

UNIT 8: PASSING LEGISLATION FOR HUMAN RIGHTS

Introduction and Overview

As the law-makers of a country, it is parliaments that ensure international human rights standards are met through domestic legislation. Bringing domestic laws in line with the standards required by treaty commitments usually requires parliament to pass legislation that specifically incorporates treaty provisions into domestic law. This Unit also discusses a constitutional Bill of Rights with key human rights protections, and explains that all laws should accord with international law. The importance of prioritising key human rights issues such as poverty alleviation and justice sector reform, in budget allocations by providing substantial funds to support the work of national human rights institutions, and guaranteeing a transparent, participatory budget process is also discussed. It concludes by highlighting ways the legislature can support the judiciary to protect human rights, as well as the responsibility of the judiciary to consistently maintain a human rights approach in its decision-making process.

Bill of Rights: Enshrining Human Rights in the Constitution

Subject-specific domestic legislation is one way to protect and promote rights. One of the most effective national efforts is through a constitutional Bill of Rights. The national Constitution is the highest law of a country and overrides all other laws. Enshrining human rights in the Constitution, therefore, gives them enormous legal weight –all other laws must be in consonance with the standards set out in the Constitution.

Most Commonwealth countries have a constitutional Bill of Rights. New Zealand and the UK are examples of countries that have relied upon common law traditions for

safeguarding rights but in the modern context have legislated for specific protection of rights. Most Bills of Rights enshrine core values such as respect for human dignity; equality and non-discrimination; and the opportunity to realise one's potential through the exercise of fundamental freedoms. While many focus on civil and political rights, some notable examples, like the Bill of Rights in the South African Constitution, also include economic and social rights. Constitutions should ideally also enshrine the establishment of an independent human rights institution.

Passing Complementary Legislation

Ratification of treaties requires that all domestic laws be brought up to the standards of the international commitment and be in harmony with it. In some countries, such as the United States, this is a simple matter because when a treaty is ratified, it is "self-executing" so the provisions in the treaty automatically become part of domestic law, such that the public can take the Federal government to court if it has failed to implement the treaty.

In Commonwealth countries though, even where a treaty has been ratified, this does not necessarily mean that the commitments in it can be automatically enforced in domestic courts. This is because while the executive might have the constitutional power to bind the State at international law, only the parliament has the power to change domestic law. As such, parliament must pass legislation to specifically 'incorporate' the treaty provisions into domestic law. One recent example of this was the United Kingdom's enactment of the Human Rights Act 1998, which was specifically enacted to make the rights contained in the European Convention on Human Rights enforceable in UK courts. Likewise, Fiji's Human Rights Commission Act, 1999 for the purposes of the Fiji Human Rights Commission describes human rights as rights embodied in the United Nations Covenants and Conventions on Human Rights and includes the rights and freedoms set out in the Bill of Rights.

Despite the obligation to pass laws that are consonant with treaty obligations many domestic considerations prevent or slow their passing. The conflict between personal laws, customary law and prevailing culture has been cited by some countries in explanation as to why they haven't passed laws that conform to treaty standards, although other countries have managed to do so.

Ensuring All Other Legislation meets Human Rights Standards

In addition to legislation that specifically domesticates international treaties, all laws which parliament passes should be in accordance with international human rights standards. This requirement also applies to the constitutional Bill of Rights, if one exists.

Specific human rights oversight committees set up to review legislation ensure it conforms to human rights standards. These committees are bolstered by legislation that specifically requires that all legislation meet minimum human rights standards. In the State of Queensland, in Australia, for example, the Legislative Standards Act 1992 enshrines fundamental legislative principles that "must be considered when legislation is drafted so that it does not infringe individual liberties". These principles include whether the legislation is consistent with the principles of natural justice and if it has sufficient regard for aboriginal traditions and customs, or provides for protection against self-incrimination.

In the United Kingdom, the Human Rights Act 1998 specifically requires that all UK legislation should, if possible, fit with the European Convention on Human Rights. Because the UK does not permit judicial review of legislation, the courts cannot strike down inconsistent legislation, but if a court finds that a law is incompatible with the Convention, it can make a "declaration of incompatibility" and parliament must decide what action to take. An example is when Section 23 of the Anti-Terrorism Crime and Security Act 2001, was ruled incompatible with the Human Rights Act 1998 and the

When the Going Gets Tough

In times of conflict and strife, special laws are sometimes enacted in the name of protecting the life and property of the nation. This has been witnessed in some countries in dealing with insurgents, asylum-seekers or refugees. It has been seen particularly in the context of the global anti-terror campaign. While living in a low-crime environment or protecting the sovereignty and the integrity of the nation may be a priority, existence of irregular circumstances should not be an excuse to undermine human rights and the rule of law. Granting carte blanche to the military or police – especially through laws that allow special powers of arrest and detention backed with immunity - to deal with particular situations, often perpetuates cycles of violence and undermines the roots of democracy in a nation.

Care must be given to ensure that measures to deal with internal conflict or national emergencies do not violate basic human rights standards. One evil cannot be replaced with another. Laws that violate the presumption of innocence; right against self-incrimination; provide for long or indefinite periods of detention; contain harsh bail provisions; and restrict or deny free access to a lawyer of choice fall in this category.

European Convention on Human Rights, by the highest court in the country. This section allowed indefinite detention without trial, of foreign nationals suspected of involvement in international terrorism. The Act makes it clear that parliamentarians have a key role to play in ensuring that all legislation is in line with universal standards. The Act also makes it unlawful for a public authority to violate Convention rights, unless it had no choice due to an Act of Parliament. This explicit extension of the duty to respect human rights on to the

bureaucracy is a major step forward in creating a domestic environment genuinely respectful of and committed to human rights.

Promoting Pro-Human Rights Budgets

Allocations made in budgets show where a country's priorities lie. Optimum budget allocations towards poverty alleviation, human rights education, justice sector reforms, and socio-economic areas reflect the State's commitment to these areas and determine whether human rights can be truly upheld. Budget allocations also indicate the relative importance given to institutions such as human rights commissions, minority commissions, women's commissions, police complaints commissions, human rights courts and ombudsmen – both to be established and to be maintained with sufficient resources to properly discharge their duties. Despite a strong mandate and excellent networks, human rights institutions are often unable to function to their true potential due to lack of funds. The difference between tokenism and true commitment of a government to human rights can often be seen through the funds available to these institutions.

These priorities will be brought to the forefront through genuine consultation and participation of the people. By providing space for such participation and making sure that these views are incorporated into the budget, governments show their commitment to ensuring that both the process and final document are human-rights friendly. NGOs are increasingly engaging with the process through submissions, as well as analyzing the final budget for adherence to human rights and social justice norms. One example is an initiative in Tanzania that has led to budget guidelines for government departments that now require that budget submissions be prepared with a gender focus. Since 1996, the Commonwealth Secretariat has also supported gender budget initiatives. In the pilot phase of their project, technical assistance was provided to Barbados, Fiji, St Kitts and Nevis, South Africa and Sri Lanka, for projects with the joint support of the Ministry for Finance and Ministry for Women's Affairs.

It must be recognized though that it is not just the community within the country that will influence the budget process, but also international bodies. Donors, for instance, whether through bi-lateral or multi-lateral agreements wield increasing leverage in setting the budgetary agenda in beneficiary countries. The process of developing Poverty Reduction Strategy Papers (PRSPs), for instance, involves not just national stakeholders, but external development partners as well, particularly the IMF and World Bank. PRSPs aim to bring about a comprehensive national strategy for poverty reduction

and describe the macroeconomic, structural and social policies and programs that a country will pursue over several years, as well as external financing needs and the associated sources of financing. These provide an opportunity for all stakeholders to ensure that poverty reduction is designed and implemented through a human rights framework and that explicit human rights activities are prioritized.

A country's commitment to human rights is also gauged by willingness to contribute to international development agencies that promote human rights, democracy and good governance. Countries quite often make statements committing funds to international agencies but delay in releasing the money. Many crucial bodies such as the Office for the High Commissioner on Human Rights receive some general UN money but require voluntary contributions to function as designed. Financial contributions included in the budget reflect a State's commitment to international human rights.

Supporting the Judiciary to Promote and Protect Human Rights

Judiciaries have often been active promoters of human rights by strategically maximizing their position in interpreting legislation and developing common law. As pillars of governance, the legislature and the judiciary share a common goal to promote public welfare through the realization of human rights. Upholding and protecting rights often involves working in tandem, supporting each other and respecting each other's spheres of competence. As law making bodies, parliaments can create the right conditions to buttress the judiciary's efforts to promote human rights. Examples include voting in adequate budgets that support setting up free legal aid systems for the indigent or setting up special commissions to review the working of laws or courts. The Fiji Law Reform Commission has a mandate to develop law that is just, principled, and accessible, and which reflects the aspirations of the people of the Republic of the Fiji Islands. Open and transparent appointment procedures for judges also offer opportunities to examine the candidates' demonstrable commitment to progressing the cause of human rights.

Strategic interpretation and development of common law by the judiciary helps international human rights standards seep into domestic law, and the public psyche.

Judicial decisions that call upon the Executive to fulfill its obligations under international law, and decisions which set the standard to view future policy options must be supported wholeheartedly by elected representatives. The Indian Supreme Court, for instance, scored a considerable victory for human rights in the Nilabati Behera case, when it struck down a reservation by the Indian Government to the International Covenant on Civil and Political Rights to the provision requiring that a victim of unlawful arrest/detention have an enforceable right of compensation. The court, relying on this international law provision, upheld the right of citizens to monetary compensation for wrongful acts of the State. It is positive that the executive and the legislature have supported this decision.

Unit 8 Questions

Please answer each of the following questions. If you are taking this course in a group you may then meet to discuss your answers.

1. What are the two ways that treaties can be incorporated at a national level after they have been ratified?
2. What is a Bill of Rights?
3. How can parliaments ensure that all legislation meets human rights standards?
4. What action can parliament take to support the work done by the judiciary to protect human rights?

Relevant Internet Resources

OHCHR draft guidelines on a human rights approach to poverty reduction strategies:
<http://www.unhcr.ch/pdf/povertyfinal.pdf>