

International Conference of the Constitutional Court of the Russian Federation  
«**Constitutional Identity and Universal Values: the Art of Balance**»

Saint Petersburg, Russian Federation  
14 May 2019

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## **The Search for Balance between National and Universal Values**

### ***Red lines – once and for ever?***

Just a few weeks ago I was in Beirut for a discussion on rule of law with judges and professors from different Arab countries, Kuwait, Egypt, Jordan, Lebanon where I had to introduce the European Court of Human Rights' jurisprudence on sharia law. In this context I explained that, while, in my view, Arab and European countries had a lot in common, I would also see relevant differences. I gave two examples – the different understanding of gender equality and the existence of the death penalty in many of the Arab countries. I argued that my Court would not accept the death penalty or any form of gender inequality and it would consider these standards as “red lines”. My Arab colleagues did not accept the idea of “red lines”. In their view courts could never draw “red lines”. They held that there should always be openness for change and flexibility. I admitted that what I would call “red lines” in the Court's jurisprudence now had not always been “red lines”. On the contrary, when the Convention was drafted, death penalty was explicitly allowed and practiced in many of the founding members of the Convention system such as France (1981), Belgium (1996), Greece (1993), Ireland (1990), Turkey (2002) and UK (1973). In the 1950s, while there might have been clauses about gender equality in constitutions it was clear that there was no equality between men and women, neither in law nor in practice. Women could not freely choose their family names after marriage, they were excluded from many professions, they could not decide on questions concerning their fortune or take up work without their husbands' consent. Thus, we have to admit, that what are “red lines” now in European human rights protection were not always “red lines”.

Red lines, values we find so fundamental that we see them as part of our identity and do not want to give up, values that are regional and contrasted to universal values – that is the topic of my intervention today.

### ***Universal values***

„We stand today at the threshold of a great event both in the life of the United Nations and in the life of mankind, ... This Declaration may well become the international Magna Carta of all men everywhere.“ That is how Eleanor Roosevelt introduced the final vote on the Universal Declaration of Human Rights which was in the end unanimously accepted even if the then socialist block and the Arab countries abstained. It was indeed a major achievement, first to decide what rights and guarantees to include as part of world heritage and, second, to agree on the concrete wording of the respective rights and guarantees. It was clear that the driving force behind this unique effort was to mark a new starting point for rebuilding the world after the catastrophe of World War II. In order to see what is white you need a black background. This black background were “the barbarous acts which have outraged the mankind” as mentioned in the Preamble, it was tyranny and oppression that had been characteristics of Nazism in my own country.

What are universal values? If we have a closer look at the text of the Universal Declaration we will understand what it means to define universal values for all. It means making compromises.

So let's have a look at the Universal Declaration of 1948. Let's just take Article 1. In Art. 1 we find a definition of what are the main and most important characteristics of human beings. The first version of Art. 1 was the following:

„All men, being member of one family, are free, possess equal dignity and rights and shall regard each other as brothers.“

It was considered that the idea of “reason” should be added as reason is what distinguishes men from animals. So it was changed and written “all men being endowed with reason.”. But as this is an essential part of West European philosophy, an idea

developed in and cherished by the Enlightenment, the Chinese representative proposed to add a specific idea of Confucian philosophy. In Chinese the relevant word is “ren”, a word composed of two signs, one for man and one for two. The meaning is that men have always to be related to one another. “Ren” is something like “two-men-mindedness”. But in Western languages there was no adequate term to express this idea. What was retained was the word “conscience” – something very different and, as I have heard, not really present in Chinese traditional thinking. The original idea of including an element of Chinese philosophy was thus to a certain extent transformed and “lost in translation”.

The final version in the Universal Declaration was the following:

“All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act toward one another in a spirit of brotherhood.”

This example shows that when fixing universal values compromises can only be reached if the words remain vague and open: “freedom”, “equality”, “dignity”, “reason”, “conscience”, “spirit of brotherhood”. Who should not agree to those values?

At the same time it is this feature of the Universal Declaration – its openness and vagueness – that allows everybody to see in the text his or her preferred message.

So I imagine that the Chinese will still interpret “conscience” as “ren”. For someone in Russia with a view to their specific cultural tradition the idea of the “spirit of brotherhood” might be connected to the idea of “*соборность*” or “*духовность*”, concepts that are also very difficult to translate. They were created by the so-called slavophiles to explain a specific idea of spiritual community in Russia. But, of course, these are not constitutional concepts and not shared by all. The Preamble to the Russian Constitution speaks of people „joined by the common fate on our land.“ Coming from the German tradition I would probably pick up the idea of “dignity” which has its traces in Immanuel Kant’s philosophy and explains that human beings are subjects and not objects. For the French the tradition of equality might be predominant with a view to

their human rights tradition closely linked with the Enlightenment and the French Revolution.

So in the first article of the Universal Declaration, even it is one common text, we all will find what we are looking for.

Thus universal values are “universal” because the formulae used are so broad and all-embracing that all can accept them. The understanding of such a text by individuals coming from different regions will, no doubt, overlap, but most probably it will not be identical.

Universal values are therefore like headlines under which different chapters can be written. In this sense I would not agree to approaches arguing for a basic opposition between what is called “Western universalism” and historical traditions in other parts of the world. In the West there are as many different traditions as anywhere else. What is considered to be “universal” is composed of many different sources even if, as in my examples, not all sources are always equally visible, but may be hidden at deeper layers.

I would agree with the description judge Gadziev gives of what he calls “the postmodernists’ view”:

Постмодернисты выдвигают идею ризомного децентрализованного права. В их представлениях право не является иерархической, имеющей единое основание, структурой, оно представляет собой разветвленную, многомерную сеть – ризому, состоящую из множества случайно и локально развивающихся элементов – язык права, символы права, нормы права, акты правоприменения, законы, традиционные правовые ценности.

At the same time I would add that this rhizome is rooted in common ground.

There is another important element that I have already mentioned in my introduction. Such values are not abstract and static, but develop further with new insights and changes in society. This is most obvious in the case of equality and discriminatory clauses. For the year 1948 what is considered to be discriminatory is defined in Art. 2 of the Universal Declaration: Race, colour, sex, language, religion, political and other opinion, national and social origin, property, birth or other status. All those elements

were taken up because of historical experiences of persecution. What is missing in this list is age, sexual orientation, and disability. These are criteria discovered only in recent years. I do not think that this is the end of the development. New forms of discrimination might be discovered in the future.

### ***Regional values***

So, if we have universal values, why do we need regional values? Don't we share all the same values? Obviously there is a need for defining regional values, otherwise we would not have specific documents in Europe, South America, in the Arab countries and in Africa; in Asia they are reflecting on drafting their own Charta.

If we accept that universal values are defined in a very broad manner and based on compromises, regional definitions can be more concrete and can emphasize different key aspects like for example in Africa collective rights such as the right to development or the link between rights and obligations. But I think that is not what matters most. What matters most is the instruments created to implement these rights. The distinguishing factor between the different human rights regimes is in how far these rights and guarantees are taken seriously.

And there we arrive at the mechanism implementing the European Convention on Human Rights, i.e. the European Court of Human Rights. Only in Europe we have such an efficient Court with a jurisprudence of some 20.000 judgements. 20.000 judgements mean 20.000 answers to concrete human rights questions.

Is it a question of dignity if a prisoner is transported over thousands of kilometres while he has less than a square meter of space? Yes, it is. Is it disproportionate to disperse a peaceful meeting just because some modalities of the permission have not been fully respected? Yes, it is. Is it an unjustified discrimination when a man can be sentenced to a lifelong sentence while a woman cannot? No, it isn't.

The more concrete the answers the less it is possible to hide between broad notions. If concrete answers are given it becomes clear what is meant and who consents and who

dissents. The European value system is faithful to what has been written down on the universal level; that is made clear in the Preamble. But it does not leave anything in the vague. It gives concrete answers to concrete questions. They are meant to be minimum standards. But, nevertheless, they can go very far and have decisive influence on developments in society.

### ***National values***

So with that we come to the third level, to the national level. Three hundred years ago it was hardly known what a Constitution is. Nowadays, almost all the States in the world have their Constitutions. They are all the more important the less harmonious the living together is. Not only political fights need rules and regulations, the basic values also have to be fixed. Once again, it is not so interesting to compare the wordings of the different texts of the national constitutions. The variations are not so important. What is important is what is made out of them, what is made out of “dignity” or “freedom of expression” or “right to private life”.

Let's take dignity. What has the German Constitutional Court made out of it? It is a violation of human dignity to shoot down a plane with passengers and terrorists on board as the passengers would be degraded to pure objects in a calculation. It is a violation of human dignity if someone is extradited to a country where he has been sentenced to a long-term prison sentence in absentia without possibility of retrial. Dignity is also an issue in abortion cases. – I do not want to evaluate if this jurisprudence is right or wrong. But I think it is clear that the way in which the concept of dignity is used – as an absolute, inviolable, but at the same time as a very broad concept might not be the same in other constitutional systems. At the same time this understanding of human dignity is seen to be at the very basis of constitutional identity of Germany. Similar developments can be seen in other constitutional systems. Specific values or, to be more precise, concrete answers to concrete questions given on the basis of constitutional values could be understood to be so important that they constitute “red lines” which cannot be crossed.

### ***Clashes between universal, regional and national values***

With that we come to potential clashes between universal, regional and national values, identity jurisprudence and the famous “red lines”.

There are rarely clashes concerning the words in the respective documents. The only example I know is the controversy about the freedom to change religion, a right enshrined in documents such as the Universal Declaration, but denied by the Muslim community; it is not possible to give up the Muslim faith.

But while such clashes are the exception there are many clashes between different interpretations. We all know a lot of such examples. One of the most famous examples is the right of prisoners’ voting. Some in the British political class argued that demanding such a right would be incompatible with Parliamentary sovereignty, and there they tried to draw a red line. In Russia the prohibition of prisoners’ voting is in the parts of the Constitution that cannot be changed unless a new Constitution is adopted. Another example is the right to strike of civil servants. According to the German Federal Constitutional Court the status of civil servants does not allow to grant them a right to strike without destroying the specific concept of civil service in Germany. For the French the separation between State and Church is part of their constitutional identity. What can we do with so many red lines? Perhaps we do not see the common European values any more? Do they get lost in the jungle of all those constitutional identities?

### ***Solutions***

With that I come to my last point, to potential solutions. I think that a precondition for finding solutions is to show good will on both sides. Without good will there will be no compromise; without good will there will not be any common values.

Allow me to make five points.

First, we have to come back to the starting point. I have said that the inspiration of the drafting of the Universal Declaration of Human Rights was to overcome what was called “the barbarous acts which have outraged the mankind”. We all are aware that history has taught us that too much nationalism and too much pride of being different can – in

the long run – have very detrimental effects. We cooperate as we know how the world can look like if we do not cooperate.

Second, we do agree on the existence of universal values that we accept without any hesitation. These “headings over different chapters” as I have called them are something we have in common, they are a starting point. Even if we might not always find a consensus on what “equality” means we agree that equality is an aim worth striving for.

Third, we agree that there is only a very small number of questions where we profoundly disagree and at the same time think that the issue is very important. In the majority of cases we do share the same common approaches.

Forth, we all have good will to build bridges even where there might be seemingly unbridgeable ditches.

Fifth, we do have the tools to find solutions. The most important tools for the European Court of Human Rights are margin of appreciation and dialogue.

Let me give you some good examples, famous examples. The application of the margin of appreciation is very well shown in the different approach of the Chamber and the Grand Chamber in the case of *Lautsi v. Italy* about taking down crucifixes in public schools. While the Chamber pretended that there should be one common standard in Europe defining the relationship between State and Church this approach was incompatible with long-standing convictions and traditions in Italy. The Grand Chamber took those different traditions into account and, based on the margin of appreciation, did not find a violation in the Italian regulation.

An excellent example for dialogue is to be found in the solution of the problem of retrospective security detention in Germany. After the European Court had found a violation of the Convention there was an intense judicial dialogue between the Federal Constitutional Court of Germany between 2011 and 2018. The German Constitutional Court annulled its own judgment, but explained a slightly different approach to the problem. The Strasbourg Court finally accepted this approach in the Grand Chamber case *Ilseher v. Germany* and noted: “The Court agrees in this context with the

Government's view that the reform of the German preventive detention system was conducted and put in practice against the background of a dialogue between this Court and the Federal Constitutional Court."

Nevertheless, it is true that neither the margin nor judicial dialogue are perfect instruments; they might fail to provide a solution. On this basis Judge Gadziev argues

"что составной частью судебной доктрины конституционной идентичности России является реалистическое допущение возможности неуспеха в достижении компромисса между национальным российским и наднациональным европейским правопорядками."

The realistic possibility of a failure is what I have described as "red lines".

### Concluding remarks

So, in order to conclude, let me come back to the "red lines" I have mentioned in the beginning. I think the Arab colleagues are right, we don't need them. Neither the idea of the "last word" nor the idea of "red lines" is helpful. Both are notions used by politicians, not by judges, and even for politicians such language is confrontational and risky and, as a rule, creates problems instead of solving them. You remember the beautiful and poetical wording of Article 1 of the Universal Declaration? We are all considered to be members of one family. Do you speak of "red lines" when you talk with your sons and daughters, with your wife and husband? I guess not. Let's rather talk about the different "constitutional identities" we have, how to best combine our national identity and our European identity and how to overcome whatever conflicts might exist. It is true that sometimes there might be a failure, a clash we cannot overcome immediately. But - nothing is fixed forever, what seems to be impossible now may become possible tomorrow. In its judgment on prisoners' voting the Russian Constitutional Court has left the door a little bit open. In the long-term conflict between the UK and the Committee of Ministers on this issue a solution was found.

Everything is moving, and to a certain degree it is in our hands in which direction it is moving.