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BOOK REVIEWS

David Kinley, *The European Convention on Human Rights: Compliance without Incorporation*. Aldershot etc.: Dartmouth, 1993. ix + 202 pages. ISBN 1-85521-298-6. GBP 35.

"Freedom of speech is one of the characteristics of democracy; nowhere is it more freely practised than in Britain", so Hamlyn's Childrens' Encyclopedia (1971) assures its readership. Not everyone in the United Kingdom would agree as far as the freedom of expression is concerned, nor as concerns some other fundamental rights and freedoms. In fact, the introduction of a catalogue of fundamental rights similar to those contained in some foreign constitutions has been vociferously and unsuccessfully advocated by many in the UK. There is, however, not much support for the idea in the Labour and Conservative parties. Because the introduction of a bill of rights would only be meaningful if it were entrenched and enforceable in court, as is actually proposed, it would mean a major change in the British Constitution. The major objections are related to the fact that it would bind the hands and feet of the sovereign legislative power and would shift sovereignty from the legislature to the judiciary in a manner which under the present constitution is inconceivable. The objections against the incorporation of the European Convention on Human Rights and Fundamental Freedoms into the national legal system, which in the UK is necessary to give it full effect within the legal order, are essentially identical. It is, of course, not that the British have any objections to the rights and freedoms contained in this treaty, to which the United Kingdom has been a party since its inception – but incorporation would presumably amount to the introduction of the controversial Bill of Rights.

In the book under review Kinley provides an overview of the pros and cons put forward in the discussion over the Bill of Rights and the incorporation of the European Convention. Dissatisfied with the stalemate reached in that debate, Kinley comes up with the proposal to introduce a scheme of parliamentary pre-legislative scrutiny of both bills and secondary legislation (mainly statutory instruments). This scrutiny should be undertaken as far as bills are concerned by a Joint Committee of both Houses of Parliament on the European Convention on Human Rights, which would be assisted in its duties by a specially appointed counsel, the Examiner for the European Conven-

tion on Human Rights. Scrutiny of secondary legislation would be achieved by an extension of the terms of reference of the existent Joint and House of Commons Select Committees on Statutory Instruments, assisted by the office of Speaker's Counsel.

Kinley's book is a detailed and densely argued defence of this proposal. It is based on an analysis of the place of pre-legislative scrutiny within the legislative decision-making process, an analysis of the infringements of the European Convention by the United Kingdom as established by the European Court of Human Rights (most of which concern violations of the Convention by primary and secondary legislation), a brief comparison with systems of pre-legislative scrutiny by parliament, the executive and independent bodies in Australia, New Zealand and France respectively, and an assessment of the effect the proposed scheme would have had on legislation which violates the Convention. The book is of high quality and should be of value not only to students of British constitutional law, but to anyone with an interest in legal questions concerning the involvement of national parliaments in carrying out treaty obligations.

On the whole, the case Kinley makes is fairly convincing, based as it is on a broad and thorough constitutional analysis, although admittedly his reasoning is sometimes repetitive. The pre-legislative scrutiny proposed, would indeed not require nor imply any fundamental changes in the British constitutional framework. Kinley submits it would also significantly improve the standards of compliance with human rights. Even without the detailed justification he provides, one would have been inclined to support this submission. Sometimes, the arguments which Kinley uses are not juridical but moral in nature, especially when he is preparing the ground for the conclusion that something ought to be done about improving the conformity of legislation with the Convention. Unfortunately the moral arguments are of the superficial kind which hardly goes beyond the rhetoric of moral indignation and seems merely to sollicit the response: "How unjust, how evil!" That is not particularly helpful. In the plethora of arguments one which could have helped is missing. It concerns the established constitutional doctrine of parliamentary sovereignty in relation to the equally undisputed bindingness of treaty obligations which the United Kingdom has entered into. If the bindingness of treaty obligations is generally accepted, precisely the dualist assumption underlying the sovereignty of parliament would foster the necessity to bring about conformity of national legislation with treaty obligations during the very process of legislation through the means of parliamentary scrutiny.

It is not in the nature of Kinley's book overly to emphasize the limitations of pre-legislative parliamentary scrutiny, but is within the province of the book-reviewer's duty to do so. Firstly, it seems to be a historical contingency that scrutiny should be limited to conformity with this particular human rights treaty: in the bill of rights debate, reference to human rights treaties happens only to have been made to the European Convention on Human Rights. But the UK is also party to the 1961 European Social Charter (UKTS 38 (1965), Cmnd. 2643), the UN International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of all Forms of Racial Discrimination, to mention only a few important international legal instruments in the

sphere of the protection of fundamental rights. Why not include those? Indeed, why should one not include other international instruments aiming to protect citizens' rights other than human rights, including Community law? As a matter of fact the Court of Justice of the European Communities extends the protection of fundamental rights – via the general principles of Community law – to "international *treaties* for the protection of human rights on which the Member States have collaborated or of which they are signatories" (*Nold II*) – note the plural. Hence, British courts already have to take these other human rights treaties into account within the sphere of application of Community law. In the perspective sketched by Kinley, it would seem to be the duty of parliament, if only towards the citizens it represents, to take full account of the obligations ensuing from these other international engagements also.

A second point concerns the suitability of parliamentary scrutiny. The scrutiny proposed is formally a task of the relevant parliamentary committees. But the nature of assessing bills and (draft) secondary legislation laid before the committee is more juridical than political. As a consequence, the existent Select Committee on European Legislation has a problem in finding MPs with a minimal interest in the Committee's work to become member of the committee. In his proposal Kinley lets the real work be done by the clerk to the proposed Committee, the "Examiner". Kinley gives us good reason to believe that this might work reasonbly well in the British context and in the light of the overall favourable experience with the Select Committees. But there is no guarantee that the Committee, or parliament in any of the later stages of the legislative process, would not succumb to the pressures inherent in the British legislative system, stemming from the majority system and the fact that the government of the day can use its majority to get its business through, and let political opportunism prevail over strict legal analysis. Whereas in the UK the scrutiny of draft EC decisions still has a definite political edge to it, one may wonder whether MPs were ever to think that they made a good chance of winning a point politically by questioning the conformity of a bill with the European Convention of Human Rights. Judging by the headlines, the present mood in the Commons seems to lend support to MPs who think that they can win a point by lavishing light-hearted abuse over the qualities of the allegedly judicially unexperienced academics sitting on the European Court of Human Rights.

Thirdly, pre-legislative scrutiny may well prevent a number of infringements of the European Convention, but only those that are of a general nature and can, upon scrutiny, be foreseen. Pre-legislative scrutiny can only give an abstract assessment on proposed legislation which is by definition general. Hence, it cannot be a substitute for judicial protection which only courts can provide in the concrete cases which require an assessment of all the particular circumstances of the case. The political and constitutional choice not to incorporate the Convention within the national legal order of the United Kingdom, is ultimately the choice to expose oneself in all such cases to the judgment of the European Court of Human Rights. Whatever one may think of the inexpediency in terms of time, money, subsidiarity and all that, for litigants to have to go to Strasbourg, I find – differently from what Kinley suggests at several places in the book – not much that is dishonourable in this choice. After all, it is also paradoxically

the choice to have such cases decided by an international court rather than by a British court.

Leonard F.M. Besselink
Utrecht

J.K. Wibmer, *Rechtsschutz von Produktausstattungen in Europa. Eine vergleichende Untersuchung des deutschen, englischen, französischen, italienischen, schweizerischen, europäischen und internationalen Rechts*. Ph.D. Thesis (Zürich). Bern: Stämpfli, 1995. xli + 400 pages, Sfr. 98.–, DM 122.–, öS 951.–. ISBN 3-7272-0586-5.

In a recent decision involving a trade mark, the European Court of Justice pointed out that national trade-mark rights are territorial and independent of each other. As for the principle of territoriality, it "means that it is the law of the country where protection of a trade mark is sought which determines the conditions of that protection." (Case C-9/93 *IHT Internationale Heiztechnik GmbH* v. *Ideal Standard GmbH* [1994] ECR I-2788 at paras. 21 and 22). It is this factual territoriality of intellectual property law as opposed to the often seen "factual or economic internationality" of the trade marks which is the starting point of Ms Wibmer's Ph.D. thesis.

The book deals with a specific aspect of intellectual property law, namely the legal protection of a product design or "get-up" (*Produktausstattung*), which the author describes as the total of a product's objective or subjective material characteristics, i.e. those which can be perceived through the five senses (pp. 3 and 4). The aim of the book is to show systematically in how far the law of five European countries (Germany, Great Britain, France, Italy and Switzerland), the law of the European Union and other international law grant effective protection of the economic interests involved in the context of product "get-ups".

The book is divided into three parts. The first part deals with basic economic aspects of the protection of product "get-ups". A large, second part (240 pages) describes in detail the laws in the five selected countries already mentioned on the protection of a product's "get-up". This part is divided into three chapters: on trade mark law, on design law and copyright, and on competition law and criminal law. Within those chapters, the legal systems of the five countries are described individually. There are lots of summaries: at the end of every part and the subpart, and at the end of every chapter (here a comparative summary and conclusions from an economic perspective). The third part of the book (52 pages) deals with harmonization, first with regard to the European Union (and the European Economic Area) and then with regard to other international law such as the GATT and law by the World Organization on Intellectual Property (WIPO). The book concludes with a nine-page overall summary of the results.

If one is aware of the starting point that national laws are not tailored to international situations involving intellectual property rights and, moreover, "in no area of intellectual property law are national laws as diverse as those that protect designs" (Groves,

Martino, Miskin and Richards, *Intellectual Property and the Internal Market of the European Community*, London etc.: Graham & Trotman, 1993, at p. 109), the findings presented in the summaries and conclusions are not very surprising. The author detects protection islands ("Schutzinseln") and protection gaps ("Schutzlöcher") everywhere, i.e. a situation with lots of differences between the various legal systems which makes it very hard to act internationally when dealing with product designs.

From a comparative perspective, probably the most interesting finding of the book is that in the systems examined there seems to be a certain connection between the protection of a design by copyright law and by trade mark law. Countries where there is protection under copyright of the product design from the beginning of its existence, independent from registration (like for instance in France), tend to have a trade mark law which is based on an "absolute" principle of registration, i.e. protection under trade mark law is only possible if the design is registered as a trade mark (and it is also only then that protection under competition law is possible). On the other hand, in countries where there is a copyright law with a registration system, protection under trade mark law (and under competition law) is possible without registration. As for Switzerland, it has chosen a somewhat unfortunate combination of these two approaches, having a trade mark law based on a registration system allowing protection of product designs. In cumulation, there is the possibility of protection of a product design under copyright law and competition law. This approach has very negative consequences if a product design which is neither registered under trade mark law nor under patent law: in this case, there is no legal protection whatsoever under Swiss law.

It is obvious that Ms Wibmer has put a great effort in her thesis which offers a wealth of information. The author has certainly succeeded in presenting a systematic study, especially of the national laws, which is what she declares in the introduction to her thesis to be one of the aims of her work. However, with regard to the selection of these national laws, it would be interesting to know what exactly were the reasons for choosing the laws of Germany, Great Britain, France, Italy and Switzerland. Unfortunately, this is not explained in the book. In my view, it is to be regretted that other laws which might be of special interest in the present context – such as the unified BENELUX trade-mark law – have not been taken into account. As for the part devoted to EC law, it seems to be limited to a description and an analysis of the legislation (inlcuding planned and draft legislation). It touches only very briefly upon the relevant case law and the question whether the chosen national laws are compatible with existing EC legislation. Considering the strong connections between EC law and national law, and the eminence of the European Court of Justice case law, that is a pity. The above-mentioned "*Idealstandard*" judgment (which, however, came out too late for Ms Wibmer to have included in her work) provides a splendid example, illustrating very clearly the crucial role of case law in the context of EC law in general and in EC trade mark law specifically.

C. Tobler
Leiden