

Editors' Comment*

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Transplant of legal concepts from one constitutional system to another necessarily raises the question of transformation of those concepts and consequently the further questions of hybridization and perhaps convergence of legal systems. In the new context, with its unique politics, history, and culture—legal and otherwise, the transplant may, in ways determined by its host environment, thrive, wither or transform itself. A transformed transplant may work differently, serving distinct ends, or replicate its original model. It may induce legal systems to converge or to evolve in continued independent ways.

The thirteen essays here contributed speak to the potential benefits of transplant and the phenomenon of transformation, as well as the prospects of convergence, in distinct and diverse voices. The legal systems considered include those of Canada, France, India, Italy, Malaysia, South Africa, Turkey and the United States. They range across common and civil law systems and along a broad spectrum of developed and emerging market economies. In the illustration of transplants and their ramifications, the authors address areas of scholarly legal inquiry such as judicial review, constitutionalism, human rights, intersectionality, and legal education. The authors probe historical and

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contemporary developments to address current challenges that include: (i) providing water in South Africa to sustain human dignity in an impoverished community, (ii) the implications of allowing or prohibiting the wearing of a veil in the context of public education in France and Turkey (and more broadly relative to Canada, the interfaces of women's rights, the observance of cultural and religious traditions, and family law), (iii) the establishment of judicial review in a post-conflict environment (drawing on Italy's post World War II experience), (iv) the transformation of European civil law systems, as well as that of the European Union itself, by virtue of their exposure to the European Union's common law jurisdictions (notably the law of England and Wales), (v) the revolution in English law associated with the injection of European Community and European human rights components into it, (vi) the role of constitutional anchors in India for state intervention to lift significant portions of society from poverty, and (vii) attention to foreign constitutional models in the systems of legal education in Malaysia and South Africa as well as in South Africa's vibrant constitutional jurisprudence.

From the multiplicity and heterogeneity of subject matters in highly diverse legal systems and societies, emerges a clear value in the conduct of investigations of transplants and convergence, as well as the impact of hybridization in generating social change. Such investigations enrich the understanding of constitutional issues within and across systems and empower those who seek social change with a more profound understanding of the array of instruments, their advantages and their limitations, that are available to carry it forward. The Conference and Symposium in this context address seven basic themes: **(i) comparative constitutional law (methodology, hybridization, transplants); (ii) religion, State and constitution; (iii) gender and constitution; (iv) constitutional adjudication and democracy; (v) distributive justice; (vi) contemporary challenges to executive power; and (vii) legal education.**

COMPARATIVE CONSTITUTIONAL LAW: METHODOLOGY,
HYBRIDIZATION, TRANSPLANTS

Methodological Challenges in Comparative Constitutional Law

Vicki Jackson

Hybridization: A Study in Comparative Constitutional Law

John McEldowney

Introduction of Judicial Review in Italy—Transition from Decentralized to Centralized Review (1948-1956)—A Successful Transplant Case Study

Louis F. Del Duca

Vicki Jackson, a leading scholar of comparative constitutional law methodology, opens this selection of articles by addressing *Methodological Challenges in Comparative Constitutional Law*. She identifies general goals of comparative legal studies and notes the special way in which they apply to the unique challenges of comparative constitutional law.

Prof. Jackson identifies four main goals of comparative study of legal systems: (i) understanding other systems; (ii) developing better understanding of one's own system; (iii) identifying "best practices" and, (iv) further exploring domestic doctrinal or textual questions. As she notes, seeking to achieve each of these goals presents characteristic challenges. For example, acquiring sufficient fluency in another legal system may require committing time and effort that might be invested in direct, deeper understanding of one's own legal system. Moreover, it may be quite difficult to appreciate in a founded way the nature of differences and the reasons that give rise to them.

Prof. Jackson is clear: a correct methodological approach is of primary relevance in any legal study. However, its importance increases when legal comparisons are involved in order to avoid focusing on easy and misleading analogies (or differences) and to further studies of cultural and social backgrounds along with legal materials. Methodological issues are even more important in a young field like comparative constitutional law.¹ The field has emerged from the

1. Currently, two leading United States casebooks address comparative constitutional law: Vicki Jackson, Mark Tushnet (eds.), *COMPARATIVE CONSTITUTIONAL LAW* (2nd ed. 2006, first ed. 1999); Norman Dorsen, Michel Rosenfeld, Andras Sajó, Susanne Baer, *COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS* (2003). A work from outside the United States is Aalt Willem Heringa, Philipp Kiiver, *CONSTITUTIONS COMPARED: AN INTRODUCTION TO COMPARATIVE CONSTITUTIONAL LAW* (2009). One of the first casebooks for comparative constitutional law published in the United States was Mauro Cappelletti, William Cohen, *COMPARATIVE CONSTITUTIONAL LAW. CASES AND MATERIALS* (1979). See also Vicki Jackson, Mark Tushnet (eds.), *DEFINING THE FIELD OF COMPARATIVE CONSTITUTIONAL LAW* (2002), with a foreword by the Chief Justice of the United States Supreme Court, William H. Rehnquist. To address the absence of comparative and transnational law components in conventional law school teaching materials in the United States, one publisher has come to market with a GLOBAL ISSUES SERIES to supplement such materials. The series includes *GLOBAL ISSUES IN CONSTITUTIONAL LAW* by Brian Landsberg and Leslie Jackobs, as well as volumes on civil procedure, contracts, copyright, corporate law, criminal law, employee benefits, employment, employment discrimination, environmental law, family law, freedom of

discipline of comparative law, originally focused on comparisons of the *private* law of various jurisdictions. While comparisons among fundamental documents (constitutions) date back to Aristotle, only with the development and spreading of written constitutions has the study of this subject gained momentum and its own scientific independence.² Although the United States Constitution, at least from the 1803 decision of *Marbury v. Madison*,³ has contemplated judicial review of the constitutionality of laws, and Hans Kelsen's conceptualization of a mechanism for centralized constitutional review in a civil law legal system was first implemented in post World War I Austria, only following World War II did constitutions widely assume the rigidity associated with their use as a criterion of reference for judicial review of laws, thus creating the conditions for emergence of the new discipline. The discipline came of age in the 1980s and 1990s, under the influence of significant constitutional changes in Canada, South Africa and, after fall of the Berlin Wall, several central European countries.⁴

Prof. Jackson identifies three challenges that are unique to comparative constitutional law relative to other comparative legal studies: (i) the historical contextual foundation of constitutional provisions; (ii) the tendency in constitutional law and theory to conflate descriptive and normative assertions (that is, to mix "what is" with "what should be"); and (iii) the aspirational (what Prof. Jackson references as "identitarian" or "expressivist" and others might understand as "nation/national identity-building") aspects of constitutional law (for example, inclusion of the invocation of the Holy Trinity in the preamble of the constitution of Ireland, or inclusion in the preamble of the constitution of Iraq, the identification of "the people" as those originating from "the land between the two rivers"). Prof. Jackson's analysis teaches: (i) a need for sensitivity to how functions that appear similar, may in fact be different in different societies; (ii) an attention to how seemingly separate institutions or legal practices can be actually connected to and influenced by others; and, (iii) an openness to

speech and religion, income taxation, intellectual property, legal ethics, property, torts and trademarks.

2. On development of comparative constitutional law, see Mark Tushnet, *Comparative Constitutional Law*, in Mathias Reimann, Reinhard Zimmerman (eds.), *THE OXFORD HANDBOOK OF COMPARATIVE LAW* 1226 *et seq.* (2006).

3. *Marbury v. Madison*, 5 U.S. 137 (1803).

4. *Id.* at 1127 *et seq.* Here Prof. Tushnet identifies three events that provoked affirmation of comparative constitutional studies: "patriation" of Canada's Constitution; South Africa's democracy-building and constitution-drafting processes of the 1990s leading to its 1993 and 1996 constitutions; and the extensive revisions of Eastern European constitutions after the fall of the Berlin Wall, with support of the Council of Europe's (Venice) Commission for Democracy through Law.

perceiving how “expressivist” components of a constitution can influence legal rules and doctrines.

In his article on *Hybridization: A Study in Comparative Constitutional Law*, **John McEldowney** analyses a special form of convergence between different legal systems, defined as Hybridization. This process furthers a migration and transposition of ideas and concepts between legal systems, rejecting a mutually exclusive approach that would result in substitution of one system for another. The process endorses common sharing and mutual influence, while safeguarding national sovereignty and identity. Introducing his analysis with an overview of the historical foundations of hybridization processes, Prof. McEldowney underlines the origins in the field of private law of convergence among legal systems. The processes of hybridization, however, are now no longer limited to the area of private law, but are also significantly at work in the areas of administrative and constitutional law, contributing, for example, to the establishment of a new European administrative law and determining constitutional consequences especially relative to the role of courts.

And indeed, Prof. McEldowney identifies hybridization dynamics in a current European trend that he maintains has led to a new legal tradition in Europe. This tradition finds its roots in the convergence between the two well known Western legal traditions: common law and civil law. The European Union is presented therefore as one paradigmatic example of hybridization, in which processes of transplants and convergence have nonetheless been able to preserve elements of national sovereignty within domestic legal systems. Together with current developments in the field of human rights protection, the Treaty of Lisbon simultaneously represents both a visible outcome and a foundational element of this new process. In the Treaty, harmonization of the twenty-seven Member States' diverse legal systems in areas relevant to the Union is pursued with consideration to mutual influence and harmonization on the one hand, and preservation of national constitutional and cultural elements on the other.

Moving away from the European landscape, Prof. McEldowney identifies the Japanese legal system as presenting another example of the dynamics of hybridization. Since the early medieval period, Japan has experienced at least three periods (the medieval-Tokugawa period, the Meiji era and the post-World War II period) of adaptation to foreign influences. While these influences have deeply affected the Japanese legal system, they also show that adaptation to foreign influences may be achieved while retaining national cultural and societal attitudes.

In the final part of the article Prof. McEldowney draws some conclusions addressing concerns about how hybridization may ultimately

change the dynamics of how legal systems adapt to changes while striving to preserve their own essential characteristics.

Louis F. Del Duca in his article on *Introduction of Judicial Review in Italy—Transition from Decentralized to Centralized Review (1948-1956)—A Successful Transplant Case Study* charts how Italian courts initially reacted to the judicial review of the constitutionality of laws. He provides a detailed account of the reaction of the legal system as a whole and, more specifically, of sitting judges to the establishment of a system of judicial review. In the 1948 to 1956 period between the adoption of the Italian constitution and the commencement of functioning of the Italian Constitutional Court, the Constitution granted ordinary and administrative judges the power of judicial review of the constitutionality of laws.⁵ The judicial decisions of this period that he discusses illustrate the political and ethical sensitivities confronted by sitting judges, as well as the challenges of cultural transition, in a post-conflict environment.

Along with other European countries following the end of World War II, Italy adopted a new constitution. Its drafters intended that it safeguard against the abuses of power and the horrors that had occurred. One of the innovations of the new constitution was the introduction of the concept of judicial review of the constitutionality of laws into the Italian legal system.

Together with the entrenchment of civil, political and social rights in a “rigid” constitution, i.e. amendable only through a procedure requiring supermajorities, the constitution’s framers saw a key guarantee of the Constitution as being the establishment of a system of judicial review that would defend the newly enacted Constitution against acts of the legislator inconsistent with the rights rooted in the Constitution. The design of the Italian system of judicial review, like that of other constitutions introducing such review into civil law systems, draws heavily from the so-called centralized model of judicial review developed by Hans Kelsen for the 1919 Czech Constitution and introduced also in the 1920 Austrian Constitution.⁶

5. Disputes between private parties are handled by the so called “ordinary” courts in Italy and in civil law countries generally. Disputes between private parties and the State are handled by the “administrative” courts in Italy and in other civil law countries that follow the inspiration of French administrative law. For a discussion of the “ordinary” courts and “administrative” courts in Italy, see Louis Del Duca, Patrick Del Duca, *An Italian Federalism?—The States, its Institutions and National Culture as Rule of Law Guarantor*, 54 AM. J. COMP. L. 799, 835 *et seq.* For a recent discussion of the Italian system of constitutional justice, see Tania Groppi *The Constitutional Court of Italy: Towards a Multilevel System of Constitutional Review?*, 2 J. OF COMPARATIVE LAW 100 (2008).

6. Fundamental in comparative study of systems of judicial review was Mauro Cappelletti, *JUDICIAL REVIEW IN THE CONTEMPORARY WORLD* (1971).

The Italian Constitutional Court was contemplated by the 1948 Constitution and established in 1956. Prof. Del Duca's paper explores elements of the re-invention of the Italian state in the transition period between the adoption of the constitution and the commencement of functioning of the Constitutional Court that the constitution contemplated. This period of re-invention and re-definition of the Italian state following the end of World War II charted a course of respect for the rule of law that continues to prevail in Italy today.

Prof. Del Duca's work lays out the politically challenging cases that arose during the 1948-1956 transition period from efforts to use the justice system to resolve charges of misconduct and collaboration with the fascist regime during the period of the war. As the Italian courts experimented with their approach to the constitutionally-granted new power of judicial review, they demonstrated sensitivity to either upholding or countermanding acts of the non-elected transitional government on constitutional grounds, preferring in key instances to rely on other tools of statutory interpretation to resolve the cases presented to them. The launch of the Constitutional Court in 1956 overcame any diffidence of Italian courts to judicial review of the constitutionality of laws and was the moment in which the innovative principles established by the 1948 constitution received full endorsement and application. From its very first decision in 1956, the Italian Constitutional Court, as a freshly established institution directly legitimated by the constitution, determined the "peremptory" status of the civil rights' provisions of the constitution and their direct applicability without further implementation, rejecting the view that they had a merely "programmatic" nature. It thereby began its continuing and flourishing role as a voice, without ambiguity, of the central position of constitutional review of laws in the Italian legal system.

RELIGION, STATE AND CONSTITUTION

Secularism, The Veil and "Reasonable Interlocutors": Why France Is Not That Wrong"

Guy Haarscher

The Protection of Laicism in Turkey and the Turkish Constitutional Court: The Example of the Prohibition on the Use of the Islamic Veil in Higher Education

Mehmet Cengiz Uzun

Guy Haarscher and **Mehmet Cengiz Uzun** in their respective essays on France and Turkey, *Secularism, The Veil and "Reasonable*

Interlocutors”: *Why France Is Not That Wrong and The Protection of Laicism in Turkey and the Turkish Constitutional Court: The Example of the Prohibition on the Use of the Islamic Veil in Higher Education*” consider the issues raised by the wearing of a veil in educational contexts. Both France and Turkey posit themselves as lay states. However, whereas Turkey historically defined itself as a lay state as part of separating the state from Islam, France’s experience of Islam arises from a growing Islamic community not present in the period of France’s initial address of the issues of church and state. In each country, the debate waged through high court decisions, legislation and electoral contests reflects concerns over the present and future nature of society, related to perceived tensions between the current exercise of individual freedoms and the maintenance of a society in which such freedoms are sustained.

Each of Prof. Haarscher’s and Mehmet Cengiz Uzun’s works emphasizes the significance of the special features of a school setting in the determination of whether display of a religious symbol should be allowed or banned. In the educational setting, they explore the special prominence to be afforded to the values of academic freedom, the educational process and the development by students of an autonomous perspective on religion.

In addressing the controversy over the wearing of the veil in secondary education, **Guy Haarscher** provides a comparative overview of developments in France and Belgium, while analyzing the rhetoric employed in the public discourse over the veil. This discourse has involved participation by “reasonable” and “unreasonable” interlocutors, defined in Prof. Haarscher’s view by whether they embrace respect for human rights and popular sovereignty and posit themselves within the framework of a liberal-democratic State. Prof. Haarscher views arguments by “unreasonable” interlocutors (whether for or against use of the veil) as simply incompatible with what has been defined as “reasonable pluralism.”⁷ However, he finds it increasingly difficult to identify which interlocutors fall within his “unreasonable” classification. He observes that the employment of new dialectic techniques and appearances of more nuanced approaches often disguise fundamentalist views, further obscured by deliberate attempts to confuse the audience through use of sophisms. In such efforts, new terminology is carefully chosen to participate in the general discourse, and old references to “race” are substituted by the term “culture,” while the content of the message remains unchanged. Instead of speaking of unequal “races,”

7. John Rawls, *POLITICAL LIBERALISM* (Columbia Univ. Press 1993).

such interlocutors now speak of different “cultures” that, while perhaps enjoying the same dignity, should nonetheless be kept separated.

Prof. Haarscher traces the veil controversy in France back to 1989, when a group of girls attending a public secondary school refused to remove the veil, the wearing of which they saw not as a religious imposition, but rather as an exercise of religious freedom. The incident raised the question of whether veil should be considered as an individual's right or as an intrusion into a domain of the State, to wit a public school. The French Council of State (*Conseil d'Etat*), invoked to issue an opinion on the compatibility of wearing the veil in a public school with the principle of laicism guaranteed by the 1958 French Constitution,⁸ determined that wearing the veil could not by itself be considered to violate the principle of laicism, but instead qualified as an exercise of freedom of religion.⁹ However, the Council cautioned that if “supplemental elements”¹⁰ were present, school principals would be entitled to ban use of the veil. Prof. Haarscher compares this perspective with the contemporary, but different approach adopted in Belgium, where public school directors have had, even absent “supplementary elements,” full discretion to decide whether to allow or prohibit the veil in school settings. There, in almost all cases, the directors had banned it.

Fifteen years following the Council of State's advisory opinion, France further drew from the Belgian experience to adopt a law providing uniform national treatment of the issue. In France, support for use of the veil became increasingly radical, making it difficult to separate the “supplementary elements” from unconditional exercise of religious freedom. Accordingly, the approach of case-by-case decisions had become unmanageable. In March 2004, France therefore adopted a statute prohibiting overt religious signs at school.¹¹ According to Prof. Haarscher, the two countries reached the same conclusion, albeit by different routes. The growing presence of fundamentalism rendered inappropriate to allow wearing of the veil in secondary schools, where attending students remained vulnerable by virtue of their youth. In each country, the conclusion was that to allow the wearing of the veil by students in secondary education would constitute an unreasonable accommodation.

8. Art. 1, 1958 FRENCH CONST.: “France shall be an indivisible, secular, democratic and social Republic.”

9. Council of State, Interior section, Advisory Opinion no. 346893 of November 27, 1989 on Wearing of the Islamic Scarf.

10. The Council of State opinion identifies examples of “supplemental elements” such as pressures on girls to force them to wear the veil in the nature of provocation, proselytizing, propaganda, acts against the dignity or freedom of the student, and breach of school order.

11. Law no. 228/2004 of March 15, 2004.

The article concludes by addressing the notion of “reasonable accomodation,” a notion increasingly applied in multicultural societies to accomodate and protect cultural, religious and ethnic diversity.¹² According to Prof. Haarscher, accommodation of religion in public schools can be considered reasonable only when the inconveniences generated by the positive “intrusion” of religion in the secular neutral public sphere are balanced by benefits in terms of religious freedom and tolerance. Problems arise, however, when accommodation becomes the means for “unreasonable” interlocutors to “conquer” the secular public sphere. According to Prof. Haarscher, reasonable accommodation therefore should be pursued only when respect for democratic values is guaranteed and prioritized. He asserts that the “slippery slope” argument here rightly applies.¹³ He, however, would leave open the possibility of allowing the wearing of the veil in educational environments if a more favorable context would evolve, one in which the principles established by the Council of State could be applied to so allow.

Mehmet Cengiz Uzun focuses on two decisions of the Turkish Constitutional Court issued in June 2008. On June 5, 2008 the Court

12. In regard to accommodation of diversity, Canada presents the example of valuing multiculturalism and committing itself to preservation of an “ethnic mosaic.” In the educational setting, the Supreme Court of Canada’s decision *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256 is often cited as paradigmatic example of “reasonable accomodation” of religious diversity. The Court there declared unconstitutional a Quebec school authority order imposing a total ban on carrying weapons at school when applied to a Sikh boy’s wearing of a traditional religious knife (*kirpan*). The Court determined that the total ban violated the freedom of religion protected by section 2(a) of the Canadian Charter of Rights and Freedoms, and that the violation was not justifiable under Section 1 of the Charter. It therefore struck down the ban as unconstitutional. Reasonable accommodation has some times been qualified as a duty, especially with regard to recognition of religious holidays by employers. See José Woehrling, *L’obligation d’accomodement raisonnable et l’adaptation de la société à la diversité religieuse* [The duty of reasonable accommodation and the adaptation of society to religious diversity], 43 MCGILL L.J. 325 (1998). The Supreme Court of Canada imposed a duty of accommodation of religious diversity on employers in *Ontario Human Rights Commission v. Simpson Sears Ltd.* [1985] 23 D.L.R. (4th) 321 (C.C.C.); *Central Alberta Dairy Pool v. Alberta Human Rights Commission* [1990], 72 D.L.R. (4th) 417 (S.C.C.); and *Central Okanagan School District No. 23 v. Renaud*, [1992] 95 D.L.R. (4th) 577 (C.C.C.).

13. “‘Slippery slope’ arguments claim that endorsing some premise, doing some action or adopting some policy will lead to some definite outcome that is generally judged to be wrong or bad. The ‘slope’ is ‘slippery’ because there are claimed to be no plausible halting points between the initial commitment to a premise, action or policy and the resultant bad outcome. The desire to avoid such projected future consequences provides adequate reasons for not taking the first step.” Walter Wright, *Historical Analogies, Slippery Slopes and the Questions of Euthanasia*, 28 J. OF LAW, MEDICINE AND ETHICS 176 (2000).

issued its judgment¹⁴ on the constitutionality of a constitutional amendment (Law no. 5735/2008, known as the “turban amendment”)¹⁵ intended to lift the existing ban on the wearing by women of the Islamic veil in higher education settings. Expressly vested by the constitution with the power to judge the constitutionality of constitutional amendments,¹⁶ the Constitutional Court struck down the turban amendment as violating the principle of laicism established through several provisions of Turkey’s Constitution.¹⁷ A few weeks later, on June 30, 2008, the Turkish Constitutional Court addressed the request that the long-established political party “Justice and Development” (AKP), that through popular election had become the ruling party, be dissolved on ground of an alleged violation of the principle of laicism.¹⁸ The violation was asserted to arise from the AKP’s introduction into the Parliament of the turban amendment. Although the Court found that actions of the AKP had indeed violated the principle of laicism, the Court lacked the necessary majority of seven of its eleven judges required to dissolve the party. Instead, it ordered the most stringent measure short of dissolution, namely the interruption of all state financial support. The Court in its decision cited the 2005 European Court of Human Rights’ judgment in the *Case of Leyla Şahin v. Turkey*, in which the Strasbourg Court had found that a ban on headscarves in universities did not violate the European Convention on Human Rights as it was

14. Judgment of June 5, 2008, E: 2008/16, K: 2008/116, Constitutional Court of Turkey.

15. Law no. 5735 of February 9, 2008.

16. Article 148 of the 1982 Turkish Constitution provides “[c]onstitutional amendments shall be examined and verified [by the Court] only with regard to their form.” This therefore excludes review of the substance and content of the amendment. Although the Supreme Court of the United States has never addressed the constitutional legitimacy of a constitutional amendment, other courts around the world have found constitutional amendments to be unconstitutional. Notable examples are the Constitutional Court of Germany (the 1951 *Southwest States Case*), India (1967 *Golak Nath* case and the 1973 *Kesavandanda Bharati v. State of Kerala* decision) and Taiwan (Judicial Interpretation no. 499 of March 24, 2000). The Italian Constitutional Court declared the unconstitutionality of a constitutional law (enjoying the same status of the constitution in the hierarchy of the sources of law, even if not directly modifying the text of the Italian constitution) in decision no. 1146 of December 29, 1988.

17. More specifically, determined by the content of the preamble together with articles 2 (Turkey as a democratic, laic, social state governed by the rule of law), 10 (equality before the law), 14 (Prohibition of Abuse of Fundamental Rights and Freedoms), 24 (Freedom of Religion and Conscience), 174 (laic character of the Republic) and with specific regard to the educational setting here at issue, article 42 (Right and Duty of Training and Education).

18. Judgment of June 30, 2008, E: 2008/1, K: 2008/2, Constitutional Court of Turkey. The Court has jurisdiction over these requests under article 101 of Law No. 2820 on Political Parties.

“required, especially in Turkey, to protect the rights of those who do not wear the headscarf.”¹⁹

The two decisions represent the starting point for Mehmet Cengiz Uzun to analyze, from historical, constitutional and cultural perspectives, the development and current status of the protection of laicism in Turkey.²⁰ According to Uzun, the Turkish principle of laicism finds its roots in the French doctrine of “*laïcisme*,” requiring abstention from any religious influence in the public sphere and translating into a ban of public display of religious symbols, be they artifacts or clothing, especially in educational settings.²¹ Building on the original French conception, this principle has however found an original application in Turkey where the state is called to play a role in regulating religious affairs. The article describes the tension arising in Turkey in connection with balancing the interests at stake, namely the right of any individual to enjoy the so-called *forum externum* of the freedom of religion and the right of a third party not to be exposed to abusive proselytism. In analyzing in detail the circumstances surrounding the adoption of the turban amendment and the decision of Constitutional Court declaring its unconstitutionality, it focuses on the illustration of the fundamental position of the principle of laicism in Turkish constitutional law, with specific reference to the use of the Islamic veil in higher education.

In this regard, Uzun charts the history of legislative enactments and judicial counter-actions taken concerning this ban and devotes specific attention to the recent events surrounding the so called “turban amendment,” qualified by the Constitutional Court as an attempt to modify provisions in the Constitution safeguarding the principle of laicism and bypass the Court’s “constant jurisprudence” on point.²² The article also addresses the theological approach that the Constitutional Court has employed in the interpretation, protection and enforcement of the principle of laicism. In Uzun’s view, this approach derives from the intent to pursue, since the foundation of the Republic, the “institutionalization of the state according to the rules of reason and

19. Leyla Şahin v. Turkey, Grand Chamber, [GC] App. No. 44774/98 Eur. Ct. H.R. (2005).

20. Case of Leyla Şahin v. Turkey, Grand Chamber, [GC] App. No. 44774/98 Eur. Ct. H.R. (2005)

21. The European Court of Human Rights has recently addressed this issue in its decision *Affaire Lautsie c. Italie* (App. No. 30814/06 Eur. Ct. H. R.(2009)) in which the Court found display of the crucifix in Italian classrooms in violation of article 2 of the Additional Protocol to the European Convention on Human Rights and Fundamental Freedoms (right to education) and Article 9 of the abovementioned Convention (freedom of thought, conscience and religion).

22. In 1989 that the Court had declared for the first time that the use of the Islamic veil in higher education was irreconcilable with the principle of laicism: Judgment of March 7, 1989, E: 1989/1, K: 1989/12, Constitutional Court of Turkey.

science.”²³ Uzun’s detailed analysis represents therefore a primary reference for all those countries where analogous issues are increasingly debated, and an interesting case study of possible legal and political implications of such a ban.

GENDER AND CONSTITUTION

Is Constitutionalism Bad for Intersectional Feminists?

Beverley Baines

Is Constitutionalism Bad for Intersectional Feminists? This is the challenging question **Beverley Baines** asks in her article and that guides her analysis and assessment of the collective significance of so-called “intersectional feminists.” The constitutionalism that Prof. Baines references in the title of the article is broadly the classic rule of law tradition that holds the State accountable for its actions and entrenches citizens’ fundamental rights in a rigid constitution. However, her analysis is also rooted specifically in recent developments in the Canadian constitutional landscape. In 1982 Canada supplemented its first constitution, the British North American Act, with the Canadian Charter of Rights and Freedoms. That Charter is a bill of rights enjoying constitutional status²⁴ that, among other rights, expressly codified protection and enhancement of multiculturalism.²⁵ Canada recognizes itself for its tolerant and “ethnic mosaic” approach to multiculturalism, whether originating from religious or ethnic components, by way of difference from the “melting pot” approach sometimes proclaimed as descriptive of the United States. The distinction in approach from the United States is consistent with the Canadian reality of foundation on English- and French- speaking societies, neither of which was prepared to “melt” into the other.

To Prof. Baines, however, it is doubtful whether the constitutional guarantees proclaimed in the recently adopted Canadian Charter of Rights and Freedoms (Charter) have truly been made available to women. The Charter expressly codifies two sex equality provisions, namely, Section 15 which provides general equality protection and

23. Judgment of January 16, 1998, E: 1997/1 (*Siyasi Parti Kapatma*), K: 1998/1, Anayasa Mahkemesi [Constitutional Court] (Turkey).

24. By virtue of its lack of constitutional status, Canada’s 1960 statutory Bill of Rights offered limited protection of the rights that it purported to guarantee.

25. See Section 27 (“Multicultural heritage”) of the 1982 Canadian Charter of Rights and Freedoms, which provides: “[t]his Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.” Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, Schedule B to the Canada Act 1982, ch. 11 (U.K.).

Section 28 which provides specific gender equality protection.²⁶ In litigation, however, women have relied more on the former provision (principle of equality) than the latter. Prof. Baines surveys recent cases decided by Canadian courts presenting conflict between religious freedom and sex equality, with specific references to the prohibition of polygamy, the ban on faith-based family arbitration tribunals and the limit on the accommodation of cultural differences. Within this landscape, and building on her own theoretical framework, Prof. Baines identifies women seeking protection in religious and social contexts as either *religious* or *secular* feminists, according to the priority they give, respectively, to religious freedom over sex equality or to sex equality over religious freedom. Women falling into these two categories can invoke provisions of the Canadian Charter to find protection against discrimination and, however imperfectly, have access to courts. In Prof. Baines' view, however, the two categories of religious and secular feminists do not exhaust the spectrum of women in need of protection. Indeed, in the cases examined that present issues of polygamy, faith-based family arbitrations and accommodation of cultural differences, religion and equality are represented in a mutually exclusive relationship, and protection of equality is sought at the expenses of religious freedom and vice versa.

Other feminists, however, put forth different claims, seeking at the same time religious freedom and equality. Refusing to define them as "multicultural feminists," Prof. Baines prefers to underline the missing narrative of these feminists and their *de facto* intersectionalism, calling them "intersectional feminists." Prof. Baines' main goal, here, is to assess whether these intersectional feminists can and should have access to the promise of constitutionalism and the protection it guarantees. After providing an account of responses developed by Professors Moller Okin,²⁷ Volpp²⁸ and Sunder²⁹ to intersectionalism issues, Prof. Baines

26. Section 15 of the Canadian Charter of Rights and Freedoms proclaims the principle of equality:

(1) [e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or economic origin, colour, religion, sex, age or mental or physical disability.

Section 28 provides: "[n]otwithstanding anything in this *Charter*, the rights and freedoms referred to in it are guaranteed equally to male and female persons."

27. Susan Moller Okin, *Is Multiculturalism Bad for Women?*, in *IS MULTICULTURALISM BAD FOR WOMEN?* 7-24 (Joshua Cohen, Michael Howard, Martha Nussbaum eds., 1999).

argues that, while these responses can work to accommodate concerns of multiculturalism, they cannot satisfactorily address intersectionalist claims. Her conclusion therefore is that constitutionalism, due to the impermeability of its normative and strategic barriers, does not serve intersectional feminists.

CONSTITUTIONAL ADJUDICATION AND DEMOCRACY

The Constitutional Role of Transnational Courts: Principled Legal Ideas in Three-Dimensional Political Space

Kim Lane Scheppelle

In her article on *The Constitutional Role of Transnational Courts: Principled Legal Ideas in Three-Dimensional Political Space*,²⁸ **Kim Lane Scheppelle** analyzes the relationship between transnational and domestic courts in the context of the global anti-terrorism campaign started after the terrorist attack of September 11, 2001. Her title's reference to three-dimensional space is a metaphor to facilitate consideration of the "vertical" relationships among transnational, national and, possibly, sub-national bodies and the "horizontal" relationships among courts and institutions. Prof. Scheppelle identifies transnational and national courts as important institutional actors of transnational constitutionalism, that exist not only in a hierarchical relationship with each other. Indeed, not only do they reinforce each other's ideas, they also increase the commitment to constitutionalism using principled legal ideas to counter political action inconsistent with such principled legal ideas. In the three-dimensional space, pressures for lawmaking and for normative control over this lawmaking come from different levels of actors. In some cases national laws are required to implement international or regional mandates; in others, transnational law develops as a consequence of the parallel action of multiple national legislatures. These two kinds of pressures (top down—transnational to national, and bottom up—national to transnational) result in intertwined law adopted at different levels. The existence of the different levels also results in overlapping jurisdictions of courts established at both national and supranational levels. Indeed, matters involving national and supranational law can be adjudicated in both transnational and national courts sharing a common commitment to methods and values.

28. Leti Volpp, *Feminism Versus Multiculturalism*, 101 COLUM. L. REV. 1181 (2001).

29. Madhavi Sunder, *Piercing the Veil*, 112 YALE L.J. 1399 (2003).

Analyzing these relationships in the context of the anti-terrorism campaigns launched following September 11, 2001, Prof. Scheppele notes the high number of binding transnational resolutions and of other legal pronouncements addressed to the national level, as to which national governments have generally been responsive in undertaking to implement them through national law. She notes that the influence also works in the opposite sense, with national governments pressing transnational bodies to require consistent response from all member states.

The extensive legal measures in the anti-terrorism field have generated numerous constitutional challenges around the world. Courts of various countries have found anti-terrorism measures adopted following September 11, 2001, to be unconstitutional, at least in part. Prof. Scheppele views such judgments as operating in a space occupied by other judicial bodies and by national as well as transnational law. Accordingly, Prof. Scheppele emphasizes the increasing overlap of national and transnational law and judicial pronouncements. Transnational courts might once have been seen primarily as issuing decisions providing principled bases for the judgments of other political bodies, including transnational institutions, national governments and national high courts. Moreover, national courts have enlarged their sphere of action, being increasingly called upon to rule on matters having implications that extend beyond national borders. The growing body of law relative to anti-terrorism initiatives and constitutional values is thus in Prof. Scheppele's view best seen with a three dimensional perspective on the interactions of levels of government and of their courts and other institutions.

DISTRIBUTIVE JUSTICE

Distributive Justice—Poverty and Economic Development

V.S. Elizabeth

Poverty and Constitutional Rights

Mónica Pinto

Adjudicating Socio-Economic Rights under a Transformative Constitution

Linda Stewart

V.S. Elizabeth, in *Distributive Justice—Poverty And Economic Development* reviews aspects of Indian constitutional law that Prof. Elizabeth identifies as critical to India's achievements to date in lifting

significant parts of its population out of the legacy of poverty that persisted following the British colonial period in India. The paper addresses provisions of the Indian Constitution and decisions of India's Supreme Court to highlight the key role of intervention by India's governmental authorities in building a "mixed" economy. Prof. Elizabeth argues that absent the constitutional foundation for such intervention, India would not have made the progress achieved to date.

Prof. Elizabeth underlines the need for an implementation of the constitutional principles that the constituent assembly included in India's 1950 constitution.³⁰ One of the world's longest,³¹ the constitution of India was adopted January 26, 1950 and stands out for its ambitious programmatic character, aiming to establish, as envisioned in its Preamble, a society based on justice, freedom, equality and fraternity. Its forty-second amendment, adopted in 1976, significantly modified the text of the Preamble, introducing the aspiration to constitute India as a socialist and lay democratic republic.³² This amendment, however, has not led to the establishment of a full-fledged socialist state, but has rather enhanced India's character as a state based on the principle of social justice.

The constitution also includes what has been consistently defined as a "trilogy" of aspirational principles and the "bedrock of the Indian Constitution"³³ in its Parts addressing "Fundamental Rights" (FR, Part

30. The Constitution of India was adopted by the Constituent Assembly on November 26, 1949, and came into effect on January 26, 1950.

31. The Indian Constitution consists of a Preamble, three hundred and ninety-five articles divided in twenty parts and twelve schedules. It has been amended ninety-four times, most recently in 2006.

32. Constitution of India (Forty-second Amendment) Act, 1976, Section 2, which changed the former qualification of India as a "Sovereign Democratic Republic" to one aiming to the establishment of a "Sovereign Socialist Secular Democratic Republic." The change is particularly significant since the Supreme Court of India, in one of its most famous decisions, determined that the Preamble can be invoked like any other provision in the constitution for direct application in litigation and that any change to it may be challenged on the ground of violation of the *basic structure* of the Constitution. The decision at issue, *Kesavananda Bharati v. State of Kerala and Others*, AIR 1973 SC 1461, established the power of the Indian judiciary to judge constitutionality of constitutional amendments and declared unconstitutional a 1976 constitutional amendment adopted to curtail protection of the previously constitutionally established right to property in order to pursue land reform and redistribution of large landholdings to cultivators, and to overrule previous decisions of the judiciary suggesting that the right to property could not be restricted.

33. See Mahendra Singh, Surya Deva, *The Constitution of India: Symbol of Unity in Diversity*, in 53 JAHRBUCH DES OFFENTLICHEN RECHTS DER GEGENWART, YEARBOOK OF PUBLIC LAW (GERMANY) 649, 652 (2005), where the authors explain that these Parts of the constitution are considered a "trilogy" because "together they constitute the vision of a particular society which the Constitution envisage for India; a society which affords opportunity to all its people for an all-round development, and in which citizens bear the responsibility towards nation and society as such" (emphasis in the original).

III), “Directive Principles of State Policy” (DPSP, Part IV) and “Fundamental Duties” (Part IV A, introduced in its entirety by the forty-second amendment).³⁴ It is with specific regard to the Fundamental Rights and the Directive Principles of State Policy that Prof. Elizabeth furthers the analysis on poverty and economic development in India, taking into account significant decisions of the Supreme Court of India.

While the Fundamental Rights (listing mostly civil and political rights) are considered justiciable by the constitution, the constitutional text expressly excludes the justiciability of the Directive Principles of State Policy. Constitution articles 36-51 define the Directive Principles of State Policy and include among them various social rights such as the rights to work, education, public assistance, living wages, and a guaranteed minimum standard of living, among others.³⁵ Notwithstanding that the constitution explicitly states that these rights are not enforceable in court and were accordingly merely programmatic provisions,³⁶ the Supreme Court of India has qualified them as inalienable human rights.³⁷

Prof. Elizabeth offers the conclusion that portions of the Indian Constitution, namely its Preamble, Part III on Fundamental Rights and Part IV on the Directive Principles of State Policy, taken together and considered as instructions to the legislative and executive powers, established the legal basis for actions taken by the Indian government to fight poverty, such as the Twenty Point Programme and the National Rural Employment Guarantee Scheme.

Mónica Pinto’s article on *Poverty and Constitutional Rights*, focuses on the interrelation between democracy, human rights, poverty and dignity, and on efforts made through international documents and constitutions to guarantee basic fundamental rights to subjects facing extreme deprivation. Since the 1990s, the international community has increasingly addressed the relationship between poverty and human rights. In 1996 the United Nations Committee on Economic, Social and Cultural Rights defined poverty as a “denial of human rights” and a

34. Constitution of India (Forty-second Amendment) Act, 1976, Section 11.

35. The Forty-second amendment also added several articles of this Part: Articles 39 A (equal justice and free legal aid), 43 A (participation of workers in the management of industries) and 48 A (protection for environment).

36. Art. 37 of the constitution states: “[t]he provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.”

37. *Air India Statutory Corporation v. United Labour Union*, AIR 1997 SC 645: (1997) 9 SCC 377: 1997 Lab IC 365 paragraph 38.

condition in which the “basic capability to live in dignity was lacking.”³⁸ The Inter-American Court of Human Rights in 1999 defined poverty as a “deprivation of the right to live with dignity.”³⁹ Most recently, in 2000 the Human Development Report defined poverty as an “infringement on freedom” and qualified efforts to fight it as basic entitlements and human rights.⁴⁰

According to Prof. Pinto, democracy represents the ideal context for the development and enjoyment of human rights, in which everyone is entitled to the establishment of a social and international order where human rights and fundamental freedoms can be fully guaranteed. Democratic states are obliged to ensure the enjoyment of human rights to every citizen. Among the factors hindering a full enjoyment of human, civil and political rights, poverty represents a most serious threat, because people lacking material, educational and spiritual resources are socially excluded, marginalized and *de facto* barred from the enjoyment of citizenship’s rights. In fighting poverty, Prof. Pinto favors abandonment of an assistance approach. She advocates its replacement with a rights perspective in which citizens are considered rights-holders, legitimated to claim action on the part of the State to address situations of deprivation. Moreover, in Prof. Pinto’s view, poverty should be dealt with through strict enforcement of economic, social and cultural rights not just in courts, but first and foremost through the action of the public authorities.

Almost all Latin American countries are parties to the International Covenant of Economic, Social and Cultural Rights, and fourteen are also parties to analogous regional instruments. Prof. Pinto notes, however, that the mere ratification of treaties is not sufficient to effectively protect human rights against poverty. Whether by express recognition in the constitution of the constitutional or infra-constitutional status⁴¹ of international treaties (Paraguay and Argentina), or by establishment of the rule that international treaties ratified by the country take precedence over national legislation (Peru, Guatemala, Colombia and Bolivia), most Latin American constitutions converge towards recognition to human

38. See U.N. Comm. Econ., Soc. & Cult. Rts. [CESCR], *Poverty and the International Covenant on Economic, Social and Cultural Rights*, 993 U.N.T.S. 4, § 1, U.N. Doc. E/C.12/2001/10 (Dec. 16 1996).

39. *Villagrán-Morales et al. v. Guatemala*, 1999 INTER-AM. CT. H.R. (ser. C) no. 63, § 4 (Nov. 19, 1999) (Trinidad & Burelli, JJ., concurring).

40. U.N. Development Programme [UNDP], *Human Development Report 2000*, at 61-63 (Comms. Dev. Inc. ed., Global Rep. 2000) (prepared by Philip Alston et al.), available at http://hdr.undp.org/en/media/HDR_2000_EN.pdf.

41. What is meant here, is that in these constitutional systems international treaties have supremacy over legislative materials but remain subordinate to the constitution itself in the hierarchy of sources of law.

rights treaties of overriding rank in the hierarchy of sources of law. Brazil's constitution goes as far as to expressly establish the "prevalence of human rights" as a principle guiding Brazil's international relations and express Brazil's commitment to international protection of human rights. However, Prof. Pinto advocates the need for provisions of treaties to be translated into concrete governmental measures and policies to promote respect and development of human rights. Prof. Pinto concludes that this is the only way to fight poverty effectively, guarantee enjoyment of civil and political rights, and ultimately strengthen democracy.

In her article on *Adjudicating Socio-economic Rights under a Transformative Constitution*, **Linda Stewart** provides an account of the South African Constitutional Court's socio-economic rights jurisprudence. The Preamble to the 1996 Constitution expressly states that its adoption is meant to "heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights," and to "improve the quality of life of all citizens and free the potentials of each person." In this context, Prof. Stewart carries out an analysis of the Constitutional Court's leading decisions that interpret the social rights' provisions of the Constitution. In the first part of the article, she outlines three cases that shaped the Constitution Court's general approach to social rights adjudication: (i) the 2000 *Grootboom*⁴² decision in which the Court affirmed justiciability of socio-economic rights; (ii) the 2002 *Treatment Action Campaign* case,⁴³ in which the Court established its competence to review adequacy of the State's implementation of social rights in view of the obligation of the public powers to respect, protect, promote and fulfill such rights; and, (iii) the 2004 *Khosa* case,⁴⁴ interpreting the text of the Constitution in an universalist way to include permanent, but non-citizen residents in the benefits provided by the welfare system. While the outcome of the cases has widely been welcomed and the Court has been praised for its context-sensitive approach to the transformative potential of socio-economic rights jurisprudence, the Court's refusal to provide normative clarity to the content of various socio-economic rights has been criticized. In these cases the Court indeed avoided providing an invariable universal standard, instead moving immediately to review the effectiveness of the State's implementation of the rights and its reasonableness. In Prof. Stewart's view, the Court's application of this

42. *Government of the Republic of South Africa and Others v. Grootboom and Others*, 2000 (11) BCLR 1169 CC; TAC 2002 (5) SA 72 CC (S. Afr.).

43. *Minister of Health and Others v. Treatment Action Campaign and Others*, 2002 (5) SA 72 (CC).

44. *Khosa & Others v. Minister of Social Development & Others*, 2004 (6) BCLR 569 CC (S. Afr.).

reasonableness test, evaluating State action for simple compliance with general good governance principles, does not succeed in avoiding the court's injection of itself into separation of powers principles. Rather, the Court's application of its reasonableness test amounts to adoption of a formal, abstract and procedural approach to evaluation of action (or inaction) taken by the State.

The article then presents recent litigation concerning the right of access to sufficient water pursuant to the Constitution's Section 27.⁴⁵ The *Mazibuko*⁴⁶ cases exemplify the varied approaches of the High Court, the Supreme Court of Appeal and the Constitutional Court. The two lower courts showed a willingness to provide normative content to the right at issue before moving to apply the reasonableness test and determining a specific amount of water to be guaranteed by the State. However, the Constitutional Court once again avoided establishing a universal standard, instead adopting a more positivistic approach focusing on the literal meaning of Constitution Section 27. In so doing, according to Prof. Stewart, the Court abandons the contextual, purposive and generous constitutional interpretation prescribed by Constitution Section 39,⁴⁷ disregarding the opportunity for a thorough analysis of international and foreign law. Prof. Stewart concludes that the Constitutional Court seems to overlook that although it is the primary role of the legislature and executive to implement socio-economic rights, courts are vested with a quasi law-making role allowing them to translate constitutional rights into enforceable legal claims.

CONTEMPORARY CHALLENGES TO EXECUTIVE POWERS

The Executive and the Courts

Richard Clayton

45. Section 27 ("Health care, food, water and social security") states: "Everyone has the right to have access to . . . (b) sufficient food and water."

46. *Mazibuko & Others v. The City of Johannesburg & Others*, Case CCT 39/09 2009 ZACC 28 (S. Afr.).

47. Section 39 of the 1996 South African Constitution ("Interpretation of the Bill of Rights") provides: (1) "[w]hen interpreting the Bill of Rights, a court, tribunal or forum— (a) must promote the values that underlie an open and democratic society, based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law. (2) When interpreting any legislation, and when developing the common law or customary law, every court tribunal or forum must promote the spirit, purport and objects of the Bill of Rights. (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognized or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill of Rights." S. AFR. CONST. 1996 Sec. 39.

Richard Clayton in his article on *The Executive and the Courts* analyzes the relationship between the executive power and courts in the United Kingdom. The United Kingdom does not have a written constitution. In a constitutional system characterized by the absence of a written constitution (understood as a foundational charter embodied in one single written document), the relationship between the executive power and the courts is not regulated by a formal constitutional framework, but rather is the result of rules developed through history and through patterns of conduct considered binding by the political actors involved but not enforceable in courts.⁴⁸

The adoption in 1998 of the Human Rights Act (“HRA”), which entered into force in October 2000, altered the premise of parliamentary sovereignty on which the United Kingdom’s constitutional framework had previously been based.⁴⁹ The HRA incorporated the European Convention on Human Rights (“ECHR”) into the English legal system.⁵⁰ While prior to the adoption of the HRA the ECHR enjoyed the status of an international treaty, the HRA rendered it domestic law of constitutional significance. The rights established in the Convention are thus equivalent to a national bill of rights, mandating that public authorities comply with it.⁵¹ Moreover, as Prof. Clayton underlines, the adoption of the HRA means that should a public authority interfere with a covered right (e.g. freedom of expression), the authority must demonstrate that the interference is “prescribed by law” and “proportionate.” The HRA vests courts primarily with a power to read “primary legislation and subordinate legislation [. . .] in a way that is compatible with Convention rights,” conferring a “conformative” interpretative power to judges. The conferral marks a significant shift of power from Parliament to the judiciary. Although courts are not given

48. The often-cited definition of behavioral conventions defining a constitution (termed “constitutional conventions” in countries influenced by the British system of government) comes from Albert Venn Dicey. He maintained that British political actors and institutions were bound by two sets of rules, the first being “laws” in the strict sense, and the second defined as “conventions, understandings, habits, or practices which, though they may regulate the conduct of the several members of the sovereign power, of the Ministry, or of other officials,” are not “laws” and hence not enforceable by courts. Albert Venn Dicey, AN INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 23-24 (10th ed., 1959).

49. Human Rights Act, 1998, c. 42 (UK).

50. European Convention on Human Rights, Nov. 4, 1950, 213 U.N.T.S. 221, *as amended* by Protocol no. 11, 155 E.T.S. (1994) (effective Nov. 1, 1998) *available at* <http://conventions.coe.int>.

51. Peter Leyland, THE CONSTITUTION OF THE UNITED KINGDOM. A CONTEXTUAL ANALYSIS 64 (2007).

the power to invalidate legislation,⁵² they are vested with the power to exercise supervisory jurisdiction over decisions of the executive power. This is a significant judicial power, although an outright declaration of incompatibility of a law with the Convention merely prompts referral of the question to Parliament, which is supposed to take active steps to amend the legislation at issue. Section 6(2) of the Human Rights Act provides that until the legislation is amended, a public authority may nonetheless act in a way incompatible with the Convention.

Within this new constitutional landscape, Prof. Clayton's article focuses on the extent to which executive decisions, at both central and local level, are regulated by law and the degree to which courts can scrutinize such decisions when deciding the merits of a specific case. Prof. Clayton addresses the applicability and theoretical foundation of the *ultra vires* principle as applied to local governments (i.e. decisions issued by a local authority which are not based on a statutory power and therefore considered *ultra vires* because the authority has acted without jurisdiction to do so) and relevant decisions applying this principle. Prof. Clayton then provides a detailed account of the proper approach to a merits challenge in an administrative law case and the necessary application of the so-called *Wednesbury* rationality test, which, on the basis of the principle of separation of powers, justifies adoption by the courts of a highly deferential approach in evaluating executive actions. After explaining the process of application of the *Wednesbury* test, Prof. Clayton also gives an account of the recent criticism developed against application of the test and of advocacy of its replacement with a structured proportionality test.

LEGAL EDUCATION

Comparative Constitutional Law in the Classroom: A South African Perspective

Henk Botha

Teaching Constitutional Law in Malaysia: The Universiti Kebangsaan Malaysia's Experience

Faridah Jalil, Che Norlia Mustafa

In his article, *Comparative Constitutional Law in the Classroom: A South African Perspective*, **Henk Botha** considers several means of

52. Section 4 of the Human Rights Act provides that when a judge cannot interpret legislation in a way that would make it compatible with the Convention, the judge can issue a declaration of incompatibility, which cannot "affect the validity, continuing operation or enforcement" of the legislation.

integrating foreign constitutional law into the curricula of South Africa's law schools, that surprisingly persist in a traditional approach of overlooking it. The omission is surprising because of comparative law's fundamental role in the jurisprudence of South Africa's Constitutional Court and that institution's key contribution to the foundation of South Africa's post-apartheid regime, as well as the South African constitution's direction to all judges to consider international law in the interpretation of the constitution's bill of rights and its permission that they do likewise as to foreign law. Notwithstanding these prominent openings of the South African legal system to comparative constitutional law, Prof. Botha reports that the nation's typical law school curricula offer few opportunities to study foreign public law.

Professor Botha offers several explanations for the relative lack of inclusion of comparative constitutional law in South African legal education. He identifies one source as the inertia of a focus on private law continuing from the period of apartheid when the perceived neutrality of private law led many to focus on it as a refuge from the manipulation of South African public law at the time. A further explanation is the recent establishment of legal education as a four-year, first university degree, thereby impeding the more advanced study possible when legal study was achieved through an advanced degree. An additional factor that he identifies is the development of approximately fifteen years of specifically South African jurisprudence of depth sufficient that many lawyers and judges focus on it to the exclusion of other sources of law.

Prof. Botha identifies aspects of South African constitutional law that cannot be easily appreciated without reference to foreign law, such as English parliamentary and American presidential governance, German federalism, and Canadian, European and United States' approaches to human rights to appreciate respectively, South African parliamentary presidentialism, federalism, and protection of human rights. Further, he notes that studying various foreign models can stimulate students to contemplate the contingency of their own system and the prospect of alternative solutions. In addition, he observes the utility of reference to foreign models in reconciling the tensions inherent in recognition of the plural natures of South African society.

As a short cut to achieving the benefits of comparative constitutional study, Prof. Botha points to the possibility of reading various decisions of South Africa's constitutional court that delve into foreign constitutional law and employ it to decide South African disputes and to shape the ongoing constitutional debates. As the new constitutional order in South Africa "embraces plurality and institutionalizes dissent by committing itself to a variety of often

conflicting ideals,” Prof. Botha asserts that the teaching of comparative constitutional law helps future practitioners accept the existence of plurality and dissent.

Faridah Jalil and **Che Norlia Mustafa**'s article on *Teaching Constitutional Law In Malaysia: The Universiti Kebangsaan Malaysia's Experience* provides an account of how the teaching of constitutional law is affected by the unique character of Malaysian society. Addressing both undergraduate and postgraduate studies offered at the Law School, the two professors underline the differences in both methodology and topics addressed at these two different levels of study.

Professors Jalil and Mustafa note that students find constitutional law engaging for its connection to history, politics, economics and other social sciences. However, in studying the 1957 Constitution of Malaysia—heavily amended since its enactment, they note a need of students to overcome a tendency to seek a simple “right answer” approach. The challenge of the instructor is to teach the students continuously to refer to and rely on case law, judicial interpretation and legal history to grasp the meaning of general and indeterminate constitutional provisions and identify the original intention of the Framers and assess how contemporary interpretation may differ.

Enrollment in undergraduate studies, after completion of secondary education, brings to class all the richness and complexities of the multifaceted Malaysian society. Students come from different educational, residential and social settings, and contribute with their diverse personal experiences and approaches to life. In teaching a subject which requires understanding and balancing of the values and principles entrenched in the Constitution, students are challenged to move beyond their subjective backgrounds to endorse diversity and a more critical approach to the subject. Topics like the rule of law, constitutional interpretation, human rights and independence of the judiciary make the students' different backgrounds emerge out of discussion in class. Teaching has recently moved towards a more student-centered, problem-based approach. Comparative elements are usually employed to better understand topics as constitutional supremacy and separation of powers. The United Kingdom is a preferred object of study for the purpose of understanding the Westminster system of government as applied to the Malaysian context.

Educational programs for postgraduate students feature, in contrast, a more international background, with students coming from Indonesia, the Middle East, Africa and China. Comparative law represents a fundamental component of postgraduate studies in constitutional law, Australia being the most referenced jurisdiction. Special attention is paid to cornerstones of constitutional theory like the principle of equality,

affirmative actions, freedom of speech and religion, constitutional interpretation, independence of the judiciary and federalism. Postgraduate students are significantly encouraged to develop a critical approach to constitutional doctrines and decisions through interactive seminars and presentations. The most daunting task, for postgraduate students, is represented by understanding and acceptance of the Western conception of rights and liberties, especially in light of the more cultural-oriented Asian conception of rights.

* * *

CONCLUDING OBSERVATIONS

The diversity and breadth of the thirteen works here contributed will provide insight not readily available in the domestic constitutional law literature. We invite a detailed and careful reading of these symposium papers, confident that they will reward the reader with new insights and provoke further reflection and debate.