria, Estonia, Kazakhstan, Russia, and Tajikistan. *Id.* at 34. Customary international law, or generally accepted principles and norms, are supreme over national law in Uzbekistan, Turkmenistan, and Belarus. *Id.* (Of the last three countries, the constitutional provisions are unclear

Other developments in international relations would seem to indicate that the convergence between international and domestic law is likely to continue. Various global regions have codified their own human rights treaties, and established courts to adjudicate violations.<sup>22</sup> The integration experiment that became the European Union requires new states to modify their domestic law to conform to pre-determined standards of human rights and international law.<sup>23</sup> International organizations have sprung up to complement the United Nations, and many have their own guidelines for membership.<sup>24</sup> One of the more important of such organizations is the International Criminal Court, established in 2002 to adjudicate the worst crimes committed during armed conflict.<sup>25</sup> Therefore, the internationalization of domestic politics<sup>26</sup> is making inclusion of international law in constitutions a very important and necessary strategic choice, especially when it comes to human rights.

Part II of this paper will briefly describe the traditional methods by which international law was incorporated into domestic constitutions. Part III will highlight the contemporary methods by using the fairly recent constitutions of Kosovo and South Africa as models, focusing specifically on negative and positive human rights and their interpretation. Part IV will highlight the practical benefits of incorporation of human rights into domestic constitutions by comparing the evolution of the British *Z* case with two very similar cases in the United States. Part V will

---

and may refer “only or primary to international relations, and aimed at establishing priority of the dictates of general international law over political considerations of foreign policy.”) *Id.* at 35.

<sup>22</sup> Kirby, *supra* note 10, at 330. These include European Convention for the Protection of Human Rights and Fundamental Freedoms (1953), the American Convention on Human Rights (1978), and the African Charter on Human and Peoples’ Rights (1986). Richard B. Bilder, *An Overview of International Human Rights Law*, in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 5 (Hurst Hannum ed., 2004).

<sup>23</sup> See Peters, *supra* note 8, at 172 fn.7, 173; Vereshchetin, *supra* note 9, at 31.

<sup>24</sup> See Vereshchetin, *supra* note 9, at 31; Peters, *supra* note 8, at 172 fn.6.

<sup>25</sup> Peters, *supra* note 8, at 172 fn.9. France and Germany, for example, have provisions in their constitutions that address jurisdiction of, and surrender of persons to, the International Criminal Court. *Id.* at 172.

<sup>26</sup> Two other factors contribute to this convergence phenomenon. The first is the “interdependence processes” that require the resolution of global problems and further economic integration. Vereshchetin, *supra* note 9, at 31. The other is the increase in supervised regime change by Western nations, as evidenced by the experiences of Cambodia, Bosnia and Herzegovina, South Africa, East Timor, Afghanistan, Iraq, and Kosovo. Peters, *supra* note 8, at 173.

provide a modern-day context for the creation of constitutions and assess which approaches to human rights in domestic law are best. Part VI will conclude.

## II. Traditional Manifestations of International Law in Constitutions

Domestic law and international law are derived from different types of state sovereignty. Domestic law is the realm of internal sovereignty, whereby the government exercises absolute authority within a confined territory.<sup>27</sup> International law, or the law of nations, devolves from external sovereignty; external sovereignty gives the government the independence to conduct its international affairs as it sees fit.<sup>28</sup> Theorists have sought to answer the question, “Are international law and municipal law concomitant aspects of the same juridical reality . . . or are they quite distinct normative realities . . . ?”<sup>29</sup> In other words, what is the interplay between these two types of law—is there overlap, is there a hierarchy? The debate over the answer to these questions has spawned the theories of monism and dualism.

### A. Monism

Monism, as its name suggests, holds that domestic law and international law are part of the same legal order of sovereignty.<sup>30</sup> Within that order, there is a hierarchy because of the way the laws have developed. Laws are developed from norms, which give them their meaning and make them binding.<sup>31</sup> Each level of the law depends on the preceding one, making them all dependent upon each other.<sup>32</sup> “From norm to norm, legal analysis eventually reaches one

---

<sup>27</sup> A.O. Enabuele and C.O. Imoedemhe, *Unification of the Application of International Law in the Municipal Realm: A Challenge for Contemporary International Law*, 12.3 ELECTRONIC J. COMP. L. 1, 3 (2008).

<sup>28</sup> *Id.*

<sup>29</sup> J.G. Starke, *Monism and Dualism in the Theory of International Law*, 17 BRIT. Y.B. INT’L L. 66, 67 (1936).

<sup>30</sup> *Id.* (“Two normative systems with binding force in the same field must form part of the same order.”)

<sup>31</sup> *Id.* at 74.

<sup>32</sup> *Id.*

supreme fundamental norm which is the source and foundation of all law.”<sup>33</sup> The theory of monism holds that that foundation is international law. The laws governing the domestic and international affairs of a state, therefore, are actually unified.<sup>34</sup>

Within this unitary legal system, international law—as the foundation—has primacy over domestic law.<sup>35</sup> Its primacy derives from the fact that international law is uniquely immune to “change or abolition of constitutions or . . . revolutions” and instead applies even-handedly “despite alterations in the state normative order.”<sup>36</sup> This uniform application requires that domestic laws conform to the principles of international law, or states will be in violation.<sup>37</sup> The practical consequences of this are that in national court systems, international law will prevail over both international as well as municipal decisions.<sup>38</sup>

### *B. Dualism*

By definition, dualism rests on the premise that domestic law and international law are two different spheres of law.<sup>39</sup> Domestic law regulates the interactions between individuals and the government; international law governs relations among states.<sup>40</sup> In other words, domestic law “addresses itself to the subjects of sovereigns, international law to the sovereigns themselves.”<sup>41</sup> Thus dualism takes the two faces of sovereignty and creates a permanent

---

<sup>33</sup> *Id.* at 74–75.

<sup>34</sup> Tom Ginsburg, Svitlana Chernykh & Zachary Elkins, *Commitment and Diffusion: How and Why Nat’l Constitutions Incorporate International Law*, 2008 U. ILL. L. REV. 201, 204 (2008).

<sup>35</sup> *Id.*

<sup>36</sup> Starke, *supra* note 29, at 76.

<sup>37</sup> Ginsburg et al., *supra* note 34, at 204.

<sup>38</sup> Daniel P. O’Connell, *The Relationship Between International Law and Municipal Law*, 48 GEO. L.J. 431, 432 (1960).

<sup>39</sup> *Id.* at 436.

<sup>40</sup> Starke, *supra* note 29, at 70.

<sup>41</sup> O’Connell, *supra* note 38, at 436.

division. This division is supposed to ensure that there never be any “point of conflict” that arises between them.<sup>42</sup>

The only application of international law within the domestic context, therefore, should come only by affirmative domestic laws.<sup>43</sup> For the state to have any international obligations, it must transpose them into the domestic legal order.<sup>44</sup> Without such transposition, there would be a very real possibility that a state might take an action that under its domestic laws would be perfectly legal, but would in reality be a violation of international law.<sup>45</sup> In such cases, proponents of dualism assert that national courts would be required to apply domestic law.<sup>46</sup> Thus domestic laws will trump international law in municipal decisions, but international will trump domestic law in international decisions.<sup>47</sup>

### *C. Execution of Treaties*

The dichotomy between monism and dualism is best exemplified by the way in which international treaties are applied domestically. A state becomes party to a treaty when its representative signs the treaty and the treaty is ratified; ratification is the process by which “a State establishes on the international plane its consent to be bound by a treaty,” the method of which differs among states, and can usually be found in the constitution.<sup>48</sup> Upon ratification of a treaty, the rules and obligations contained within it may or may not automatically take effect domestically—here is where monism and dualism showcase their different approaches.

A state that approaches treaty law in a monist fashion views treaties as self-executing. Since monists believe that international and domestic law are part of the same legal hierarchy, a

---

<sup>42</sup> *Id.*

<sup>43</sup> Ginsburg, *supra* note 34, at 204.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> O’Connell, *supra* note 38, at 432.

<sup>48</sup> Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 333 (May 23, 1969).

self-executing treaty is therefore one that does not require any domestic legislation to become internally binding.<sup>49</sup> Typically, a domestic constitution will authorize the national courts to apply international law, signaling that the country views treaty law as self-executing.<sup>50</sup> The result is that “a treaty assumes the force of municipal law the moment it is entered into.”<sup>51</sup>

A state that approaches treaty law in a dualist fashion views treaties as non-self-executing. A non-self-executing treaty is binding on the state externally—i.e. failure by the state to uphold its responsibilities violates international law—but is not binding internally.<sup>52</sup> Upon signing, a treaty does not have “the force of law in the municipal realm of the state part[y]” without further action.<sup>53</sup> In order for the obligations contained within the treaty to become applicable in domestic law, therefore, the legislature must take one of two steps to make it so. Either the legislature can pass a law “giving force and life to the application of [the] treaty,” or it can independently “incorporate the provisions of the treaty into domestic policy” and then codify that policy into law.<sup>54</sup>

The vast majority of countries take either one approach or the other. The United States, however, takes a hybrid approach; a treaty signed and ratified by the United States may either be self-executing or it may be non-self-executing.<sup>55</sup> This strange result is due to the fact that the US Constitution does not contain an explicit provision dictating how international treaties should be handled in domestic law.<sup>56</sup> The consequence is that the courts in the United States “must of

---

<sup>49</sup> O’Connell, *supra* note 38, at 451.

<sup>50</sup> *Id.* at 452.

<sup>51</sup> Enabuele and Imoedemhe, *supra* note 27, at 7. Countries taking the monist self-execution approach include France, Greece, the Netherlands, and Portugal. *Id.* Additionally, the European Union is the “most uniform example of self-execution of international law in the municipal realm.” *Id.*

<sup>52</sup> O’Connell, *supra* note 38, at 451.

<sup>53</sup> Enabuele and Imoedemhe, *supra* note 27, at 8. Countries taking the dualist non-self-execution approach include Ireland, Finland, Belgium, Spain, Burkina Faso, Cameroon, and Nigeria. *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

necessity examine each treaty on its merit and determine whether it is self-executing or not.”<sup>57</sup> Courts look at the language and wording of the treaty to determine the intent behind it and whether it is specific enough to be immediately applicable.<sup>58</sup> United States Supreme Court jurisprudence has also developed the principle that wherever possible, domestic laws should be interpreted so as not to violate international law.<sup>59</sup> That principle complements the legal standard gleaned from Article VI of the Constitution<sup>60</sup> that international treaties have the same validity as domestic law and therefore that which is most recent prevails.<sup>61</sup> The haphazardness of international law application in US domestic law has led one scholar to quip that “[t]he United States regards international law commitments as having the force of law only as it wishes to honor them.”<sup>62</sup>

Interestingly enough, not all constitutions are consistent in their monist or dualist approaches. Depending on the type of international obligation, states choose either monism or dualism; put another way, states either provide for immediate effect of international obligations or require legislative action to put them into effect.<sup>63</sup> The complement of treaty law in the international realm is customary international law (CIL). States that allow for self-execution of treaties do not necessarily treat CIL as immediately binding.<sup>64</sup> On the other hand, some states

---

<sup>57</sup> *Id.* at 10.

<sup>58</sup> *Id.*

<sup>59</sup> Enabuele and Imoedeme, *supra* note 27, at 9; *see* Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804).

<sup>60</sup> U.S. CONST. art. VI, “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and 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, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”

<sup>61</sup> Enabuele and Imoedemhe, *supra* note 27, at 3.

<sup>62</sup> Peter Western, *The Place of Foreign Treaties in the Courts of the United States: A Reply to Louis Henkin*, 101 HARV. L. REV. 511, 513 (1987).

<sup>63</sup> Ginsburg et al., *supra* note 34, at 204.

<sup>64</sup> *Id.* One example is the Dutch Constitution, which puts international treaties above domestic law but not CIL. *Id.* at 204–05.

prefer that CIL have primacy over domestic law, but do not accord the same status to treaties.<sup>65</sup> Then there are a variety of other approaches within this spectrum.<sup>66</sup> This seeming inconsistency among states' approaches to their treatment of international law calls into question the usefulness of the monism and dualism dichotomy.

#### *D. Legal Pluralism*

The theories of monism and dualism have been around for over a hundred years, and for the most part, are still leading the discussion on the relationship between international law and domestic law.<sup>67</sup> Yet the world those theories tried to explain no longer exists in any relevant form. Independent nation-states have evolved to become interconnected players in a globalized world.<sup>68</sup> International law has witnessed its own rejuvenation and massive expansion.<sup>69</sup> The emergence of new countries and new constitutions has altered traditional constitution-making rules and envisions a role for courts to adjudicate of scope of those very same constitutions.<sup>70</sup> And those new constitutions have embraced the incorporation of international law on a vast scale and in a variety of brand-new ways.<sup>71</sup> As a result, “[a]s theories, monism and dualism are today unsatisfactory.”<sup>72</sup>

A new way of looking at the relationship between international and domestic law is by embracing the concept of legal pluralism. Legal pluralism, far from separating the two legal

---

<sup>65</sup> *Id.* at 205. Germany, Italy, and Austria are three examples. *Id.*

<sup>66</sup> France provides for self-execution of treaties but has no provision for CIL. *Id.* Switzerland allows only *jus cogens* to have immediate effect, but no other rules of CIL. *Id.* In the United Kingdom and the United States, CIL has traditionally been viewed as part of the common law, and therefore directly applicable. *Id.* at 206.

<sup>67</sup> Armin von Bogdandy, *Pluralism, Direct Effect, and the Ultimate Say: On the Relationship Between International and Domestic Constitutional Law*, 6 INT’L J. CONST. L. 397, 399 (2008).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 400.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* “Their arguments are rather hermetic, the core assertions are little developed, opposing views are simply dismissed as ‘illogical,’ and they are not linked with the contemporary theoretical debate.”

regimes, is founded on the idea that there is constant interaction between international law and domestic law.<sup>73</sup> Given that today, what were historically domestic issues are now frequently addressed by international norms as well as domestic norms, the presumption of interaction between the two bodies of law is fair and relevant.<sup>74</sup> It is also very helpful, given that “[t]he positioning of a domestic legal order within the wider world necessarily affects fundamental issues such as democracy, self-determination, and the self-understanding of the citizenry.”<sup>75</sup> This “positioning” is done on the constitutional level, where states explicitly incorporate international norms and rules to varying degrees and in a variety of ways into their founding document. Thus rather than attempt to parse new and modern constitutions to determine which provisions are monist and which are dualist—and which theory prevails generally in a constitution—it is much more useful to view each such constitution as the product of legal pluralism. That assumption then allows for meaningful analysis and comparison of the different ways in which international and human rights law has been constitutionalized.

### **III. Contemporary and Evolving Manifestations of Human Rights Law**

The incorporation of international human rights in domestic constitutions has become ubiquitous. New constitutions in particular are enumerating in their Bills of Rights a wide variety of civil, political, economic, social, and cultural rights. These rights are a mix of negative and positive obligations on governments. Kosovo and South Africa—two countries with among the newest constitutions—provide a good example of the different ways by which those types of rights are incorporated. Each constitution takes a unique approach, one that is in considerable part motivated by that country’s history.

---

<sup>73</sup> Von Bogdandy, *supra* note 67, at 401.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 403.

### A. *Negative versus Positive Rights*

The arrival of human rights on the international stage was heralded by the adoption of the Universal Declaration on Human Rights by the United Nations General Assembly in 1948.<sup>76</sup> In one comprehensive document, all human rights—civil, political, social, economic, and cultural—were “recognized as inseparable and interdependent—indivisible.”<sup>77</sup> They were also recognized as being an integral aspect of the maintenance of international and domestic peace and security.<sup>78</sup> The Declaration was followed in 1966 by two separate treaties that broke apart the human rights framework. The International Covenant on Civil and Political Rights (ICCPR) contained negative rights, or what President Franklin Delano Roosevelt had termed “freedom to” rights.<sup>79</sup> Its counterpart, the International Covenant on Economic, Social, and Cultural Rights (ICESCR) contained positive rights, or “freedom from” rights.<sup>80</sup> From that moment, the distinction between negative and positive rights became prominent in discussions and debates over human rights.

A negative right is a “right to be free from government.”<sup>81</sup> A negative right is a defensive right, asserted to prevent the government from interfering with, and trampling on, a person’s liberty.<sup>82</sup> Such a right does not conceive of state responsibility—a state need not implement

---

<sup>76</sup> Rhonda Copelon, *The Indivisible Framework of International Human Rights: A Source of Social Justice in the U.S.*, 3 N.Y. CITY L. REV. 59, 59 (1998).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 60; Frank Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857, 858 (2001). These have also been called “first-generation rights,” but the United Nations General Assembly (and scholars) has recognized that dividing human rights into generations creates a hierarchy that frustrates the “indivisib[ility] and interdependen[ce]” of all rights. Copelon, *supra* note 76, at 60; Indivisibility and Interdependence of Economic, Social, Cultural, Civil and Political Rights, G.A. Res. 41/117, U.N. Doc. A/RES/41/117 (Dec. 4, 1986) (The Resolution “reaffirm[s] . . . that all human rights and fundamental freedoms are indivisible and interdependent and that the promotion and protection of one category of rights can never exempt or excuse States from the promotion and protection of the other rights.” The General Assembly was “[c]onvinced that equal attention and urgent consideration should be given to the implementation, promotion and protection of both civil and political rights and economic, social and cultural rights.”).

<sup>80</sup> Copelon, *supra* note 76, at 60 (these rights have also been called “second-generation rights.”); Cross, *supra* note 79, at 858.

<sup>81</sup> Cross, *supra* note 79, at 864.

<sup>82</sup> Helen Hershkoff, *Foreword: Positive Rights and the Evolution of State Constitutions*, 33 RUTGERS L.J. 799, 809 (2002).

measures to protect its citizens from private harm, to enable the enjoyment of liberty, or to guard against “purposeful state suppression and discrimination.”<sup>83</sup> Given that the foundation of a negative right is to prevent governmental meddling, the absence of a government all but ensures that those rights are fulfilled.<sup>84</sup>

By default, then, a positive right is a “right to command government action.”<sup>85</sup> A positive right is an affirmative right that allows for citizens to demand of their government certain “substantive goods or services as an aspect of constitutional duty.”<sup>86</sup> In order to provide for goods and services, a government is presumptively obliged to actively implement measures that will allow for the enjoyment of those goods and services.<sup>87</sup> Without a government, positive rights cannot be fulfilled.<sup>88</sup>

Negative and positive rights, therefore, create negative and positive obligations on government.<sup>89</sup> It is the interaction between the two that creates the dynamism of international human rights law. The international human rights framework presupposes that the governments fulfill some of their obligations immediately (largely negative rights) while working to fulfill others (largely positive rights) more gradually and in cooperation with other countries and international organizations.<sup>90</sup> The framework also recognizes that different countries will be in different economic and financial positions to implement those rights. Countries are asked simply to endeavor, to the maximum of the resources they have available, to achieve progressive realization of those rights.<sup>91</sup> Thus a country such as the United States, for example, would be

---

<sup>83</sup> Copelon, *supra* note 76, at 63.

<sup>84</sup> Cross, *supra* note 79, at 866.

<sup>85</sup> *Id.* at 864.

<sup>86</sup> Hershkoff, *supra* note 82, at 809.

<sup>87</sup> Cross, *supra* note 79, at 868.

<sup>88</sup> *Id.*

<sup>89</sup> Copelon, *supra* note 76, at 64.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

expected to be farther along in its fulfillment of human rights than a lesser-developed country. Regression, additionally, is forbidden.<sup>92</sup>

The distinction between negative and positive rights, while seemingly very clear, is nevertheless more complex. The full realization of civil and political rights—generally accepted as being negative rights—does rely to a certain extent on the provision of economic and social rights.<sup>93</sup> “Hungry people don’t vote.”<sup>94</sup> Their concerns are more basic, and more important. As a result, proper enjoyment of negative rights requires implementation of state measures to ensure a standard of living such that a person will engage—standard of living here encompassing every aspect related to security of person. Thus

[t]he right to be free from torture, for example, requires that states institute systemic preventive measures against official misconduct—training, monitor, and sanctions . . . Life, liberty, and security of person, [as another] example, must be protected against privately inflicted harm through investigation, punishment, and preventive measures. . . . [T]he right to life entails an obligation to prevent and punish political assassination and kidnapping by paramilitary operations, as well as murder, gender violence, and child abuse by private individuals.<sup>95</sup>

The responsibility of states is, therefore, multi-faceted. A constitution enshrining negative rights on its face actually contains within it positive obligations to provide for conditions that allow for enjoyment of those rights. Not every country recognizes such obligations. But the underlying theme of both positive and negative human rights is that of “accessible and effective judicial remed[ies] for violations.”<sup>96</sup> Citizens should have recourse if and when their rights are violated. Unlike in the United States, where justiciability is based on

---

<sup>92</sup> *Id.* at 65.

<sup>93</sup> *Id.* at 66.

<sup>94</sup> Herman Schwartz, *Do Economic and Social Rights Belong in a Constitution?*, 10 AM. U. J. INT’L L. & POL’Y 1233, 1243 (1995).

<sup>95</sup> Copelon, *supra* note 76, at 66.

<sup>96</sup> *Id.* at 68.

narrow requirements of injury or standing, under international human rights law, injury is given a much broader interpretation.<sup>97</sup> It can encompass everything from true injury, to risk of injury, to disadvantages like stigma.<sup>98</sup> This point about the importance of judicial remedy was illustrated in the *Z and Others v. United Kingdom* case discussed in the introduction. Nothing in the United Kingdom's law provided a remedy for Z, who had been severely abused.<sup>99</sup> The European Court of Human Rights found that failure to provide Z with a judicial remedy for the United Kingdom's failure to protect her was an additional violation of her right to be free from inhuman and degrading treatment.<sup>100</sup>

Negative and positive rights, therefore, have a complicated relationship. The trend in international human rights law has been for the incorporation of positive obligations into the fulfillment of negative rights, and the recognition that positive rights are a necessary aspect of human rights. Newly-drafted constitutions, such as those of Kosovo and South Africa, reflect these trends.

### *B. Kosovo*

The Constitution of the Republic of Kosovo, adopted on June 15, 2008,<sup>101</sup> contains a chapter on "fundamental rights and freedoms," which in thirty-six articles lays out Kosovo's broad and deep human rights framework.<sup>102</sup> Of those, Article 22, Articles 23 through 52, and Article 53, are worth further discussion.

---

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> See *X (Minors) v. Bedfordshire County Council*, [1995] 3 WLR 152 / UKHL 9, page 4, available at <http://www.bailii.org/uk/cases/UKHL/1995/9.html>.

<sup>100</sup> See *Z and Others v. the United Kingdom*, 29392/95 at ¶ 69–75.

<sup>101</sup> Joseph Marko, *The New Kosovo Constitution in a Regional Comparative Perspective*, 33 REV. CENT. AND E. EUR. L. 437, 437 (2008).

<sup>102</sup> CONST. OF THE REPUBLIC OF KOSOVO, ch. II.

Article 22 is arguably the most novel in the constitution, and potentially even the most novel in the history of the art of constitution-drafting. Entitled “Direct Applicability of International Agreements and Instruments,” the article lists eight international human rights treaties, the “human rights and fundamental freedoms guaranteed [therein] . . . are directly applicable in the Republic of Kosovo and, in the case of conflict, have priority over provisions of laws and other acts of public institutions.”<sup>103</sup> Those treaties make up the foundation of international human rights law today, and are the Universal Declaration of Human Rights; the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols; the International Covenant on Civil and Political Rights and its Protocols; the Council of Europe Framework Convention for the Protection of National Minorities; the Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination Against Women; the Convention on the Rights of the Child; and the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment.<sup>104</sup> As a result of this article, these eight international human rights treaties have been “constitutionalized,” meaning that their substantive provisions now have the same rank as the constitution.<sup>105</sup>

Given that these eight treaties contain almost all of the human rights currently recognized, there would seem to be no need for an additional enumeration of rights. Nevertheless, Articles 23 through 52 explicitly list the human rights which all citizens of Kosovo are guaranteed.<sup>106</sup> Their breadth is quite impressive and they contain a very healthy mix of

---

<sup>103</sup> *Id.* at art. 22.

<sup>104</sup> *Id.* The only major human rights treaty missing from this list is the International Covenant on Economic, Social and Cultural Rights. See note 125 and accompanying discussion.

<sup>105</sup> Visar Morina, Fisnik Korenica & Dren Doli, *The Relationship Between International Law and National Law in the Case of Kosovo: A Constitutional Perspective*, 9 INT’L J. OF CONST. L. 274, 294 (2011).

<sup>106</sup> In order, those rights are: human dignity; equality before the law; life; personal integrity; prohibition of torture, cruel, inhuman or degrading treatment; prohibition of slavery and forced labor; liberty and security; rights of the

negative and positive rights. Additionally, negative rights are given more value as they are coupled with positive obligations undertaken by the government of Kosovo. For example, Article 25 protects the right to life.<sup>107</sup> To further the enjoyment of that right, the same article affirmatively forbids the practice of capital punishment.<sup>108</sup> Article 113 gives emphasis to these provisions, as it allows for individual citizens to file a complaint with the Kosovo Constitutional Court regarding violations by the government of “their individual rights and freedoms guaranteed by the Constitution.”<sup>109</sup>

In addition, Article 53 requires that when the human rights enumerated in the chapter are interpreted by the courts, the courts must interpret those rights “consistent with the court decisions of the European Court of Human Rights [ECHR].”<sup>110</sup> This provision is interesting in that it seems contrary to the constitutional “rank” that the European Convention on the Protection of Human Rights and Fundamental Freedoms, listed in Article 22, enjoys.<sup>111</sup> Article 22 provides for the rights contained within the Convention to assume the same status as any of the other rights explicitly listed in the Constitution; however, by requiring that all interpretations of human rights be in line with the jurisprudence of the ECHR, that in essence places the rights of the Convention above the rights in the Constitution. The Kosovo Constitution is still young but it will be interesting to see this dynamic play out; it may indeed be a flaw.<sup>112</sup>

---

accused; fair and impartial trial; legal remedies; legality and proportionality in criminal cases; not to be tried twice for the same criminal act; freedom of movement; privacy; marriage and family; belief, conscience and religion; religious denominations; express; access to public documents; media; gathering; association; election and participation; protection of property; education; freedom of art and science; work and exercise of profession; rights of children; health and social protection; and responsibility for the environment. CONST. OF THE REPUBLIC OF KOSOVO at arts. 21–52.

<sup>107</sup> *Id.* at art. 25(1).

<sup>108</sup> *Id.* at art. 25(2).

<sup>109</sup> *Id.* at art. 113 ¶¶ 7–8. All other legal remedies must have been exhausted. *Id.* at ¶ 7. A lower court may refer questions of constitutionality of a law when the issue is raised in a case before it and a decision in that case depends on the compatibility of that law with the constitution. *Id.* at ¶ 8. *See also* Marko, *supra* note 101, at 445.

<sup>110</sup> CONST. OF THE REPUBLIC OF KOSOVO art. 53.

<sup>111</sup> Marko, *supra* note 101, at 447–48.

<sup>112</sup> *See id.* at 450.

*i. Historical Context*

“Every constitutional text must be seen in light of its historical and political context, since such provisions frequently have the character of being a ‘response’ to political and legal problems of the past.”<sup>113</sup> The enclave of Kosovo used to be an autonomous region in Serbia, which itself was a part of Yugoslavia. Animosity, however, between the majority Albanian Kosovars, and minority Serbian Kosovars, were rife.<sup>114</sup> Following war between Serbia and Kosovo in 1998–99, during which NATO had to intervene militarily, the region of Kosovo was placed under the administration of the United Nations (UN).<sup>115</sup> The UN adopted a “standards before status” approach as its governing strategy, focusing on rebuilding and reconciling before attempting to determine if and when Kosovo should become an independent country.<sup>116</sup> Nevertheless, Kosovo’s independence was contingent on compliance with international human rights—the various proposals and plans for Kosovo contained “firm guarantees of the human rights dimension.”<sup>117</sup> The international governance by the UN had also begun to engrain in Kosovo a culture of incorporating international principles and standards, including human rights.<sup>118</sup>

When a committee was created to draft a constitution, following Kosovo’s unilateral declaration of independence on February 17, 2008, not only was it heavily influenced by international sources, but it also had to achieve three internationally-oriented goals. First, the constitution had to be deemed legitimate by the Kosovo people, who could begin to feel a sense of ownership of it, while at the same time being “acceptable and impressive” to the rest of the

---

<sup>113</sup> Marko, *supra* note 101, at 438.

<sup>114</sup> *History, Bloody History*, BBC NEWS (Mar. 24, 1999), [http://news.bbc.co.uk/2/hi/special\\_report/1998/kosovo/110492.stm](http://news.bbc.co.uk/2/hi/special_report/1998/kosovo/110492.stm).

<sup>115</sup> Morina et al., *supra* note 105, at 276.

<sup>116</sup> Marko, *supra* note 101, at 441.

<sup>117</sup> Morina et al., *supra* note 105, at 293.

<sup>118</sup> *Id.* at 276–77.

world.<sup>119</sup> Second, it had to underpin a broad global acceptance of the independence of Kosovo and Kosovo's quick legal recognition, especially considering the anticipated, and actual, resistance from Russia and Serbia.<sup>120</sup> Third, it had to lay the foundation for eventual accession of Kosovo into the European Union.<sup>121</sup>

In order to achieve those goals, then, the constitution had to cement a firm adherence to international human rights. Decades of ethnic violence and animosity, and the widely-held view that national minorities would not be protected by the new government, needed to be addressed.<sup>122</sup> The constitution thus contains a very strong framework of protection for ethnic minorities while sustaining the overall multiethnicity of the country.<sup>123</sup> As a result, many of the human rights enumerated and strong minority protections provided for were as much a strategic political choice as they were an altruistic one.

The inclusion of Article 22 constitutionalizing the eight human rights treaties provides a case in point. During the administration of Kosovo by the UN, the UN Mission in Kosovo (UNMIK) passed a regulation that almost exactly paralleled Article 22.<sup>124</sup> It provided for Kosovo's adherence to the obligations contained in the self-same human rights treaties that are now found in Kosovo's constitution, save one.<sup>125</sup> Kosovo, having not yet declared independence, could not ratify those treaties and therefore the UNMIK regulation was the only way by which Kosovo could be bound by them. This same international law principle was—and still is—applicable at the time of the drafting of the constitution. Kosovo's independence has not

---

<sup>119</sup> John Tunheim, *Rule of Law and the Kosovo Constitution*, 18 MINN. J. INT'L L. 371, 375 (2009).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> Fisnik Korenica and Dren Doli, *Constitutional Rigidity in Kosovo: Significance, Outcomes, and Rationale*, 2 No. 6 PACE INT'L L. REV. ONLINE COMPANION 1, 4 (2011).

<sup>124</sup> Morina et al., *supra* note 105, at 276.

<sup>125</sup> *Id.* The position now occupied by the Council of Europe Framework Convention for the Protection of National Minorities was held by the International Covenant on Economic, Social and Cultural Rights. *Id.*

been universally recognized and it therefore does not have the legal capacity to accede to these treaties.<sup>126</sup> Kosovo, therefore, cannot become a party to those treaties and the obligations are not binding. By constitutionalizing the treaties, however, Kosovo confirmed that it would consider itself bound by the human rights protected therein.<sup>127</sup>

### *C. South Africa*

The Constitution of the Republic of South Africa came into force on February 4, 1997.<sup>128</sup> Within it, Chapter 2 is entitled Bill of Rights and includes thirty-three individual articles.<sup>129</sup> Several articles in this chapter bear further discussion, specifically Articles 9 through 35, and Article 39.

Articles 9 through 35 contain the specific human rights, liberties, and freedoms that South Africa sought to enshrine in the Bill of Rights.<sup>130</sup> These rights are extraordinarily progressive—they contain not only civil and political rights, but also numerous social, economic, and cultural rights. As a result, the Bill of Rights imposes on the South African government both negative and positive responsibilities. Interestingly, the articles enumerating negative rights do not contain explicit positive obligations for their fulfillment. The language laying out the rights to life, expression, assembly, and association, for example, is very straightforward—“everyone has the right to life.”<sup>131</sup>

---

<sup>126</sup> *Id.* at 295.

<sup>127</sup> *Id.*

<sup>128</sup> CONST. OF THE REPUBLIC OF SOUTH AFRICA.

<sup>129</sup> *Id.*

<sup>130</sup> Those rights are, chronologically: equality; human dignity; life; freedom and security of the person; slavery, servitude and forced labor; privacy; freedom of religion, belief and opinion; freedom of expression; assembly, demonstration picket and petition; freedom of association; political rights; citizenship; freedom of movement and residence; freedom of trade, occupation and profession; environment; property; housing; health care, food, water, and social security; children; education; language and culture; access to information; just administrative action; access to courts; and arrested, detained and accused persons.

<sup>131</sup> CONST. OF THE REPUBLIC OF SOUTH AFRICA art. 11.

The articles specifying the positive rights—the socioeconomic rights—are, on the other hand, very explicit about the role of the government in their implementation. Article 26 provides “the right to have access to adequate housing,” requiring that the “state . . . take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.”<sup>132</sup> That language is repeated for the rights to health care, food, water and social security.<sup>133</sup> Articles 32 and 33, pertaining to the right of access to information and the “right to administrative action that is lawful, reasonable, and procedurally fair,” respectively, state that “[n]ational legislation must be enacted to give effect to these rights.”<sup>134</sup> South Africa has heartily embraced the concepts of progressive realization of rights based on resource capability.

Justiciability, or the judicial enforcement, of socioeconomic rights is rare. South Africa, however, does not shy from imposing responsibilities on the state to ensure the enjoyment of these rights and provides for their enforcement in Article 38. That article allows for a very broad interpretation of standing, giving persons the right to “approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened,” to those who are acting on their own behalf; acting on behalf of someone who is unable to act; acting as a member of a group; acting in the public interest; or an organization acting on behalf of its members.<sup>135</sup> The generous nature of this provision is made even more so by the fact that the language in the constitution permits the rights enumerated in the Bill of Rights to be applied both vertically and horizontally.<sup>136</sup> Article 8(2) states that “[a] provision of the Bill of Rights binds a natural or a

---

<sup>132</sup> *Id.* at art. 26.

<sup>133</sup> *Id.* at art. 27.

<sup>134</sup> *Id.* at arts. 32–33.

<sup>135</sup> *Id.* at art. 38.

<sup>136</sup> Vijayashri Sripati, *Constitutionalism in India and South Africa: A Comparative Study From a Human Rights Perspective*, 16 TUL. J. INT’L & COMP. L. 49, 104 (2007).

juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.”<sup>137</sup> That means that not only do all the rights in the Bill of Rights bind the state with regard to its citizens,<sup>138</sup> but under certain circumstances, some rights may also bind private institutions and actors with regard to civilians.<sup>139</sup>

Article 39 provides clear instructions for judges on how to interpret the Bill of Rights.<sup>140</sup> First, courts “must promote the values that underlie an open and democratic society based on human dignity, equality and freedom.”<sup>141</sup> Second, courts “must consider international law.”<sup>142</sup> Third, courts “may consider foreign law.”<sup>143</sup> Of those three guidelines, the second is the most interesting and has been interpreted by the South African Constitutional Court very broadly.<sup>144</sup> International law can thus be both binding and non-binding, take the form of an international agreement or customary international law, decisions of international tribunals such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the European Commission on Human Rights, and the European Court of Human Rights, and may also include “reports of specialised agencies such as the International Labour Organisation.”<sup>145</sup>

## *ii. Historical Context*

As with Kosovo, the unique nature of the South African Constitution requires some historical context in order to be better understood. Following the end of World War II, the Afrikaner white minority in South Africa tightened its grip on power by institutionalizing the

---

<sup>137</sup> CONST. OF THE REPUBLIC OF SOUTH AFRICA art. 8(2).

<sup>138</sup> *Id.* at art. 8(1) (“The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.”).

<sup>139</sup> *Id.* at 8(2).

<sup>140</sup> *Id.* at art. 39.

<sup>141</sup> *Id.* at art. 39(1)(a).

<sup>142</sup> *Id.* at art. 39(1)(b).

<sup>143</sup> CONST. OF THE REPUBLIC OF SOUTH AFRICA art. 39(1)(c).

<sup>144</sup> John Dugard, *International Law and the South African Constitution*, 1 EUR. J. INT’L L. 77, 85 (1997).

<sup>145</sup> *Id.*, quoting and citing *S. v. Makwanyane*, 1995 (3) SA 391 (CC), at 413–14.

apartheid system of strict repression and massive discrimination against the black African majority.<sup>146</sup> The valuable “multiethnic, multilingual, and multicultural nature of South African society” was cast aside.<sup>147</sup> Forty years of apartheid followed, with South Africa increasingly becoming a pariah in the international community and a delinquent within the international human rights framework.<sup>148</sup> As international human rights developed, apartheid became a crime as it was contrary to the United Nations Charter principles of non-discrimination and self-determination.<sup>149</sup>

Within South Africa, the white National Party had banned the African National Congress and imprisoned its leader, Nelson Mandela.<sup>150</sup> The thawing and ultimate collapse of the Cold War in the late 1980s began to thaw the apartheid system and Mandela was released in 1990.<sup>151</sup> The first attempt at a new constitution revealed thirty-four constitutional principles with which the final constitution would have to comply.<sup>152</sup> Compliance with those principles was to be determined by the newly-created South African Constitutional Court.<sup>153</sup> The Bill of Rights was the fulfillment of the second principle, namely that “everyone shall enjoy all universally accepted fundamental rights, freedoms and liberties.”<sup>154</sup>

That principle was the manifestation of the struggle “to confront how to permit the creation of democratic political structures, and the inevitable emergence of black majority rule, while allaying the fears of the white minority that this ‘democracy’ would simply be code for

---

<sup>146</sup> Sripati, *supra* note 136, at 81–82.

<sup>147</sup> *Id.* at 82.

<sup>148</sup> Dugard, *supra* note 144, at 77.

<sup>149</sup> *Id.* at 77; Sripati, *supra* note 136, at 58.

<sup>150</sup> Sripati, *supra* note 136, at 82.

<sup>151</sup> *Id.*

<sup>152</sup> Dugard, *supra* note 144, at 78.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 84.

racial revanchism.”<sup>155</sup> For unlike in most countries drafting new constitutions—after independence—the black South Africans needed to construct a society and a government that would allow them to “coexist on equal terms with their past oppressors.”<sup>156</sup> The constitution had to be created in a credible and transparent way to make it fair, inclusive, legitimate, accessible, and durable.<sup>157</sup> The result was the 1996 Constitution and the Bill of Rights. The release of black South Africans from oppression had resulted in a clamor for recognition of social interests and identities, which lead to the incorporation of numerous socioeconomic rights into the Bill of Rights.<sup>158</sup> Distrust between the National Party and the African National Congress led to the placement of broad judicial review with the independent judiciary, rather than with the legislature.<sup>159</sup>

South Africa’s history of flaunting international law and international human rights law particularly underpinned the inclusion of Article 39, requiring courts to consider international law. The provision would allow for harmony between South African jurisprudence and the jurisprudential development of international human rights.<sup>160</sup> Another motivating factor was that international law is beyond the control of South Africa’s legislature—requiring the courts to look to international law “constrain[s] majoritarian prerogatives by providing an independent, non-parliamentary source of authority for courts to enforce.”<sup>161</sup>

Incorporation of progressive and expansive international human rights protections into the constitutions of Kosovo and South Africa speaks to the increasing importance of human rights among the international community and human rights’ increasing relevance in addressing

---

<sup>155</sup> Samuel Issacharoff, *Constitutionalizing Democracy in Fractured Societies*, 82 TEX. L. REV. 1862 (2004).

<sup>156</sup> Sripati, *supra* note 136, at 87–88.

<sup>157</sup> *Id.* at 84.

<sup>158</sup> *Id.* at 87.

<sup>159</sup> Issacharoff, *supra* note 155, at 1873.

<sup>160</sup> Dugard, *supra* note 144, at 84.

<sup>161</sup> Issacharoff, *supra* note 155, at 1880.

domestic issues. The unique socio-political histories of Kosovo and South Africa in turn influenced the manner and method by which human rights were enshrined in the respective constitutions. Kosovo chose to place great emphasis on international human rights treaties and the jurisprudence of the European Court of Human Rights, both due to its ambiguous legal status and because of its future goal of joining the European Union. South Africa chose to favor social and economic rights and to swear adherence to international law because of its oppressive past and international ostracism. Ultimately, however, both countries recognized the importance and necessity of international human rights and the power of negative and positive rights.

#### **IV. The Interplay of the Traditional and the Contemporary in the United States**

Analysis of a constitution that includes robust negative and positive rights, and the process by which it was drafted, is by necessity a theoretical one. The constitutions of South Africa and Kosovo provide numerous rights which each country's judiciary is in the process of defining and applying. In order to truly highlight the very practical benefits that are created by the incorporation of both negative and positive human rights into a domestic constitution, however, this paper will look at human rights jurisprudence from the United States. The United States has an entirely negative constitution and the Supreme Court is reluctant to reference international human rights law in its decisions. As a result, progressive developments in the law and jurisprudence of human rights have no impact on US cases, to the detriment of those alleging serious violations of human rights.

##### *A. The Tragedies of DeShaney and Castle Rock*

The case of *Z and Others v. the United Kingdom*, discussed in the introduction, had a happy ending because the United Kingdom, which did not recognize a positive duty to protect

under domestic law, was subject to the European Convention on the Protection of Human Rights and Fundamental Freedoms.<sup>162</sup> The European Court of Human Rights found that by failing to protect Z from the inhumane treatment she was subjected to, and by failing to provide a judicial remedy, the United Kingdom was in violation and was required to pay damages and change its laws to conform to the Convention.<sup>163</sup>

A very similar situation was brought to the attention of the United States Supreme Court in *DeShaney v. Winnebago County Department of Social Services*.<sup>164</sup> Little Joshua DeShaney was in the custody of his father after his parents divorced.<sup>165</sup> Over a course of several months, he was admitted into hospital with numerous injuries, bruises, and abrasions; a Department of Social Services (DSS) caseworker reported seeing other injuries, including ones to the head, when she visited his house.<sup>166</sup> Nobody took any measures to protect Joshua. One day, his father beat him so badly that Joshua “fell into a life-threatening coma.”<sup>167</sup> Medical scans revealed massive brain hemorrhages from repeated injuries to the head.<sup>168</sup> Joshua’s mother brought suit for violation of Joshua’s federal constitutional right to liberty under the Fourteenth Amendment because the DSS had failed to protect him even though they knew or should have known he was in danger.<sup>169</sup>

Traveling through the federal court system, the case made it to the Supreme Court. Despite the “undeniably tragic” circumstances, the Court found that the Fourteenth Amendment

---

<sup>162</sup> *Simplified Chart of Signatures and Ratifications*, COUNCIL OF EUROPE (Nov. 18, 2012), <http://conventions.coe.int/Treaty/Commun/ListeTableauCourt.asp?MA=3&CM=16&CL=ENG>.

<sup>163</sup> *Z and Others v. the United Kingdom* 29392/95 [2001] ECHR 333 (10 May 2001), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59455>.

<sup>164</sup> 489 U.S. 189 (1989).

<sup>165</sup> *Id.* at 191.

<sup>166</sup> *Id.* at 192–93.

<sup>167</sup> *Id.* at 193.

<sup>168</sup> *Id.*

<sup>169</sup> The claim was brought under 42 U.S.C. § 1983. *Id.*

does not provide for government protection of “citizens against invasion by private actors.”<sup>170</sup> DSS could not be held liable for failing to remove Joshua from his father because his father was a private actor. The interaction between DSS and the family, additionally, did not create a “special relationship” under which DSS had the duty to protect him, because special relationships are only created in a few narrow circumstances.<sup>171</sup> No reference was made to international law.<sup>172</sup> As a result, Joshua, who did not die but instead suffered permanent and severe brain damage,<sup>173</sup> and his mother were denied any remedy.

A case with even more horrifying facts came before the Supreme Court fifteen years after *DeShaney*. *Castle Rock v. Gonzales*<sup>174</sup> involved a mother, Jessica, who had obtained a restraining order for her and her three young daughters against her husband whom she was divorcing.<sup>175</sup> A month later, her husband abducted the daughters while they were playing in their front yard.<sup>176</sup> Jessica rushed to the police to have them enforce the restraining order, but they refused and did nothing.<sup>177</sup> Early the next morning, the husband showed up at the police station and opened fire; the police fired back and killed him.<sup>178</sup> The bodies of the three daughters, riddled with bullets, were discovered in the back of his pickup truck.<sup>179</sup>

Jessica’s Fourteenth Amendment violation claim rested on the argument that she had a property interest in her restraining order that she had been deprived of without due process.<sup>180</sup>

---

<sup>170</sup> 489 U.S. at 195.

<sup>171</sup> *Id.* at 197–98.

<sup>172</sup> *See generally id.*

<sup>173</sup> *Id.* at 193.

<sup>174</sup> 545 U.S. 748 (2005).

<sup>175</sup> *Gonzales v. Castle Rock*, 307 F.3d 1258, 1261 (10th Cir. 2002).

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 1262.

<sup>179</sup> *Id.*

<sup>180</sup> *Castle Rock v. Gonzales*, 545 U.S. 748, 755 (2005).

This was a question that the Supreme Court had explicitly left unresolved in *DeShaney*.<sup>181</sup> Answering it, the Court said that enforcement of “apparently mandatory” arrest provisions of restraining orders actually has a “well established tradition of police discretion.”<sup>182</sup> Police officers thus may, but are not required to, arrest the person who is in violation of the restraining order. Any benefit of protection that a third party might get from such an arrest “generally does not trigger . . . the Due Process Clause.”<sup>183</sup> Nowhere in the opinion was there a discussion of protections that international human rights law could have afforded.<sup>184</sup> Jessica thereby received no remedy for the lackluster behavior of the police, given that the Fourteenth Amendment cannot be used as an incentive for vigorous policing.<sup>185</sup>

### *B. Negative Nature of the United States Constitution*

The United States is historically very strongly opposed to positive rights, as evidenced by the nature of the Constitution as “a charter of negative rather than positive liberties.”<sup>186</sup> Given the history of the American colonies, subjected to repeated interference from the British Crown, the Framers of the Constitution were duly concerned with the protection of rights against government.<sup>187</sup> Accordingly, the Constitution and specifically the Bill of Rights contain “prohibitory constraints” on government action, and not affirmative duties requiring compliance by the government.<sup>188</sup>

---

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 760.

<sup>183</sup> *Id.* at 768.

<sup>184</sup> *See generally id.*

<sup>185</sup> *Id.* at 768–69. “The Fourteenth Amendment did not create a system by which police departments are generally held financially accountable for crimes that better policing might have prevented.”

<sup>186</sup> Jenna MacNaughton, Comment, *Positive Rights in Constitutional Law: No Need to Graft, Best Not to Prune*, 3 U. PA. J. CONST. L. 750, 750 (2001), quoting *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1989) (Posner, J.).

<sup>187</sup> Cross, *supra* note 79, at 872.

<sup>188</sup> Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2273 (1990).

The almost exclusive focus on negative rights—and their interpretation by the United States Supreme Court—has resulted in the inability of citizens to put forward both “narrow claims that particular government officials violated specific duties to known individuals” and “broad claims that government must provide food to the starving, jobs to the unemployed.”<sup>189</sup> Any desire by the government to provide services is therefore discretionary; and even if the government does so choose, those services do not have to be provided competently.<sup>190</sup>

This is not to say that the negative rights in the Bill of Rights and the Constitution cannot be interpreted to contain some positive obligations.<sup>191</sup> Nothing in the Constitution prevents such an interpretation and it would be equally as “plausible and legitimate as a strict negative rights view.”<sup>192</sup> Indeed, the international human rights framework contemplates that governments take positive steps to ensure the proper and full enjoyment of negative rights.<sup>193</sup> Prior to the *DeShaney* case, state and federal district courts were not averse to articulating doctrines that imposed some positive obligations on the government.<sup>194</sup> Since *DeShaney*, however, judges have repudiated those doctrines and instead have “dismissed any claim that citizens have any positive rights to government services.”<sup>195</sup> The federal government no longer has, if it ever truly had, affirmative duties to actively ensure citizens’ enjoyment of their constitutional rights.<sup>196</sup>

This harsh approach—not necessarily harsh on its face but certainly harsh in its consequences—may have a parallel in the interpretive approach taken by the United Kingdom. The international human rights framework, however, forced the United Kingdom to modify its position. Whether or not it can force the United States to do the same is open for discussion.

---

<sup>189</sup> *Id.* at 2274–75.

<sup>190</sup> *Id.* at 2275.

<sup>191</sup> MacNaughton, *supra* note 186, at 752.

<sup>192</sup> *Id.*

<sup>193</sup> *See supra* Part III.A.

<sup>194</sup> MacNaughton, *supra* note 186, at 752.

<sup>195</sup> *Id.* at 750.

<sup>196</sup> *Id.*

### C. Castle Rock *Internationally*

Domestically, the result of *DeShaney* and *Castle Rock* are the same: there is no remedy for a failure of a government body—whether Department of Social Services or police—to prevent a crime it is not statutorily mandated to prevent. Unlike Joshua DeShaney’s mother, however, Jessica Gonzales took her case before a new tribunal, the Inter-American Commission of Human Rights (IACHR or Commission). The IACHR is one counterpart in the Western hemisphere of the European Court of Human Rights, to which the case of *Z* was submitted.<sup>197</sup> The United States is subject to the jurisdiction of the IACHR as a member of the Organization of American States, as it is bound by the international obligations laid out in the American Declaration on the Rights and Duties of Man.<sup>198</sup> The other counterpart to the European Court is the Inter-American Court of Human Rights, which adjudicates violations of the American Convention on Human Rights, as well as violations of the American Declaration.<sup>199</sup> The United States is not party to the Convention, and therefore cannot be brought before the Court.<sup>200</sup>

The violations alleged in *Gonzales v. United States*<sup>201</sup> were radically different from those alleged in *Gonzales v. Castle Rock*, as they were based on international human rights that are not affirmatively embedded in the United States Constitution in any form. The circumstances of the case—not just the facts of the abduction and murder of the girls, but the decisions of the American courts, as well—implicated potential violations of a number of these human rights. The petition alleged violations of the right to life, liberty, and security; equality before the law;

---

<sup>197</sup> See Part I.

<sup>198</sup> *Basic Documents in the Inter-American System*, ORGANIZATION OF AMERICAN STATES (undated), [www.oas.org/en/iachr/mandate/Basics/intro.asp](http://www.oas.org/en/iachr/mandate/Basics/intro.asp) [*OAS Documents*]. The Declaration, a document not normally binding under international law, has been deemed to be a formally binding “source of international obligation” for all members of the OAS. *Id.*; see *Roach and Pinkerton v. United States*, Case 9647, Inter-Am. Comm’n H.R., Res. No. 3/87, ¶¶ 46–49 (1987).

<sup>199</sup> *OAS Documents*, *supra* note 198.

<sup>200</sup> *Id.*

<sup>201</sup> Case 12.626, Inter-Am. Comm’n H.R., Report No. 80/11 (2011).

protection of honor, personal reputation, and private and family life; family and protection thereof; protection for mothers and children; inviolability of the home; fair trial; and petition.<sup>202</sup>

The United States, in its response, reiterated the holding of the *DeShaney* case, stating that the American Declaration does not impose an affirmative duty on the United States “to prevent the commission of individual crimes by private actors.”<sup>203</sup>

The IACHR did not agree. Addressing the violations alleged under the rights to life, liberty, security, equality, and protections for the mother and children, the Commission declared that states must take positive measures, including policy and laws, to guarantee the enjoyment of the rights contained in the Declaration.<sup>204</sup> It drew the connection between the vulnerability of women and children, saying that “protection of life is a critical component of a State’s due diligence obligation to protect women from acts of violence.”<sup>205</sup> The failure of the United States to fulfill its due diligence duty meant that it failed to protect Jessica’s daughters from the violence, violating their rights to life and equality.<sup>206</sup>

The IACHR also discussed the effectiveness of the judicial remedies available to Jessica, and found them wanting. Due diligence in providing remedies does not simply mean that such remedies exist, but that they are “available and effective.”<sup>207</sup> Incorporated within the scope of judicial protection is the right to access of information and truth, which corresponds to a duty by the state to fully investigate a case.<sup>208</sup> That investigation must be “impartial, serious and exhaustive” and must be conducted according to international standards.<sup>209</sup> The failure of the

---

<sup>202</sup> *Id.* at ¶ 2. Those rights correspond to articles I, II, V, VI, VII, IX, XVIII and XXIV of the American Declaration.

<sup>203</sup> *Id.* at ¶ 3.

<sup>204</sup> *Id.* at ¶ 120.

<sup>205</sup> *Id.* at ¶ 128.

<sup>206</sup> *Id.* at ¶ 160.

<sup>207</sup> *Gonzales v. United States*, Case 12.626, Inter-Am. Comm’n H.R., Report No. 80/11, ¶ 173 (2011).

<sup>208</sup> *Id.* at ¶ 178, 193.

<sup>209</sup> *Id.* at ¶ 178, 181. The objectives of the investigation are:

Castle Rock Police Department to investigate fully the deaths of Jessica's three daughters was therefore a violation of their and their mother's right to judicial protection.<sup>210</sup>

The Commission found the United States in violation of Jessica and her daughters' rights to life, liberty, and security, right to equality under the law, right of protection for mothers and children, and right to judicial protection. It issued, as part of its decision, a series of recommendations of actions that the United States take to come into compliance with the American Declaration.<sup>211</sup> The United States had two months to respond to the recommendations and submit a report detailing the actions it took to bring them about.<sup>212</sup> The US did not respond, not even after an extension, so the IACHR concluded that the United States had not implemented any measures and was therefore in violation.<sup>213</sup> The IACHR decision is undoubtedly a vindication for Jessica Gonzales, but as the United States' response—or lack thereof—to the recommendations demonstrates, the domestic implications of the decision are less clear.

As discussed above,<sup>214</sup> the United States takes a hybrid approach toward execution of treaties. This has very important consequences for the future of the *Gonzales* case. Unlike the United Kingdom, the United States has not signed any treaty that makes the law created by the IACHR superior to domestic law and therefore binding.<sup>215</sup> It is treated like a regular treaty in the

---

to identify the victim; to recover and analyze all the material and documentary evidence; to identify possible witnesses and collect their testimony; to determine the cause, manner and time of death, as well as the procedure, practice, or instruments which may have caused the death; to distinguish between natural death, accidental death, suicide, and homicide; and to identify and apprehend the person or persons who may have participated in the execution.

*Id.* at ¶ 182.

<sup>210</sup> *Id.* at ¶ 186.

<sup>211</sup> *See id.* at ¶ 201.

<sup>212</sup> *Id.* at ¶ 202.

<sup>213</sup> *Id.* at ¶ 207.

<sup>214</sup> *See* Part II.C.

<sup>215</sup> This state of affairs in the United Kingdom as reinforced in the case of *Ex Parte Factortame Ltd.*, Case C-213/89, 1990 E.C.R. 1-2433. Ginsburg, *supra* note 34, at 206 fn.22.

sense that it is an obligation undertaken by the United States under international law.<sup>216</sup> But as the Supreme Court has made very clear, not all international law obligations become domestically-enforceable obligations—they themselves are not binding domestic law.<sup>217</sup> They only become binding once Congress has passed enacting legislation or has independently incorporated those obligations into national law.<sup>218</sup> Since the obligations are not domestic law, the United States is not bound to follow them; as a result, the United States, by failing to implement the recommendations, is in violation of international law, but not in violation of domestic law. Thus the ending to Jessica’s story is less happy than the ending of the story of Z and her siblings and family.

## V. Choosing the Proper Approach

The world went through a fit of constitution-making in the early and mid-1990s with the end of the Cold War and emancipation of much of Central and Eastern Europe and the Balkans. The need for constitutions then slowed. New constitutions were created for East Timor and Kosovo in the early 2000s by the administration of the United Nations.<sup>219</sup> South Sudan created its new constitution in 2011.<sup>220</sup> The Arab Spring that began in 2011 has sparked a need for yet another handful of new constitutions for the Middle East and North Africa.<sup>221</sup> Thus while there are fewer and fewer new states being created, old states are undergoing powerful revolutions that

---

<sup>216</sup> See *Medellin v. Texas*, 552 U.S. 491, 504 (2008). In *Medellin*, the Supreme Court declined to find that a decision handed down by the International Court of Justice regarding the United States’ obligations under the Vienna Convention on Consular Relations was binding domestically without implementing legislation. *Id.* at 506. The result was that Medellin, who had been convicted of murder in Texas, was denied access to the Mexican consulate. See generally *id.* He was later executed. *Texas Executes Mexican Murderer*, BBC (Aug. 6, 2008), <http://news.bbc.co.uk/2/hi/americas/7542794.stm>.

<sup>217</sup> *Medellin*, 552 U.S. at 504.

<sup>218</sup> *Id.* at 505.

<sup>219</sup> CONST. OF THE DEMOCRATIC REPUBLIC OF EAST TIMOR (2002); CONST. OF THE REPUBLIC OF KOSOVO (2008).

<sup>220</sup> TRANSITIONAL CONST. OF THE REPUBLIC OF SOUTH SUDAN (2011).

<sup>221</sup> Constitutions will be required in Tunisia, Egypt, and Libya, to name but a few. Anthony Billingsley, *Writing Constitutions in the Wake of the Arab Spring*, FOREIGN AFFAIRS (Nov. 30, 2011), <http://www.foreignaffairs.com/articles/136699/anthony-billingsley/writing-constitutions-in-the-wake-of-the-arab-spring>.

will also necessitate a complete reevaluation of their current constitutional structure. In addition, there are always secessionist movements around that world that will seek to take advantage of favorable international conditions to try to declare independence.<sup>222</sup>

The continually increasing importance of international law, particularly human rights law, and the now-common practice of incorporation of human rights into domestic constitutions, will undoubtedly play a prominent role in the process of crafting future new constitutions. It is undeniable that despite the number of constitutions that incorporate international human rights, there is no uniformity in wording and implementation.<sup>223</sup> While that may to some respect be detrimental, it is actually very beneficial because it allows countries to specifically tailor their human rights provisions to their particular socio-political histories. Those countries will also have the benefit of being able to survey a handful of constitutions that can provide different models for incorporation of human rights. This section will outline some recommendations on how to integrate human rights into new countries' domestic constitutions.

#### *A. Enumeration of Human Rights*

The inclusion of a Bill of Rights in a new constitution—or a chapter on fundamental freedoms and rights—has by now become almost mandatory. In its rendition, Kosovo constitutionalized eight human rights treaties, enumerated many negative and some positive rights, and provided for its court to interpret human rights based on the jurisprudence of the European Court of Human Rights.<sup>224</sup> South Africa's rendition included negative rights and numerous positive rights with strong governmental obligations and required that its court

---

<sup>222</sup> South Ossetia and Abkhazia, enclaves of Georgia, declared independence from Russia in the early 1990s, and Russia recognized their independence in 2008. Clifford J. Levy, *Russia Backs Independence of Georgian Enclaves*, NY TIMES (Aug. 26, 2008), <http://www.nytimes.com/2008/08/27/world/europe/27russia.html?pagewanted=all>.

<sup>223</sup> Vereshchetin, *supra* note 9, at 29.

<sup>224</sup> *See supra* Part III.B.

consider international law in interpreting human rights provisions.<sup>225</sup> Ideally, a new constitution created today would display the best of both of these models.

Such a modern constitution would contain both negative and positive human rights. The negative rights need or need not explicitly provide for actions to be taken by the state for the rights' proper fulfillment, but courts should interpret that as inherent. Positive rights should include socioeconomic and cultural rights, as that is the future of international human rights law. Countries should embrace—or become reconciled with—the fact that progressive realization of positive rights, based upon a country's availability of resources, is the only way to ensure the full enjoyment of all rights, negative and positive.

Given the rapid development of international human rights over the past half-century, there should be some provision to allow for the constitutionalization of rights that may still be controversial, but the universal recognition of which may not be far away. Kosovo does not make its human rights list non-exhaustive; the rights enumerated in that list are the only rights protected under the constitution. South Africa does not expressly provide for recognition of additional international human rights, rather the constitution “does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.”<sup>226</sup> Other constitutions, however, have included a much more explicit ‘catch-all’ provision.<sup>227</sup> In essence, such a provision would state that grants of new human rights codified in international human rights treaties signed and ratified by a particular country be accorded primacy over national law to the extent that they

---

<sup>225</sup> See *supra* Part III.C.

<sup>226</sup> CONST. OF THE REPUBLIC OF SOUTH AFRICA art. 39(3).

<sup>227</sup> See Vereshchetin, *supra* note 9, at 32.

provide for more freedom and greater rights.<sup>228</sup> That way, citizens will be able to appeal to the courts on the basis of human rights treaties to create new rights not contained in their constitutions.

Kosovo's quirky and potentially unwieldy provision constitutionalizing human rights treaties is not recommended for most countries. The motivation behind that provision was to bind Kosovo to treaties it is not yet allowed to accede to due to its controversial legal status in international law. Countries undergoing revolutions during the Arab Spring do not have controversial legal statuses—they have long been recognized as countries. Thus such a provision would be useless. However, it would not do to rule out the possibility of another Kosovo-like situation occurring, with disputes among the international community about a new country's legal status. Should that be the case, and should that country wish to demonstrate its commitment to international law and human rights, it may be well-advised to rank human rights treaties equal with other constitutional articles.

### *B. The Importance of a Worldly Court*

Of the constitutions created over the past two decades, those of Kosovo and South Africa seem to be two of very few that require that courts rely on some form of international law as a basis for interpreting human rights.<sup>229</sup> Kosovo binds its courts to the jurisprudence of the European Court of Human Rights while South African requires that the courts consider international law broadly.

---

<sup>228</sup> “[I]nternational instruments of human rights and freedoms ratified by the Slovak Republic and promulgated under statutory requirements shall take precedence over national law provided that the international treaties and agreements guarantee greater constitutional rights and freedoms.” CONSTITUTION OF THE SLOVAK REPUBLIC art. 2.

<sup>229</sup> East Timor stipulates that human rights will be “interpreted in accordance with the Universal Declaration of Human Rights.” CONST. OF THE DEMOCRATIC REPUBLIC OF EAST TIMOR § 23.

The requirement of at least contemplating the current state of international law on a particular topic certainly has its virtues. It allows the court to see where, within the spectrum of international law, its decision might fall. The development of international human rights law being particularly dynamic, such a requirement also seeks to prevent a country from implementing a human rights framework that is out of touch with the rest of the world. That is why it is more useful to have a provision that enables courts to look beyond simply the jurisprudence of one international tribunal, such as the European Court of Human Rights. The European Court is currently at the forefront of human rights law, but it is not the only human rights court in the world. Nothing in the Kosovo Constitution prevents the court from looking at other treaties and jurisprudence, of course. But strict adherence overlooks the fact that development of international human rights is a global venture.

In that respect, it can also be a fruitful exercise for courts to be able to consider laws of other countries. South Africa makes consideration of foreign law discretionary. That should be the proper approach. Considering the diverse legislation around the world, even on a singular topic, making use of foreign law mandatory would frustrate court resources and allow a court to cherry-pick which countries supported whatever position it wished to take. But allowing for consideration of foreign law, and foreign jurisprudence, could be a useful tool for courts to use, especially in determining the scope of a controversial new human right.

*i. Use (or Lack Thereof) of International Law by the United States Supreme Court*

The preceding discussion about the use of international and foreign law by domestic courts to interpret human rights presupposes that such an exercise is a good idea. It also rejects the idea of an “originalist” approach to constitutions, meaning that constitutions are exclusively

interpreted based on “the historical public meaning of words and phrases” they contain.<sup>230</sup> This approach is contrasted with the approach of the “living constitution,” where its provisions are interpreted according to the contemporary situation.<sup>231</sup> In the United States Supreme Court, Justice Antonin Scalia purports to be the defender of originalism, stating that “comparative [international and foreign] analysis [is] inappropriate to the task of interpreting a constitution,” even as he acknowledges that “of course [it was] quite relevant to the task of writing one.”<sup>232</sup>

That statement not only seems illogical but is also contrary to the Supreme Court’s history of referencing international law.<sup>233</sup> The lawyers of the 1800s viewed international law as derived from natural law, and used it to support arguments on how to interpret the Constitution.<sup>234</sup> As international law evolved, so too did its use in domestic courts’ opinions about constitutional provisions.<sup>235</sup>

More recently, international and foreign law has been used in one of three ways by the justices of the Supreme Court. The first is that international law is referenced only to provide “facts about the state of the law outside the United States.”<sup>236</sup> The international law mentioned in *Atkins v. Virginia*, *Grutter v. Bollinger*, and arguably in *Lawrence v. Texas* was not used to support the justices’ conclusion about the scope of the US Constitution, only to provide global context.<sup>237</sup> The second type of reference is that which indicates true disagreement among

---

<sup>230</sup> Gerald L. Neuman, *International Law as a Resource in Constitutional Interpretation*, 30 HARV. J. L. & PUB. POL’Y 177, 180 (2006).

<sup>231</sup> *Id.*

<sup>232</sup> *Printz v. United States*, 521 U.S. 898, 921 n.11 (1997).

<sup>233</sup> For a more detailed account, see Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT’L L. 1 (2006).

<sup>234</sup> Neuman, *supra* note 230, at 181.

<sup>235</sup> *Id.* “Jurisprudential assumptions of international law have themselves evolved, first through the ascendance of positivism in the nineteenth century, and then through the tempering of positivism by the human rights paradigm in the late twentieth century.”

<sup>236</sup> Mark V. Tushnet, *Referring to Foreign Law in Constitutional Interpretation: An Episode in the Culture Wars*, 35 U. BALT. L. REV. 299, 304 (2006).

<sup>237</sup> *Id.* “Moreover, within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.” *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002).

justices about the method of interpreting a constitutional provision. *Printz v. United States* is the best example.<sup>238</sup> In his dissent, Justice Breyer compares the federal system in the United States to that found in Switzerland, Germany, and the European Union.<sup>239</sup> It is this discussion that prompted Justice Scalia to say that international law has no place in interpreting the Constitution.

The third, and most controversial, reference to international law—and that which has sparked the greatest controversy—is its substantial use in a Supreme Court decision to support an outcome. In *Roper v. Simmons*,<sup>240</sup> the majority opinion written by Justice Kennedy contained a separate section on international and foreign law pertaining to the execution of juveniles.<sup>241</sup> That section discusses the United Nations Convention on the Rights of the Child and conducts a survey of countries’ laws to determine that the United States is an outlier in allowing the death penalty for juveniles.<sup>242</sup> Despite Justice Scalia’s excoriation that “[t]o invoke alien law when it agrees with one’s own thinking, and ignore it otherwise, is not reasoned decisionmaking, but sophistry,”<sup>243</sup> Justice Kennedy prefaced and concluded the international law section by stating that “[t]he opinion of the world community . . . [does] not control[] our outcome.”<sup>244</sup>

On the contrary, Justice Kennedy was quite right to assert that “respected and significant” corroboration from the international community can help to confirm the court’s own

---

“The Court’s observation that race-conscious programs ‘must have a logical end point,’ accords with the international understanding of the office of affirmative action.” *Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring). Justice Ginsburg pointed to the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination Against Women. *Id.* In *Lawrence v. Texas*, Justice Kennedy refuted “[t]he sweeping references by Chief Justice Burger to the history of Western civilization and to Judeo-Christian moral and ethical standards” in *Bowers v. Hardwick*, 478 U.S. 186 (1986), by referring to the United Kingdom and the European Court of Human Rights to show that Chief Justice Burger’s statement “did not take account of other authorities pointing in an opposite direction.” *Lawrence v. Texas*, 539 U.S. 558, 572–73 (2003).

<sup>238</sup> 521 U.S. 898 (1997).

<sup>239</sup> *Id.* at 976–78 (Breyer, J., dissenting).

<sup>240</sup> 543 U.S. 551 (2005).

<sup>241</sup> *See id.* at 575–79.

<sup>242</sup> *Id.*

<sup>243</sup> *Id.* at 677 (Scalia, J., dissenting).

<sup>244</sup> *Id.* at 578.

conclusions.<sup>245</sup> “It does not lessen [the Supreme Court’s] fidelity to the Constitution or [its] pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.”<sup>246</sup> International and foreign law does not, and cannot, control the Supreme Court’s interpretation of the Constitution.<sup>247</sup> It can, however, provide a useful evaluation of the “factual realit[ies]” of the world as well as “normative standards” that can help to guide judges and justices in making their decisions.<sup>248</sup> As a result, just as original intent is but one factor that is to be used in interpreting a constitution, so is international and foreign law. A constitution, particularly the United States Constitution, consists of broad principles that may sometimes be in conflict; the norms of international law may help to solve that conflict.<sup>249</sup>

This is especially the case with human rights. International human rights law does not require that states constitutionalize its protections as the method of domestic implementation.<sup>250</sup> Neither does it require that states that have stronger and broader protections reduce the scope of their human rights to the international level.<sup>251</sup> What the international human rights regime does do is “challenge[] states to reexamine the justifiability of their local practices. When international human rights protections exceed traditional . . . interpretations of the same right, [domestic courts] may properly consider whether [their] own doctrinal formulations afford insufficient respect to some aspect of that right.”<sup>252</sup> Thus careful and intelligent application and

---

<sup>245</sup> *Id.*

<sup>246</sup> 543 U.S. at 578.

<sup>247</sup> Neuman, *supra* note 230, at 185.

<sup>248</sup> *Id.* at 183.

<sup>249</sup> *Id.*

<sup>250</sup> *Id.* at 187.

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

consideration of international law—in particular human rights law—gives countries the ability “to interact with other nations and international institutions” on an equal plane.<sup>253</sup>

## **VI. Conclusion**

International human rights law occupies an important role on both the international scene and the domestic scene. In response, countries faced with the challenge of overcoming troubled histories have turned to the incorporation of human rights into their new constitutions as a clear manifestation of their intent to abide by international law. The methods of incorporation are as numerous as the countries that have employed them. Far from being a disadvantage, this lack of uniformity allows countries to uniquely shape their approach to best respond to their situation. Different circumstances notwithstanding, each future constitution should include a Bill of Rights containing negative and positive human rights, with explicit or implicit provisions for positive obligations on the government to provide for the full enjoyment of the rights. Domestic courts should be required to access international law, and allowed to reference foreign law at their discretion, to provide guidance on how to interpret constitutional human rights provisions.

The benefits of incorporation of negative as well as positive human rights in domestic constitutions becomes readily apparent when considered in the light of the United States’ rejection of any positive obligations on the government. The cases of Joshua DeShaney and Jessica Gonzales’ daughters demonstrate that while positive obligations on the government may be onerous and expensive, they can also be literally life-saving. The heart-wrenching situations may have been prevented—or at least some judicial remedy could have been provided for the surviving victims—had the United States incorporated, through legislation, the rights found in the American Declaration on the Rights and Duties of Man. It could have ratified the American

---

<sup>253</sup> *Id.*

Convention on Human Rights and incorporated those provisions into statutory law. It could have amended the Constitution to require that judges take international law into consideration when adjudicating cases or that judges take notice of the jurisprudence of international human rights tribunals. Most of these suggestions are admittedly fanciful, but they serve to illustrate the variety of ways in which the United States, and other countries, can bring their human rights jurisprudence in line with the international human rights jurisprudence.

Incorporation of human rights into constitutions is not therefore simply a writing exercise. Failure to do so has very real consequences that seem inherently unfair and are realistically avoidable. Newly-created countries and old countries with newly-awoken societies have the distinct advantage of decades of constitution-making they can study and from which they can benefit. Recent history has shown that they will and that their citizens will be grateful.