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TRAINING MANUEL ON HUMAN RIGHTS AND HUMAN RIGHTS PROTECTION FOR LAWYERS

FILE N° 6: IMPLEMENTATION OF INTERNATIONAL HUMAN RIGHTS LAW IN DOMESTIC LAW

Art.27 of the 1969 Vienna Convention on the Law of treaties : A party may not invoke the provisions of its national law as justification for the non-performance of treaty obligations.

States are free to choose the modalities for incorporation of international law into their national legal system to comply with their international obligations.

These conditions are defined in State constitutions. From a theoretical standpoint, two conditions stand out. However, States in practice have other modalities (linked for example to a lack of precise details regarding constitutional provisions).

➤ *Modalities of incorporation of treaties relating to human rights with regard to conventional theories of international law*

- **Direct incorporation**

- ✓ Theoretical basis

Monist theory: unity of national legal system and international legal system.

- ✓ Consequence

Once the treaty is ratified by a State and published (or the international norm accepted), the resulting obligations are incorporated into the legal system of the State, without the requirement for any acceptance act for the treaty.

This enables *direct applicability* of conventional norms creating rights and obligations for individuals ; applicability subject, however, to two cumulative conditions :

- Intention of contracting States to create laws for individuals



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- Norm sufficiently precise in its content (purpose, etc.), and not requiring additional measures for execution (*self-executing*) (for example Heading I of the ECHR).

- **Specific act of acknowledgment**

- ✓ Theoretical basis

Dualist theory: separation of national legal system and international legal system.

Consequence

To be applicable, and therefore to be invoked by a judge or by an individual, the international norm must have been accepted into the national legal system by a specific act (act of transposition or law which includes the content of the norm).

➤ ***Examples of other modalities resulting from State practices***

- **Constitutional provisions**

Many constitutions contain provisions relating to human rights which often draw inspiration from, or summarise the text of international legal instruments for the protection of human rights (Universal Declaration of Human Rights, for example). These constitutional provisions also enable judges to interpret other provisions in consideration of these.

- **Recourse to International Human Rights Law or international case-law by the judge or national legislature**

Where there exists, in the national legislation of a State, a legal vacuum concerning human rights, the judge or national legislator may rely upon international case-law (even national case-law of other States), or norms of international law.

Through this practice, a judge may in particular give legal effect (broadly speaking) to a treaty relating to human rights, without this necessarily being a determining factor in the decision delivered.

➤ ***Hierarchical seniority attributed to a conventional norm when incorporated into domestic law***

The applicability of a treaty is also related to its place in the hierarchy of norms. The higher the hierarchical seniority, the greater the likelihood that the treaty will be applied. The specific features of treaties relating to human rights require that their seniority be at least supra-legislative.

➤ ***Limitations of rights***

- **Restrictions**

Restrictions to guaranteed rights are intended, in normal situations, to preserve democratic institutions. These restrictions, which are stipulated in various treaties relating to human rights, must have a common legitimate object : national security, public order, prevention of criminal offences, protection of health and morality, or the rights and freedoms of others.

Furthermore, they must be stipulated by law and respect the principle of proportionality (coherence between the means employed and the intended object).

Certain rights cannot be the subject of restrictions, such as, for example, the prohibition on torture.

- **Exceptions**

Certain conventional norms relating to human rights contain provisions authorising States Parties to suspend enjoyment and exercise of rights proclaimed in the event of exceptional circumstances (war or exceptional public danger which constitutes a national threat).

This type of derogation clause can be found in article 15 of the ECHR and article 27 of the ACHR. However, the ACHRP contains no clause which allows any exceptions to guaranteed rights.

The implementation of clauses is dependent upon a certain number of conditions, which vary slightly from one text to another, but which can be summarised as follows :

- ✓ Existence of exceptional circumstances as stipulated by the norm,
- ✓ The measure taken should be strictly necessary to deal with the situation,
- ✓ It must respect the principle of proportionality : there must be a coherence between the means employed and the intended object,
- ✓ *The object* of the measure must be compatible with other obligations resulting from international law (for example, exceptions should involve no discrimination), and must not adversely affect intangible rights (certain rights are indeed unlikely to be the subject of exception, for example, certain legal guarantees such as *habeas corpus* or recourse *recurso de amparo*).

Sources:

- Frédéric SUDRE, *Droit européen et international des droits de l'homme*, Puf, 2008.
- Claudia SCIOTTI-LAM, *L'applicabilité des traités internationaux relatifs aux droits de l'Homme en droit interne*, Bruylant, 2004.
- *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, Office of the high Commissioner for Human Rights, International Bar Association, 2003.

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