

Interpenetration of International and National Systems: Internal Protection of Human Rights by States

Part D completes the basic structure of this coursebook. We first examined in Part A the processes for the creation of international human rights norms and the basic categories of civil-political and economic-social rights. Our attention then turned in Part C to the relations between norms and institutions, particularly to the significance of international institutions and processes for the development and enforcement of norms.

Those parts gave primary attention to the international dimensions of the human rights movement. Of course, states—the creators of the norms, the designers and members of the institutions, the participants in the processes, as well as the primary duty-bearers under international human rights law—figured prominently in these earlier materials. They appeared frequently as the violators, the defendants, the entities being monitored, investigated and reported on by intergovernmental and nongovernmental organizations.

Part D shifts focus. Here we observe primarily the internal processes of the states themselves, particularly the decisions and acts of governments bearing on human rights issues. Our perspective is that of the state rather than the international community. For the most part, we examine executive, legislative and judicial action looking toward the observance and protection of human rights, rather than state action violating rights. In short, we here imagine states as the first-line enforcers of the international human rights system that they have created. Such is indeed the primary focus of the entire human rights movement. In a state-organized world, the highest human rights aspiration would imagine states as fully adequate protectors of human rights, to the point where an international enforcement machinery would become redundant.

Part D has two chapters, both of which involve the interpenetration of national legal-political orders and the international system. Chapter 12 examines ways in which states observe and protect human rights. Chapter 13 inquires into the ways in which a state acts internationally as an enforcer of international human rights by applying pressure against violator states.

In both chapters, as in the entire coursebook, the materials view the state primarily *in its relationships* to the international system. That is, these chapters do not examine state politics, history, or culture *independently* of that system. In both chapters, states draw from and work to increase the efficacy of the international standards. The chapters draw their illustrations particularly from the United States and Europe, to permit a more contextual examination of the issues posed.

Human rights violations occur *within* a state, rather than on the high seas or in outer space outside the jurisdiction of any one state. Ultimately, effective protection must come from within the state. The international human rights system does not typically place delinquent states in political bankruptcy and through some form of receivership take over the administration of a country in order to assure the enjoyment of human rights—although the measures implemented by the international community in Bosnia-Herzegovina after the 1995 Dayton Peace Agreement and especially in Kosovo (see p. 653, *supra*) represent steps in that direction. Rather the international system seeks to persuade or pressure states to fulfil their obligations through one or another method—either observing national law (constitutional or statutory) that is consistent with the international norms, or making the international norms themselves part of the national legal and political order.

Such is the focus of Chapter 12, which falls into three sections. *Section A* describes the adoption by many states during the last half of the twentieth century, and especially the recent decades, of constitutions informed by liberal political (and often economic) premises and frequently declaring human rights. It notes the many relationships between such state constitutions and the international human rights regime. These themes are surely familiar, in the light of the many illustrations of state constitutions and constitutional litigation in this coursebook's earlier chapters. *Section B* inquires how states 'internalize' *treaty* norms—that is, how they absorb the provisions of human rights treaties within the state's legal and political order so that they can be implemented and enforced by state authorities. *Section C* then turns to the use of state judiciaries to provide remedies to victims of human rights violations that took place in other countries, and in the process to draw on customary international law. It stresses the role of distinctive legislation in the United States, the Alien Tort Statute.

A. THE SPREAD OF STATE CONSTITUTIONS IN THE LIBERAL MODEL

This section looks at one of the important phenomena of the past 50 years: the spread among many states of constitutions expressing the principles of political (and sometimes economic) liberalism, and often recognizing human rights. Although 82 per cent of constitutions adopted between 1788 and 1948 contained provisions of some sort dealing with human rights,² the subsequent period is of particular importance because of the convergence of the formulae used (with the Constitutions of the United States, France and Germany, as well as the Universal Declaration, being especially influential) and the expanded emphasis upon judicial and other remedies for violations. Of course other states have adopted constitutions that have involved neither liberal principles nor the embrace of human rights.

One can approach this phenomenon from two perspectives. First, the adoption of liberal-style constitutions (or at least constitutions with a significant liberal component) can be seen as a *horizontal* trend among states, a consequence of the influence and pressures exerted by powerful countries in the liberal constitutional tradition like the United States. For the states achieving independence upon decolonization and adopting constitutions in the liberal model, the primary influence may have been the internal constitutional and political orders of the former colonial powers.

A second perspective stresses the links between the spread of such types of constitutions and the achievements of the human rights movement in constructing an international system of norms, institutions and processes. One could describe these links and the related influence and pressure as *vertical* rather than horizontal in character, since they come from international law and institutions 'above' the state rather than from other states.

Both horizontal and vertical influences and pressures were simultaneously at work in this process of states' drafting constitutions. They were indeed complexly intertwined, for the very states exerting a 'horizontal' influence were simultaneously creators and members of the international system exerting pressure from above. International human rights figured ever more pervasively in the discourse of international relations and made demands on states that in many respects could best be met through constitutions assuring the conduct required by the treaties to the citizens of the state. Those constitutions both 'borrowed' from other states and revealed, through their governmental structure and declarations of rights, the influence on them of the UDHR and the two basic Covenants.

¹ Many decisions of courts of these states, including the new constitutional courts, that interpret and apply these constitutions are set forth in Vicki Jackson and M. Tushnet, *Comparative Constitutional Law* (1999).

² H. van Maarseveen and G. van der Tang, *Written Constitutions: A Computerized Comparative Study* (1978), at 191.

COMMENT ON CONSTITUTIONS AND CONSTITUTIONALISM

The range of constitutions

Most states of the world (the United Kingdom being the most striking exception) have a formal, written constitution. By itself, that statement says very little. A 'constitution' refers simply to a basic state document that organizes a political system by, for example, setting forth the basic institutions of government. It need not follow any particular structure, impose or reflect any particular political or economic system or ideology, or prescribe any particular form of government. It may be democratic or authoritarian, oriented to private property and markets or to collective ownership and central direction, multi-party or one-party, attentive or not to individual rights, and so on.

Constitutions vary radically in their practical significance and symbolism as well as content. At one extreme, entire instruments or particular provisions may be meant to be hortatory and aspirational rather than to form part of the state's legal system. Those aspirations may represent genuine goals to be worked toward, or amount to sham and pretence, a shallow disguise of radically different and less admirable state purposes and methods. At the other extreme, constitutional provisions may be judicially enforceable against the government in actions brought by private parties, even to the extent of judicial review—that is, testing legislation against constitutional norms, and invalidating legislation found to violate them.

From a different perspective, a constitution may be broadly understood by the people to be insignificant, a document freely manipulated by government. Consider, for example, the People's Republic of China which, since 1949, has had five constitutions, each of which has:

... signaled a change in power or a change in the economic or political objectives of the Chinese leadership. ... The judiciary had virtually no significant role in this constitutional evolution. ... [E]ach constitution has been premised on the belief that rights are granted to citizens by the state. Rights are not derived from human personhood, nor are they enshrined or fixed within the constitution itself. This premise or belief allows the state to change both the quality and quantity of a citizen's rights whenever it is believed necessary because the existence of such rights does not limit the power of the state. Consequently, each constitution has either implicitly or explicitly permitted the state to define the nature of a citizen's rights by legislation. ... [T]he U.S. constitutional principle of checks and balances between the traditional branches of government (executive, judicial, and legislative) is absent.³

Alternatively, a constitution may be understood as an authoritative charter, or a solemn covenant, between the government and people. If so, it will tend to be more stable and resistant to change; the amendment process will be correspondingly complex, demanding and time-consuming.

³ R. Folsom, J. Minan and L.A. Otto, *Law and Politics in the People's Republic of China* (1992), at 56.

Constitutionalism

Scholars frequently use the term 'constitutionalism' to describe a particular type of constitutional system. This fluid term is put to many different uses, although many scholars would agree on the core meaning. Constitutionalism here refers to a constitutional system that falls within the liberal tradition (see the Common Law tradition at p. 361, *supra*) and possesses many characteristics of the democratic state. Often constitutionalism in this sense is implied when one speaks of the spread of constitutions among states as a part of the human rights movement. For example, the post-apartheid South African constitution.

Constitutionalism refers broadly to the following characteristics of a constitution, found among many states to a greater or lesser degree, in different combinations and with different emphases. Often based on a conception of popular sovereignty, the constitution assures accountability to the people through a range of techniques and institutions, the most important being the requirement of periodic and genuine elections in a multi-party system. Consistent with the liberal tradition, the constitution would control and limit the powers of government in several different ways, including a scheme of checks and balances through a separation of powers that must include an independent judiciary. That judiciary becomes the essential guardian of the rule of law, in the sense that the executive (or 'government') must act within established legal frameworks and according to established processes. The legality and legitimacy of that action must be subject to judicial review.

Constitutionalism implies that the constitution is a 'real' rather than merely hortatory instrument, truly the fundamental law or charter—in the words of the United States Constitution, 'supreme law'. It thus possesses a distinctive solemnity and force. It may come to symbolize the nation itself.

Constitutionalism generally involves a declaration of the individual rights associated with the liberal tradition, in the manner of the Bill of Rights of (the first ten amendments to) the US Constitution, and of many European constitutions as well as constitutions in a broad range of African, Asian and Latin American states. These rights are indispensable to setting limits to governmental action, particularly when they are coupled with judicial review of the constitutionality of legislation. Such judicial review itself could be seen as a desired but not essential element of the constitutional scheme.

The list of rights declared will vary among states. For example, in the constitutional history of the United States, the property right protected by the Fifth and Fourteenth Amendments to the Constitution has played a large and influential role. That has been much less the case in many states whose constitutions now fall within the liberal tradition, and indeed in the major human rights treaties.

Since the end of the Cold War new constitutions, including bills of rights, have been adopted in a great many countries. In Central and Eastern Europe alone, there have been more than 25 new or revised constitutions in that time. Developments in Africa have been characterized as a prolonged fit of 'constitutional fever'; a 1998 compilation included 20 constitutions published in French since 1990.

One of the most notable success stories of this period is South Africa's

transition from a racist regime to constitutionalism. Perhaps no change in regime principles has been as sudden and dramatic. After the collapse of apartheid came various interim arrangements which in turn were followed by the 1996 constitution of the Republic of South Africa. Chapter 1 (sec. 1) of the Constitution entitled Founding Provisions and reads like a textbook on constitutionalism:

The Republic of South Africa is one sovereign democratic state founded on the following values:

- (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
- (b) Non-racialism and non-sexism.
- (c) Supremacy of the constitution and the rule of law.
- (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

Section 2 provides that the 'Constitution is the supreme law of the Republic'. Chapter 2 contains a Bill of Rights which is described as 'a cornerstone of democracy' and 'enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom'. 'The state must respect, protect, promote and fulfil' these rights. The Constitutional Court here plays a vital role.⁴

The key question raised by such developments is: Under what circumstances will provisions designed to establish a system of constitutionalism succeed? Are there any indispensable ingredients? Are there preconditions, in the absence of which an otherwise splendid constitution will remain as a façade or an illusion? Compare the analyses which follow. Ghai paints a bleak picture of the experience in post-colonial Kenya, but retains an element of optimism. Several authors who survey recent developments within Africa see cause for considerable satisfaction. The assessments of post-1989 developments in Eastern and Central Europe are less sanguine.

YASH GHAI, THE KENYAN BILL OF RIGHTS: THEORY AND PRACTICE

in Philip Alston (ed.), *Promoting Human Rights through Bills of Rights: Comparative Perspectives* (1999), at 187

I. Introduction: The Background to the Bill of Rights

... During the colonial period, there were no restrictions, stemming from a fundamental law, on the legislative or executive power of the government. The colonial administration established and maintained by means of the law a governmental and social system characterized by authoritarianism, and racial

⁴ The decision of the South African Constitutional Court in the *Makwanyane* case p. 39, *supra*, offers an apt illustration.

discrimination. . . . Several features of this system may be mentioned. First, for a long time there was no local or popular participation in law making. . . . Second, in general the law conferred wide discretion on officials. . . .

. . . [T]he colonial laws and administration . . . fashioned official attitudes and behaviour and the submissiveness of the people to authority. Not only have these attitudes and behaviour continued, but so have most of the laws. . . . The result of these laws and practices was the growth of a powerful administration which had scant regard for the rights of the people. . . .

However, European settler and commercial communities could not face with equanimity the prospects of such a legal and administrative system continuing into the era of African rule. . . . Under their pressure, Britain agreed upon a fundamental reversal of policy. This involved political and administrative decentralisation . . . [and] the inclusion of a Bill of Rights in the Constitution for independence. Britain had in fact extended the [European Convention on Human Rights (ECHR)] to Kenya in 1953, but it was not incorporated in local laws and therefore had little impact in the country. . . .

Equally ineffective was the first domestic Bill of Rights which made its appearance in 1960. It is not possible to trace a single case in which the Bill was successfully invoked. It was succeeded by another one . . . [which] was entrenched in the independence Constitution (December 1963). The 1960 Bill was closely modelled on the ECHR, although for subsequent Bills inspiration was drawn from the Nigerian and Ugandan constitutions. This made little difference since the latter two countries had drawn upon the ECHR (or rather the [British] Colonial Office had drawn on it for them).

It should be stated that the decision to include the Bill of Rights was that of Britain. By this time it was becoming normal (but by no means universal. . .) for a colony to adopt a Bill of Rights on independence, but the need to protect Kenya's minorities, particularly the white settlers, was upper-most in the decision. There is no evidence of any enthusiasm on the part of African parties for the Bill (although it would have been hard for them to oppose it, given their anti-colonial stance). . . .

V. Conclusion: The Reason for the Ineffectiveness of the Bill of Rights

Most African states adopted shortly before or at independence a Bill of Rights, very similar in form and content to that in Kenya. In the large majority of instances, the Bill of Rights was no more effective than in Kenya. How is one to explain the ineffectiveness of the Bill of Rights?

[The author adopts a dichotomy used by Max Weber to distinguish between legal-rational (rule of law-related) and patrimonial systems of governance. Over time, Kenya moved to the latter system, under which an] apparatus of coercion and oppression (. . . a mixture of the legal and the illegal) is established to deal with those who resist the arbitrary exercise of patrimonialism, while the resources of the state provide a ready source of patronage to keep others in line.

The explanation for this shift lies in the nature and purposes of the state in Africa. The state is an imposition, and stands in a relationship of antagonism to

society. . . . Independence facilitated the access to state power of leaders who had only a weak hold in the economy. . . . As the state is the primary instrument of accumulation, corruption is endemic, woven into the very fabric of the apparatus of the state. The pressures towards corruption arise not only from economic greed, but also from the imperatives of political survival, since the main basis of a politician's support is generally not the party or another political platform, but clientelism, sustained by regular favours to one's followers. Public control and accountability over that apparatus are unacceptable; resistance on the part of the exploited is met with coercion. The role of constitutions and laws becomes totally instrumental, unmediated by autonomous processes and procedures. Law itself becomes a commodity that only the state may mobilize and manipulate. . . . In these circumstances it becomes impossible to secure the enforcement of rights and freedoms.

The domestic and international environment was not unpropitious to the centralisation of power. The leitmotif of the time was 'nation building' and economic development, and African leaders managed to present the independence constitutions (with the diffusion of power and checks and balances) as obstacles towards these goals. Arguments were also presented as to the failure of the constitutions to reflect the 'African personality' and understandings of authority and power. Thus from the very beginning the legitimacy of these constitutions was undermined, the ideology of legality replaced by that of developmentalism. (The legal system was allowed to atrophy; law reports ceased to be published, law libraries were run down, the system of filing in courts became the twin victim of inefficiency and corruption). The fact that this was merely a cover for the aggrandisement and consolidation of personal power did not become obvious until later. There were few domestic groups with a genuine commitment to human rights (for the truth is that anti-colonialism was not about human rights but about black power). . . .

. . . In these circumstances . . . the Bill of Rights became largely irrelevant. . . . Even if a judicial decision favourable for human rights could be secured, it seems to have little impact on administrative or police practice, or indeed on subsequent litigation. However, this assessment needs a qualification. The experience of the 80s shows that the Bill is not without effect in other ways. The skilful use of it by a few lawyers tied the government in litigation of key political issues. Courts became the only venue where these issues could be aired. They exposed the inconsistencies and malpractices of the government and raised public consciousness of rights and politics. . . . The Bill established standards by which the conduct of the government and the courts could be judged. It inspired the establishment and work of some NGOs. It helped to produce a sense of solidarity among disparate persons working for social and political reform. For a time it provided the only alternative coherent ideology to that of tribalism and one partyism of the government. It also enabled democratic struggles in Kenya to be linked to the growing international concern with rights and democracy, and being focused on rights which by now were proclaimed as universal rather than on specifics of local politics, it facilitated the engagement of foreign private and official institutions. . . .

The authoritarianism of African rulers and the bankruptcies of their policies have raised a consciousness of the value of human rights. A number of NGOs with a commitment to human rights, have arisen. There is greater awareness of the procedures to secure human rights (and a growing number of lawyers willing to risk the use of them). The international environment is supportive. The role of the state is being downgraded. There are growing demands for public accountability. . . .

ANALYSES OF CONTEMPORARY MOVES TOWARD CONSTITUTIONALISM IN DIVERSE STATES

Mpazi Sinjela, *Constitutionalism in Africa: Emerging Trends*

60 *The Review, Int'l Commission of Jurists* 2 (1998)

[At] independence most African countries adopted a 'Westminster' or a 'Gaullist' constitution model . . . [Subsequently, however, a] multiparty democracy was considered to encourage tribal division and conflict, and was, therefore, undesirable. . . .

Where a peaceful transition to a one party rule was not possible, civilian governments were overthrown by force and were replaced by military rule. . . .

The political changes in Eastern Europe signalling the end of the Cold War meant that African totalitarian [states] were no longer needed by the West by virtue of their strategic or geographical location. No longer supported but condemned for gross violations of human rights, these dictatorial regimes had to succumb and give way to a new order. A hurricane of political change in Sub-Saharan Africa ensued. . . .

[The author then refers to the 1990s constitutions of South Africa, Namibia, Tanzania and Malawi, all of which contain extensive human rights provisions.] . . . By the beginning of the 1990s, multiparty systems had been introduced in almost all Francophone countries. The constitutional reforms accompanying the political reforms have also signalled a return to the independence constitutions modelled after that of France. Like in Anglophone African countries, the new Constitutions include an array of human rights provisions. A mechanism for safeguarding human rights has been established. This includes the establishment of Constitutional Courts or the office of an Ombudsman. . . .

Bertrand Ramcharan, *The Evolving African Constitutionalism*

60 *The Review, Int'l Commission of Jurists* 23 (1998)

. . . [African states] are engaged in a determined effort to address conflicts in the continent and to promote African solutions to African problems. . . .

The national constitutions bring out one point forcefully: the evolving African constitutionalism is a constitutionalism of human rights and liberty. In all the constitutions discussed, the themes of democracy and respect for human rights are emphasised prominently. There is experimentation in new forms of governance, not enough, but the thread running through these experiments is an insistence on democratic legitimacy—with the meaning of democracy left open as the experiments unfold. . . .

Mmedou Ould-Abdallah, *The Rule of Law and Political Liberation in Africa*

60 *The Review, Int'l Commission of Jurists* 29 (1998)

The mere existence of a constitution, however comprehensive, will do little to create a stable environment for democracy and development unless people know and understand its provisions, have faith that their governments will not overrule it, and believe that their rights as promulgated within it, will indeed be upheld. Therefore, the existence of an independent judiciary and legislature, a free and competent press, and a vibrant civil society are all necessary to ensure that constitutional provisions are translated into reality.

. . . An unfortunate legacy of single-party politics in some countries is that most people have little faith in either the legal system or the judiciary, and public confidence has to be re-built if the rule of law is to be institutionalised.

. . . [A]s experience has shown, freedoms can easily be reversed and repression reintroduced. There is no guarantee that the current process of democratisation in Africa will continue or be sustained. . . .

Abdullahi An-Na'im, *Eritrean Independence and African Constitutionalism: A Sudanese Perspective*

in Tekle (ed.), *Eritrea and Ethiopia: From Conflict to Cooperation* (1994), at 115

. . . Constitutions by themselves cannot transform political, economic and social reality; at best, they can only seek to regulate it and direct its energy in the desired direction. In essence, constitutions represent the legal expression of underlying principles and institutions which should be firmly embedded in and supported by norms and values regarding the incidence, exercise, sharing and transfer of political power which are accepted and practiced by the population at large. For better or worse, constitutions and constitutionalism should therefore be the product of the historical evolution of the culture of the particular society.

. . . I argue that the need and cultural resources for developing commitment to

constitutionalism are present in African societies. The need is due to the fact that the nation-state is now the primary form of large scale political organization. Both domestic and international political and economic relations are predicated on the fact, Africans must develop and learn to operate their own nation-states in order to exercise their right to self-determination in the modern world. In my view, the necessary resources for this already exist in African cultural traditions, albeit in somewhat rudimentary form. To the extent that one can speak of African culture in general, there are certainly rich traditions of political consultation or government by consensus and communitarian welfare which can now be utilized to promote African constitutional models.

I am not suggesting that traditional African cultures are in full accord with modern constitutionalism. On the contrary, I can see that certain aspects of that tradition, such as the status of women and outsiders to the clan or tribe, are certainly at odds with constitutional principles of equality and non-discrimination.

...

Igor Petrukhin, The Judicial Protection of the Constitutional Rights and Freedoms in Russia: Myths and Reality

in Gibney and Frankowski (eds.), *Judicial Protection of Human Rights: Myth or Reality?* (1999), at 25

[This analysis focuses on the role of the judiciary under the 1993 Russian Constitution which proclaims in Article 2 that 'Man, his rights and freedoms shall be the supreme value. It shall be a duty of the state to recognize, respect and protect the rights and liberties of man and citizen'. The Constitution contains a comprehensive listing of civil and political rights and enumerates a significant range of economic, social and cultural rights. Human rights are judicially enforceable and a Constitutional Court is established.]

The 1993 Russian Constitution is a good basis for the democratization of justice and the protection of citizens' rights. Many important laws have been adopted in its implementation. These laws govern various aspects of the market economy, they allow the authorities to fight crime more effectively and they also protect citizens' rights and freedoms. But the process of legal reform is far from over. . . .

The judicial profession has become less attractive. The courts are badly financed, receiving only about one third of the funds allocated to them by the state. In some regions, one may speak of the virtual paralysis of justice. Owing to high court costs, many people cannot afford to turn to the judiciary to vindicate their rights. The judiciary is generally distrusted. Defense attorneys have found themselves in a difficult situation because most of them handle 50 percent of their cases free of charge or for a low payment from the government while acting as appointed defense attorneys.

The judiciary is still under pressure from prosecutors, the Ministry of Internal

affairs and the Federal Security Service. These agencies are dissatisfied with the number of not-guilty verdicts (although they amount to only 0.5 percent of the verdicts), with the judicial supervision over pre-trial detention and with the demand by the judiciary of many cases for additional investigation. Finally, a series of laws on operational investigatory activities have legalized highly questionable methods and techniques typical of oppressive political regimes. All of these phenomena raise serious concerns regarding the future of judicial legal reform in Russia.

Istvan Pogany, Constitution Making or Constitutional Transformation in Post-Communist Societies?

in Bellamy and Castiglione (eds.), *Constitutionalism in Transformation: European and Theoretical Perspectives* (1996), at 157

... Amongst many of the post-Soviet states, in particular, the absence of established national political cultures (other than Communism), the stresses and dislocation resulting from transition to a quasi-market economy (characterized by corruption and incompetence) and the general absence of ethnic, linguistic or religious homogeneity (a factor which was frequently exacerbated by the policies pursued during the Soviet era) have combined to create conditions in which many of the new state structures remain vulnerable and fragile. In such circumstances, even if a general collapse of state authority can be avoided (or recovered from), the alternative may not be liberal democracy. It is altogether more probable that authoritarian governments, drawing on ethnic, religious or other loyalties, will provide a more credible basis for the preservation and continuation of central authority in these states.

... Constitution making and constitutional transformation may go hand in hand. However, there is no logical reason why this should always be so. Indeed, there are numerous reasons why governments engage in spates of constitution making, apart from the wish to transform the way in which a society is governed. These include the desire for international (or national) legitimacy, a need to encourage foreign aid or investment, or even the wish to avoid genuine transformation. Constitution making may, thus, constitute a form of political deception, helping cynical and manipulative regimes to pursue policies which are the reverse, or merely a parody, of the principles enshrined in the constitution (this is at least partially the case in Slovakia, Romania and in some of the post-Soviet states).

... It surely cannot be a coincidence that the four most successfully transforming political democracies and market economies—the Czech Republic, Slovenia, Poland and Hungary—are strikingly homogeneous in ethnic, religious and linguistic terms. They are truly 'nation' states. . . . By contrast, in Romania, Slovakia, Bulgaria, Ukraine, the Russian Federation, the Baltic states and the

former Yugoslavia, tensions over minorities have undoubtedly complicated any possible transition to democracy and constitutionalism.

This is, in many respects, a depressing conclusion. It suggests that democracy and constitutionalism will be slow to develop, or may never develop, in many of the post-Communist states. Even if these countries succeed in overcoming the legacy of the Communist era—political, social and economic infantilization, economic backwardness, pollution etc., they must continue to wrestle with the ghosts of their pre-Communist pasts. For some, these may prove to be altogether more formidable adversaries. Thus, 'the more fundamental trend may be a return to indigenous political traditions'.

...

QUESTIONS

1. Where civil society remains both weak and repressed in many countries, should reformers put liberal constitutionalism low on their priorities?
2. An-Na'im concludes that if constitutionalism is to succeed it should be 'the product of the historical evolution of the culture of the particular society'. Is this true historically in any of the cases with which you are familiar? Germany? Japan? Korea? What are the difficulties of 'transplanting' constitutions in the liberal model to countries in which they grew over time organically (even if the process started by violent revolution) to states of a radically different ethnic, cultural, religious, economic and political character?
3. Does it make sense to promote a single model of constitutionalism both for countries which have major ethnic, religious, linguistic or other minorities, and for those whose populations are relatively homogeneous? If a standard model should be modified for countries with mutually antagonistic minorities, what should the modifications consist of?
4. Is constitutionalism synonymous with human rights? All the rights of the UDHR and the two Covenants? If not all, which? Can you imagine a state characterized by constitutionalism that was at the same time a systematic and gross violator of basic rights in the UDHR?

ADDITIONAL READING

M. Tushnet, 'The Possibilities of Comparative Constitutional Law', 108 Yale L. J. 1225 (1999); M. Tushnet and V. Jackson (eds.), *Comparative Constitutional Law: Cases and Materials* (1999); P. Alston, 'Lessons Relating to Bills of Rights from Pre-Twentieth Century Experience' in F. Coomans et al. (eds.), *Rendering Justice to the Vulnerable* (forthcoming 2000); D. Nelken, *Comparing Legal Cultures* (1997); W. Twining, 'Globalization and Comparative Law', 6 Maastricht J. Eur. & Comp. L. 217 (1999); G. Teubner (ed.), *Global Law without a State* (1997); F. Azzam, *Arab Constitutional Guarantees of Civil and Political Rights*

(1996); D. Beatty (ed.), *Human Rights and Judicial Review: A Comparative Perspective* (1994); R. Bellamy and D. Castiglione (eds.), *Constitutionalism in Transformation: European and Theoretical Perspectives* (1996); T. Buergenthal, 'Modern Constitutions and Human Rights Treaties', 36 Columbia Journal of Transnational Law 211 (1997); Symposium, 'Rights in New Constitutions', 26 Columbia Human Rights Law Review 1 (1994); D. Greenberg et al. (eds.), *Constitutionalism and Democracy: Transitions in the Contemporary World* (1993); M. Lacey and K. Haakonssen (eds.), *A Culture of Rights: the Bill of Rights in Philosophy, Politics and Law* (1991); and L. Henkin and A. Rosenthal (eds.), *Constitutionalism and Rights: The Influence of the United States Constitution Abroad* (1990).

B. HUMAN RIGHTS TREATIES WITHIN STATES' LEGAL AND POLITICAL ORDERS

While the many new constitutions have been deeply influenced by the Western models and by the basic international human rights instruments, they are nonetheless emphatically *national* instruments, created and shaped and instituted by each state.

Section B shifts attention to international instruments, specifically to human rights treaties. It examines the interpenetration of the international and national systems, the significance of treaties within states. The broad questions explored are: how do these treaties influence the national legal and political systems of states and parties? Are they automatically absorbed into a state legal system, or reproduced in state legislation, and with what effects on the different branches of government such as the executive and judiciary? Or do they remain distinct from the state system, 'above' it as part of international law? The readings draw on the techniques and experiences of a range of countries in this excursion into comparative constitutional law.

1. BASIC NOTIONS: ILLUSTRATIONS FROM DIFFERENT STATES

VIRGINIA LEARY, INTERNATIONAL LABOUR CONVENTIONS AND NATIONAL LAW

(1982) at 1

[The efficacy of human rights treaties] depends essentially on the incorporation of their provisions in national law. ...

International law determines the validity of treaties in the international legal system, i.e., when and how a treaty becomes binding upon a state as regards other State Parties. It also determines the remedies available on the international plane for its breach. But it is the national legal system which determines the status or

force of law which will be given to a treaty within that legal system, i.e., whether national judges and administrators will apply the norms of a treaty in a specific case. . . . When the treaty norms become domestic law, national judges and administrators apply them, and individuals in the ratifying states may receive rights as a result of the treaty provisions. Thus, developed municipal legal systems supplement the more limited enforcement system of international law.

While the international legal system does not reach *directly* into the national systems to enforce its norms it attempts to do so *indirectly*. States are required under international law to bring their domestic laws into conformity with their validly contracted international commitments. Failure to do so, however, results in an international delinquency but does not change the situation within the national legal systems where judges and administrators may continue to apply national law rather than international law in such cases. . . .

The status of treaties in national law is determined by two different constitutional techniques referred to in this study as 'legislative incorporation' and 'automatic incorporation'. In some states the provisions of ratified treaties do not become national law unless they have been enacted as legislation by the normal method. The legislative act creating the norms as domestic law is an act entirely distinct from the act of ratification of the treaty. The legislative bodies may refuse to enact legislation implementing the treaty. In this case the provisions of the treaty do not become national law. This method, referred to as 'legislative incorporation', is used, *inter alia*, in the United Kingdom, Commonwealth countries and Scandinavian countries. In other states, which have a different system, ratified treaties become domestic law by virtue of ratification. This method is referred to as 'automatic incorporation' and is the method adopted, *inter alia*, by France, Switzerland, the Netherlands, the United States and many Latin American countries and some African and Asian countries. . . . Even in such states, however, some treaty provisions require implementing legislation before they will be applied by the courts. Such provisions are categorized as 'non-self-executing'.

International law does not dictate that one or the other of the methods of legislative or automatic incorporation must be used. Either is satisfactory assuming that the norms of treaties effectively become part of national law. Conversely, neither method is *ipso facto* satisfactory under international law; if, in practice, the norms of ratified treaties are not applied by national judges and administrators. The method by which treaties become national law is a matter in principle to be determined by the constitutional law of the ratifying state and not a matter ordained by international law. The international community, lacking more effective means of enforcement, is often dependent on the constitutional system of particular states for the effective application of treaties intended for internal application.

Some national constitutions provide for automatic incorporation of treaty provisions. In other states, judicial decisions have determined that treaties are to be automatically incorporated. A correlation appears to exist between legislative consent to ratification and automatic incorporation. In states with the system of automatic incorporation, legislative consent by at least one house of the legislature

is generally required before the executive may ratify treaties. In states with the system of legislative incorporation, ratification of treaties is frequently a purely executive act not requiring prior approbation of the legislature. In the United Kingdom, and other common law countries which have followed UK precedent in this regard, parliamentary consent to ratification is normally not required and express legislative enactment of treaty provisions is necessary before they become domestic law.

An individual may invoke the provisions of a treaty before national courts in automatic incorporation states in the absence of implementing legislation only when its provisions are considered to be self-executing and when he has standing to do so. . . . [I]n general, treaty provisions are considered by national courts and administrators as self-executing when they lend themselves to judicial or administrative application without further legislative implementation. . . .

NOTE

As of March 2000, there were 41 Member States of the Council of Europe, all of which are parties to the European Convention on Human Rights. Chapter 10 examined the international organ of the ECHR, the European Court of Human Rights; these materials examine the internal application by member states of the Convention's rules.

All but three states parties have incorporated the Convention into domestic law. Of those three, the United Kingdom (see p. 1008, *infra*) and Norway are in the process of creating a new relationship between the Convention and domestic law. In Ireland the Convention continues to have only the status of international law within the domestic legal system, although a move to incorporate is under active review.

There follow brief studies of treaties within the domestic law of several countries.

JÖRG POLAKIEWICZ, THE APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN DOMESTIC LAW

17 Hum. Rts. L. J. 405 (1996), at 406

II. The status of the Convention in the domestic law of States Parties

Since there is no formal obligation for member States to incorporate the substantive provisions of the Convention into their domestic law their status varies from one country to another. . . .

The experience of Nordic countries is rather interesting. . . . The Convention was already ratified by the Nordic countries during the 1950s. . . . Even before

formally incorporating the Convention, courts in these countries refer particularly to the Convention when applying domestic law. In a judgment of 1989, the Swedish Supreme Court [said]... even though the Convention does not form part of Swedish law it is natural that its position in questions of rights influences the interpretation of the Instrument of Government [Constitution]....

The benefits of incorporation are obvious. Incorporation gives national authorities the opportunity to afford redress in cases of human rights violations when the case is taken to Strasbourg. Protracted proceedings in a forum that is so remote from and unfamiliar to the claimant can be spared. The settlement of litigations [sic] on the national level, saving both time and money, always remains the preferable solution.

As far as the States which have incorporated the Convention in their domestic law are concerned, two different situations have to be distinguished. In States with a monist tradition like Belgium, Luxembourg or the Netherlands, the rights and freedoms of the Convention were applied by the courts immediately after ratification. In States favouring a dualist approach to international law such as Germany, Italy and most of the States of Eastern and Central Europe, the Convention had to be 'transformed' into domestic law. It is usually the parliamentary act of ratification, i.e. the law approving the treaty and authorizing the deposit of the instrument of ratification which makes the Convention's provisions applicable in domestic law....

III. Application of the Convention in domestic law

In the past, a direct application of the Convention had sometimes been objected to with the argument that the rights and freedoms contained therein were too abstract and vague to be of any help for the national judge or lawyer. Lord Denning MR once went so far as considering the Convention to be 'indigestible'.

The convention is drafted in a style very different from the way which we are used to in legislation. It contains wide general statements of principle. They are apt to lead to much difficulty in application because they give rise to much uncertainty. They are not the sort of thing which we can easily digest. Article 8 [of the ECHR] is an example. It is so wide as to be incapable of practical application. So it is much better for us to stick to our own statutes and principles and only to look to the convention for guidance in case of doubt.

Today, such a reasoning appears anachronistic. The Convention and its Protocols are not only a mere catalogue of basic fundamental rights and freedoms. They constitute a body of law which has been tested, developed and applied by the Court and Commission for more than forty years....

The main responsibility for ensuring the observance of the Convention in domestic law lies with the legislature and the judiciary. In the first place, it is for the legislature to ensure that national legislation is in conformity with the rules of

the Convention. Prior to ratification, a number of States which have recently become Parties to the Convention went, with the assistance of the Council of Europe, through a 'compatibility exercise'. In Finland, Hungary, Lithuania, Estonia and Latvia, inter-ministerial committees or working groups were set up in order to review and assess the domestic legislation and its compatibility with the Convention.

Secondly, it is for the national judiciary to take the Convention seriously and to take it into account in the interpretation of statutory law. It is a usual practice in many countries to interpret statutes in a manner consistent with treaties. This practice is sometimes referred to as the rule of presumption....

The position of the Convention with regard to the rights and freedoms of national constitutions

In countries of Eastern and Central Europe have incorporated the Convention into their domestic law. Prior to this and sometimes even in parallel, most of them have embarked on a process of far-reaching constitutional reform which has resulted in the adoption of a whole series of new constitutions....

[Most] countries adopted a detailed catalogue of fundamental rights and freedoms often inspired by the provisions of the European Convention on Human Rights....

How to overcome possible conflicts between the provisions of the Convention and domestic legislation?

It is common practice in many countries that the courts give statutes, wherever possible, an interpretation which is in line with the Convention. National courts are indeed required to ensure that international responsibility of their country arising from wrongful application of or disrespect for rules of public international law be avoided.

There may, however, be cases of a clear-cut conflict between domestic legislation and the Convention. Here, the national judge has to decide. Where, according to the constitutional law of the State concerned, the provisions of the Convention take precedence over domestic legislation, the national judge must disregard the national law and apply the Convention instead.

This is the situation in a certain number of countries. The Dutch Constitution generally gives pre-eminence to the self-executing norms of international treaties. Austria has formally accorded constitutional rank to all the rights and freedoms contained in the Convention. Their precedence over conflicting legislation, both prior and subsequent to the ratification of the Convention, is in principle recognised in Belgium, Cyprus, the Czech Republic, France, Greece, Lithuania, Luxembourg, Malta, Portugal, Romania, Spain and Switzerland.

In other countries, the Convention's provisions can theoretically be overridden by subsequent legislation according to the well known *lex posterior derogat legi priori* rule. Fortunately, such a result which would constitute a violation of the

Convention is practically always avoided by using [techniques including broadening the presumption of the supremacy of the Convention by requiring that the legislature be explicit when a later-in-time statute is intended to deviate from the Convention (as the German Constitutional Court has done), and treating the Convention as *lex specialis* so that even subsequent statutes need not necessarily take precedence.]

...

COMMENT ON MONISM AND DUALISM

The preceding article refers to monist and dualist (or pluralist) theories about the relationship between international and national law, thereby tapping into a longstanding jurisprudential, legal and political debate. Monist theories imagine a unitary world legal system in which national and international law have 'comparable, equivalent, or identical subjects, sources, and substantive contents'.⁵ Monists argue for the supremacy of international law in relation to national law. In its classical formulation, monism asserts that all activity of states is regulated by the superior international law. Thus the so-called 'domestic affairs' of a state are not affairs unregulated by international law, but rather affairs which a state has exclusive competence to regulate pursuant to and under international law.

Dualist theories distinguish between the system or public order of international law and of national law. Each has 'its own distinguishable subjects, distinguishable structures and processes of authority, and distinguishable substantive content'. Thus the subjects of international law are only states, its sources lie only in treaties and custom made by states, and its content involves only relations between states. Neither international law nor national law can *per se* create or invalidate the other. Of course a state may by its own custom or national law adopt rules of international law as the law of the land, through practices and theories of incorporation, transformation, adoption and so on.

Hans Kelsen has stressed the different perspectives on institutions and world values and order that these two theories express:

... It may be that our choice ... is guided by ethical or political preferences. A person whose political attitude is that of nationalism and imperialism may be inclined to accept as a hypothesis the basic norm of his own national law. A person whose sympathy is for internationalism and pacifism may be inclined to accept as a hypothesis the basic norm of international law and thus proceed from the primacy of international law. From the point of view of the science of law, it is irrelevant which hypothesis one chooses. But from the point of view of politics, the choice [between dualism and monism] may be important since it is tied up with the ideology of sovereignty.⁶

⁵ All quotations in this Note are taken from Myres McDougal, 'The Impact of International Law upon National Law: A Policy-Oriented Perspective', 4 S. Dak. L. Rev. 25, (1959) at 27-31.

⁶ *Principles of International Law* (1952), at 446, quoted in McDougal, *supra* n. 5.

Monist theory is clearly illustrated by the Dutch Constitution of 1983, as seen in the following excerpts:

Art. 93 of the Constitution provides that provisions of treaties and decisions of international organisations, the contents of which may be binding on everyone, shall have this binding effect as from the time of publication. The words 'the contents of which may be binding on everyone' are generally understood to refer to the self-executing character which is required for their application by Dutch Courts. The rights contained in the ECHR are considered self-executing by the courts and are therefore directly applicable.

... [Pursuant to Art. 94 of the Dutch Constitution, Dutch courts must] give precedence to self-executing treaty provisions over domestic law that is not in conformity therewith, be it antecedent or posterior, statutory or constitutional law. ... But the courts have no competence to nullify, repeal or amend the legislation in question. The provision remains in force, but will not be applied.

3. Case-law

[The earlier] reticent attitude of Dutch courts towards the ECHR has changed quite dramatically during the 1980s. The statistical survey recently given by Van Dijk shows a considerable increase of references to the ECHR. The percentage of cases, however, in which the Supreme Court has found a violation of the Convention remains small (an average of 9%). When confronted with a conflict between a provision of the ECHR and a provision of Dutch law, the Supreme Court tends to circumvent it by giving to the latter an interpretation or scope different from its original meaning and from the anterior legal practice, or by inserting a new principle into Dutch law derived from the treaty provision. ...

Dualist theories are illustrated in the practice and constitutional norms of several of the states described below.

BRUNO SIMMA ET AL., THE ROLE OF GERMAN COURTS IN THE ENFORCEMENT OF INTERNATIONAL HUMAN RIGHTS in B. Conforti and F. Francioni (eds.), *Enforcing International Human Rights in Domestic Courts* (1997), at 107

Our review of the jurisprudence of German courts on international human rights will probably leave the observer with mixed feelings. On the one hand, the implementation of human rights treaties and customary human rights law in the German legal order, combined with the extensive jurisdiction and broad powers of review available to the judiciary, would offer a good starting-point for German courts to take an active part in the formation of an extensive body of case law on

⁷ Jörg Polakiewicz and V. Jacob-Foltzer, 'The European Human Rights Convention in Domestic Law', 12 Hum. Rts. L. J. 65 (1991), at 125.

international human rights. The demand of the Bundesverfassungsgericht (Federal Constitutional Court) to pursue an interpretation in favour of public international law . . . grants German courts further possibilities to apply international human rights indirectly in their jurisprudence. Unfortunately, however, the number of cases in which German courts deal with international human rights is meagre except in some areas like expulsion and extradition, where domestic statutes explicitly require the consideration of international human rights standards.

Why do German courts apply international human rights norms so rarely? At least, practical reasons can explain this reluctance of German courts:

1. International human rights norms are not part of the core curricula in the legal education and practical training of lawyers and judges.
2. Some courts may have difficulties in obtaining German translations.
3. Access to the texts of international norms sometimes proves to be difficult. . . .

The most plausible explanation for the reluctance of German courts to consider international human rights norms in their case law, however, seems to be the far-reaching *prime facie* parallelism of some international rights and domestic constitutional and statutory rights. Whenever courts can enforce an individual right simply on the basis of a constitutional or statutory provision they will do so, simply because they can rely on an elaborate case law, commentaries and other secondary literature. . . . In addition, German courts, and German jurists in general, seem convinced that the German legal system establishes such a high standard of protection for individual rights guaranteed in the Basic Law that international human rights law could hardly offer any improvement. Thus, it is not surprising that courts often refer to international human rights only in the way of stating briefly that the application of these rights would not lead to a different result in the specific case. Judgments of the European Court of Human Rights which found a violation of the Convention by German authorities have proved that this general assumption is erroneous. In the long run, these decisions had quite considerable impact insofar as they changed the general attitude of German courts towards the European Convention. . . .

YUJI IWASAWA, INTERNATIONAL LAW, HUMAN RIGHTS LAW AND JAPANESE LAW: THE IMPACT OF INTERNATIONAL LAW ON JAPANESE LAW

(1998) at 288-306

A. The Relationship between International Law and Japanese Law

International law is accorded high formal authority in Japan; both treaties and customary international law have the force of law and override statutes, even if the statutes were enacted later in time.

Impact of International Law on Japanese Law

(a) Tendency of the courts to ignore arguments based on international human rights law

The courts are generally reluctant to adjudicate on the basis of international human rights law. Japanese courts often restrict their interpretation to the Japanese Constitution, ignoring arguments based on international human rights law.

(b) Tendency of the courts to summarily dismiss arguments based on international human rights law

Japanese courts tend to dismiss arguments based on international human rights law without detailed analysis of their substance. The courts often interpret the Japanese Constitution and then apply the same reasoning to a comparable provision in a human rights treaty. Japanese courts assume that the meaning, scope, and effect of human rights provisions under international human rights law are the same as those under the Japanese Constitution. Accordingly, if a governmental action is found to be lawful under the Japanese Constitution, it is automatically regarded as lawful under international human rights law as well.

... To justify restrictions of human rights, the courts have preferred to rely on the familiar Japanese concept of 'public welfare' rather than the international concepts of 'national security, public order (*ordre public*), public health or morals' . . .

(c) Reluctance of the courts to find violations of international human rights law

... In recent years, more and more individuals and attorneys have come to invoke international human rights law, particularly the International Covenants on Human Rights, before the courts. Yet, the courts have so far applied the ICCPR directly in only a few instances. Occasionally, the courts have used international human rights law as an aid in the interpretation of domestic law to hold in favour of the individual who had invoked it.

(d) Japanese courts and the practice of judicial restraint

... Japanese courts are highly restrained in judicial review and generally reluctant to invalidate legislation on constitutional grounds. Even when Japanese courts sympathize with the plaintiff, they hesitate to find a government action to be unconstitutional, preferring instead to dispose of the case by statutory interpretation. . . .

... In the five decades since the enactment of the Constitution, statutes have been found to be unconstitutional on only five occasions.

...

2. Revision of Domestic Law in Accordance with International Law

(a) Revision of domestic law upon ratification of treaties

Since treaties have the force of law and override domestic laws in Japan, when the Japanese Government decides to enter into a treaty, it makes scrupulous efforts to bring Japanese law into conformity with the treaty. . . . Thus, upon ratification of treaties, Japanese law significantly improves through revision of laws. The most conspicuous such changes have occurred in the area of human rights—in the treatment of aliens and women.

...

K.D. EWING, THE HUMAN RIGHTS ACT AND PARLIAMENTARY DEMOCRACY

62 Modern L. Rev. 79 (1999)

The UK Human Rights Act 1998 . . . represents an unprecedented transfer of political power from the executive and legislature to the judiciary, and a fundamental re-structuring of our 'political constitution'. As such it is unquestionably the most significant formal redistribution of political power in this country since 1911, and perhaps since 1688 . . .

...

The nature and extent of incorporation

The Human Rights Act 1998 does not incorporate the ECHR into domestic law in the way that the European Communities Act 1972 incorporates the EC Treaty. Rather what it does is to give effect to certain provisions of the Convention and some of its protocols by providing that these so-called 'Convention rights' are to have a defined status in English law. There is no question of the Convention rights in themselves 'becoming part of our substantive domestic law': rather, certain defined provisions of the Convention enjoy a defined legal status. The terms of the Convention which are given effect to in this way by section 1 of the Act are articles 2 to 12 and 14, as well as articles 1 to 3 of the First Protocol and . . . articles 1 and 2 of the Sixth Protocol. The major omissions here are articles 1 and 13 of the Convention, the former providing that 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of [the] Convention'; and the latter providing that 'Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority'. There was little objection to the omission of article 1, which was properly excluded on the ground that it was an inter-state obligation. . . .

In giving effect to Convention rights in this way, by section 2 the Act also directs the courts to have regard to the jurisprudence of the different enforcement and supervisory bodies in Strasbourg. For this purpose the Act refers expressly to the

European Court of Human Rights, the European Commission of Human Rights, and the Committee of Ministers. As we have seen, the Commission and the Committee of Ministers will have been abolished or removed from questions of adjudication by the time the Act comes into force, though the jurisprudence of these bodies will continue to be relevant. It is to be noted, however, that the courts are required simply to take into account the jurisprudence of the Strasbourg bodies, and are not bound by it, and that the government rejected an amendment in the Act which would have imposed the stronger obligation. . . .

The fact remains that the Convention is meaningful only because of the principles of interpretation developed in the case law, and the decisions on points of substance, issues which are of universal application. As a text the Convention is meaningless without the jurisprudence, as is true of any other legal text: to sever the jurisprudence from the treaty is like severing the limbs from a torso. But whatever the reasons for refusing to be bound by Strasbourg jurisprudence, it should be clear that the nature and extent of judicial power under the Act are greater than may be realised. Convention rights are now free standing and autonomous (even if not 'substantive') rights of British law which the judges are empowered to develop as they wish, guided but unconstrained by the Convention jurisprudence.

What this in fact confirms is that what we have incorporated is not the European Convention on Human Rights, but a number of principles which happen to be included in the Convention. We have something much closer to a distinctively British Bill of Rights than is sometimes imagined: not perhaps in terms of the structure of the rights themselves; but certainly in terms of their interpretation and application, with British judges having the same [un]fetter[ed] (the word is Lord Browne-Wilkinson's) discretion as their counterparts in Canada and elsewhere.

Statutory interpretation

The first way by which the Convention will impact upon domestic law is through the obligations in respect of statutory interpretation in section 3. This provides that 'so far as possible to do so', both primary legislation and delegated [subordinate, secondary] legislation are to be read and given effect to in a way which is compatible with Convention rights. . . .

. . . Parliament has also been careful to point out in section 3, however, that the duty of construction which it embraces does not 'affect the validity, continuing operation or enforcement of any incompatible primary legislation'. Nor does it affect the continuing operation or enforcement of any incompatible subordinate legislation 'if primary legislation prevents removal of the incompatibility'.

But what happens if legislation—primary or subordinate—is incompatible with Convention rights, and it is not possible to construe the former to meet the demands of the latter? The answer lies in section 4 which empowers the courts to make a declaration of incompatibility . . . [Discussion of secondary legislation omitted.]

The power to grant a declaration of incompatibility is limited to the higher courts. . . . The duty to construe legislation to comply with Convention rights is

one which in contrast is imposed on all courts. The granting of a declaration of incompatibility is discretionary even where a 'mismatch' has been found, and the government resisted an amendment that it should be mandatory. If granted, a declaration of incompatibility has 'no operative or coercive effect', and 'does not prevent either party relying on, or the courts enforcing, the law in question'. It does not affect the validity, continuing operation or enforcement of the legislation in question; nor is it binding on the parties in the proceedings in which it is made. This in itself may serve to ensure that there is little incentive for litigants to appeal where they have lost under legislation which may infringe a Convention right, but which the lower court has no authority to determine. It is in any event unclear at this stage whether there would always be grounds to appeal where a case has been decided clearly and unequivocally under legislation which may prove to breach Convention rights.

...

Liability of public authorities

The second way by which the Act gives effect to the Convention is by imposing an obligation on public authorities to comply with Convention rights, an obligation which is directly enforceable in the courts. Section 6 provides that it is unlawful for a public authority to act in a way which is incompatible with one or more of the Convention rights, with a 'public authority' being widely defined to include a court; a tribunal which exercises functions in relation to legal proceedings; and any person certain of whose functions are functions of a public nature. The definition is fluid and open ended. . . . But the intention clearly is that they should apply to central government (including executive agencies), local government, the police, immigration officers, and the prison service, as well as to others. One of the most difficult questions under the Act relates to the inclusion of courts and tribunals within the definition of a public authority. The precise meaning and implications of this are unclear . . .

According to the Lord Chancellor, the government 'believe that it is right as a matter of principle for the courts to have the duty of acting compatibly with the Convention not only in cases involving other public authorities but also in developing the common law in deciding cases between citizens'. But what does this mean, given the government's belief that 'full horizontal effect' would be 'a step too far in a Bill which . . . is designed to allow the Convention rights to be invoked in this country by people who would have already a case in Strasbourg', and given also the rejection by the Lord Chancellor of the view that the courts will be required to legislate by way of judicial decision 'whenever a law cannot be found either in the statute book or as a rule of common law to protect a convention right'? The answer it seems is that Convention rights may be relied upon in litigation between private parties, but cannot themselves be the basis of a cause of action. So although a worker dismissed for a reason incompatible with the Convention may not sue his or her employer for breach of a Convention right, the worker in question may be able to sue for wrongful dismissal, claiming that a dismissal for a reason incompatible with a Convention right is wrongful.

...

Remedial action

We have seen, section 4 of the Act permits the courts to declare an Act of Parliament to be incompatible with Convention rights, though they are required to enforce and apply it until such time as the legislation has been amended. The government considered but rejected the option of giving the courts the power to set aside an Act of Parliament believed to be incompatible with Convention rights, 'because of the importance the Government attaches to Parliamentary sovereignty'. The White Paper continues in powerful and convincing terms, as follows:

In this context, Parliamentary sovereignty means that Parliament is competent to make any law on any matter of its choosing and no court may question the validity of any Act that it passes. In enacting legislation, Parliament is making decisions about important matters of public policy. The authority to make those decisions derives from a democratic mandate because they are elected, accountable and representative.

Concern was expressed that to permit the courts to set aside Acts of Parliament 'would confer on the judiciary a general power over the decisions of Parliament', and 'would be likely on occasions to draw the judiciary into serious conflict with Parliament'. Crucially there 'is no evidence to suggest that they desire this power, nor that the public wish them to have it'.

So why give the courts the power to rule on the compatibility of an Act of Parliament with Convention rights? How can this be reconciled with the authority of the mandate? The answer is that it is open to the government to decide how to deal with the decision of the courts, and to refuse to take steps to remedy the incompatibility if it deems it appropriate to do so. This after all is the position currently with decisions of the European Court of Human Rights which do not change domestic law but require amending legislation, which the government cannot be compelled to introduce and Parliament cannot be compelled to pass. But although these are weighty and logical considerations, we should be careful about distinguishing form from substance, principle from practice. As a matter of constitutional legality, Parliament may well be sovereign, but as a matter of constitutional practice it has transferred significant power to the judiciary.

...

QUESTIONS

1. It has often been observed that respect for human rights begins and ends at home and that international organizations have little more than a catalytic or intermediary role. On the basis of the preceding descriptions of states' relationships to international human rights norms, how satisfactory have the efforts of each of the states been to ensure that its legal order respects the relevant norms?
2. Is the *de facto* preference for applying domestic constitutional rather than inter-