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The Role of International Human Rights Law in the Professionalization of Public Administration: The Right to a Fair Trial

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1. Introduction

The last seven decades have seen rapid development of international human rights law, which has grown from a simple idea to a set of principles, standards, and mechanisms. Apart from its legal nature, it has also been playing an increasingly significant role in international politics.

This policy brief seeks to tentatively evaluate its role at the domestic level, in particular in the professionalization of public administration. In doing so, the brief focuses on the right to a fair trial, providing an overview of how the implementation of international human rights law has benefited the professionalization of public administration in different jurisdictions. This is followed by an analysis of its potential role in China.

For the purpose of this policy brief, "public administration" is defined as the planning, organizing, directing, co-ordinating, and controlling of government operations.[1] This definition does not preclude a broader understanding that the legislature, judiciary, and even the constitution itself may carry public administration functions. Since "professional" can be construed in different ways,[2] the professionalization of public administration is understood in this brief as the process of achieving better public administration, including a stronger guarantee of a fair trial.

2. The Right to a Fair Trial in Domestic Contexts: A Survey

Articles 10 and 11 of the 1948 Universal Declaration of Human Rights stipulate that "[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal". This was later cemented in the 1966 International Covenant on Civil and Political Rights ('ICCPR') and regional human rights treaties. A substantial jurisprudence has emerged elaborating and interpreting the right to a fair trial. There is not enough space in this policy brief to examine the jurisprudence carefully, but we will illustrate with some examples how this human right has benefited the professionalization of public administration in several jurisdictions.

2.1. Constitutions and Bills of Rights

International human rights law may play a significant role during the process of drafting or amending a constitution, in particular constitutional provisions on human rights (sometimes called 'bill of rights'). For example, after the abolishment of apartheid, drafters of South Africa's Constitution were well aware of the existence and importance of the ICCPR, although the country had not become a State Party. The Minister of Foreign Affairs even indicated in a memorandum to the Constitutional Assembly that it was "imperative […] to take account of existing international law obligations". As a result, there is a high degree of overlap between ICCPR Articles 14 and 15 and Article 35 of the Bill of Rights of the 1996 Constitution.[3]

Similarly, Canadian federal officials made specific use of the international human rights treaties, particularly the ICCPR, in drafting the Charter of Rights and Freedoms, Article 11 of which is similar to the relevant provisions of the ICCPR.[4] In Finland, the Fundamental Rights Chapter of the Constitution was specifically reformed in 1995 to incorporate the rights contained in international human rights treaties, including the ICCPR.[5] In fact, "no fewer than 90 national constitutions drawn up since 1948 contain statements of fundamental rights which, where they do not faithfully reproduce the provisions of the Universal Declaration, are at least inspired by it".[6] The incorporation of the

1 Edward C. Page, "Public administration", in *Encyclopædia Britannica*, at http://global.britannica.com/topic/public-administration, last accessed on 14 June 2016.

2 *Merriam-Webster's Dictionary*, "professional", at http://www.merriam-webster.com/dictionary/professional, last accessed on 14 June 2016.

3 Christof Heyns and Frans Viljoen, *The Impact of the United Nations Human Rights Treaties on the Domestic Level*, Kluwer Law International, The Hague, 2002, pp. 552–554.

4 Anne Bayefsky, *Canada's Constitution Act 1982 and Amendments: A Documentary History*, McGraw-Hill Ryerson Limited, Toronto, 1989, pp. 150 ff., as cited in *ibid*, p. 123.

5 Heyns and Viljoen, 2002, pp. 275–276, *supra* note 3.

6 Nihal Jayawickrama, "Hong Kong and the International Protec-

right to a fair trial into a bill of rights proclaims a commitment by the highest authorities of the state, making it more likely that public administrators of that state respect the right and, consequently, behave more professionally.

2.2. Legislation: Establishing, Reforming and Annulling

International human rights law may also urge a state to adopt legislation, carry out legislative reform, or annul specific statutes or case law, leading to a legal framework that ensures better administration of justice by improving fair trial standards.

The 1998 Human Rights Act of the United Kingdom is noteworthy in this respect. The Act incorporated the rights contained in the European Convention of Human Rights ('ECHR') into its domestic law, and has had strong influence not only on the legal protection of human rights by introducing "Convention rights", but also represents a fundamental constitutional change.[7] In particular, the right to a fair trial incorporated as Article 6 of the Act goes wider than due process rights normally do in the common law tradition. It has arguably served to achieve more independent and impartial tribunals and less restrictive access to court,[8] thus contributing to the professionalization of the judiciary.

Under the ECHR mechanism, the Committee of Ministers supervises the execution of judgments of the Court and examines whether "general measures have been adopted, preventing new violations similar to that or those found or putting an end to continuing violations".[9] This often occurs in relation to judgments disclosing major structural and/or complex problems as identified by the Court and/or the Committee of Ministers.[10] Under such circumstances, the Member States concerned must carry out legislative reform in compliance with the treaty obligation to prevent new violations from occurring. In *Bottazzi v. Italy*,[11] the Strasbourg Court considered that the frequency with which violations of "a fair and public hearing within a reasonable time" provision were found against Italy constituted a practice of systematic human rights breaches incompatible with the ECHR.[12] As a result and in an attempt to enhance the quality of the administration of justice, Italy embarked on several reforms, including the unification of the court of first instance in 1999, a constitutional amendment in 1999 introducing the "right to a fair trial", the Pinto Law in 2001, the civil procedure reforms, and the development of information and communication technology across the justice system.[13]

Sweden modified her legislation as regards judicial review of certain administrative decisions to cover all matters that could possibly be considered as "civil rights and obligations", following several judgments concerning the absence of a legal right of access to court.[14] A broader scope of procedural safeguards can itself indicate a better administration of the judiciary. Being exposed to more chances of judicial review, the executive can be expected to achieve better compliance with human rights standards. Similarly, the Danish Parliament amended its Administration of Justice Act with regard to the impartiality of judges[15] after the Strasbourg Court found a violation.[16] In a more recent case, the Slovenian Government established the Lukenda Project and passed legislation following *Lukenda v. Slovenia*,[17] which later satisfied the Court.[18]

Another example from Lithuania also suggests that the individual communication procedure of the Optional Protocol to the ICCPR[19] may play a role in the professionalization of the administration of justice, through law reform and adoption of a new Code of Criminal Procedure.[20] Besides, some legislative reforms may also take place as a result of compatibility studies, in response to concluding observations, and in the course of ordinary legislative review.[21]

2.3. Judicial Interpretations and Decisions

The third way is through interpretation by the national

tion of Human Rights", in Raymond Wicks (ed.), *Human Rights in Hong Kong*, Oxford University Press, Hong Kong, 1992, p. 160.

7 David Feldman, "The Human Rights Act 1998 and Constitutional Principles", in *Legal Studies*, 1999, vol. 19, pp. 165–206.

8 Satvinder Singh Juss, "Constitutionalising Rights Without a Constitution: The British Experience under Article 6 of the Human Rights Act 1998", in *Statute Law Review*, 2006, vol. 27, no.1, pp. 29–60.

9 Rules of the Committee of Ministers for the Supervision of the Execution of Judgments and of the Terms of Friendly Settlements, 10 May 2006, Rule 6(2)(b)(ii).

10 David Harris *et al.*, *Law of the European Convention on Human Rights*, Oxford University Press, Oxford, 2014, p. 183.

11 ECtHR, *Bottazzi v. Italy*, App. 34884/97, Judgment, 28 July 1999, ECHR 1999-V (http://www.legal-tools.org/doc/7cb75b/).

12 Bernadette Rainey *et al.*, *The European Convention on Human Rights*, Oxford University Press, Oxford, 2014, p. 274.

13 Marco Fabri, "The Italian Maze Towards Trials Within Reasonable Time", in *The Right to Trial Within a Reasonable Time and Short-term Reform of the European Court of Human Rights*, available at http://www.coe.int/t/dghl/standardsetting/cddh/Publications/bled-proceedings_book.pdf, last accessed on 14 June 2016, p. 15.

14 Elisabeth Palm, "Access to Court – Strasbourg and Stockholm", in James O'Reilly (ed.), *Human Rights and Constitutional Law*, The Round Hall Press, Dublin, 1992, pp. 61–70.

15 "Appendix to Resolution DH (91) 9", available at http://hudoc.echr.coe.int/eng?i=001-55508, last accessed on 14 June 2016.

16 ECtHR, *Hauschildt v. Denmark*, Judgment, 24 May 1989, Series A, No. 154, 12 EHRR 266 (http://www.legal-tools.org/doc/ee1c41/).

17 ECtHR, *Lukenda v. Slovenia*, App. 34884/97, Judgment, 6 October 2005, (2008) 47 EHRR, ECHR 2005-X (http://www.legal-tools.org/doc/550145/).

18 ECtHR, *Korenjak v. Slovenia*, App. 463/03, Decision, 15 May 2007 (http://www.legal-tools.org/doc/bf1741/). See Rainey *et al.*, 2014, p. 275, *supra* note 12.

19 See *Kestutis Gelazauskas v. Lithuania*, Communication No. 836/1998, UN doc. CCPR/C/77/D/836/1998 (1997) (http://www.legal-tools.org/doc/ac30b2/).

20 Report of the Human Rights Committee, UN doc. A/59/40 (Vol. I), para. 246 (http://www.legal-tools.org/doc/4f90b2/).

21 Heyns and Viljoen, 2002, p. 17, *supra* note 3.

judiciary. There is a rule of interpretation in many countries to the effect that domestic law must be interpreted to be in conformity with treaty obligations where possible. Even where such an explicit rule does not exist, courts have used treaties for interpretive guidance, for example in Canada.[22] This is also referred to as "presumption of conformity", "presumption of compatibility",[23] or "Charming Betsy canon"[24] in the United States; in Germany, it has been labelled the "*völkerrechtsfreundliche Auslegung*"[25] or "*völkerrechtskonforme Auslegung*", and "*EMRK-konforme Auslegung*"[26] in regard to the ECHR.[27]

Moreover, the principle that law should be interpreted consistently with human rights is explicit in countries such as the UK,[28] Ireland,[29] and New Zealand,[30] and has even been incorporated into the Portuguese and Spanish constitutions.[31] This could offer virtually limitless possibilities for achieving greater protection of the rights of individuals,[32] and help ensure that the conduct of government conforms to the nation's treaty obligations.

In addition, domestic judicial decisions may also apply international human rights law standards. The Strasbourg Court considered in *Lutz v. France*[33] that the compensation for administrative fault, as determined by the *Conseil d'Etat*, does not constitute an effective remedy as defined in Article 6(1) of the ECHR. Three months later, the *Conseil d'Etat* abandoned its old theory, referring to Article 6(1) and "general principles that govern the functioning of administrative tribunals".[34] This shows how international human rights law can urge governments to speed up the professionalization of their public administration.

3. The Right to a Fair Trial in Chinese Contexts: A Prospect

This section considers the right to a fair trial and its potential role in the professionalization of public administration in Chinese contexts. As China has been a signatory to the ICCPR since 1988 without ratifying it, the following analysis is based on the hypothetical scenario that China has become a State Party. Nevertheless, some roles below may be possible even in the absence of Chinese ratification of the ICCPR.

Although China has expressed the willingness to ratify the ICCPR,[35] among dozens of recommendations received during its second Universal Periodic Review, China "accepted" those with a moderate tone, such as "consider ratifying" or "take steps towards ratification", but refused to "speed up", ratify "in the near future",[36] or set out a specific timetable, saying that it is "now prudently carrying out its judicial and administrative reform to actively prepare for the ratification".[37] It seems that China wants to ensure a high degree of compliance *before* ratifying in order to avoid an international image of non-compliance and reduce possible criticisms. Consequently, the ICCPR may equally play an important role in the course of China's said reform.

First of all, the right to a fair trial in the ICCPR might be incorporated into China's Constitution. Although its Chapter 2 contains major fundamental human rights provisions, the right to a fair trial is not listed.[38] After its amendment in 2004, this right could be seen as a non-enumerated right under the umbrella of "human rights" protected by Article 33. Its concretization by express reference would become a strong affirmation with binding effect on all branches of government.

Second, the right to a fair trial may be incorporated and specified through statutory law reforms. In fact, China has

22 *Ibid*, pp. 6, 18.

23 Philip Alston and Ryan Goodman, *International Human Rights*, Oxford University Press, Oxford, 2013, p. 1061.

24 See U.S. Supreme Court, *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804).

25 See, *e.g.*, Federal Constitutional Court of Germany, Judgment, 2 BvR 2365/09, 4 May 2011 (http://www.legal-tools.org/doc/91bae5/).

26 See Federal Constitutional Court of the Federal Republic of Germany, Decision, BVerfGE 74, 358 (370), 26 March 1987.

27 See Ralf Schenke, *Die Rechtsfindung im Steuerrecht*, Mohr Siebeck, Tübingen, 2007, pp. 53 ff.

28 See, *e.g.*, Human Rights Act 1998, 9 November 1998, Section 3 (1) (http://www.legal-tools.org/doc/3d5e50/); U.K. House of Lords, *R v. Director of Public Prosecutions, Ex P Kebilene*, [2000] 2 AC 326, p. 373F; U.K. House of Lords, *R v. A (No. 2)*, [2002] 1 AC 45, para. 43.

29 See European Convention on Human Rights Act 2003, Section 2 (1) (http://www.legal-tools.org/doc/cdc748/).

30 See New Zealand Bill of Rights Act 1990, 28 August 1990, Section 6 (http://www.legal-tools.org/doc/6d321c/).

31 See Constituição portuguesa de 1976 (Portuguese Constitution of 1976), 2 April 1976, Article 16 (2) (http://www.legal-tools.org/doc/484aee/); Constitución española de 1978 (Spanish Constitution of 1978), 27 December 1978, Section 10 (2) (http://www.legal-tools.org/doc/1ec036/).

32 Richard Lillich, "Invoking International Human Rights Law in Domestic Courts", in *University of Cincinnati Law Review*, 1985, vol. 54, p. 412.

33 ECtHR, *Lutz v. France*, App. 48215/99, Judgment, 26 March 2002 (http://www.legal-tools.org/doc/261fca/).

34 L'Assemblée du contentieux, Conseil d'Etat, 28 June 2002, *Garde des sceaux, ministre de la justice c/ Magiera*, n° 239575 (http://www.legal-tools.org/doc/ee1353/). See Clotilde Morlot-Dehan, *Le Président de juridiction dans l'ordre administratif*, Editions Publibook, Paris, 2005, p. 321.

35 See, *e.g.*, National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21, UN doc. A/HRC/WG.6/17/CHN/1, 5 August 2013, para. 7 (http://www.legal-tools.org/doc/ae1671/).

36 Human Rights Council, Report of the Working Group on the Universal Periodic Review: China, UN doc. A/HRC/25/5, 4 December 2013, para. 186 (http://www.legal-tools.org/doc/cc9a27/).

37 Human Rights Council, Report of the Working Group on the Universal Periodic Review: China Addendum, UN doc. A/HRC/25/5/Add.1, 27 February 2014 (http://www.legal-tools.org/doc/4663bb/).

38 See 中华人民共和国宪法 (Constitution of the People's Republic of China), 14 March 2004, Chapter 2 (http://www.legal-tools.org/doc/0764a1/).

previously adopted the recommendations for a review of legislation by the Committee for the Rights of the Child with regard to "the principle of the best interests of the child".[39] Following these concluding observations, China immediately initiated the law amendment process, citing both the Convention on the Rights of the Child and UN Standard Minimum Rules for the Administration of Juvenile Justice.[40] The Convention on the Rights of Persons with Disabilities played a similar role during the amendment of the Law on the Protection of Disabled Persons.[41]

Therefore, it is reasonable to expect that after its ratification of the ICCPR or during its preparation for it, China would carry out law reform in conformity with the provisions of the right to a fair trial, including concerning:

1. Article 187(1) of the Criminal Procedure Law which restricts the right to call and examine witnesses of the accused (as enshrined in Article 14(3)(e) of the ICCPR) to situations where a material witness statement is objected to and "the court deems necessary",[42] subjecting it to the discretion of the judges; and
2. Article 22 of the Criminal Procedure Law which stipulates that "the Supreme People's Court shall have original jurisdiction over criminal cases which are significant in the entire nation",[43] depriving the accused of the right to be reviewed by a high tribunal enshrined in Article 14(5) of the ICCPR.

Third, the right to a fair trial may be used to interpret Chinese domestic law during judicial proceedings. In international trade administrative cases, "if there are two or more reasonable interpretations [...] and among which one interpretation is consistent with the relevant provisions of the international treaty that the PRC concluded or entered into, such interpretation shall be chosen".[44] This provision shares similarities with the interpretive rules of "presumption of conformity" or "*völkerrechtskonforme Auslegung*" and provides a basis for an indirect application of the ICCPR.

Fourth, the substantial requirements of the right to a fair trial, including the competence, independence and impartiality of the tribunal, as well as the right to be presumed innocent and the equality of arms, may serve to shape a more professional judicial system in China. China is likely to carry out reform towards better compliance with these principles in preparation for and after its ratification, providing reassurance that it cares about human rights.

By achieving the above-mentioned four roles, international human rights law would benefit the professionalization of public administration, be it the legislative, executive, judiciary, or the whole system. Besides, it would contribute towards the gradual development of a human rights culture through human rights education, which, in turn, helps the process of professionalization along.

4. Conclusion

International human rights law has a significant role to play in the professionalization of public administration. In particular, respecting the right to a fair trial contributes to more professional administration of justice. China's reforms in preparation for the ratification of ICCPR can further improve its judicial system. Possible ratification down the road may further foster the professionalization of public administration of justice in China.

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39 Committee on the Rights of the Child, Report on the Fortieth session, UN doc. CRC/C/153, 17 March 2006, para. 316 (http://www.legal-tools.org/doc/b3b2f7/).

40 See ZHU Mingshan (祝铭山), "Explanations for Law on the Protection of Minors (Revision Draft)" (关于《中华人民共和国未成年人保护法（修订草案）》的说明), available at http://www.npc.gov.cn/npc/oldarchives/zht/zgrdw/common/zw.jsp@label=wxzlk&id=357674&pdmc=1524.htm, last accessed on 14 June 2016.

41 See ZHANG Bailin (张柏林), "Report by the NPC Law Committee Concerning the Revision of Law on the Protection of Disabled Persons (Revision Draft)" (全国人大法律委员会关于《中华人民共和国残疾人保障法（修订草案）》修改情况的汇报), available at http://www.npc.gov.cn/wxzl/gongbao/2008-06/03/content_1463229.htm, last accessed on 14 June 2016.

42 中华人民共和国刑事诉讼法 (Criminal Procedure Law of the People's Republic of China), 14 March 2012, Article 187(1) (http://www.legal-tools.org/doc/2b7be5/).

43 *Ibid.*, Article 22.

44 最高人民法院关于审理国际贸易行政案件若干问题的规定 (Provisions of the Supreme People's Court on Several Issues Concerning the Hearing of International Trade Administrative Cases), 27 August 2002, Article 9 (http://www.legal-tools.org/doc/0b47a3/).

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