Antioch Law Journal

Volume 3 | Issue 1 Article 4

3-31-1985

Remarks: The Constitutional Status of Human Rights Here and Abroad

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THE CONSTITUTIONAL STATUS OF HUMAN RIGHTS HERE AND ABROAD

REMARKS OF
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Many people here this evening have worked diligently to add to the Constitution an explicit guarantee of the equality of men and women before the law. I would like to present a few preliminary comments on that subject, and to tie it to the main line of my remarks about the constitutional status of human rights here and abroad.

It is a disappointment, of course, that the ERA ratification effort has not succeeded this time around, but ours is a Constitution that is hard to amend and hardly ever amended. It is also a Constitution enforced in courts; and therefore, laws inconsistent with it may be invalidated by judicial decree. Many constitutions in our world include equal rights guarantees. A typical example from a faraway place is Afghanistan's 1976 Constitution. It provides: All people of Afghanistan, both women and men, without discrimination or privilege, have equal rights and obligations before the law. But without constitutional review by courts, such provisions state goals, not positive law. That is why equal rights for men and women as stated in modern international human rights declarations and conventions tends to be noncontroversial. It is one thing to agree "in principle," quite another to agree that the principle should have immediate, comprehensive application.

I am confident that protection against government abridgment of rights on account of sex will be a secure constitutional principle in the United States by the year 2000. Over time, the idea will be better understood and fears about what courts might do with it will be put to rest. ERAs are now part of the constitutions of several** states of the United States and the experience under state provisions should provide reassurance. After all, that is what occurred in the case of suffrage for women. Once it became clear beyond argument that women's suffrage would not destroy the home and family as we know and cherish those institutions, a national amendment became inevitable.

I see a relationship between prophecies of judicial mishandling of the ERA and the concrete proposals in Congress intended to clip the wings of the federal courts, to teach the judiciary a lesson, by removing third branch jurisdiction in areas where the Supreme Court and lower

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** Editor's note: Seventeen states have adopted their own state ERAs.

federal courts have rendered constitutional interpretations unpopular in some quarters, most notably, school prayer, busing, and abortion.[1]

I hope the current effort to retaliate against the judiciary will fail, as other, efforts have failed throughout our history—for constitutional review by courts, as my Columbia colleague Louis Henkin has said,[2] is our nation's hallmark and pride. Courts have made some dreadful decisions in the past and will err in the future. But on the whole, I believe our rights are better protected here than elsewhere, largely because of the nonpolitical, or at least less political, branch of government that safeguards our rights even against the majority will, or the will of a noisy or powerful minority.

I would like to share with you some thoughts on constitutions, constitutional rights, and courts in relation to constitutions and constitutional rights here and abroad. It is a large topic and I can offer little more than a quick trip over some of the surface. I will start with an overall impression.

I have travelled a fair amount, and have not yet found a place where civil liberties are protected against state interference more effectively than in the United States. That is not to say that our Constitution is a model document in declaring human rights; far from it. The body of the Constitution is concerned dominantly with the structure of government, not with the people's rights. The Bill of Rights is not long and it has distinct gaps.[3]

Further, because the founders of the nation conceived of our fundamental human rights both as antedating the state and as inalienable, the Bill of Rights does not really declare those rights. Instead, it instructs government to keep its hands off. (It states, for example, "Congress shall make no law . . . abridging the freedom of speech or of the press.") Our Bill of Rights tells the legislature what it must not do; it does not command affirmative action by government. It states freedoms government may not invade, not rights essential for human sustenance, which government must provide. And, with the notable exception of the Thirteenth Amendment, our Constitution restricts only action by

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[1] Registration for the draft was high on the list of federal jurisdiction excision measures until the Supreme Court, last year, removed that bone of contention by upholding against an equal protection challenge Congress' decision to require males, but not females, to register for possible future conscription.

[2] In preparing the remarks that follow, I have drawn heavily on ideas and analysis presented with depth and elegance in Henkin, *Rights: American and Human*, 79 COLUM. L. REV. 405 (1979), and Henkin, *Rights: Here and There*, 81 COLUM. L. REV. 1582 (1981).

[3] For example, no explicit equal protection guarantees are applicable to federal legislation under the U.S. Constitution. The Supreme Court eventually read such protection into the Fifth Amendment's due process clause. That clause is the same one the Supreme Court once read to keep Dred Scott in slavery.

government. It does not secure rights against invasion by private persons.

Post World War II international human rights documents and national constitutions framed since that war, by contrast, contain positive, longer, more precise catalogues of human rights. For example, the 1948 Universal Declaration of Human Rights, presents an enumeration of civil and political rights more extensive and specific than our Bill of Rights and post-Civil War amendments. In addition, the Universal Declaration includes among enumerated rights economic and social guarantees relating to the satisfaction of basic human needs—rights to food and shelter, health care, and education. (An attempt to amend our Constitution to include positive guarantees of that order, I suspect, would encounter resistance that would make the anti-ERA campaign seem pale and restrained.)

The current French Constitution incorporates the world-renowned 1789 Declaration of the Rights of Man.[4] The 1958 French Constitution also includes explicit references to the right to work; the right to strike and to bargain collectively; the right to welfare, health care, free public education at all levels and, for the first time, a statement of the equality of men and women.

But the 1948 Universal Declaration of Human Rights is a statement of principles; it in and of itself does not have the force of law in any court. And the French idea, like that of the British up to now, is that rights, even if stated in a constitution, can be enforced only through law, law passed by the people's elected representatives. That law, not the Constitution, is to be applied by judges. Thus the French Constitution states: "Every citizen may speak, write, publish freely, except that he is responsible for abuse of this liberty in the cases determined by law . . . No man is to be interfered with because of his opinions, provided his manifestations of them does not disturb the public order as established by law." Law as used in these clauses means legislation, not constitutional law developed through judicial decisions. A law passed by parliament, once promulgated, is simply not subject to challenge by anyone, in any place.

The chief executive too, in most systems, is untouchable by courts. Archibald Cox reports this conversation with a Scandinavian legal scholar. Cox told his Scandinavian friend of the subpoena he obtained as Watergate Special Prosecutor, demanding production of conversations taped in then President Nixon's offices, and of Judge Sirica's order directing the President to produce the tapes. "Amazing, unthinkable that

[4] That highly influential declaration was first given constitutional stature in France in 1946.

the courts of any country would order about the Chief of State," the Scandinavian scholar said. Of course, he acknowledged, the head of state is obliged to adhere to the Constitution and to the nation's laws. But his position is independent of and coordinate with the courts. That should mean, the Scandinavian gentlemen believed, that the President neither dictates to, nor is subject to the dictates of the courts. Rather, the President should self-monitor his compliance with constitutional requirements, as should the legislature.

A new constitution was adopted in the People's Republic of China (PRC) in the spring of 1978, the third constitution the PRC has had. That summer, I was in China and was struck by a particularly attractive poster which quickly sold out at the bookstore. It showed a woman holding a young child and pointing with pride to a scroll representing the new constitution. Members of the newly reinstated Peking law faculty told of the work they had done helping to draft the constitution, and of the new constitution's importance in the campaign to "strengthen socialist legality." But the idea of a judicial branch as guardians of people's rights under the constitution was not part of their vision. Nor was it within the contemplation of the drafters of the 1977 Soviet Union Constitution or, indeed, the 1958 French Constitution.

Our notion of a constitution enforced in courts has gained adherents since World War II, a war which cast some doubt on the conviction that popularly elected legislatures can be relied upon to protect human rights through law. Much that was evil in that era had the stamp of approval by popularly-elected legislators. Recently, there has been considerable discussion in the United Kingdom of adopting a written constitution, including a bill of rights backed up by judicial review. (The United Kingdom has managed until now without a written constitution.) Post-World War II constitutions in West Germany and Italy provide for judicial review as one protection against return to autocratic government and as a safeguard of individual rights.

Constitutional review in West Germany and Italy does not occur in the regular court hierarchy. Rather, that function is assigned to a special court, designated the Constitutional Court. The constitutional courts in West Germany and Italy (also in Austria and, alone among communist states, Yugoslavia) hear no "cases." Rather, they decide constitutional questions on petition of legislators or governmental units, or issues abstracted from a concrete case and referred by the ordinary court that retains the full case for adjudication once the special court has answered the constitutional question. One politically-loaded question referred to the Constitutional Court of West Germany concerned a law passed by the national parliament in the early 1970s decriminalizing abortion in the

first trimester. The court had this issue framed for it by the petitioning national legislators and local governments: Did the law decriminalizing abortion violate a constitutional provision not far removed in spirit from our due process clause? The cited constitutional provision read: Everyone shall have the right to life. A sharply divided bench ruled that the law wholly decriminalizing abortion in the first three months of pregnancy had gone too far—and found it to be unconstitutional.[5]

The 1975 West German Constitutional Court decision has been compared with our Supreme Court's ruling in 1973 in *Roe v. Wade*, a ruling that due process bars government prohibition of abortion. The two courts reached opposite results, but both were accused of extreme judicial activism, of thwarting the will of the people's elected representatives on a matter that many thought the Constitution, properly interpreted, did not address.

Lawyers might find some initially attractive features in a system where the constitutional adjudicator is presented with and decides only the bare question—Is this statute consistent with the Constitution? No facts of a particular case surround the question, no worries about the existence of a genuine "case or controversy," no quibbling over standing, ripeness, whether the issue is justiciable or whether it is a "political question." None of the elaborate standards of jurisprudence our federal courts use for declining, deferring, or narrowly limiting constitutional decisions is before the court.

There are drawbacks, of course, to putting questions to a constitutional adjudicator that must be answered with a clear yes or no, and without a pattern of specific facts to inform the decision. Nor is the route of interpreting a statute to avoid constitutional questions generally open in a system in which the regular courts interpret the statute and the special court deals only with the Constitution.

Furthermore, what works in one system may not be exportable. We would not easily adjust to a regime in which one judicial organ alone has a constitutional review function, and that function only. On the other side, the regular court hierarchy in a civil law system may lack the tradition, structure, and mind set for constitutional review. These regular courts outside the common law sphere generally have a career (civil service) judiciary, and the Supreme Court is usually a large body, perhaps 50 judges or more, that processes cases in divisions and panels. Appellate jurisdiction, even at the highest level, is generally mandatory; hence constitutional adjudication would be submerged, a relatively small part of the Supreme Court's total business. Judges, under those circum-

[5] In response, the legislature passed a new law enumerating circumstances under which abortion is permissible.

stances, could not be expected to develop a view of themselves primarily as special guardians of constitutional values.

Japan may be a case in point. After World War II, under our influence, a constitutional review system resembling our own was adopted and placed under the superintendence of the regular, civil service court system. Japan's tradition worked against the arrangement. During the first 20 years it operated, only two laws failed to survive constitutional challenge, one of them a statute no longer in effect at the time of decision. Constitutional adjudication has figured more importantly in West Germany, with its one, specialized court. The court's members are relatively few in number, sixteen; they are set apart from the regular civil service court hierarchy, and are drawn from law degree holders of diverse backgrounds and experience.

Constitutional review by the judiciary is not the only means of restraining arbitrary exercise of government power. The highest administrative tribunal in France, the Conseil d'Etat, where there is no statute in point, may nullify an administrative act on finding that it violates the Constitution. And the 1958 French Constitution introduced a kind of constitutional preview. The preview occurs before a body called the Constitutional Council. It is not a court. All former presidents served on it and nine others, three designated by the President of the Republic, three by the president of each of the two legislative chambers. Legislators and certain government officers (but not private individuals) may refer bills to the Council after the parliament has passed them, but prior to promulgation. When a reference is made, the Council has one month to say whether the bill referred to it comports with the Constitution. If the Council says no, the measure does not become law. If it says yes, the bill is promulgated and no one can then challenge its validity. Essentially, Council preview is a stage in the legislative process. No parties appear before the Council; no hearings are held. But the Council's existence and its function do indicate that the Constitution stands higher than ordinary law in the current French scheme.

Other systems have developed institutions that we would not describe as constitutional review but that nonetheless keep government officers and executive officials within proper limits. The Scandinavian term ombudsman may not be a household word here, but inspector-general or ombudsmen types have been installed at local, state, and federal levels in our country and can contribute importantly to the protection of individuals against arbitrary treatment by a bureaucracy.

I have tried to illustrate why the status of the Constitution, and of constitutional rights, is different here than in most places. Our Constitution is prescriptive; it is a source of law that courts must apply. Else-

where, constitutions tend to be descriptive, or aspirational, and people do not, indeed in most places cannot, go to court to enforce constitutional rights. Still, a guarantee of human rights in a constitution is significant. The very statement of the ideal, even if not enforced in court, is a declaration of the way things should be. If governments act in a contrary way, and do not conceal or deny their actions, they may feel obliged to explain their departures from declared human rights principles.

I should mention a strong criticism of constitutional rights under a system of constitutional review like that of the United States. This criticism is voiced particularly in Third World nations. Our 18th century Constitution, and our mode of judicial review, do not lend themselves easily, if at all, to accommodation of economic and social rights. Not that we are less of a welfare state, even with severe budget cuts, than others that proclaim constitutional rights as life's basic necessities. But we rely on legislation to attend to social and economic needs. Legislation is the means through which such needs are in fact served in places that enshrine freedom from want first among constitutional rights. So the constitutional status such rights have there, and lack here, does not have immediate practical significance.

To return home again to close these remarks, constitutional review as we know it in the United States is a heavy responsibility and courts do make mistakes, sometimes grave ones. But I can imagine no more secure way, particularly in a country marked by the diversity of its regions and its population, of safeguarding individual rights, at least civil and political rights, than the one that has developed from Chief Justice Marshall's insistence that if judges lacked authority to follow the Constitution beyond and above ordinary statutes then the very idea of a written constitution would be reduced to insignificance.

Perhaps it is an insular view. Constitutional review by courts, particularly those with appointed judges enjoying life tenure, has been attacked both here and abroad as undemocratic. But if our human rights record, for all its shortfalls, remains unmatched, it seems hard to avoid the conclusion that a good share of the credit must go to an independent judiciary armed with the powerful remedy of constitutional review, a judiciary that shapes no cases on its own, but applies the Constitution as the highest law, when people claim, in concrete controversies, that lawmakers or public officials have injured them by acting outside the constraints of our fundamental instrument of government.

Allow me to make one concluding comment, addressed to an embarrassing aspect of our world record with regard to human rights. People in the United States complain about human rights violations here, perhaps more than elsewhere, but the very frequency of complaints

against, and criticism of, our government's performance shows the openness of the United States on these questions. Still, there remains a blot on our record that mars our image and influence on a world stage—we have not ratified any of the principal international human rights instruments.

President Carter signed the UN-sponsored International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social, and Cultural Rights, both adopted by the United Nations General Assembly in 1966, both in force since 1976, and now ratified by over sixty nations. He also signed the Declaration on Elimination of All Forms of Racial Discrimination, and the Convention on Human Rights of the Organization of American States. But Congress has not acted on these measures, not even on the Convention on Prevention and Punishment of the Crime of Genocide. Part of the problem may be our view of rights guarantees as living law susceptible to court enforcement, not simply aspirations or ideals to be achieved incrementally. But there is little doubt that our failure to ratify basic international human rights documents undermines our effectiveness in promoting a genuine commitment to human rights around the globe. I hope, before the end of the 1980s, we will become party to the major international covenants and thereby enhance our credibility as a nation that cares deeply about the enjoyment of fundamental human rights by all people.