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Editorial Policies

The Loophole is a journal for the publication of articles on drafting, legal, procedural and management issues relating to the preparation and enactment of legislation. It features articles presented at its bi-annual conferences. CALC members and others interested in legislative topics are also encouraged to submit articles for publication.

Submissions should be no more than 8,000 words (including footnotes) and be accompanied by an abstract of no more than 200 words. They should be formatted in MSWord or similar compatible word processing software.

Submissions and other correspondence about *The Loophole* should be addressed to —

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Contents

Editor's Notes

This issue contains articles based on presentations made on the second day of the 2013 CALC Conference in Cape Town, South Africa in April of 2013 as part of a session dealing on legislative sovereignty and the globalisation of law. This topic raises many challenging issues for legislative counsel. International law and agreements have enormous influence over the drafting of domestic legislation, reflecting how developments in such areas as communications, travel, commerce and security, to name just a few, have transformed the world into an increasingly connected place. The articles in this issue provide a good taste of the impact this globalisation is having from a legal perspective and the challenges it presents for drafting legislation.

We begin with Jacques Wolmarans' article on legislative supremacy in South Africa, the host country for the 2013 Conference. Its struggle to achieve a democratic system of government that ensures respect for human rights is inspirational. It provides a compelling account of how international norms can influence the transformation of government institutions. Conference delegates were exposed to this remarkable and still unfolding story through Jacques' address as well as through the many other South African delegates who attended the conference. However, it should also be noted that his paper presents a vision of a "legislative-centred" approach that transcends the South African experience and resonates with jurisdictions around the world in their quest for democracy.

Next, Julie Melville's article takes us to New Zealand for a detailed and compelling look at how it implements in legislation its increasing volume of international obligations. But rather than presenting only the challenges, she also suggests that these obligations also present opportunities for enhancing the transparency of legislative action for the citizens of New Zealand, and not just for its international partners.

Estelle Appiah then takes us more deeply into the implementation of international obligations by focusing on those relating the national security in world subject to an ever-changing array of threats. She reviews selected experiences from Ghana and takes into account recent statutory developments focusing on the legislative framework for implementing anti-terrorism treaties.

Dayantha Mendis rounds out the treatment of this subject by providing a truly global perspective on this topic with his masterful account of treaty-implementation processes and the interplay between international obligations and legislative sovereignty at the national level. He argues for a proper balance between global interests and national interests in the negotiation of global norms and standards.

This issue concludes with a review of a long-awaited 5th edition of Garth Thornton's classic text *Legislative Drafting*. Bilika Simamba provides a glimpse of this new edition prepared by Professor Helen Xanthaki.

Finally, I would like to acknowledge the creation of an editorial board for the *Loophole* consisting of three CALC Council members: Beng Ki Owi, Therese Perera and Bilika Simamba. I am deeply grateful for their assistance with the editorial tasks needed to publish this journal.

John Mark Keyes

Ottawa, August 2013

Legislative Supremacy – A viable option in the South African context?"

Jacques Wolmarans[1]

Abstract

In South Africa, policy development and initiation of legislation is strongly dominated by the executive. This is the case within the national and provincial spheres of government where the national legislature and the provincial legislatures tend to play a more reactive role in respect of policy and legislative initiatives. This is not what was intended by the new constitutional dispensation and the constitutional provisions embodied in the South African Constitution of 1996. This paper

- *argues that there is no constitutional or legal impediment for legislatures in South Africa to play a more prominent role in policy development and initiation of legislation;*
- *pleads for a legislature-centered approach; and*
- *proposes certain practical interventions and mechanisms to achieve this as the preferred option for the young South African democracy.*

Introduction

I am very grateful to CALC for affording me, a mere fledgling member of CALC, only having joined at the end of 2011, this opportunity to participate in this Conference!

I would like to share with you some thoughts on whether the concept of Legislative Supremacy would be a viable option in the South African context**.**

[1] Provincial Chief State Law Advisor, Office of the Premier, KwaZulu-Natal, South Africa.

At the outset, let me state the obvious. Neither the legislature nor the executive are supreme in a constitutional democracy. Only the Constitution is supreme. This is the principle of constitutional supremacy.

In his opening address presented at Constitution Week on Monday, 12 March 2012 at the University of Cape Town, South Africa, Justice ZM Yacoob, Judge of the Constitutional Court of South Africa, made the following statement about the difference between constitutional supremacy and parliamentary supremacy –

> The minority white Parliament was supreme in our country until 1994. Although South Africa did have a Constitution then, it was not supreme in the true sense of the word nor was it underpinned by a rights-based normative system of law. Our present Constitution proclaims its own superiority and says without qualification that all law and conduct inconsistent with it is invalid. We must remember here that the implementation of government policy is conduct that must comply with the Constitution. No state conduct is excluded from constitutional scrutiny. The supremacy of the Constitution has an obvious implication which is quite often not recognised. It is this. The corollary to the proposition that the Constitution is supreme is that none of the legislature, the executive or the judiciary can be supreme. We are all subject to the Constitution.
>
> The fact that the Constitution is binding on all arms of government renders it necessary to determine a mechanism for deciding whether the Constitution is being complied with. That mechanism chosen in the Constitution is the courts. It may be that some other mechanism may be considered appropriate in the future but we must proceed on the basis that the courts make this determination. It is the duty of the court to set aside any law or conduct if that law or conduct is found to be inconsistent with the Constitution. It must be remembered that neither the executive nor the legislature has the power to decide whether there has been compliance with the Constitution.

In a constitutional democracy where the Constitution reigns supreme, one cannot really speak of "legislative supremacy*"* or "executive supremacy". Perhaps we should rather speak of a legislature-centered approach or an executive-centered approach in driving policy and legislation.

In any constitutional democracy, there is always some dynamic tension between particularly the executive and the legislature as these branches of government seek to assert themselves in the exercise of their powers and the performance of their duties and functions as accorded to them in the Constitution.

South African Context

In South Africa, our particular history and entrenched practices and perceptions also give rise to certain assumptions regarding the role and powers of the branches of government -

particularly in relation to the legislature, the executive and the judiciary – assumptions which, in the light of our current constitutional order, may not be entirely justified or correct.

Some of these assumptions are that:

- It is the sole preserve or exclusive domain of the executive to determine policy and to initiate legislation.
- It is the role of the legislature to consider and pass legislation placed before it by the executive.

We can agree that any policy, decision or resolution of government or any structure or functionary of government (no matter how good, necessary, appropriate or laudable) does not automatically become applicable to, or binding upon, citizens. To become binding, that policy, decision or resolution must go through a procedure to be made law (embodied in legislation). Government does not rule by decree, but makes laws through the elected representatives of the people sitting (in the South African context) as Parliament or the provincial legislatures. In the normal course of events, laws are informed by policy. There is, therefore, an inextricable link and relationship between law and policy.

The laws must be made (or "legislated") by an elected and accountable legislature. Once made, the laws must be implemented or executed by the executive, and tested or adjudicated by a judiciary (it goes without saying that the judiciary must be independent).

We have already started to touch on the principle of separation of powers. The exact phrase "separation of powers" does not appear anywhere in the text of our Constitution and many people, lawyers included, often mouth this phase as a mindless slogan labouring under the misapprehension that its substance and content is clear and that they know exactly what it means.

I tend to agree with Prof Pierre de Vos on his blog where he correctly observes that the text of the Constitution is not *absolutely* clear on this principle (or doctrine as it is sometimes termed) in our particular South African context.[2] We, in South Africa, are still developing our concept of the doctrine of separation of powers and as former Chief Justice Sandile Ngcobo stated at a public lecture in 2010,

> while we are still developing this doctrine we should conceptualise our separation of powers doctrine in terms of a dialogue between the legislature and the executive on the one hand and the judiciary on the other (as quoted by Prof de Vos in his blog).

Prof de Vos continues:

> Because the text and structure of our Constitution requires the Constitutional Court to determine whether certain policy choices of the legislature or the executive comply

[2] "How not to criticise a court judgment," 28th March 2011: http://constitutionallyspeaking.co.za/how-not-to-criticise-a-court-judgment/.

> with the Constitution (as it has done in other cases like the *Rail Commuters* case,[3] the *Treatment Action Campaign*[4] case, the *Khosa* case,[5] the *Nicro* case[6], and many other cases) one cannot argue in any credible way that when our Court declares invalid legislation that contains policy choices of parliament they overstep the boundaries of the separation of powers doctrine. We can agree that the principle of separation of powers is not absolute in any jurisdiction in the modern world and the application thereof differs from country to country. A total separation of powers in watertight compartments is not possible, nor practical, and would defeat the objects of the doctrine, which is to ensure the maintenance of a proper balance between the exercise of powers by the respective branches of government through a system of checks and balances to ensure that one branch cannot usurp the powers of another.

This principle was discussed in the context of the Constitution by the Constitutional Court in *In re: Certification of the Constitution of the RSA,*[7] where it was stated that –

> (108) There is, however, no universal model of separation of powers and, in democratic systems of government in which checks and balances result in the imposition of restraints by one branch of government upon another, there is no separation which is absolute … Moreover, because of the different systems of checks and balances that exist in these countries, the relationship between the different branches of government and the power or influence that one branch of government has over the other, differs from one country to another.
>
> (109) … No constitutional scheme can reflect a complete separation of powers: the scheme is always one of partial separation.
>
> (111) As the separation of powers doctrine is not a fixed or rigid constitutional doctrine, it is given expression in many different forms and made subject to checks and balances of many kinds …

It was thus held by the Constitutional Court that the Constitution reflected our country's own special brand of separation of powers.

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[3] *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* (CCT 56/03) [2004] ZACC 20; 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) (26 November 2004)

[4] *Minister of Health and Others v Treatment Action Campaign and Others* (No 1) (CCT9/02) [2002] ZACC 16; 2002 (5) SA 703; 2002 (10) BCLR 1075 (5 July 2002)

[5] *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* (CCT 13/03, CCT 12/03) [2004] ZACC 11; 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC) (4 March 2004)

[6] *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and Others* (CCT 03/04) [2004] ZACC 10; 2005 (3) SA 280 (CC); 2004 (5) BCLR 445 (CC) (3 March 2004)

[7] *South African Association of Personal Injury Lawyers v Heath and Others* (CCT27/00) [2000] ZACC 22; 2001 (1) SA 883; 2001 (1) BCLR 77 (28 November 2000).

In *SA Association of Personal Injury Lawyers v Heath and Others*,[8] the Constitutional Court again dealt with the principle of separation of powers as it exists in our Constitution –

> (24) The practical application of the doctrine of separation of powers is influenced by the history, conventions and circumstances of the different countries in which it is applied In *De Lange v Smuts*,[9] Ackermann J said:
>
> > I have no doubt that over time our Courts will develop a distinctively South African model of separation of powers, one that fits the particular system of government provided for in the Constitution and that reflects a delicate balancing, informed by both South Africa's history and its new dispensation, between the need, on the one hand, to control government by separating powers and enforcing checks and balances and, on the other, to avoid diffusing power so completely that the government is unable to take timely measures in the public interest.
> >
> > This is a complex matter which will be developed more fully as cases involving separation of powers issues are decided …

Let us as lawyers, therefore, contribute to the development of our constitutional democracy and the development of our distinctively South African model of separation of powers within the parameters of our Constitution and its interpretation by the courts. No-one may use the principle of separation of powers as an empty, mindless slogan in an attempt to frustrate the legitimate exercise of a power or the legitimate imposition of a check and balance on any branch of government by another branch of government.

Law, Policy and the Role of Legislatures

I stated earlier that there is an inextricable link between policy and law. It is easy to define what a law is. Legislative instruments come in various forms: Acts, Regulations and Rules. A policy or a policy determination is more difficult to define or conceptualise. In terms of the Constitution, it is the executive that develops and implements policy (section 85(2)(b) of the Constitution). The executive may prepare and initiate legislation (section 85(2)(d) of the Constitution).

But it cannot be said that all aspects of policy development which may, ultimately find its way into legislation, is the sole preserve of the executive.

Apart from conferring other powers such as the power of oversight, the Constitution also gives the legislature the power to initiate or prepare legislation (except money Bills).[10] If one accepts that policy must inform legislation, then preparation or initiation of legislation by the legislature must, of necessity, involve some form of policy development and formulation

[8] 2001(1) SA 883 (CC).

[9] *De Lange v Smuts NO and Others* [1998] ZACC 6; 1998 (3) SA 785 (CC); 1998 (7) BCLR

[10] See section 55(1)(b) (National Assembly) and section 114(1)(b) (a provincial legislature) of the Constitution, 1996.

by the legislature prior to the preparation or initiation of legislation. It would not, therefore, be constitutionally correct to assert or assume that all policy development is necessarily always the exclusive preserve of the executive in terms of the specific brand of separation of powers envisaged in our Constitution.

The legislatures, in terms of our Constitution, are not envisaged to be bodies which always merely react to legislative initiatives of the executive. Our Constitution attempts to balance what may be termed executive supremacy or domination and a Parliament or legislature-centered approach. A strong legislature would, in certain instances, therefore originate policy and initiate legislation.

Portfolio Committees of the legislatures could play a central role in this respect in initiating and preparing such legislation, also making use of their powers to gather information in terms of sections 56 and 115 of the Constitution.

We can now accept that, contrary to some perceptions and assumptions, a strong legislature would, in certain instances, therefore, develop policy for purposes of exercising its constitutional power in preparing and initiating legislation. This, in my view, would not be unconstitutional or repugnant to the brand of separation of powers envisaged in our Constitution. The legislature is not there merely to react to the initiatives of the executive and the legislature must never merely "rubber-stamp" the will or whim of the executive. The checks and balances of the principle of separation of powers envisage a certain dynamic tension between the branches of government.

Only the legislature can pass legislation into law. It is conceded that much - and to date, in the South African context, nearly all -draft legislation placed before the legislature emanates from, and is initiated by, the executive. The legislature considers and debates the draft legislation to determine whether it is to be adopted and passed into law. In theory, the will of the executive may then be thwarted by the legislature as part of the prevailing checks and balances in our system of separation of powers. In a legislature in which the governing party has a majority, this is an unlikely scenario, however. But, what can be stated as fact is that no legislature in South Africa is currently exercising its constitutional power to initiate and prepare legislation to any extent, let alone, fully.

One wonders whether the elected members of legislatures are aware of the full extent of their powers and whether they are content, as a matter of course, to defer at all times to the executive when it comes to initiating and preparing draft legislation to be placed before the legislature. I would plead that this practice desists and that our legislatures transform themselves from being relatively weak and reactive to becoming as strong and proactive as our Constitution allows them to be. Our legislatures (as part, and a branch, of government) must also be fully capacitated.

This challenge to legislatures is not endemic to South Africa and various jurisdictions have wrestled, and continue to grapple, with similar issues. In his insightful article: "*Who makes*

the laws? The struggle for legislative supremacy in Canada",[11] Professor James B Kelly laments (as he puts it) "the decline of Parliament and the Provincial legislatures as policy actors at the hands of the political executive". He argues convincingly that the parliamentary arena, the legislature in other words, should remain the center of public policy and pleads for a Parliament or legislature-centered approach where legislative activism and a legislative response must be primary and proactive and not merely reactive to initiatives from the executive and instances of judicial review. Where legislative activism (initiating legislation) is driven bureaucratically and under the direction of the executive, executive supremacy will be the primary outcome, which will necessitate increased judicial activism in an attempt to keep the executive in check. Cabinets (executive councils) have been empowered at the expense of legislatures which have been marginalized.

A legislature-centered approach avoids the possible excesses of executive supremacy which seems so prevalent in countries with weak legislatures or where legislatures do not exercise all the powers afforded to them.

In some respects we can see certain similarities in South Africa.

Where legislatures are given, and lawfully assume, their proper constitutional place, role and powers, what may be perceived as "unacceptable" levels of judicial activism and intervention (some would say "interference") by the judiciary, would not be required to keep the executive in check. May I be so bold as to say that certain of the current tensions between the executive and the judiciary in South Africa would, perhaps, be minimised if legislatures properly fulfilled their constitutional roles and powers.

In order to properly fulfill their constitutional roles and powers, our legislatures must be empowered and capacitated – this includes the individual members of the legislatures and the support and advisory services available to the legislatures and individual members.

In respect of the support and advisory services to the legislatures, we must consider the role of lawyers in government. But before we do, we must confirm and restate that lawyers working for government are not only public servants, but remain officers of the court and must also strive to maintain their freedom, independence, integrity, impartiality and non-partisanship.

Public sector lawyers serving the executive and the legislature must guard against being overly "executive-minded" in their approach.

We as lawyers working in the public sector, and our employers, must recognise that public sector lawyers are, firstly, lawyers and only secondarily, public sector employees. This means that our role and responsibilities as lawyers supersede our role and responsibilities as public sector employees.

[11] Canadian Federation for the Humanities and Social Sciences, *Breakfast on the Hill Seminar Series*, 2nd October 2003.

As public sector lawyers we must, firstly and always, serve and uphold the values and principles of constitutionalism and the rule of law in providing professional, non-partisan legal services and legal advice to government.

We must ensure that we understand and apply these principles and we must endeavour to make our employers and those we report to in the scope of our employment in the public sector, understand and respect this.

We have a duty to advise in accordance with the law, our ethical standards and our conscience – even if such advice proves to be unpopular. We must always remember our first responsibility as lawyers and never resort to attempting to excuse any unconstitutional or unlawful action by saying that, as public servants, we were merely following orders or instructions from our employers or those we report to.

Legal activism is important. Lawyers in the public sector must play an activist role. We must also attempt to exercise some sense of social responsibility and social conscience. In addition, we must promote the professionalization and empowerment of public sector lawyers.

Centralized Drafting

The only way to achieve this in a concerted, co-ordinated and organised manner would be by establishing one or more professional associations catering for lawyers in the public sector.

Objectivity, impartiality, independence and professionalism are qualities required of a dedicated legislative drafter. A delicate balance must be struck. Legislative drafting requires rare individuals who balance contributing to the development of policy without becoming too subjectively involved.

There is currently no central cadre of legislative drafters in South Africa, neither within the national sphere, nor the provincial sphere.

Internationally, the doctrine of separation of powers has not been an issue in establishing a central cadre of legislative drafters or a centralized legislative drafting service or office within government serving both the executive and the legislature. Many Commonwealth countries have what is known as an Office of Parliamentary Counsel which is, in effect, a centralized legislative drafting service. The situation in the USA is that 26 of the 50 states employ the mechanism of a central legislative drafting office.

It is submitted that the establishment of a centralized legislative drafting service in South Africa would not be repugnant to the model of separation of powers as enunciated in our Constitution and I pose the question whether it is not high time we considered this option, which is being employed ostensibly to good effect elsewhere.

The advantages of the option of a central legislative drafting office are the following –

(a) best use is made of limited resources,(human and financial;

(b) collective experience, skills and know-how are pooled and shared;

(c) procedures and style and format of legislation are easily standardised;

(d) the resulting legislation is more consistent and uniform simplifying the task of interpreting the law.

The advantages are maximised when the central drafting office or service is tasked with drafting both principal (Bills) and subordinate (Regulations) legislation.

The only disadvantage of a central drafting office or service may be a perception that such a body may be too "elitist", but this perception may be easily dispelled by the attitude and demeanor of those staffing such an office.

Another advantage of establishing a central drafting office or service is that *accessibility* to legislation would be enhanced if that office is also tasked with the publication, maintenance and updating of the Statute Book.

Once the principle has been accepted that a central drafting office would be desirable (and it is submitted that the argument is compelling) the preferred mechanism for establishing such a body would have to be identified. In any event, there would, ultimately, be no legal impediment to the enactment of such a proposed legislative measure nationally.

Such a body or bodies would assist and, in a sense, also capacitate, the national and provincial legislatures to fulfil their constitutional responsibilities and mandates in playing a stronger role in a more legislature-centered approach as was discussed earlier.

Where public sector lawyers also play their role more strongly in advising the executive and the legislature on the legality and constitutionality of proposed laws, the burden on the judiciary may also be lifted somewhat. We as legislative counsel must strive to ensure that draft legislation we formulate and certify –

(a) complies with the Constitution;

(b) correctly reflects –

(i) national and provincial policy on the subject matter of the legislation; and

(ii) the legitimate and lawful briefing, instruction or objective of the client, whether that client is –

(aa) the employer;

(bb) a member of the executive; or

(cc) a member or a committee of the legislature,

as the case may be;

(c) is clear and unambiguous; and

(d) is capable of practical implementation.

Conclusion

We (as public sector lawyers/ legislative drafters/ legislative counsel) must test all draft legislation against the Constitution – this is our role and we cannot leave this solely to the courts. The courts are, of course, the final arbiters, but we should not abdicate our role and function of advising the executive and the legislature in this respect as well.

We as public sector lawyers must also perpetually review, harmonise and rationalise all legislation and make recommendations to the executive and the legislatures for appropriate amendments to, or repeal of, laws. This routine housekeeping of the statute book cannot be left undone and is not a one-off exercise. The more cluttered and muddled the laws become over time, the more amendments that are effected over time, the less accessible the law tends to become – not only to citizens, but lawyers as well!

I would recommend that the first step for any legislature would be to establish a dedicated committee of the legislature with a brief to consider, and make recommendations to the legislature on, the technical review, rationalisation and harmonisation of all Legislation. The committee would then have the power to initiate draft legislation in this respect to place before the legislature for consideration.

In conclusion, I would, therefore, plead for a legislature-centered approach and the building of strong legislatures in South Africa together with the bolstering of an independent and a fearless judiciary in accordance with the principles enunciated in our Constitution as not only a viable, but the preferred option for our young constitutional democracy.

Just in passing, what may also assist in raising the profile of our legislatures and promoting a legislature-centered approach would be if politicians – the executive – as members of the legislatures make policy statements and important announcements primarily and firstly in the legislatures, only calling press conferences later to explain and clarify their statements and announcements and to take questions from the press.

This brings me to the end of my paper and I trust what we have shared here today will inspire you, as public sector lawyers, to greater thought and action (and, perhaps, to look at and do some things a little differently!) as we as lawyers in the public sector work at building democracy, constitutionalism and the rule of law in our respective countries and jurisdictions!

We must remember that the decline of civil society activism (and we can say, the decline of legal activism by lawyers in the public and private sector) contributes to the decline of democracy.

We, as public sector lawyers, must start developing an intellectualism which will inform the future, and contribute to the development, of our respective democracies!

Legislative Sovereignty and the Globalisation of the Law – A New Zealand View

Julie Melville[1]

Abstract:

This article give some context as to where legislative sovereignty currently sits in New Zealand and looks at how the negotiation of international agreements (such as free trade agreements) by the Executive can affect legislative sovereignty. It also looks at whether calls by our trading partners for greater transparency when law-making may join with domestic calls for greater transparency and concludes with thoughts about how our statute books may change as a result.

The point of this article is to note that –

- *sovereignty in New Zealand currently takes the form of a very intense level of scrutiny given by the New Zealand Parliament to domestic proposals to change the law and results in very large numbers of amendments as a Bill is passed;*
- *but there is an increasing tendency for multi-party, multi-topic international agreements which can present a more "take it or leave it" choice to the Legislature;*
- *some of these agreements call for more transparency in lawmaking, but could make our statute books more fragmented;*
- *the constitutional checks and balances and the future of the statute book might need to be revisited.*

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[1] Parliamentary Counsel and Drafting Team Manager, Parliamentary Counsel Office, Wellington, New Zealand (Julie.melville@parliament.govt.nz).

Where legislative sovereignty currently sits in New Zealand

One of New Zealand's former Prime Ministers, Sir Geoffrey Palmer, once said that New Zealand was the fastest lawmaker in the west. He wrote an influential book called *Unbridled Power*.[2] Since then, the balance has shifted away from Executive control in favour of Parliamentary scrutiny. This article presents a snapshot of the practices in New Zealand to enable you to compare it with your jurisdiction. The snapshot looks at legislative sovereignty via the following indicators

- success rate of Bills,
- time taken to pass Bills,
- scrutiny of Bills,
- length of Bills,
- amount of law passed by Bills versus Executive regulation, and
- practices for entering into international agreements.

Success rate of Bills

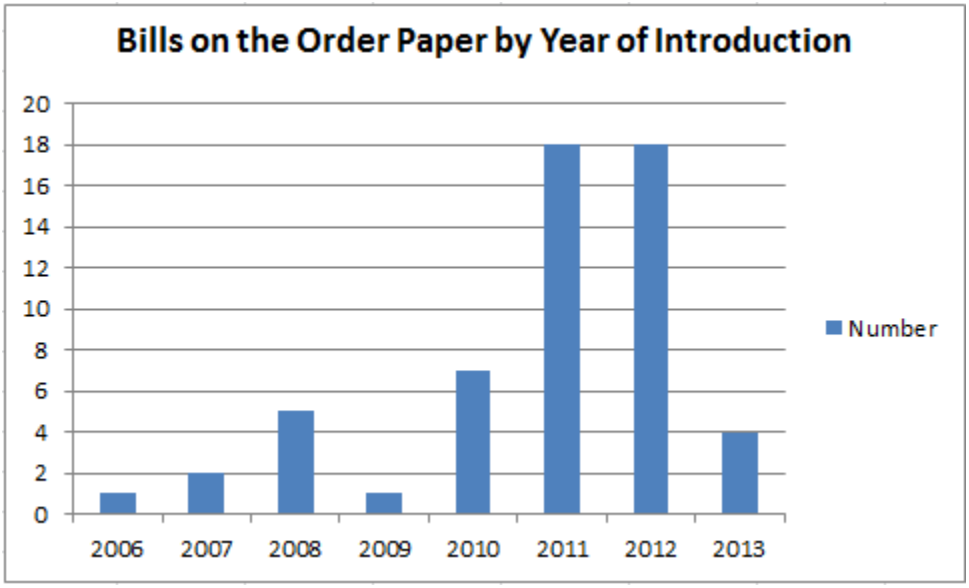
In the 19th century the success rate of Bills was relatively low. Only between half and two-thirds of all Bills actually passed.[3] Nowadays, the vast majority of New Zealand Government Bills pass, despite the coalition composition of Parliament. A Government in New Zealand can pass its flagship measures relatively quickly. But Bills that run into opposition may languish on the Order Paper for a considerable period of time if the Government finds that it cannot get the support of one or more of its coalition partners.

Time taken to pass Bills

There were 51 Government Bills on the Order Paper as at end of February 2013. Of these, more than half were introduced in 2011 or before the last election in November 2011) and are more than a year old. Here is a graph showing the Bills on the Order Paper as at February 2013, by year of introduction.

[2] NZPD, vol. 464, 1985, p. 5599. Geoffrey Palmer, *Unbridled Power?: An Interpretation of New Zealand's Constitution and Government,* (Oxford University Press: Wellington, 1979).

[3] John E. Martin, "From legislative machine to representative forum? Procedural change in the New Zealand Parliament in the twentieth century" (2011), 26 *Australasian Parliamentary Review* No. 2 (available at http://www.parliament.nz/en-nz/about-parliament/how-parliament-works/fact-sheets/00PlibFactsheetFromlegislative1/from-legislative-machine-to-representative-forum-procedural).



A Bill can move fast when the Legislature wants to. Here is an example of a relatively pressing Bill of great importance to New Zealand!

> **Example** - *Rugby World Cup 2011 (Empowering) Act 2010*.
>
> Introduced June 2010, Royal Assent November 2010.

But Bills can languish on the Order Paper for many reasons. New Zealand has no formal system of allocating provisional dates for forthcoming stages of Bills as England does. Here is an example of a slower Bill, to implement an agreement between the Government of New Zealand and the Government of Australia for the establishment of a joint scheme for the regulation of therapeutic products.

> **Example** - *Therapeutic Products and Medicines Bill*.
>
> Introduced December 2006, still on Order Paper as at February 2013.

Scrutiny of Bills

Scrutiny of Bills is a growth area. In the 1950s, select committees only dealt with a small minority of Bills, an average of about a dozen a year. By the mid-1960s, select committees considered between one-third and two-fifths of all Bills. Since 1985, there has been a new structure of select committees and their functions have been greatly enlarged, "to strengthen the accountability of government to Parliament by more systematic, comprehensive scrutiny of government activity".[4] Virtually all legislation has from this time been referred to select

[4] Martin, ibid. at fn. 47.

committees. An increasing number of significant amendments are made to Bills, both in select committees and in the House.

Legislation is scrutinised extensively in parliamentary select committees. All Bills are referred to a particular select committee for consideration with the exception of Appropriation Bills, Imprest Supply Bills, and urgent Bills. The process of select committee scrutiny usually involves the following features:

- select committees are briefed by departmental advisers about each Bill for which public submissions are called;
- witnesses appear and give evidence at hearings that are open to the public;
- submissions are analysed and any reports recommending amendments are prepared by the department and considered by the committee;
- some committees engage independent advisers;
- amendments required by the committee are drafted by Parliamentary Counsel in consultation with departmental advisers and considered by the committee;
- a commentary on the committee's consideration of the Bill is prepared by the committee's advisers and accompanies the Bill when it is reported back to the House.

Select committee consideration of Bills can occupy many months. The Bills may be extensively amended to take account of changes recommended by select committees following from the public submission process and the select committees' overall consideration. Parliamentary Counsel attend meetings of select committees when departmental reports are considered and when the amendments to a Bill are decided upon. They will sometimes attend meetings to hear evidence from key witnesses. The drafting work involved can be considerable and time consuming.

Parliamentary Counsel also draft all amendments to Bills required by Ministers at the committee of the whole House stage. Extensive changes are possible at this stage to take account of policy changes or technical refinements that are necessary or desirable.[5]

Length of laws

On average, legislation was about five pages in length during the 19th century. The length of Acts began to increase from the time of the First World War to reach ten pages into the 1930s. From the late 1980s, Governments passed fewer laws, but the legislation got even longer – the average length of Acts these days is about 25 pages.[6] The 2011/12 financial

[5] 2012 Annual Report of the Parliamentary Counsel Office, Wellington, available at http://www.pco.parliament.govt.nz/2012-report/.

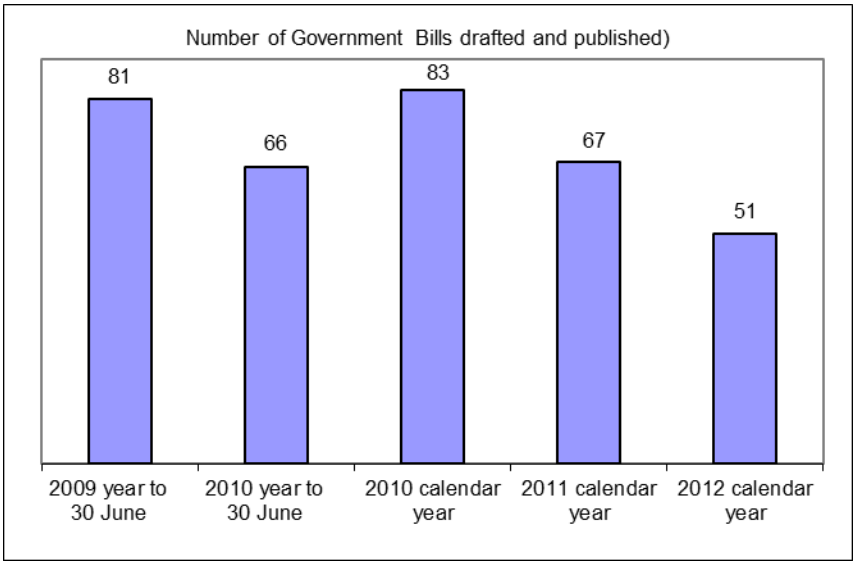
[6] Martin, above n. 3.

year has been characterised by the passage of some lengthy and very complex legislation, including the *Criminal Procedure Act 2011* (which is 423 pages in length) and the *Financial Markets Conduct Act* (which is over 600 pages in length).[7]

In 1960, the NZ population was about 2.4 million. In 2008 it was about 4.3 million - so it has just about doubled in about 50 years. The 1960, the NZ Law Reports occupied about 1,200 pages. In 2008, they occupied about 2,550 pages - a bit more than double the volume for 1960. In 1960, there were 123 Acts enacted, in a total of 720 pages. In 2008, there were only 111 Acts enacted - but they covered around 3,000 pages - over 4 times as many pages as for 1960. The record for regulations is even starker: In 1960, 198 regulations occupied 944 pages. In 2008, 456 regulations occupied 3,500 pages.[8]

Amount of law passed by Bill versus Executive regulation

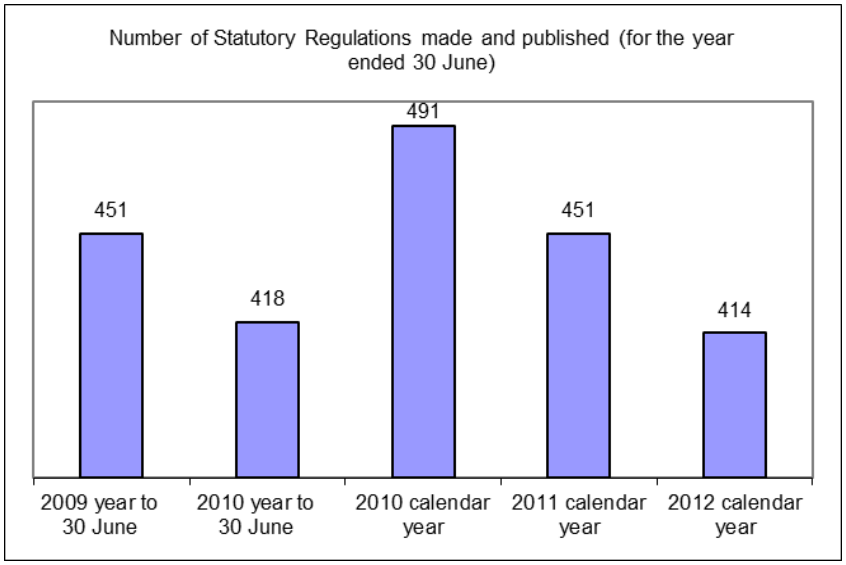
The Parliamentary Council Office drafted 67 Government Bills and 451 Executive regulations ("statutory regulations") in the 2011 calendar year.[9] In general, Acts of Parliament contain the main policy components of a legislative regime while regulations contain much of the essential detail and administrative mechanisms to make the Act work. All regulations proposed to be made by the Governor-General in Council are considered by the Cabinet Legislation Committee and by Cabinet before they are submitted to and made by the Governor−General in Executive Council.



[7] Above n. 5 at http://www.pco.parliament.govt.nz/2012-report#tablequantity.

[8] Catherine Yates, Victoria University of Wellington Legislation course 2012.

[9] Above n. 5.



In New Zealand, there is a convention that Acts should deal with matters of principle, and regulations and other secondary or tertiary legislation should only deal with matters of detail. This is very rigorously enforced by the scrutiny of regulations select committee, which in New Zealand is called the Regulations Review Committee. That committee is dedicated to scrutinising the powers conferred by primary legislation and the use of those powers in secondary legislation. As a result, much of the annual series of regulations in New Zealand consists of matters of detail, such as fees and forms and the like.[10]

The Regulations Review Committee has become increasingly active in recent years. They have just disallowed their first Executive regulations. At the end of February 2013, certain regulations relating to road user charges were effectively revoked by Parliament and, as a result, no longer have the force of law. This type of revocation is known as "disallowance" and is provided for in a key piece of constitutional legislation, the *Regulations (Disallowance) Act 1989*. This is the first time that the automatic disallowance provisions of the 1989 Act have taken effect.[11] The Executive has now remade regulations to similar effect.

So, to set the scene, the legislative process in New Zealand is characterised by an expectation by the members of the Legislature that it controls the law in very considerable detail. They expect Bills, rather than regulations, to contain most of the provisions that support new policies. They expect to be able to retain Bills for long periods, both in select committee and in the House, and they do. They expect to be able to rewrite Bills extensively

[10] See R. Malone & T. Miller, *Regulations Review Committee Digest* ,4th ed. (New Zealand Centre for Public Law: Wellington, 2012), available at http://www.victoria.ac.nz/law/centres/nzcpl/publications/regulations-review-committee-digest.

[11] "Parliamentary law milestone: first automatic disallowance of regulations", New Zealand Parliament (Wellington, 2013), available at http://www.parliament.nz/en-NZ/Features/e/f/e/50NZPHomeNews201303011-Parliamentary-law-milestone-first-automatic.htm.

in select committee and in the House as they see fit, and they do. They expect to be able to supervise closely any remaining powers delegated by Act to the Executive, and they do.

International agreements

The process for entering into international agreements varies. But generally, the Executive negotiates them, with varying degrees of domestic consultation, and the agreements are then scrutinised by Parliament once made.

The key features of the New Zealand Parliamentary Treaty Examination Process are as follows:

- The Cabinet Manual and Standing Orders require the Government to present all multilateral treaties and major bilateral treaties of particular significance to the House before binding treaty action is taken;
- Once a treaty has been presented (with an accompanying National Interest Analysis), it is the subject of select committee consideration;
- The Government refrains from taking any binding treaty action in relation to a treaty that has been presented to the House until the relevant committee has reported, or 15 sitting days have elapsed from the date of presentation, whichever is sooner;
- If the select committee report contains recommendations to the Government, a Government response to the recommendations must be presented to the House within 90 days of the report;
- In very rare situations, the Government may take urgent treaty action in the national interest before the treaty is presented to the House. When this occurs, the treaty must be presented to the House as soon as possible after the binding action has been taken, together with a National Interest Analysis and an explanation from the government as to why it was considered necessary to take urgent action.[12]

Once the New Zealand Parliamentary Treaty Examination Process has been completed, the Executive is free to proceed to introduce any domestic legislation that may be needed to implement the Treaty. From that point on, the same process for legislative scrutiny applies as just described in the Bill and regulation-making paragraphs above.

So, to set the scene, the process in New Zealand for implementing international agreements is also characterised by an expectation by the Legislature that they have the right to scrutinise, if not control, the process in quite considerable detail after the agreement is signed.

[12]Department of the Prime Minister and Cabinet (NZ), *Guide to Cabinet and Cabinet Committee Processes*, (Wellington, 2013) available at http://cabguide.cabinetoffice.govt.nz/procedures/international-treaty-making/parliamentary-treaty-examination-process.

Context - effect generally of globalisation

Globalization has been defined as the process of international integration arising from the interchange of world views, products, ideas, and other aspects of culture.[13]

On a practical level, the reality is that New Zealand is a small country that is geographically challenged. So, while we are a sovereign nation, if it comes to a contest in the ring, we are often the smallest and least powerful player. Even a large multi-national company can sometimes persuade a small country like New Zealand to accommodate its wishes.

Example - the filming of The Hobbit movies

In 2010 Warner Brothers threatened to film the Hobbit movie elsewhere unless the Government passed changes to New Zealand's employment laws. The loss of that "business" was regarded as a potential disaster following the success of the Lord of the Rings trilogy.

So the Government introduced an urgent amendment Bill that prevented independent contractors from claiming entitlements as employees, as well as an agreement to increase the tax concession for big screen productions.[14]

The Bill was introduced on 28 October 2010 and received the Royal assent the following day as the *Employment Relations (Film Production Work) Amendment Act 2010*.[15]

On the level of principle, New Zealand is keen to be a good world citizen and to fulfil its international obligations. To that extent, New Zealand tries to integrate its law as fast as possible, and as well as possible, with international standards.

The PCO in New Zealand keeps databases of Acts and regulations which implement New Zealand's international obligations. There are 210 Acts currently on the database as being known to have implications for New Zealand's international obligations. These range from Acts which directly implement one or more international covenants to Acts which indirectly relate to international law, for example the *Time Act 1974* sets New Zealand standard time as 12 hours ahead of Universal Co-ordinated Time. There are 259 regulations currently on the database as being known to have implications for New Zealand's international obligations.

[13] See Wikipedia at http://en.wikipedia.org/wiki/Globalization citing Al-Rodhan, R.F. Nayef and Gérard Stoudmann, *Definitions of Globalization: A Comprehensive Overview and a Proposed Definition* (Geneva Centre for Security Policy: Geneva, 2006); Albrow, Martin and King, ed. *Globalization, Knowledge and Society* (London: Sage, 1990) at 8: "...all those processes by which the peoples of the world are incorporated into a single world society."

[14] *The National Business Review*, 20 December 2010: http://www.nbr.co.nz/article/warner-bros-sought-job-law-change-film-the-hobbit-nz-135087.

[15] 2010, No. 120.

Some Acts give the force of law to an international convention, so that the rules set and drafted on the international stage apply lock, stock, and barrel in New Zealand. This is globalisation at its purest.

Examples

The Sale of Goods (United Nations Convention) Act 1994

Civil Aviation (Cape Town Convention and Other Matters) Amendment Act 2010

Some Acts implement international conventions in a way that is unique to New Zealand. For example, the New Zealand Climate Change legislation is very different to the Climate Change legislation adopted by other States signing up to the international agreements on climate change. This is globalisation but with latitude for contracting States to put their own stamp on it.

New Zealand is bound by some amendments whether or not they are incorporated into domestic legislation. This is globalisation taking precedence over legislative sovereignty.

Example - International Monetary Fund

Changes to the Articles of Agreement of the International Monetary Fund, were agreed by IMF in 2008 and 2010.

Once changes to the Articles are agreed by the requisite majority of IMF members, New Zealand is bound by the amendments whether or not they have been incorporated into New Zealand legislation.

Yet the old articles are set out in a Schedule to the relevant Act of Parliament.

The International Financial Agreements Amendment Bill (336-1) was introduced in October 2011 so that future updates to the Articles can be made by regulation.

The Bill faced considerable Opposition concern about reduction in parliamentary sovereignty. The Bill was only just passed in February 2013, with the Opposition still "very very concerned that future updates will be done by way of regulations".

How the negotiation of international agreements by the Executive affects legislative sovereignty

International agreements can take many forms and can involve many contracting parties. The constitutional arrangements of each country set out the checks and balances that govern

Executive powers and maintain legislative sovereignty. These checks and balances, in New Zealand, include

- international agreements that bind the Executive when signed, but do not bind New Zealand citizens until given effect in New Zealand law;
- international agreements that require the Legislature to pass a Bill to give them domestic effect; the full treaty is often scheduled in the Bill;
- the treaty examination process, which gives the Legislature a right to scrutinise treaties before they are given domestic effect, as described above;
- the subordination method of giving domestic effect to an international treaty, which involves drafting a provision in an Act that authorises the making of regulations or rules to give effect to particular treaties; this method is used fairly often, but is generally restricted to treaties that provide for ongoing technical changes that justify the delegation of law-making power from Parliament to the Executive;
- the Regulations Review Committee inquiry into regulation-making powers that allow the Executive to override the provisions of Acts to implement treaties; the Government's response to the Committee's report in 2002 provides that this type of regulation-making power should be included in a Bill only in exceptional circumstances, that is, if necessary to implement treaties invoking emergency measures or treaties of a highly technical nature; if this power is included, the explanatory note to the Bill should state this fact explicitly, and the power should, to the extent possible and practicable,
  - be drafted in the most specific and limited terms;
  - be restricted to overriding the principal Act; and
  - respect the common law and the *New Zealand Bill of Rights Act 1990*.

So, what is new?

The following seem to be the developing trends-

- international agreements are now being negotiated between many contracting states and in respect of a multitude of topics. This may present a smaller nation with a "take-it-or-leave-it" choice that is quite different to their usual expectations about legislative scrutiny of Executive action,
- international agreements now more often contain transparency provisions calling for greater consultation with trading partners before further laws can be made.

There have always been international agreements of enormous global importance, such as the International Covenant on Civil and Political Rights, a multilateral treaty adopted by the

United Nations General Assembly in 1966. But there are many more international agreements that are confined to particular topics.

There have always been international agreements that involve many contracting states. For example, the Patent Cooperation Treaty is an international patent law treaty concluded in 1970. It provides a unified procedure for filing patent applications to protect inventions in each of its contracting states. A majority of the world's countries are signatories to the PCT, including all of the major industrialised countries.

However, a combination of both a multitude of topics and a multitude of contracting states creates some interest. New Zealand is currently a negotiating party to major free trade agreements which cover a multitude of topics. Free trade agreements in years gone by used to be largely concerned with customs and tariff matters. But in more recent years, they seem to be covering a range of matters, and may involve more compromises whereby a contracting state will agree to a measure on one topic in return for improvements sought by it on another topic.

Examples

The Trans-Pacific Partnership (TPP) aims to create a regional free trade agreement involving nine Asia Pacific countries: Australia, Brunei Darussalam, Chile, Malaysia, Peru, Singapore, the United States, Viet Nam and New Zealand. Also Japan, Canada, and Mexico all expressed interest recently in joining the TPP negotiations. Negotiations began in March 2010 and are ongoing.

The Regional Comprehensive Economic Partnership (RCEP) among the 10 ASEAN states, together with Australia, China, India, Japan, Korea, and New Zealand(16 countries in total). Negotiations begin in early 2013 with an aim to complete them by the end of 2015.

These 2 sets of negotiations are confidential and cannot be discussed by me here. Little material has been published yet by the contracting States themselves in the 3 years that the Trans-Pacific Partnership has been in the negotiation stage, although there are processes for stakeholder engagement. The extent to which the Legislature will have input, or be presented with a fait accompli, is unknown.

So I will look at existing agreements that have already been implemented, or are being implemented, in New Zealand. The Protocol on Investment to the Australia New Zealand Closer Economic Relations Trade Agreement (CER) is one such agreement. It ensures that the package of trade and economic agreements between New Zealand and Australia remains the most comprehensive of our free trade agreements. CER has been described by the World

Trade Organisation as "the world's most comprehensive, effective and mutually compatible free trade agreement".[16]

Here are 3 examples of the impacts of international agreements on legislative sovereignty.

International agreements can set limits on domestic process

CER is an example of how another country can, via international agreement, influence the processes and the transparency of law-making in another country.

Example 1 - The Protocol on Investment to the Australia New Zealand Closer Economic Relations Trade Agreement (CER)

> Article 15 - Transparency
>
> 2. To the maximum extent possible, each Party shall:
>
> (a) publish in advance any measure referred to in Paragraph 1 that it proposes to adopt; and
>
> (b) provide interested persons of the other Party with an opportunity to comment on such proposed measures.

Transparency provisions such as these may well require Parties to change their processes in a way that prevents, or slows down, their law making.

In New Zealand, this will not involve a change in practice in so far as Bills are concerned. Bills are already published in advance and everyone has the right to make submissions on Bills (except in rare cases).

But transparency provisions such as this may well involve a change in practice in so far as some other instruments, such as regulations, are involved. Currently, discussion drafts of proposed legislation are sometimes released in New Zealand for either general or targeted consultation, in the case of some secondary and tertiary legislation. But this is not required. And it does not happen often.

Example 2 - Agreement between the Government of New Zealand and the Government of Australia for the establishment of a joint scheme for the regulation of therapeutic products

> 7 Each Party shall ensure that its legislation implementing the Scheme is not amended or repealed in a manner that is inconsistent with this Agreement, or would prejudice the joint nature of the Scheme or its effectiveness.

[16] Ministry of Foreign Affairs and Trade (NZ) Fact Sheet, available at http://mfat.govt.nz/downloads/trade-agreement/australia/Australia-NZ-CER-Factsheet.pdf.

> 8 A Party shall not:
>
> (a) introduce Government legislation giving effect to paragraphs 4 or 5 of Article 5; or
>
> (b) introduce Government amendments to the legislation giving effect to paragraphs 4 or 5 of Article 5;
>
> without the written consent of the other Party, which may be withheld only if the other Party:
>
> (c) is of the view that the legislation is inconsistent with the requirements of paragraphs 4 or 5 of Article 5; and
>
> (d) outlines the nature of its concerns in a diplomatic note.

It is interesting to speculate on what would happen if provisions of this type were inserted into a Government Bill that was domestic in scope. For example, a provision in a Bill that purported to bind a future Parliament, or that purported to prevent a Minister or a Government from introducing a Bill without the consent of another political party, would be thought objectionable in New Zealand.[17]

International agreements can set substantive limits

An international agreement can place limits on the substantive laws that a Contracting State may make.

> **Example –** CER again
>
> Article 12 - Minimum Standard of Treatment
>
> 1. Each Party shall accord to covered investments treatment in accordance with the customary international law minimum standard of treatment, including fair and equitable treatment and full protection and security.
>
> Article 14 – Expropriation
>
> 1. Neither Party may expropriate or nationalise a covered investment either directly or indirectly through measures equivalent to expropriation or nationalisation ("expropriation"), except: …

[17] Such a provision in a domestic setting might have to be diluted. See for example section 73 of *the New Zealand Superannuation and Retirement Income Act 2001*, which reads:

> The Minister must, on the introduction into the House of Representatives of a Government Bill that proposes an amendment to this Act, bring to the attention of the House the consultation process that was followed in the formulation of the proposed amendment.

The following is from the Finance Minister's press release

> Does this mean that New Zealand can't introduce any policies that might affect Australian investors in New Zealand business assets?
>
> No. Provisions in the Protocol preserve New Zealand's ability to take measures that could affect investors for a range of purposes. These include fulfilling obligations under the Treaty of Waitangi, to protect human, animal or plant life or health, or to manage a balance of payments crisis. In addition, we retain flexibility to adjust the criteria and factors - under existing investment categories - that must be taken into account when we look at investment applications.

International agreements can present implementation issues

International agreements can lead to some tension about implementation. Sometimes an international agreement is negotiated which commits a contracting state to amend a controversial provision of its law that is set out in primary legislation. But it may be too controversial for the Executive to introduce an amending Bill into the Parliament to make the change. The issue will first be scrutinised when the international treaty examination is conducted. At that point, one or more political parties may not support the amendment, but there is little they can do at that stage. The pressure may come later to make the amendment by way of regulations, rather than by way of a Bill that will probably get bogged down in the House. The usual regulations scrutiny select committee will not always notice that a somewhat novel route has been chosen, since they are not a policy select committee, and the regulation may not run afoul of their usual red flags in the absence of a complaint.

How transparency requirements in international agreements may affect the Legislature's control over Executive measures

These international developments are happening at a time when there are calls in New Zealand for greater disclosure by the Government of whether its proposed laws will comply with good law-making type principles. The timing of this call is, in one sense, fortuitous given that any consultation process in favour of trading partners might be able to be extended to domestic citizens too. This call has taken the form of various Members' proposals for a Regulatory Standards Bill, similar to the *Queensland Legislative Standards Act*. Some proposals are for a set of "bottom-line principles with which legislation must comply. Or some proposals are for a series of disclosures about whether a Bill has certain "red flag" features.

These matters cover some matters addressed in the latest international agreements such as processes, transparency and expropriation. For example, the current proposed disclosures include disclosure of the following "red flag" features warranting careful scrutiny:

- provisions having retrospective effect,

- conferral of a civil or criminal immunity,
- compulsory acquisition of private property,
- executive powers to amend the effect of an Act,
- creation of strict liability offences, or reversal of the usual onus of proof, and
- catch-all for other unusual provisions, or features that call for special comment.

The theory is that if these matters are disclosed, the Legislature is alerted and can be sure to give them the necessary scrutiny.

But the issue is – of what use is more scrutiny if in fact there is no effective power to change something?

Where will this all lead? How may the statute book look in the future?

Questions that run through both sets of trends include –

- should there be more or less transparency before laws are made?
- what are the impacts on sovereignty?
- will our statute books look more or less homogenised?

Transparency

Impacts on transparency will depend on the extent of true consultation that is built into a process that involves both Executive action in signing up to international agreements and legislative action in scrutinising them.

Example – the Regional Comprehensive Economic Partnership (RCEP) as at the end of February 2013

> Negotiations here are only just beginning. The Ministry of Foreign Affairs and Trade in New Zealand has invited submissions on the Regional Comprehensive Economic Partnership (RCEP) between the 10 ASEAN states, together with Australia, China, India, Japan, Korea, and New Zealand.
>
> The participants have developed Guiding Principles for the negotiations, endorsed by Leaders, that outline the areas for negotiation and a series of 'scoping papers' relating to each chapter are being elaborated.
>
> It remains to be seen how much consultation with the citizens of each Contracting State will occur after that, and before any agreement is signed.

Impacts on sovereignty

Contracting States may need to re-examine their constitutional arrangements to ensure that legislative sovereignty is maintained to the extent appropriate.

At the moment in New Zealand, the same checks and balances apply whether the international agreement is a bilateral one or a multi-party one.

In the case of a bilateral agreement, such as that between Australia and New Zealand in respect of therapeutic products, their Legislatures and their legislative processes have greatly influenced the end result, to the extent that the New Zealand implementing Bill is still on the Order Paper more than 6 years after the Bill was introduced and more than 9 years after the agreement was signed.[18] Why? Because the Treaty scrutiny process did not sufficiently consider that some aspects of the Treaty (about complementary medicines) would not be acceptable to the New Zealand public.

In the case of a multi-lateral agreement, such as the large free trade agreements that are currently in negotiation with many countries, the speculation is that their Legislatures and legislative processes may have much less influence. It is possible that the Legislatures may be presented with more of a take-it-or-leave-it choice. In these cases, legislative sovereignty may have less sway than in the case of other laws.

Homogenisation

International agreements could result in more homogenisation. States may adopt Model laws which are the same across the various contracting parties. New Zealand has very few of these.

Alternatively, if each contracting State can implement agreements in a way that suits their domestic conditions and fits their legislation, many laws may continue to vary in structure and wording across the globe, even if they are intended to harmonise or to have the same effect.

Alternatively, if free trade agreements expand beyond their traditional boundaries (such as customs and tariff matters) and into more substantive areas of law, it is possible that each domestic law-book may become littered with exceptions or special rules that apply on a country-by-country basis. In that scenario, we would no longer have one law in a country that applies equally. We would have laws that apply differently, depending on which country the reader was from or with which country the reader may be contracting.

[18] For an interesting contrast, see the *Trans-Tasman Proceedings Acts, 2010* (Australia and NZ). They implement in Australian and New Zealand law the Agreement between New Zealand and Australia on Trans-Tasman Court Proceedings and Regulatory Enforcement done at Christchurch on 24 July 2008. They are yet to be brought fully into force. If the Acts are brought into force, they will further integrate the systems of civil procedure in these two countries. The scheme involved close cooperation on policy development and drafting.

Example 1 – *Overseas Investment Regulations*

> *"Exemptions for Australian investors from requirement for consent in respect of certain overseas investments in significant business assets*
>
> "36A The exemptions in Schedule 5 apply to certain overseas investment transactions entered into on or after 1 March 2013."

Example 2 – *Fair Trading Act 1986*

> 3 Application of Act to conduct outside New Zealand
>
> (1) This Act extends to the engaging in conduct outside New Zealand by any person resident or carrying on business in New Zealand to the extent that such conduct relates to the supply of goods or services, or the granting of interests in land, within New Zealand.
>
> (2) See section 51 for the application of this Act in relation to an international trade instrument.

Section 51 deals with China, so far the only country in respect of which there are special application rules.

> 51 Application of Act to goods that are, or may be, exported to China
>
> (1) This Act applies to conduct or representations relating to goods that are, or may be, exported from New Zealand pursuant to the Conformity Cooperation Agreement in the same way as this Act applies to goods supplied within New Zealand as follows:
>
> (a) ….
>
> (2) In this section, **Conformity Cooperation Agreement** means the Agreement between the Government of New Zealand and the Government of the People's Republic of China on Cooperation in the Field of Conformity Assessment in Relation to Electrical and Electronic Equipment and Components, which is Annex 14 of the Free Trade Agreement between the Government of New Zealand and the Government of the People's Republic of China done at Beijing on 7 April 2008.

Conclusion

Globalisation is inevitable as national boundaries become more porous with the ever-increasing movement of people, goods, and information.

The process of globalisation can be very time-consuming for those negotiating the international agreements, for the policy makers, for the members of the Legislatures and for

legislative counsel. Positions change, issues reinvent themselves, and resourcing can be difficult.

So we need to look carefully at both our constitutional arrangements and our drafting practices so that legislative sovereignty is maintained to the extent appropriate and so that readers have some chance of knowing what the law is that applies to them, or will apply to them, in the various worlds that they inhabit.

Legislative Sovereignty and the Globalisation of Law – Experience from Ghana

Estelle Matilda Appiah[1]

Abstract:

This article explores the impact of globalisation on national sovereignty and the role of legislative counsel in the transformation of international treaties. It reviews selected experiences from Ghana and takes into account recent statutory developments. The prime focus is the legislative framework for implementing anti-terrorism treaties.

Introduction

This article will explore the impact of globalisation on national sovereignty and the role legislative counsel is obliged to play in the transformation of international treaties, referred also to as Conventions. The paper will examine how peer review mechanisms affect national sovereignty and require Parliament to be a law transformer in the quest for the sovereign state to meet international standards in its best interest. The paper will review selected experiences from Ghana and take into account recent statutory developments to implement international Conventions. The prime focus of the paper will be the legislative framework for anti-terrorism. The paper will also deal with ancillary legislation connected to organised crime as a result of the legal obligations of the Republic of Ghana in international law. The discourse will deal with dualism in Ghana, what the Constitution provides on the execution of treaties, their transformation and monitoring and peer review mechanisms.

[1]Legislative Counsel, Ghana.

History of terrorism

Terrorism has been on the international agenda since 1934. A draft resolution on the subject was prepared by the UN General Assembly in 1937 but never came into force. The international community has since adopted fourteen counter terrorism legal instruments with amendments through the General Assembly and its specialised agencies. Member states are currently working on a comprehensive Convention on terrorism, including a definition of terrorism. The major international legal instruments are:

- Convention on Offences and certain other Acts committed on Board Aircraft, Tokyo 1963;
- Convention for the Suppression of Unlawful Seizure of Aircraft, The Hague 1970;
- Convention for the Suppression of Unlawful Acts against the safety of Civil Aviation, Montreal 1971;
- Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, New York 1973;
- Convention against the taking of Hostages, GA, UN 1979;
- Convention on the Protection of Nuclear Material, Vienna 1979;
- Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Montreal 1971;
- Protocol for the Suppression of Unlawful Acts of violence at Airports serving International Civil Aviation, Montreal 1988;
- Convention for the Suppression of Unlawful acts against the Safety of Maritime Navigation, Rome 1988;
- Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms located on the Continental Shelf, Rome 1988;
- Convention on the Marking of Plastic Explosives for the Purpose of Detection, Montreal 1998;
- Convention for the Suppression of Terrorist Bombings, New York 1997;
- Convention on the Suppression of Terrorist Financing, GA, UN 1999;
- Convention for the Suppression of Acts of Nuclear Terrorism, GA, UN 2005;

At the World Summit on Terrorism in New York on the 14th September 2005, terrorism "in all its forms and manifestations, committed by whomever, wherever and for whatever purpose" was condemned.

On the 8th September 2006, the member states of the UN agreed to create a Global Counter Terrorism Strategy. The key points of the strategy are to build consistent unequivocal

condemnation of terrorism and strengthen the individual and collective capacity of the UN to prevent and combat terrorism. The strategy seeks to protect human rights and upholds the rule of law. It puts in place victim support, involves civil society, regional and international organisations and develops partnerships with the private sector. It establishes a database on biological incidents and modernises border control. The strategy ensures co-operation on anti-money laundering measures relating to terrorist financing.

Dualist system of the ratification of treaties

The Republic of Ghana follows the dualist approach as regards the domestic implementation of treaties. Treaties are part of a separate system of law. Accordingly, a treaty to which the Republic has expressed its consent to be bound does not become applicable within the country until it has been transformed into domestic law. International law must be incorporated into the legal system to be effective.

The transformation of treaties in Ghana may take different forms. The following are the principal forms.

- The legislation may not contain any reference to the Convention but provide the Convention with the force of law. Examples of this are the *Children's Act, 1998* (Act 560) based on the Convention on the Rights of the Child. Another is the *Juvenile Justice Act, 2003* (Act 653) based on the same Convention and the UN Standard Minimum Rules for the Administration of Juvenile Justice, the Beijing rules. Act 653 provides for a juvenile justice system, protects the rights of juveniles, ensures an appropriate and individual response to juvenile offenders and provides for young offenders.
- The *Human Trafficking Act, 2005* (Act 694) is another example of this approach. It is based on the United Nations Convention on Transnational Organised Crime, the Palermo Convention. The Republic of Ghana acceded to this Convention on the 21st August 2012. Although the accession had not occurred before the enactment of the law, it was closely followed. The Act prevents, suppresses and punishes traffickers in persons particularly women and children. It also provides for the rescue, rehabilitation and re-integration of victims of the trade, though the Palermo Convention is its source, the text of the Act does not make any reference to it.
- Legislation may refer to a Convention but not set it out and may give effect to it by separate substantive provision, not by granting the Convention the force of law. This happened in the *Geneva Conventions Act, 2008* (Act780). The articles of the 1949 Geneva Convention extensively defined the basic wartime rights of prisoners ,civil and military, established protections for the wounded and established protection for civilians in and around a war zone and were incorporated in Act 780.

- Legislation may also set out a Convention in a Schedule but for information or reference purposes only, such as in the *Refugee Act, 1992* (PNDCL 305D). Alternatively, it may set out the Convention in a Schedule and endow it, or part of it, with the force of law, such as in the *West African Examinations Council Act, 2006* (Act 719) that gives legal authority to the regional examining body.

The 1992 Fourth Republican Constitution provides for the execution of treaties in article 73 and states that the Government of Ghana is to conduct its international affairs in consonance with the accepted principles of public international law and diplomacy in a manner consistent with the national interest.

Article 75 of the Constitution outlines the process for the execution of a treaty.[2] Article 75 (2) makes it clear that treaties, agreements or Conventions executed by or under the authority of the President must be ratified by Act of Parliament or a resolution of Parliament supported by the votes of more than one-half of the members of Parliament after the requisite Cabinet approval. Advice must be sought from the Attorney-General and Minister for Justice, the principal legal adviser to the Government, to determine the legal obligations of the Republic of Ghana and if the treaty, agreement or Convention conflicts with domestic legislation.

A Cabinet Memorandum for a treaty, agreement or Convention to be ratified by an Act of Parliament or by resolution of Parliament is prepared by the relevant Ministry with copies of the treaty, agreement or Convention attached. It should state whether an amendment to legislation is required or whether a new law is needed. The Cabinet Memorandum should also specify whether there is the need for the Republic of Ghana to make a reservation that will make certain provisions of the treaty, agreement or Convention inoperative and therefore not subject to peer review.

Where ratification is to be by Act of Parliament, the normal enactment process for a Bill follows; but where ratification is to be by a resolution of Parliament, the treaty, agreement or Convention is laid before Parliament by the sector Minister or any Minister designated for that purpose. A copy of the ratification of Parliament is forwarded to the Minister for Foreign Affairs and Regional Integration by the Office of Parliament for the preparation of the appropriate instrument. The Instrument is then forwarded to the Office of the President for the signature and seal of the President after which the Minister responsible for Foreign

[2] Article 75 states:

75 (1) The President may execute or cause to be executed treaties, agreements or conventions in the name of Ghana.

(2) A treaty, agreement or convention executed by or under the authority of the President shall be subject to ratification by-

(a) Act of Parliament; or

(b) a resolution of Parliament supported by the votes of more than on-half of all the members of Parliament.

Affairs deposits the Instrument with the appropriate depository and forwards two copies to the sponsoring Ministry for its records and two copies to the Attorney-General and Minister for Justice.

Anti-terrorism legislation in Ghana, past and present

Terrorism, but not terrorist financing, was first criminalised under the *Criminal Offences Act, 1960* (Act 29) in a very narrow form that provided for hi-jacking and the attack on international communications. All member states are obliged under the Security Council Resolution 1373 of 2001 to deny safe haven to those who finance, plan, support and commit a terrorist act. Furthermore, there is a Commonwealth Plan of Action on terrorism that enjoins members to implement SCR 1373. Apart from these, there is the Algiers Convention on the Prevention and Combating of Terrorism, 1999, the OAU Convention, that has become the framework for the collective African response to terrorism. Members of the African Union are mandated to review their national laws to include terrorist offences.

The key points of SCR 1373, the main anti-terrorism resolution of 2001, are that State parties are to criminalise the wilful collection of funds for terrorist acts, criminalise terrorism, freeze without delay the funds of terrorists and prohibit funds being made available to terrorist organisations. They are also to prevent their territory from being used for terrorist acts, deny safe haven to terrorists and prohibit support to terrorists and their collaborators. Others obligations are to prevent, suppress and take action against perpetrators. Terrorists acts should be extraditable offences and member states are to prosecute terrorists if they are not extradited. Member states are also expected to foster international co-operation to eradicate terrorism through bilateral and multi-lateral agreements. SCR 1373 also established the Counter Terrorism Committee to conduct peer reviews of member states for compliance with the resolution. The UN Convention for the Suppression of the Financing of Terrorism was adopted by the Republic of Ghana on 9th December, 1999 and ratified on the 6th September, 2002.

The *Anti-Terrorism Act 2008* (Act 762) is the principal legal framework for combatting terrorist financing in Ghana. It was enacted in furtherance of SCR 1373, the Commonwealth Plan of Action on Terrorism and the OAU Convention and came into force on the 13th October, 2008. It seeks to combat terrorism, suppress and detect terrorist acts, prevent the territory, resources and financial resources of the country from being used for terrorism and protect the rights of people to live in peace, freedom and security. The Act addresses terrorism and terrorist financing and the issues contained in SCR 1373. It includes specific provisions on freezing, confiscation and repatriation of terrorist related funds and assets. Terrorist acts are prohibited. An act is a terrorist act if it is in furtherance of a political, ideological, religious, racial or ethnic cause, and causes serious bodily harm, causes serious damage to property, endangers a person's life, creates a serious risk to the health or safety of the public or involves the use of firearms.

The Act includes the elements of a terrorist act and states what acts are not considered to be terrorist acts. The OAU Convention excludes a legitimate struggle for national liberation from colonialism, aggression and other forms of foreign domination from the meaning of terrorism and this is reflected in section 4. The terrorist offences listed are; the provision or collection of property to commit a terrorist act, provision of financial services for the commission of a terrorist act, use of property to commit a terrorist act and the arrangement for retention or control of terrorist property. Others are dealing with terrorist property, support of a terrorist act, the harbouring of persons committing a terrorist act, the provision of a lethal device to a terrorist group, the recruitment of members of a terrorist group and the provision of training and instruction to a terrorist group. The rest are the incitement, promotion or solicitation of property for a terrorist act, the provision of facilities to support a terrorist act and the arrangement of meetings in support of a terrorist group. The penalty for a terrorist offence is a minimum of seven years imprisonment and a maximum of twenty five years imprisonment. An attempt to commit a terrorist act also makes the person liable to a term of twenty five years imprisonment. The Act covers individual terrorists, terrorist groups and terrorist acts.

The *Anti-Terrorism Act* was amended in 2012 by the *Anti-Terrorism (Amendment) Act, 2012* (Act 842) that came into force on the 20th April 2012. It empowers the Minister for Justice, by the insertion of section 37A in Act 762, to issue instructions by executive instrument to accountable institutions in relation to the identification of terrorists and terrorists' assets to meet the requirement of SCR 1269 and SCR 1373 to prevent and suppress terrorism and the financing of terrorist acts. The instructions are to be issued by executive instrument and non-compliance with the instructions is a criminal act. The amendment to section 39 of Act 762 enables the Minister for Justice to make regulations to specify the reporting procedures for suspicious and unusual transactions to the Financial Intelligence Centre and for accountable institutions to verify, identify and maintain records, among other things. Accountable institutions and the Financial Intelligence Centre are referred to in the *Anti-Money Laundering Act, 2008* (Act 749).

The executive instrument (E.I.2 of 2013) issued in pursuance of Act 842, entitles the Minister for Justice to issue instructions for the implementation of SCR 1267(1999), SCR 1373 (2001), SCR 1718 (2006), SCR 1737 (2006), successor resolutions and other relevant resolutions. The executive instrument was made in furtherance of the *Anti-Money Laundering Act, 2008* (Act 749), the *Anti-Terrorism Act, 2008* (Act 762), the *Economic and Organised Crime Office Act, 2010* (Act 804), the *Anti-Money Laundering Regulations*, 2012 (L.I. 1987), the *Anti-Terrorism Regulations*, 2012 (L.I. 2181) and the *Economic and Organised Crime Office (Operations) Regulations*, 2012 (L.I. 2183) and provides the nexus between terrorism and organised criminal activity. It establishes an Inter-Ministerial Committee to be responsible for the implementation of the SCRs. The Committee consists of:

- The Minister responsible for Finance and Economic Planning

- The Minister responsible for Foreign Affairs
- The Minister for the Interior
- The Attorney-General and Minister for Justice
- The National Security Co-ordinator
- The Deputy Chief of Staff at the Office of the President, and
- The Governor of the Bank of Ghana

The Committee is to perform functions and exercise powers connected with the implementation of the SCRs. It has the supervisory authority for the implementation of the National Strategy and Action Plan on Anti-Money Laundering and the Counter Financing of Terrorism. To implement the instructions, the Committee is to establish a sub-committee referred to as the Law Enforcement Co-ordinating Bureau and may also establish other sub-committees,

The Bureau comprises one representative each from:

- National Security Council Secretariat,
- Bank of Ghana,
- Attorney-General's Department,
- Bureau of National Investigation,
- Financial Intelligence Centre,
- Ghana Immigration Service,
- Economic and Organised Crime Office,
- Ghana Armed Forces,
- Ghana Police Service,
- Ghana Maritime Authority,
- Securities and Exchange Commission,
- National Insurance Commission,
- Ghana Revenue Authority,
- Ghana Airports Company Limited, and
- Ministry responsible for Foreign Affairs.

The Bureau is to be chaired by the National Security Co-ordinator. The Executive Instrument provides for the dissemination of the United Nations Sanctions List to competent authorities associated with accountable institutions listed in the *Anti-Money Laundering Act*.

When a person receives the UN Consolidated List, necessary measures are to be taken to freeze or seize the funds of the specified entity, file a suspicious transaction report with the Financial Intelligence Centre and take any other action to give effect to the SCRs.

The Bureau is to prepare a Domestic List of the names of each terrorist individual, entity or organisation and any other person who owns, controls, works in the name of, for the interest, or under the direction of a terrorist individual, entity or organisation. The Domestic List is to include:

- names of persons and families, false names and titles,
- places and date of birth,
- original and acquired nationality,
- passport numbers and other identity card numbers,
- gender,
- address,
- occupation,
- number in the Consolidated List,
- telephone number, and
- other relevant information

The Domestic List is to be circulated, reviewed and amended as necessary. Names on the Consolidated and Domestic List can be deleted. Anyone aggrieved by the inclusion of a name on the Consolidated List can object. The Committee is to forward the petition to the UN Sanctions Committee through the Minister for Foreign Affairs. A person aggrieved about the inclusion of his or her name on the Domestic List can petition and there is a time frame within which the petition is to be considered. A body concerned with implementation of the instructions may issue internal rules to facilitate the implementation and obligations of the Instructions. The procedure for the meetings of the Committee is contained in a schedule to the executive instrument.

The *Anti-Terrorism Regulations* 2012, L.I. 2181 came into force on the 8th June 2012.These are made under section 39 of the *Anti-Terrorism Act, 2008* (Act 762) by the Minister for Justice. The regulations prohibit the provision of financial and other related service to a specified entity.

They also spell out what is meant by an organisation being associated with acts of terrorism under section 25 of the Act. The effect of a person being declared a specified entity by virtue of an application under section 19 is dealt with, together with the immigration implications. What should happen as regards the provision of information on individuals on vessels and aircraft leaving and entering the country is also detailed. Other provisions in the regulations relate to the listing and de-listing of terrorist individuals, the freezing of funds, duty of

accountable institutions to report on frozen funds and to report suspicious and unusual transactions. There is to be website publication of information and offences and penalties for contravention are provided.

Confiscation, freezing and seizing of proceeds of crime

The legal framework for the confiscation, freezing and seizing of proceeds of crime is found in several enactments. These include the *Criminal and other Offences (Procedure) Act, 1960* (Act 30) and the *Anti-Terrorism Act, 2008* (Act 762).

The *Economic and Organised Crime Office Act, 2010* (Act 804) however provides comprehensively for the confiscation of proceeds of crime. "Proceeds" mean any property derived or obtained, directly or indirectly, through the commission of an offence. Property may be seized incidental to an arrest or search where there are reasonable grounds to believe the property is the proceeds of unlawful activity.

Freezing of funds used for terrorist financing

Under the *Economic and Organised Crime Office Act*, the Office is empowered to identify, trace, freeze, confiscate or seize proceeds derived from the commission of a serious offence or property that correspond to the value of those proceeds.

Freezing may be effected during investigation with or without an arrest. The Financial Intelligence Centre may also recommend the freezing of a transaction or bank account where necessary. The Centre is to circulate a list of terrorists issued by the UN. If an account is identified, the High Court may order that the bank must immediately freeze and notify the Centre. The Centre must in turn notify the relevant law enforcement agency to commence a detailed investigation.

The *Economic and Organised Crime Office (Operations) Regulations*, 2012 L.I.2183 came into force on the 24th July 2012. They provide for the prohibition of terrorist financing and the proliferation of weapons of mass destruction amongst other matters.

Situation analysis

Although there are no known domestic threats of terrorism in Ghana, there are incidents of armed robbery, illegal possession of arms and armed conflicts that are inter-ethnic and intra-ethnic. The security and law enforcement agencies are however aware that the country is at the risk of external terrorism, terrorist financing and the possible use of the country as a haven for terrorists. The country has also been used as a place of transit for terrorist suspects. The recent terrorist activity in Nigeria and Mali has put the country at risk.

Monitoring and peer review

Peer review provides state parties the opportunity to bench mark compliance with international standards in a transparent, efficient, non-intrusive and impartial manner. The

mechanism enables the sharing of good practices through self-assessment procedures. The system generally involves a country visit with information gathered from open sources; the public sector, private sector and civil society. The system enables recommendations to be made by the reviewers to pave the way for technical assistance requirements to be identified. The process encourages inter-institutional dialogue and provides policy makers with detailed information and analysis. The threat of blacklisting and naming and shaming are powerful tools to engineer change and compliance with international standards.

Peer review and anti-terrorism

In 2004 under SCR 1535, the Counter Terrorism Executive Directorate (CTED) was established to assist the work of the Counter Terrorism Committee (CTC). The function of the CTED is to co-ordinate, process and monitor the implementation of SRC 1373. It is to remind member States to ensure that terrorists are brought to justice, deny safe haven to terrorists, extradite or prosecute terrorists and ensure that refugee status is not abused. The CTC and CTED arrange country visits on request, provide technical assistance, prepare country reports, ensure best practices and arrange special meetings. The CTC monitoring visit to Ghana took place from the14-16 September 2009.It reviewed the legal framework on terrorism and made recommendations for improvement. The CTC visit enabled Ghana to take stock of the legal framework and started the process that culminated in the enactment of amending and subsidiary legislation that ensures compliance with the main international instruments on terrorism.

United Nations Convention Against Corruption

The United Nations Convention against Corruption (UNCAC) and the African Union Convention on Preventing and Combating Corruption were ratified by the Parliament of Ghana on the 18th October 2002. The UNCAC is the international standard on corruption and was ratified by the Republic of Ghana in 2003. The African Union Convention is its version of the UNCAC.

UNCAC is the only legally binding universal anti-corruption instrument. The Convention's far-reaching approach and the mandatory character of many of its provisions make it a unique tool to develop a comprehensive response to a global problem. It covers five main areas: prevention, criminalisation and law enforcement measures, international co-operation, asset recovery, technical assistance and information exchange.

The UNCAC came into force in 2005 and provides a comprehensive and unique opportunity for countries to collectively fight corruption. In November 2008, the Conference of State Parties to the Convention (CoSP) was established pursuant to article 63 of the UNCAC to improve the capacity of and co-operation between State parties to achieve the objectives of the UNCAC and to promote and review its implementation.

The CoSP has established a mechanism for the review of the implementation of the UNCAC. Under the review mechanism, each State party is required to complete a self-

assessment checklist. The information provided in the checklist then forms the basis for the review of the state party. The state party is reviewed by two other states parties in a process that is broad-based and involves key stakeholders, such as the public, private sector, civil society and development partners.

The UNCAC assessment process is to stimulate broader national involvement in anti-corruption efforts, encourage inter-institutional dialogue and co-operation and provide policy makers with detailed information and analysis on its anti-corruption efforts. It serves as a benchmark for successive governments and stakeholders to measure progress, share knowledge and expertise with other countries implementing the UNCAC. The assessment is also to fulfil international reporting obligations under the UNCAC review mechanism. The Ghana UNCAC review is scheduled for 2013. Currently the Commission of Human Rights and Administrative Justice (the lead anti-corruption agency) and other stakeholders are preparing for the review.

Globalisation and the law

The creation of the League of Nations and then the United Nations after the Second World War established the principle of global interconnection. Transnational connections cut across nation-state boundaries and create a web of people, networks and institutions. This has led to the decline of the nation state and its replacement by global governance through international standards that state parties have agreed to implement. The immediacy and reach of media reportage in the First and Second World Wars was very limited. Information communication technology has changed the media landscape and now international events can be broadcast instantly.

The September 11, 2001 attack on the World Trade Centre and the Pentagon represented a deliberate and strategic orchestration of a "global event". The emergence of global terrorism suggests that physical territories and national boundaries no longer provide adequate protection as attacks can take place anywhere and at any time, as subsequent terrorist attacks have revealed. The effect is that the world has become a global village and no country can cut itself off from the rest of the world.

We are told by C. Thomas in "Globalisation and the South" that globalisation "... refers broadly to the process whereby power is located in global social formations and expressed through global networks rather than through territorially-based states"

Ulrich Beck in "The Cosmopolitan Perspective; Sociology of the Second Age of Modernity" states that "Globalisation - however the word is understood - implies the weakening of state sovereignty and state structures"

The following quotation from an article featured in *Modern Ghana* states that

> In January 2013, the ICRG, *International Co-operation Review Group*, Regional Review Group , RRG, of the FATF, *Financial Action Task Force*, covering Africa and Middle East, conducted an on-site visit to Ghana to ascertain the extent to which

measures are in place to implement the action plan *on money laundering and financing of terrorism which had been subject to peer review in 2009 for compliance with the international standard of the FATF.*

The on-site team was satisfied that five of the action plan items had been substantially completed, and that there is political commitment and institutional capacity to implement *anti-money laundering and counter financing of terrorism*, AML/CFT, reforms in Ghana. The only one item the team considered unsatisfactory was the inadequacy of the implementation of obligations under the United Nations Security Council Resolutions (UNSCRs) 1267, 1373, and successor resolutions.

During the exit meeting with the assessment team, the Ghanaian authorities assured them that this would be met before the FATF-ICRG meeting scheduled for 18 February 2013 in Paris. At that meeting, Ghana proved beyond reasonable doubt that this requirement had been met and presented in evidence Executive Instrument (E.I. 2) entitled: "Instructions for the Implementation of the UNSCRs 1267 (1999), 1373 (2001), 1718 (2006), 1737 (2006), Successor Resolutions and Other Relevant Resolutions" issued by the unconsolidated list of individual terrorists, entities or organisations dated 14 February 2013.

Consequently, at its plenary meeting held in Paris, France, from Feb 20 - 22, 2013, the FATF welcomed Ghana's significant progress in improving its AML/CFT regime and noted that Ghana has established the legal and regulatory framework to meet its commitments in its Action Plan. The FATF concluded that Ghana is therefore no longer subject to the FATF's monitoring process under its on-going global AML/CFT compliance process. Ghana will work with GIABA, *the Intergovernmental Action Group against Money Laundering in West Africa*, as it continues to address the full range of issues identified in its Mutual Evaluation Report."[3]

In conclusion, as a result of the ratification of the legal instruments on terrorism by the Republic of Ghana, the Ministry of Justice has been obliged to prepare implementing legislation. The national sovereignty of the Republic has not only been affected by the treaties aimed at creating a global haven of peace, but also by the peer review mechanisms that have ensured that loopholes in the legal framework on terrorism have been filled. In that regard it can be said that Ghana has been a trail-blazer in Commonwealth Africa.

Bibliography

1. C. Thomas, "Globalization and the South", in C. Thomas and P. Wilkin (eds.), *Globalization and the South* (Houndmills, Basingstoke: Macmillan, 1997) at 6.

[3]"Ghana exits FATF blacklist; Nigeria enacts Terrorism (Prevention) (Amendment) Act 2013", *Modern Ghana*, 22 February 2013: http://www.modernghana.com/news/447311/1/ghana-exits-fatf-blacklist-nigeria-enacts-terroris.html. Text in italics added for extra clarity.

2. Ulrich Beck, "The Cosmopolitan Perspective: Sociology of the Second Age of Modernity" (2000), 51 *British Journal of Sociology* 79 at 86.
3. Information on UN Security Council Resolutions (SCRs 1267, 1373 and 1718) is available at http://www.un.org/en/sc/documents/resolutions/index.shtml.

Globalisation of the Law and Legislative Supremacy: Can They Co-exist in the 21st Century?

Dayantha Mendis[1]

Abstract:

This article deals with the globalisation of the law as a legal process at international and national level. A holistic approach is taken by the writer to illustrate the full impact of the globalisation of the law in the contemporary world through treaties and implementing legislation. This article also deals with the impact of legislative supremacy on the globalisation of the law by reference to several countries. Although there is no violent confrontation between the globalisation of the law and legislative supremacy, it is difficult to predict whether they can co-exist in the future without any violent confrontation. The writer is of the view, if a proper balance between global interests and national interests could be agreed upon by states-parties in negotiating global norms and standards, they may co-exist into the first half of the 21st century.

"Everything on earth is changing – bit by bit – right now – in front of our very eyes. In two or three hundred years …… there will be a new world, a better world. We can plan for it, work towards it, and suffer for its sake. We are creating it – that is the whole point of our existence – our so called happiness."

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Vershinin in Anton Chekhov's *Three Sisters*

Background

Globalization of the law is an important legal process in the 21st Century. It deals predominantly with treaty norms and standards relating to global issues, threats and challenges. These treaty norms and standards include international rules relating to trade and commerce, human rights, international humanitarian law (IHL), protection of the environment, transnational organized crime, cyber-crime, intellectual property rights, international waters, international sea and air transport, trafficking in illicit drugs, trade in arms, corruption, money laundering, terrorism, ozone depletion, climate change, nuclear non-proliferation, etc. (See: Appendix I).

Implementing legislation gives legal effect to treaties and contributes to the globalisation of the law at the national level. Such legislation is also referred to as "enabling", "uniform" or "model" legislation. In monist states, implementing legislation is enacted into law, whenever necessary, although treaties constitute law on ratification/accession by states. In dualist states, as treaties do not constitute law at the national level on ratification/accession by States, it is mandatory to enact implementation legislation to comply with international obligations. Thus, implementing legislation becomes an important legal instrument for the globalisation of the law at the national level. (See: Appendix II).

Treaties and implementing legislation are important legal instruments in the world.[2] They provide the best legal framework for global/regional governance, coordinated governance, good governance and the promotion of the rule of law in the 21st century. These two legal instruments also constitute the basis for "rule-based" diplomacy and international relations. Hence, they have important implications for politicians, diplomats, legal advisers, parliamentary counsel and judges in the 21st century, especially as they are involved on a daily basis in the drafting, interpretation and implementation of these two legal instruments at the international and national level.

Legislative Supremacy

Unlike globalisation of the law, legislative supremacy is a rule of constitutional law**.** It has been described by Professor Dicey as "Parliamentary sovereignty", by Professor Salmond as "Ultimate legal principle" and by Professor Hans Kelsen as the "*Grundnorm*". This rule evolved in Great Britain in the 17th century due to political conflict between the King and the Parliament on the divine right of kings (the king is from God and the law from the king -

[2] Sir Franklin Berman, QC, "International Treaties and British Statutes" [2005] Statute Law Review 26(1)1. Martin Eaton, "Enacting Treaties" (2005), 26 Statute Law Review13; K.J. Keith, "Treaties and Legislation" [1970] 19 ICLQ 5, 127.

a deo rex et a rege lex), which was finally resolved in favour of legislative supremacy by the Glorious Revolution of 1688..

Under this rule of legislative supremacy -

- Parliament can pass any law,
- Parliament cannot bind a future Parliament,
- Parliament cannot recognise a rival law-making authority.
- Courts cannot invalidate any laws passed by Parliament.

In many Commonwealth countries, legislative supremacy is replaced by "constitutional supremacy" or "sovereignty of the people" as the basic norm of the Constitution.[3]

Against this background, I will deal first with the **globalisation of the law** at the international and national levels and thereafter outline how **legislative/constitutional supremacy** impacts on the globalisation of the law in various legal systems of the Commonwealth and beyond.

Globalisation of Law – International Level

Globalisation of the law is a complex process. It consists of several important elements. These elements include - (a) the drafting of treaties, (b) the interpretation of treaties, and (c) the implementation of treaties. Before dealing with these three elements, it is useful to give a brief outline on the importance, nature and the historical development of treaties.

As indicated above, treaties constitute the most important source for globlisation of the law at the international level. They have grown exponentially since the World War II. The Australian Jurist – Julius Stone said in 1954 that in one single year, more treaties are concluded than in the whole of the 19th century.[4]

The term "treaty" is a generic term. It includes conventions, protocols, agreements, concordats, exchanges of letters and *notes verbales*. Treaties can be classified as multilateral

[3] Constitutional supremacy requires any legislation inconsistent with the constitutional provisions to be enacted with a requisite majority and the sovereignty of the people requires certain provisions of the Constitution to be amended by way of a referendum (See the 1978 Constitution of Sri Lanka and the 1980 Constitution of Guyana). See also *Bribery Commissioner v Ranasinghe* (1964) 55 NLR 73 at 83 - Lord Pearce said "A Parliament does not cease to be sovereign whenever its component members fail to produce among themselves the requisite majority". Ian Loveland, *Constitutional Law, Administrative Law and Human Rights: A Critical Introduction*, 4th ed. (Oxford University Press**:** Oxford, 2006) at 47-54. See also Albert Fiadjoe, *Commonwealth Caribbean Public Law* (Cavendish: …1999) at 15-16; A.W.**Bradley and K.D. Ewing, *Constitutional and Administrative Law*, 14th ed. (Pearson Longman; Harlow, 2006);** Sir William Wade and Christopher Forsyth, *Administrative Law*, 8th ed. (Oxford University Press: Oxford, 2000) at 28; *Collymore v AG* [1970] AC 538 PC; *Hinds v R* [1977] AC 195 PC; *Jennifer Gairy v AG of Grenada* [2001] 4 LRC 67; *Queen v Liyanage* (1962) 64 NLR 313 and (1963) 65 NLR 74.

[4] Julius Stone*, Legal Control of International Conflicts*, (Rinehart: New York, 1954) at 23. In the 1970s Professor Clive Parry at Trinity Hall , University of Cambridge used to tell his students that it was possible to study international law a few years ago without reading a single treaty, but today it is impossible to do so

or bilateral or law-making or contractual. They can be defined as an agreement between states or between states and inter-governmental organisations (IGOs) or between IGOs.[5] Treaties must be distinguished from non-treaty instruments such as MOUs, letters of intent and codes of conduct, which are not binding on States.[6]

A treaty is an old world legal instrument. It has been used in the conduct of diplomacy in Mesapotamia (Iraq), Persia (Iran), China and India as far back as the 3rd century BC. However, the modern treaty law starts with the 1815 Concert of Europe. In Vienna, all Western European states, whether big or small, met for the first time to determine the future of Europe after the Napoleonic wars. The former US Secretary of State, Dr. Henry Kissinger, wrote his doctoral dissertation on the Concert of Europe and demonstrated its importance to international relations and diplomacy.[7] Johann Strauss (Jr) in his famous Operetta illustrated the relevance of the Vienna spirit (*Wiener Blut*) - "give and take" - as an indispensable requirement in the negotiation and conclusion of treaties.[8] In the 20th century, especially after World War II, treaties have grown exponentially, as a source of international law, to deal with important global issues, threats and challenges.

The drafting of treaties is an important element in the globalisation of the law.[9] In the negotiation and conclusion of treaties, states have to compromise with other states to arrive at a consensus. Treaty drafting is different from legislative drafting, and includes actors such as inter-governmental organizations (IGOs), non-governmental organizations (NGOs) and the International Law Commission. Treaty drafting is a protracted process in which the "rolling text" undergoes many changes. A diplomat or a legal practitioner involved in treaty drafting, as described by Lord McNair, must have a good knowledge of the legal character of treaties and the widely differing functions of treaty provisions.[10] A treaty drafter must

[5] Vienna Convention on the Law of Treaties, 1969 and Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations, 1986 (hereinafter referred to as VCLT, 1969 and VCLT, 1986).

[6] Anthony Aust, *Modern Treaty Law and Practice,* (Cambridge University Press: Cambridge, 2000); Jan Klabbers, *The Concept of Treaty in International Law* (Martinus Nijhoff Publishers: The Hague, 1996). Treaties also apply to individuals as provided in ICSID, ITLOS, Rome Statute and WTO Agreements. See also *Trinidad Cement Ltd. (TCL) v Republic of Guyana* (2009, CCJ, IOJ).

[7] Henry A. Kissinger, *A World Restored: Metternich***,** *Castlereagh and the Problems of Peace 1812-1822* (Literary Licensing, LLC, 2011).

[8] *Wiener Blut* (Viennese Blood or Viennese Spirit) is an operetta named after the "*Wiener Blut*" waltz, supposedly with music by the composer Johann Strauss II - the Younger, who did not live to witness the première. Such was the popularity of the original "Wiener Blut" Op. 354 waltz till the time of the composer's death that his work would be chosen as the name of the operetta with libretto by Victor Léon and Leo Stein set around the Vienna Congress of 1814 to 1815.

[9] Roy S. Lee, "Multilateral Treaty Making and Negotiation Techniques: An Appraisal, Contemporary Problems of International Law" in *Essays in honour of Georg Schwarzenberger on his 80th birthday*, (Stevens & Sons: London, 1998); Jose E. Alvarez *, International Organizations as Law-makers*, (Oxford University Press: Oxford, 2006).

[10]Lord McNair, *Law of Treaties*, (Clarendon Press: Oxford, 1961).

have an interdisciplinary knowledge of the subject matter of the draft treaty and also the form and structure of treaties, including the final clauses.

The interpretation of treaties is another important element of the globalisation of the law. Interpretation is undertaken by state parties, legal counsel, the executive branch of government and international and national courts and tribunals on the basis of the Vienna Rules enshrined in articles 31 and 32 of the VCLT, 1969.[11] The interpretation of treaties has raised complex issues as to whether Article 51 of the UN Charter allows pre-emptive self-defence (Bush doctrine), whether the use of drones is legal in the fight against terrorism vis-à-vis international humanitarian law principles and whether enhanced interrogation techniques fall outside the definition of the UN Convention Against Torture. The interpretation of these treaties has become complex as the global order is threatened by abominable acts terrorism, aggression, money-laundering and other transnational organised crimes.

Implementation of treaties is another important element for the globalisation of the law at national and international levels. At the national level, all three organs of the State (Legislature, Executive and Judiciary) must play a pro-active role in regard to implementation of treaties as illustrated by Lord McNair in his monumental work *Law of Treaties.*[12]

At the international level, state parties and international organisations play an important role in the implementation process. Treaties empower international organisations to make recommendations, impose sanctions or even engage in use of force if diplomacy fails (for example, in the first Iraq war). Unfortunately, sanctions have been imposed or concessions have been withdrawn on some states selectively and at times unfairly for geo-political reasons.

Globalisation of Law – National Level

As indicated above, implementing legislation contributes immensely to the globalisation of the law at the national level. It is a process which consists of (a) the drafting of implementing legislation, (b) the interpretation of implementing legislation, and (c) the implementation of implementing legislation.

The drafting of implementing legislation is a specialised branch of legislative drafting.[13] According to Francis Bennion, treaties are transformed *directly* by incorporating the treaty

[11] See in regard to a dynamic or evolutionary approach on interpretation of treaties - *Costa Rica v Nicaragua*, 2011 ICJ. In this case the ICJ adopted a dynamic approach and went beyond the Vienna Rules by giving a broad definition to the word "commercial" by reference to the subsequent practice between the Parties, although the word "commercial" was narrowly defined in the 1858 Treaty between Costa Rica and Nicaragua.

[12] Above n. 10.

[13] G.C. Thornton , *Legislative Drafting* 4th ed. (Butterworths: London, 1996) at 308-314; F.A.R. Bennion, *Statutory Interpretation*, 2nd ed. (Butterworths, 1992); F.A. Mann, *Foreign Affairs in English Courts*, (OUP,

in a Schedule or *indirectly* by re-drafting/re-phrasing the treaty in a manner consistent with the style and form of national legislation.[14] These two legislative techniques have many variants. These variants can be of value to legislative counsel in the transformation of treaties into national legislation. Hence, it is important for legislative counsel to select the best legislative technique or a combination of techniques which can mirror the globalised law at national level in an effective and efficient manner.

The interpretation of implementing legislation is another important element in the globalisation of the law at the national level. Literal interpretation is not suitable for the interpretation of implementing legislation as there is a need to harmonise the legislative provisions with treaty norms and standards in the interpretation of implementing legislation.[15] Various Interpretation Acts across the world have been amended to enable the courts and tribunals to consult treaties as extrinsic material in the interpretation of implementing legislation.[16] This paradigm shift in the interpretative technique augurs well for globalisation of the law.

The implementation (enforcement) of implementing legislation is also very important for the globalisation of the law. Any serious "implementation deficiencies" or "gaps" can affect the globalisation of the law. International compliance and control measures have been established by various treaty regimes. These treaty regimes provide for submission of reports, establish verification processes and review mechanisms and engage in diplomatic efforts to ensure compliance. Any intervention by state parties or international organisations in regard to the implementation requirements or peer review must not be construed as an infringement of state sovereignty.

1986) at 84-101; John Mark Keyes and Ruth Sullivan, "Legislative Perspective on the Interaction of Domestic and International Law" in *The Relationship between International Law and Domestic Law*, (Irwin Law: Toronto,2006); D.L. Mendis, "Legislative Transformation of Treaties" (1992) 13, *Statute Law Review* 216.

[14] Bennion, ibid. at 460. He said: "The internationally agreed words cannot be suited to the legal systems of every participating state, and difficulties of interpretation must follow from indirect enactment." However he concluded that the direct method does not serve the need for uniformity in the interpretation of implementing legislation.

[15] Law Commission (UK), T*he Interpretation of Statutes, Report No. 21*, (HM Stationery Office: London, 1969, available athttp://www.bailii.org/ew/other/EWLC/1969/21.html. According to this report, the interpretation of implementing legislation is dependent on the way in which treaties are transformed into national legislation. See also *Ellerman v Murray* [1931] AC 236 and *Saloman v Customs and Excise Commissioner* [1967] 2QB 116. Lord Diplock said in the latter case, "If the terms of the legislation are clear, they must be given effect to whether or not they carry out Her Majesty's treaty obligations." See also the new trend in *James Buchanan & Co. v Babco* [1978] AC 141 at 152, where Lord Wilberforce said "I think the correct approach is to interpret the English Statute ... in a manner appropriate for the interpretation of an international convention."

[16] See *Extrinsic Aids to Statutory Interpretation* (Australian Government Publishing Service: Australian Government Publishing Service: Canberra, 1982) and section 15AB of the Australian Commonwealth *Acts Interpretation Act 1901*.

Impact of Legislative Supremacy on Globalisation of Law

Legislative supremacy impacts on the globalisation of the law at the international and national levels.

In monist states, ratification/accession to treaties requires consent of Parliament, Congress or the Senate. In the US, the consent of the Senate is necessary for ratification of treaties. Recently, President Obama was unable to obtain its consent for the ratification of the United Nations Convention on the Law of the Sea, 1982. Likewise, President Woodrow Wilson in 1919 was unable to obtain its consent to ratify the Covenant of the League of Nations as the US Senate was bent on "isolationism". Perhaps, the history of the world would have been more humane in 20th century if the US Senate had provided its consent. This clearly demonstrates that the Executive in the US is unable to ratify a treaty which is of fundamental value to international peace and security without the consent of the Senate.

In dualist States, although treaties do not generally become law at the national level, there is an emerging constitutional and parliamentary practice to enact implementing legislation before the ratification of important treaties. The former Minister of State (UK), Earl Ferrers in moving the Second Reading of the bill to enact the *Criminal Justice International Cooperation Act 1989* said:

> The United Kingdom takes the view that there is no point of ratifying the convention until there is in place all the legislation and procedures which are necessary to implement it fully.[17]

Similarly, Malta and Antigua and Barbuda have enacted a *Ratification of Treaties Act 1983* and *Ratification of Treaties Act 1987* respectively to require the approval of Parliament prior to ratification of treaties which affect the sovereignty of the State. These legislative measures go beyond the traditional Ponsonby Rule requiring that treaties be laid before Parliament at least 21 days before they are ratified.[18]

It must be emphasised that implementing legislation must be enacted at the national level in conformity with constitutional provisions. It becomes complicated if international human rights norms are incorporated as fundamental rights in the Constitutional document, and if so, implementing legislation needs to comply with human rights standards.

In the Canadian Case of *R. v. Finta*,[19] the accused was charged with war crimes and crimes against humanity on the basis of the amendments made to the Canadian *Criminal Code*. The accused argued that the *ex post facto* retroactive offences contravened the *Canadian Charter of Rights and Freedoms*, but the Supreme Court of Canada held that because international

[17] HL Debates – Vol.513, Col.1217, 12th December 1989. See also Charles Carstairs and Richard Ware, *Parliament and International Relations* (Open University Press, 1991).

[18] See: C.J. Bolton, ed. (1989) *Erskine May's Treatise on the Law, Privileges, Proceedings and Usages of Parliament,* 21st ed. (Butterworths: London, 1989), at.215.

[19] [1994] 1 S.C.R. 701.

law at the time the acts were committed recognized that they were morally wrong and attracted collective (but not individual) responsibility, this was a justifiable exception to the rule against retroactivity.

In the Sri Lankan Case of *AG v. Sepala Ekanayake*,[20] the *Offences Against Aircraft Act 1982* gave effect to the Tokyo (1963), Hague (1970) and Montreal (1971) Conventions. The accused argued that these offences were *ex post facto* retroactive offences and therefore inconsistent with fundamental rights. The Supreme Court held that the above legislation was *intra vires* the Constitution, as the offences were already criminal at that time according to general principles of law recognized by the Community of Nations and as provided under Article 13(b) of the Constitution of Sri Lanka.

In the UK and Ireland, the European Convention on Human Rights is transformed into national legislation by the *Human Rights Act of 1998* (UK) and the *European Convention Human Rights Act of 2003* (Ireland), but the UK and Irish Parliaments did not grant primacy to human rights standards over any other legislation so that the traditional rule of legislative supremacy is preserved. Instead, the Courts were authorised to interpret the legislation as far as possible in conformity with the treaty and Strasbourg jurisprudence and to make declarations of incompatibility if any legislation is inconsistent with the human rights.[21]

Likewise, the *European Communities Act 1972* (UK) has been drafted in an ingenious manner to accommodate this principle of direct effect as determined in *Van Gend v Loos*,[22] without compromising legislative supremacy of the British Parliament.

In Trinidad and Tobago, the question arose whether a treaty could be incorporated by reference and be granted primacy over any future legislation (*lex posterior*). In the *Owners of Vessel "Alarm Selaras" v The Owners of the Vessel "Diamond Cay"*,[23] Madam Justice C. Gobin of the High Court of Trinidad and Tobago held that section 410 of the *Shipping Act* is unconstitutional vis-à-vis legislative supremacy, as it gives the treaty which is incorporated by reference, the primacy over national legislation.

Concluding Remarks

Treaties and implementing legislation are important legal instruments for the globalisation of the law in the 21st century. These two legal instruments require approval of Parliaments, Congress or Senate, as the case may be, for the ratification/accession of treaties at the international level and for their enactment into law at the national level. Up to now,

[20] (1988), 1 SLR 47. See also Averbuck, "Sri Lanka Courts Incorporate Human Rights: Sepala Ekanayake v AG", (1989) 1 Sri Lanka JIL 1.

[21] Paul Brady, "Convention Compatible Statutory Interpretation: A Comparison of British and Irish Approaches", (2012), 33 *Statute Law Review* 224.

[22] *Van Gend & Loos v Nederlandes Administratie der Belastringen*, 1963 ECR 1.

[23] Judgement of the High Court of Trinidad and Tobago, CV2008-04598 delivered on 1st June 2010 (Unreported).

globalisation of the law and legislative/constitutional supremacy have been able to co-exist without a violent confrontation in the global order. However, "US Exceptionalism" in regard to certain international standards and norms has created difficulties in the emerging global order.[24] In a multipolar world, it is likely that the global public opinion may demand a proper balance between global interest and national interest if these two processes are to co-exist in the emerging world order.

Today, treaties and implementing legislation are increasing in volume and in subject matter. According to Ambassador Kohona, almost 500 multilateral treaties and 52,000 bilateral and regional treaties have been registered with the UN Secretary General at the UN Treaty Office.[25] At least one-fourth of the Legislative Agenda of Parliaments in developed and developing countries relates in one way or another to treaties. Hence, these two legal instruments are indispensable for international cooperation, international coordination and inter-dependence. Nonetheless, some small States and high-waged developed countries are encountering tremendous difficulties in adjusting to neo-liberal economic policies incorporated in WTO Agreements on the basis "Reaganomics" (Reagan and Thatcher economic policies on globalisation, liberalisation of trade and de-regulation) and these difficulties have been further accentuated by the 2008 US financial crisis.[26]

In the 21st century, everything in law is changing – bit by bit, right now, in front of our very eyes – through treaties and implementing legislation. In another 20 years or so, it is likely that the laws of the world will be fully globalized through treaties and implementing legislation.

In this context, legislative and treaty drafters provide a unique contribution to the globalisation of the law. In the preparation and drafting of treaties and implementing legislation, the treaty drafter and the legislative counsel must have a good interdisciplinary knowledge of global issues, threats and challenges, an understanding of international law and relations, and a sound knowledge of treaty drafting and legislative drafting principles, practices and techniques.

APPENDIX I

Major multilateral treaties:

International Convention on Civil and Political Rights 1966 and the Optional Protocol 1976,

[24] Professor Cesare P.R. Romano (Ed.), *The Sword and the Scales: The United States and International Courts and Tribunals*, (Cambridge University Press, 2009). Professor Romano concludes that the United States needs international courts and international courts need the United States.

[25] Dr. Palitha T.B. Kohona, former Chief, Treaty Section, UN, "The United Nations Treaty Collection - A Legal Framework for a Better World" (2002), 14 Sri Lanka Journal of International Law.

[26] See Tennyson S.D. Joseph, *Decolonization in St. Lucia - Politics and Global Neoliberalism* (University Press Mississippi: 2011); Julian Ku , *Taming Globalization: International Law, the US Constitution and the New World Order*, (Oxford University Press: New York, 2012).

International Convention on Economic, Social and Cultural Rights 1966,

Convention on the Rights of the Child 1989,

European Convention of Human Rights 1950,

The Banjul Charter on Human and Peoples' Rights 1981,

Inter-American Human Rights Convention 1978,

Geneva Conventions 1949 and the Additional Protocols 1977,

Ottawa Convention on Anti-Personnel Mines 1997,

Rome Statute on the Establishment of International Criminal Court 1998,

Nuclear Non-Proliferation Treaty 1968,

Biological Weapons Convention 1973,

Chemical Weapons Convention 1992,

Comprehensive Nuclear Test Ban Treaty 1996,

UN Framework Convention on Climate Change 1992,

UN Biodiversity Convention 1992,

Kyoto Protocol 1997,

International Whaling Convention 1932,

Montreal Protocol on Substances that Deplete the Ozone Layer 1987,

Terrorism Conventions (11),

UN Convention on Transnational Organized Crime 2002,

UN Convention Against Corruption 2004,

Marrakesh Agreement Establishing WTO 1994,

UN Convention on Conditions for Registration of Ships 1986,

UN Convention on International Sale of Goods 1986,

International Convention for the Safety of Life at Sea 1974,

International Convention for the Settlement of Investment Disputes between States and Nationals 1965,

Revised Treaty of Chaguaramas 2001,

Chicago Convention on International Civil Aviation1944.

APPENDIX II

The major implementing legislation includes –

Human Rights Act 1998 (UK),

Geneva Conventions Act 1957 (UK),

Evidence (Proceedings in other Jurisdictions) Act 1975 (UK),

Tokyo Convention Act 1967 (UK)

Merchant Shipping (Load Lines) Act 1967 (UK),

Antarctic Treaty Act 1967 (UK),

International Sales Act 1967 (UK),

Consular Relations Act 1968 (UK),

Non-Citizens (Registration, Immigration and Expulsion) (Amendment) Act 1980 (Sierra Leone),

Refugee Protocol (1951),

Climate Change Response Act 2002 (New Zealand),

Terrorism Suppression Act 2002 (New Zealand) (the schedule includes SC Resolution 1373 (2001)),

International Transport Convention Act 1983 (UK),

Canada Shipping Act, 2001 (Canada),

Canada Post Corporation Act (Canada),

Marine Pollution Prevention Act 1982 (Sri Lanka),

Shipping Act 1981 (Barbados),

Section 69 of National Parks and Wildlife Conservation Act 1975 (Australia),

National Conservation and Environment Protection Act 1987 (St. Kitts and Nevis),

Uruguay Round Agreement Act 1994 (USA).

Book Review

Thornton's Legislative Drafting, 5th ed. by Professor Helen Xanthaki, published by Bloomsbury Professional, West Sussex: 2013

Reviewed by Bilika H. Simamba[1]

Bloomsbury Professional has just published the 5th edition of G. C. Thornton's well-known book, *Legislative Drafting*, now under the amended title, *Thornton's Legislative Drafting.* It is edited by Professor Helen Xanthaki, Academic Director at Sir William Dale Centre for Legislative Studies, Institute of Advanced Legal Studies, University of London, England. Professor Xanthaki is a well-established teacher of law and legislative drafting. She has also published extensively in those areas, including at least 10 books, as well as undertaken consultancies in law reform and legislative drafting in Europe, Africa and Asia. The book carries a foreword from the author of the original work.

In 1966 Garth Thornton was loaned to the Tanzanian Government by his then employer, the Hong Kong Government, to fill the post of Chief Parliamentary Draftsman and Counsel to the Speaker. Then a relatively young legislative counsel, he was struck by the shortage of that expertise in that part of the world. And there appeared to be no text book or practice manual to help trainees learn the craft. Seeking to be of more assistance than his own presence, and eager to share his burgeoning expertise to a wider audience, he set out to write what eventually became an iconic work, first published in 1970. In subsequent years, drawing on his experience particularly in Hong Kong and Western Australia, he prepared

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three subsequent editions. Today one would be hard pressed to find a legislative counsel in the Commonwealth who has not referred to his work.

As one might expect, Professor Xanthaki, in preparing the revised text, "set out to enhance it through careful updating, rather than through a disrespectful massacre of its invaluable original concepts." To that end, the book retains by and large the subject matters and approaches of previous editions while refreshing them and providing some new insights. It begins, as before, with a discussion of the first building blocks of writing legislation or indeed anything: words. Chapter 2 deals with syntax while Chapters 3 and 4 consider different aspects of style. Admonitions regarding certain words and expressions, which are of great value to budding legislative counsel, are dealt with in Chapter 5. Chapter 6 deals with Interpretation Acts, continuing to make the point that, when deciding the extent to which an Interpretation Act is relied upon, a balanced approach is best and that legislation should be as self-sufficient as is practical.

The drafting process, from the receipt of instructions to the completion of an agreed draft, which in earlier editions, up to the 3rd edition, comprised one chapter, is comprehensively covered in Chapters 7 and 8, as it was in the 4th edition. These chapters discuss some key aspects of the interaction between legislative counsel and the instructing official. In that connection, it must be pointed out that in many countries in the Commonwealth the idea of training instructing officials in a systematic way has not yet been embraced and materials intended to assist officials in this regard are either non-existent or basic. Whereas in certain places legislative counsel working in a department of one has benefitted a lot from a ready reference such as *Thornton*, their task is often rendered even more challenging because of instructing officials who do not play their role effectively. And sometimes the legislative counsel, in trying to avoid being misunderstood, is cautious not to point to this as partly explaining the "slow" delivery of legislation. In relation to such jurisdictions, it must be emphasized that the objective of well-drafted legislation, completed within the time-frames set by government, can be greatly aided by using Chapter 7 as a training manual.

Chapter 9 deals with formalities and arrangement of provisions of legislation. Thereafter, Chapters 10 to 19 deal respectively with preliminary provisions, powers and duties, substantive and administrative provisions (in three chapters), supplementary provisions, penal provisions, final provisions, amending legislation and finally subordinate legislation.

More generally, Thornton and Xanthaki have lent their authority to a number of issues relating to plain language and other matters which some countries in the Commonwealth have not yet addressed. For example, there are still a number of countries which insist on suing "shall" to impose obligations, are still to adopt gender-neutral drafting and use marginal notes instead of section headings. Those jurisdictions should take full advantage of the contents of the book in that regard in order to move their offices forward.

The book is characterized by detailed references to cases as well as the views of numerous authorities relevant to language, the law and of course legislative drafting. In using these materials, the editor, as did Thornton himself, does not hesitate to be prescriptive in certain well-chosen areas, while in others being cautious to state the ideal and give different approaches to that ideal, leaving it to legislative counsel to decide what works best in the circumstances with which he or she is dealing.

True to Thornton's international exposure from his origins Down Under and Xanthaki's own international experience, further enhanced by the diversity of students on the LL.M. in Legislative Studies programme with which she is associated, the book draws on examples from geographically disparate parts of the Commonwealth. In the Caribbean she cites statutes from Antigua and Barbuda, Bahamas, Bermuda, Dominica, and Trinidad and Tobago. From Africa she quotes from statutes in Botswana, Ethiopia, Ghana, Kenya, Malawi, Namibia, Nigeria, Rwanda, Sierra Leone, South Africa, Tanzania, Uganda and Zimbabwe. With respect to the older Commonwealth, examples are quoted from Australia, Canada, Isle of Man, New Zealand and of course the United Kingdom. From Asia there are examples out of Bangladesh, Brunei, India, Indonesia and Malaysia. There are also examples from Cyprus, Fiji, Ireland and even the United States of America. Praise and condemnation – both for good cause of course – are evenly distributed.

The new edition has, as before, a detailed table of contents, reflecting major and minor headings in the text. There is also a detailed index. This edition introduces the use of decimalized numbered segments, which are also reflected in the index, making it easier to pinpoint the subject matter one is looking for.

More specifically, on page 113, in a revised portion of the text, it is said that among the reasons why the use of "Notwithstanding any law to the contrary. . ." is unacceptable is that "It simply repeats an existing presumption of statutory interpretation that applies to any provision anyway." Especially considering how often the concept of overriding provisions is used in legislation, that statement seems to need clarification.

There are a few other prescriptions with which I do not agree. Another example is at page 104. The book rightly repeats the now well-established practice in most offices that "must" instead of "shall" is to be used to impose a duty. However, this edition goes on to state that the formulation "The authority makes and enforces bylaws ..." is better than "The authority must make and enforce bylaws ...". The reason given is that "Legislation does not need to repeat that its text is compulsory" since "legislation is inherently compulsory". Quite apart from the fact that legislation can also be permissive, and is therefore prescriptive in that sense also, both the example and reason for the recommended formulation go too far. An obligation must never be stated as a fact unless that fact is in the nature of a legal declaration as in (a starch formulation) "The authority *is* responsible for making and enforcing bylaws ..." or "A student *is* entitled to ...". One can imagine the awkwardness of formulating an

argument before a court if a statute stated that, "A constable warns a suspect before taking a statement ..." and it is alleged that no warning was given. In the example given in the book, an alternative formulation could have been "The authority *is to* make and enforce bylaws ...".

Despite these few caveats, in a book of 557 pages, there can be no doubt that, with the 5th edition, *Thornton's Legislative Drafting*, in this rendering by Professor Xanthaki, will continue for many years to be a principal player in galvanizing good legislative drafting practice in the Commonwealth and beyond. And yet in some areas the debate goes on. On pages 106 to 108 the use of "and/or", in line with many other authors, continues to receive condemnation. Mention is there made of the 1974 case of *Federal Steam Navigation Co Ltd*, a criminal matter, in which the House of Lords by a majority of three to two decided that "or" meant "and/or", resulting in the conviction of both the owner and master of a ship. In that case Lord Wilberforce is quoted as having remarked,

> the revelation of this difference of opinion may perhaps be salutary, if the draftsmen are encouraged to [*take*] care in the use of "or" and "and" or even if I dare to say so "and/or".

It should not pass without comment that the book generally uses the word "drafter" rather than "legislative counsel". Whereas the former term is convenient shorthand and the book is principally concerned with the drafting aspect, the term does not give recognition to our legal advisory role. It is due to a greater desire to emphasize this role that in many parts of the Commonwealth the names of departments and posts within them have been changed to omit the narrow term and incorporate the more descriptive term. Indeed, the publisher of this journal is known as the Commonwealth Association of *Legislative Counsel*.

Thornton expresses in the foreword his hope and confidence that the book will "continue to be of practical assistance to drafters in their demanding but exciting and useful branch of the law." There can be no doubt that it will continue to do so not only to legislative counsel but also to those who aspire to take up the profession.