ROMAN SCHUPPLI

Memo on Answers to Interview Questions regarding Current Debates on HRL, 18.07.2019/ IG

Request:

- Respond to all questions (or as many as possible).
- Send your relevant documents concerning the questions (optional).
- Add web page links and article links within answers (optional).
- Provide a one-minute video for the last question (optional).
- Provide information about the institutes or academicians in your university/faculty or in any other university in your country who would you be interested in collaborating with research and with whom requesters can realize this interview (optional).

Below, only the non-optional part of the request is provided, namely the answering of the questions.

1. **Who is "human" in the concept of modern human rights?**

Today there is a consensus in the legal community that human beings have dignity and therefore have a special right to be respected. Even in torture states it is not seriously disputed that every human being is a legal subject and thus the bearer of rights and obligations. However, the practice in certain states of denying certain groups full and equal enjoyment of rights remains a reality. A person who lacks legal personality is excluded from enjoying all rights and subsequently from enforcing them – he or she is and remains legally invisible, lawless and thus defenceless. The recognition of the human being as a legal person (one also speaks of legal entity, legal capacity or legal subjectivity) makes legal rights effective: Whoever has no legal personality cannot be a holder of rights, he has no legal claims, not even the right to life and to respect for his dignity as a human being. He or she is not a subject, but a lawless object. Against this background, the simple formula of the "right to have rights" (HANNAH ARENDT) shows the core of the idea of human rights.

The right to legal personality is an expression of human dignity and is guaranteed as a universal human right. The guarantee includes the right of every human being to be recognised as a legal person at any time and in any place without preconditions and thus to be, in principle, the bearer of rights and obligations. This right belongs to every individual belonging to the

human species, regardless of his age, cognitive abilities, existing or missing citizenship or other personal characteristics.

(Excerpt from KIENER REGINA, Das Recht auf Anerkennung als Rechtsperson, Zeitschrift für Schweizerisches Recht (ZSR) 2015 I, pp. 429 ff.)

2. **How is carried out of the protection of a right which is not regulated in the Constitution in your legal system? What kind of balancing is done when a right uncounted in the Constitution is conflicted with a constitutional right?**

No formal ranking or prioritisation can be inferred from the Federal Constitution's catalogue of rights, so the individual guarantees are fundamentally of equal rank. The principle, which the Federal Supreme Court had shaped at an early stage, according to which the constitutional norms "coexist with equal legal force", applies in principle both to the relationship between fundamental rights (no matter if written or unwritten) and to the relationship between fundamental rights and other constitutional norms. Solely, the guarantee of human dignity occupies a special position: It not only constitutes the supreme guiding principle of the state, but is also an important element for the interpretation and concretisation of the other rights, in particular the core contents of fundamental rights. A certain prioritisation also results from the fact that individual fundamental rights (e.g. the prohibition of torture) or fundamental right contents (in particular the core contents) have absolute validity; likewise, the permissible restrictions must satisfy a particularly strict examination regarding certain guarantees (e.g. in the case of the prohibition of discrimination). However, there are no guarantees which would generally take precedence over other rights.

(Excerpt from KIENER REGINA, Grundrechte in der Bundesverfassung, in: Verfassungsrecht der Schweiz, 2. Ed., forthcoming)

3. **Do International Human Rights Documents applied in your country represent minimum standards that are already provided or the must-reach aims? Are there any regulations in your legal system above international human rights standards? If there are, would you please explain?**

The Swiss legal system is embedded in a network of International Human Rights Documents. At the European level, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) of 4 November 1950, drawn up and signed within the framework of the Council

of Europe, has gained central importance. The ECHR contains a catalogue of minimum human rights standards, but has also provided (and still provides) important impulses for the development of the Swiss catalogue of fundamental rights. This development is particularly fuelled by the "living instrument"-doctrine of the ECtHR, which allows the Court to interpret the Convention on an updated understanding through the application of a dynamic-teleological interpretation.

The ECtHR's line of jurisprudence was of very much importance for the development of procedural guarantees in the Swiss Confederation. It initially led to considerable legal and institutional innovations in criminal proceedings and later also in public law proceedings. In particular, the ECHR had a considerable influence on the expansion of the control of administrative acts and on the creation or consolidation of independent administrative courts at cantonal and federal level, thus shaping not only the legal system but also the institutions entrusted with its execution. More recently, the importance of the ECHR for Swiss public procedural law has tended to decline: The establishment of a comprehensive guarantee of legal recourse (Art. 29a of the Federal Constitution), the differentiation of procedural guarantees on the occasion of the total revision the Federal Constitution in 1999 (Art. 29-32 of the Federal Constitution) and, finally, the comprehensive revision of the procedural decrees in civil, criminal and public law have substantially increased the level of procedural protection, so that in the meantime the ECHR fell back to its intended function of a common European minimum standard.

(Partly an excerpt from KIENER REGINA/RÜTSCHE BERNHARD/KUHN MATHIAS, Öffentliches Verfahrensrecht, 2. Ed., Zürich/St. Gallen 2015)

4. **In your legal system, is the jurisdiction an actor itself to move forward human rights standards? If it is, would you please explain?**

The Swiss catalogue of fundamental rights is the historical result of a gradual and dialogical process. The key role in this development has been played by the Federal Supreme Court since the second half of the 19th century. It has specified the protective contents of written fundamental rights, enriched them with new contents, derived unwritten guarantees from the constitution, and later implemented the practice of the European Court of Human Rights. For instance, contemporary provisions of the Swiss catalogue of fundamental right, such as the prohibition of arbitrariness, the right to a fair hearing or the right to legal aid, were derived from Art. 4 of the Federal Constitution of 1874 ("All Swiss are equal before the law"). Unwritten guarantees recognised by the Federal Supreme Court include the freedom of

expression (1962), the guarantee of ownership (1969) or the freedom of assembly (1970). Through this jurisprudence, which was geared towards concretisation, supplementation and creation of rights, cantonal and international protective contents were woven into the fundamental rights material of the Federal Constitution, condensing it, modernising it and extending it by numerous facets.

(Excerpt from KIENER REGINA, Grundrechte in der Bundesverfassung, in: Verfassungsrecht der Schweiz, 2. Ed., forthcoming)

5. **Are there values and issues in your country that are not covered by human rights documents but need to be protected under the concept of human rights? If your answer is yes, would you please explain?**

A look at more recent cantonal constitutions (the cantons are the federal states in the Swiss legal system) reveals further possibilities for development of the Federal Constitution, including, but not limited to, the area of fundamental social rights. This applies, for example, to the right to assistance for victims guaranteed in several cantonal constitutions or to the ban on discrimination enshrined in Art. 15 Constitution de la République et canton de Genève, which is extended to include the aspect of sexual orientation and also includes gender identity, a development that can also be foreseen for the federal constitutional level in view of international human rights standards.

(Excerpt from KIENER REGINA, Grundrechte in der Bundesverfassung, in: Verfassungsrecht der Schweiz, 2. Ed., forthcoming)

6. **Are there such human right regulations in the legal system of your country that is protected by the constitution but contradicts social reality and justice?**

On 29 November 2009, Swiss voters adopted the popular initiative "Against the Construction of Minarets". Thus they have supported the new constitutional provision "The construction of minarets is forbidden" (Art. 72 para. 3 of the Federal Constitution), which came into force immediately after. The ban on minarets appears as a restriction of religious freedom, which at the same time amounts to an unconstitutional discrimination due to its one-sidedness. Materially, the violation of the prohibition of discrimination appears indisputable, since there is a worsening of the position of Islam towards other religions for which no objective reason may be found.

7. **Are there any social realities contradicting international human rights concept based on individualism?**

International human rights law does not establish any rights of subjects who have no legal standing, such as those of future generations, nature or animals. With regard to future human rights challenges, such as climate change, it is by no means clear whether the traditional model of individualistic human rights protection in its current form could reach its limits as it may not adequately take into account the interests of the mentioned groups.

8. **In your legal system, are there legal mechanisms to protect human rights if fundamental rights are violated by private persons? Are these mechanisms effective?**

Since the 19th century, the Federal Supreme Court has held that it is at least the task of the courts to protect fundamental rights even where they are endangered or violated by private assaults. The obligation provided for in Art. 35 of the Federal Constitution to comprehensively implement fundamental rights takes up this practice and now states in constitutional force that fundamental rights must generally be protected from impairments, i.e. irrespective of whether the danger emanates from the state, from private individuals or from environmental and natural disasters.

Today, it is recognised that all fundamental rights contain such a dimension of protection. Protection obligations are initially directed at the legislature, which has to design the legal system in such a way that assaults on fundamental rights are prevented or repressively sanctioned. Justiciable protection obligations can also arise in the area of the application of law or simple administrative action and require corresponding factual measures such as, in particular, police interventions to protect integrity rights. The state infringes the protection claims of the individual in any case if the authority has knowledge of the concrete – i.e. real and imminent – violation of fundamental rights or would have to know about it with due attention and sufficient diligence, but nevertheless does not take those measures which could reasonably be taken within the framework of the available means and from which a defence of the danger is to be expected. The restrictive rule is that the necessary protective measures must themselves be in conformity with fundamental rights, i.e. they must not inadmissibly interfere with the fundamental rights of the (potential) perpetrators or third parties. This legal mechanism is, in fact, of a very effective nature, because it allows for inclusion of all the involved parties' legal positions and, thereby, allows for a flexible approach in conformity with all of the relevant fundamental rights.

(Excerpt from KIENER REGINA, Grundrechte in der Bundesverfassung, in: Verfassungsrecht der Schweiz, 2. Ed., forthcoming)

9. Are there groups in your country who have their own national, ethnical, religious and linguistic identities? Could you please give some information about them (especially if you feel yourself one of them)?

The Swiss Confederation is a multi-ethnic country. On the one hand, the country consists of four language groups recognised in the Federal Constitution (Art. 4), on the other hand it is a multi-confessional state, consisting of historically catholic and protestant federal states. In addition, there exist smaller groups of minorities (conf. question 10).

10. What is the definition of the notion “minority” according to your constitutional system? What is your opinion on this concept? Do you think that minority rights should be protected broadly by the constitutional level? Do you think that constitutional regulations that would broaden the rights of minorities will solve the conflicts between majorities and minorities?

The Federal Constitution places the individual at the centre of the protection of fundamental rights; a group-related segmentation of elementary rights is not indicated. Unlike other constitutions, the constitution therefore does not enshrine minority or similar group rights and does not even provide for a definition of the term. Selected cantonal constitutions, on the other hand, mention the notion of minorities (e.g. Art. 4 Verfassung des Kantons Bern). According to the interpretative declaration to Framework Convention for the Protection of National Minorities the Swiss Confederation defines "national minorities" as “those groups of persons who are numerically smaller than the rest of the population of the country or of a canton, whose members have Swiss citizenship, who maintain old, solid and lasting ties with the Swiss Confederation and who are motivated by the will to preserve together what constitutes their identity, in particular their culture, their traditions, their religion or their language.” In autumn 2016, the Swiss Confederation has recognised the Swiss Jeni and Sinti as a national minority – regardless of whether they live in a mobile or sedentary environment. In 1998, the Swiss Confederation has designated the "Travellers" with Swiss citizenship as a recognised national minority. The Federal Council rejected the recognition of the Roma in June 2018.

This does not mean that the Federal Constitution does not take into account the protection needs of linguistic, religious and other minorities; the prohibition of discrimination, the freedom of language, and the freedom of belief and conscience grant protection to members of vulnerable groups in particular.

(Partly excerpt from KIENER REGINA, Grundrechte in der Bundesverfassung, in: Verfassungsrecht der Schweiz, 2. Ed., forthcoming)

11. What do you think on the notion and the concept of minority rights in international law? Could the international regulations/treatments be a response to the reality and problems of the peoples in your country? In other words, do they cover the reality in your country from the view of the state and the view of peoples?

The contemporary notion of minority rights in international law, as enshrined in Art. 27 ICCPR or Art. 14 ECHR, operates on the basis of individual rights protection. This is in contrast to historical examples as the League of Nation's minority protection system, which existed in the beginning of the 20th century. As already mentioned (conf. question 10), the Swiss Confederation's minority protection system does not operate with any notion of minorities, but rather with individualistic rights. Community-related concerns are not considered justiciable by the constitutional legislator; corresponding objectives are defined as state tasks to be realised by law and not as individual rights (cf. Art. 73 and 74 of the Federal Constitution). They can, however, be asserted by the state as public interests within the meaning of Art. 36 para. 2 of the Federal Constitution and thus, under certain circumstances, rebind fundamental rights interests. Overall, this Swiss approach of protection appears to be differentiated and effective, as it provides for a basis for the consideration of a wide range of interests and their balancing.

(Partly excerpt from KIENER REGINA, Grundrechte in der Bundesverfassung, in: Verfassungsrecht der Schweiz, 2. Ed., forthcoming)

12. What you think is the most current human rights problem in your country?

Until recently, the prohibition of torture in the Swiss Confederation was a guarantee of human rights which was regarded as inviolable in the presence of security threats of any kind. In the context of the prevention of terrorism, however, political demands now point to a tendency to weaken this ban,

which affects the most elementary core of humanity. This is illustrated by a motion passed by parliament in March 2019 calling on the Federal Council to change its practice with regard to the expulsion of terrorists to their countries of origin.

The parliament thereby disregarded the fundamental principle of non-refoulement that forms part of mandatory international law (ius cogens) and the Federal Constitution and according to which no one may be deported to a state in which torture is imminent. This decision of the legislator shows a clear misunderstanding of the principle of the rule of law and reveals the danger of wilfully eroding the institutional balance in the Swiss Confederation. It may be situated in a broader zeitgeist of Swiss politics that aims at undermining the level of human rights protection in the country.