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# ARTICLES

The Lalive Lecture  
Geneva, May 27, 2009

## Unlawful Laws and the Authority of International Tribunals

*Jan Paulsson\**

INTERNATIONAL DISPUTES OFTEN INVOLVE ISSUES of both national and international law. Not infrequently, challenges are raised to the legitimacy of the national law invoked. Attention is then immediately switched to international law, to see whether it may have a corrective effect, by operation of such things as international minimum standards or international public policy. The main point of this lecture is to say: “Not so fast!” National laws themselves contain corrective norms, and they may be formidable. An international court or tribunal charged with applying a national law has both the duty and the authority to apply it as a whole. If it does so, there may be no need to determine whether international law trumps national law. In this way a confrontation of legal orders is avoided.

### A DEFICIENCY OF THE ENGLISH LANGUAGE

We must begin by struggling with the word “law.” Otherwise, we may fail to perceive what it means to apply a national law *in its totality*.

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When their parliament approves a new law, the citizens of France would not dream of saying “*ils viennent de sortir un nouveau droit.*” The idea of a *nouveau droit* implies revolution—and even revolution, sweeping out the *ancien régime*, may not be enough to displace *le droit*. Parliament may invent new *lois*, ministers may issue new *décrets*, mayors may proclaim new *arrêtés*; they all have their place within *le droit français*, but they are incapable of altering it. To proclaim *un nouveau droit* is to make a vast claim. An academic who publishes a work to introduce his or her conceptions of *un nouveau droit* had best be prepared for accusations of vanity. *Le droit* is the product of a social order, built up over generations—an order without which *le droit* would be an illusion. In France as elsewhere, the national *droit* has easily survived regime changes. Emperors and kings, presidents and commissars, may come and go—yet their comings and goings are not enough to displace *le droit*.

Astonishingly, the English language, proud of its compendious, agglutinate lexicon, so rich in nuance in other contexts, gives us no means to articulate this fundamental distinction. There is only the word “law,” used indifferently whether one says “this contract is subject to French *law*” or “a new French *law* forbids the use of foreign language labels on consumer goods.”<sup>1</sup>

In a well-known essay published some 30 years ago,<sup>2</sup> the legal philosopher Joseph Raz looked squarely at this distinction. He suggested that lawyers have a comprehensive view of the law; it includes anything which the legal system itself acknowledges. The multitude of texts which engage the lawyer’s attention may all be verified. If they emanate from authorized rule-makers they are part of the law—from the constitution down through layers of attributed authority all the way to a city ordinance establishing rules for parking vehicles on streets. The layman, on the other hand, has a narrow view. He perceives “the law,” in Raz’s words, as “a set of open, general and relatively stable laws.” The distinction is absolutely critical to an understanding of the concept of government by law and not by men. Unless one acknowledges the supremacy

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<sup>1</sup> Of course, any language may develop ambiguities even if it has the means to avoid them. When it appears as part of the expression *conflit de lois*, as Pierre Mayer has observed, the French word *loi* is at times used as a synonym for “rule,” at times for “legal order.” This, he wrote in an important article, “Les lois de police étrangères,” *J. du dr. int’l*, 277, 283 (1981), inhibits a proper understanding of the very concept of *conflit de lois*, which may concern two very different matters: which legal order is the relevant authoritative source of norms, on the one hand, and what is the inherent applicability of a particular norm to a given situation, on the other hand. A French doctoral thesis devoted to this differentiation was published on December 5, 2008 by LGDJ under the title “La distinction des ordres et des systèmes juridiques dans les conflits de lois.” The author, David Sindres, proposes that “systems” may be used to designate any coherent normative corpus, even if not created by the State.

<sup>2</sup> See J. Raz, “The Rule of Law and its Virtue,” 93 *The L. Quarterly Rev.* 95 (1977), reprinted in J. Raz, *The Authority of Law* 210 (1979).

of this category of “law,” *i.e.* the supremacy of the law as seen by the layman, everything would be the rule of men. Those who secure power, and the formal authority to issue *rules*, would control *the law*. This would not be the rule of law, but rule *by* law.

This point is hardly novel. It was well perceived and beautifully expressed in Santi Romano’s great work, *L’ordinamento giuridico* (published in 1918 but never translated into French until 1975). I am forced to offer this translation from the French; it is a scandal of intellectual history that this seminal monograph has never been translated into English. When we speak of *le droit*, be it Italian or French, Romano wrote:

We do not only think of a series of rules; nor do we visualize the rows of volumes which form the official collections of laws and decrees . . . . What lawyers, and even more so laymen, have in mind is, to the contrary, something more vital and vigorous: it is above all the complex and diversified organization of the Italian or French State; the multiple mechanisms and gearwheels, the relations of authority and of force which create, modify, apply, and impose respect for the legal norms—without partaking of their identity. In other words, the legal order is an entity which to some degree acts in accordance with the norms but above all activates the norms, somewhat like pieces on a chessboard. In this way, the norms are the object and even the instrument of the legal order, and not a part of its structure.<sup>3</sup>

Of course modern society cannot function only with “open, general and relatively stable laws,” that is to say the core features that make it a society. We also need rules that are complex, specific and responsive to fast-changing events: from natural catastrophes to war, from economic crises to transformative elections.

The fundamental conclusion is that *le droit* must dominate *les lois*. This can be put in similar ways in many languages besides French—“*Sein Wort ist Gesetz*” does not mean “his word is *das Recht*”; a *caudillo* may *dictar sus propias leyes*, but only a megalomaniac can imagine that he is transforming *el derecho*. This instantly recognizable distinction, I repeat, is lost in English. How does one put the essential idea *that the rule of law applies to law itself* without sounding tautological? Here is how Raz does it. It is a cornerstone of his essay, and an excellent piece of exposition, but note the cumbersome paraphrases needed in English to express the dichotomy of “general, open and stable rules” on the one hand, and, on the other, “particular laws (legal orders)”:

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<sup>3</sup> S. Romano, *L’ordinamento giuridico* 10 (1918).

The doctrine of the rule of law does not deny that every legal system should consist of both general, open and stable rules (the popular conception of law) and particular laws (legal orders), an essential tool in the hands of the executive and the judiciary alike.

As we shall see, what the doctrine requires is the subjection of particular laws to general, open and stable ones. It is one of the important principles of the doctrine that *the making of particular laws should be guided by open and relatively stable general rules*.<sup>4</sup>

One must surely regret that the powerfully evocative noun *le droit, das Recht, el derecho*, must find its cognate in an amorphous phrase like “general, open, and stable rules.” Indeed the word *rules* itself is not really acceptable. We are not talking about an accumulation of rules, but about an area, a domain, a system, an order, a whole which is very much larger than the sum of its parts. Surely the concept is passably clear. We finally get to a vantage point from which we can see that we are speaking of the essential substance of a social group: its order, its *raison d’être*, its constitution.

It is my purpose today to reflect on the implications of these broad and fundamental ideas for the authority, and indeed the duty, of an international tribunal which has jurisdiction to apply a national law. This international tribunal may be of practically any kind, and its mandate to apply national law may be found in the terms of a state-to-state compromissory agreement, in the stipulation of a bilateral investment treaty invoked by a private party against a state, in a default provision such as Article 42 of the ICSID Convention, or simply in a garden-variety applicable-law clause found in a commercial contract.

It seems that these implications have been given very little sustained attention. As mentioned at the outset, we are, it seems, too quick to consider the corrective effect of international law on national law before giving full scope for national law to correct itself. If you allow me to develop my conception of this feature of national law, I will be able to conclude this lecture with a series of propositions, in fact eleven of them, which may suggest a proper understanding of how an international tribunal should and must face the task of applying national law.

## NATIONAL CHECKS ON UNLAWFUL LAWS

If we pick up the thread where I left it a few moments ago—referring to a legal order rather than a list of rules—we will find ourselves moving

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<sup>4</sup> Raz, *supra* note 2, at 213 (emphasis in the original).

ineluctably toward the issue of how an international tribunal understands and applies the constitution of a state—but we must be careful about that word too. The constitution of a state is not something tangible; it is the sum of the forces that make the state what it is. A constitution thus *constitutes* the state. It is a reality—not a document called “the constitution.” It is not even the words in that document. Texts that call themselves constitutions are nothing but images of constitutions. Some are accurate, but others frankly grotesque—not even deserving to be called Platonic. Not so long ago all residents of France received in their mailbox a massive, totally indigestible document written in the most abysmal, soul-deadening language, and purporting to be the new draft constitution of Europe. If that document had been enacted, it most certainly would not have been the constitution of Europe any more than a four-year old’s drawing of Daddy really is Daddy. For all we know, Somalia still lives under the formal illusion of having a lovely aspirational constitution which long ago ceased to have any connection with reality. Bolivia has just enacted by referendum a lengthy document which in the most minute detail explains how the government is now empowered to move the country from poverty to welfare. It is a type of policy manifesto of a government in power. Those are not the true constitutions of Somalia or Bolivia.

The constitution of a social group, state or not, is the reality of the adhesion that created it and that continues to sustain it. That is the quintessential representation of a legal order. Someone who has no notion of the legal order is severely handicapped, unable to distinguish between *the law* as an overriding social reality and “laws” which purport to be part of it. Where *the law* is in good health, imperfect laws and deficient compliance can be dealt with; but where it is illusory there can in reality be nothing but arbitrariness and power—however many and ostensibly good laws may be on the books.

Great efforts have been expended on finding the ultimate law of laws, the original ordering that legitimizes all subsidiary rules in society. It may be a wasted effort. Philosophers and economists may seek to explain the nature of law’s foundation, for example by positing types of moral or practical bargains as the theoretical justification for a legal system. These are but metaphors or abstract projections. There is no original law of laws. There has never been one, and none will ever be. It is a conceptual impossibility. In the end, every legal system is based on a political phenomenon, namely that a social group has decided to accept a given order. It works because it works. It lasts as long as it lasts. The order *produces* law. The order *regulates* the criteria of acceptable law-making. And when it no longer commands sufficient political adhesion, it perishes.

In this perspective, the fact that the United Kingdom has not produced a comprehensive document purporting to be its constitution is wonderful, because it forces us to think about the nature of constitutions. The British constitution is a powerful one, but no one can keep it in a pocket for consultation. It contrasts with the lofty eloquence of the constitutions of banana republics of yore—commissioned perhaps from a famous scholar by a petty dictator on a shopping trip to Europe, at the same time as he commissioned his portrait and new decorations for his uniform—which were never much more than insults to human intelligence.

Viewed as nothing more than the way society is ordered, a constitution may have a foundation of pure willfulness; “I am the law,” declares the *capo di tutti capi*. Such orders have indeed existed, but usually not for very long and never with broad social authority. Members of society want to think that the maker of laws himself is subject to the law. And thus the most absolute rulers, from antiquity to the present day, have declared their obedience to law. Louis XIV may have said “*l’Etat, c’est moi*”—but not “*je suis le Droit*.” Indeed he said something quite different: “what brings perfect felicity to a kingdom is the fact that the king is obeyed by his subjects and that he himself obeys the law.”<sup>5</sup> In saying such things, despots seek to assume a cloak of legitimacy traceable to Thomas Aquinas (who himself echoed Aristotle while articulating his concepts in words more palatable to the sacerdotal power of his time) and Aquinas’s insistence that sovereigns, while themselves immune from coercion, are limited by divine and natural law—although the enforcement of this restriction is in God’s hands.

This last qualification undoubtedly caused many a cynical despot to chuckle while putting on a show of fervor in embracing the precepts of *Summa Theologica*. Yet for our purposes we should not take Thomas Aquinas as a naïve dreamer. The ruler who promulgates unjust laws will squander his political capital. (Remember: politics precedes law.) When his account is depleted, he will topple. Considering the mysteriousness of the ways which believers attribute to God, why not see the success of a *coup d’état* as a form of divine sanction?

The notion of a superior constraint above the law-giver has been explored for centuries by the finest minds in Western civilization, but it would be a mistake to view it as a uniquely Western achievement. Even in societies described as primitive, the authority of the chief is based on the belief that he can muster in the hearts of his followers—the belief that he will ensure respect for the law of

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<sup>5</sup> A. Tunc, “The Royal Will and the Rule of Law,” in A. E. Sutherland (ed.), *Government Under Law* 404 (1956).

the tribe. The quickest way to erode that belief would be to set himself above it. In the little group of Tswana chiefdoms known as the Kgatla, before their absorption into the Bechuanaland Province in the late 1800s, it was said: “The law is blind, it eats even its owner.”<sup>6</sup>

It is necessary to be conscious that we are not considering the imperatives of *jus cogens*, or any other form of international public policy which might be said to trump national law. Nor is this a matter of asserting that an ordinary stipulation of international law, such as those to be found in a treaty, are incorporated into the relevant national law and may therefore have precedence over other national enactments.<sup>7</sup> So far, we have contemplated something less complex: the straightforward determination of the national law without regard to any factors of externality—be it positive international law or notions of international public policy.

### THE INTERNATIONAL APPLICATION OF NATIONAL CORRECTIVE NORMS

Let us consider a hypothetical illustration. Rex has recently installed himself as the benevolent dictator of a resource-rich country where many live in poverty. He took power from a government he accuses of having distributed national wealth in a grossly unfair manner. He proclaims a policy of redistributive justice, and enjoys passionate popularity among the vast disadvantaged segments of the population. He accuses foreign business interests of having colluded with formerly powerful national elites.

In pursuit of his policies, Rex will naturally find it convenient, as he sees fit, to abrogate treaties, laws and contracts. His political majority will support him—and so will the legislators and judges he has put in office.

Yet Rex has a thorn in his side: international tribunals. Rex insists that he respects the rule of law. In particular, he affirms adamantly that he abides by international law. But by “law” he means the rules that need to be put

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<sup>6</sup> In the Setswana language: *Molao sefofu, obile otle oje mong waone*, as reported by Simon Roberts of the London School of Economics (who spent two years doing field research in what is now known as Botswana, and was Adviser on Customary Law to the Government of Botswana in 1968–71), in S. Roberts, *Order and Dispute: An Introduction to Legal Anthropology* 147 (1979).

<sup>7</sup> An arbitral tribunal recently reasoned that since a bilateral investment treaty was part of the law of El Salvador, and since that treaty called for the application of general principles of international law before resorting to national law, a controversy as to the legality of an investment should be decided by reference to general principles of law. *Inceysa Vallisoletana SL v. El Salvador*, ICSID Case No. ARB/03/26 Decision on Jurisdiction, (Aug. 2, 2006), para. 224. By reference to such principles, the arbitrators upheld El Salvador’s contention that the investment had been made unlawfully and was therefore not entitled to protection under the treaty.

into place to further his policies, which are proclaimed to be in the national interest. He finds it intolerable that an external authority should be allowed to determine what is lawful, or that international obligations accepted by his dubious predecessors should be given effect.

Let us leave aside the subject of the tyranny of the majority within a nation, which has occupied political philosophers for a very long time. That is an important issue for any society, but we are looking only at the international perspective. So let us instead consider the consequences of Rex's options as he seeks to escape external limits on his authority.

Current events in the real world reflect a resurgence of attempts by various Rexes to tame the authority of international tribunals. One way is pure politics: to lambaste the international system as inherently biased and dominated by regressive forces. International judges and arbitrators are easy targets who cannot make effective retort.

Another way is to fight law with counter-law. To neutralize international obligations, why not pass new laws, or indeed constitutional amendments, forbidding the international adjudication of claims involving the interests of the State? Why not decree the unenforceability of any award that recognizes obligations which Rex has nullified?

Such temptations are not new. History has known many precursors of Rex. International tribunals have not looked with favor on attempts to defeat international law in this fashion. They have impressive authority on their side. This is familiar territory—the corrective role of international law. As you will already have understood, this is precisely *not* my theme. But before we put it to the side, and consider how an international tribunal should cooperate in giving scope for a national law's *self-correction*, allow me to remind you of one or two fundamental international norms, so that we get a sense of the topography as we travel from the well-known to the new.

The Vienna Convention on the Law of Treaties provides in Article 27: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." The International Law Commission's 2001 draft Articles on State Responsibility similarly set down that the wrongfulness of an act "is not affected by the characterization of the same act as lawful by internal law" (Article 3).

In the context of disputes between states and private foreign parties, the proposition was articulated as follows in an oft-cited ICC award from 1971:

[I]nternational *ordre public* would vigorously reject the proposition that a State organ, when dealing with foreigners, having openly, with knowledge and intent, concluded an arbitration clause that inspires

the cocontractant's confidence, could thereafter, whether in the arbitration or in execution proceedings, invoke the nullity of its own promise.<sup>8</sup>

Among a great number of cases adopting the same approach is the seminal award on jurisdiction in *Benteler v. Belgium* (1981).<sup>9</sup> The Belgian government had objected to arbitral jurisdiction on the grounds of an article of its Civil Code which allowed "public law entities" to agree to arbitration only by means of an international treaty. The case involved an arbitration clause in a contract between private German parties and the state of Belgium itself. The tribunal, comprised of internationally renowned arbitrators (Reymond, Böckstiegel, Franchimont), rejected Belgium's objection after a full review and analysis of authorities and argument. They accepted, in effect, a presumption that public law entities have the capacity to agree to international arbitration, and that this presumption had acquired the status of a substantive international norm overriding contrary national law.

A host of authorities provide powerful support for the proposition that a state may not invoke its own law to vitiate international agreements to arbitrate concluded by its organs—whether this interdiction is viewed as a matter of *ordre public* or one of general principles of law. Indeed, Switzerland, a venerable seat of international arbitration, in 1987 enacted a federal act on private international law which, in Article 177(3), adopted this norm as a matter of mandatory national law. In other words, Swiss law rejects arguments that such foreign national laws can vitiate arbitration agreements.

If purportedly nullifying national law is declared ineffective even when it has taken the form of pre-existing, general enactments, such as the Belgian Civil Code, there is yet stronger reason to reach the same result in the face of *subsequent* decrees.

After this look at what may or may not lie ahead (if one needs to consider international corrective norms), we can return to the subject of this lecture. Leaving aside the possibility of international challenge to Rex's laws of convenience, how do they stand up as national laws in the first place? This is a simple yet profoundly significant question which seems not to have been adequately explored despite the long history of claims by foreigners against states. The importance of the issue should be apparent. Purported laws must themselves be lawful. A text is not to be accepted as an expression of national

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<sup>8</sup> ICC Case No. 1939 (1971), cited in Y. Derains, *Revue de l'arbitrage* 145 (1973).

<sup>9</sup> See J. Paulsson, "May a state invoke its internal law to repudiate consent to international commercial arbitration? Reflections on the *Benteler v. Belgium* Award," 2 *Arb. Int'l* 90 (1986).

law just because national officials deem it expedient. If the enactment violates national “rules of recognition” (to use Hart’s expression for norms of the type often found in a living constitution) it simply is not law.

Mandatory national law (*i.e.* enactments which may not be waived or supplanted by the volition of its subjects) must under no circumstances be automatically equated with public policy. Otherwise the rule of law would indeed be nothing but rule by law. Laws themselves must be subject to the rule of law. A national law which declares itself to be mandatory achieves no greater status by doing so. To the contrary, self-aggrandizing attempts to announce explicitly that a legislative act or an executive order “is a matter of public policy” may well raise suspicions that the law in question is improper at its root—even as a non-mandatory law, *i.e.* a default rule to be applied in the absence of an alternative voluntary arrangement.

A purported mandatory law—like any law—is not necessarily effective even on the national level. In all legal systems worthy of the name, courts may annul or disregard laws which violate the rule of law—often by their constitutional irregularity. *International courts and tribunals must have at least equally great authority if their duty to apply the national law is to have its full meaning.*

International tribunals have no national *lex fori*; their members do not act as officials of any state. Yet they are routinely called upon to deal with national norms: to acknowledge, interpret and apply them. When they do so, they are not paralyzed by declarations issued by Rex or his legislators or his judges. Nor, if Rex has muffled the judiciary, should such an abuse of power be allowed to have the effect of neutralizing the authority of international tribunals. This idea is vital. If Rex’s decrees violate fundamental laws of his country, an international tribunal empowered to apply that national law should not give effect to them—and is under no obligation to wait for the national courts (if ever) to make such a determination; the international tribunal’s authority to determine and apply that national law is plenary. Rex would of course prefer that the constitutionality of his decrees not be subject to testing by any standard other than his will, but, once again, the international tribunal is empowered to determine national law whenever it has the mandate to apply it. When the tribunal does so, it is proper for it to refuse to recognize unlawful laws. Whatever may be its *de facto* fate within the territory controlled by Rex, an international decision rendered on this basis is entitled to recognition everywhere else.

In this way, our mind’s door opens to a more profound understanding of the function of international tribunals when they deal with matters of national law. An international tribunal may reject a discriminatory law because it contravenes a treaty signed by Rex’s predecessor (which therefore is part of the national law), or a statute which disregards a prohibition of retroactivity contained in

the constitution, or indeed a purported modification of the constitution which violated its own rules pertaining to the process of amendment. This is not the application of international law. If the fundamental national law provides that constitutional amendment requires a certain type of parliamentary or popular ratification, a purported enactment that does not satisfy the requirement should be rejected by arbitrators as non-law. In this sense, an unlawful enactment may be seen as a species of denial of justice: an attempt to subvert the legal process by the deployment of purported laws which are contrary to the law.

This discussion has focused on Rex's attempts to avoid law. It would be a mistake for Rex to disregard the possibility that his anti-law initiatives (couched as "full sovereignty") will come back to haunt him the day he seeks to rely on law. He might consider the words of another powerful leader, Vladimir Putin, who was reported in *Russiatoday*<sup>10</sup> as castigating Ukraine for having asked the Kiev Economic Court to prohibit the transit of Russian gas through Ukrainian territory. Ukraine had violated its legal duty, Mr. Putin complained. Under the gas transit contracts, any disagreement should be resolved by international arbitration in Stockholm: "If they keep acting in such a 'civilized' way," he was reported as saying, "the order will never get restored." Yet that is the world of states ruled by Rex and those who are tempted to copy him. International lawyers should applaud Mr. Putin for insisting on the agreed forum, and be prepared to hold his government to the same principle.

## TWO ILLUSTRATIONS

France lives under a constitution of 1958. Some of you may know that in 1974, it became possible for the Parliamentary opposition to seize the *Conseil constitutionnel*. But it was the *Loi constitutionnelle* of 2008 that brought about what some French lawyers believe is the *aboutissement pour l'Etat de droit*. If this *Loi* were implemented by a corresponding *loi organique* as required in the French system, Article 61-1 of the Constitution would thenceforth allow the *Conseil* to be seized at any moment, not just before the passage of legislation. Moreover, any private person or entity could directly challenge the constitutionality of a law when it is invoked before any court. The challenge could not, however, be decided by all courts, but would have to be referred to the relevant supreme court—*Cassation* or *Conseil d'Etat*—which would decide if the question merits an ultimate referral to the *Conseil*.

What does this mean for an international tribunal charged with applying French law? Would the reform change anything? If not, could a different reform

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<sup>10</sup> *Russiatoday*, Jan. 9, 2009, <http://www.russiatoday.com>.

have had more impact? These questions seem most intriguing. Let us see what they imply.

Imagine an international tribunal faced with an argument based on a new French law, and, from the other side, with the rejection of that argument on the grounds that the new act is unconstitutional. But in the French legal system only the *Conseil constitutionnel* could rule on such a challenge. The international tribunal has no access to the *Conseil constitutionnel*. Does that mean that the international tribunal cannot consider the challenge? This is a misguided question, and it is critical to see why. The irrelevance of access to the *Conseil constitutionnel* has nothing to do with French law, but everything to do with the jurisdiction of the international tribunal. It would be an excess of power for the international tribunal to refer to the *Conseil constitutionnel* (if it could) because the former's jurisdictional duty is to apply French law. This duty is not to be delegated to the national *Conseil constitutionnel*.

Let us take one step further. The French reform would limit constitutional challenges to those that allege a violation of constitutional "rights and liberties." (We are talking of challenges brought *par voie d'exception*, *i.e.* a plea of avoidance; the *voie d'action*, *i.e.* a positive challenge, remains a parliamentary prerogative.) In other words, challenging parties may be heard to say that they are the victims of discrimination. But they cannot question the formal constitutional regularity of the law in question, *i.e.* on the grounds of a lack of legislative authority or a procedural irregularity in the adoption of the law. Does this mean that an international tribunal could not question a purported law which was adopted in a constitutionally unlawful manner? Surely this would be inconceivable. An international tribunal empowered to apply French law cannot silently bow to a text without ruling on an allegation that it is unlawful under a norm which as a matter of French law has a higher status.

Here, we perceive two independently decisive factors: first, the international tribunal's jurisdiction—to apply *le droit français*, not bits and pieces of it; and secondly, the principle that an international tribunal applies its own procedure and not that of the country whose substantive law is to be applied. The fact that national procedural arrangements somehow do not allow a practical avenue for the hearing of legal claims cannot possibly, it seems to me, have any effect on the work of an international tribunal charged with the duty of applying that substantive law. International adjudicators are bound to apply the corrective *norm* as a part of the national law, not to seek to conform to national procedures or mechanisms for raising such challenges.

This leaves us with a very broad and useful conclusion. From the standpoint of an international tribunal, the French constitutional reform of 2008 would be an irrelevant event. It promises a significant broadening of the opportunities

for those subject to French jurisdiction to raise constitutional objections to laws invoked against them, but it would give no more authority to international tribunals than what they had before. When applying a national law, an international tribunal cannot be precluded from considering the effect of the highest norms of that law simply because lower norms do not create practical domestic avenues for such examination.

A serious objection must be acknowledged. It is based on the counterargument that to be applicable, any law must be a truly effective norm of the legal order in question, and that it be intended to be applied by the courts of that order. It would be nonsense to say that an international judge or arbitrator applying French law should reject a French parliamentary decree as contrary to the French constitution if the courts of France do not have that authority under *French law*. Is it sufficient to answer to this objection that the international judge or arbitrator applies the ultimate norm enshrined in the constitution, and in so doing may put to the side subordinate questions as to the internal attribution of authority to decide controversies inside the system with respect to such ultimate norms? If a higher norm is acknowledged as fundamental in a legal system, it seems difficult to insist that it has no impact because no national court has been empowered to apply it.

This is a different matter than desuetude. We are not considering the prospect of an international judge or arbitrator applying an antiquated law which no one takes seriously enough even to bother repealing it. We are considering what happens when a vital and therefore unquestionably current higher norm existing in the legal order—like equality before the law—is invoked against a new enactment, but it appears that no national courts are empowered to pronounce upon the constitutionality of the new text. This would be the situation in the U.S. if one imagined that the Supreme Court had not imposed the *Marbury v. Madison* principle of judicial review. It seems perverse to say that this means that the higher norm is not a part of the country's law. (The fact that courts are not given the task of ensuring constitutional conformity does not absolve other organs of government from the duty in principle to comply with the higher norm.) The international jurisdiction does not derive its authority from national law, and therefore is not subjected to the restrictions of national courts. If it is empowered to apply the national law, that includes the superior norm.

There is perhaps no example more instructive than that of the Union of India, which in and of itself may be viewed as a miracle: the world's most populous political entity as an enduring democracy. The history of India's constitution has not been without strife. There have been bitter struggles between the executive and judicial branches. There have been times when

the executive in effect controlled Parliament, and sought to impose ultimate norms on the judiciary, namely alterations to the Constitution itself. The judiciary responded by asserting the right to limit the scope of parliamentary constitutional amendment. In a landmark case of 1967, decided by a 6:5 majority, the Supreme Court held that Parliament could not abridge what the Court deemed to be “fundamental rights.”<sup>11</sup>

The Court found support in a constitutional provision that “the State shall not make any law which takes away or abridges” certain rights. The Government reacted by prompting Parliament to pass the Constitution (24<sup>th</sup> Amendment) Act which provided simply that the passage in question would not apply to Constitutional amendments (*i.e.* as opposed to other “laws”). In other words, Parliament was in the Government’s view constitutionally constrained only when enacting ordinary laws, but had unfettered authority when exercising “constituent powers.”

The Supreme Court confronted this amendment in 1973, in the epic case of *Kesavananda Bharati v. State of Kerala*<sup>12</sup> which altered the constitutional landscape in India forever. The case was argued in the course of 70 full working days. The thirteen judges gave their reasons in no less than 594 pages of the *All India Reporter*. The important point, subscribed to by nine of the judges, was that one cannot *amend* a thing by destroying it; to *change* a thing does not mean to obliterate it. Hence Parliament’s power to amend was limited by the impermissibility of altering the Constitution’s “basic structure or framework.”

In 1976, the powerful government of Indira Gandhi—in the midst of the Emergency of 1975–77—secured the passage of a further amendment to the Constitution which stated rather bluntly that no constitutional amendment “shall be called into question in any court on any ground.”<sup>13</sup> These enactments were struck down by the Supreme Court four years later.<sup>14</sup>

So back to the watershed *Kesavananda Bharati* case. What is one to make of the concept of an unalterable “basic structure or framework”? It is a matter of considerable interest that the germ of this notion is traceable to a lecture given in 1965 by a visiting German constitutional scholar, Professor Dieter Conrad,<sup>15</sup> at the Law Faculty of the Banaras Hindu University on the topic of “Implied Limitations on the Amending Power.” This lecture, famous in India,

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<sup>11</sup> *Golaknath v. State of Punjab*, AIR 1967 SC 1643; 1967 (2) SCR 762.

<sup>12</sup> *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461; 1973 (4) SCC 225.

<sup>13</sup> Constitution (42<sup>nd</sup> Amendment) Act, Sect. 55 (1976).

<sup>14</sup> *Minerva Mills Ltd. v. Union of India*, AIR 1980 SC 1789; 1980 (3) SCC 625.

<sup>15</sup> Professor Conrad subsequently became affiliated with the University of Heidelberg’s South Asia Institute and its branch in New Delhi.

inspired Indian advocates to consider the importance of judicial defenses to extreme cases of constitutional amendment. It appears that Indian lawyers were especially alarmed by the specter of amendments such as those introduced in Germany in the days of the Weimar Republic.

Still, how do we know when the “basic structure or framework” is under attack? You may think that this might be the example to end all examples of an open-textured normative statement. You would not be wrong. Certainly many voices in India have been heard railing in exasperation, along the lines of this sentence from an introductory textbook: “The expression has now become a shop-worn, hackneyed phrase and like a galaxy it expands every day.” Certainly the Supreme Court itself has not provided a stable and exhaustive list. Still, there appear to be a number of core values which are inviolate, such as democracy, secularism, federalism, parliamentarianism (as opposed to presidential rule), and the dignity of individuals as reflected in a number of fundamental rights.<sup>16</sup>

I will not take you further into Indian constitutional law. The example is intended to no more than illustrate the impermissibility for any arbitrator, when applying Indian law, to disregard these absolutely fundamental features of what Indian law is, of how it is to be understood, of how reliance on purported Indian positive *laws* are to be evaluated. To accept heedlessly what an emergency dictator might tell his or her Parliament to do to the Constitution seems nothing less than *une forfaiture*—a dereliction of duty on the part of the international decision-maker.

Arbitrators are unlikely to exercise their authority at this high normative level very often. Constitutional issues do not appear frequently on the arbitral menu. A thousand cases may well go by, or the entire career of a professional arbitrator, without the need to decide whether a law is unlawful. Nevertheless, it is important to see that arbitration as a social institution is entitled to play this controlling role by virtue of the recognition that arbitrators are given the authority to apply the law—the whole law, including its ultimate ramparts. (The fact that such arbitral decisions may be reviewable by courts having the last word with respect to matters of public policy—with a variable degree of territorial effect—does not affect this analysis.) In this way, arbitrators as well as courts may play their proper role in ensuring that law does not present itself

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<sup>16</sup> In the landmark 1953 case of *Kol Ha'am and Others v. Minister of the Interior*, 7 Piske'y Din 871, the Israeli Supreme Court in effect proclaimed constitutional principles to fill a vacuum. Chief Justice Arganat explained that while the Declaration of Independence was not a constitutional act which determined the validity of statutes, it nevertheless reflected the expression of a “foundation of liberty.” Hence, notwithstanding the authority of the Minister of the Interior under the Press Ordinance to regulate the media, the Supreme Court interpreted the statute so as to limit the censorship of *Kol Ha'am*, a communist newspaper which regularly expressed anti-Zionist positions.

as a blank sheet of paper upon which any dictator or dominant group can write laws illegitimate within the legal order, and thereby debase law itself.

Of course, it may well be that in cases where national laws are nationally unlawful, they would also be disentitled to applicability as a matter of international public policy. But that is no reason to sidestep the initial duty to apply national law in the fundamental sense developed above. True, careful tribunals may find it proper to hold that the challenged law is defective in two ways, each of which would be sufficient to disqualify it. The value of the approach developed here, however, is that the outcome is shown not to be an international imposition on national law, but a vibrant affirmation of that same law.

The proposition that an international tribunal has the authority and indeed duty to take account of national law in this profound sense does not strike me as unorthodox. For example, it seems to find a firm anchor in no less a venerable international instrument than the Vienna Convention on the Law of Treaties. Article 46 of the Convention says this:

A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

Now we need to let that sink in. Here we have an international treaty which naturally speaks to international tribunals, and which instructs such tribunals to make absolutely fundamental determinations as to essential constitutional postulates of what I will refer to—by now you expect it—as the relevant national *droit*. That is exactly what Article 46 says. It does not command the international tribunal to ask the ruler of the country in question to declare what is “fundamental” and what is not. It does not require international tribunals to obey the rulings of national courts—or to be victims of paralysis if those courts are silent, or silenced. Their authority is plenary.

## CONCLUSIONS

I have come to the end of the description of the cluster of ideas which I invite you to explore. Of course we lawyers do not do business with “clusters.” So let me conclude by disaggregating a series of specific observations which I now set loose from their moorings to float away on the perilous sea of international criticism.

1. A fundamental issue of applicable law seems to have escaped sustained attention. This issue is likely to have myriad ramifications which lie beneath the surface of my observations, unexamined by me today, and deserving of future analysis.

2. Broadly speaking, this issue concerns the international court or tribunal's role in determining whether specific prescriptions of national law are valid by reference to fundamental norms of that very law.

3. We may be at an even higher level of abstraction than constitutional law, because in difficult cases the controversy reaches the very licitness of purported constitutional amendments.

4. The expression "higher level of abstraction" is not to be taken as a synonym for sterile intellectualization. In difficult cases of the greatest importance to an entire society, it is precisely the case that the abuse of power ultimately confronts a high—and powerful—abstraction. It is worth thinking about.

5. At one level down, we find issues of licitness of purported acts of legislation. This is ordinary constitutional law, *i.e.* evaluating enactments by the light of the formal constitution in place. There is nothing at all unorthodox about the proposition that international tribunals empowered to apply national law make plenary determinations about constitutionality—no matter what government officials say, without any subservience to pronouncements by a national judiciary.

6. Although there may be overlap, there is no reason to expect that national corrective norms are coextensive with international ones. The latter are perhaps more likely to involve high thresholds, *e.g.* findings of violation of minimum standards. The former may be quite ordinary, affecting regulations which would not stand a chance of being seen as violative of international law, yet are to be denied effect because they fail to satisfy a formal national requirement for effectiveness.

7. It is essential not to equate purported mandatory laws with public policy. The declaration that an enactment or decree is "mandatory" achieves no higher status by that simple expedient. Laws themselves must be subject to the rule of law.

8. To say that international adjudicators have plenary jurisdiction to apply national law implies that they may disregard the views of the national supreme court. Naturally this prospect must be viewed with circumspection. At one extreme, an international tribunal should not hesitate to contradict a national supreme court which has very recently expressed its views in the context of the very matter which has now reached the international domain. At another extreme, the international tribunal should respect a venerable national supreme court decision which has held sway for decades and achieved an unquestioned

normative status as part of the national law. Between the two extremes lies the challenge, familiar to so many issues of fundamental interest to lawyers, of locating a dividing line. Yet the existence of twilight does not disprove the reality of day and night.

9. We may be assisted, when we configure our thoughts, by reflecting on a surprising *lacuna* of the English language, but of course this is a sideshow. We may discuss semantics to help our native English-speaking friends escape their predicament. The central substantive issue remains, even in languages having the advantage of apter expressions.

10. We should naturally consider the effect of the application of national corrective norms on perceptions of the legitimacy of international adjudication. It may be argued, on the one hand, that national sentiment could be offended when international adjudicators presume to apply national norms understandable only to those who are part of the national community. Certainly it is likely that the government of the day, and its supporters of the day, will take umbrage. But on the other hand, as long as international adjudicators are mandated to apply the national law (which is after all something which *ex hypothesi* the relevant state insisted on when committing to international jurisdiction), they simply cannot do so selectively; the difficult questions are precisely the ones likely to be important. In the long run, when a government has overreached, when it has cowed legislators or judges, when it has followed a practice of weakening the judiciary, even citizens of the country whose law is in question may come to see the international tribunal as a defender of enduring national values. Of course the work of international adjudicators will be carefully examined for failure to understand national norms. Their ability and discernment will be paramount. But one should have faith that a fully and judiciously motivated decision, reached after a painstaking ascertainment of the sources of national law, will be accepted by thoughtful nationals as wholly legitimate. If that is not so, why should one have higher hopes for perceptions of the way an international tribunal applies international norms, like “fair and equitable treatment,” which, in the view of detractors, are nebulous and therefore ultimately arbitrary?

11. The international exercise of this authority will never be popular with a government which is insisting on a purported national-law impediment to international jurisdiction, or on a purported mandatory rule which imposes a solution on the merits. But if international adjudication or arbitration is to be a popularity contest, we must all get new jobs because that leaves only force and negotiation. Does the world need more law, or more politics? Views seem to differ, depending on the vicissitudes of current affairs, depending on the question of the day. Proponents of the rule of law should strive for more durable foundations.