THE CONSTITUTION OF KOSOVO.

1. Role of the constitution.

a. The limitation of power.
b. Procedures for amendment.
c. Provisions which cannot be amended.
d. Guarantees for human rights. The European Convention on Human Rights. **Need for further human rights connected with protection for minorities in education, employment and religious and cultural development**.

2. THE PRINCIPLE OF POWER-SHARING. In divided societies, the Westminster Model does not work. There is unlikely to be an alternation of power.

BUT – power-sharing is not a panacea.

THE DANGERS OF POWER-SHARING.

a. The reinforcement of divisions.
b. The danger of deadlock.
c. The absence of an opposition, and too little room for democratic choice.

Power-sharing as a TRANSITIONAL form.

THE STRUCTURE OF GOVERNMENT.

3. The legislature.

a. Method of election. See separate note.
b. Relationship to executive: The idea of responsible government. Alternatives to responsible government. The examples of Austria and Northern Ireland.
c. The role of committees.
d. Protection for minorities. Weighted majorities/ minority vetoes. Alarm bell procedures. The example of Belgium.
e. The provisions for dissolution of the legislature.

4. The executive.

a. Role of the President. A `super-president'? Example of Nelson Mandela. Role of leadership. A dual presidency with requirement for joint action on fundamental matters?
b. Role of cross-community consent and proportionality in executive appointments. The examples of Austria and Northern Ireland.
c. The principle of Cabinet responsibility.

5. The judiciary and the public service.

a. The principles of IMPARTIALITY and PROPORTIONALITY.
b. Appointment of judges by impartial and non-political process. Commission for Judicial Appointments. Tenure during good behaviour. Politicians should not be able to dismiss them.
c. Appointment of civil servants and public officials by impartial and non-political process. Civil Service Commission. Commission for Public Appointments..

6. The principle of decentralization. BUT must be combined with the principle that benefits and burdens should depend upon need and not on geography. Cultural and linguistic communities. The examples of Belgium and Estonia. The idea of personal federalism. The ideal of **GROUP AUTONOMY** within a national framework of rights and duties.

7. **Links with other countries without compromising the principle of sovereignty.** The example of the North/South Council, linking Northern Ireland, which remains a part of the United Kingdom, and Ireland, a separate country. Seek co-operation by agreement while respecting the identities of different nations.

Vernon Bogdanor,
July 2006.

INDEPENDENCE OF THE JUDICIARY

PARLIAMENTARY AND CONSTITUTIONAL ROUNDTABLE ON CONSTITUTIONAL ISSUES

DEFINITION OF CONSTITUTION

- FUNDAMENTAL LAWS: BASIC STRUCTURE OF GOVERNMENT
- DEMOCRATIC CONSTITUTIONALISM
- INDIVIDUAL FREEDOM
- COMMUNITY RIGHTS
- LIMITED GOVERNMENT POWER

INDIVIDUAL RIGHTS VS MAJORITY OPINION

- WHO DECIDES?
- STRONG AND INDEPENDENT JUDICIARY
- HUMAN RIGHTS HAVE PRECEDENCE OVER MAJORITY OBJECTIONS

RULE OF LAW

- STRONG, INDEPENDENT COURTS
- AUTHORITY
- RESOURCES
- PRESTIGE
- TO HOLD GOVERNMENT OFFICIALS ACCOUNTABLE TO LAWS AND REGULATIONS

JUDICIAL INDEPENDENCE

- INDIVIDUAL ASPECTS AND INSTITUTIONAL ASPECTS:
- INDIVIDUAL JUDGES NEED TO BE INDEPENDENT
- JUDGES AS A BODY NEED TO BE FREE FROM ANY INFLUENCE OF OTHER GOVERNMENT BODIES

HOW TO ENSURE INDEPENDENCE

- PRIMARILY BY KEEPING POSITIONS AND SALARIES OF JUDGES BEYOND REACH OF EXTERNAL FORCES.
- HOLDING OFFICE DURING “GOOD BEHAVIOUR”
- HENCE SECURITY IN PAY AND POSITION.

What are the obligations of the judges?

- NO BIAS: PERSONAL OR OTHER
- TOTAL INTEGRITY
- ETHICAL CONDUCT

- HENCE THE CHOICE OF JUDGES IS FUNDAMENTAL.

- LEGALLY PREPARED,FULL INTEGRITY
- FROM CROSS-SECTION OF POPULATION

UN RESOLUTIONS 40/32 AND 40/146 1985

- DISTILLED MULTICULTURAL EXPERIENCE

- GUARANTEED BY THE STATE AND ENSHRINED IN THE CONSTITUTION
- DUTY OF OTHER BODIES TO RESPECT INDEPENDENCE OF JUDICIARY.

ARTICLES 2 & 3

- DECIDE MATTERS IMPARTIALLY WITHOUT RESTRICTIONS,PRESSURES, OR INTERFERENCE
- EXCLUSIVE AUTHORITY TO DECIDE WHAT FALLS WITHIN ITS COMPETENCE

ARTICLE 4

- NO UNWARRANTED INTERFERENCE WITH JUDICIAL PROCESS, NO REVISION OF JUDICIAL DECISIONS.

- RESERVATION FOR JUDICIAL REVIEW AND MITIGATION OR COMMUTATION.

ARTICLES 5, 6 & 7

- PROTECTION OF COURT JURISDICTION
- JUDICIAL INDEPENDENCE REQUIRES JUDGES TO CONDUCT PROCEEDINGS FAIRLY AND WITH RESPECT OF RIGHTS OF PARTIES.
- STATES TO PROVIDE ADEQUATE RESOURCES FOR JUDICIARY TO PERFORM ITS FUNCTIONS.

OTHER ISSUES

- FREEDOM OF EXPRESSION,ASSOCIATION AND ASSEMBLY
- STANDARDS IN JUDICUIAL SELECTION, SELECTION NOT IN THE HANDS OF GOVERNMENT AND ADMINISTRATION

CONDITIONS OF SERVICE

- TERM OF OFFICE
- INDEPENDENCE AND SECURITY,REMUNERATION,PENSION ,RETIREMENT-AGE
- SHALL BE ADEQUATELY SECURED BY LAW.

REMOVAL FROM OFFICE/ DISCIPLINE

- DEFINITE PROCEDURE TO BE ESTABLISHED BY LAW FOR REMOVAL AND DISCIPLINE.
- COMPLAINT PROCESSED EXPEDITIOUSLY AND FAIRLY

Financial security, promotion,immunity

- NO VARIATION TO REMUNERATION AND BENEFITS DURING TERM OF OFFICE.
- PROMOTION BASED ON OBJECTIVE FACTORS
- PERSONAL IMMUNITY. DECISION ON ARREST TO BE TAKEN BY JUDICIAL BODY.

RESOURCES

- JUDGES ARE TO BE PROTECED FROM INFLUENCE OF OTHER PARTS OF GOVERNMENT.
- ADEQUATE FUNDING, EMPLOYING AND DISMISSING COURT STAFF, INCENTIVES, ORGANIZING INFORMATION.

THROUGHOUT JUDICIAL TENURE

- TO MAINTAIN PUBLIC CONFIDENCE
- ONCE APPOINTED JUDGES TO ABIDE BY STRICT ETHICAL STANDARDS. EITHER AUTO-REGULATION OR ADHERENCE TO A CODE
- NO PERCEPTION OF POLITICAL VIEWS, CORRUPTION, UNETHICAL TRAITS

BANGALORE PRINCIPLES OF JUDICIAL CONDUCT

- SIX CORE VALUES
- INDEPENDENCE
- IMPARTIALITY
- INTEGRITY,
- PROPRIETY,
- EQUALITY
- COMPETENCE

CONSTITUTIONAL FRAMEWORK

- BEST WAY FORWARD IS NOT CAST IN STONE
- PUT IN PERSPECTIVE AND CONTEXT
- PRESENT PERCEPTION
- EUROPEAN UNION ASPECT.

Proposed inclusions in new constitution

- Independence of the judiciary
- Separation of powers
- Balance of powers
- Specific tasks for each branch and for judges

|Representation

- The need for an interlocutor
- Ministry of Justice, judicial council etc.
- An independent branch should represent itself.

Constitutional Courts

- Review of legislation and executive acts.
- Selection of judges of fundamental importance
- Ideally judicial review should be through ordinary courts or by normally appointed judges.

Incompatibility

- Personal or professional affiliations
- Commercial activities
- Usually allowance for academic, artistic work.

Disclosure

- Financial disclosure may help to increase accountability
- Transparency essential

Court Administration

- Judiciary should manage its own resources.
- Budgetary responsibility frequently a problem
- Transparent procedures.

OSCE Round Table

Constitutional Issues

The Judiciary

Frederick Michael Lorenz JD, LLM
Public International Law and Policy Group

Sample Language: Powers and Functions

- **The courts shall ensure equal justice for all. They shall safeguard the rights and legitimate interests of all citizens, individuals, legal entities, and the State.**
- **The courts shall be responsible for the administration of justice in accordance with the Constitution, as well as statutes and binding international laws and norms.**

Sample Language: Structure of the Judiciary

- **Judicial power is implemented by way of constitutional provisions or legislation provided for in the constitution.**
- Option 1: **The courts shall consist of [provide court names].**
- Option 2: **The Courts of Law shall consist of a Constitutional Court, a Supreme Court, and such District Courts, Municipal Courts and Minor Offence Courts as are established by law.**

Sample Language: Supreme Court

- **The Supreme Court shall be the highest appellate Court of Law in the State and shall possess appellate jurisdiction over other Courts of Law, including specialized courts.**

Constitutional Courts

"Since the court has neither the power of the sword nor of the purse, it depends on public support and for this, particularly in the early years, it must tread carefully, and not expend whatever capital it has on matters best handled by other institutions."

Prof Herman Schwartz, American U Law School

Austria

- The Austrian constitution was the first in the world to enact (in 1920) judicial review under what came to be known as the "Austrian system", where a separate constitutional court reviews legislative acts for their constitutionality. Many European countries adopted the Austrian system of review after World War II.

Latvia Experience

- **Award winning program (Ciceron 2005) of the new court focused on transparency, open court sessions and a public relations campaign that helped convince citizens that to court was operating to protect their rights and freedoms.**

Latvia (continued)

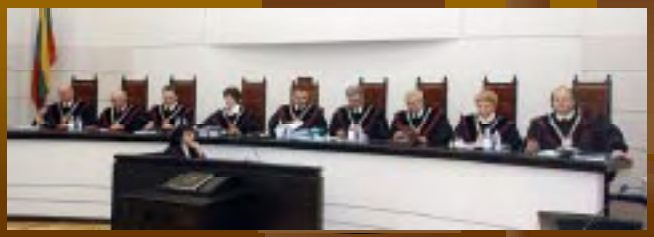
- "The Constitutional Court is needed in the time of political transition, especially in the small country, and should do some things in a different way as compared with the (traditional) German Constitutional Court"

Ms Dzintra PEDEDZE, Advisor to the Chairman of the Republic of Latvia Constitutional Court

Lithuanian Constitution

- **CHAPTER VIII**
  THE CONSTITUTIONAL COURT

  Article 102
  The Constitutional Court shall decide whether the laws and other acts of the Seimas (legislature) are not in conflict with the Constitution and whether the acts of the President of the Republic and the Government are not in conflict with the Constitution or laws.



Sample Language: Judicial Independence

- **The judiciary of [name of state] shall be autonomous and independent.**
- **Judges shall be autonomous, independent, and bound only by the law.**

Judicial Independence

- **Three times in America's history, a politically dominant majority has openly challenged the authority and independence of the US Supreme Court as an institution.**
- **1805 Impeachment of Justice Chase**
- **1868 proposed law to limit Supreme Court jurisdiction**
- **Franklin Roosevelt's "Court-packing" plan in 1937.**

Judicial Independence

- **"The degree to which (judicial) independence will be preserved will depend in some measure on the public's respect for the judiciary. Maintaining that respect and a reserve of public goodwill, without becoming subservient to public opinion, remains a challenge to the federal judiciary.**

US Chief Justice William H. Rhenquist
March 2004

Recent events in the US

- Congress attempted to strip the US Supreme Court of jurisdiction to proceed with a case, Hamdan v. Rumsfeld, when it passed the Detainee Treatment Act in December 2005 providing that "no court, justice, or judge" had jurisdiction to hear certain petitions filed by detainees at Guantánamo Bay.

Judicial Independence

- Sample Language:
- State institutions and administrative bodies shall comply with court decisions; these entities shall neither alter court decisions in any respect nor delay their execution.

Terms of Office: Options

- Judges of the Supreme Court shall be appointed for a term of [X] years and may be reappointed to office. The terms of judges of other Courts of Law shall be determined by law.
- The Judicial Council shall have responsibility for discipline and removal of judges [as provided by law].
- Judges may only be dismissed, suspended, transferred or retired on the grounds, and subject to the guarantees, provided by law.
- A judge shall be relieved of his duty only if he is convicted of a crime which makes him unworthy of performing his function, [or] if he becomes permanently incapable of performing the function, [or for any other reason prescribed by law].

Selection of Judges: Three Options

Option 1: Cooperative Selection

- The [Supreme/Constitutional/Other] Court is composed of [9] judges. The President shall appoint [3] of the judges, the Assembly shall appoint [3] of the judges and the Judicial Council shall appoint [3] of the judges on the [Supreme/Constitutional/Other] Court.

Option 2: Plurality System

- Judges of all Courts shall be selected by the President and approved by [2/3] members of Parliament [and the Judicial Council].

Option 3: Majority System

- Judges of all Courts shall be selected by [2/3] members of Parliament [and approved by the Judicial Council].

Sample Language: Impartiality

- The Courts of Law shall be autonomous and independent from any organ, authority, office, group of individuals, or individual.
- During their term of office, judges shall not hold any other public office or engage in any other service or profession that is determined by law to be incompatible with the judicial function.

Sample Language: Qualifications and Diversity

- Judges of all Courts of Law shall be independent and impartial. They shall be distinguished jurists of the highest moral character, with adequate qualifications, including higher legal education. The membership of the judiciary shall reflect the diversity of the people.

Kosovo Parliamentary and Expert Roundtable on Constitutional Issues

Inclusion of human rights in the Constitution

Prof.Dr.Emilia Drumeva
Constitutional Court of Bulgaria

20-22 July 2006

Skopje, FYR Macedonia

Human rights belong to constitutionalism.

Inclusion in the Constitution is a conditio sine qua non.

The organisation, established in every Constitution for exercising public power as "separated powers" has a special and unique purpose: to guarantee fulfilment of human/individual rights. That is why a Constitution is adopted; here is its designation and justification. The Declaration of the Rights of Man and Citizen, adopted in August, 1789 by the revolutionary French National Assembly provides that a society, which has no separation of powers and no protection of individual rights, has no constitution /art. 16/; with other words separation of powers and protection of human rights go together and represent the indispensable components of a Constitution. The Declaration is an official recognition of the person as a value.

In the Constitution human rights become **fundamental rights.**

Fundamental rights are binding public authorities.

Fundamental rights and constitutional rights are often used as synonyms. Nowadays the notion of "fundamental rights" has enriched its content and application – it has gone beyond the borders of the nation state and is bound to become an acting institute of the European Union law with the Charter of Fundamental Rights of the European Union.

Fundamental rights bind the legislature, the executive and the judicial branch as directly applicable law. As a result, they justify an obligation on the part of public authorities to protect them; all acts of the authorities should respect fundamental rights and not infringe upon the spheres they protect, unless the intrusion is justified by constitutional reasons. If rights of the individual, proclaimed by the Constitution, are violated, then the right holder has pretence for eliminating the infringement, respectively for restitution and compensation. The execution of such pretences is a task for the law-maker.

Fundamental rights represent the appropriate form, in which between individuals and society occurs an exchange of values, vitally important for both parties. Fundamental rights concentrate constitutional value judgements, which advance the protection of individual freedoms. Fundamental rights cover goods, which are indispensable for the normal being of the individual as a person and citizen. They constitute relations, without which the fulfillment of the needs of the person, on one hand, and their concurrence with the public interest, on the other hand, would be unthinkable. However, fundamental rights are only possible, where the state recognizes every individual's capacity as a person.

Nature of fundamental rights:

- subjective rights /in public law sphere/.

- objective values ;

In fact, the recognition of fundamental rights as source of individual subjective rights in public law was achieved after long histo
rig
expressed primarily in the construct of fundamental rights, which gradually came up and "ripened" into subjective rights for every person for the protection of his/her freedom and property. The emergence of social rights in contemporary constitutions a
socia
f

The justification of a subjective right includes a norm of the objective legal order /in our case, a constitutional provision regarding f

Thus, the legal norm could be basis for protection of an individualized citizen interest, so that the citizen, as a right holder, could require from public authorities and "third" persons observance of the protected interest. The capacity of fundamental citizens' rights as source of subjective rights in public law is their foremost nature.

Fundamental rights have also another, equally important meaning in the sphere of "the objective": they are objective principles of constitutional legal order and, respectively, of the overall legal order.

What does a Constitution protect? – the core of every fundamental right.

Two principles concerning core of fundamental rights :

- freedom ;
- participation/involvement.

Accordingly two main categories:

- defensive/negative rights ;
- participatory/positive rights.

As the two categories rights have a different nature, respectively they enjoy a different protection.

Which human rights to proclaim as fundamental rights in the Constitution? First, the defensive rights which protect the private sphere of individuals against public authorities.

Second, indispensably the participatory/social rights.

Initially, the constitutional movement, inspired by natural rights, fully shared the understanding about freedom as securing the individual against the public authorities. The freedom of religion, of opinion, the protection of property and other freedoms had to secure for everyone a space "free of state" for individual decisions and individual action. Thus, the constitutional function of fundamental rights used to be mainly "defense", i.e. limitations before the public authority. Even nowadays this function and nature of fundamental rights as defensive rights /Abwehrrechte- dt., droits-resistences-fr./ is very important and has new dimensions – e.g. the inviolability of personal data and its regime.

The other aspect lies in the theory of involvement of citizens in the state's achievements. This idea is directly related to the notion of the social state and the German legal doctrine. Participation means a right for everybody to take part in the decisions, influencing the rights and interests of the specific individual. In this sense involvement is an element of the democratic state and human rights /Teilhaberechte-dt., droits-exigences-fr./ include election rights, freedom of association and of assembly, etc. In contrast to that, however, the connection between involvement and the social state lies in the realm of involvement in the economic and social achievements of the state and society. In this case the aim is already not to protect the individual sphere from the intrusion of public authority, but to claim a share, a piece of the achievement – of the success of the state. That is why those rights are called participatory rights , positive rights - they involve a claim for a share in the achievement, a part of the common success. They can only be exercised if the state performs certain actions and provides what is needed to create the, primarily, economic conditions for the exercise of those social rights. These rights better accepted as social fundamental rights – right to labour, including right to rest, etc.

The notions of defensive and participatory rights, also present in the case-law of Bulgarian Constitutional Court show the different basis and nature of those two groups of fundamental rights, which reflects on their different means of protection. By the way, this difference gives rise to a widespread understanding, mainly in American legal ideology, that participatory rights are not fundamental in their nature and are not equal to the classic rights/freedoms. The following arguments are given for this: first, financial: such social rights can only be exercised if we have the respective economic capacities; secondly, procedural: many of the social rights cannot be clearly defined and thus are not justifiable in principle, i.e. their exercise is not guaranteed through judicial protection. Where legal theory is influenced by those views, there is a hierarchy in citizens' fundamental rights: defensive rights are seen as classic as and higher in rank than social rights. This understanding also recommends that social rights be differentiated from fundamental rights and put in constitutional norms, which regulate the state's main goals or program directives towards the law-maker.

Still, contemporary legal theory mostly supports the view that social rights are equally fundamental. This is supported by the statement that the preference towards one type of rights or the other is a political choice, whose results could be fatal even for the values, protected by the Constitution itself. An indicative example is the freedom of opinion or the right/freedom of expression as a classic individual right: it aims at providing to everyone the opportunity to develop as a person and gather knowledge on his/her social and natural environment; the one-sided emphasis on the defensive nature of this right is not enough for accomplishing this aim – nowadays the distribution of information is a mass industry; a lot of action is taken by the state so that the freedom of opinion could be decently protected, i.e. the right to information is supported by the obligation on the part of the state to provide the necessary information.

This example actually illustrates the efforts of contemporary constitutional practice to get over the inherited controversy between "defensive rights" and "participatory/social rights". The solution is sought through finding the answer to the question what should the principles and the values of society be: only "individualism, liberalism and equality before the law" or also "solidarity, democracy and equal chances"?

Both categories rights belong to a modern Constitution with the appropriate implementation and enforcement mechanisms.

II. MINORITY RIGHTS.

The term

The term embodies two separate concepts :

- individual rights of each member of a racial, ethnic, religious, language,cultural or sexual minority ;
- collective rights accorded to a minority group.

Minority protection A notion of the international law. First steps in modern times were made in 1815 during the Vienna Congress. After the I. World war minority protection was based on bilateral agreements. After the II world war - on multilateral basis; first it was

introduced in addition to the Universal Declaration of 1948 to cover this specific issue. Later a dynamic development in the framework of the UN followed :

1966 the UN Covenant for civil and political rights ;

Subcommittee for prevention of discrimination and protection of minorities.

Oblig

An intensive international law regulation developed also within the Council of Europe, especially after the democratic changes in Central and Eastern Europe :

1990 The Kopenhagen standards on human dimensions ;

1991 The Geneva experts meeting ;

1991 The Venice Commission Draft for a European convention on protection of minorities ;

1992 The European charter for minority and regional languages ;

1995 The Framework Convention for the protection of national minorities.

So minority protection according to the Framework Convention covers not only language, culture, religion and traditions, but also education, media etc.

National law/constitutional law in the last decades shows a diversity of regulations, some of them very detailed – for ex. Constitution of Slovakia. In the same time modern constitutional law shows also flexibility: some constitutions proclaim fundamental rights, which protect minority groups without those having the statute of a national minority /Bulgaria/.

In conclusion : International law and constitutional law have established positive obligations upon public authorities to protect minority groups if objective criteria are at hand and if subjective will is manifested.

Recommendation

As there is no universal model of minority protection rights of minority groups must be proclaimed in the Constitution in both cases: “with” or “without” the statute of a minority, so that individual rights could be practiced in communion.

Ombudsman for minorities to be provided by the Constitution as a special reinforced protection.

Ensuring the fundamental rights in Constitution no matter what the ethnic origin, religious or language affiliation is, represents a part of the guarantees for a long duration and stability in Kosovo.

III. Implementation and enforcement mechanisms for fundamental rights

- Inside Protection – principle of proportionality;
- Outside protection:
- The road to the court must always be free.
- Control for constitutionality /incl. individual constitutional complaint?/
- Ombudsman/men /a network ?/
- Supranational mechanisms.

/ Fundamental rights and hopefully protecting mechanisms belong to the establishing of a functioning legal system and administration, of a civil society, what means – they belong to the concept of rule of law.

Fundamental rights and rule of law represent a key step towards the European perspective of Kosovo.

Human Rights and Constitutional Law

Ronald Hooghiemstra
OSCE Mission in Kosovo

Human Rights and Constitutional Law

Preliminary point:

Human Rights Law is International Law

Therefore:

To include human rights, the Constitution would also need to incorporate international law

Human Rights and Constitutional Law

International law is contained primarily in treaties.

WHAT IS A TREATY?

An agreement between states

Human Rights and Constitutional Law

HOW DOES A TREATY ENTER INTO FORCE?

1. Signature
2. Ratification
3. Promulgation

Human Rights and Constitutional Law

Human Rights Treaties are made up of three parts:

1. Preamble = ***1.*** ***WHY*** we agreed to regulate something
2. Substantive Provisions = ***2.*** ***WHAT*** we agreed to regulate
3. Operative Provisions = ***3.*** ***HOW*** we agreed to enforce what we regulated

Human Rights and Constitutional Law

TWO *LEVELS* OF OBLIGATION:

1. To other states
2. Within the state

Human Rights and Constitutional Law

TWO *TYPES* OF OBLIGATION:

1. Securing the enjoyment of human rights
2. Enforcing the enjoyment of human rights

Human Rights and Constitutional Law

Example of obligation 1:

European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)

Article 1

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention.

Human Rights and Constitutional Law

Example of obligation 2:

ECHR

Article 13

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

Human Rights and Constitutional Law

In other words a state would need to:

Do things in compliance with human rights

and

Fix things when they go wrong

Human Rights and Constitutional Law

Therefore the Constitution would need to:

- Specify the status of treaties in the national legal order
- Specify how treaties enter into force in the national legal order
- Clarify the relationship between treaty law and the Constitution, and with national law
- Specify the obligation on national authorities to protect human rights *in legislation, decisions and actions*
- Specify how national legal procedures will remedy violations of human rights; *and ideally*
- Specify how national authorities will ensure that violations, once fixed, will not happen again *(feedback)*

Human Rights and Constitutional Law

Two uncommon examples

1. The Netherlands
2. The United Kingdom

The Netherlands

The Netherlands is a Constitutional Monarchy

It has a written Constitution and there is a specific role for the Crown

The Crown is Sovereign

The role of the Crown in this Monarchy can be understood as broadly equivalent to the role of the President in a Republic

The Netherlands

CATALOGUE OF RIGHTS

The Constitution of the Netherlands begins with a catalogue of fundamental rights and freedoms of all persons in the Netherlands. This catalogue comprises 23 separate provisions which cover the range of rights broadly similar to the Universal Declaration of Human Rights of 1948.

The Netherlands

STATUS OF TREATIES

Article 91

1. The Kingdom is not bound by treaties and treaties are not renounced without prior approval of Parliament.

3. In case a treaty contains provisions which conflict with the Constitution, or which require changes to the Constitution, Parliament can only approve the treaty by two-thirds majority.

The Netherlands

ENTRY INTO FORCE

Article 93

Provisions of treaties and decisions of public international organizations which, according to their substance, can be binding on everyone, are binding once they have been made public.

(Self-executing provisions of treaties and decisions of public international organizations have the force of law.)

The Netherlands

ENTRY INTO FORCE

Article 95

The Law provides rules on how treaties and decisions of public international organizations are made public.

The Netherlands

RELATIONSHIP WITH NATIONAL LAW

Article 94

Legislative provisions in force within the Kingdom shall not apply if their application is incompatible with self-executing provisions of treaties and decisions of public international organizations.

The Netherlands

OBLIGATION TO PROTECT?

Article 73

1. The Council of State shall be consulted on legislative proposals and draft regulations, as well as on proposals for the adoption of treaties by Parliament.

(Review of draft primary and subsidiary legislation for compliance with treaty obligations, the Constitution and other legislation in force)

The Netherlands

REMEDY?

Article 120

The courts do not review the constitutionality of laws and treaties.

However, read in conjunction with Article 94, the courts do review the application of legislative provisions to the case before them for compliance with self-executing provisions of treaties and decisions of public international organizations.

The United Kingdom

The United Kingdom is a Constitutional Monarchy

It has an unwritten Constitution

Parliament is Sovereign

This implies that no law can be of higher legal value than an Act of Parliament

The United Kingdom

STATUS OF TREATIES

Because Parliament is sovereign, a treaty that has been ratified only binds the United Kingdom in its dealings with other states.

No treaty can have consequences for the internal legal order without the treaty being converted into an Act of Parliament

The United Kingdom

INCORPORATION OF A TREATY

Human rights treaties have moral force in the internal legal order but not legal force.

In 1998, Parliament incorporated the ECHR into the internal legal order through the **Human Rights Act 1998**

The United Kingdom

HUMAN RIGHTS ACT 1998

The Human Rights Act repeats all the substantive rights of the ECHR and sets out procedures for these rights to be implemented in the national legal order through legislation, public action and court procedures.

The United Kingdom

RELATIONSHIP WITH NATIONAL LAW

Section 3(1)

So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

The United Kingdom

RELATIONSHIP WITH NATIONAL LAW

HOWEVER:

Section 3(2)(b)

This section does not affect the validity, continuing operation or enforcement of any incompatible primary legislation.

The United Kingdom

OBLIGATION TO PROTECT – 1

Section 6

(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

(2) Subsection (1) does not apply to an act if, as the result of one or more provisions of primary legislation, the authority could not have acted otherwise.

The United Kingdom

OBLIGATION TO PROTECT – 2

Section 19

(1)(a) A Minister of the Crown in charge of a Bill in either House of Parliament must make a statement to the effect that in his view the provisions of the Bill are compatible with the Convention rights.

The United Kingdom

REMEDIES - 1

Section 7

(1)(a) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by Section 6(1) may bring proceedings against the authority under this Act in the appropriate court or tribunal.

The United Kingdom

REMEDIES – 2

Section 8

In relation to any act […] of a public authority which the court finds is […] unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.