

# 第一章

## 導言

### 壹、憲法導入國際人權條約

第二次世界大戰期間，由於侵略國家殘暴的行為，如德國納粹對犹太人的種族滅絕行動、戰爭與和平與人權保障間具有密切關聯性的認識等，世界人類受到慘痛的深刻教訓之後，終於喚起國際社會對人權問題的關注。因而第二次世界大戰之後，不論是聯合國或是區域國際組織，均將人權保障視為重要價值。

在聯合國部分，二次世界大戰之後，國際人權法發展快速，聯合國將諸多國際人權文件歸類為國際人權法典、兒童權利、婦女權利、難民及庇護等共十七種類型，而其中包括有直接法律拘束力之條約及無直接法律拘束力之宣言、準則及標準等。但是最受重視之國際人權文件為國際人權法典（International Bill of Human Rights）及核心國際人權條約（core international human rights treaties）。

所謂國際人權法典，包括世界人權宣言（Universal Declaration of Human Rights）、公民與政治權利國際公約（International Covenant on Civil and Political Rights，簡稱《公政公約》／ICCPR）與經濟社會文化權利國際公約（International Covenant on Economic, Social and Cultural Rights，簡稱《經社文公約》／ICESCR），國際人權法典最重要貢獻是建構普世人權範疇。

核心國際人權條約的主要目標是將國際人權法典所揭諸之某特定權利或是主體，作更加細部之規範，其實在建構核心國際人權條約的過程中，聯合國原則上是由包含比較多數人之主體開始著手，然後慢慢涵蓋更少數之弱勢族群。聯合國核心國際人權條約包括消除所有形式種族歧視國際公約

(International Convention on the Elimination of All Forms of Racial Discrimination, 簡稱《消除種族歧視公約》/ICERD)、消除對婦女一切形式歧視公約(Convention on the Elimination of all Forms of Discrimination against Women, 簡稱《消除婦女歧視公約》/CEDAW)、兒童權利公約(Convention on the Rights of the Child, CRC)、禁止酷刑及其他殘忍、不人道或有辱人格的待遇或處罰公約(Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 簡稱《禁止酷刑公約》/CAT)、保障所有遷徙勞工及其家庭成員國際公約(International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 簡稱《移工公約》/ICMW)、身心障礙者權利公約(Convention on the Rights of Persons with Disabilities, CRPD)、保障所有人免於強迫失蹤國際公約(International Convention for the Protection of All Persons from Enforced Disappearance, 簡稱《免於強迫失蹤公約》/ICPPED)。

所有核心國際人權條約均已設立個人申訴制度，所謂個人申訴制度是指，個人如果認為在國內訴訟程序中，其人權沒有得到應有之救濟，得向國際人權監督機制提出申訴，進而得到救濟。而所稱之國內訴訟程序包括憲法訴訟程序，因此其結果是國內憲法解釋機關曾經審查之案件，會經由個人申訴制度，再由國際人權監督機制審查之，而國際人權監督機制可能認定被告當事國敗訴，因而形成國際人權監督機制否定國內憲法解釋機關之意見，而形成了一定程度之挑戰。因而所謂國際人權機制對於憲法解釋機關之挑戰，是指某一案件經過憲法解釋機關表達意見之後，國際人權機制在其審理此案時，推翻憲法解釋機關之既有意見，並且表達不同於憲法解釋機關之意見。

而在區域國際組織部分，歐洲理事會(Council of Europe)、美洲國家組織(Organization of American States, OAS)、非洲聯盟(African Union)等都通過多數人權條約，並建立人權訴訟制度。同樣地個人如果認為在國內訴訟程序中，其人權沒有得到應有之救濟，得向區域國際組織所設立之人權監督機制提出申訴，因而同樣地，即使憲法解釋機關以審理過這些案件，也可能面臨

區域國際人權監督機制有不同意見。<sup>1</sup>

事實上國際人權條約之國內實踐與其在國際監督實踐是一樣重要的，因為國際監督之目標也是希望達到國際人權條約在國內實踐之目標。<sup>2</sup>因而漸漸地有許多國家將國際人權規範導入國內憲法規定，期待憲法基本權與國際人權能同步實踐。

## 貳、四種比較模式

二次世界大戰之後，憲法與國際人權法本來是平行發展，但是兩者有越來越多之互動。<sup>3</sup>經過多年的國內法與國際法之互動，將國際人權條約之規範納入憲法條文中已有相當多的例子。依據學者統計，1989 年之後憲法提及國際人權條約之情形有比較快速之成長，在 2006 年時有四十六部憲法提及國際人權條約，最經常被提及的是世界人權宣言與公政公約。<sup>4</sup>確實自 1990 年以後已有許多國家將國際人權規範納入其國內憲法<sup>5</sup>中，本文依其方式與內容區分為四種模式。<sup>6</sup>

### 一、憲法前言宣示遵守國際人權規範

依憲法前言是一般性規定或是明示特定國際人權文件，其又分為兩種模式。第一種是憲法前言宣示一般性規定，例如喬治亞憲法前言宣示，「喬治亞

<sup>1</sup> 相關論述請參見廖福特，〈憲法解釋機關之國際人權挑戰〉，收錄於廖福特主編，《憲法解釋之理論與實務第六輯》，中央研究院法律學研究所籌備處，2009 年 7 月，273 至 325 頁。

<sup>2</sup> David Feldman, "The Role of Constitutional Principles in Protecting International Peace and Security Through International, Supranational and National Legal Institutions," (2008) 6 *N.Z. J. Pub. & Int'l L.* 1, 6.

<sup>3</sup> Wayne Sandholtz, "How Domestic Courts Use International Law," (2015) 38 *Fordham Int'l L. J.* 595, 602.

<sup>4</sup> *Ibid.*, p. 604.

<sup>5</sup> 本章所引用之憲法條文取材自 Constitute 網站<<https://www.constituteproject.org/?lang=en>>。

<sup>6</sup> 參見廖福特，〈引進國際人權準則：比較分析與台灣借鏡〉，《東海法學研究》，第 17 期，2002 年 12 月，153 至 224 頁。

人民之強烈意願乃是建立一民主社會秩序、經濟獨立及社會法治國家，以保障普世承認之人權及自由……。」

第二種是憲法前言中明確指出國際人權文件之名稱，憲法中比較常提到的國際人權文件世界人權宣言、公民與政治權利國際公約、經濟社會文化權利國際公約、非洲人權及民族權憲章（African Charter on Human and Peoples' Rights or Banjul Charter）及國家、種族、宗教及語言少數民族權利宣言等。

例如阿富汗憲法前言宣示：「尊重憲法運動之傳統，遵從聯合國憲章及世界人權宣言。」而有許多非洲國家的憲法前言提及國際人權文件，例如阿爾及利亞憲法前言完全承諾世界人權宣言、公民與政治權利國際公約、經濟社會文化權利國際公約、非洲人權及民族權憲章及阿拉伯人權憲章（Arab Charter on Human Rights）所宣示之人權。布吉納法索、<sup>7</sup>中非共和國、<sup>8</sup>查德、<sup>9</sup>剛果、<sup>10</sup>象牙海岸、<sup>11</sup>吉布地、<sup>12</sup>埃及、<sup>13</sup>赤道幾內亞、<sup>14</sup>加彭、<sup>15</sup>茅利塔尼亞、<sup>16</sup>尼日、

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<sup>7</sup> “Subscribing to the Universal Declaration of the Rights of Man of 1948 and to the international instruments concerning economic, political, social and cultural problems; Reaffirming solemnly our commitment vis-a-vis the African Charter of the Rights of Man and of Peoples of 1981.”

<sup>8</sup> “Reaffirms their adherence to the Charter of the Organization of the United Nations, to the Universal Declaration of the Rights of Man of 10 December 1948, to the International Pacts of 16 December 1966 concerning economic, social and cultural right on the one hand and civil and political rights on the other; Reaffirms its commitment to the African Charter of the Rights of Man and of Peoples of 27 June 1981 and to the African Charter of the Democracy, of the Elections and of the Governance of 30 June 2007; Reaffirms its adherence to all International Conventions duly ratified, notably those concerning the prohibition of all forms of discrimination with regard to women, to the protection of the rights of the child and those relative to the autochthonous and tribal peoples.”

<sup>9</sup> “Reaffirm our commitment to the principles of the Rights of Man as defined by the Charter of the United Nations of 1945, the Universal Declaration of the Rights of Man of 1948 and the African Charter of the Rights of Man and of Peoples of 1981.”

<sup>10</sup> “Declare as an integral part of this Constitution, the fundamental principles proclaimed and guaranteed by: the United Nations Charter of 24 October 1945; the Universal Declaration of the Rights of Man of 10 December 1948; the African Charter of the Rights of Man and of Peoples of 26 June 1981; the Charter of the National Unity and the Charter of Rights and Freedoms of 29 May 1991; all the pertinent national and international texts duly ratified, relative to human rights.”

<sup>17</sup>等非洲國家的憲法前言亦宣示其對國際人權之重視。

## 二、憲法本文中規定國際人權條約之地位

在憲法本文中規定國際人權條約之地位者，又可分為幾種模式。第一種是憲法本文中作應遵守國際人權條約之一般規定，例如哥倫比亞憲法第 94 條

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<sup>11</sup> “Reaffirm our determination to build a Rule of Law in which human rights, public freedoms, human dignity, justice and good governance as defined in the international legal instruments to which the Côte d’Ivoire is a party, in particular the United Nations Charter of 1945, the Universal Declaration of Human Rights of 1948, the African Charter on Human and Peoples’ Rights of 1981 and its supplementary protocols, the Constitutive Act of the African Union of 2001, are promoted, protected and guaranteed.”

<sup>12</sup> “The Djiboutian People solemnly proclaim their attachment to the principles of Democracy and of the Rights of Man as they are defined by the Universal Declaration of the Rights of Man and by the African Charter of the Rights of Man and of Peoples, of which the provisions form an integral part of this Constitution.”

<sup>13</sup> “We are drafting a Constitution that paves the way to the future for us, and which is in line with the Universal Declaration of Human Rights, which we took part in the drafting of and approved.”

<sup>14</sup> “Firmly supported by the principles of social justice and solemnly reaffirmed by the rights and liberties of men defined in the Universal Declaration of Human Rights of October 10, 1948; The African Charter of Rights of Man and of Peoples of June 26, 1981.”

<sup>15</sup> “Affirm solemnly its attachment to human rights and to fundamental liberties that result from the Declaration of the Rights of Man and the Citizen of 1789 and from the Universal Declaration of Human Rights of 1948, consecrated by the African Charter of the Rights of Man and the Rights of Peoples of 1981, and by the National Charter of Liberties of 1990.”

<sup>16</sup> “Strong from its spiritual values and from the radiation of its civilization, it also proclaims, solemnly, its attachment to Islam and to the principles of democracy as they have been defined by the Universal Declaration of the Rights of Man of 10 December 1948 and by the African Charter of the Rights of Man and of Peoples of 28 June 1981 as well as in the other international conventions to which Mauritania has subscribed.”

<sup>17</sup> “Proclaim our attachment to the principles of pluralist democracy and of human rights as defined by the Universal Declaration of Human Rights of 1948, the International Pact Relative to Civil and Political rights of 1966, the International Pact Relative to the Economic, Social and Cultural Rights of 1966, and by the African Charter of the Rights of Man and of Peoples of 1981.”

規定：「本憲法及有效國際協議所列示之權利與保障，不應視為排除其他於此為明示之其他權利。」拉脫維亞憲法第 89 條規定：「國家應承認並保障依憲法、法律及拉脫維亞受拘束之國際協議所確認之基本人權。」馬其頓憲法第 8 條規定：「馬其頓共和國憲法秩序之基本價值為國際法所承認及憲法所規定之基本自由及權利…。」安哥拉憲法第 21 條第 1 項規定：「一、本憲法所保障之基本權利，並不排除國際法律及規範所保障之權利。」

第二種是特別強調世界人權宣言之地位，例如安道爾憲法第 5 條規定：「世界人權宣言對安道爾有拘束力。」東帝汶憲法第 23 條規定：「本憲法所規定之基本權利，不應排除其他法律所保障之權利，同時其解釋應符合世界人權宣言。」海地憲法第 19 條規定：「國家有絕對義務保障所有公民之生命權及健康權，以符合世界人權宣言。」

第三種著重特定國際人權公約或是已批准之國際人權條約。就特定條約而言，有特別重視歐洲人權公約，例如阿爾巴尼亞憲法第 17 條第 2 項規定，對於權利之限制，不得侵犯其本質，或超越歐洲人權公約所允許之範疇。瑞典政府條款（Instrument of Government）第 19 條規定，沒有任何法律條款得以違反歐洲人權公約。高棉憲法提及世界人權宣言、兒童權利公約及其他核心國際人權條約。<sup>18</sup>科索沃憲法第 22 條提及多數歐洲理事會（Council of Europe）及聯合國之人權條約。<sup>19</sup>尼加拉瓜憲法第 46 條<sup>20</sup>及第 71 條<sup>21</sup>則是著重

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<sup>18</sup> Article 31: “The Kingdom of Cambodia recognizes and respects human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights and the covenants and conventions related to human rights, women’s rights and children’s rights.” Article 48: “The State shall protect the rights of children as stipulated in the Convention on Children, in particular, the rights to life, education, protection during wartime, and protection from economic or sexual exploitation.”

<sup>19</sup> Human rights and fundamental freedoms guaranteed by the following international agreements and instruments are guaranteed by this Constitution, are directly applicable in the Republic of Kosovo and, in the case of conflict, have priority over provisions of laws and other acts of public institutions: 1. Universal Declaration of Human Rights; 2. European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols; 3. International Covenant on Civil and Political Rights and its Protocols; 4. Council of Europe Framework Convention for the Protection of National Minorities; 5. Convention on the Elimination of All Forms of Racial Discrimination; 6.

聯合國及美洲國家組織之人權條約。貝林憲法第 7 條強調非洲人權憲章。<sup>22</sup>

有關著重本國已批准之國際人權條約之例證，例如羅馬尼亞憲法第 20 條規定：「一、本憲法有關權利及自由規定之解釋及實踐，應符合世界人權宣言及羅馬尼亞為會員國之國際人權條約之規範。本憲法所規定之基本權利，不應排除其他法律或是或國際法所保障之基本自由。二、當國內法與羅馬尼亞為會員國之國際人權條約有衝突時，國際人權條約優先適用。」秘魯憲法第 206 條規定：「…四、憲法有關人民權利及自由規範之解釋，應符合世界人權宣言及秘魯所批准之國際人權條約之規定。」墨西哥憲法第 1 條第 1 項規定：「在墨西哥，所有個人均享有本憲法及墨西哥已簽署之條約所賦予之人權，這些權利之保障應確保之。」阿根廷憲法第 75 條第 22 項規定：美洲人權及義務宣言、世界人權宣言、美洲人權公約、美洲經濟社會及文化權利公約、美洲公民及政治權利公約、禁止及處罰殘害人群公約、消除種族歧視公約、消除婦女歧視公約、禁止酷刑公約、兒童權利公約，有憲法地位以實踐其各條款…其他人權條約，如經國會之三分之二多數通過，亦有憲法地位。多哥

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Convention on the Elimination of All Forms of Discrimination Against Women; 7. Convention on the Rights of the Child; 8. Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment.

<sup>20</sup> “All persons in the national territory shall enjoy State protection and recognition of the rights inherent to the human person, as well as unrestricted respect, promotion and protection of those human rights, and the full applicability of the rights set forth in the Universal Declaration of Human Rights; in the American Declaration of the Rights and Duties of Man; in the International Pact of Economic, Social and Cultural Rights; in the International Pact of Civil and Political Rights of the United Nations; and in the American Convention of Human Rights of the Organization of American States.”

<sup>21</sup> “Childhood enjoys special protection and all the rights that this status may require; for that reason, the International Convention on Rights of Children is fully applicable in Nicaragua.”

<sup>22</sup> “Article 7 The rights and duties proclaimed and guaranteed by the African Charter on Human and Peoples’ Rights adopted in 1981 by the Organization of African Unity and ratified by Bénin on January 20, 1986 shall be an integral part of the present Constitution and of Béninese law.”

(Togo) 憲法第 50 條亦規定已批准之國際人權條約為憲法之一部分。<sup>23</sup>

### 三、憲法解釋應符合國際人權公約規定

有一些歐洲國家的憲法規定憲法解釋必須符合國際人權規範，例如芬蘭憲法第 74 條規定：「憲法委員會應就立法法案及其他審核事項，提出是否違憲及其與國際人權條約之關係的意見。」西班牙憲法第 10 條規定：「…二、憲法所規定之相關基本權利及自由，其解釋應符合世界人權宣言及其他西班牙所批准之相關國際條約。」葡萄牙憲法第 16 條第 2 項規定：「…二、憲法所規定之相關基本權利及自由，其解釋應符合世界人權宣言。」羅馬尼亞憲法第 20 條、<sup>24</sup>摩爾多瓦憲法第 4 條<sup>25</sup>亦有類似規定。

而非洲也有一些國家的憲法規定憲法解釋必須符合國際人權標準，例如南非憲法第 39 條規定：「一、當法院或其他司法機關解釋憲法之人權法案時，… (b) 應考量國際法。…」安哥拉憲法第 21 條第 2 項規定：「憲法及法律規範所保障之基本權利，必須納入且解釋上符合世界人權宣言、非洲人權憲章及其他拘束安哥拉之國際文件。」而衣索比亞憲法第 13 條第 2 項、<sup>26</sup>維德角憲法第 16 條第 3 項、<sup>27</sup>幾內亞比索憲法第 29 條第 2 項、<sup>28</sup>莫三比克憲法第 43

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<sup>23</sup> “Article 50 The rights and duties, stated in the Universal Declaration of the Rights of Man and in the international instruments relative to the Rights of Man, ratified by Togo, are an integral part of this Constitution.”

<sup>24</sup> Article 20.1: “Constitutional provisions on the rights and freedoms of citizens shall be interpreted and applied in accordance with the Universal Declaration on Human Rights and with other treaties and pacts to which Romania is a party.”

<sup>25</sup> Article 4.1. “Constitutional provisions on human rights and freedoms shall be interpreted and enforced in accordance with the Universal Declaration of Human Rights, other conventions and treaties to which the Republic of Moldova is a party.”

<sup>26</sup> “The fundamental rights and freedoms specified in this Chapter shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and international instruments adopted by Ethiopia.”

<sup>27</sup> “Constitutional and legal norms regarding fundamental rights may be interpreted and integrated in accordance with the Universal Declaration of Human Rights.”

條、<sup>29</sup>聖多美普林斯比第 18 條第 2 項<sup>30</sup>等亦有相近之規定。

在其他區域，亦有國家有相關規範，例如墨西哥憲法第 1 條第 2 項規定：「人權條款應依本憲法及相關人權條約詮釋之，以使最多人受較廣泛之保障。」土瓦魯憲法第 15 條規定：「…五、法院於決定某一法律是否符合民主社會之理性規範且尊重人權及人性尊嚴時，應審酌…（c）國際條約、宣言、建議及有關人權判決。」巴布亞新幾內亞憲法第 39 條第 3 項<sup>31</sup>及東帝汶憲法第 23 條<sup>32</sup>也有類似規定。

#### 四、賦予人民進行國際人權救濟之權利

有少數國家是以憲法直接規定得以進行國際人權救濟，例如俄羅斯憲法第 46 條規定：「依據俄羅斯為會員國之條約規定，當已用盡國內救濟之後，人人均有向國際人權保障機制要求救濟之權利。」烏克蘭憲法第 55 條規定：「當已用盡國內救濟之後，人人均有向烏克蘭為會員國之國際人權機關或國際組織之相關機制提起訴訟，以保障其權利與自由。」

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<sup>28</sup> “Constitutional and legal principles relating to fundamental rights have to be interpreted in harmony with the Universal Declaration of Human Rights.”

<sup>29</sup> “The constitutional principles in respect of fundamental rights shall be interpreted and integrated in harmony with the Universal Declaration of Human Rights and with the African Charter of Human and Peoples Rights.”

<sup>30</sup> “The precepts relative to fundamental rights are interpreted and integrated in harmony with the Universal Declaration of Human Rights.”

<sup>31</sup> “For the purposes of determining whether or not any law, matter or thing is reasonably justified in a democratic society that has a proper regard for the rights and dignity of mankind, a court may have regard to ... b. the Charter of the United Nations; and c. the Universal Declaration of Human Rights and any other declaration, recommendation or decision of the General Assembly of the United Nations concerning human rights and fundamental freedoms; and d. the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Protocols thereto, and any other international conventions, agreements or declarations concerning human rights and fundamental freedoms.”

<sup>32</sup> “Fundamental rights enshrined in the Constitution shall not exclude any other rights provided for by the law and shall be interpreted in accordance with the Universal Declaration of Human Rights.”

## 參、本書範疇

本書論述之範疇包括四個國家，分別為西班牙、拉脫維亞、南非及波士尼亞，其涵蓋不同的時期、區域、脈絡。而這四個國家共通的是面對重大憲政轉型時，毅然抉擇導入國際人權。

### 一、西班牙 1978：走過威權獨裁、邁向國際人權

西班牙 1978 年憲法被認為是民主轉型之「西班牙模式」(Spanish Model)，其以相對較短之時間完成，並建構長期穩定之架構。<sup>33</sup>而西班牙 1978 年憲法第 10 條第 2 項規定：「本憲法所承認的基本權利及自由之原則，應以符合世界人權宣言及西班牙已批准之條約及協議解釋之。」此規定被認為是比較憲法之創見。<sup>34</sup>從時間發展脈絡觀之，其早於 1990 年代第三波民主立憲潮，可以說是將國際人權條約之規範納入憲法條文之最早典範之一，<sup>35</sup>因而西班牙 1978 年憲法第 10 條第 2 項之規範模式，亦影響新興民主國家，例如羅馬尼亞及哥倫比亞。<sup>36</sup>就所採用模式而言，其採取第三種模式，即憲法解釋應符合國際人權公約規定此，亦是前述四種模式中相當重要的。

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<sup>33</sup> Luis Lopez Guerra, “The Application of the Spanish Model in the Constitutional Transition in Central and Eastern Europe,” (1998) 19 *Cardozo L. Rev.* 1937, 1938.

<sup>34</sup> Xabier Arzoz, “Constitutional Court of Spain,” *Max Planck Encyclopedia of Comparative Constitutional Law*, available at <<https://oxcon.ouplaw.com/display/10.1093/law-mpeccol/law-mpeccol-e537?prd=MPECCOL#law-mpeccol-e537-div1-4>>, p. 1.

<sup>35</sup> 雖然葡萄牙是比較憲法歷史上第一份直接在憲法明文規定憲法解釋必須符合國際人權文件。1976 年葡萄牙憲法第 16 條第 2 項規定：「憲法及法律有關基本權條文之解釋及建構應符合世界人權宣言。」不過因為所引用之國際人權文件僅限於世界人權宣言，範圍較窄，因而比較不受重視。

<sup>36</sup> Pedro Julio Tenorio Sanchez, “Convergence of the Protection of Fundamental Rights between the Spanish Constitutional Court and the European Court of Human Rights,” (2016) 52 *IUS Gentium* 13, 15.