

## ‘Adventurous’ judgments A comparative exploration into human rights as a moral-political force in judicial law development

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### 1. Judicial activism

‘I’m a romantic optimist about the law’, Lord Scarman said when his long period of service as a law lord had come to an end, ‘I believe it can always be reformed to make it better’.<sup>1</sup> Among academic jurists such an outlook on law tends to be rather common; it certainly permeated the XVII<sup>th</sup> World Congress of the International Academy of Comparative Law held at Utrecht University from 16-22 July 2006. Law, it was strongly felt, can be developed into more and more refined notions, interconnections and codifications coupled with increasingly sophisticated ways of interpretation. ‘A rather harmless pastime’, even legalists might react. That attitude changes, however, when it is judges themselves who start ‘developing’ the law into something ‘better’. *Judicial activism* it is called, often pejoratively.

Actually, there are two distinct ways of understanding judicial activism. Firstly, the term may refer to deliberate attempts to influence judicial decision making from a political angle. A primary observation in this respect is that this is not a prerogative of the left. In the United States, for example, there appears to be continuous political pressure from the right to get judges appointed who would judge from a partisan rightist perspective on issues such as abortion and capital punishment, and the role of international law in the American national jurisdiction.<sup>2</sup> Political pressure on judicial decision making is, however, not this article’s focus, neither from left nor right. In contrast, the second way of understanding judicial activism is premised on judicial impartiality based on a serious striving for judicial neutrality and objectivity. Accordingly, the type of ‘adventurous’ judgments discussed here is of a different nature: an active attempt to ground judicial decisions in strong as well as sustainable notions of what is right. To move law forward is the endeavour, a kind of global civilizing process: a ‘universal legal advancement’.<sup>3</sup>

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1 *Sunday Times*, 12 January 1986.

2 Naturally, those who campaign on such issues are not the ones who are calling this process the politicization of judicial decision making. Rather, they seek connections with legal theories that produce politically desired results, such as textualism.

3 In his *De la déclaration de volonté. Contribution à l’étude de l’acte juridique dans le code civil allemand 1901* (préface p. ix) R. Saleilles speaks of a ‘Progrès juridique universel’, quoted by J.H.A. Lokin in his keynote address on *Legal History and Comparative Law* at the World Congress of the International Academy of Comparative Law at Utrecht University, 18 July 2006 (to be published).

From a legal theoretical viewpoint it is Ronald Dworkin, in particular, who calls the attention of his fellow jurists time and again to the inevitability of judicial law finding and hence the necessity for judges to be grounded not only in their understanding of legal systems, but also in 'very abstract principles of political morality'. In his *Justice in Robes* he put it this way:

'My claim, to repeat, is that legal reasoning presupposes a vast domain of justification, including very abstract principles of political morality, that we tend to take that structure as much for granted as the engineer takes most of what she knows for granted, but that we might be forced to re-examine some part of the structure from time to time, though we can never be sure, in advance, when and how.'<sup>4</sup>

In the comparative exploration of 'adventurous' judgments that we shall embark on, our focus will be on the *political morality of human rights* as a driving force in judicial activism. It is assumed, in other words, that where the judiciary is 'active' human rights may play their part as general principles of law as distinct from rules already incorporated in positive law. Indeed, wherever power is executed and disputes arise, human rights may influence processes of judicial decision making as well as their outcome. 'The language of human rights', Justice Bhagwati of the Indian Supreme Court once observed, 'carries great rhetorical force ... At the level of rhetoric, human rights have an image which is both morally compelling and attractively uncompromising'.<sup>5</sup> It is, particularly, the judiciary, which may play an important part in translating this rhetoric into normative decisions. Judges tend to reason in an *evaluative* manner, not so much oriented towards goals but rather towards norms.<sup>6</sup> They judge facts in the light of set norms while weighing and balancing various interests and the values behind these against one another.

Accordingly, it is against the background of judicial activism that we shall attempt to illustrate the potential of human rights as a moral-political force. Judicial law development is considered here in the sense of judgments taking the law beyond the point of what was hitherto regarded as *ius positivum*. Our main perspective, however, is not the creation of law by the courts per se, but rather the ways and means in which the human rights idea has encouraged judges to make decisions that imply an overturning of 'settled' law. Notably, this is a different manner in which human rights affect positive law than through processes of international, regional and national standard setting connected with the establishment of new supervisory institutions and mechanisms. Therefore, we shall not concentrate on characteristic human rights cases, nor examine the case-law of typical human rights courts such as the European Court of Human Rights in Strasbourg. Instead the focus of this article is on major decisions by national courts that were not in the first place regarded as human rights cases at all. In this endeavour, the article aims to be no more than an initial comparative exploration, intended to illustrate a function of human rights that is not normally highlighted, namely its role as an inspirational force towards 'adventurous' judgments. Yet, the judicial potential illustrated here is of great significance, as it may lead to law development inspired by the two principal pillars underpinning the international quest for the realization of human rights: universality and human dignity. The cases we shall discuss are intended to substantiate our hypothesis that notions underlying human rights protection such as universality and human dignity may play a significant part as modern *regulae iuris*. But first a

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4 Ronald Dworkin, *Justice in Robes*, 2006, p. 56.

5 P.N. Bhagwati, *Address to the Caribbean Human Rights Seminar*, Jamaica, September 1989 (unpublished), p. 1.

6 Cf. H.P. Graver, 'Norms and Decisions', 1988 *Scandinavian Studies in Law*, pp. 47-67, p. 60.

deeper understanding is needed of human rights as a moral-political force and the way in which they may function as general principles.

## 2. Human rights as a moral-political force

Human rights reflect a determined effort to protect the dignity of each and every human being against abuse of power. This endeavour is as old as human history. What is relatively new is the global venture for the protection of human dignity through internationally accepted legal standards and generally accessible mechanisms for implementation. That mission got a major impetus with the founding of the United Nations in 1945 and its emphasis on subjective rights pertaining to each and every individual human being. The interests that are accordingly protected by international human rights law are of a *fundamental* character in the sense of being directly linked to basic human dignity. Human rights, then, function as abstract acknowledgements of fundamental freedoms and titles that support people's claims to live in freedom while sustaining their daily livelihoods.<sup>7</sup>

At the root of this international venture lie two grand principles, one of a procedural and the other of a substantive nature: *universality* (and with that inalienability) and *human dignity*. These two elements do not only play a part through their incorporation in positive law or just vis-à-vis the State. Indeed, while the primary focus of the international project for the realization of human rights used to be on ways and means of limiting and governing political power, other institutions have now also come within its range of attention, including the corporate world. Recently, a 'human rights approach' to poverty gained a place on the development agenda. It is precisely in this context that, besides their original protective function as safeguards of individually obtained freedoms and entitlements against the State, human rights have come to acquire a transformative role as well, namely stimulating the incorporation of hitherto unprotected interests in current public-political systems of protection. One such mechanism is the judicial system. The driving force in this respect is not so much positive human rights law – feebly grounded as this may be – but the human rights *idea* as expressed in principles, values and what may perhaps be regarded as an emerging *culture of rights*.<sup>8</sup>

The spiritual source of such a culture lies in the fundamental belief that the protection of human dignity and equality is a responsibility of society at all its different layers and levels. This should generally limit and govern any use of power over human beings. The starting point is the acknowledgement of every person's right to exist. People count and in principle no individual counts more, or less, than another. No one, in other words, is to be excluded from the scope of the typical human rights term '*everyone*'.

The human rights idea has a great and diverse cultural backing. However, human dignity as a fundamental standard of assessment easily gets twisted into a norm applying 'to us but not to all those others'. Thus, the Romans, while grounding their legal system in the rule that freedom is of inestimable value, nevertheless institutionalized slavery. Indeed, human history displays a continuous tendency to justify abuse of power by placing certain individuals and groups regarded as obstacles to the fulfilment of certain ambitions into categories to which the fundamental notions of human dignity and equality would not apply, including the laws and treaties providing

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7 See Bas de Gaay Fortman, 'Human Rights', in: David Clark (ed.), *Elgar Companion on Development Studies*, 2006, pp. 260-266.

8 See Janet L. Hiebert, 'Parliament and the Human Rights Act: Can the JCHR help facilitate a culture of rights?' 2006 *International Journal of Constitutional Law*, no. 1, pp. 1-38. She contrasts such a culture with the 'tyranny of convenience', a phrase taken from a report published in 1994 that expressed 'a growing concern about the protection of civil liberties arising from "a series of policies and decisions in which the rights of individuals have been overridden in the assumed interests of public policy".'

such protection. Consequently, crucial qualifications of human rights such as 'inalienable' and 'universal' tend to meet with a great deal of practical resistance. Human rights implementation, in other words, requires huge efforts. It is in such struggles that the judiciary has to play an obvious part by offering direct protection as well as from an exemplary (awareness-building) perspective.

Actually, judicial law development inspired by human rights principles is quite conspicuous, as will be demonstrated below. Yet, a caveat is appropriate: the cases we are about to review are not intended to be read as harbingers of a worldwide trend, as that is not the point we are trying to make. What we intend to show is the great *potential* that universality and human dignity have in judicial law development as *regulae iuris*. Accordingly, the cases serve to substantiate and illustrate our principal premise that even within the legal realm itself an analysis of the impact of human rights cannot be confined to positive human rights law and its application. As a moral-political force the human rights idea, based on its principal pillars of universality and human dignity, exerts a major influence on processes of judging. The cases examined serve to illustrate that capability. However, before turning to some concrete illustrations of this thesis let us first look at the role principles may play in judicial law development in general.

### 3. The impact of general principles in judicial law development

In processes of judicial decision-making judges are confronted with the need for *substantive* rather than merely procedural legitimization. In this regard those well-established principles of law finding, the *regulae iuris*, have always played a part. They throw light upon concrete cases in which legal rules first have to be determined as applicable and then applied in line with a correct interpretation. As *maximae propositiones* these principles of interpretation rest on everyday common sense; as concise declarations of the demands of justice (*generalia iuris principia*) they are rooted in morality.<sup>9</sup> Often the *regulae* combine elements of both logic and fairness, illustrated, for example by the rule that who carries the burden should also be entitled to the benefits.<sup>10</sup> Generally, their form tends to be short and succinct while their authority rests on past experience in law finding. In the difficult task of attaching legal weight to the different interests involved, the *regulae* assist those charged with law making as well as those responsible for law finding in concrete cases.

Such principles then, exert an immediate appeal to both the heart and the mind. Hence, Baldus argued that a party in a court case that can invoke a *regula iuris* might be considered as being *prima facie* in the right.<sup>11</sup> While this could apparently already be said in the fourteenth century, the *regulae* have maintained their validity through the ages. For example, the stipulation that policies cannot be changed to another person's unfair detriment<sup>12</sup> has acquired a modern translation in the principle of good government, which demands that expectations that have been justifiably raised cannot be ignored. The eminent Dutch jurist Paul Scholten has typified such

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9 An example of legal common sense is the rule that everything that has come into being through certain causes, by the same causes can be dissolved (Omnis res, per quascunque causas nascitur, per easdem dissolvitur): X 5,41,1 (*Corpus Iuris Canonici*: DECRETAL. GREGOR. IX LIB. V, TIT.XLI.,DE REGULIS IURIS, CAP. I ). General principles of justice may be illustrated by the rule that without guilt there can be no punishment. (Sine culpa, nisi subsit causa, non est aliquis puniendus: VIo 5,12, reg. 23 (*Corpus Iuris Canonici*: SEXTI DECRETAL. LIB. V, TIT.XII.,DE REGULIS IURIS, Bonifacius VIII, Regula XXIII).

10 Qui sentit onus, sentire debet commodum, et e contra: Vol 5,12, reg. 55 (*Corpus Iuris Canonici*: SEXTI DECRETAL. LIB. V, TIT.XII.,DE REGULIS IURIS, Bonifacius VIII, Regula LV).

11 See P. Stein, *Regulae Iuris: From Juristic Rules to Legal Maxims*, 1966, p. 154.

12 Papinianus libro tertio quaestionum: 'Nemo potest mutare consilium suum in alterius iniuriam', *Corpus Iuris Civilis*, DE DIVERSIS REGULIS IURIS ANTIQUI, D. 50, 17, 75 In private law a similar rule is 'Venire contra factum proprium'. From a comparative perspective one might also refer here to the principle of *Estoppel*.

general principles of law as the desk light that may shine so unmistakably upon the case that what the ceiling light of statute book and precedent could not reveal suddenly becomes clearly visible.<sup>13</sup>

Some *regulae* are quite precise, particularly those that pertain to due process. As examples may serve the well-known rule that not just one party, but both parties should be heard (*audi et alteram partem*), and the rule that no one can be a judge in his/her own case (*nemo iudex in sua propria causa*). A rule of an obvious moral-political nature that is common to many more legal questions than just contract is the requirement of good faith (*bona fides*). Other *regulae* are of a highly general character, e.g. the exclamation that freedom is of inestimable value (*libertas inaestimabilis res est*), a norm obviously also underlying human rights.<sup>14</sup> New principles follow particularly from the global human rights project. One could think here of the value of life *per se*, but also of norms underlying rights of a collective nature such as the right to self-determination, the right to development and the right to a healthy environment.

While most principles originate in Roman law, many have been incorporated in the *Corpus Iuris Canonici* as well. Yet, legal incorporation in recognized law books such as Dinus' treatise on the Rules of the Sext is not the essence. What is important is not the formal source of a general rule of law, but its immediate appeal to the legal mind and the moral heart. Principally their role lies in the need for legitimacy rather than pure legality. It is that evident 'moral-political' (Dworkin) connection to formal and substantive justice which can play such a significant part in judicial and administrative decision making. As 'the general principles of law recognized by civilized nations' the *regulae iuris* have been acknowledged as a source of law finding for the International Court of Justice (Article 38(1) (c) of the ICJ Statute). Apart from this formalized role, however, they tend to serve as guidelines in adjudication in general.

Meanwhile, 'strict and complete legalism' as a way of confronting judicial activism has developed into a rather rare attitude, prevailing particularly in the United States with Supreme Court justices Scalia and Thomas as its major exponents. (Their 'textualism' is based on a continuous attempt to trace the original 'ordinary' meaning of statutory texts.) Yet, as recently concluded in a textbook, the 'belief that judges do not make law is hopelessly out of date. As Lord Reid famously said as long ago as 1972: 'We do not believe in fairy-tales anymore'.<sup>15</sup> Indeed, as Lokin put it rather bluntly, the text of the law is no more than an empty covering, which is to receive its substance from the judge.<sup>16</sup>

It was Scholten again who introduced the term *law finding*, to be understood as the creative activity performed to unveil the hidden treasures of the law, covered by texts, principles and the art of interpretation. Lokin criticizes the term precisely from an anti-legalist perspective: law is being created rather than merely found. Against Scholten who has stated that every law *could* require interpretation, he quotes Ulpianus: *Quamvis sit manifestissimum edictum praetoris*,

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13 See P. Scholten, *Mr. C. Asser's Handleiding tot de beoefening van het Nederlandsch Burgerlijk Recht. Algemeen Deel*, 1931, pp. 83 *et seq.*

14 Paulus libro secundo ad edictum, *Corpus Iuris Civilis*, DE DIVERSIS REGULIS IURIS ANTIQUI, D. 50, 17, 106. See also 122: Gaius libro quinto ad edictum provinciale: 'Libertas omnibus rebus favorabilior est.' A modern source is Ho Chi Minh: 'Rien n'est plus précieux que la Liberté et l'Indépendance'.

15 E.W. Thomas, *The Judicial Process. Realism, Pragmatism, Practical Reasoning and Principles*, 2005.

16 J.H.A. Lokin, *Tekst en uitleg. Opstellen over codificatie en interpretatie naar aanleiding van de invoering van het nieuwe Burgerlijk Wetboek*, 1994, p. 30.

*attamen non est negligenda interpretatio eius*,<sup>17</sup> implying that all laws *do* require interpretation, including those whose phrasing is unequivocal.

A famous case in the Netherlands displaying clear signs of law development by the judiciary is *Lindebaum v. Cohen*.<sup>18</sup> The legal question at issue in this case concerned the interpretation of unlawful conduct (*iniuria*) as a basis for extra-contractual damage compensation. In this early twentieth-century judgment the *Hoge Raad* (the Netherlands Supreme Court) extended its interpretation of a tort beyond what had already been legally defined as unlawful, to 'general standards of due care'. Thus, the law of 'torts', within which each distinct tort had been legally defined, became a law of tort that could in principle be invoked by anyone affected by unfairly inflicted damage: an evident example of judge-created law. Indeed, the case clearly illustrates how the range of legal protection was extended by recognizing legitimate interests that had hitherto gone judicially unprotected. This, as will be further argued below, is the juridical core of the human rights idea: extending legal protection to all whose interests merit protection from a moral-political human dignity perspective.

In the art of law *creation* – as distinct from law *making*, a term pertaining above all to legislators and their staff – it was in particular Lord Denning's judgments which received the qualification 'adventurous'.<sup>19</sup> His focus was on 'the just result' while asserting 'that he would search the case books, high and low, until he found the precedent or the principle that would achieve justice'.<sup>20</sup> Notably, finding justice in a concrete case involves more than just equity in respect of the parties: the public-political community must be able to live with it as well. Judicial decisions, in other words, should not just be legal in the sense that they are based on the law,<sup>21</sup> but also *legitimate*. Legitimacy is a normative concept referring to decisions based on the right institutions and principles, due process and a socio-politically acceptable outcome.<sup>22</sup> Accordingly, the term adventurous is used here as an affirmative label. It applies to judgments transcending 'the law' (*ius positivum*) as hitherto understood, from a civilizational perspective. The latter phrase is seen here as being linked to structural progress in the implementation of human rights.

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17 *Ibid.*, pp. 26-27 However, the view that 'rules are rules' still breaks into political discussions every now and then, as in the case of the Dutch Minister of Immigration who in Parliament appealed to this maxim in the case of an MP who, she stated, by lying about her name and birth date had *ipso facto* lost her nationality (May 16, 2006). 'I simply conclude', the Minister said, apparently not aware that by 'simply concluding' she created legal consequences that without such a deduction from the facts of the case would not have come into being. Indeed, the Minister could have chosen to ignore the history of Ms Hirsi Ali's acquisition of her Dutch citizenship in view of the legal principle of *estoppel* (*venire contra factum proprium* or in the Dutch legal context 'rechtsverwerking') since an organ of the State had already twice endorsed her credentials as a member of the States-General.

18 HR, 31 January 1919, *NJ* 1919/161, W. 10365.

19 Cf. Lord Phillips of Sudbury in The House of Lords, 20 December 2005: '... Lord Denning never got to the House of Lords ... because he was too *adventurous* for their Lordships' [my italics, F]. (By interruption he was corrected by Lord Goodhart: 'Lord Denning did get to the House of Lords and then he went down a step to become Master of the Rolls at the Court of Appeal'), Lords Hansard 2005, Column GC 262. In his autobiography Denning himself explains this step down as follows: 'I was too often in a minority. In the Lords it is no good to dissent. In the Court of Appeal it is some good.' (Lord Denning, *The Discipline of Law*, 1979, p. 287.) Denning's apparent strategy was to confront the Law Lords with innovative judgments from a lower instance.

20 Michael Kirby, Justice of the High Court of Australia, 'Denning: Bold Spirit of the Law', *The Australian Financial Review*, 19 March 1999.

21 Naturally, Denning himself did not deny the legality principle. As he put it in a case concerning law abidance by the Trade Unions: 'The law should be obeyed. Even by the powerful. Even by the Trade Unions. We sit here to carry out the law. To see that the law is obeyed. And that we will do. A subject cannot disregard the law with impunity. To every subject in this land, no matter how powerful, I would use Thomas Fuller's words over three hundred years ago 'Be you ever so high, the law is above you'.' (Quoted by Michael Kirby in a paper of 1999 entitled *Lord Denning and Judicial Activism*, accessed on the internet at 7/31/2006: <http://lawfoundation.net.au/ljf/app/&id=04FA7A2F1016634ACA2571A40022191D>).

22 Cf. Berma Klein Goldewijk and Bas de Gaay Fortman, *Where Needs Meet Rights. Economic, Social and Cultural Rights in a New Perspective*, 1999, p. 119. Actually, this corresponds to what Dworkin has termed 'integrity', composed of *fairness*: 'the right structure for the political system, the structure that distributes influence over political decisions in the right way', *due process*: 'the right procedures for enforcing the rules and regulations the system produced', and *justice*: 'the right distribution of goods, opportunities and other resources.' (Ronald Dworkin, *Law's Empire*, 1986, p. 404).

When Denning retired (in 1982) the Lord Chancellor referred to a time in which the law of England had moved from a phase of quiescence to a period of growth and creativity.<sup>23</sup> For ‘growth and creativity’ we here use the term ‘law development’, given that the notion of development already incorporates this general connotation of structural progress. It is, indeed, in a context of judicial law development that the present comparative analysis sets out to explore the role of human rights. After reviewing various cases we shall attempt to draw some conclusions as to the ways in which human rights may play their inspirational role.

In the perusal of the various cases, a distinction may be made between procedure and substance. First we shall look at cases in which the realm of protection was extended in such a way that *universally* adopted norms and standards which were conventionally supposed to be inapplicable, were henceforth considered relevant. The second category of cases were a manifestation of judicial legal development in the actual application of universal norms and principles in terms of judicially activated freedoms and entitlements. Here the core principle was human dignity.

#### **4. Universality: maintaining and incorporating international protective sources**

Suppose settled law includes nothing to grant a particular remedy, this does not necessarily mean that the remedy is unavailable, but just that it has not succeeded in the past. Therefore it will be necessary for the judge to embrace a morality of some sort to fill the gap.<sup>24</sup> The question then is where to look for sources.

The *Fairchild* case<sup>25</sup> in the *United Kingdom* is particularly remarkable as regards the ways and means in which the Law Lords struggled to find justice in a situation in which positive law impeded a remedy that would compensate victims of wrongful conduct. This was due to the established criterion of causation. The injustice that they wished to avoid had to do with workers who had contracted mesothelioma after being wrongfully exposed to significant quantities of asbestos dust at different times by more than one employer or occupier of premises. Consequently, the claimant of damage compensation for a worker who had contracted the disease could not establish ‘on the balance of probabilities when it was he inhaled the asbestos fibre, or fibres, which caused a mesothelial cell in his pleura to become malignant’, as the Court of Appeal had noted. The House of Lords overturned that decision, ruling that the worker or his relatives could sue any of those whose duty it had been to protect him, notwithstanding that he could not prove which exposure had caused the disease. Considerations on the part of the Law Lords included terms such as ‘recognising and righting wrongful conduct’, and ‘a broader view of causation’. ‘Any other outcome’, Lord Nicholls observed, ‘would be deeply offensive to instinctive notions of what justice requires and fairness demands.’ Yet, the right outcome had to be argued in terms of established principles and procedures.

Landmarking as *Fairchild* may be in respect of the right to health and responsibility for occupational disease as well as in its discussion of causation, it is particularly remarkable in its efforts towards law finding. From a truly universal perspective the Law Lords reviewed case-law from, besides common law sources, Austria, Germany, Greece, Italy, France, the Netherlands, Spain and Switzerland, and they noted that:

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23 Lord Hailsham of St Marylebone in a speech reported in *The Times*, 31 July 1982, p. 16.

24 See Ronald Dworkin, *Justice in Robes*, 2006.

25 *Fairchild v. Glenhaven Funeral Services Ltd and Others*, [2002] UKHL22; [2003] 1 AC 32.

'The problem of attributing legal responsibility where a victim has suffered a legal wrong but cannot show which of several possible candidates (all in breach of duty) is the culprit who has caused him harm is one that has vexed jurists in many parts of the world for many years ... The texts show that, in a certain form, problems with unidentifiable wrongdoers had begun to exercise the minds of Roman jurists not later than the first century BC ... Julian considers whether someone "kills" a slave for these purposes if he mortally wounds him and later someone else attacks the slave who dies more quickly as a result. Julian takes the view, which was probably not shared by all the jurists, that both persons who attacked the slave should be liable for "killing" him.'<sup>26</sup>

Even among jurists this type of openness to universality in law finding is not generally accepted, closely connected as it is to judicial activism. When in *Lawrence v. Texas*,<sup>27</sup> for example, the US Supreme Court engaged in a certain amount of comparative law finding in order to overturn its previous holding in *Bowers v. Hardwick* that had upheld a law prohibiting sodomy in Georgia, Justice Scalia in his dissent depicted 'these foreign views' as 'meaningless dicta'. Yet, at a time when globalization amongst other things also affects the law<sup>28</sup> the comparative method is unquestionably gaining ground.

Another issue with respect to the sources of judicial protection for individuals whose legal position appears to be weak is the extension of local sources of law to incorporate international law. We shall first look at a case where international law had already become part of positive law and then at cases where international law had not yet been locally incorporated.

An example of a case in which an effective appeal was made for the extension of legal sources for judicial protection of *Dutch* citizens to incorporate international human rights law, also in the case of newly ratified treaties, was the *Cruise missiles* case.<sup>29</sup> In fact, the case was only decided in the highest national instance after the matter had already been settled as to substance: thanks to new agreements between the two superpowers following Gorbachev's *novoye mushleenye* (new thinking) American cruise missiles were no longer to be stationed in the Netherlands. Yet, from a legal point of view the issue remained crucial: are the Dutch courts of law free to adjudicate possible incompatibilities between new treaties – in this case a bilateral treaty between the Netherlands and the United States of America to place American cruise missiles on Dutch territory – and already established norms under international treaties previously ratified? The Court of Appeal had interpreted Article 94 of the Dutch Constitution, which declares statutory regulations inapplicable if they go against 'provisions of treaties that are binding on all persons...', in conjunction with Article 120, which prohibits the judicial review of the constitutionality of Acts of Parliament and ratified treaties. Given that it was therefore, according to the Court of Appeal, Parliament (the States-General) that had the final say as to the constitutionality of both statutory law and treaties, the question of whether or not a treaty had to be considered incompatible with previous treaty obligations was also a matter for the exclusive jurisdiction of Parliament. Consistent as the Court of Appeal's analogous reasoning may seem, the Supreme Court disagreed and held that because the judiciary is constitutionally obliged to consider ratified treaties as the primary source of law, it also has to assess whether Acts of Parliament meet the test of estab-

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26 For an excellent summary of the case and what it involved see, for example, Laurie Kazan-Allen's compilation in 2002 *British Asbestos Newsletter*, no. 47.

27 *Lawrence v. Texas* 539 US 558 (2003).

28 Cf. Jean-Bernard Auby, *La globalisation, l'état et le droit*, 2003.

29 HR 10 November 1989, no. 13698, *NJ* 1991/248 annotated by P.H. Kooijmans.

lished treaty law. Yet, a legal consequence of this view would be that, due to the simple fact that a State action is subsumed under a treaty rather than an Act of Parliament, citizens may be deprived of rights whose protection is entrenched in international legal norms. This was unacceptable. As to the practical effects of this consideration, however, the Supreme Court emphasized that it did not necessarily imply that already established international law would automatically prevail; in case of conflicting treaty norms the relevant court would have to come to a reasoned decision. The Supreme Court further considered that, given that in the case under review a conflicting norm of international law was not considered to be at issue, further jurisprudence on how such incompatibilities would have to be resolved could be disregarded.

Nevertheless, this decision has to be acknowledged as being of enormous jurisdictional significance. If, for example, the Supreme Court had held that the *lex posterior*<sup>30</sup> rule simply applied, this would have implied that established norms of international law could at all times be overruled by new bilateral treaty rules. Now, however, whenever doubts arise as to the compatibility of a new treaty with already existing treaty law, Parliament has to consider a likely judicial review. Doubtless, the human rights drive towards the inalienability of fundamental protection for everyone played a significant part in this bold judgment.<sup>31</sup>

In the *United States* an executive prerogative as against a possible role for the judiciary in issues of war and peace is part of established legal thinking and case-law. In the recent *Hamdan* case<sup>32</sup> the issue was not so much whether the scope of legal protection had to be extended, but that its erosion had to be halted. Here the essential query concerned the extent and scope of the executive power which is waging a ‘war on terror’ unconstrained by ‘a strategy of the weak using international fora, judicial processes and terror.’<sup>33</sup> The nature of the US separation of powers doctrine came into question, with the Court having to decide whether the President was exceeding his authority by the manner in which detainees at Guantánamo Bay are being denied certain due process rights guaranteed under the Constitution. The Constitution allows for broad wartime powers for the executive branch, but the President can more easily claim moral legitimacy if he has the express support of the legislative.

Notably, Salim Hamdan is one out of only fourteen Guantánamo detainees who have been selected for trial; the others – numbering over four hundred – have never been charged at all.<sup>34</sup> Hamdan himself has already been imprisoned at Guantánamo Bay for over four years, and so had already filed his appeals based on writs for *Mandamus* and *Habeas Corpus* injunctions, prior to the enactment of the Detainee Treatment Act of 2005 (DTA), which effectively strips all US Courts of their jurisdiction to hear requests from detainees for such injunctions. Consequently his case could still become the judicial test for such legislation. The question was whether the only offence that he had been charged with (conspiracy to commit war crimes, to be tried by a

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30 *Lex posterior derogat legi priori*.

31 Koopmans has expressed a fear that *Cruise missiles* were to disturb the trias politica as entrenched in the Dutch democratic political and legal order (T. Koopmans, ‘Nabeschouwing’, in: G.J. Wiarda, *3 typen van rechtsvinding. Bewerkt en van een nabeschouwing voorzien door T. Koopmans*, 1999, pp. 137 *et seq.*). He overlooks, however, the ratio of *Cruise missiles*, viz. the necessity of preserving protection of Dutch citizens by standards incorporated in internationally agreed treaties. Universality entails of course that tensions between national politics and international law are more likely to come to the fore. Indeed, the trias politica should not be seen as a way of avoiding occasional tensions between the legislative, the executive and the judiciary.

32 *Hamdan v. Rumsfeld, et al.* # 05-184, decided on June 29, 2006. The case has yet to be formally reported. Link to decision: <http://www.supremecourtus.gov/opinions/05pdf/05-184.pdf>

33 From the *Pentagon's 2005 National Defense Strategy*, as quoted by David Cole, ‘Why the Court Said No’, *New York Review of Books*, 10 August 2006, p. 43.

34 For such facts and other crucial information and reflection around the *Hamdan* case see David Cole, *ibid.*

special military commission), was to be regarded as sufficient to deprive him of due process rights, such as the right to legal counsel and access to evidence against him.

At issue, then, was whether the DTA, which, the Court's majority conceded, does strip courts of jurisdiction for future claims, also strips them of jurisdiction for writs already pending. If Justice Scalia had prevailed on this issue, the Court would have had to announce that it did not have standing to hear the case (*stare decisis*). However, the majority found that the ambiguous language in which the DTA is phrased allowed them to maintain the power of judicial review for pending detainee cases, thus giving them the authority to disapprove of the executive's methods for dealing with detainee litigation:

'The Government's more general suggestion that Congress can have had no good reason for preserving habeas jurisdiction over cases that had been brought by detainees prior to enactment of the DTA not only is belied by the legislative history, (...), but is otherwise without merit. There is nothing absurd about a scheme under which pending habeas actions – particularly those, like this one, that challenge the very legitimacy of the tribunals whose judgments Congress would like to have reviewed – are preserved, and more routine challenges to final decisions rendered by those tribunals are carefully channelled to a particular court and through a particular lens of review.' (p. 27)

It is such reasoning that renders *Hamdan* a shining example of an active judiciary, using all jurisprudential tools at its disposal in an attempt to clarify the importance of rights and procedures to maintain legal protection of individuals.<sup>35</sup> Writing the majority opinion Justice Stevens, after consulting international law, finally ruled that the arguments presented by the executive were untenable and that Hamdan should not be tried before the military commissions created by the Bush Administration. Furthermore, it was concluded that the commissions themselves are invalid as they violate the US Military Code of Justice as well as the Geneva Convention:

'We have assumed, as we must, that the allegations made in the Government's charge against Hamdan are true. We have assumed, moreover, the truth of the message implicit in that charge – viz., that Hamdan is a dangerous individual whose beliefs, if acted upon, would cause great harm and even death to innocent civilians, and who would act upon those beliefs if given the opportunity. It bears emphasizing that Hamdan does not challenge, and we do not today address, the Government's power to detain him for the duration of active hostilities in order to prevent such harm. But in undertaking to try Hamdan and subject him to criminal punishment, *the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction.*' (p. 80)

Underlying the phrase put in italics [by me, F] one senses an enormous reluctance on the part of the United States Supreme Court to abandon norms for legal protection that have become an

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35 While the government attempted to rely on a ruling in which the Court abstained from hearing a case due to judicial restraint, as military proceedings were already underway, the Supreme Court in *Hamdan* instead chose to rely on the holding from *In Re Quirin* which dealt with German saboteurs who had been captured in the United States. While the President commissioned a military tribunal to try them, they appealed to US civilian courts. The Supreme Court chose to hear that case for the following reasons:

'Far from abstaining pending the conclusion of military proceedings, which were ongoing, we convened a special Term to hear the case and expedited our review. That course of action was warranted, we explained, [I]n view of the public importance of the questions raised by [the cases] and of the duty which rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty, and because in our opinion the public interest required that we consider and decide those questions without any avoidable delay.' *Supra* note 32, p. 24.

established result of a legal civilizational process, and thus its unwillingness to go along with the executive in making us-them distinctions such as the one implied earlier in the phrase ‘enemy combatants’.<sup>36</sup> Even though the essence of *Hamdan* has meanwhile been overruled by the US Congress in passing the Military Commissions Act of 2006 (MCA), the case still stands as a judicial tribute to the rule of law. Summing up *Hamdan*, Cole concludes:

‘The fact that the Court decided the case at all in the face of Congress’s efforts to strip the Court of jurisdiction is remarkable in itself. That it then broke away from its history of judicial deference to security claims in wartime to rule against the President, not even pausing at the argument that the decisions of the commander in chief are “binding on the courts”, suggests just how troubled the Court’s majority was by the President’s assertion of unilateral executive power. That the Court relied so centrally on international law in its reasoning, however, is what makes the decision truly momentous.’<sup>37</sup>

Even more striking than the mere references to ‘international law’, ‘individual liberties’ and ‘the rule of law’ is the gist of the Court’s judgment. Without explicitly mentioning international human rights standards, it is obvious that values and notions behind these such as *universality*, *inalienability* and *everyone* are alive in the majority’s hearts and minds. One is indeed reminded of Justice Learned Hand’s well known expression of faith in people’s hearts and minds. ‘Liberty’, he said, ‘lies in the hearts of men and women. When it dies there, no constitution, no law, no court can save it. While it lies there, it needs no constitution, no law, no court to save it.’ Yet, we should like to add, if crucial values of a moral-political nature lie in the hearts of judges too, so much the better.

For a long time already, the Supreme Court of *India* has been known for its judicial activism, which has led it to indeed ‘becom[e] the Supreme Court for Indians.’<sup>38</sup> Human rights evidently function as a motivational force as Justice Bhagwati, for one, has frequently underlined. Notably, in a speech at a human rights seminar in the Caribbean in 1989 he already cited several cases in which human rights had been positivized by the Indian judiciary, for example, by establishing free legal aid for criminal defendants through an interpretation of the Indian Constitution in conjunction with Article 2 (3)(a) taken together with Article 14 (3)(d) of the United Nations Covenant on Civil and Political Rights.<sup>39</sup> The case we shall now review, *Shri D.K. Basu v. State of West Bengal*,<sup>40</sup> stemmed from the acknowledged abuse of power structures in the Indian Criminal Law system in general and the mistreatment or torture of detainees while in police custody in particular. The question explicitly asked of the Court concerned the remedy for such abuses. What could be ‘just’ compensation when one has been tortured or, sadly, died at the hands of the police? No more was therefore required of the judiciary than simply interpreting the term ‘compensation’. However, the Court chose also to address the underlying issue of a person’s

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36 In the *Hamdi* case of 2004 in which it had been held that US citizens detained as ‘enemy combatants’ had no right to a hearing, the Court had insisted that:

‘whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.’ [*Hamdi v. Rumsfeld*, 542 U.S. 507 (2004)]

37 Cole, *supra* note 33, p. 42.

38 Upendra Baxi, ‘an eminent jurist’, as quoted by P.N. Bhagwati, ‘Judicial activism and social action in Asia’, in: Jose Ventura Aspiras (ed.), *Law as Weapon. Alternative Approaches to Distributive Justice*, 1990, p. 111.

39 See note 5, *supra*.

40 *Shri D.K. Basu v. State of West Bengal*, 1996(9), Scale 298.

rights when arrested. While other jurisdictions might have narrowly construed the task and decided only on the issue of compensation that had been submitted to their jurisdiction,<sup>41</sup> here instead we see the judiciary tackling the underlying issues, and ultimately issuing reforms for the whole of the nation with the explicit purpose of ensuring the protection of rights, which ultimately ensures the legitimacy of the entire endeavour.

The justification for that extensive ruling was to be found in the commonality of the problem across the states of India, as well as in the fundamental importance of protecting basic human dignity. The Court acknowledged the Universal Declaration of Human Rights (UDHR) as well as India's own constitution, persuasively stating:

'Fundamental rights occupy a place of pride in the Indian Constitution. Article 21 provides "no person shall be deprived of his life or personal liberty except according to procedure established by law". Personal liberty thus, is a sacred and cherished right under the Constitution. The expression "life or personal liberty" has been held to include the right to live with human dignity and thus, it would also include within itself a guarantee, against torture and assault by the State or its functionaries.' (Paragraph 17)...

'The increasing incidence of torture and death in custody has assumed such alarming proportions that it is affecting the creditability of the Rule of Law and the administration of the criminal justice system. The community rightly feels perturbed. Society's cry for justice becomes louder.' (Paragraph 18).

Before simply concluding that because human rights have been affirmatively adopted in the Indian Constitution this judgment merely reflects conventional judicial interpretation, we have to pay attention to the compelling counter-argument of the State that through its police functionaries it is faced with the need to obtain useful information during interrogation after arrest; this, indeed, could prevent future criminal activity. Put differently, a balance has to be struck between on the one hand the personal rights and liberties of an arrested person and on the other hand the interest of society as a whole in the maintenance of law and order. The Court responded as follows:

'Any form of torture or cruel, inhuman or degrading treatment would fall within the inhibition of Article 21 of the Constitution whether it occurs during investigation, interrogation or otherwise. If the functionaries of the Government become lawbreakers, it is bound to breed contempt for law and would encourage lawlessness and every man would have the tendency to become law unto himself thereby leading to anarchism. No civilised national can permit that to happen. Does a citizen *shed off* his fundamental right to life, the moment a policeman arrests him? Can the right to life of a citizen be put in *abeyance* on his arrest? These questions touch the spinal cord of human rights jurisprudence. The answer, indeed, has to be an emphatic 'No'. The precious right guaranteed by Article 21 of the Constitution of India cannot be denied to convicts, under trials, detainees and other prisoners in custody except according

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41 Take, for example, the way in which Lord Denning was rebuked by Viscount Simonds when in his first (turning out to be dissenting) opinion in the House of Lords – in 1958 – he had argued that it would be unsatisfactory not to consider 'some questions and authorities which were not mentioned by counsel':

'My Lords, I must add that, since writing this opinion, I have had the privilege of reading the opinion which my noble and learned friend, Lord Denning, is about to deliver. It is right that I should say that I must not be taken as assenting to his views upon a number of questions and authorities in regard to which the House has not had the benefit of the arguments of counsel or of the judgements of the courts below.' (Denning, *supra* note 19, p. 288)

to the procedure established by law by placing such reasonable restrictions as are permitted by law.’ (Paragraph 22)

Although, therefore, the question presented to the judiciary had merely been what financial remedies might exist for victims of police mistreatment, the Court chose to address the underlying problem, and did so by formulating an awe-inspiring list of new requirements. No less than eleven procedural changes were handed down as obligations for every police department in the nation. These ranged from obliging arresting officers to wear clear insignia of identification to requiring all information from an arrest to be prominently displayed within twelve hours of the arrest. The changes were presented as *requirements*, with punitive measures attached in case of non-compliance. Even more astounding was that the scope of application of the Court’s ruling extended beyond the Police Department, applying these new procedures to all other governmental agencies with power to arrest or detain. This indeed was a clear example of judicial law creation inspired by the view that the principles of human rights should trump any *lex particularis*, thus enabling the Court to remedy the underlying problems which gave rise to the specific instance brought before it.

Obviously, judicial activism in the incorporation of human rights in positive law is possible only where the judiciary is independent, creative and committed to human rights. But even then these rights will not lead to truly functioning freedoms and entitlements if the law does not reign supreme. It turned out to be difficult, for example, to implement the Indian Supreme Court’s condemnations of bondage in outlying areas in which feudal landlords rather than the law were in control. Thus, the dialectics of law and power are likely to pose even more serious challenges than just the dialectics of human rights and ‘settled’ law.<sup>42</sup>

## **5. Human dignity: concrete recognition of freedoms and entitlements hitherto unacknowledged**

While rights are a manifestation of the legal protection of interests, human rights are intended to protect fundamental human interests, *viz.* those that directly refer to basic human dignity. Although an elusive concept<sup>43</sup> by the fact that it is used in different senses depending on text and context, human dignity is widely recognized as the primary principle underlying human rights. It refers to the inherent worth of each and every human being, simply as an innate consequence of human existence whether or not the individual person herself is convinced of that.<sup>44</sup> *Inherent* means that human dignity is a matter of being rather than having, and implies therefore that it cannot be taken away. In fact, as argued by Justice Brennan, ‘even the vilest criminal remains a human being possessed of common human dignity’.<sup>45</sup> Yet, although inalienable, human dignity can be violated, by the individual himself – the drunkard, for example – as well as by others. (In case of the vilest crimes both occur at the same time; a rapist, for instance, violates the dignity of both his victim and himself.)

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42 See Bas de Gaay Fortman, *Laborious Law*, 2002, pp. 3 *et seq.*

43 Ronald Dworkin, *Life’s Dominion*, 1993, p. 233.

44 Cf. Matthijs de Blois, ‘Self-Determination or Human Dignity: The Core Principle of Human Rights’, in: Mielle Bulterman, Aart Hendriks and Jaqueline Smith (eds.), *To Baehr in Our Minds: Essays on Human Rights from the Heart of the Netherlands*, 1998, p. 531.

45 Quoted by Stephen J. Wermiel, ‘Law and Human Dignity: the Judicial Soul of Justice Brennan’, 1998 *William & Mary Bill of Rights Journal*, no. 1, p. 232. Not surprisingly Justice Brennan regarded the death penalty as ‘wholly inconsistent with the constitutional principle of human dignity’.

Crucial in our context of judicial law development is that human dignity presupposes certain freedoms and entitlements. Fundamental freedoms are presumed to be protected by civil and political rights, whereas basic entitlements relate to the protection of claims essential to the sustenance of daily livelihood. Problematic in regard to both categories is that they are declared rather than conclusive in nature. For this reason, while an entitlement to matters such as food, shelter, health and education has generally been acknowledged through the declaration of certain universal rights, it still depends on concrete conditions what these entail. In other words, the freedoms and entitlements of which it is assumed that they are protected often still have to be acquired in terms of actual liberties and real access to resources.<sup>46</sup> Yet, in such struggles to realize affirmative rights, the judiciary still has a part to play. In this respect too, the Indian case discussed above serves as a good example. The cases reviewed below give some indication of concrete consequences of the general recognition of human dignity as a principle of law.

An example of an *Indian* judgment with substantial implications in respect of people's entitlement positions is *F.K. Hussain v. Union of India*.<sup>47</sup> This case was a response to a writ petition to stop the mechanical pumping of potent ground water from the coral Islands of Lakshadweep as this would upset the fresh water equilibrium leading to salinity in the available water resources. The findings of the Judge, Chettur Sankaran Nair, of the High Court of Kerala, indicated a strong disposition to preserve ground water as a natural resource, protected by the human right to life. The writ was brought under Article 21 of the Indian Constitution already quoted above: 'no person shall be deprived of his life or personal liberty except according to procedure established by law.'

The Judge first established that this was a new type of conflict, where there were two competing principles: the need for development and the necessity of preserving limited resources. Scientific research seemed to maintain deferential power, and the competing claims both relied on findings. The Court appeared to favour the research indicating the need to preserve the limited resource.

'The Executive Government has onerous responsibilities in the matter of providing civic amenities. The Technocrat too has his role to play, in view of the impact the matter has on environmental and hydro geological concerns. There must be an effective and wholesome interdisciplinary interaction. At once, the administrative agency cannot be permitted to function in such a manner as to make inroads into the fundamental right under Article 21. The right to life is much more than the right to animal existence and its attributes are manifold, a life itself. A prioritisation of human needs as a new value system has been recognised in these areas. The right to sweet water, and the right to free air, are attributes of the right to life, for these are the basic elements that sustain life itself.'

The language shows a strong preference to maintain a right to sweet and hence potable water, in the context presented as formulated here to be seen as a collective right.<sup>48</sup> Since development and the pressure on resources it inherently creates are also compelling interests, one could indeed speak of significant development of the law by the judiciary. Human rights, we repeat, must be not only be regarded as purely subjective rights – to be enforced through claims based on

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<sup>46</sup> *Ibid.*

<sup>47</sup> *F.K. Hussain v. Union of India* O.P. 2741/1988 (1990.02.26).

<sup>48</sup> In terms of individual claims I would speak here of an entitlement, protected particularly by the right to health and the right to a decent living standard. See B. de Gaay Fortman, 'Safe Water: An Enquiry Into Water Entitlements and Human Rights', in: J.W. de Visser and C. Mbazira (eds.), *Water Delivery: Public or Private?*, Utrecht: Utrecht University (NILOS) 2006, pp.1-29.

entitlements deriving from them – but also as general principles of justice. In the latter meaning they may play a part in adjudication too, not as a direct basis for the acceptance of certain claims but to shed light upon a case, in the same way in which the old *regulae iuris* perform that function. Let us take as an example, the damage suffered by small fishermen when, in the name of development, big trawlers are introduced that go into the shallow waters, destroying the breeding grounds for the fish that forms the basis of their livelihoods. It is true that in contentious action these people may fail to get recognition of claims based on a subjective ‘right to development’, but in concrete litigation procedures the right to development may well be invoked in order to determine liability for a tort.<sup>49</sup>

Remarkably, while the United States of America has not ratified the United Nations Convention on Economic, Social and Cultural Rights (UNCESCR), let alone incorporated the relevant rights into its national legal system,<sup>50</sup> in the American jurisdiction the concept of social rights appears to play its part too. In the Californian case of *Boehm v. Superior Court*, for example,<sup>51</sup> the issue was whether a county administration could reduce benefits to those on social welfare just like that. The case was a response to a writ of mandamus presented by indigent petitioners in Merced County, California. Even after an initial ruling that the reductions were arbitrary and capricious, the County Administration had reduced the General Assistance welfare payments (GA) based on two studies that merely assessed the payments in light of subsistence needs for food and shelter. This reduction in benefits was found to be arbitrary and capricious as the studies failed to address other basic needs such as clothing, transportation, and access to medical treatment. The Court’s opinion, written by Judge Hamlin, mandates that the GA code should be liberally construed to ensure the protection of basic human dignity:

‘The evolution of public welfare has been from public ‘charity’ toward social justice. Courts should facilitate such development by an enlightened and liberal interpretation of all welfare laws ...’ (pp. 500-501).

‘Indeed, it defies common sense and all notions of human dignity to exclude from minimum subsistence allowances for clothing, transportation and medical care. Such allowances are essential and necessary to ‘encourage [self-respect and] self-reliance’ ... in a ‘humane’ manner consistent with modern standards. (See *Robbins v. Superior Court*, *supra*, 38 Cal.3d at p. 210; §§ 10000, 17000.) Without a clothing allowance, recipients must wear tattered clothing and worn out shoes. The lack of adequate and decent clothing and essential transportation is damaging both to recipients’ self-respect and their ability to obtain employment. Finally, to leave recipients without minimum medical assistance is inhumane and shocking to the conscience.’ (p. 502)

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49 In that way collective rights, too, can play their part. Thus, as an enlightening principle the right to a healthy environment, for example, or the right to development, may well determine a court case. See below, *Gbemre*, p. 41.

The right to development is based on UN General Assembly Resolution 41/128 of 4 December 1986. It stipulates, among other things, the duty of States to adopt development policies that are aimed at ‘free and meaningful participation in development’ and ‘the fair distribution of benefits’ resulting from development. Through a certain period of regular practice, supported by *opinio iuris*, principles formulated by the General Assembly may acquire the status of general principles of law. Another example is sovereignty over national resources. See Nico Schrijver, *Sovereignty over National Resources. Balancing Rights and Duties*, 1997, pp. 371 *et seq.*

50 Whereas in a country like the Netherlands ratified treaties have an immediate direct effect (remember the *Cruise missiles* case discussed above), in other countries, among which generally those with common law systems national incorporating legislation is required for treaties to have effect. However, even in those systems the judiciary sometimes takes the ratified treaty into account in its interpretation.

51 *Boehm v. Superior Court*, 178 Cal. App. 3d 494 (1986).

This set of considerations is preceded by a reference to Article 25 of the UDHR (right to a decent living standard), although in the US the legal stature of the UDHR tends to be generally in doubt while the articles on ESC rights are definitely not considered *ius cogens*.

The opinion does identify the dilemma of limited resources of the government versus the need to provide for the deprived. Judge Hamlin disposes of this contention in favour of the State's role in providing for the poor, by liberally construing the laws established to provide for the poor: 'budgetary constraints cannot justify excluding from minimum subsistence grants to the indigent allowance for each of the basic necessities of life: food, housing (including utilities), clothing, transportation, and medical care.' (p. 503)

The case resulted in retroactive pay for the petitioners, and a remand demanding the lower court to use a study that incorporated the extended list of necessary benefits. The question of whether the case should become a *class action suit* was addressed as well, to ensure justice for all those affected by the GA reduction. Notably, after this case the relevant legislature changed the law to reflect the necessities of life.

The strongest legal foundation for economic, social and cultural rights in our world today is the *South African Constitution*. Consequently, much more straightforwardly than elsewhere, cases in that country concerning affirmative rights will obtain a 'human rights' label.<sup>52</sup> Yet, obviously such constitutional incorporation does not automatically create the relevant entitlements for everyone, transforming have-nots into haves in a flash. Indeed, even in the landmarking *Grootboom* case<sup>53</sup> the Constitutional Court of South Africa emphasized that neither section 26 nor section 28(1)(a) of the Constitution gave any of the respondents the right to claim shelter out of the blue.

*Grootboom* concerned nine hundred homeless adults and children who had constructed shacks on land not belonging to them, but not in current use either, and in that way consciously acquired roofs over their heads while, as a by-product, forcing public attention towards their constitutionally guaranteed right to adequate shelter (section 26). Their subsequent eviction – by mandatory court order – left the respondents homeless, and this gave rise to the claim for housing based on two provisions of the Constitution, which guarantee the right to adequate housing for all (section 26), and especially for children (section 28(c)). The court, then, had to address the essential dilemma of enforcing an affirmative right embedded in the Constitution when there are clear constraints in clauses such as 'reasonable legislative and other measures', 'within its available resources', and 'progressive realisation' in reference to what steps the government must take to ensure the implementation of the right. The High Court of the Province ruled that the government had taken adequate steps for progressive realization of the right to housing, but the State was still responsible to house the children under section 28 along with one parent. Against this judgment the government appealed to the Constitutional Court.

Judge Yacoob immediately set the stage, stating that socio-economic rights were enforceable in South African Law as they are entrenched in the Bill of Rights, which is justiciable. The only question, then, was *how* to enforce them. The discussion that followed stresses the importance of reading the rights in their particular context, whereby the court apparently went to great lengths to extend the scope of the right to housing, constrained as this was by terms such as 'reasonable' in respect of the duties of the government. Judge Yacoob observed:

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52 Thus, the two cases discussed below, *Grootboom* and *Treatment Action Campaign* can also be found in B.G. Ramcharan, *Judicial Protection of Economic, Social and Cultural Rights*, 2005, pp. 297-336 and 144-153 respectively. This does not refer to the other cases reviewed here.

53 On the *Grootboom* case see my *Laborious Law* (*supra*, note 42), note 37 (Constitutional Court – CCT11/00, 4 October 2000).

‘To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right. It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the right. Furthermore, the Constitution requires that everyone must be treated with care and concern. If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.’ (Paragraph 44, p. 34).

In concluding that there was a deficiency in the State’s programme for realizing housing, the Court’s mandatory order demanded that this be addressed. Unique, then, to the position of the judiciary is the ability to look into the context of the claim, and weigh the perceived violation against the objectives of the rights. In the end, human dignity as the founding principle of rights appears to be essential in reaching a ‘just’ conclusion. Judge Yacoob put it as follows:

‘But section 26 is not the only provision relevant to a decision as to whether state action at any particular level of government is reasonable and consistent with the Constitution. The proposition that rights are interrelated and are all equally important is not merely a theoretical postulate. The concept has immense human and practical significance in a society founded on human dignity, equality and freedom. It is fundamental to an evaluation of the reasonableness of state action that account be taken of the inherent dignity of human beings. The Constitution will be worth infinitely less than its paper if the reasonableness of state action concerned with housing is determined without regard to the fundamental constitutional value of human dignity. Section 26, read in the context of the Bill of Rights as a whole, must mean that the respondents have a right to reasonable action by the state in all circumstances and with particular regard to human dignity. In short, I emphasise that human beings are required to be treated as human beings. This is the backdrop against which the conduct of the respondents towards the appellants must be seen.’ (Paragraph 83, p.61).

Indeed, the case ended in a mandatory court order commanding the South African government to secure alternative shelter for Irene Grootboom and the 899 other poor and vulnerable individuals they had removed from their squatter compound. Yet, even after more than five years this order – so much welcomed in human rights circles – has still been executed marginally. This is therefore perhaps the right time to emphasize that the struggle for the implementation of human rights cannot be restricted to the courts. It is fortunate indeed that these rights play a part not just as sources of law, but also as political instruments.<sup>54</sup> No use of political power can be regarded as *legitimate* unless it is exercised in conformity with international standards for the protection of human dignity. Concretely, this means that when the primary actors – poor people themselves – are confronted with insurmountable obstacles in their daily efforts to secure sustainable livelihoods, the duties of other actors are activated. This applies not only to the power of the State, but to that of all actors, including corporations, as the UNDP Human Development

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54 See, for example, Bas de Gaay Fortman, ‘Persistent Poverty and Inequality in an Era of Globalisation: Implications of a Rights Approach’, in: Paul van Seters, Bas de Gaay Fortman and Arie de Ruijter *Globalization and Its New Divides: Malcontents, Recipes, and Reform*, 2003, pp. 149-167.

Report 2000 duly notes.<sup>55</sup> *Actors become duty bearers*: here lies the crux of uphill struggles to get human rights realized.

An exemplary *South African* case in which the Constitutional Court goes even further in the type of injunctions it issues is *Treatment Action Campaign and others v. Minister of Health and Others*.<sup>56</sup> It concerned Nevirapine, an anti-retroviral drug that helps to reduce the risk of HIV/AIDS being spread at birth from mothers to newborn children. The government had limited its use to two research and training sites per province, denying the giving out of the drug at public health sector hospitals. The most needy rural populations felt the greatest impact of this restriction. The High Court ruled that this action was unreasonable under the relevant provisions of the Bill of Rights. Specifically, sections 27(1)(a) guarantees a right to adequate healthcare for all, and section 28(1)(c) especially for children. The government then appealed to the Constitutional Court. As in *Grootboom*, the argument is reducible to a judgment on the application of section 27(2) of the Bill of Rights, which limits application of claims against alleged rights violations via language such as 'reasonable' and 'within available resources'.

Once again, the debate can be viewed in the framework of separation of powers. Should the judiciary defer to the other branches that their efforts are reasonable, or should independent criteria and judgment be applied? The Court's position here, issuing the decision *en banc*, was that without doubt, it maintained the authority to be active:

'This Court has made it clear on more than one occasion that although there are no bright lines that separate the roles of the legislature, the executive and the courts from one another, there are certain matters that are pre-eminently within the domain of one or other of the arms of government and not the others. All arms of government should be sensitive to and respect this separation. This does not mean, however, that courts cannot or should not make orders that have an impact on policy.' (Paragraph 98).

'A dispute concerning socio-economic rights is thus likely to require a court to evaluate state policy and to give judgment on whether or not it is consistent with the Constitution ... Section 38 of the Constitution contemplates that where it is established that a right in the Bill of Rights has been infringed a court will grant "appropriate relief." It has wide powers to do so and in addition to the declaration that it is obliged to make in terms of section 172(1)(a) a court may also "make any order that is just and equitable."' (Paragraph 101).

With this justification then, the Court proceeded to order the removal of the restrictions on the distribution of nevirapine. Furthermore, the Court used this creation of law to further address the underlying system, and in so doing ordered the government to devise and implement a programme 'to realise progressively the rights of pregnant women and their newborn children to have access to health services to combat mother-to-child transmission of HIV.' (Paragraph 135). Here the underlying concept of human dignity through human rights manifests itself in the decision of the court. (As an amusing aside, the Court ordered that all legal costs were to be paid by the government.)

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55 Cf. Bas de Gaay Fortman, 'Rights-based Approaches: Any New Thing under the Sun?', 2000 *International Development Ethics Association Newsletter*, December. See also below, p. 41 (the *Gbemre* case).

56 Constitutional Court of South Africa, Case No. 8/02 Judgment of 5 July 2002.

In *India* the Supreme Court's firm stand on the use of green fuel ended a dispute between environmentalists and bus owners who had the backing of corporate and political lobbies. In a decision taken in 1998 subsequent to Public Interest Litigation (PIL)<sup>57</sup> the Court had issued a Mandatory Order for public transport to switch to *compressed natural gas* (CNG) 'to improve the air quality in this choking city of 15 million'.<sup>58</sup> Time and again both the administration and the private owners of buses used for public transport had pressed for extension of the period in which they had to switch to 'clean fuel', which does not cause pollution or is otherwise injurious to health. Early 2001 the Court appeared to be fed up with vested interests and the way they argued their case:

'We are conscious of the fact that due to lack of effective action taken by the private bus operators and also by the governmental authorities with effect from 1.4.2001 inconvenience is likely to be caused to the commuting public, including the school children who use the city buses, but, this "urban chaos", (to use the expression used by the Administration) which may arise as a result of not extending the deadline fixed by this Court is a creation of the private operators and the administration and they have only themselves to thank for it. They are accountable to the commuting public for creating this situation. The administration does not admit its 'lapses' but the learned Additional Solicitor General has time and again submitted for their lapses "let the commuting public not suffer". It appears to be an argument of despair.'<sup>59</sup>

Consequently, no extension was granted beyond 1 April 2001, albeit with some relaxations for those who had already started a process of conversion. The transport department had to see to it that these were not abused. As 2002 came to a close all diesel buses had been converted to CNG and air pollution levels were considerably down. In 2003 Delhi won the US Department of Energy first 'Clean Cities International Partner of the Year Award' for its 'bold efforts to curb air pollution and support alternative fuel initiatives.' Indeed, it had been a whole city that suffered, listed as it used to be among the ten most polluted cities of the world, with vehicles accounting for more than 70% of the polluting emissions.

Activism abounds! But what is striking in this case is not just the way in which the judiciary confronts the administration with a mandatory order that leaves hardly any room for executive discretion in determining and executing policy. Still more interesting within the context of the present inquiry is the subject matter proper: a question concerning 'the right to a healthy environment'. Legally weak as this collective right might be,<sup>60</sup> in India since the Bhopal tragedy and its

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57 In cases in which protection of the public interest is at stake, it is not necessary that immediate victims of alleged violations bring the cases to court.

58 Ehtashamuddin Khan, 'Supreme Court puts end to anti-green fuel crusade in Delhi', *Indo-Asian News*, New Delhi, 13 April 2002.

59 Supreme Court of India Writ Petition (Civil), No. 13 029/85, New Delhi, March 26, 2001.

60 Collective rights tend to be heavily contested even in human rights circles themselves. See, for example, Jack Donnelly, 'Human Rights, Individual Rights and Collective Rights', in: Jan Berting *et al.*, *Human Rights in a Pluralist World. Individuals and Collectivities*, 1990, pp. 39-62. Formally, the legal basis of collective rights in general is already rather weak, and that applies to the right to a healthy environment in particular, originating as that does from the UN Stockholm Declaration on the Human Environment of 16 June 1972, a typical specimen of so-called 'soft law'. A more recent source, of a regional as well as consensual nature, is the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, ('Protocol of San Salvador') of which Article 11 states: 'Everyone shall have the right to live in a healthy environment ...' According to Article 14 of the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights approved by the UN Sub-Commission on the Protection and Promotion of Human Rights [U.N. Doc. E/CN.4/Sub.2/2003/12/rev.2 (2003)] transnational corporations and other business enterprises are responsible for the health and environmental impact of their activities, while the commentary to the article states: 'Transnational corporations and other business enterprises shall respect the right to a clean and healthy environment.'

disgraceful legal aftermath<sup>61</sup> it has acquired concrete significance in efforts to protect whole communities against pollution and other types of environmental damage. Judicially this is done through a rather broad interpretation of Article 21 of the Indian Constitution on the right to life, while through public international law, cases can easily be presented for adjudication at the highest level. In this connection the collective right to a healthy environment may, indeed, be regarded as a modern *regula iuris*, throwing light on the meaning of Article 21 in concrete situations of environmental damage.

In *Nigeria* oil production has regularly given rise to court proceedings on environmental damage. The case of *Gbemre and Others v. Shell Petroleum Development Company Ltd and Others*<sup>62</sup> was remarkable in two respects. Firstly, the Court had no trouble whatsoever in granting leave to Jonah Gbemre to institute proceedings in a representative capacity not only for himself, but also 'for each and every member of the Iweherekan Community in Delta State of Nigeria'. Indeed, there was no discussion whatsoever in the judgment on juridical intricacies such as legal personality. Secondly, the decision against the defendants who had continued flaring gas in the course of their oil exploration and production activities explicitly mentioned 'the right to a clean, poison-free, pollution-free and healthy environment'. This is based on an interpretation of the 'Constitutionally guaranteed fundamental rights to life and dignity of human person' in conjunction with Articles 4 (right to life), 16 (right to enjoy the highest attainable physical and mental health standard and duty for states to take the necessary measures to protect the health of their people) and 24 (people's right to a generally satisfactory environment favourable to their development) of the African Charter on Human and Peoples' Rights as well as certain national procedural rules.

But *Gbemre* is noteworthy particularly from a political economy perspective. On 10 November 1995 Ken Saro Wiwa and eight of his companions in MOSOP (Movement for the Survival of the Ogoni People) were hanged after a trial that had met with worldwide indignation on account of gross violations of due process rules. This was the time of the reckless tyranny of general Abacha. In those days, writ petitions such as Gbemre's did not even reach the courts; the applicants would be dealt with in a brutal law-conflicting manner.<sup>63</sup> No matter therefore how important judicial law development may be, from a civilizational perspective there is another, primary struggle: founding, grounding and nurturing the rule of law.<sup>64</sup> Sadly, amidst complicated jurisprudential efforts to bring positive law to a higher level of both sophistication and civilization, all can suddenly be set aside when unrestricted power takes over completely.<sup>65</sup>

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61 See Amnesty International USA, *Business and Human Rights. Dow Chemical Company (DOW), Union Carbide Corporation and the Bhopal Communities in India*, 2006, accessed on the Internet, 11 August 2006 at <http://www.amnestyusa.org/business/sharepower/bhopal.html>.

62 Federal High Court of Nigeria, Benin City, 14 November 2005, Suit No: FHC/B/CS//53/05 (not yet published).

63 On the notion of anti-law ('un anti-droit') see Jean Carbonnier, 'La Bible et le Droit', in: J. Bosc *et al.*, *La Révélation Chrétienne et le Droit*, 1961, p. 117.

64 In the time of King Charles I of England, as a prerequisite to legal practice, one had to study law and the legal method for seven years to be versed in all intricacies of the common law system. In the same period a case was decided in favour of the King's complete discretion to dispense with any laws if deemed fit because, as one of the concurring judges declared: 'The law is of itself an old and trusty servant of the King's; it is his instrument ... it is common and most true that *Rex is Lex* ... The King cannot do wrong.' [*R. v. Hampden* (1637) 3 State Trials 825-1316, quoted by Geoffrey Robertson, *The Tyrannicide Brief. The Story of the Man who sent Charles I to the Scaffold*, 2005, p. 49]

65 The superb World Congress of the International Academy of Comparative Law at Utrecht University in July 2006 took place just after the Middle East had been set on fire and civilians lost life and good in a flash, without any perspective of judicial remedies. It was mentioned only in the corridors those days, while we privately signed petitions to stop the slaughter on the internet. Yet, during the public sessions too we were bound to feel the dialectics of law and power in our hearts and stomachs. But what can lawyers do except to continue living and acting from a belief in law as a global civilizing mission? One is, indeed, reminded, time and again, of the inscription that adorns the Harvard Law School Library: OF LAW THERE CAN BE NO LESSE ACKNOWLEDGED THAN THAT HER SEATE IS THE BOSOM OF GOD. Obviously, Law is to be interpreted here as what is now called the *Rule of Law*.

## 6. An emerging human rights culture in judicial law development?

In countries such as India and South Africa human rights have been strongly incorporated in the national legal system, including the constitution, while an active judiciary demonstrates the great potential of judicial sensitivity to interests protected by internationally accepted human rights standards, even though not yet part of *ius positivum*. Moreover, albeit perhaps in less spectacular ways, other judiciaries have also shown that they have been inspired by the worldwide need to extend the realm of interests to which judicial protection is given to include all interests that closely relate to basic human dignity. As the Californian *Boehm* case has shown, judicial decision making in the United States too, may well reflect substantial recognition of basic entitlements. Another way in which a judicial human rights culture is actually becoming discernible, is through an evident reluctance to declare applicants inadmissible in cases involving evident injustices even when pure legal reasoning could easily substantiate such a formal decision. *Hamdi*<sup>66</sup> and *Hamdan* in the United States are cases in point. Noteworthy too, is the apparent extension of legal sources in processes of judicial law creation in which the justice issue is unequivocal. *Fairchild* in the United Kingdom illustrates contemporary globalization in law-creating methodologies.

Notably, it is precisely vague and undefined notions and formulations that would seem to influence judicial decision making as *legal principles*, comparable to the old *regulae iuris* in the sense of *generalia iuris principia*. Values behind terms such as ‘universal’ and ‘inalienable’ actually – and of course to a much larger extent potentially – influence judicial decision making, in particular when the judiciary is faced with executive attempts to restrict its role in the protection of human dignity. Indeed, when it comes to the global plague of us-them divides, it is the judiciary in particular whose armoury calls for the human rights weapon of ‘everyone’, related as that is to the grand principle of ‘human dignity’.

But lest we get carried away in jurisprudential idealism some caution is called for. Although rights are abstract acknowledgements of claims in the sense of a general commitment to offer judicial protection for their realization, our world remains full of denials of claims founded upon universal freedoms and basic entitlements. Indeed, while the whole idea of rights is based upon the expectation that evident violations would lead to contentious action resulting in redress, *human* rights often remain without effective remedies. This is due to two crucial deficiencies: firstly, the often prevailing inadequacy of law as a check on power, and secondly, the lack of reception of these rights in many cultural and political economic contexts. In that wider setting of environments that are adverse to the realization of human rights, the role of the judiciary, important as it continues to be, is not the principal factor. While the adequate embodiment of human rights in positive law is all too often lacking, these rights are moreover also violated in and from centres of power. In the case of economic, social and cultural rights general recognition appears to be lacking even at the centres of power. Hence, the primary struggle remains for the rule of law as a public-political underpinning: at the global, regional, national and local levels of execution of power. Indeed, it would be an illusion to think that major judicial progress in the implementation of human rights could be made while realities as experienced by people at the grass roots level reflect views closely approaching the old *Rex est Lex*. As Sheth, for one, has observed in respect of the law in India, a country that knows the blessing of a legal superstructure and which can be considered ‘progressive’ both in letter and spirit, ‘it is the law operating at the grassroots that regularly undermines the rights of the citizens’.<sup>67</sup> Obviously, a judiciary commit-

66 See *supra*, note 36.

67 D.L. Sheth, ‘Limits and possibilities of using the law for the poor’, in: Ventura Aspiras, *supra* note 38, p. 73.

ted to the human rights venture and convinced of its basic ideas, is not to be regarded as a substitute for a human rights culture at all levels of decision making, while uphill struggles for the actual realization of people's fundamental freedoms and basic entitlements remain essential. Remarkable, finally, appears to be the role of collective rights in judicial legal development. Although scarcely translated into hard positive law they may nevertheless acquire concrete meaning in judicial interpretation. Thus, the right to a healthy environment, which has not been incorporated in firm legal texts still appears to function as a general principle in judicial decision making. Indeed, the human rights idea is more duty-oriented than is often realized. This gives these rights a substantial role in upstream processes of acquiring concrete freedoms and entitlements, even against adverse forces as might manifest themselves on the part of both the State and the corporate world. A number of cases reviewed here have illustrated how an active judiciary may support those involved in uphill struggles to acquire freedoms and entitlements formally protected by human rights, but not yet realized.

'It is only if the judiciary is sensitive to the misery and suffering of the people and responsive to their hopes and aspirations that basic human rights can become meaningful to the large masses of people in the country ...', Justice Bhagwati of the Indian Supreme Court once asserted.<sup>68</sup> What we have come across in this explorative review of 'adventurous' judgments is indeed what might perhaps be called a 'judicial culture of human rights'.<sup>69</sup> In this way the role of the judiciary in human rights implementation goes much further than through pure application of already positively incorporated human rights law. What is needed, to quote Bhagwati once more, is a judicial awareness that 'the violation of the human rights of the poor is caused mostly by unjust social and economic structures'.<sup>70</sup> Apart from knowing the law, in other words, an active judiciary needs a capacity for discerning *injustice*. The Supreme Court of India is itself a living testimony to that contention.

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68 Bhagwati, *supra* note 38, p. 104.

69 I encountered the term 'culture of rights' in connection with the Human Rights Act in the United Kingdom. The gist of this Act is that affirmative human rights are prevalent at all stages of State action and not just in *ex post facto* litigation. Janet Hiebert, *supra* note 8, summarizes this function of the British model for downstream human rights implementation as follows:

'A second function is proactive and is closely related to the HRA's goal of facilitating a political culture of rights. Its systematic scrutiny of legislative bills provides incentives for ministers, department officials, and drafters to ensure that they are attentive to the consequences of legislative bills for rights. Knowledge that the committee will question provisions that engage or impinge on rights influences departmental assessments of bills because public officials do not want to be called before the minister to explain why he or she failed to recognise that a particular provision adversely impacts on rights.' (p. 21).

70 Bhagwati, *supra* note 38, p. 106.