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The Internationalization of Constitutional Law

by Herman Schwartz*

Constitutional law in our country has been almost entirely a domestic matter. This is hardly surprising, because one of the primary features of a constitution is to regulate relations between the government and the persons subject to it, and relations among the elements of government. Moreover, as we are seeing today, our government takes the position—without expressly saying it—that international norms that might inject a foreign element into any of those relationships do not apply to us, except in the loosest sense.

This attitude does not hold true elsewhere in the world. The post-WWII era can be characterized as the age of the judges. Before World War II, there were almost no constitutional tribunals in which judges asserted the right to annul legislation—in Western Europe, only Austria and Czechoslovakia did so, and they did infrequently. (There were also a few relatively insignificant courts in Latin America following the US model.) Since 1945, however, when the Austrian court was revived, almost every new state has established some kind of constitutional court, usually in a separate tribunal whose membership and other characteristics are very different from the ordinary judiciary. Although all of these courts were obviously domestic tribunals established by national constitutions, they quickly became subject to extra-national norms, primarily regional norms, so that their constitutional laws became, perforce, internationalized.

In part, this internationalization occurred because in almost all cases a major element of the jurisdiction of these courts and indeed a major reason for their coming into existence was to protect and promote human rights, which in most parts of the world are now subject to norms that are partly internationally established and to some degree simply adhered to by many different states. In many cases—and this applies not only to human rights—these domestic tribunals have become subject to regional treaties, regional tribunals, and other institutions implementing those treaties.

Perhaps the most prominent examples come from Europe—the establishment of the European Court of Human Rights (ECHR) to enforce the European Convention on Human Rights and the European Court of Justice (ECJ) to enforce the Treaty of Rome, establishing what is now the European Union. Among the ECJ's many achievements, it has also developed a substantial body of human rights law. The ECHR, now in existence since 1959, has had an immense influence both directly on the 43 countries subject to its jurisdiction and on tribunals elsewhere, which have been influenced by its decisions.

The direct influence operates in two ways, both of which force a state to comply with a supra-national constitutional norm: in most of the states subject to it, the European Convention is either incorporated by statute or by direct inclusion in domestic constitutions. In the Czech and Slovak Republics, *all* human rights treaties ratified by those two states are expressly adopted as part of their constitutions and supersede domestic law, with a proviso in the Slovak Constitution that the superseded domestic norm not be higher. Romania also

allows international human rights treaties that it has ratified to supersede inconsistent domestic law. The South African Constitution provides that in interpreting its Bill of Rights, a court *must* consider international law and *may* consider foreign law. Even Great Britain, one of the most stubborn holdouts, has gone most of the way to incorporating the European Convention into domestic law, while superficially maintaining domestic parliamentary sovereignty.

Judges and lawyers in these 43 countries must therefore look to a law that is common to all 43 outside of their own constitutions. This is the theory at any rate, though in practice things do not occur so smoothly. In many European countries, and certainly in Central and Eastern Europe, looking to an international convention or even a domestic constitution for the governing norm is still quite alien to most judges and lawyers.

Even those Council of Europe (COE) members that have not incorporated the European Convention into their domestic laws must comply with ECHR rulings on the validity of their laws under the Convention, either by changing legislation, as Britain had to do until it incorporated the Convention into its domestic law in 1998, or by otherwise remedying the situation. The ECHR is not the only regional court with this authority. The other significant tribunal is the Inter-American Court of Human Rights, which arguably has had a similar but lesser impact, in part because of the involvement of

less democratic and highly unstable regimes in Latin America.

An even more profound penetration of regional international law outside the human rights area has resulted from the Treaty of Rome establishing the European Union, for this treaty addresses a vast number of private economic activities in the EU states, as well as human rights. Here, even Great Britain formally incorporated the treaty into its domestic law. Under it, in the EU countries, domestic courts are bound by the treaty provisions and must apply them, as interpreted by the ECJ, including the implementing directives, often overriding inconsistent local law, though here too, there are some ambiguities related to human rights.

The European Court of Human Rights has had a significant influence even beyond its jurisdiction. That influence is the product of a much larger phenomenon—constitutional courts looking for guidance from the decisions in other countries dealing with similar issues. For example, this search for guidance elsewhere took place in one of the earliest of the South African Constitutional Court cases—the 1995 decision in *State v. Makwanyane*, under the transitional constitution that struck down capital punishment.

In his opinion, Chief Justice Arthur Chaskalson wrote:

In the course of the arguments addressed to us, we were referred to books and articles on the death sentence, and to judgments dealing with challenges made to capital punishment in the courts of other

“[The U.S.] government takes the position—without expressly saying it—that international norms that might inject a foreign element into any of those relationships do not apply to us, except in the loosest sense. This attitude does not hold true elsewhere in the world.

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countries and in international tribunals. *The international and foreign authorities are of value because they analyse arguments for and against the death sentence and show how courts of other jurisdictions have dealt with this vexed issue. For that reason alone they require our attention* (emphasis added). They may also have to be considered because of their relevance to section 35(1) of the Constitution, which states:

In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the right entrenched in this Chapter, and may have regard to comparable foreign case law.

Customary international law and the ratification and accession to international agreements is dealt with in section 231 of the Constitution which sets the requirements for such law to be binding within South Africa. In the context of section 35(1), public international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation. International agreements and customary international law accordingly provide a framework within which Chapter 3 can be evaluated and understood, and for that purpose decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights, and the European Court of Human Rights, and in appropriate cases, reports of specialised agencies such as the International Labour Organisation may provide guidance as to the correct interpretation of particular provisions of Chapter 3.

Indeed, the first section of the decision after the statement of the contentions of the parties was on international and foreign comparative law.

In its decision, the South African Constitutional Court cited and discussed decisions from more than ten countries, ranging from Tanzania to the United States to India, including a decision from Hungary on the meaning of a provision common to the South African, Hungarian and German constitutions requiring that restrictions not infringe on the essence of a right. The Court cited some 100 decisions from these foreign jurisdictions, and discussed many of these.

South Africa offers another example of internationalization, this time from an even more supranational source, but with less binding authority. In the summer of 2002, the Constitutional Court decided a very important case dealing with AIDS and the right to health, *Minister of Health v. Treatment Action Campaign*. In connection with this case, the Constitutional Court looked to a detailed comment by the UN Committee on Economic, Social and Cultural Rights, which implements the International Covenant on Economic, Social, and

Cultural Rights (CESCR) interpreting the requirements of the relevant CESCR provision. Although the South African Constitutional Court did not adopt all of the comment, its decision was clearly influenced by it.

International humanitarian law has also played a role. A case from Hungary, Decision 23/1990 (Oct. 31, 1990), illustrates a rather special example, based on specific Hungarian law. In the early years after the Velvet Revolution, statutes were enacted to prosecute the perpetrators of crimes associated with the brutal repression of the 1956 revolution. Most of these laws were barred by statutes of limitations, and were struck down by the Hungarian Constitutional Court—at the time, one of the most creative and progressive constitutional courts in the world. Some statutes survived, however: those that tracked international war crimes or crimes against humanity and were therefore not subject to statutes of limitation under applicable international law.

One final example of particular interest: the European Social Charter is implemented largely through reporting requirements imposed on the parties to the Charter. There is, however, an additional protocol allowing for what is called a collective complaint, whereby states party to it—of which there are nine—agree to be bound by the decisions of the Committee of European Social Rights regarding complaints brought by non-governmental organizations “of unsatisfactory application of the Charter.” Decisions against child labor and forced labor have been issued.

All of these developments led László Solyom, former President of the Hungarian Constitutional Court and one of the most creative judges of our time, to rhapsodize about the development of a world constitutional law. As in so many other respects, the world minus one—the United States.

Recall the South African Constitutional Court’s looking to over 10 countries for guidance on capital punishment, and its citation of over 100 foreign cases. In our Supreme Court, that kind of approach draws nothing but scorn and irritation from some of the justices.

In 1999, two prisoners on death row petitioned the Supreme Court for writs of certiorari in the case of *Knight v. Florida*, urging that the Eighth Amendment prohibited the execution of prisoners who had spent some 20 or more years on death row. One of them had spent almost 25 years awaiting execution. The Court routinely denied certiorari, but Justice Stephen Breyer dissented, arguing that the Court should consider the question. In the course of his opinion, Justice Breyer wrote:

A growing number of courts outside the United States—courts that accept or assume the lawfulness of the death penalty—have held that lengthy delay in administering the lawful (sic) death penalty renders ultimate execution inhuman, degrading, or unusually cruel (emphasis in original).

He went on to cite and quote cases from Great Britain, India, Zimbabwe, Canada, and the UN Human Rights Committee, the latter two upholding lengthy sentences but with concern. Justice Breyer’s effort aroused the ire of Justice Clarence Thomas, who wrote a concurrence to the denial of certiorari, using the opinion as an opportunity to condemn “this Court’s Byzantine death penalty jurisprudence.”

This term, in *Atkins v. Virginia*, the Court ruled 6–3 that mentally retarded defendants could not be executed. In

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describing the growing consensus against executing mentally retarded offenders, Justice Stevens, writing for the Court, dropped a footnote in which he referred in passing to the fact that “within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.” This led Chief Justice William Rehnquist to write a separate dissenting opinion—Justice Antonin Scalia wrote the main dissent—to chide the Court for its decision to “place weight on foreign laws,” saying, “I fail to see, how the views of other countries regarding the punishment of their citizens provide any support for the Court’s ultimate determination.”

This October, Justice Breyer tried again. In *Foster v. Florida*, petitioner Charles Foster had spent more than 27 years in prison since his initial death sentence in 1975. Justice Breyer urged the Court to take the case, again citing “courts of other nations [that] had found that delays of 15 years or less can render capital punishment degrading, shocking or cruel,” and noting that The Federalist Number 63 also urged “attention to the judgment of other nations” when determining “the justice and propriety of [America’s] measures.” This was just too much for Justice Thomas, who again wrote a separate concurrence to the denial of certiorari, bursting out in a footnote that “while Congress as a legislature may wish to consider the

actions of any other nation on any issue it likes, this Court’s Eighth Amendment jurisprudence should not impose foreign moods, fads or factions on Americans.”

Although Chief Justice Rehnquist and Justice Thomas were the only two who spoke out against the importation of foreign norms even for consideration, I think they reflect a very wide-spread attitude among American judges, as witnessed by the absence of any substantial judicial use, for any purpose, of foreign norms. Note also that Justice Breyer’s efforts drew only marginal support from Justice Stevens in his *Atkins* opinion. For this reason, I think any effort to import international norms into American constitutional law, especially as governing norms, is largely a waste of time, at least for some time.

Constitutional law is indeed moving toward some degree of internationalization . . . but not here. ☹

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tion the Government for a redress of grievances.” The United States Supreme Court’s decisions are a product of their time and context; the First Amendment has been restricted to protect racial minorities but expanded to ensure the protection of the free market of ideas. Restricting hate speech may improve the quality of public debate, mainly in the context of most of the European states, and the U.S. model may not be adaptable to young or weak democracies.

The Inter-American Commission and Court have not yet dealt with hate speech issues, but the European Court’s interpretation of Article 10 of the ECHR and the United Nations Human Rights Committee’s interpretation of Article 19 of the International Covenant on Civil and Political Rights, which are immediate precedents for the American Convention, seem to imply that Article 13 is incompatible with speech inciting racial or religious hatred.

Conclusion

Freedom of expression is a right considered essential in the promotion and respect of a democratic society, and therefore must be interpreted in the least restrictive possible way. This right has been privileged by both the European and the inter-American systems, although a balance between this right and other interests is sought through case law, recognizing that there is a certain interdependence among the different rights recognized in the Conventions.

The text of the European Convention is not as detailed in describing the limitations as the American Convention, and the European states have traditionally been granted a margin of appreciation due to the political homogeneity that exists in Europe and the confidence in the states’ abilities to redress

major violations. Nevertheless, the European Court has settled vast case law narrowing the limits and defining the restrictions, which the new democracies now incorporated into the system will have to apply and respect. The Inter-American Commission and Court, more reluctant to leave to the states the choice of abusing the limitations, have stressed the necessity of respecting freedom of expression in the Americas, and in 1997, the Office of the Special Rapporteur for Freedom of Expression was created.

True freedom of speech can be realized only if states fully comply with the existing regional norms. Although this ideal is still far from being achieved, awareness and promotion of free and open debate is the first step to its realization. ☹

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