FROM SYMBIOSIS TO SYNERGY?

A COMPARATIVE ANALYSIS OF THE IMPACT OF INTERNATIONAL HUMAN RIGHTS NORMS ON THE LEGAL SYSTEMS OF CANADA AND AUSTRALIA

by

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To the memory of my Grandmother

Beatrice Anne ("Nancy") Bennett
1907-1993

who inspired this thesis by asking a question
both simple and profound:

"What on earth are human rights?"

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ABSTRACT

Is it possible to transform a perception of human dignity into a workable reality by means of the law? Such a perception is itself not immutable, and its expression in a legal system further skews it due to the systemic problems within that system. When the position is one with respect to human rights which are developed in international law, and are then transferred into domestic legal systems, the potential pitfalls are magnified further again. The nature of freedom and equality thus becomes contingent upon these factors.

The development of human rights in the international legal system has resulted in compromised rights, but they are in an explicit, implied and functional symbiosis with domestic legal systems. This relationship gives them meaning in an operational context. The Common Law has a reputation for supporting and protecting people's rights which is largely exaggerated. The use of international human rights norms can help to improve this situation.

The concept of symbiosis more accurately explains the relationship between international human rights law and domestic law than do theories of monism, dualism, transformation or incorporation, particularly because of the asymmetry between the international and domestic legal systems. It is also of more use in considering the impact of human rights norms on a domestic system than only considering the use of reservations to human rights treaties or the existence or absence of a constitutionally entrenched Bill of Rights.

If law is a conjoint expression of power and ideology, the issue becomes: whose power and whose (or what) ideology? A comparison between Canada and Australia helps to expose the factors affecting the receptivity of or resistance to the use of human rights norms in domestic systems, and ultimately indicates the extent to which Canada and Australia are implementing, or are able to implement, their international human rights obligations. At the moment, that use is minimal, as well as being inconsistent, sometimes dubious and occasionally wrong. A synergy between the two systems can and sometimes does occur, but this is infrequent.

ABBREVIATIONS

DDA	Disability Discrimination Act 1992 (Cth)
HREOCA	Human Rights and Equal Opportunity Commission Act 1986 (Cth)
RDA	Racial Discrimination Act 1975 (Cth)
SDA	Sex Discrimination Act 1984 (Cth)
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICCPR	International Covenant on Civil and Political Rights
UDHR	Universal Declaration of Human Rights

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CHAPTER 1

INTRODUCTION

1.1 Myths, Fables, Fairy Tales and Other Stories: The Paradoxes of the Human Condition

Human rights are as much about human imagery as about human law: they are not just about rights - they are about how we, as humans, see ourselves. And the image is one crowded with paradox.

Our own century has produced both Adolph Hitler and Albert Schweitzer; Ma Barker as well as Mother Theresa. It is true that humans do not always act merely at the level of basest self-interest. History is full of examples of selfishness and selflessness. In wars, natural disasters and everyday life, we can see callousness, and also see what we consider to be best about ourselves rising up out of appalling tragedy like "stars twinkling through the loops of time."[1] Yet our grip on humanity is fragile and can be wrested away by war or dictatorship,[2] or let go, wittingly or unwittingly. The reality is that children in many South American

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[1] Byron, "Childe Harold's Pilgrimage", Canto 4, Stanza 144

[2] See, for example, Jung Chang: Wild Swans: Three Daughters of China (1992, Flamingo Press, London) which describes life in Maoist China.

countries (to take but one example) literally live on garbage dumps, and hunt like modern-day Neanderthals not for food, but for the two kilos of aluminium cans which will provide them with enough money to buy breakfast. A situation like this is not always the result of sheer callousness, but sometimes of stupidity or lack of foresight hidden by the best of intentions. In Rio, the slums are known as "favella". This is a Spanish word for "wildflower" - they just keep growing even if trampled upon. However, the seed from which they grew was in fact the freeing of the slaves - who upon emancipation moved from the country to the cities which could not properly accommodate them. We have not always known how to most wisely use this sense of our humanity.

What we must not only consider, but confront, is what our conceptions of human dignity are, and whether they can be transformed into a workable legal reality. Are assertions of an inherent human dignity merely articulations of a symbol? When these aspirations are translated into law are they, or can they be, articulations of a truth, the "E=mc2" of the law, or are they in effect only a gold-plated icon: the body of a man with the head of an ox?

If we regard notions of humanity in terms not only of rights but of legal rights of a special type (namely, being "inalienable" and "fundamental") why did it take us so long to develop them? Why has what is supposed to be axiomatic, even obvious, undergone such an arduous and protracted creation process? And since the first

significant international attempts at articulation in a rights-based context (the Universal Declaration of Human Rights in 1948), why has the succeeding catch-up phase been in comparison so breathtakingly quick? Conversely, why was the de jure abolition of slavery and the slave trade possible more than a century before the current legal concept of human rights emerged?

Some commentators have claimed that human rights are little more than myth, that they are something less than "real" or are, in effect, wish-lists of the well-intentioned optimists in a cynical world of realpolitik.[3] Myths, fables and fairy tales all relate to the perception of what it is to be human. Myths are attempts to explain what we don't know, (for example about the creation of the universe or the creation of human beings) so that we can better appreciate our place in that creation. The myths of the ancient Greek gods and of Adam and Eve are examples. Fables are short stories used to convey a moral lesson (like Aesop's fables such as "The Grasshopper and the Ant") which help us to live "better" lives in that place in creation. Fairy tales (literally, tales about fairies, but more often stories about anthropomorphic animals interacting with humans - and often children) deal with

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[3] For example, H. Klenner, "Human Rights: A Battle Cry for Social Change or a Challenge to Philosophy of Law?", Paper delivered to the World Congress on Philosophy of Law and Social Philosophy, Sydney, 1977, who writes that human rights are neither eternal truths nor supreme values (at p.8). See also L.J.M. Cooray (ed): Human Rights in Australia (1985, A.C.F.R. Community Education Project, Sydney) which claims that human rights treaties in particular have confused the distinction between rights and needs (at Chapter 3). Others, such as Maurice Cranston: What Are Human Rights? (2nd ed., 1973, Bodley Head, London) particularly object to certain types of rights, especially economic and social rights, being regarded as human rights.

existential problems. They deal with inner moral development. They illustrate that struggle against severe difficulties is an intrinsic part of human existence. On a deeper level, they reflect the unconscious.[4]

In essence, human rights also deal with, and their content and application are a reflection of, our perceptions of our place in the scheme of things and how to live better lives within that place, and ultimately can impact upon individual moral development.

But context is crucial, in myths, fables, fairy tales and human rights. Unlike many fables and myths, fairy tales are essentially optimistic ("And they all lived happily ever after.")[5] Indeed, they are sometimes aggressively so. Thus are to be found in

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[4] For a post-Freudian analysis of fairy tales, see Bruno Bettelheim: The Uses of Enchantment: The Meaning and Importance of Fairy Tales (1976, Alfred A Knopf, New York). As Bettelheim also points out (at pp.10ff), fairy tales, fables and most myths usually have a clear moral message. But fables and myths are more healthily cynical - sceptical even - about the human condition, rather than being cloyingly romanticised. The fairy tale does not pose for the child the question "Do I want to be good?", but rather "Who in this story do I want to be like?". The moral is there, but it is accepted by suggestion rather than intonement. The listener/reader finds their own solution to the real-world existential dilemmas underlying the fantasy elements of the story. Fairy tales relate to the person's internal reality rather than to external reality. But they also have the effect of giving meaning and value to that external reality which is at one and the same time personal, but communal. To the extent that human rights may only reflect symbols or ideas, their external effect is similar.

[5] Bettelheim, at pp.42-43, contrasts the fairy tales of "The Three Little Pigs" with the fable of "The Ant and the Grasshopper". Both involve a distinction between time wasted on pleasure contrasted with the advantages of hard work. At the end of the fable, the grasshopper who has spent all summer singing and by winter is starving, asks the ant for some of the food it has been busily collecting all summer. The ant replies: "Since you could sing all summer, you may dance all winter." In contrast, when the houses of straw and sticks are blown over all the little pigs live in the house

fairy tales the elderly and the infirm being devoured by anthropomorphic animals ("Little Red Riding Hood"); theft from and violence towards those who possess different physical characteristics ("Jack and the Beanstalk"); the use of children as hostages to enforce performance of a contract ("The Pied Piper"); the use of spells and poisons - usually against an innocent third party - to wreak revenge for real or supposed wrongs ("Sleeping Beauty", "Snow White"); cruelty to children and enforced child labour ("Cinderella"); and the murder by incineration of the elderly and eccentric for their real or supposed malicious intentions ("Hansel and Gretel"). In fairy tales the message is: "This is not real; concentrate on the moral". The difference between the treatment of a child in "Cinderella" and in "Oliver Twist", or between the demise of the victim at the hands of people who hate them in "Hansel and Gretel" and in the gas chambers of Auschwitz or Dachau, is not so much in the actual content of the events described as in the handling of the material to produce the desired emotional response. The contextual medium is as important as the substantive matter being described.

This is not restricted to fairy tales. It also applies to the portrayal of history or to the exposition of a moral point of view. The dilemma is to understand properly the effect the context may have on the appreciation and acceptance of (and therefore on the ultimate effectiveness of) the substance. There can be a manipulation of

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of bricks and in addition defeat their common enemy, the wolf. In the fable, the wrong choice leads to starvation. In the fairy tale, personal development is possible and at the end the "reality" is that of a synthesis of pleasure with hard work by enjoying the comforts and protection of the brick house.

emotions, expectations and understanding, whether intentional or not.

Human rights have come to be regarded as having a powerful, even talismanic, quality. Law itself is a context for the delivery of moral principles, especially when the substance of the rules relates to human rights. It can imbue those principles with authority and create an emotional response ("I should do this; it must be right because it is the law"). But, by paradox, it is a context which by its very nature is susceptible to manipulation.

Consider this ancient Arabic fable. There was once a very wealthy man. He had everything. Including an apparently incurable illness. In desperation, he vowed to his God that if his life would be spared he would sell his magnificent home and donate the proceeds to the poor. It came to pass that he was in fact cured and, remembering his vow, felt obliged to dispose of his home for the benefit of the poor. Not being a man to ignore his obligations, he put the home on the market and the price asked was one silver piece. The contract of sale, however, was conditional upon the acceptance by the purchaser of a parallel contract, under which the purchaser agreed to buy the vendor's cat (which also resided in the house) for the price of 10,000 silver pieces.

A purchaser was eventually found, both contracts being entered into and performed. Thereupon, the man discharged his vow by donating one silver piece

(the purchase price of the house) to the poor. The moral: man (and, presumably, woman) will interpret an obligation in the manner most advantageous to himself.

Changing the field from the optional to the obligatory, and in particular from a moral obligation to a legal obligation, transforms the obligation from "I can" through to "I ought" to "I must" - but this is only guaranteed in minimalist terms. We must not just consider the law in its relevant context (although this is essential) we must appreciate that the law is the context as well, when we are considering human rights.

The articulation of human rights is essentially the process of choice with respect to what the "better" side of ourselves is, an attempt to prevent being sucked into the black vortex of the "other" side of our own natures. But that process is conditioned by circumstance and hedged by other realities: there are paradoxes which exist in our own nature; there are shortcomings in the process of articulating our aspirations; there is an inbuilt possibility of the manipulation of rules recognised as legal; there is, above all, the effect of all of these operating each on the other.

Does this then mean that human rights are a fantasy, a type of Santa Claus for well-intentioned grown ups? It is in fact not a matter of a simplistic choice between fantasy and reality: rights are enigmatic, and human rights by their very nature must be more so. The enigma of the nature of human beings has been implanted

into the conundrum of modern day existence, and this is now being articulated in the context of law which, however uncertain it may in reality be, strives for certainty, rationality and predictability.

Perhaps the process can be described as did Franz Kafka in his diaries as "a delicate business, walking as it were on tiptoe across a worm-eaten beam over a gulf."[6] Or it is perhaps more like trying to perform the trick of walking on water. In Christian tradition, this ability has been ascribed to divine powers. Divine powers were later to be transmogrified and articulated as a divinely-inspired Natural Law. With the demise of the popularity of a divinely-based Natural Law, God has been replaced by human beings and divine precepts by human aspirations. If the process is like one of attempting to walk on water, we are not being supported by immutable external forces but are in fact treading on our own reflection glimpsed in that water: it is our own self-image which sustains us.

Being conscious of being human is what sets us apart, in our own minds, from all the other animals and is the ultimate commonality despite all of our other differences such as sex, colour, nationality, religion, etc. It is the essential basis of human rights. And yet through human rights we also demand the right to be different for exactly the same reason: because we are humans with "inherent" rights. It is the ultimate paradox: a perceived right to difference based on a belief

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[6] Franz Kafka: Journal intime p.230, translated in Birthright of Man (UNESCO, 1969) p.558.

in essential sameness. And the context of the law, trying to encompass this paradox, sometimes threatens to burst under the strain like an over-filled balloon. Indeed, in order to understand this and to apply the law effectively, many scholars now consider stories to be essential.[7] The double distillation, through international law and then domestic law, of symbols of hope into legal norms, is a process which will decisively impel human rights towards the simple fantasy of fairy tales, the stoical moralising of fables, or towards an effective endorsement of human dignity. This thesis looks at how Canada and Australia are faring in this struggle.

1.2 From the Fantastical to the More Mundane: Why I am Writing this Thesis

We are supposed to "have" human rights. They are not "given" by the law but are, according to the Preamble to the Universal Declaration of Human Rights, inherent and inalienable in all human beings. This thesis is concerned with an issue of both theoretical and practical importance: the impact international human rights norms have (or can have) on the domestic legal systems of Canada and Australia, what factors affect and effect this and, as a result, to what extent both countries can claim that they are implementing their international obligations in this regard, most importantly by ensuring that the individuals under their respective jurisdictions can

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[7] See, for example, Richard Delgardo, "Storytelling for Oppositionists and Others: A Plea for Narrative" (1989) 87 Michigan L.R. 2411.

validate and enforce their human rights domestically. This impact is examined to determine whether a synergistic effect is produced (ie, whether the end result amounts to more than merely the sum of its individual domestic and international components) and why - or why not.

This is not to say that implementation and enforcement never occur at the international level, but as far as individuals are concerned it is the potential for enforcement at the domestic level which is of the most immediate importance and is more accessible. Indeed, for individuals the exhaustion of the domestic level of redress is usually an essential precondition to proceedings at an international level, whether those proceedings are taken by that individual or by that person's State on their behalf.[8]

The extent to which the objects of international human rights norms (i.e., individual human beings) can become transmogrified into the subjects of legal rights and be able to enforce those rights is affected by the nature and structure of both the international and domestic legal systems, in particular by the different law-creating processes in each, and thus by the asymmetrical nature of the relationship between the two systems. It is also affected by the nature of human rights themselves: open-ended (even vague) and non-synallagmatic in international law, but nevertheless in a symbiotic relationship to domestic law which gives them

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[8] Interhandel Case (Switzerland v USA) ICJ Rep. 1959, 25.

meaning in an operational context.

Several issues and problems arise from this investigation: are human rights natural or constructed?; how universal are they?; what do they entail?; what is the domestic "standard of delivery" of human rights norms?; what factors influence the choice of modalities of domestic implementation?; what is the effect generally on the domestic recognition and implementation of international law?; is the comparative method a useful device?; are there lessons that can be learned by countries other than Canada and Australia?; what are the future prospects of international human rights?

If law is "a conjoint expression of power and ideology"[9] the question must become: whose power and whose (or what) ideology? There has been no fixed content to the notion of human dignity. Natural Law has an ancient pedigree but natural rights grew particularly out of the Enlightenment and Romantic periods; human rights grew out of the period of modernism; human rights operating in domestic legal systems today must cope in a postmodern world. At the very least, this investigation will underscore, and hopefully make apparent, the importance and necessity of what today we call human rights, both in themselves (despite their many problems) and as a fundamental part of domestic legal systems.

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[9] Colin Sumner, "The Ideological Nature of Law" in Piers Beirne & Richard Quinney (eds): Marxism and Law (1982, John Wiley & Sons, New York), at p.255.

1.3 Methodology

This thesis adopts primarily a comparative approach: it examines the differences and similarities of the impact of human rights norms between the legal systems of Canada and Australia. The comparative method is useful in that it offers a perspective which can provide a starting point for critical analysis and aids an appreciation of the social function of rules by clarifying the historical/political context. Its function is not merely documentary.[10] However, in order to explain the impact of human rights norms on anything, those norms have first to be explained in terms of their nature, function and meaning (particularly in the light of the challenges of postmodernism). As well, the entities upon which these norms have an impact must be considered similarly, to identify the factors affecting the levels of receptivity or resistance to them. The process is imbued with values (and not necessarily the same ones) at both the international and domestic levels. The thesis is therefore also an interdisciplinary examination of the principal historical, political, social, constitutional, philosophical and jurisprudential factors, considered both synchronically and diachronically, which have played a part. The "nature of the (human rights) beast" can only be appreciated as part of a rights discourse in a legal, political and cultural matrix. (This makes for a long thesis - but, I contend,

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[10] See M.A. Glendon, M.W. Gordon & C. Osakwe: Comparative Legal Traditions (1985, West Publishing Co, St. Paul); C. Varga: Comparative Legal Cultures (1992, New York U.P., New York).

it is nevertheless a succinct one: my very point is that all these factors acting in combination produce and affect the "impact" and provide the context which must be taken into account lest the comparison and its results be superficial). The comparison is thus, in effect, from two perspectives (which might be called vertical and horizontal): a (horizontal) comparison between the domestic laws and legal structures of Canada and Australia, and a (vertical) comparison of the relationship between the international legal system and the domestic legal systems of Canada and Australia. Both are required to understand why the legal response to human rights and the latter's domestic impact may be different. The methodology does not just involve the normative and doctrinal, but is also instrumental, examining how these factors in varying combinations achieve different results, and why this is so.

Thus, while I did not set out to write a postmodern critique of human rights, the thesis does employ some postmodern approaches which I have found useful in answering the questions posed (as the discussion in 1.1 above shows): a contextual approach, a focus on process as well as norms (showing that norms are really compromises caused by actors with power), an explanation of what human rights are (or can be) in Canada and Australia specifically, rather than a metanarrative. It is not simply an "emergence study" followed by an "implementation study" but an analysis of how the former affects the latter.

I chose Australia and Canada for the comparison because they are not so dissimilar

in culture and legal-historical background or development that a comparison would be of limited value. They have in common the fact that they are both federations, they are of Common Law background - the civil laws of Quebec are outside the ambit of this enquiry but its provincial Charter will be considered - and they are both Commonwealth countries which emerged into nationhood by consent rather than as a result of revolution. This enables me to by-pass the additional problems posed by a comparison of countries which have substantially different legal and political systems or societies which adhere to significantly different value systems. In this way the structures and modalities of human rights generation and implementation can be focussed upon with greater clarity.

Australia and Canada also share many relevant problems pertinent to human rights and equality. Race discrimination is a problem, especially as a result of the existence in both countries of indigenous peoples at the time of European settlement and the treatment of those peoples since then. Sex discrimination is also a major issue in both places. However, so that the comparison is not too anodyne, the two countries do have a substantial relevant difference in that Canada has a Charter of Rights and Freedoms whereas Australia does not. In the latter case the advancement of notions of individual rights is to be found more in the push for statutory reforms (which are subject to amendment after a change of government, or simply as a result of political whim) and, lately, in the renewed interest of the courts in notions of fundamental and implied rights.

Which of these approaches appears to be the more effective is an important issue. It helps shed light not just on what the law (whether international or domestic) says, but on what in fact it does - and why.

The primary and secondary research materials used for the thesis can be found in the Bibliography. These also reflect the interdisciplinary nature of the thesis and comprise not only treaties, declarations, cases, legislation and learned writings at both international level and with respect to Canadian and Australian domestic law, but also materials dealing with political history, philosophy, anthropology and the history and philosophy of science. In addition, to research the development of the Universal Declaration I was given permission to use the Dag Hammarskjold Library at UN Headquarters where I read the reports of the meetings of the Commission on Human Rights and the Third Committee. I also conducted interviews with key players, in particular with the late Professor John Humphrey (who was the Director of the Human Rights Division of the UN 1946-65 and who helped write the first draft of the Declaration) and people in government service in Canada and Australia responsible for human rights implementation. I have also drawn on my own professional experience as a practising legal consultant to the Australian Human Rights and Equal Opportunity Commission since 1987 and to the Queensland Anti-Discrimination Commission since its inception in 1992.

1.4 Organisation of the Thesis and Issues Discussed

Although called "chapters", this thesis is organised into four broad bands. The substantive argument is to be found in Chapters 2-5.

Chapter 2 ("From Natural Law to Fundamental Rights? Pervasive Misconceptions about Human Rights Values in Australian and Canadian Law") is about domestic law (initially in England from which Australia and Canada inherited their systems) groping its way towards notions of fundamental values. Those values (and the laws attempting to embody them) arise out of a social, historical and political matrix which I call for short the "developmental matrix". A consideration of this matrix helps to answer two questions: whose values and what values? The answer to the first question is tied to the struggle between the Crown, Parliament and the individual in English history. It shows why in Canada and Australia (in contrast to the USA) it is Parliament rather than "the people" in which ultimate political authority is considered to reside (and explains phenomena such as the "notwithstanding" clause in section 33 of the Canadian Charter). The answer to the second question is tied to the intellectual paradigms used to structure responses to the challenges thrown up by the ebb and flow of life within particular political, economic and social structures. It shows why what is regarded as natural or fundamental in one time and place (such as slavery) can be regarded as anathema in another. It also discloses how the meaning and use of significant documents

(such as Magna Carta) have been openly manipulated, or unconsciously skewed, because of these intellectual paradigms and social structures.

Both of these issues directly affect domestic receptivity to notions of human rights because they are determinative of the contingent nature of freedom and equality. However, there will be seen to be no grand narrative, no majestic upward progression towards perfection at either the international or the domestic level. Indeed, what is shown in the chapter is that the belief that there is an English common law tradition favouring individual rights is exaggerated. Indeed, the slavery cases indicate that the development of a general rights discourse is not necessarily reflected in legal discourse. The links are opportunistic. When judged against current standards of international human rights, the laws of Canada and Australia are found, to varying degrees, also to be wanting. Human rights norms are therefore needed in those systems. But the developmental matrix impacts upon their application there, whether directly as legal rules or as standards against which domestic laws can be assessed.

Chapter 3 ("From Natural Law to Human Rights in the International Legal System: Systemic Problems and Productive Ambiguities") looks at the concept of human rights in international law. It considers the character of international human rights as it has developed through a rights discourse in the context of an international structure which remained State-centred. This is shown to produce productively

ambiguous norms hedged by systemic problems which directly influence the juridical foundations, normative content and operation of human rights.

It traces an increasing systematisation of international law amid doctrinal oscillations between Natural Law and State consent. It describes the impressive achievement of the abolition of the slave trade more than a century before the Universal Declaration of Human Rights was formulated, but also shows how this was a "false dawn" falling short of creating human rights as opposed to a single-context right of limited applicability and effectiveness. Similarly, other international protections of a human rights type (such as protections provided by minorities treaties and the mandate system, as well as the growth of international labour standards and customary law on the treatment of aliens and humanitarian intervention) were exceptions to international law, the doctrine of which changed little. They were ad hoc, patchwork protections at the control of States rather than overriding principles to which States were subject.

The shift from specialised concerns to general notions of protection and responsibility is then shown to occur after World War II. With the UN Charter, vague aspirations for, and weak protection of, human rights arose. It did mark, however, the beginning of a juridical "universalism" in this regard. The input of Australia and Canada to this process is seen to be a study of converse patterns of enthusiasm and participation.

The chapter then considers the compromises which led to the creation of the most important human rights document in the world: the Universal Declaration of Human Rights. An articulation of transnational, transideological rights, it has an eclectic style and while it reflects elements of its Enlightenment antecedents, it is also shown to carry with it the seeds of postmodernism, in particular in its symbiotic relationship to domestic legal systems upon which it relies for both meaning and implementation. The analysis indicates an essentially neutral philosophical stance of the instrument. This produces a productive ambiguity which postmodern approaches, rather than relegating it to the dustbin of history specially reserved for objectified absolutes of a universal nature, can carry into the twenty-first century as a usable and useful legal tool. This includes customary human rights norms where the approach of the International Court of Justice in the Nicaragua Case[11] is seen to be useful with respect to norms of a non-synallagmatic type.

Chapter 4 ("The International Human Rights Obligations of Canada and Australia: A Symbiosis of Legal Systems?") then turns to the normative content of international human rights. It examines the obligations created, and the exceptions allowed, by the international system for Canada and Australia, especially with respect to implementation, to help clarify the links between international human rights and domestic norms. It discloses that while there is a great similarity in the

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[11] Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v USA), ICJ Reports 1986, p.14.

range of treaties to which each country is a party, there are dissimilarities in the level of domestic implementation accepted by each. The reasons for this are considered. In particular, while reservations may be used as a form of "insurance", for political or economic reasons, against the possibility of a treaty breach, or may be considered necessary for constitutional reasons, this avenue, while much used by Australia, has been little used by Canada with respect to human rights treaties.

The chapter also shows that enforcement measures at international level are essentially weak and that therefore the links with domestic systems are important. The treaty analysis shows that they maintain the essentially neutral philosophical basis of the Universal Declaration, but that a symbiotic relationship is established with domestic systems, so that domestic laws and the values underlying them supply the parameters within which the international norms operate in any given context. The analysis shows this symbiosis to be of three types: explicit, implied and functional. As this situation does not necessarily import only the best features of each system and screen out the worst, it is necessary to analyse how this symbiotic relationship works (or not) in particular domestic systems - and why. Because of the lack of strong international implementation and enforcement measures, together with the asymmetrical structure of the international and domestic legal systems with respect to each other, this symbiosis thus becomes determinative of both the strengths and weaknesses of domestic implementation and of the very meaning of the norms, and is thus crucial to their impact on and in

those domestic systems.

Chapter 5 ("Human Rights Norms and the Domestic Legal Systems of Canada and Australia: From Symbiosis to Synergy?") analyses the factors affecting the effectiveness of the implementation and enforcement of human rights as legal rights in Canada and Australia to see whether, and if so to what extent, the symbiosis discussed in Chapter 4 can become a synergy. The chapter contrasts the Australian and Canadian developmental matrices with respect to rights and constitutionalism. In Canada, the Bill of Rights 1960 and the Charter of Rights and Freedoms 1982 are the principal focus of the discussion. They are seen to create rights which are neither "universal" nor inalienable, and the resort to international human rights is found to be infrequent, inconsistent, sometimes dubious and occasionally wrong.

The analysis of the situation in Australia reveals a sorry tale with respect to three separate attempts to introduce a Bill of Rights, thus necessitating a consideration of human rights in the Australian Constitution, in legislation and as recognised by the courts. Three types of constitutional rights are identified in this regard - express, implied and constructive - the latter particularly being seen, in contrast to Canada, as a result of the lack of bifurcation between the treaty-making and the treaty-implementing powers in Australia. The analysis of legislation in particular focuses on anti-discrimination laws and contrasts the Charter influence on similar legislation in Canada. It also identifies domestic systemic problems which impact

upon human rights delivery by this method.

The analysis of resort to human rights by the courts commences with a consideration of the theories of the reception of international law in domestic systems, showing that particularly with respect to the reception of international human rights norms the theories are muddled and of limited use, while the courts are pragmatic rather than consistent.

The chapter also analyses the slowly expanding use of human rights in other areas (particularly in Family Law and Administrative Law) and concludes with a consideration of the effect of the systemic problems that arise through the use of a legal system itself: issues of locus standii, cost, justiciability and the adversarial approach.

These factors, together with those discussed in Chapter 4, show a basic disjunction between international human rights and domestic law which could be overcome. The situation at the moment, however, is that this relationship while occasionally being synergistic (and some instances of this are highlighted) is more often than not at best synergetic. We are losing a lot.

Chapter 6 concludes by collating the results of the Australian-Canadian comparison, indicating five principal instances where synergy occurs, proposing

twenty-five underlying factors generating or illustrating these results, and pointing a way to the future.

1.5 Location of this Thesis within the Existing Literature

I feel confident in stating that this thesis is unique. There are some significant books dealing with the use of international human rights by domestic courts in Canada, such as those by Bayefsky[12] and Schabas,[13] as well as many articles,[14] and similar but more general books in Australia,[15] but there is no other commentary examining the domestic impact of human rights through a comparison of Canada and Australia in a contextual vein. While there is an Australian monograph in this area[16] it deals with the US, Canada and Australia seriatim and is analytical but not comparative.

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[12] Anne Bayefsky: International Human Rights Law - Use in Canadian Charter of Rights and Freedoms Litigation (1992, Butterworths, Toronto)

[13] William Schabas: International Human Rights Law and the Canadian Charter: A Manual for the Practitioner (1991, Carswell, Toronto)

[14] See Bayefsky, ibid, and Schabas, ibid, and generally the references in Chapter 5. A synoptic rundown can also be found in Ken Norman, "Practising What We Preach in Human Rights: A Challenge in Rethinking for Canadian Courts" (1991) 55 Saskatchewan L.R. 289 at pp.298-9.

[15] Peter Bailey: Human Rights: Australia in an International Context (1990, Butterworths, Sydney); Nick O'Neill & Robin Handley: Retreat From Injustice: Human Rights In Australian Law (1994, Federation Press, Sydney).

[16] Murray R. Wilcox: An Australian Charter of Rights? (1993, Law Book Co, Sydney)

As a comparative study dealing with international law, it follows the path delineated particularly by Butler,[17] breaking away from traditional approaches which saw international and domestic law as being too separate to be susceptible to valid comparative analysis,[18] and in particular along the lines of Kiss[19] in comparing the functioning of internal legal orders in respect of international norms, but going beyond this.[20]

Comparisons between Australia and Canada have been drawn before, but more along the lines of constitutionalism and constitutional law rather than with respect to the human rights ramifications to comparative constitutionalism.[21] Comparative approaches to human rights have been written in both general[22] and specific[23]

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[17] W.E. Butler, "Comparative Approaches to International Law" Receuil des Cours, 1985 I (1986, Martinus Nijhoff, Dordrecht), pp.13-89.

[18] For example, H.C. Gutteridge: Comparative Law, 2nd ed (1949), pp.61-71.

[19] A.C. Kiss, "Droit comparé et droit international public" (1972) 18 Revue Internationale de Droit Comparé 5

[20] Kiss, ibid, refers to the substructures and repercussions of international acts. My view of the symbiotic relationship between international human rights norms and domestic legal systems entails more than this.

[21] See Christopher D. Gilbert: Australian and Canadian Federalism: 1867-1984 (1986, Melbourne U.P., Melbourne); Sharman, "Parliamentary Federations and Limited Government: Constitutional Design and Re-Design in Australia and Canada" (1990) 2 Journal of Theoretical Politics 205.

[22] Richard P. Claude (ed): Comparative Human Rights (1976, Johns Hopkins U., Baltimore); Armand de Mestral et al (eds): The Limitation of Human Rights in Comparative Constitutional Law (1986, Les Editions Yvon Blais, Cowansville). Claude's book in particular attempts to provide a systematic approach to human rights so that transnational comparisons can be scientifically made. The approach is now a little dated and tends to wilt in the glare of postmodernism.

terms. Comparisons of domestic reception of international law have been drawn, but with other countries.[24] Empirical studies of the connexion between international law and domestic law have been made generally,[25] or with respect to specific countries,[26] or particularly in relation to human rights and domestic law but within specific countries.[27] The interconnexion between international human rights and domestic law has been drawn in terms of "complementarity",[28] "legality",[29] "legal aspect",[30] "intersecting sovereignty",[31] and

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[23] David M. Beatty (ed): Human Rights and Judicial Review: A Comparative Perspective (1994, Martinus Nijhoff, Dordrecht)

[24] M.J. Bossuyt, "The Direct Applicability of International Instruments on Human Rights (with special reference to Belgian and US law)" (1980) 15 Rev. belge de droit international 317; Allan Rosas (ed): International Human Rights Norms in Domestic Law: Finnish and Polish Perspectives (1990, Finnish Lawyers' Publishing Co, Helsinki).

[25] Christoph Schreuer: Decisions of International Institutions Before Domestic Courts (1981, Oceana, London)

[26] Edward M. Morgan: International Law and the Canadian Courts: Sovereign Immunity, Criminal Jurisdiction, Aliens' Rights and Taxation Powers (1990, Carswell, Toronto); Christian Starck (ed): Rights, Institutions and Impact of International Law according to the German Basic Law (1987, Nomos Verlagsgesellschaft, Baden-Baden); F. Jacobs & S. Roberts (eds): The Effect of Treaties on Domestic Law (1987, Sweet & Maxwell, London).

[27] Mark Gibney (ed): World Justice? US Courts and International Human Rights (1991, Westview Press, Boulder); Kenneth C. Randall: Federal Courts and the International Human Rights Paradigm (1990, Duke University Press, Durham).

[28] Luigi Ferrari-Bravo, International and Municipal Law: The Complementarity of Legal Systems" in R. St.J. Macdonald & Douglas M. Johnston (eds): The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory (1983, Martinus Nijhoff, The Hague), pp.715-44.

[29] Oscar M. Garibaldi, "General Limitations on Human Rights: The Principle of Legality" (1976) 17 Harvard International Law Journal 503

[30] Benedetto Conforti: International Law and the Role of Domestic Legal Systems (1993, Martinus Nijhoff, Dordrecht)

"interdependence and permeability."[32] None of them deals with symbiosis leading to synergy which, as Chapter 5 points out, is different to all the just-mentioned concepts and approaches. My thesis therefore offers a different perspective, but at the same time it is more than a mere extension of regime theory.[33]

There is an enormous literature on rights generally and on human rights in particular, commencing with the locus classicus by Lauterpacht[34] and now including a growing literature on human rights and postmodernism. This literature is discussed in Chapter 3 (specifically at 3.9) where its implications for this thesis can be made more apparent and be of more use. Suffice it to say here that none of this literature is written in a comparative perspective.

There is also a considerable literature on the theories of the reception of international law in domestic legal systems. This is discussed in Chapter 5 (specifically at 5.6), again because there it will make more sense there in the light of this thesis. While some of this literature specifically discusses Canada, and some specifically discusses Australia, none compares the two, little of it considers the

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[31] Neil MacCormick, "Beyond the Sovereign State" (1993) 56 Modern Law Review 1

[32] Craig Scott, "The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants of Human Rights" (1989) 27 Osgoode Hall L.J. 769, although Scott is more concerned with permeability between international instruments.

[33] See J. Donnelly: Universal Human Rights in Theory and Practice (1989, Cornell U.P., Ithaca), especially at pp.205-28.

[34] Hersch Lauterpacht: International Law and Human Rights (1950, Praeger, New York)

specific situation of international human rights norms, and none of it proposes that those norms should be treated as a special case when considering domestic reception.

Traditional views of the general relationship between international law and domestic law have seen this relationship as moving from one which regarded those laws as existing in essentially separate spheres, to one where there may be some connexion (ie, the traditional monism/dualism/relativism debate).[35] In the specific context of human rights the two systems have been seen as being "not unrelated" but requiring separate study,[36] or, alternatively, of their working in opposition to each other.[37] This thesis develops that line further by arguing that they are explicitly and implicitly related through the symbiosis between international human rights and domestic legal systems, and that the effect can be synergistic. This is a parallel (but not identical) development to the literature from Europe dealing with the effect of the European Human Rights Convention where decisions upon individual petitions to the European Court of Human Rights are domestically binding as a matter of treaty agreement and are regarded as a new order of law

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[35] This literature is discussed in Chapter 5, particularly at 5.2.

[36] See Louis Henkin, "International Human Rights as Rights", Chapter 13 in J. Roland Pennock & John W. Chapman (eds): Human Rights (Nomos XXIII) (1981, New York U.P., New York).

[37] C.G. Weeramantry: "National and International Systems as Denigrators of Human Rights", Chapter 4 in Alice Ehr-Soon Tay (ed): Teaching Human Rights (1981, AGPS, Canberra).

neither entirely international nor entirely domestic in nature.[38] The thesis also links with a significant change in perspective, as illustrated by the contrast between the work of Falk thirty years ago (where the emphasis was on the way courts could apply international law as international law),[39] with the current work of Conforti which pays much more attention to the importance of the domestic operator.[40] In this regard, the thesis also extends Brudner's seminal work which attempted to provide a theoretical framework for domestic enforcement of international human rights by employing Dworkin's distinction between rules, principles and policies.[41]

The thesis does not subscribe to any particular school or approach. While I do not subscribe to the Natural Law critique of law, the thesis is more than a systems critique, and while it finds postmodern approaches useful and valuable, it is not consciously a Critical Legal Studies or a feminist critique. It is comparative, but does not use that comparison to try to find, as some do,[42] a common core or

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[38] See A.H. Robertson: Human Rights in Europe (1977, Manchester U.P., Manchester); A. Drzemczewski: The European Human Rights Convention in Domestic Law (1983, Clarendon Press, Oxford).

[39] See Richard A. Falk: The Role of Domestic Courts in the International Legal Order (1964, Syracuse U.P., Syracuse).

[40] Benedetto Conforti: International Law and the Role of Domestic Legal Systems (1993, Martinus Nijhoff, Dordrecht)

[41] Alan Brudner, "The Domestic Enforcement of International Covenants on Human Rights: A Theoretical Framework" (1985) 35 U. of Toronto L.J. 219.

[42] See Michael Bogdan: Comparative Law (1994, Kluwer, Deventer), Chapter 8.

presumption of similarity.

As an addition to the discourse on rights this thesis is, hopefully, a development from the existing literature but also an independent extension to it.

CHAPTER 2

FROM NATURAL LAW TO FUNDAMENTAL RIGHTS?

PERVASIVE MISCONCEPTIONS ABOUT HUMAN RIGHTS VALUES

IN AUSTRALIAN AND CANADIAN LAW

2.1 Introduction

In 1992 the Queensland Electoral and Administrative Review Commission investigated the desirability of introducing a Bill of Rights in the state of Queensland. It received 154 written submissions on the matter.[1] Of these, eight[2] specifically referred to the existence of ancient documents as part of the Common Law, generally to illustrate the contention that it was unnecessary to protect individual rights by means of a Bill of Rights. A typical response was:

> The rights of all Queenslanders are completely defended by the Bill of Rights of 1688 and the Magna Carta. As repression of individuals rights has instigated the creation of the Magna Carta and the British Bill of Rights, they reflected the primacy of the individual rights over the secondary rights of society.[3]

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[1] Electoral and Administrative Review Commission: Review of the Preservation and Enhancement of Individuals' Rights and Freedoms - Public Submissions, 4 Vols., (1992, Queensland Government Printer, Brisbane).

[2] Submissions numbered S35, S38, S44, S52, S90, S92, S108, S136.

[3] Id., Vol.2, S92 (Submission from the Household Security Association).

This chapter will shown that every contention in that statement is wrong. It will show that while the developments described here did lay much of the groundwork for international human rights norms, they did not have the same effect on English (and hence on Canadian and Australian) domestic law. What seems ironic to us today is that the latter situation is largely the result of a Bill of Rights! The importance of clearing away misconceptions such as those in the above quotation is that the true impact of international human rights norms on the domestic legal systems of Canada and Australia can only be properly assessed once this is done. There is also a more immediate practical side to this issue. The Supreme Court of Canada has stated that in giving a purposive interpretation to the Canadian Charter of Rights and Freedoms, an historical approach is important.[4] However, what is needed is an historical view taken contextually, not one based on accretion of myth. While notions of fundamental or "higher" rights do have a pedigree in English (and thus Australian and Canadian) law, and have been and are still used,[5] they are not necessarily the same quality of rights as are human rights.

The first preambular paragraph of the Universal Declaration of Human Rights[6] reads:

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[4] Per Dickson CJ in R v Big M Drug Mart Ltd (1985) 18 DLR (4th) 321 at 360-61.

[5] For example, in Criminal Law (as in the case of R v Dudley and Stevens (1884) 14 QBD 273), in negligence (the concept of reasonableness), in the maxims of Equity, in Administrative Law concepts (such as natural justice) and in concepts such as unjust enrichment and the law of Restitution.

[6] G.A. Resol. 217A (III), December 10, 1948.

> ... recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world ...

The fifth preambular paragraph of the Declaration refers to "fundamental human rights", while the sixth refers to "human rights and fundamental freedoms". What is the basis for and meaning of the inherency, dignity, equality, inalienability and fundamentality wrapped up in a notion of rights? This chapter outlines the essential background to an answer to this question, and contends that such notions are derived through a rights discourse developed in a political and social matrix. It is concerned with the paradigm shifts behind the idea that recourse can be had to law to vindicate rights which are regarded to be fundamental. The term "paradigm" has been borrowed particularly from the work of Thomas Kuhn, the philosopher of science, who sought to explain progress in the natural sciences by reference to general frameworks or paradigms (the constellation of beliefs, values and techniques) which are overthrown by new paradigms, such as the effect generated by the theories of Copernicus, Newton, quantum theory or (now) chaos theory.[7] The applicability of paradigms and paradigm shifts to explain legal knowledge is in fact in dispute.[8] Indeed, Kuhn used the notion with respect to scientific communities which shared common knowledge and concerns, not with respect to

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[7] See Thomas Kuhn: The Structure of Scientific Revolutions, 2nd ed (1970, U. of Chicago Press, Chicago)

[8] Contrast P. Ziegler, "A General Theory of Law as a Paradigm for Legal research" (1988) 51 Melbourne Law Review 569, with T. Daintith, "Legal Research and Legal Values" (1989) 52 Melbourne Law Review 352.

change in whole societies, particularly pluralistic ones.[9] Indeed, it may even be that we cannot really use paradigms at all if we cannot separate ourselves from the thing observed.[10] I use the notion here to indicate a fragmentation of beliefs and theories which underlie and can affect the adequate operation of legal norms.[11]

The emphasis in this chapter will be primarily on documentary evidence from "Western" sources: the Magna Carta, the Petition of Right, the Habeas Corpus Acts, the English Bill of Rights, the American Declaration of Independence and Bill of Rights, and the French Declaration of the Rights of Man and the Citizen. But to see the development of human rights only as the documentary result of an enlightened legal process, even though these documents might reflect perennial high goals, is not enough.[12] We must examine them in the light of the complicated matrix from which they are derived, and which affected their content,

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[9] See Walter Truett Anderson (ed): The Truth About the Truth: De-Confusing and Re-Constructing the Postmodern World (1995, Putnam Books, New York), pp.179-81.

[10] See the discussion in Chapter 3 on deconstruction and poststructuralism.

[11] For example, in Ex parte H.V. McKay (the Harvester Case) (1907) 2 C.A.R. 1, the Australian Conciliation and Arbitration Commission set a standard for wages which in 1907 was a landmark: in a civilised society a wage should be paid to workers which enabled a man to support his wife and children. However, decades later, the paradigm of sexism (and heterosexism) on which this judgement rests has been a major factor enshrining a principle of unequal pay for women.

[12] See James C. Strouse & Richard P. Claude, "Empirical Comparative Rights Research: Some Preliminary Tests of Development Hypotheses", Chapter 2 in Claude: Comparative Human Rights (1976, Johns Hopkins U.P., Baltimore). Strouse and Claude adopt this view for a slightly different purpose (to cross-culturally compare the notion of welfare and the achievement of it) but, in my view, it also pertains to a study focusing more directly on the law.

their structure, and their very existence. The legal definition, as well as the social construction, of human dignity arises from this matrix as expressions of freedom and equality. These developments, if properly understood, will help us to perceive of human rights not just as an iconography of the past, but of a sense of how the past has - or has not - shaped and sustains the modern, and the extent to which it can valuably operate in the "post-modern".

Therefore, the documents which are regarded as the antecedents of the Universal Declaration of Human Rights will be examined in the light of the shifting paradigms provided by, and the writings of some of the major thinkers in, the relevant periods, but particularly in the seventeenth and eighteenth centuries, to show their effect on the nineteenth and twentieth century developments.

The predominant themes which arise are: the perceived place of humans in their community and in the universe as a whole; the changing perception of transcendent theories to explain this placement, and in particular what is considered natural, inherent or fundamental; and the changing conceptions of freedom and equality and the development of "rights" to protect these.

A "Universal Declaration" written in Athens by Aristotle would be different to the Declarations of 1776 and 1789, which in turn were different to the one of 1948.

Ones being written today are different again.[13] While common threads can be found, the differences may be more significant. And the reason for this is in the changing developmental matrix from which they emerged and/or in which they now operate. It is certainly not the result of humans of any era being intrinsically better or worse than their predecessors or their descendants.

Thus Cotterrell has remarked that "it cannot be assumed that there is a direct link of intellectual development which threads its way as a kind of triumphal progress of increasing enlightenment as one major theory or theoretical approach is refined and eventually gives way to a later one. ... [I]deas and theoretical orientations seem to be adopted and discarded in ways which simply cannot be explained in terms of intellectual superiority or inferiority."[14] Lauterpacht has remarked that: "Legal and political theories are not, as a rule, leisurely speculations of philosophers unrelated to human needs and aspirations ... They are pragmatic and teleological; they serve a purpose."[15] But theories are like seeds falling on arid

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[13] For example, the Queensland Bill of Rights Bill 1993 includes the right to an unpolluted environment and development regulated by this right.

[14] Roger Cotterrell: The Politics of Jurisprudence: A Critical Introduction to Legal Philosophy (1989, Butterworths, London), pp.17-18. This view is in complete contradistinction, for example, to that of the separate dissenting opinion of Judge Ammoun in the ICJ Advisory Opinion on Namibia where his Honour said: "Historians have outlined the upward march of mankind from the time when homo sapiens appeared on the face of the globe ... up to the age of the great thinkers and, more particularly, throughout the whole history of social progress, from the slavery of Antiquity to man's inevitable, irreversible drive towards equality and freedom." ICJ Reports, 1971, p.16 at paragraph 4, pp.72-73.

[15] Hersch Lauterpacht: International Law and Human Rights (1950, Stevens & Sons, London), p.111.

land if they are projected onto social relations which bear little or no correspondence with them. Thus a writer such as Mary Wollstonecraft was strongly influenced in her feminist views by her childhood and early life. Yet her writings never "caught on" in the same way as those of Hannah More.[16] The "right" ideas are right when they are planted in a social climate receptive to them and in a political and economic situation able to cope with and nurture them.[17] The right to own property, for example, means little in a society where such ownership is communal, such as traditional aboriginal society.[18] In feudal times, the right to own real property meant little when literally everyone who has possession of real property is regarded as holding it as a tenant of the king. Values changed with changes in the political and economic structure of society. This affects the a priori premises which are the basis of the shifting theories of nature and rights.

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[16] See the discussion below at 2.7.2.

[17] Gallantin considers that a political system can have an influence on "the collective mentality of a nation" to explain why different influences can be observed across cultures when human motivations can be presumably similar all over the world (Judith Gallantin, "The Conceptualization of Rights: Psychological Development and Cross-National Perspectives", Chapter 12 in Richard P. Claude (ed): Comparative Human Rights (1976, Johns Hopkins U.P, Baltimore) at pp.302-3).

[18] This is particularly so with respect to aboriginal relationships with the land, which is not proprietorial but part of the essence of being, a gemeinschaft structure where the elements are composed not only of individuals and their social structures but of the land as well as being intimately a part of these. See H. Mc Rae, G. Nettheim & L.Beacroft: Aboriginal Legal Issues: Commentary and Materials (1991, Law Book Company, Sydney), Ch.2. Australian law has been spectacularly unsuccessful in coping with this concept (see Chapter 5, below).

Thus, what is considered to be natural, inherent or fundamental about humans, their position with respect to society, and the consequential rights then arising, when looked at diachronically, has not been immutable. Slavery at one time was regarded as natural and right; the complete reverse is considered to be the truth now. There is no consistent, linear development free of paradox. And a synchronic analysis shows the same: there were a variety of schools and approaches at any given time (for example, the variety of Greek schools; the comparison between Augustine and Aquinas; between Machiavelli and More; between Luther and Calvin; between Hobbes and Locke; between Burke and Paine; between Mary Wollstonecraft and Hannah More; between J.S. Mill and Karl Marx). Any individual's perception of the "reality" around them must be affected and effected by their personality, their life experience, their socio-cultural surroundings and the specific situation in which the issue for consideration arose.[19]

The process is interactive and the development is causative, although not deterministic: if the "video tape" of conditions on earth were rewound to the beginning and played over again, human rights would not necessarily arise in exactly the same way and at exactly the same time. The evolution of human rights, like the evolution of species, is random. Human rights are a result (and not necessarily the result) of this interactive process: they are not the purpose of it.

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[19] See, for example, Gordon Allport: The Nature of Prejudice (1958, Doubleday, New York), p.203.

I agree with Oakshott who writes:

> ... a falling together of ... occurrences is understood to intimate a dependent relationship and recognition of it thus to enhance the intelligibility of the occurrences, not because there is any assigned reason why they should have fallen together, nor because there is any noticeable 'fit', but merely because having fallen together they do not repulse one another. They are recognized to hold together rather than identified as belonging together.[20]

While human rights is a socially constructed, invented, notion rather than a discovery, it nevertheless reflects values based on questions which have been asked by humans since the beginning of recorded time. Thus, while it is essentially a Western intellectual construct, it can have value in non-Western systems.

This chapter is not a "historiography" of human rights, as that term implies the construction of scattered events into a narrative,[21] disguising the elements of fiction in the imposed coherence and intelligibility.[22] Although it concentrates on major documents, it shows that these should not be treated as the juridical equivalent of the Ten Commandments. It shows rather that documents such as Magna Carta, the English Bill of Rights, the American and French Declarations of Rights, and so on, have not been of equal importance or impact. What they all did do was to provide an immediate political response to a local crisis. None of them

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[20] Michael Oakshott: On Human Conduct (1975, Clarendon Press, Oxford), at pp.103-104.

[21] See P. Ricoeur, "Narrative and Hermeneutics", in K. Mullikin (ed): Religion and Hermeneutics (1981, National Humanities Centre, Research Triangle Park), at p.43.

[22] See Wenche Ommundsen: Metafictions? Reflexivity in Contemporary Texts (1993, Melbourne U.P., Melbourne), pp.49-53.

applied to everybody. The French Declaration makes an explicit distinction with respect to the rights applying to French citizens and those applying to all. The American Declaration and the later Bill of Rights were never intended to free the slaves, despite the width of the language used in their preambles. Magna Carta was only ever intended to apply to relations between the king and nobles, its wider application being the result of a later ideological reconstruction to promote the interests of particular groups. It is in this regard particularly that the Universal Declaration of Human Rights was unique and remains significant: it was the first document expressly about general human rights applicable to everyone, everywhere, at all times. In this regard, while it represented a developmental continuity with the past, it paradoxically marked a significant break with what the earlier documents really did do. There are thus antecedents of human rights as we now know them, but no grand narrative with respect to their development. In 1945 Lauterpacht wrote, with respect to the limited effect of some rights documents that "it is of no decisive significance" that "the vindication of human liberties did not begin with their complete and triumphant assertion at the very outset [but] ... with recognizing them in some matters, to some extent, for some people, against some organ of the state."[23] The issue must now be <u>why</u> this limitation was so. An appreciation of the resons for this provides the key to the factors which limit rights directly and consequentially, both in the past and in the present.

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[23] H. Lauterpacht: <u>An International Bill of the Rights of Man</u> (1945, Columbia U.P., New York) at p.57.

What this historical investigation also shows, I think, is that despite the continual evidence of inconsistency, this does not necessarily entail that the system overall does not work. In this regard, Critical Legal Studies approaches which contend that an exposure of contradictions will bring arguments crashing to the ground, are wrong in so far as they overlook the historical fact that opportunistic use has always been made of such arguments. They are, however, correct in exposing the powerful "legitimising" force of that opportunistic use.

The development of human rights has been intimately connected with the development of Natural Law theories. A conviction that there are superior principles of right has been persistent throughout the history of legal and philosophical thought. It has, however, waxed and waned throughout that history. It became a search for a standard against which laws may be judged, a standard which is itself regarded as being superior to those laws.[24] "Natural law" is itself an abused and confused term[25] but at its basis was the distinction between laws which were fundamental because they were in accordance with nature, and those which resulted from ordinary human enactments. I agree with d'Entreves that "what really calls for attention on the part of the modern student is the function of natural law rather than the doctrine itself, the issues that lay behind it rather than

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[24] Paul Sieghart: The Lawful Rights of Mankind: An Introduction to the International Legal Code of Human Rights (1985, Oxford U.P., Oxford), p.7.

[25] See for example the discussion by B.F.Wright Jr in "American Interpretations of Natural Law", (1926) 20 Am. Pol. Sc. Rev. 542.

the controversies about its essence".[26] In another work, the contrast between Ionian naturalism and Pythagorean mysticism may be relevant,[27] or even essential, but that is not the case here.

The central belief of adherents to natural law is that there exists in nature and/or in human nature some rational order which can provide intelligible value-statements that are universal in application, unchangeable in their ultimate content and morally obligatory on mankind.[28] The practical importance of Natural Law in this context lies in the concept of legitimacy (i.e., establishing a ground to challenge or justify existing laws) and hence the notion of natural law and of natural rights plays a significant part in the history of the growth of the idea of human rights. But its changing nature also illustrates an important paradox: the relationship between "right" and "law" which is contingent and particular, but which claims to be universal. Such notions are powerful, in both an inclusionary and an exclusionary manner.

2.2 The Ancient World: Rights, Nature and Teleology

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[26] A.P. d'Entreves: Natural Law: An Introduction to Legal Philosophy 2nd rev. ed. (1970, Hutchinson & Co., London) at p.18.

[27] See, for example, Herschel Baker: The Image of Man: A Study of the Idea of Human Dignity in Classical Antiquity, the Middle Ages and the Renaissance (1947, reprinted in 1961, Harper & Row, New York), Chapter 1.

[28] Paul E. Sigmund: Natural Law in Political Thought (1971, Winthrop Publishers, Cambridge, Massachusetts), Introduction.

It is impossible to trace the antecedents of human rights to any specific date or culture. While the Ancient Greeks are attributed to have been the first to develop (at least in written evidence now available) a rationalised concept of nature and natural law, a policy of respect for the inherent dignity of individuals can be found earlier.[29] For example, ancient Hebrew belief is indicated in the book of Leviticus where the Jews are admonished to treat the stranger and the citizen alike.[30] Confucius (551-479 B.C.) taught a set of moral principles based upon the fundamental principle of man's inherent goodness.[31] The teachings of Siddharta Gautama (563-483 B.C.), the founder of Buddhism, also preached man's respect for his fellow man.[32]

It has also been alleged that ancient Greek civilisation was itself profoundly influenced by Egyptian and Phoenician culture going back to the second or even

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[29] See generally Joseph Wronka: Human Rights and Social Policy in the Twenty-First Century (1992, University Press of America, Lanham, N.Y.)

[30] Leviticus 19.33,34 The motivation was apparently their own experience as outcasts in Egypt.

[31] Michael Palumbo: Human Rights: Meaning and History (1982, Robert E. Krieger Publishing Co., Florida), Chap. 2, hereafter cited as Palumbo. See also Frederick Tse-Shyang Chen, "The Confucian View of World Order", Chapter 2 in The Influence of Religion on the Development of International Law (Mark W. Janis, ed), (1991, Martinus Nijhoff, Dordrecht). A central tenet of Confucianism is the Golden Rule ("Do not do to others what you do not like when done to yourself"). Confucius was the product of an era in China of unsettled feudalism. One of his objects was to secure an ordered society through the exercise of the most deeply-rooted instincts, especially those rooted in family relations. Respect for the family and for ancestors is stressed. Mankind, as one large family, should also be respected. Confucianism emphasises the necessity of harmony. This was particularly suitable for an agrarian economy.

[32] Palumbo, Chap.2.

the third millennium BC and that this influence was ignored, distorted or suppressed by modern classical scholarship beginning in the seventeenth and eighteenth centuries.[33] One scholar has traced protection for the physical and moral existence of humans as far back as Babylonian laws promulgated in the reign of Urukagina of Lagash (3260 B.C.).[34] The Eurocentric "Aryan" model of Greek culture may be wrong. Thus, even our perception of the very beginning of the development of rights pertaining to humanity may be based on a misconception.

A perfunctory glance at the many entries in the UNESCO publication The Birthright of Man[35] will show that claims to human dignity have been recognised, even cherished, through millennia and across the world. From this, however, it cannot be said that "human rights" have been widely and highly thought of throughout history.[36] It is true that we may see ancient examples of what today might be considered to be the substance of human rights. Limitations on slavery[37] and the right to education[38] were not unknown in Antiquity but in ancient Hebrew

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[33] Martin Bernal: Black Athena: The Afroasiatic Roots of Classical Civilization - Vol.I: The Fabrication of Ancient Greece 1785-1985 (1987, Rutgers University Press); Vol. II: The Archeological and Documentary Evidence (1991, Rutgers University Press).

[34] S. Prakash Sinha, "Human Rights Philosophically" (1978) 18 Indian J. of International Law 139 at 140.

[35] Birthright of Man: A Selection of Texts Prepared under the direction of Jeanne Hersch (1969, UNESCO, New York).

[36] Contrast the view of A.H.Robertson & J.G. Merrills in Human Rights in the World (1992, Manchester U.P., Manchester)

[37] Exodus 21.2; Leviticus 25.10

[38] Deuteronomy 6.7

society, for example, these rights only extended to male Hebrews - not to non-Hebrews nor to women. According to one authority, the concept of human rights as it is now understood was absent in ancient or rabbinic Judaism.[39]

The notion of inherency with respect to rights is intimately connected with the perception of "nature" and what is "natural". Nature, however perceived, seems to antedate the oldest of authorities, conventions or customs. Nature as such or the nature of something is thought to be common and open to all. It simply exists, regardless of human wishes, beliefs or desires and therefore appears to provide a foundation for reasoning.[40]

To the ancient Greeks, the universe was perceived as being essentially systematic and rational.[41] They were apparently the first to develop the concept of a natural law although this becomes apparent more in their literature than in any written

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[39] Louis Henkin: "Judaism and Human Rights" Judaism: A Quarterly Journal of Jewish Life and Thought Vol.25 no.4, 1976, p.437.

[40] Tibor Machan: Human Rights and Human Liberties (1975, Nelson Hall, Chicago), p.6.

[41] For example, Pythagoras discovered that the musical chords which are pleasing to the (Western) ear are produced by vibrating strings where the nodes divide the string into exact parts. If the node does not occur on one of these exact points (i.e., dividing the string into exactly two, three or four parts, etc) the sound produced is discordant. In other words, Pythagoras discovered that the world of sound was governed by exact whole numbers. He also discovered that the world of vision is similarly governed: Jacob Bronowski: The Ascent of Man (1973, BBC, London), pp.156-7.

codes of law.[42] Law was custom rather than legislation,[43] and related more to duties than to rights.[44]

Societies in antiquity, and feudal society later, have been described as being of a Gemeinschaft character.[45] Generally, the gemeinschaft concept is predicated upon an organic community in which every individual is a member of a social family. The opposite is a gesellschaft character, which is predicated upon an atomistic society made up of individuals. In the former, law is regarded as expressing the will and traditions of the community · a sort of common universal will. Values

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[42] It can be seen in Sophocles' play Antigone where King Creon orders that Polynices, his enemy who had been killed in battle, be left unburied. Antigone, the sister of Polynices, believes that the king is violating the "right" of every man to a burial. The central conflict of the play is thus between natural law ("the immutable unwritten laws of heaven") and man-made laws. The suggestion is that the former takes precedence. However, too much should not be read into this. Kelly has remarked that "the Antigone passage, although much cited in later classical literature, is isolated. It contains a thought which never surfaces among the philosophers writing on the theme of law, nor among the orators pleading before courts of law. In general, Greek thought knew nothing of the idea that there exists a range of values, which, if human laws should conflict with them, render those laws invalid.": J.M. Kelly: A Short History of Western Legal Theory (1992, Clarendon Press, Oxford) at p.20.

[43] In Homeric Greece, and later, there was no legislature. The king did not make laws. Rather, there was a recognition of themis, a god-inspired finding which reflects a shared sense of what is proper. In contrast, dike is an earthly derivative from this (like the sentence of a judge based on legal principle - see Kelly pp. 7ff.). The earliest Greek "legislation" is associated with individual lawgivers like Solon. In the cities which were democracies, the demos (people) voted and the rules they propagated expanded the notion of man-made law (nomos). The demos included all freeborn men, no matter how lowly, but not women, slaves or metics (non-citizens).

[44] Antigone's argument above relates more to duties to the Gods than to the human rights of her brother.

[45] Alice Ehr-Soon Tay & Eugene Kamenka, "Public Law - Private Law", Chapter 3 in S. I. Benn & G. F. Gaus: Public and Private in Social Life (1983, Croom Helm, London), especially at pp.69ff.

were regarded to be derived from the social order and not from within each individual. Rights to do things or to be free to do them depended upon the ability to participate in the essential functions of the polis. This was in itself not a "right" that all enjoyed and as a result women, slaves, and menial workers were effectively excluded.[46] It is an early example of the public/private dichotomy, and its potentially exclusionary effects, which is the basis of much feminist writing. Thus while the Greeks did recognise such notions as "isotimia" (equal respect for citizens), "isogoria" (equal liberty to meet and speak in public) and "isonomia" (equality before the law - and the very word for democracy) the application of these rights was severely limited because of the social paradigm in which they operated and out of which they developed.

In the Gesellschaft paradigm, the atomic nature of the society can incorporate equality of individuals, but as those individuals are recognised as having diverse ends it has to recognise the possibility of confrontation between those organs of the

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[46]See, for example, the essays by Elaine Pagels ("The Roots and Origins of Human Rights") and Charles E. Wyzanski Jr ("The Philosophical Background of the Doctrines of Human Rights") in Alice Henkin: Human Dignity: The Internationalization of Human Rights (1979, Oceana, Dobbs Ferry, New York); and Isiah Berlin: Four Essays on Liberty (1969, Oxford University Press, Oxford) at p.129. For a contrary - and historically inaccurate - view see H.Lauterpacht: An International Bill of the Rights of Man (1945, Columbia U.P., New York) at pp.16-20. I also disagree with Friedmann, to the extent that theories were not always reflected in practice, when he writes: "The Stoics first developed a coherent legal philosophy based upon the individual as a reasonable being detached from the community in which he lives." (W.G. Friedmann: Legal Theory, 5th ed (1967, Columbia U.P., New York), at p.89). This "detachment" was not to occur for many centuries.

State and the individuals in society.[47]

Thus Ancient Greece, reputed to be the origin of democracy, and Ancient Rome, from whose laws many of our own can be traced, reflected scant interest in or protection of the rights of individuals. In the period of Antiquity, the individual was the object of protection afforded by, and the recipient of the advantages offered by, the State. He or she was not often the subject of rights.[48]

The Greek city state or polis[49] we would now classify as a gemeinschaft system,

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[47] Id., p.85. The authors go on to state that "only the Gesellschaft tradition of private law ... systematically subordinates interests themselves to scrutiny with a degree of care and rationality, and concern for people, conspicuously absent in politics; only the Gesellschaft tradition of law systematically elevates a bias toward freedom, fairness and equality, together with a concern for consequences. It is the only suitable matrix for a theory of social as well as legal justice, though it must be and can be supplemented with Gemeinschaft ... arrangements. ... Public law has not, and cannot have, a coherent, systematic conception of justice (as distinct from policy) that is not logically and historically parasitic on private law." (at p.90).

[48] See generally Lloyd L. Weinreb: Natural Law and Justice (1987, Harvard U.P., Cambridge), Chapter 1.

[49] Care should be taken with this term. Arlene Saxonhouse has described the Greek polis as:

> ... a unique historical configuration. The translation so often ascribed to the word 'polis', 'city state', does little justice to the social, political and religious relationships entailed in the term. ... The polis was not an aggregate of individuals or citizens who had a self-conscious awareness of themselves in opposition to an entity that was public. There was no 'Athens' for the Greeks as there is for us moderns describing the ancient world. There were only Athenians. ... In the vision of the perfect polis, there was no opposition between the self and the political entity of which one was a part. This is not to suggest that the Greeks were exclusively duty-bound individuals who cared only for the welfare of the community. Altruism was not part of the Greek moral code. Rather, the Greeks understood that their own well-being depended on the well-being of the group of which they were a part.

Arlene W. Saxonhouse, "Classical Greek Conceptions of Public and Private", Chapter 15 in S.I. Benn & G.F. Gaus (eds): Public and

the result being that while individuals were recognised and even venerated (for example, in sport[50] and art[51]) there was little conception of political individuality. The concept of nature was one of development rather than equality, and the view taken of it was deterministic, mechanistic and teleological.

Aristotle (384-322 B.C.) is significant because his writings were particularly concerned not just with the State and its laws, but how individuals fitted into the scheme.[52] According to Aristotle, the polis exists by nature. To the Greeks, "nature" was a relation, an order of things. The approach is essentially deterministic and mechanistic, the universe working like a giant organism running to laws which are eternal. Everything that has happened, is happening and will happen is fixed since time immemorial. The notion of tabula rasa was unknown to the Greeks.[53] The Greek view of natural law was, fundamentally, that things behaved according to the laws of their own being: the propensity to become an oak tree was implanted in the acorn (and, consequently, nowhere else). Thus, Aristotle

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Private in Social Life (1983, Croom Helm, London), at p.363.

[50] The Greeks invented to Olympic Games which at this time consisted almost entirely of individual rather than team sports, but which were used for the additional function of fitness for military purposes.

[51] Greek art, what is left of it, had an overriding interest in the human. There are few "landscapes" in Greek painting: Denise Hooker (ed): Art of the Western World (1991, Hutchinson Australia, Sydney), Chapter 1, especially at pp. 13-14. (hereafter referred to as Hooker).

[52] See generally W. von Leyden: Aristotle on Equality and Justice - His Political Arguments (1985, St. Martin's Press, New York).

[53] Henry Phelps Brown: Egalitarianism and the Generation of Inequality (1988 West Publishing, New York), p.17.

argued that there is a natural hierarchy in nature in which women are inferior to men and slavery is justified.[54] Indeed, Aristotle advocated the killing of deformed children.[55] This is the very antithesis of twentieth century "human rights".

Similarly, when Book V of the Politics deals with revolutions, the political and moral alternatives remain basically constant. Unlike the later revolutions in France, the Americas or Russia, there is not in Aristotle the notion of one regime based on a particular principle being replaced by another one based on a different principle. Revolution for Aristotle is more a process of natural selection based on or influenced by prevailing conditions.

However, because of the "nature" of things, and of people, equality did not necessarily mean treating everyone in the same way. Likes should be treated alike, unlikes should not.[56] The true purpose of life is not so much to achieve freedom or liberty (concepts for which people were to fight and die in later times but in this

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[54] Slavery is "natural" because enslavement was a natural consequence of capture in war: Politics I. 4-5. (The translation is taken from T.A. Sinclair: Aristotle's Politics (1926, Penguin Books, London). The term "slavery" was also used by Aristotle to indicate anyone "who is by nature not his own but another's man" (Politics I: 14-24) and could also include people born into the lower serving orders of society: See P.J.Rhodes, "A Graeco-Roman Perspective", Chapter 5 in F.E.Dowrick: Human Rights: Problems, Perspectives and Texts (1979, Saxon House, Farnborough).

[55] Politics, Book VIII, Chap. 16.

[56] This view, but from a different ethical standpoint, was espoused by Judge Tanaka in his separate opinion in the South West Africa Case (Second Phase), ICJ Reports, 1966, 34 at 304ff.

social paradigm are largely irrelevant) but to achieve happiness or pleasure.[57] True happiness or pleasure derives from virtue,[58] but as only some men are virtuous, oligarchies could be fine for the great unwashed. The benevolent dictatorship of a philosopher-king could be seen as producing justice in such a structure. The Greeks, and their version of natural law, were more interested in who should govern for the best interests of society rather than in equality.

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[57] Ethics, Book I, Chap.5.

[58] Ibid.

2.3 The Middle Ages - Rights, Nature and Theology

In 1950 Lauterpacht wrote:

> There is a striking continuity of thought between the Stoics and the most representative political literature of the Middle Ages in the affirmation of the principle of higher law - which is the law of nature - as the source of the rights of freedom and of government by consent. It was that feature of medieval political thought which led Gierke [in Das deutsche Genossenschaftsrecht, vol. IV (1913) at p.81] to assert, without undue exaggeration, that it was filled with the thought of the inborn and indestructible rights of the individual.[59]

This statement is wrong on three counts: while there was a continuity in the adherence to some notion of higher laws, this higher law was not necessarily seen as a ource of freedom, or as a source of government by consent, nor was it "filled" with recognition of inborn and indestructible "rights" of individuals.

In Medieval Europe the gemeinschaft character of society was reflected in the emphasis on relationships rather than individuals - people were looked upon as members of families, estates, guilds, etc. And there were sometimes different legal rules applying in each set of relationships. In such circumstances, the law generally did not express a universal or state interest. This requirement was filled by religion.

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[59] International Law and Human Rights, p.84

Theology seeks to integrate values with reality[60] and thus can provide a basis for a theory of a higher authority. Coming from this higher authority, the propositions can reasonably be regarded as inalienable by humans, although this is not necessarily so.

Christianity was the greatest social influence on "rights" in Europe in the Middle Ages, although it is not alone in its influence on international law generally[61] and natural law-type theories arose elsewhere.[62] It is also not an intellectually coherent belief system: it talks in terms of a god born of a mortal woman, but born by an immaculate conception; it talks of three gods in one, being at the same time the Father and the Son; it relies on miracles as much as, if not more than, on the abstract logic which was the basis of the Greek view of the world. Nevertheless, the influence of Christianity, as opposed to other religions, was profound because it became a truly international religion and the religion of the parts of the globe which, from the Middle Ages through the Renaissance and onwards to the twentieth century, dominated trade and spread ideas throughout most of the known world. As the only institution to survive the collapse of the classical world more or

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[60] Philip Allott: Eunomia: A New Order for a New World (1990, Oxford U.P., Oxford), p.94.

[61] See Mark W. Janis (ed): The Influence of Religion on the Development of International Law (1991, Martinus Nijhoff Publishers, Dordrecht), which, as well as Christianity, examines Confucianism, Hinduism and Islam.

[62] For example, Muslim and Jewish Aristotelian philosophers such as Averroes and Maimonnides were significant: see John Maxwell & James Friedberg (eds): Human Rights in Western Civilization, 1600 to the Present (1991, Kendall/Hunt Publishing Co, Dubuque), p.xiv.

less intact, the Church also became the repository of learning and continuity. Monastic scriptoria copied the works of classical authors as well as the gospels.

Christianity was originally a doctrine which was not concerned with the State and its laws as it transcended them. However, it is important to the present study because it furnished the intellectual and emotional frame of reference within which the medieval person functioned. Furthermore, Christianity was not only a belief system. The power of the church in the Middle Ages came to be at least co-terminus with, and sometimes exceeded that, of princes. It came to be a political doctrine as well.

Christianity in particular emphasises that humans are created in God's image,[63] which gives a basis for the worth of human beings in contradistinction to the other animals of creation, and rests on a belief in one God and the brotherhood and sisterhood of all people, thus making the universality of this notion of worth comprehensible.

The content of its values was sometimes explicit (such as the Ten Commandments) and sometimes implicit. It was the medieval Church which delineated that content and made it a pre-eminently powerful religious and secular body. This injection of prescriptive content marks a distinct difference with the view in Antiquity, where

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[63] Genesis I, 27

nature was a development, not a prescription, and the boundary between prescription and description was blurred.

Baker succinctly has commented:

> In the Christian world God usurped the place man had occupied in the pagan world. An anthropocentric universe was replaced by a theocentric universe, humanism by theocracy, knowledge by faith, explanation by mystery, the state by the church.[64]

Rather than merely being a part of nature, as the Greeks had thought, Christians believed that nature had been created for them. Thus, the conception of the fundamental questions changed. While, because of their conception of Nature, the ancient Greeks asked the question: "Why do things change?", the Christians asked the question: "Why do things exist?", because of the creationist paradigm on which their world view rested. Conceptions of natural law changed accordingly from something which explained natural development to something which could be used to test the validity of human constructions like law.

The predominant social structure of this period was feudalism, a more-or-less triangular system with the monarch at the apex to whom allegiance was owed, generally as duties attaching to land-holding. It was a system based on hierarchy, force and duties attaching to the position one held in the social scale. The notion was one of a descending (power emanates from the ruler) rather than of an

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[64] Herschel Baker: The Image of Man: A Study of the Idea of Human Dignity in Classical Antiquity, the Middle Ages and the Renaissance (1947, 1961 reprint, Harper & Row, New York), at p.135 (hereafter referred to as Baker).

ascending (power emanates from the people) theory of legitimacy.[65] This did not mean, however, that the king could be totally absolutist. While the king was not answerable to his subjects, he was answerable to God for them. In addition, the feudal nature of society, with the king at the apex of a social triangle, reinforced the notion of bilaterality of obligations in that system.[66] Thus the contractual theory of the right to govern (or at least to stay governing), which became so important in the eighteenth century, was implicit from this time. But in a paradigm of original sin, this implicit notion could not support a concept of the inherent dignity of the person. And the emphasis was on duties rather than rights because of the social and political structure, and a theological belief system which at times amounted to theocracy.

2.3.1 Augustine contrasted with Aquinas

I have chosen two influential Medieval writers, one from the beginning and one from the end of the Medieval period to illustrate Medieval thought in this regard. The most important early Christian writer was St. Augustine (354-430).[67]

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[65] Kelly, however, notes that there were exceptions in what was to become Germany, but that the "Germanic tradition is not easy to document": J.M. Kelly: A Short History of Western Legal Theory (1992, Clarendon Press, Oxford), p.92.

[66] Kelly, pp.96ff

[67] See Robert E. Meagher: Augustine: An Introduction (1978, Harper & Row, New York). For bibliographical materials, see Augustinian Bibliography 1970-1980, with Essays on the Fundamentals of Augustinian Scholarship, compiled by Terry L. Miethe (1982, Greenwood Press, Westport).

Augustine's beliefs are perhaps best illustrated in his work "The City of God" (De Civitate Dei) which was written between 413 and 426. The essence of man was that, while he had an innately evil side, God in His omnipotence and omniscience had created man with rationality and free will. Man was bad, society was cruel and depraved, but God had given mankind the key to escape: intelligence and willpower to choose between good and evil. However, freedom meant primarily spiritual freedom and this can only be partly achieved on earth.[68] Man is inherently weak and cursed with original sin - he is not inherently full of dignity. The time spent in the City of Man should be a preparation for entry into the City of God. Obedience to divinely-sanctioned institutions such as the Church was a duty; inequalities and injustices had to be accepted as part of God's program for the regeneration of the human race.[69] Augustine's universe was theocratic and theocentric. Freedom within society was irrelevant to the primary aim, which was salvation. Faith, in such a context, means the suspension of individualism, and the pathway to salvation is to be found through the uncritical acceptance of doctrine.

However, there began to be profound changes. Developments in farming equipment through the twelfth century (such as the plough) and changes in farming practice (such as crop rotation) began to produce agricultural surpluses instead of

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[68] 1 Peter 2, ll.13-17.

[69] Baker, ante, at p.178.

the largely subsistence farming which had existed previously in western Europe.[70] When the surplus was traded for goods or services, or sold for money, the economy changed. And the growth of a money economy fuelled trade, which resulted in contact with new and different ideas.[71]

The Crusades also brought western Europe into contact with the learning of the east. This, ironically, had included the availability of texts of Aristotle in Arabic which had been translated into Latin and reached western Europe via Spain.[72]

The way in which the medieval person reasoned and thought began to change. Trial by ordeal began to be replaced by recognised classes of crimes and specified standards of punishment. The major universities began to be established in the early thirteenth century.[73] The greater ordering of thought was also reflected[74]

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[70] See James Thompson & Edgar N. Johnson: An Introduction to Medieval Europe 300-1500 (1937, W.W. Norton & Co, New York), Chapter 19.

[71] See Sidney Painter: A History of the Middle Ages 284-1500 (1954, Alfred A. Knopf, New York), pp.239ff.

[72] See Joseph R. Strayer: Western Europe in the Middle Ages - A Short History, 2nd ed (1974, Princeton-Hall Inc, Englewood Cliffs), pp.127ff.

[73] Paris in 1223, and Oxford and Cambridge soon afterward, although Bologna had been set up in the eleventh century. See C.W. Previte-Orton: The Shorter Cambridge Medieval History (1952, Cambridge U.P., Cambridge), pp.621ff.

[74] In the sense that human thought, culture and the humanities can be regarded as "co-ordinate functional synonyms": see Richard McKeon, "Man and Mankind in the Development of Culture and the Humanities", Chapter 13 in Ben Rothblatt (ed): Changing Perspectives on Man (1968, University of Chicago Press, Chicago), p.282. This is put more simply by Allott who says: "Art is philosophy at play": Eunomia, ante, p.97.

in the style of architecture which has come to be synonymous with this period: Gothic.[75]

Clerical philosophers such as St Thomas Aquinas (1225-75)[76] blended the "re-discovered" Aristotelian approach (in particular, the view that everything has an end (telos) towards which it is naturally inclined and by which its essential nature is defined)[77] to the "traditional" Christian approach.[78] By this, it was regarded that temporal society should be modelled to resemble the Kingdom of God and laws should be formulated to resemble God's will. Aquinas' view (similar to Aristotle's) was that the State was a natural state for humans to be in, as opposed

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[75] The best known examples of Gothic architecture, in contrast to the early medieval Norman style, are the cathedrals of Notre-Dame and Chartres. In describing another, the church of St-Denis, near Paris, Clark has remarked:

> What makes the facade, dedicated in 1140, 'Gothic' is not any specific change in the figural sculpture, but a change in the relationship between the sculpture and the architecture itself. There is a new clarity and order in the arrangement of the vertical and horizontal divisions ... The windows are not isolated holes, as they had been on earlier facades, but are flanked by arcades and mouldings that visually link them to the dominant vertical buttresses. None of these elements is 'new' ... What is new about the facade of St-Denis is the way in which these elements articulate the design to create a totally unified, coherent expression of the two-towered facade. (William Clark, "Gothic", Chapter 4 in Denise Hooker (ed): Art of the Western World (1991, Hutchinson Australia, Sydney) at p.99.)

[76] See James A. Weisheisl: Friar Thomas Aquinas: His Life, Thought and Work (1974, Doubleday & Co., New York); Father Angelo Walz: St. Thomas Aquinas (translated by Father Sebastian Bullough), (1951, The Newman Press, Westminster).

[77] Summa Theologica 1a, 79-89 (translated in excerpt in Resch & Huckaby, pp.43ff).

[78] See Friedmann, ante, pp.108-12; J.G.Riddall: Jurisprudence (1991, Butterworths, London), pp.61ff., D.J. O'Connor: Aquinas and Natural Law (1967, Macmillan, London); Joseph Owens, "Aquinas as Aristotelian Commentator" in St. Thomas Aquinas 1274-1974: Commemorative Studies (1974, Pontifical Institute of Medieval Studies, Toronto), pp.213-38. Contrast, however, Mark D. Jordan: The Alleged Aristotelianism in Thomas Aquinas (1992, Pontifical Institute of Medieval Studies, Toronto).

to the Augustine view that the City of Man was inherently sinful.[79] The State was legitimised as a part of God's design.[80]

Co-operation was necessary for society to function, and there was a set place and duty for each individual within it.[81] In such a scheme, not only is the organic system and hierarchical nature apparent, it also makes superfluous any question of equality between the various parts. Their station is determined by their function, and vise versa. And all must co-operate for the proper running of the whole.

For Aquinas, God was rational and rationally orders the universe.[82] The "eternal" law (lex aeterna) through which the universe is governed by God is codified into natural law or lex naturalis, (which man, as a rational being, can discern, thus distinguishing good from evil) and divine law (lex divina) which is discovered through revelation (usually by the Church). Divine law was the revelation of God's

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[79] Summa Theologica 1a 2ae 96.4

[80] Kelly, p.126

[81] Other theologians, such as John of Salisbury had used the analogy of the human body to describe society with the Prince as the head and other people as various other parts of the anatomy. See Henry Phelps Brown: Egalitarianism and the Generation of Inequality (1988, Clarendon Press, Oxford), p.27. He is sometimes regarded as a precursor to the doctrines of the period later to be known as the Enlightenment because he contended that even though authorities ruled by the grace of God, they were still the servants of the people, subject to civil law, and could therefore be properly overthrown. Virtue (which was still a goal) only exists where there is liberty (Polycraticus, translated in excerpt in Resch & Huckaby, pp.25-39). His was, at this stage, a minority view.

[82] See John H. Wright: The Order of the Universe in the Theology of St. Thomas Aquinas (1957, Apud Aedes Universitatis Gregorianae, Rome).

truth by which the defects of human reason are supplemented.[83] Natural law thus represented a harmony between human laws and Christian values.[84]

In the Summa Theologica Aquinas wrote:

> St. Augustine says: "There is no law unless it be just." So the validity of law depends upon its justice. But in human affairs a thing is said to be just when it accords aright with the rule of reason: and, as we have already seen, the first rule of reason is the Natural law. Thus all humanly enacted laws are in accord with reason to the extent that they derive from the Natural law. And if a human law is at variance in any particular with the Natural law, it is no longer legal, but rather a corruption of law.[85]

This is an important development from the Greek conception of Natural Law (which saw Natural Law in the physical "ends" approach similar to laws of natural sciences) in that Natural Law becomes a measure of the validity of the acts of secular rulers. But it would be overstating the case to interpret this as a right to revolution. In the Latin, "lex" (law) must be distinguished from "ius", which does not mean a "right" in the sense of a claim or entitlement (or "having" a right), but rather refers to what is right. It does not necessarily provide a remedy (such as revolution) as much as moral standpoint to argue the rightness or wrongness of actions. If a ruler is breaching Natural Law, his obligation is to God rather than to the people. The latter might call upon him to mend his ways, or pray for divine

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[83] Summa Theologica II.1.9

[84] See Thomas E. Davitt, "St. Thomas Aquinas and the Natural Law", Chapter 2 in R.N. Wilkin, J.S. Marshall, T.E. Davitt & A.L. Harding: Origins of the Natural Law Tradition (1954, Southern Methodist U.P., Dallas).

[85] Summa Theologica 1a 2ae, 95, 2, quoted in D'Entreves at pp.42-43.

assistance, but revolution is not specifically sanctioned.

Thus, while natural law might be universal, one's position in society still predominantly determined one's rights and duties. Authorities ruled by the grace of God and therefore reflected both His pleasure and His wrath.[86] These authorities included the Church itself, contradiction of which amounted to punishable heresy, as the Inquisition indicated.[87] Natural law was seen to be universal, but equality meant spiritual equality. The emphasis was on natural law rather than on natural rights.

While the approach was one of a search for what is right rather than for individual rights, the greater ordering of thought (reflected, for example, in the Gothic architecture of the period) meant that the expression of the approach became more ordered. Magna Carta, for all its limitations, was not a mere custom, as was the usual form of law at this time: it was written down.

2.3.2 Magna Carta: Human Rights' Ancestor or Human Rights' Pretender?

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[86] Contrast Lauterpacht: International Law and Human Rights (ante), p.84.

[87] Shotwell records Aquinas himself as writing that heretics "deserve not only to be separated from the Church by excommunication, but also to be severed from the world by death." James T. Shotwell: The Long Way to Freedom (1960, Bobbs-Merrill, New York), p.213. His approach, while somewhat less rigid than that of Augustine was nevertheless fundamentally reactionary.

It was from this matrix that the Magna Carta emerged. While it has been called "the fountainhead of freedom",[88] the paradox is that such a seminal document in English legal history had in reality - and in intention - little if anything to do with what we would today call human rights. The belief that it did is in fact a later embellishment.

King John of England was seen as both a failure with respect to international politics (e.g., the failed wars against Philip Augustus of France) and an unpopular monarch at home.[89] The Magna Carta was forced upon him as much by circumstance rather than any necessary sense of doing right (it enabled a truce between the king and the barons so that they could prepare for war), and "the contradictions between the myth and the reality of Magna Carta are so many and so deep that its survival at all as a symbol of human rights is a first class historical conundrum."[90] It was not in fact the first royal document purporting to limit royal power. Henry I had issued the "Charter of Liberties" in 1100[91] as a means of

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[88] Raymond Stringham: Magna Carta: Fountainhead of Freedom (1966, Aqueduct Books, Rochester)

[89] See Asa Briggs: A Social History of England (1983, Viking Press, New York), p.59.

[90] J. Bartlet Brebner, "Magna Carta", Chapter 6 in R.M.MacIver (ed): Great Expressions of Human Rights (1950, Institute for Religious and Social Studies, New York), p.61.

[91] Coronation Charter of Henry I, 5 August 1100, reproduced in A.F. Scott: Everyone A Witness - The Norman Age: Commentaries on an Era (1976, White Lion Publishers, London), pp.273-75. The "rights" in this Charter included a promise that the king would not take church property, would not seek payment for giving his consent to certain marriages, would allow certain rights of inheritance and forgive certain debts.

attempting to control the barons and assure his succession.

The Magna Carta was a political compromise. It was not so much a radical break with the past as a guarantee of the rights of the nobility, clergy and "free men" (i.e., the freeholders of property and chattels - in other words, a class that would roughly approximate to the bourgeoisie) rather than of all individuals. It guaranteed few concessions to persons outside these groups. Many of its terms were in fact existing feudal customs and royal concessions.[92] Clause 39 stipulated:

> No freeman shall be captured or imprisoned or dispossessed or outlawed or exiled or in any way destroyed, nor will we go against him or send against him, except by the lawful judgment of his peers and by the law of the land.[93]

Henkin[94] refers to this clause as a mere "incidental phrase" in the document, although it came to be what is often referred to today as "due process".[95] Lauterpacht has pointed out that the principle found in Clause 39 can be found elsewhere, both before and after Magna Carta.[96] Clauses 12[97] and 14[98] have

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[92] For example, clause 23 dealing with the duty to build bridges, and clause 55 excusing penalties imposed "unjustly and against the law of the land."

[93] This version appears in the UNESCO publication Birthright of Man at p.196.

[94] Louis Henkin: The Rights of Man Today (1979, Stevens & Sons, London), p.10.

[95] See W.S. Holdsworth: A History of English Law 2nd ed (1937, Menthuen, Sweet & Maxwell, London), Vol. I, p.63, Vol. II, p.215.

[96] In 1188 by Alfonso IX at the Cortes of Leon; in 1222 in the Golden Bull issued by Andrew II of Hungary; in 1283 by Peter III of Aragon in the law of General Privileges (International Law and Human Rights, p.85).

been regarded as the origins of Parliament and of taxation by consent, although the common council is nowhere recorded as ever having met and the idea of it dropped into oblivion.[99] Parliament as we now regard it did not come into existence in England until the beginning of the fourteenth century. For most of the Middle Ages Parliament was in effect the king's court which he summoned when he pleased. It was an administrative convenience rather than an integral part of the legal and political system.[100] Therefore, to claim that Magna Carta represents a significant development in the growth of parliamentary democracy would be an exaggeration. Patterson has remarked:

> Parliament's main role for most of the later Middle Ages was one of communication and effective administration ... It was precisely in the growth of these administrative functions - originally purely a convenience for the king and a burden rather than an honour for the representatives - that we find the source of Parliament's eventual supremacy, and not in the selfish, essentially grasping, and exploitative assertion of liberties by the aristocracy.[101]

Significantly, Clause 40 stipulated: "To no one will we sell, to no one will we

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[97] "No scutage [money payment in lieu of a knight's service] or aid [a grant by the tenant to his lord in times of distress] shall be imposed in our kingdom except by the common council ... [with limited exceptions] and for these purposes it shall be only a reasonable aid ..."

[98] "And for holding a common council of the kingdom ... we shall cause to be summoned the archbishops, bishops, abbots, earls and greater barons ..."

[99] Brebner, ante, p.62

[100] See generally S.B. Chrimes: An Introduction to the Administrative History of Medieval England (1952, Basil Blackwell, Oxford).

[101] Orlando Patterson: Freedom in the Making of Western Culture (1991, Basic Books, New York), p.370. Specific footnotes have been omitted, but all of Patterson's references are to R.G.Davies & J.H.Denton (eds): The English Parliament in the Middle Ages (1981, Manchester U.P., Manchester).

refuse or delay, right or justice". The term used here is "no one" rather than "freeman". It is the only time in the document the term is used where a general right not directly or indirectly concerned with landholding and the rights and obligations arising from it is granted. It is the most significant clause in the document for us today. While Clause 61 provided that if the king did not adhere to Magna Carta, the barons were entitled to seize his castles and possessions,[102] it has been argued that the king had no intention, and was probably never expected, to live up to this guarantee as King Henry I's Charter of Liberties of 1100 had been ignored with impunity.[103] In fact, John did repudiate it and in this he was supported by the Pope on the basis that the agreement had been obtained under duress.[104] One description and analysis of the Magna Carta indicates that it primarily:

> ... consists of detailed regulations of the financial relationships between a king and his feudal tenants-in-chief, a group of a few hundred persons. Those regulations amounted to stupid and futile efforts to turn back the clock, to defeat a rise in prices and the shift to a money economy, by denying their existence. Most of the Charter, in fact, is monumental evidence that the men who imposed it were about as ignorant as men could be about what had been happening in England during the past fifty years, notably the nature of the expansion of royal justice and administration.[105]

Moreover, in a feudal social structure where the king's powers arose, inter alia,

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[102] See O'Neill & Handley, ante, p.3.

[103] Brebner, p.63

[104] Papal Bull of Pope Innocent III on August 24, 1215: see J.C. Holt: Magna Carta and Medieval Government (1985, The Hambledon Press, London), p.203.

[105] Brebner, ante p.62. For example, clause 25 provides for rents due to be payable "at the ancient rents and without any increase".

because he was the chief landholder in the kingdom and the rights referred to in the Charter arise almost exclusively as a result of land-holding, those rights take on the character of private rather than public law rights. As Maxwell Cohen has noted:

> At best the "liberty" represented by Magna Carta was a "liberty" which was intended to favour local, feudal action as against monarchical centralisation. So the spirit of liberty which the Barons sought to protect was hardly the same high sentiment which Coke and Seldon had in mind when they debated the merits of habeas corpus. For "Equality", as McKechnie has said, "is a modern ideal" quite out of place amid the Baronial arrogance of medieval England.[106]

While a far cry from being a true people's charter,[107] the Magna Carta nevertheless came to be regarded (and is still regarded in the English-speaking world)[108] as a touchstone of rights. One authority mentions that in the immediately succeeding seven reigns of Henry III to Henry VI, the Magna Carta was confirmed (in various versions)[109] thirty-seven times.[110] Another,[111]

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[106] Maxwell Cohen, "Some Considerations of the Origins of Habeas Corpus" (1938) XVI Canadian Bar Review 92 at 94-5. The reference is to McKechnie's Magna Carta (1905) at 135. Other footnotes have been omitted.

[107] For example, an example of its inequality, which astonishes us today, is clause 54 which reads: "No one shall be seized or imprisoned on the appeal of a woman concerning the death of any one except her husband."

[108] See, for example, the quote at the beginning of this Chapter. The argument being made there, however, was one opposing the introduction of a Bill of Rights because of the supposed effect of the Magna Carta.

[109] Faith Thompson calls the 1225 version "definitive": The First Century of the Magna Carta: Why It Persisted As a Document (1925, 1967 reprint, Russell & Russell, New York), at pp.8-10.

[110] Taswell-Langmead's English Constitutional History from the Teutonic Conquest to the Present Time (11th d. by T.F. Plucknett, 1960, Sweet and Maxwell, London) at p.91.

[111] Faith Thompson: Magna Carta (Minneapolis, 1948)

states that it had emerged as a "fundamental" or "liberty" document by the reign of Elizabeth I when it was used to argue the limitation of royal powers by the rule of law, a document of unalterable fundamentality that no letters patent from the monarch could touch it, although the issue of it binding parliament and affecting statutes was apparently left open.[112] One scholar has gone further, to contend that the acknowledgment believed to have been given by medieval lawgivers to the notion of natural law (whether it be that legislation was regarded as merely being declaratory of pre-existing rights, or that some matters are sacrosanct and beyond the reach of legislative authority) is highly overrated.[113] He contends that there is no evidence to establish that the Medieval attitude to enacted law was that it had to conform to any particular standard. Where Parliament is a relatively new phenomenon, the primary concern is of its jurisdiction and purpose rather than with the products of its labours. The relatively static nature of medieval law can be attributed to conservatism as much to a belief that the law reflected "natural" priorities. Moreover, law was regarded as reflecting ancient custom rather than as something which broke new ground.[114]

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[112] According to J.W. Gough: Fundamental Law in English Constitutional History (1977 reprint with corrections of the 1955 edition, Clarendon Press, Oxford), at p.224, Note C.

[113] Morris S. Arnold, "Statutes as Judgements: The Natural Law Theory of Parliamentary Activity in Medieval England", (1977) 126 University of Pennsylvania L.R. 329

[114] See Charles Howard McIlwain: The High Court of Parliament and its Supremacy: An Historical Essay on the Boundaries Between Legislation and Adjudication in England (1910, Yale U.P., New Haven), pp.42ff.

If the status of Magna Carta as a rights document is in fact exaggerated, what factors impelled its perpetuation? McKechnie has described Magna Carta's overall effect as being that "in many a time of national crisis Magna Carta has been appealed to as a fundamental law too sacred to be altered - as a talisman containing some magic spell, capable of averting national calamity."[115] If so, what precisely did - and does - it symbolise?

At a practical level these guarantees were now in written form and reiterated that the king could only proceed against his free subjects by recourse to legal process.[116] Its two important philosophical implications were that there exist fundamental laws that even the king could not violate and if he did, he could be forced to comply or be overthrown. The Magna Carta and its resurrected successors represented the medieval aspiration (if not the fact or attainment) of the law of nature. As "right" was turning into "law",[117] it represents the beginning of the notion of the rule of law.

But the fact is that the real power of the Magna Carta has been read into it by later

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[115] William Sharp McKechnie: Magna Carta: A Commentary on the Great Charter of King John (1914, Maclehose & Sons, Glasgow), p.121

[116] See Holt, ante at pp.204-5, for examples where the Magna Carta was used to restore landholdings to their "lawful" (baronial) owners.

[117] Id., p.206

generations.[118]

2.4 The Renaissance and the Reformation - Rights, Nature and Humanism

> The Italian Renaissance was something more than an instantaneous translation from superstition to rationality, from hair-shirts to Lorenzo de Medici. Voltaire said that religion began when the first fool met the first knave, but only a Voltaire ... could say of the "priest-ridden", "sottish" thirteenth century that with it we pass "de l'ignorance sauvage a l'ignorance scholastique".[119]

The Medieval social hierarchy began to fracture with the emergence of a plurality of independent States and the expansion of commerce resulting in the creation of new cities and the breaking down of the traditional social order. The previous stratification of society into aristocracy, Church and labouring peasantry was disrupted as a new class emerged: the merchants. Not dependent on the feudal lords like the peasantry, it was a new class conscious of its own identity. It had faith in the secular arts of government. Despite catastrophes like the Black Plague which killed approximately half the population of Europe, cities such as Florence,

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[118] Its use by Sir Edward Coke is described below. Anne Pallister has remarked: "each generation has written its own history of the Charter according to the needs of the day.": Magna Carta: The Heritage of Liberty (1971, Clarendon Press, Oxford), p.2.

[119] Baker, p.197. Voltaire's quote is from Essai sur les Moeurs Ch.XLV.

based on commerce, industry and banking, began to flourish.[120]

Economic and social changes spurred attitudinal change, which was reflected in the arts.[121] It was the patronage of such a wealthy commercial class which facilitated a series of intellectual and artistic breakthroughs known as the Renaissance.[122] As Kelly has written, the Renaissance marked "the secularization of public life and the emancipation of the lay individual from spiritual authority."[123] Thinking about and depicting human life had begun to move away from the belief in a universal, a priori, scheme in which things were ordained into one in which things (including

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[120] The Italian city states were at this time paramount as Italy lay at the hub of trade. Much of this trade was carried as cargo on ships and the merchant bankers made spectacular fortunes, and took great risks, with money tied up in cargo which might be sunk at sea. Money lending, which had always been frowned upon by the Church, became a major adjunct to trade, as Shakespeare's play "The Merchant of Venice" indicates (although the moral against usury is still strong in that play as England was not as great a trading nation as Venice at that time). In fact, the three balls which are today the internationally recognised symbol of the pawnbroker were a part of the crest of the Medicis. The growth of mercenary armies to protect this wealth is also another feature. Shakespeare's "Othello" was one such, as is the papal Swiss Guard. Problems which today we would recognise as "modern" begin to appear at this time. Economics and politics both within and between the city states gave rise to ethical issues such as the relations of one state to another and, more importantly for present purposes, the relationship of the individual to the State.

[121] Renaissance art exhibits more life-like figures (compare Michelangelo's God on the roof of the Sistine Chapel with medieval iconographic representations). A soft, warm reality and a new humanity and pathos can be detected. There is also a new (or renewed) appreciation of anatomy together with individual characterisations which were generally absent in Medieval art. It is also in this period that the use of perspective in art becomes dominant. The depth and dimension of art indicated a view of the subject from an individual point of view, instead of the flat-looking "God's-eye view" of earlier painting. The implication was, in addition, that the view was transient rather than a depiction of eternal truth.

[122] See generally J.R. Hale: Renaissance Europe (1971, Collins, London)

[123] At p.159

new things) could be discovered and not be regarded as an heretical challenge to the past.

There also was an increasing awareness of, and a growing dissatisfaction with, the corruption of the Church. The fragmentation of Roman Catholic Christianity was not based solely on moral considerations, however. It was also politically convenient for some of the States beginning to flex their economic and military muscles, such as the German and Scandinavian countries, and also for England, where Henry VIII wanted to rid himself of a wife. In 1534, with the Act of Supremacy, Henry rid himself of the Catholic Church instead. This would have been politically impossible and philosophically unthinkable a century earlier.

The loosening of the moral bindings of the Church in an atmosphere of "rediscovery" of the human form meant that, although humans were animals, they could also aspire to be God-like.[124] It was an age, overall, of humanism.[125]

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[124] Shakespeare's Hamlet, pondering this condition in his melancholy indecisiveness, says: "... this goodly frame, the earth, seems to me a sterile promontory; this most excellent canopy, the air, ... appears no other thing to me than a foul and pestilent congregation of vapours. What a piece of work is man! how noble in reason! how infinite in faculty! in form and moving how express and admirable! in action how like an angel! in apprehension how like a god! the beauty of the world! the paragon of animals!" William Shakespeare, Hamlet, Prince of Denmark Act II, Sc.ii, ll.302-311, (The Works of Shakespeare, John Dover Wilson (ed), Cambridge University Press, 1969). Hamlet was probably written in the 1590's.

[125] Some exemplars being Desiderius Erasmus (1466-1536), Cervantes and Shakespeare in writing, Leonardo, Michelangelo, Cellini, Titian and Raphael in art, and Thomas Tallis in music, the latter illustrating a distinct difference with the medieval music typified by the Gregorian chant, although not such a marked difference with the ballads written by people such as Richard I. In the latter case, however, the lyric was very different to Renaissance

Humanism as a movement[126] opposed Christian dogma in the sense that, where the medieval church preached original sin and the division betwee the body and the soul, humanism "preached" original goodness and of the body and soul being one.[127] It affirmed the value and dignity of human beings. It was not, however, anti-religious but a correction of the "errors" of Christianity and not a repudiation of it.[128]

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poetry, being based on themes of courtly love, where the object was to venerate the woman, not bed her. The poetry of John Donne, for example, is a distinct contrast to this. Donne's poetry also exemplifies a feeling of universality in the emotion of love and in existence itself:

> No man is an Island, entire of itself; every man is a piece of the Continent, a part of the main.
> Devotions, 17

[126] See Paul O. Kristeller, "Humanism", Chapter 4 in Cambridge History of Renaissance Philosophy (Charles Schmitt, Quentin Skinner & Eckhard Kessler, eds), (1988, Cambridge U.P., Cambridge).

[127] Kelly describes the difference between antiquity and Renaissance humanism in the following terms:

> The classical world had been a pagan world; its measure was man and his reason; its philosophy that which bade him live in accordance with the nature which his reason enabled him to interpret, rather than a personalised God and his revelation. Accordingly, the classical spirit which now begins to infiltrate the Catholic world ... was a 'humanist' one; and the word humanist is used to describe the mind, and the man, cultivated in and devoted to the heritage of classical antiquity, which was now thrown ever wider open to his view as ancient manuscripts and works of art began to fill the libraries and great houses of Western Europe. Central, of course, to the humanist mind, indeed the unconscious deposit of its pursuits, was the spirit of calm, critical. independent judgement, of intellectual freedom and self-reliance, which was the very opposite of the old medieval mentality, accustomed to accept the Church's authority on everything. (Kelly, pp.165-6)

[128] In the words of the scholar Ferdinand Schevill it was "a movement of the human mind which began when, following the rise of the towns, the urban intelligentsia slowly turned away from the transcendental values imposed by religion to the more immediately perceptible values of Nature and of man." (History of Florence (New York, 1936) pp.316-317). See also Allan Bullock: The Humanist Tradition in the West (1985, Thomas & Hudson, London).

But this God-like creature, however, operated to its full potential only within the perceived natural order of things, as the tragedies of "King Lear" and "Macbeth" illustrate. When that natural order was disturbed, tragedy followed.

It was not therefore a complete paradigm change.[129] Society was still regarded as being arranged more or less according to the will of God. Kings ruled by divine right and one's position in society, whether as a serf or as an aristocrat, determined the extent to which rights could be possessed or exercised. Even though one's position might improve through life instead of always being preordained, the social structure itself determined the rights attaching to each. But a personal rather than a social identity was no longer suspect.[130] Universality and individualism were starting to merge.

But the process of transition from Medieval to Renaissance thought was neither smooth nor consistent. The Renaissance in fact saw a variety of movements and schools.[131] The dichotomies can perhaps best be illustrated by the two sides of

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[129] See A.G. Dickens: The Age of Humanism and Reform (1972, Prentice-Hall, Englewood Cliffs).

[130] See Wilson H. Coates, Hayden V. White & J. Salwyn Schapiro: The Emergence of Liberal Humanism: An Intellectual History of Western Europe (1966, McGraw-Hill, New York).

[131] Wallace Ferguson: The Renaissance in Historical Thought: Five Centuries of Interpretation (1948, Houghton Mifflin, Boston); Hiram Haydn: The Counter-Renaissance (1950, Scribner, New York); Joseph Mazzeo: Renaissance and Revolution. The Remaking of European Thought (1965, Pantheon Books, New York); Philip Ralph: The Renaissance in Perspective (1973, St. Martin's Press, London); Keith Thomas (ed): Renaissance Thinkers (1993, Oxford U.P., Oxford).

the Renaissance philosophical coin: Machiavelli and Thomas More.

2.4.1 Machiavelli contrasted with More

Niccolo Machiavelli (1469-1527), born into a noble but impecunious family, served his native Florence for most of his life as a clerk and diplomat, observing the machinations of the rulers of Europe, including Cesare Borgia.[132] In 1512 the Florentine Republic was overthrown by the Medicis and Machiavelli, who was suspected of treason, was tortured, imprisoned and eventually banished. The embittered exile wrote in the following year (only fourteen years before the end of his life) "The Prince", in which society is depicted - as Machiavelli himself had both seen and experienced - as a struggle for power.[133] It is a bravura display of realpolitik basically unconcerned with morals, religion or the hereafter except when they contributed to the acquisition and maintenance of that power. Virtue, liberty, honour and freedom are tools to achieve power. Man is not only innately sinful (current theological theory opted for humankind's basic depravity), but positively dangerous, and therefore in need of being controlled. The Prince does not in fact

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[132] Biographical studies of Machiavelli include Pasquale Villari: The Life and Times of Niccolo Machiavelli (trans. Linda Villari) (4th impression, T. Fisher Unwin, London, n.d.); D. Erskine Muir: Machiavelli and his Times (1936, E.P. Dutton & Co., New York); Roberto Ridolf: The Life of Niccolo Machiavelli (trans. Cecil Grayson, 1963, U. of Chicago Press, Chicago); Quentin Skinner: Machiavelli (1981, Oxford U.P., Oxford).

[133] For a critique, see Leo Strauss: Thoughts on Machiavelli (1958, reprinted 1984, U. of Chicago Press, Chicago).

rule by God's grace, but by cunning, by the use of allies and by keeping enemies at bay. In its essence, a secular rather than a religious approach to government. Freedom (for some) is in effect secured by political expediency and not by virtue, or by a notion of rights or by law, whether natural or otherwise. Man was still regarded as the possessor of free will and the ability to rationalise, but the vision of using society as an instrument for moral improvement had faded. "The Prince" is a work which is not so much concerned with how society should be run, but how it must be run if one is simply to survive.

John Kelly described it this way:

> There is no pretence that the legitimacy of government's operations depends on their conformity with God's law, natural law, or any such transcendent standard; and even though ... Machiavelli preferred a form of government in which the rulers are subject to the laws, this is not for him an overriding requirement - the state's interest may legitimately require their violation ... Machiavelli is thus a significant figure ... in the intellectual march that was to lead through Hobbes and Rousseau towards the totalitarian state of the twentieth century.[134]

In contrast, Thomas More (1478-1535: and writing at exactly the same time as Machiavelli) was Chancellor of England under Henry VIII. He was martyred by the latter, later canonised, and combined piety with a humanist optimism regarding the potential goodness of man.

It is both interesting and significant to recognise that More, like Machiavelli, was a

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[134] Kelly, p.172

statesman and clearly appreciated political reality.[135] More was middle class, the son of a judge and of a spiritual frame of mind who seriously considered entering a monastery in his youth.[136] While admitting that man is weak, and that a lust for power is a contributing factor in the equation, More believed that a proper societal structure, in which laws incorporated Christian morality and promoted human dignity, would diminish this. The cause of social evil was not an innate evil in humans but in the social structures built by them.

In "Utopia"[137] written from 1515 to 1516, More wrote, in effect, a Renaissance fairytale in which tyranny was repressed by a representative system of checks and balances.[138] It can also be seen, in part, as an opposition to the rise of capitalism.[139] Virtue, ethics and duty were given the force of law. But it was not only duties which were stressed, but liberties as well. In this he was unlike his

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[135] Anthony Kenny, "More", in Renaissance Thinkers, ante, pp.205-99; E.M.G. Routh: Sir Thomas More and his Friends 1477-1535 (1934, Oxford U.P., Oxford). Biographies of More include Christopher Hollis: Sir Thomas More (1934, Sheed & Ward, London); Theodore Maynard: Humanist as Hero: The Life of Sir Thomas More (1947, Macmillan, New York), Richard Marius: Thomas More: A Biography (1984, Alfred A. Knopf, New York).

[136] He in fact lived with the Charterhouse monks while studying law. In later life he wore hair shirts and slept on a plank with a log for a pillow. (Bronowski & Mazlish, p.50)

[137] Extracted in Resch & Huckaby, pp.77-98

[138] For a critique of "Utopia" and other writings by More, see Alistair Fox: Thomas More: History and Providence (1982, Basil Blackwell, Oxford).

[139] On the island of Utopia there is no money. "Prices" are therefore not set by the operation of supply and demand, but rather people do good works for each other. Also, everybody works, fights and studies: there is no specialisation or division of labour.

medieval predecessors. Life was not seen as being one entirely of self-denial, but able to provide a joyous fellowship of mankind. The very name of his book is often used today as a term of derision, representing the impractical and the impossibly idealistic, although one authority proposes that the climate of social opinion at the time was sufficient to sustain an idealism not supported at earlier times.[140]

A man of steadfast conviction in his beliefs, More went to the executioner's block rather than exchange them for political expediency.

Despite the differences between Machiavelli and More, what is indicated is that the focus through which life and humans were viewed was shifting. In discourse, including art, it was human beings who were becoming, if not the centre of attention, then at least the focus through which that attention was directed. The individual began to emerge from what has been called "the communal cocoon of the Middle Ages".[141] And individualism helped to sustain a criticism of

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[140] ...[T]he climate of opinion in the sixteenth century prepared the way for More's imaginary commonwealth. People were ready for new extensions of their experience. We can see this, oddly, even in mathematics, where the development of negative, irrational, and imaginary numbers was taking place. As Ernst Cassirer remarks [in An Essay on Man, New York, 1953, p.84], "Negative numbers first appear in the sixteenth century in Michel Stifel's Arithmetica Integra - and here they are called "fictitious numbers" (numeri ficti)." The ability to deal with the imaginary and nonexistent in an attempt to solve real problems was an innovation of More's period. (Bronowski & Mazlish, pp.54-55)

[141] R.J.Vincent: Human Rights and International Relations (1986, Cambridge, C.U.P.) p.23

fundamental institutions.

2.4.2 The Reformation: Luther contrasted with Calvin

> Place your money in the drum
> The pearly gates open and in walks mum.[142]

The paradigm of humans in society was adjusted even further during the Reformation, which divided Europe and was the spur for wars which helped create the political map of that continent which we could recognise today.[143] It changed the relationship between monarch and church in England.[144] It was carried with the Pilgrim Fathers to the New World. At this time reform of the Church meant, in effect, reform of the world.[145] A change in religion could mean a state upheaval.[146] Dissatisfaction and disillusionment with the Church facilitated

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[142] The "hard sell" patter of the indulgence pedlar, the Dominican Tetzel, reported in Henry Chadwick & G.R. Evans (eds): Atlas of the Christian Church (1987, Equinox Books, Oxford), p.93

[143] E. Harris Harbison: The Age of Reformation (1955, Cornell U.P., Ithaca); Hans J. Hillerbrand: Men and Ideas in the Sixteenth Century (1969, Rand McNally, Chicago).

[144] Oscar A. Marti: Economic Causes of the Reformation in England (1929, Macmillan, New York).

[145] See Roland H. Bainton: The Reformation of the Sixteenth Century (1952, Beacon Press, Boston); Harold J. Grimm: The Reformation Era 1500-1650 (1973, Macmillan, New York); G.R. Elton: Reform and Reformation - England 1509-58 (1977, Harvard U.P., Cambridge).

[146] In the second half of the sixteenth century France was torn apart by religious civil wars. The rise of Calvinism gave ideological and religious justification to the struggles of the great houses to control the weak monarchy. The massacre of the Huguenot (Calvinist) leaders in Paris on St. Bartholomew's Day 1572 occurred with the connivance of the royal court - the regent queen was concerned about the Huguenot influence over Charles IX who was still a minor - and

acceptance of a belief that the struggles of life are not just a necessary preparatory exercise for admission to heaven but are part of a terrestrial process towards the creation of a heaven on earth. The goal had been wrenched from above and placed within human grasp.[147]

This was also the age of Copernicus.[148] And in the same year that Calvin died (1564), Galileo Galilei was born. The revolutionary theory of the latter - that the earth revolved around the sun and was not the centre of God's universe[149] - shook the Catholic church to its very foundations[150] and intimated that the theories could be detached from God, challenging people's perceptions of themselves. And these theories were "trusting to telescopes and mathematics rather

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triggered bloodshed over the country. (Bronowski & Mazlish, pp.102ff.) Calvinist preaching in the open countryside in the Netherlands was a crucial factor in rallying Dutch support for the revolt against Spain. On the other hand, in Spain the Reformation produced a potential binding force for the precarious ideological and spiritual unity of the kingdom: the Spanish Inquisition. The Spanish Crown saw in Catholicism not only a justification of its rule, but also the cement to bind together a society only recently formed out of several kingdoms. (Atlas of the Christian World, pp.111-114).

[147] See Alister E. McGrath: Reformation Thought: An Introduction (1988, Basil Blackwell, Oxford).

[148] Indeed, the locus classicus of the impact of changing paradigms on thought is Thomas S. Kuhn: The Copernican Revolution: Planetary Astronomy in the Development of Western Thought (1966, Harvard U.P., Cambridge).

[149] See Ludovico Geymonat: Galileo Galilei: A Biography and Inquiry into his Philosophy of Science (trans. from the Italian with additional notes by Stillman Drake) (1965, McGraw-Hill, New York). See also Stillman Drake's two monographs Galileo (1980, Hill & Wang, New York) and Galileo: Pioneer Scientist (1990, U. of Toronto Press, Toronto).

[150] Jerome J. Langford: Galileo, Science and the Church 3rd. ed., (1992, U. of Michigan Press, Michigan); Giorgio de Santillana: The Crime of Galileo (1961, Mercury Books, London).

than the Book of Genesis and Aristotle" engendering a "spirit of intellectual self-reliance."[151] At the same time, the exploration of the Far East and the European discovery of the Americas revealed that Europe itself was not the centre of the world.[152]

The lessening of the authority of the Church meant that: "because responsibility was shifted from the priesthood to the believer, the individual enjoyed a new sense of autonomy; but claiming freedom to exercise it obliged him to recognize the equal claim of others."[153]

There had been criticism of, and even rebellions against, the church before the sixteenth century (e.g., Joan of Arc). In addition, the church had its own internal problems for a century before Luther, as the Great Schism indicates.[154] At those times, the church had either absorbed the changes, or repressed them.

The prologue to the Reformation is generally considered to be the ninety-five

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[151] Kelly, p.164

[152] For the impact on European thought of the discovery of the Americas, see J.H. Elliott: The Old World and the New (1976, Cambridge U.P., Cambridge).

[153] Brown, p.54.

[154] When Pope Gregory XI died in 1378 there was a dispute as to his successor which was not resolved for approximately 50 years. A part of the reason for this was the French influence over the papacy which had grown during the time of the Holy Roman Empire. The popes in fact lived in Avignon for the first half of the fourteenth century. See Kelly, p.164.

theses of a German Augustinian monk named Martin Luther (1483-1546).[155] As a young man of twenty-three, Luther was caught in a tremendous thunderstorm and nearly killed by lightening. In terror, he vowed to become a priest if his life was spared and submitted to that vow a year later. He believed that he had been touched by the hand of God. Of a depressive nature and consumed with spiritual unease,[156] Luther's view was the traditional one of man's fallen nature and unworthiness, but his theses, nailed to the church door at Wittenberg in 1517, amounted to an accusatory challenge over excesses such as the selling of indulgences (i.e., forgiveness of sins for the payment of a fee)[157] rather than real repentance. He was excommunicated in 1521 and went into hiding. Why his challenge to the church had been much more significant than those which preceded it was the fact that a belief that contrition alone was sufficient to absolve sins rendered superfluous religious paraphernalia and a church hierarchy to administer it. These beliefs denied to the Church its ultimate sanction against disruption and

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[155] See John M. Todd: Luther: A Life (1982, Crossroad, New York); Walter von Loewenich: Martin Luther: The Man and His Work (1982, Augsburg Publishing House, Minneapolis); Martin Brecht: Martine Luther: His Road to Reformation 1483-1521 (trans. James L. Schaaf) (1985, Fortress Press, Philadelphia).

[156] See Vergilius Ferm: Cross-Currents in the Personality of Martin Luther (1972, Christopher Publishing House, Massachusetts), Chapter 2.

[157] Theoretically, the purchase of an indulgence relieved the sinner only of the requirement to do penance and did not forgive the sin itself. However, in an attempt to raise more money through indulgences (amongst other things, for the construction of St. Peter's basilica in Rome) the latter effect was falsely claimed by monks such as Tetzel who used a sales pitch such as:

> As soon as pennies in the money chest ring,
> The souls out of their Purgatory spring.

J. Bronowski & Bruce Mazlish: The Western Intellectual Tradition from Leonardo to Hegel (1960, Harper, New York), at pp.82-83.

secession.

But Luther's application of his own doctrine was basically conservative rather than liberal. The Peasants' Revolt of 1524-25 arose because of the combination of Luther's belief that the word of God declared all men to be equal with the grinding poverty suffered by the German peasantry. It horrified Luther, who wrote a pamphlet entitled "Against the Murderous and Thieving Hordes of Peasants". Luther eventually came to think that it was a mistake to expose ignorant men to the uninterpreted vernacular text of the Bible (he had translated it into German) and from then on the German Bible was not used in Lutheran schools, with biblical instruction being confined to the upper classes and taken from the Latin New Testament.[158] Luther's pamphlet provided the nobility with a strong philosophical basis to crush the revolt. One hundred thousand people died.[159]

The Reformation policy of the open Bible, however, had created a diversity of religious opinion which was never to fully abate. This was anarchic in its effects. The very name of "Protestantism" has protest at its root. Groups such as the Anabaptists, Congregationalists and Calvinists arose. It was a social revolution which some commentators consider to be the birth of "modern" politics in which all strata of society participate.[160] Ironically, this "anarchy" was a fundamentally

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[158] Atlas of the Christian Church, p.96

[159] Bronowski & Mazlish, p.88

[160] See Bronowski & Mazlish, pp.87-88 and works cited therein.

authoritarian search for order.

John Calvin (1509-64), was a Frenchman trained for both the priesthood and law, but was rejected in both careers. In 1532, ironically at the same age as Luther in the thunderstorm, he experienced a "revelation" and thenceforward joined the protest against the corruption of the Church. Calvin's revelation was, however, more cerebral than mystical. His "Institutes of the Christian Religion", which he started to write in 1536 is a reasoned, logical array of dogma (as opposed to Luther's personalised passion).[161]

Unlike Luther, who considered that good would extinguish evil,[162] Calvin believed that political activism was necessary.[163] Moreover, not only must tyranny be actively destroyed; some men are predestined (by God) to do this.[164] In a spectacular rejection of the Medieval belief in free will, a right to overthrow a government could be argued as valid because this would be done through God's agents as an indication of divine will. Lest this thesis be regarded as advocating chaos resulting from the removal of the ultimate sanction around which Medieval

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[161] See Francois Wendel: Calvin (trans. Philip Mairet) (1971, Collins, London); William J. Bouwsma: John Calvin: A Sixteenth Century Portrait (1988, Oxford U.P., Oxford).

[162] See for example his "Christian Liberty", extracted in Resch and Huckaby at pp.100-114.

[163] See John T. McNeill: The History and Character of Calvinism (1967, Oxford U.P., New York).

[164] See "Institutes in the Christian Religion", extracted in Resch and Huckaby at pp.115-133.

life revolved, Calvin argued that those predestined to be saved had a responsibility to create a society which would be a heaven on earth and would join the government to the Church to suppress corruption in both. A separation between Church and State which today is considered fundamental to liberal democracy was not considered to be the best way in which both temporal and spiritual institutions could be kept honest. In Geneva, this was in fact put into practice under Calvin's personal guidance. But it was a theocratic dictatorship,[165] and not always a kindly one. It was austere and certainly not tolerant.[166]

However, because of the shifting proportions of majority acceptance or minority existence each religion had in different countries, notions of toleration and political individualism emerged, even if as a result of historical accident rather than doctrinal tendency. For example, the Calvinists were a majority in Geneva but a minority in England and France. In the latter countries, through people such as John Knox, Calvinism came to be associated with "free" government, although doctrinally (and, in Geneva, practically) this was far from the truth.

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[165] See Bronowski & Mazlish, pp.93-95

[166] When a doctor and scientist called Servetus wrote a book attacking the doctrine of the Trinity (in France, not Geneva) Calvin, who was himself regarded as a heretic by the Catholic Church, had him burned at the stake when he fled through Geneva to escape the Inquisition in France. In the four-year period from 1542 to 1546 in Geneva, a town of 16,000 people, there were 58 executions. The observation of Christmas was punishable by a fine and imprisonment, nobody was allowed on the streets after 9PM, and a thirteen year old girl was beaten with rods for declaring her preference for Catholicism: Baker, p.328.

Thus, there was no single "movement" or "philosophy" during the period reviewed in this section.[167] Heresy became a relative concept. To the medieval mind nature had been something along the lines of the miraculous and which was subject to divine intervention. In the Renaissance, it was starting to be understood (as the Greeks had pondered) that there were underlying laws to nature.[168] The spiritual crisis provoked by this explosion of knowledge led artists, and others, to seek new ways of seeing and understanding. The Reformation and the divisions within religions meant that criticism of existing structures of government was now more possible and the notion of political freedom became a continuing rather than an occasional issue, as a dynamic force rather than one used simply for political stabilisation.[169] But this "new" freedom was represented by authority.[170] The Renaissance and Reformation created change, but did not advocate anarchy. There was at least a reduction, if not an elimination, of a priori beliefs as discovery of new things and new worlds was seen to be possible, even desirable, rather than to be heresy. But it was monarchs, not individuals or representative government,

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[167] There was also a Catholic Counter-Reformation. See Pierre Janelle: The Catholic Reformation (1963, Bruce Publishing Co., Milwaukee); A.G. Dickens: The Counter-Reformation (1968, Thamsen & Hudson, London); G.W. Searle: The Counter-Reformation (1974, U. of London Press, London); Marvin R. O'Connell: The Counter-Reformation 1559-1610 (1974, Harper & Row, New York).

[168] Galileo, watching a swinging lamp during a service in the cathedral at Pisa in 1583, measured the regularity of the swing by comparing it to the beating of his pulse. The two kept equal time. There was still a perception of an underlying uniformity in nature.

[169] Leonard Krieger, "Stages in the History of Political Freedom", Chapter 1 in Nomos IV: Liberty, Carl J. Friedrich (ed.), 1962, Atherton Press, New York, pp.4-5. Hereafter cited as Krieger.

[170] Krieger, pp.9-10

which stepped in to fill the gaps created by the new structure and its resulting questions. There was little concept of individual rights (as opposed to Natural Law), although humans were beginning to be the focus through which life and nature were viewed (even though not the as the subjects of natural rights).

2.5 The English "Revolutions": An Affirmation of Tradition?

The irony of the events of the seventeenth century in England is that it saw the emergence of three documents generally considered seminal to the recognition of fundamental and individual rights: the Petition of Right, the Habeas Corpus Act and the Bill of Rights. In fact, none of these had much directly to do with people's rights, and the conception of fundamental rights was a confused one at this time. The Petition of Right did little more than declare existing laws. The Habeas Corpus Act of 1640 applied to criminal matters only and was for many years little more than a handy procedural device rather than the weapon for freedom it was later to become. The Bill of Rights made Parliament, not the people, the supreme law-making authority in the land. Its main aim was to provide political stability after eighty-five years of political uncertainty wrapped either side of a bloody civil war. It provided the structure, rather than the content, of rights: there are no assertions of individual liberties in it and it is in marked contrast to the American and French versions which were to succeed it in the next century. Individual rights were primarily consequential and residual in these documents.

The reign of the Stuarts in England was a period marked by almost continual conflict over the issue of the origin and nature of royal authority. The accession of James I after the death of Queen Elizabeth in 1603 saw the enthronement of a monarch who had been tutored by Calvinists. In that spirit, it had been drummed

into him that tyrants could be deposed by the people and that the primary duty was to God. James reacted (and wrote in "True Law of Free Monarchy") that monarchy itself was divinely ordained. While James conceded the existence of social contractarian theories of monarchy (which were to play such a major role later), his argument was that if such a contract did exist, and if it were broken, "who should judge the breake"?[171] The king was answerable to God and, by necessary implication, not to the people. The king was therefore above earthly laws: the divine right of kings. It was this that provided in England the focus for a significant "human rights" contest: the balance of authority between the Crown and the courts and between the Crown and Parliament.

In the early Middle Ages the distinction between legislature, executive and judiciary in England was non-existent. "Parliament", the King's Court, both legislated and adjudicated. While the Common Law was developing, there was no clear-cut theory of higher or fundamental law.[172] The law of nature and the law of God were recognised as being, at least in theory, superior to positive law. However, it is controversial whether these were used in the real sense of fundamental laws, to set aside positive law. Gough points out[173] that this issue is

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[171] Kelly, p.209

[172] J.W. Gough: Fundamental Law in English Constitutional History, ante, p.15

[173] Id., pp.17-19

controversial.[174] S.B. Chrimes doubted that a judge of the fourteenth or fifteenth century ever did nullify a statute because of repugnance to higher law[175] rather than for technical reasons.

From at least the time of Elizabeth I the resort to the courts to curb the exercise of royal prerogatives is evident.[176] Sir Edward Coke is often cited as the judge who first drew attention to the power of the Common Law courts to strike down

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[174] He quotes Christopher St. Germain who published in 1523 the "Dialogues in English between a Doctor of Divinity and a Student in the Laws of England" in which six grounds of the laws of England were enumerated: first, the law of reason; second, the law of God; third, recognised general customs of the realm; fourth, recognised legal maxims; fifth, recognised local customs; and sixth, "divers statutes made by our sovereign Lord the King and his progenitors, and by the lords spiritual and temporal and the commons in divers parliaments, in such cases where the law of reason, the law of God, customs, maxims ne other grounds of law seemed not to be sufficient to punish evil men and to reward good men." Gough considers that the placing of the law of reason as the first ground "sounds as if he [St. Germain] meant it to be fundamental" and that to this day the concept of reason plays a significant role in the law. Certainly the wording of the sixth ground makes it clear that legislation performs a supplementary function. Gough makes the further point that canons of interpretation interpret statutes strictly when they appear to be contrary to those principles. The latter do not necessarily overrule the former.

[175] S.B. Chrimes: English Constitutional Ideas in the Fifteenth Century p.291; Gough at p.17

[176] For example, Darcy v Allin (1598) 74 E.R. 1131, where a grant by letters patent granting a monopoly over the sale of playing cards was held to be contrary to the "lawful custom" of the City of London under which a guild called the "Haberdashers of London" were recognised as having the right to "buy, sell and merchandize all things merchandable within the realm of England." (at p.1132). The letters patent were held to be "contrary to the laws of the realm, contrary to the laws of God, hurtful to the commonwealth and in no part good or allowable." (at p.1133) The Queen was obliged by her coronation oath to follow the law, and while she was the fountain of justice and therefore could exercise discretion, such discretion had to be exercised in accordance with the law and could not exceed it. It was held that "arts and skill of manual occupations rise not from the king, but from the labour and industry of men, and by the gifts of God to them ..." (at p.1138). The letters patent had therefore attempted to exercise a royal discretion in an area where that discretion had no power to operate, and were void.

legislation which abrogated fundamental rights. In Prohibitions del Roy[177] he held that the king had no personal power to judge a case[178] as "no King after the Conquest assumed to himself to give any judgement in any cause whatsoever ... but these were solely determined in the Courts of Justice ... [for] if the King give any judgement, what remedy can the party have."[179] In the Case of Proclamations[180] he declared: "the King hath no prerogative but that which the law of the land allows him",[181] saying that "the law of England is divided into three parts, common law, statute law and custom; but the King's proclamation is none of them."[182] Heavy reliance is placed in the judgement on "ancient"

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[177] 12 Co. Rep. 63 (1607)

[178] While the king is theoretically present in all courts, it is the court which gives the judgement (at p.64). The implication of Coke is that the king lends authority to the judgement, but cannot supply the substance. In an interesting remark (at pp.64-65) Coke states:

> ...then the king said that he thought the law was founded upon reason, and that he and others had reason, as well as the judges: to which it was answered by me that true it was , the God had endowed His majesty with excellent science, and great endowments of nature; but His Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance or goods, or fortunes of his subjects, are not to be decided by natural reason but by the artificial reason and judgement of law, which law is an act which requires long study and experience, before that a man can attain to the cognizance of it ... with which the king was greatly offended, and said, that then he should be under the law, which was treason to affirm, as he said; to which I said, that Bracton saith, quod Rex non debet esse sub homine, sed sun Deo et lege.

[179] At p.64

[180] 12 Co. Rep. 74

[181] At p.76

[182] Ibid. The proclamations related to prohibitions on the construction of new buildings in London and the making of starch from wheat.

statutes[183] to show that the king cannot by proclamation "make a thing unlawful which was permitted by the law before: and this was well proved by the ancient and continual forms of indictments; for all indictments conclude contra legem et consuetudinem Angliae ... but never was seen an indictment to conclude contra regiam proclamationem."[184]

His most famous decision in this regard is Bonham's Case where he stated: "... in many cases the common law will controul acts of parliament, and sometimes adjudge them to be utterly void: for when an act of parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such act to be void."[185] One of the reasons given by Coke for finding for the Doctor was the fact that half the fine levied by the College against him was retained by them: they were therefore judges in their own cause because of their direct pecuniary interest. The extent to which these cases were dealing with notions of fundamental law must be treated with caution. Gough considers this case not to be one where Coke was propounding a theory of

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[183] At p.75, 11 Hen. 4.37, 18 Edw. 5.35,36, 31 Hen. 8 cap. 8, 22 Hen. 8, and Fortesque De Laudibus Angliae Legum cap. 9 are referred to.

[184] At p.75.

[185] 8 Co. Rep. 117b-118b (1610). Dr Bonham, who had obtained the degree of Doctor of Physic at Cambridge, had been fined and jailed by the College of Physicians for practicing medicine in London without being admitted by the College, pursuant to letters patent granted by Henry VIII and confirmed by the statute 14 & 15 Henry VIII, c.5. Coke found for Dr Bonham.

unconstitutionality so much as one of strict interpretation of statutes.[186] Moreover, to interpret cases from Coke's time as amounting to a form of judicial review would be anachronistic: at that time there was insufficient distinction between the legislature, executive and judiciary to support it.[187] In the early Stuart period Parliament had attained supremacy as a court, but its superiority as a legislator was far from settled. There was no question that parliament could blatantly override any common law principle if it chose to do so and did so in unequivocal terms.[188] But it did so more as a court of last resort from which there was no appeal. Parliament did not sit regularly, as it does now. It could be called, or dissolved, at the whim of the monarch.[189] The real issue was which court (parliament or otherwise) could override a fundamental moral principle on which a rule of common law was based, rather than the generation of the rights of individuals per se. Coke presumed that this power vested in the Common Law

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[186] The view of the case being authority for the right of a court to strike down legislation is supported by Gough but is contrary to other views held by Pollock and Holdsworth who regard the issue of statutes being declared void for abrogating fundamental principles to be obiter dictum in this case. The controversy is discussed by Gough at pp.32-33 and the contrary views cited particularly in footnote 4. He attempts to resolve the controversy by emphasising Coke's use of the notion of the court controlling an act of parliament. By this, Gough states at p.35, Coke meant that the Act should be interpreted strictly rather than widely, thus reading it down rather than declaring it to be a nullity. Kelly, at p.223, states that "it is now agreed that the authorities referred to by Coke do not support his proposition". See also C.K. Allen: Law in the Making 7th ed, (1964, O.U.P.), 448, 623.

[187] This view is also followed by R.A.MacKay, "Coke - Parliamentary Sovereignty or the Supremacy of the Law?" (1923-4) 22 Michigan L.R. 215

[188] Gough at pp.39-40

[189] In Elizabeth I's 45-year reign, there were only ten parliaments. There were only nine in the 37-year reign of the Stuarts.

courts alone; others, such as Lord Ellesmere[190] and the king,[191] considered that the King and Parliament prevailed.[192] In 1613 Coke was removed from the King's Bench and in 1616 the King ordered him to "correct" his Reports.[193] His doctrine appeared to decline but was not totally eliminated.[194] Even if Coke's doctrine was not as directly influential as it might at first appear, the process of interpretation, which the courts undoubtedly did have, could be a powerful one. It could effectively change the meaning of statutes. Moreover, the doctrine strengthened the belief in the supremacy of law, regardless of which body made it.[195]

In 1628 Coke published The Second Institutes, his restatement of English law. It was an interpretation of the Common Law which included an influential commentary on Magna Carta, calling it "the fountaine of all the fundamental lawes of the realme" and "declaratory of the principall grounds of the fundamentall

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[190] See MacKay, ante, at pp.228-9.

[191] The king stated in the Star Chamber that "the absolute prerogative of the Crown is no subject for the tongue of a lawyer": Catherine Drinker Bowen, The Lion and the Throne: The Life and Times of Sir Edward Coke (1956, Little, Brown & Co., Boston), p.375.

[192] Plucknett has isolated some other cases at this time which appear to follow the doctrine in Bonham's Case although not necessarily citing it as authority: Day v Savadge (1614) Hobart 85; Lord Sheffield v Ratcliffe (1615) Hobart 334a - Theodore F.T. Plucknett, "Bonham's Case and Judicial Review" XL Harv. L.R. 30 at 49-50.

[193] Plucknett, ibid; Kelly, p.233; Bowen, ante, pp.377ff.

[194] Plucknett (id) at 52ff. See also the Ship Money Case (1637) 3 State Tr. 836 where the court upheld the King's right to impose taxation without the consent of parliament.

[195] Haines: The Revival of Natural Law Concepts p.38

Lawes of England"[196] making the latter appear to be Natural Law,[197] certainly in the sense that it was stated to declare and confirm the "fundamental" laws of England as embodied in the Common Law.[198] This was achieved, however, according to McIlwain, by "reading later ideas into earlier institutions."[199] He says:

> ... to take the most notable example, the judicium parium becomes trial by jury. ... The document which is strictly feudal is now interpreted in a new and a "national" sense. The baronial rights originally protected by the provisions of the charter have now become the rights of the "multitude of free men".[200]

Similarly, Gough remarks that Coke interprets per legem terrae in Magna Carta as meaning the law of the land or due process under it, which to Coke meant due process of the Common Law as he understood it.[201] Magna Carta was used by Coke as though it were a "modern" document of contemporary relevance. In effect, he made it precisely that. Coke had read the Common Law into the Magna Carta, thus making the latter look like Natural Law as a part of English

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[196] Institutes, fol.81a; see Charles F. Mullett: Fundamental Law and the American Revolution 1760-1776 (1966, Octagon Books, New York), pp.44ff.

[197] See Richard P. Claude (ed): Comparative Human Rights (1976, Johns Hopkins U.P., Baltimore), pp.17ff.

[198] Gough, pp.40-42. See also James R. Stoner Jr.: Common Law and Liberal Theory: Coke, Hobbes and the Origins of American Constitutionalism (1992, University of Kansas Press, Kansas City), Part I.

[199] Charles Howard McIlwain: The High Court of Parliament and Its Supremacy: An Historical Essay on the Boundaries Between Legislation and Adjudication in England (1910, Yale U.P., New Haven), at p.57

[200] Ibid

[201] Gough, at p.40

fundamental customary law. As Shotwell has said,[202] Coke made it appear that "the law of nature could evidently be reached by the experimental processes of English justice as well as by the philosophic deductions of Aquinas."

MacKay considers that Coke stood at the transition from the medieval to a more modern conception of law. He writes:

> Medievalists regarded law as unchangeable, as a permanent body of rules which had existed from the birth of man and would continue until his disappearance. There was no legal authority to change these rules; they were almost as rigid as the laws of the physical universe; there was no such thing as new law. Coke regarded the old law as generally the best and therefore as dangerous to change. He was, however, quite aware that it had been and could be changed, either by interpretation or by the introduction of new law.[203]

As Stein points out,[204] legal theory and moral philosophy had both grown out of a natural law tradition which was based upon the social and rational nature of humans as the foundation of both legal and moral obligations. But these two strands began to digress.[205] This becomes particularly evident after the Bill of Rights in 1689 (see below) which made parliament the supreme law-making body so that any pretensions Coke may have had to establish a doctrine of a superior and fundamental law within the common law (of which the courts would be the

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[202] Shotwell, p.330

[203] R.A. MacKay, "Coke - Parliamentary Sovereignty or the Supremacy of Law?" (1923-4) Michigan L.R. 215 at 247.

[204] Peter Stein: Legal Evolution - The Story of an Idea (1980, Cambridge U.P., Cambridge), Preface, especially at p.ix.

[205] Stein (ibid) sees this occurring particularly through the eighteenth century.

ultimate interpreters) ceased to be a central practical principle of English politics.[206]

2.5.1 Petition of Right[207]

James' successor, Charles I (1625-49), was no more successful with Parliament than his father had been. Following his father's belief in the divine right of kings, Charles dissolved Parliament when it sought to impeach his favourite the Duke of Buckingham and resorted to a "forced loan" to run the country. This was clearly illegal and although he had the power to arrest those who did not pay, he abandoned any attempt to do so. Together with the cost of the wars he was fighting with Spain and France, Charles was forced to recall Parliament in 1628. It voted him supplies, but the trade off was the Petition of Right.

When Charles had ordered the collection of the forced loan in 1626, many of those who refused to contribute were committed to prison, remaining there without specific charge. Of these, five knights, including Sir Thomas Darnel, applied for habeas corpus, in order to bring their cases to court.[208] Habeas corpus did not exist as a right at this time but only as a grace of the Crown. The Court therefore

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[206] See Haines: The Revival of Natural Law Concepts pp.36ff.

[207] 3 Charles I, c.1, s.5 (1628)

[208] Darnel's Case 3 S.T. 1 (1627)

held that habeas corpus was not available to a person imprisoned by command of the king. In 1628, when Parliament met, the issue of arbitrary taxation and imprisonment was debated. The Commons passed a resolution declaring that no-one ought to be committed by the command of the King without cause and that habeas corpus should not be denied to such people. The King refused to agree to any Bill which stipulated more than a confirmation of the existing laws or which recognised individual liberties. Parliament then dropped the idea of proceeding by way of a Bill and decided instead to proceed by way of a petition of right. This was a device used by petitioners at this time who complained of hardship as a result of royal laws.[209] Such a person could either petition Parliament for an amendment to the law (the forerunner of the present private member's bill - and requiring the normal Parliamentary process to be observed) or proceed by way of a petition of right, in effect asking the king to tell the courts that the benefit of a law should be allowed to the petitioner.[210] The problem was how Parliament itself could proceed by way of such a petition. It achieved this by proceeding through the normal Parliamentary process but, in effect, inventing a new endorsement for the Bill.[211]

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[209] See generally, E.R. Adair, "The Petition of Right" (1920-21) 5 History 99

[210] The royal endorsement being "soit droit fait a la partie", instead of "le roi le veult" which endorsed public bills and "soit fait comme est desire" which endorsed private bills.

[211] This was a combination of that for a private members bill and that for a petition of right: "soit droit fait comme est desire".

This meant that the Petition of Right was not in fact legislation and was more along the lines of a petition confirming the existing laws and directing proper application of them. It was not a general charter of rights but a response to immediate conditions, and provided that the billeting of troops with civilians and the trial of civilians by martial law cease, and prohibited arbitrary imprisonment and taxation without the consent of Parliament[212] (the latter being a clear response to the forced loan). It referred to statutes made in the reign of Edward I with respect to taxation,[213] to the Magna Carta with respect to wrongful imprisonment,[214] and to statutes passed during the reign of Edward III with respect to criminal procedure.[215] However, by the Petition, it was placed on record that the grievances expressed in it were contrary to these existing laws and this would bind the courts in the future. It was not so much a revolution as restoring the system to its proper balance by checking any unlawful abuse of power by the king "according to the laws and statutes of this realm".[216] The idea that parliament itself might exercise power in an abusive way towards individuals was not in contemplation at this time - the primary issue at this stage was the contest between Parliament and the Crown.

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[212] Article 10

[213] Article 1

[214] Article 3

[215] Article 7

[216] Article 11

The fact that the Petition of Right was not regarded as a document of a fundamental quality curtailing royal power can be seen, for example, in the Ship Money Case of 1637.[217] A majority of judges upheld the right of the king, after the Petition of Right had been passed, to impose taxation without parliamentary approval.[218] However, the opinion reads that "when the good and safety of the kingdom in general is concerned, and the whole kingdom is in danger, your majesty may, by Writ under the Great Seal of England, command all the subjects of this your kingdom at their charge to provide and furnish such number of Ships, with men, munition and victuals, and for such time as your majesty shall think fit, for the defence and safeguard of the kingdom ..."[219] It was, in effect, an early form of resort to the doctrine of a state of exception. This, however, was considered to be based on "ancient" law and not a "modern" contrivance.[220] The report goes on to state: "This judgement ... gave much offence to the nation, and occasioned great heart-burnings in the house of commons."[221] The House in fact

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[217] 3 State Tr. 836

[218] Charles had decreed that the City of London, and other inland towns, had to supply ships and men to combat pirates who were affecting English trade and for the defence of the country. Those who could not supply ships, men or supplies had to pay a monetary contribution instead.

[219] At p.844.

[220] Sir George Vernon cites 2 Hen. 7, 11 (at p.1125), although Sir William Jones states in more Natural Law terms "salus populi est suprema lex" (at p.1184) as does Sir John Finch (at p.1224); contrast Sir George Crooke who said "there is not any one precedent, nor any one record judicial, or judgement in point of law, for the writ" (at p.1129). This case, in effect a judicial opinion of the judges in the Exchequer Chamber, was made by the barest of majorities (5-4).

[221] At p.1254.

called several of the judges before it to explain their decisions and in December, 1640, declared the ship money charges to be "against the laws of the realm" and "contrary to the Petition of Right."[222] The House of Lords agreed, adding that they were also against Magna Carta and therefore void.[223]

2.5.2 Habeas Corpus

Habeas corpus has been called a common law writ[224] to indicate that it was used long before its first legislative identification in the Habeas Corpus Act of 1640.[225] Darnel's Case mentioned above is an example, although its history goes back to the twelfth century when Henry II, at the Assize of Clarendon, issued an Ordinance which established the grand jury in a regular form and required the sheriff to "have the bodies" of the accused before the judge.[226]

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[222] At pp.1261ff.

[223] At pp.1299ff.

[224] See, for example, Edward Jenks, "The Prerogative Writs in English Law" (1923) 32 Yale L.J. 523 at 524

[225] 16 Car. I, c.10

[226] Jenks, ante, pp.524-5. For a history of habeas corpus, see R.J. Sharpe: The Law of Habeas Corpus (1976, Clarendon Press, Oxford), Chapter 1, and Badshah K. Miani: English Habeas Corpus: Law, History and Politics (1984, Cosmos of Humanists Press, San Francisco).

It was initially a somewhat ordinary,[227] although important, step in judicial proceedings. By the end of the seventeenth century it had become "one of the most powerful engines of popular liberty."[228] Somerset's Case[229] came to court by way of writ of habeas corpus. For something regarded as so important, its origins have been described as being "a few vague flourishes about ancient liberties [which] are supposed to account for its existence".[230] It was, however, part of the important struggle for power between Crown and parliament. Indeed, as it was originally a Crown grant, it was originally used to put people into jail as much, if not more than, to get them out of it.[231] Habeas corpus, particularly in the fifteenth century, had been used as part of the struggle among the courts themselves for influence: the courts of Kings Bench and Common Pleas on the one hand, with the rising power of Chancery and Exchequer on the other.[232]

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[227] The general notion of legal procedures protecting individual liberty in the face of the arbitrariness of the State was not unique to England. Cohen describes Spanish procedures of the eleventh and twelfth centuries whose effects were similar to that of habeas corpus, culminating in 1188 with "The Manifestation", an instrument of judicial command used to protect individuals from monarchical caprice. Cohen also locates a Praetorian interdict (de homine libero exhibendo) used in Roman times, but only applicable to free men. (Maxwell Cohen, "Some Considerations on the Origins of Habeas Corpus" (1938) 16 Canadian Bar Review 92 at 103.)

[228] Jenks, ante, p.526

[229] Discussed below.

[230] Edward Jenks, "The Story of Habeas Corpus" (1902) 69 Law Quarterly Rev 64

[231] Id., p.65

[232] Maxwell Cohen, "Habeas Corpus Cum Causa - The Emergence of the Modern Writ - I" (1940) 18 Canadian Bar Review 10 at 20ff.

The Habeas Corpus Act 1679[233] ("An Act for the better secureing the Liberty of the Subject") in fact only applied to "criminall or supposed criminall Matters". The application to civil matters, to which the Common Law writ had also applied, did not receive legislative fiat for over another one hundred years.[234] As Cohen has noted:

> ... the writ in modern form, upon which rests its fame and utility, was the product of a purely procedural device em; ed by the courts in the ordinary course of their business, and that chance and a host of social and political considerations, combined with its singular adaptability to a variety of purposes, rather than any special principle or deliberate creation, made it the eminently useful weapon it became in English law.[235]

Habeas corpus was concerned with remedies, not rights. The process was a support to rights, especially when compared with the Lettre de Cachet in France. However, if the courts could find no rights that had been infringed, the resort to habeas corpus would be futile. Its importance with respect to the growth of individual rights was therefore tangential rather than direct.

2.5.3 The Bill of Rights

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[233] 31 Charles II, c.2

[234] The Habeas Corpus Act 1803 (43 Geo. 3, c.140) applied to bankrupts. This was strengthened by the Habeas Corpus Act 1816 (56 Geo. 3, c.100) which applied to anything other than criminal matters.

[235] Maxwell Cohen, "Habeas Corpus Cum Causa - The Emergence of the Modern Writ - II" (1940) 18 Canadian Bar Review 172 at 197. In more modern times, especially in the U.S., habeas corpus came to be used as a form of judicial review: see Amnon Rubinstein, "Habeas Corpus as a Means of Review" (1964) 27 Modern L.R. 322] On the use of the prerogative writs generally, see S.A. de Smith, "The Prerogative Writs" (1951) 11 Cambridge L.J. 40.

Charles I was executed in 1649 and a republic was established. The charge against the king was that he had attempted to:

> erect and uphold in himself an unlimited and tyrannical power to rule according to his will, and to overthrow the rights and liberties of the people ... which by the fundamental constitutions of this kingdom were reserved on the people's behalf in the right and power of frequent and successive Parliaments ...[236]

Gough has commented that this time it was more than an attempt to restore the proper balance between king and people, it was implicitly revolutionary. "Here was something new and portentous. Fundamental law, it seems, had come to mean the claim of parliament to govern, or at any rate to check misgovernment, because it represented the nation ...".[237] Kings had been deposed - and even murdered - before, but Charles' execution was in distinct contrast, for example, to the motivation for the deposition and murder of Edward II in 1327.[238] The right of the people had become fundamental to the extent that it could be used to brake excessive royal authority. It was essentially defensive. But in it lay the potential for much more.

But within five years of Charles I's execution Parliament had again broken down.

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[236] Quoted by Gough at p.78

[237] Ibid.

[238] This may have had as much to do with intolerance to Edward's homosexuality as with English military defeats at the hands of the Scots during his reign. It was not the replacement of absolute monarchy with rule by a government based on law, but an act of the nobility concerned with external military threats to their power and acting in disapproval of sexual practices which today form one of the bases of anti-discrimination legislation.

Cromwell ruled as Protector. Government in England was regarded to be for the people, but it was not by them. On Cromwell's death in 1658 his son Richard was proclaimed Protector but, without his father's personality to sustain him (and no doctrine of divine right to rule) he was out of power within two years and Charles II (1660-85) resumed the throne. This was achieved without bloodshed. Matters occurred more as a matter of historical circumstance rather than as a result of perceived doctrinal necessity, as indicated by the fact that the reintroduction of the monarchy was achieved with little disruption to the workings of government or society. The English Revolution died with barely a whimper. The Restoration represented the rejection of experimental forms of government. Fundamental law was the traditional form of government: the king and two Houses of Parliament.[239] It implied a limit to the capacity to legislate, but was never fully articulated in Britain.[240] It was also something explicitly separate from Natural Law.

However, the trouble had not ended. Parliament was concerned that Charles II's Catholic son, James, would succeed to the throne. It attempted to change the

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[239] Gough at p.142 notes that Locke, when he drafted for Lord Shaftsbury the constitution of Carolina, called it the "Fundamental Constitutions of Carolina."

[240] Plucknett (id at 52-53) cites Godden v Hales 2 Shower 475 (1686). This case, just two years before the Bill of Rights, held that the monarch was an absolute sovereign who could dispense with any law as he saw fit because the royal prerogative was part of the common law which was fundamental and therefore untouchable by statute. Plucknett calls this Coke's doctrine "strangely twisted to the advantage of the Crown".

succession by legislation. The result was that Charles dissolved Parliament and ruled for his last four years without it. James II did succeed to the throne in 1685, but Charles' Protestant (bastard) son, the Duke of Monmouth, attempted to overthrow him. This failed, but James, who had made himself as unpopular as his predecessors, fled to France. His daughter, Mary (who had been raised as a Protestant) and her husband, Prince William of Orange (also a Protestant) were "invited" to take the throne in what has been called the "Glorious Revolution" in 1688. A condition of acceptance was that they would sign the Bill of Rights.[241]

The Bill of Rights affirmed that the king had "no right to violate the fundamental law of the Kingdom".[242] Iwe has described the Bill as follows:

> The essential aim of the bill was to redress the popular grievances aroused in the reign of the Stuarts, to assert the laws and liberties as against absolutism and to settle the crown of England on Prince William of Orange and his consort, Princess Mary, and to protect the interests of the Anglican Church.... It was in its day what the Magna Carta was in the feudal Middle Ages. It sought to assert the laws, rights and liberties of the English. Thanks to the political ideas and spirit of such theorists as John Locke influencing the social atmosphere of the time.[243]

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[241] See Stephen Haley Allen: The Evolution of Governments and Laws (1916, Princeton U.P., Princeton), Chapter 25, especially pp.733ff.

[242] Art. I

[243] Nwachukwuike S.S.Iwe: The History and Contents of Human Rights: A Study of the History and Interpretation of Human Rights (1986, Peter Lang, New York), pp.96-97.

The Bill of Rights of 1688 was incorporated into the Bill of Rights Act 1689[244] (as the Bill of Rights had not been made by a Parliament, which only a "king" could summon) and it was an ordinary Act of Parliament which could be, and has been,[245] amended. As Edmund Morgan has succinctly suggested, the parliament "invented the sovereignty of the people to claim it for themselves",[246] as the franchise was limited to male property holders at this time.

The Bill of Rights, and the 1689 Act, did not, however, amount to a proclamation of equality, as did the American and French Declarations a century later. It essentially confined itself to such matters as taxation and the upkeep of a standing army. However, it recited that James had subverted the laws of the kingdom by "assuming and exercising a power of dispensing with and suspending of laws and the execution of laws without consent of Parliament" and went on to declare that this was "illegal". As such, it is an uncompromising rejection of the notion of the divine right of kings. It further provided that elections to Parliament were to be "free" and that there was to be freedom of speech and debate in the proceedings of Parliament. In addition, excessive bail and cruel and unusual punishments should not be inflicted, and juries should be impartial. These were declared to be "the

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[244] An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown, 1 William & Mary c.2

[245] In 1825 (6 Geo. 4, c.50); 1867 (30 & 31 Vict. c.59); 1888 (51 Vict. c.3); 1910 (10 Edw. 7 & 1 Geo. 5 c.29); 1948 (11 & 12 Geo. 6 c.62); and 1950 (14 Geo. 6 c.6).

[246] Edmund Morgan: Inventing the People (1988, W.W. Norton, New York)

true, ancient and indubitable rights and liberties of the people of this kingdom". However, there is really very little in the way of the content of rights. It rather more provided for a structure in which those rights could be properly determined by commencing the severance of the nexus between king and parliament and providing for some degree of impartiality in court proceedings.

Moreover, it was predominantly a document intended to provide political stability for the kingdom by "preserving a certainty in the succession". This was done by a blanket prohibition on any Catholic person, or anyone marrying a Catholic, ascending the English throne.

It did, however, represent a firming of a fundamental political paradigm in that after it, it was no longer possible to ignore in Britain the supremacy of Parliament. This supremacy, however, did not have to be exercised pursuant to overriding humanitarian principles. For example, the Toleration Act of 1689 did give freedom of worship to, and ended the political disabilities of, certain sects of dissenting Protestants. However, non-Anglicans were still second class citizens excluded from public employment (for example, Jews could not sit in Parliament until 1858). The Church of England retained many political privileges.

When Kelly writes: "What emerged vi rious from the [Glorious] Revolution was a body of principles about the supremacy of law, the fundamental rights of man,

and the essentially democratic basis of political authority"[247] I think he is overstating the case. What emerged victorious was the supremacy of Parliament. It is true that Blackstone in his Commentaries on the Laws of England stated that English law was adapted for the protection of individuals in the enjoyment of "those absolute rights which were invested in them by the immutable laws of nature"[248] which he referred to as "the natural liberty of mankind."[249] But the correlation between English law and Natural Law is scant in the Commentaries with the latter little used to invalidate the former, prompting Hart to write:

> Blackstone merely pays lip service to natural law doctrines and the famous passage in the introduction to the Commentaries on the law of nature and its relations to municipal law is by many regarded just as a piece of decoration making for the beauty of the edifice, but forming no part of its structure and certainly no part of its foundations.[250]

Thus the first edition of Blackstone's Commentaries in 1765 makes it clear that even unreasonable laws, if their intention is unambiguously expressed, cannot be struck down by a court for that reason alone.[251] Hart concludes that Blackstone in fact used the law of nature to "stifle criticism by applying to positive law an empty test and triumphantly drawing the conclusion that the institution under

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[247] Kelly, p.207

[248] Commentaries, Vol. I, p.124

[249] Id., p.125

[250] H.L.A. Hart, "Blackstone's Use of the Law of Nature" (1956) 3 Butterworths South African Law Review 169 at 169.

[251] Commentaries, Vol. I, p.91. Plucknett (id at 60-61) notes that by the ninth edition this statement had been amended to be less dogmatic, but its meaning was unclear.

criticism had passed the test because it does not contradict any of its provisions."[252]

However, at the end of the seventeenth century England was unquestionably a world leader in political freedom. This had been reinforced by the Act of Settlement of 1701 which not only settled the crown on Sophia of Hanover (when Queen Anne's heir died), but also provided that judges should hold office for life and be removed from office only by both Houses of Parliament. What had happened to Coke at the hands of the monarch would not recur. Rights expanded, but only by a process of incremental creep.

2.5.4 Hobbes contrasted with Locke: Nature and Natural Rights

The methodology of seventeenth-century philosophy was borrowed from the new science.[253] (Locke was in fact a member of the Royal Society). It was empirical, relying on observations from nature rather than the supernatural. Knowledge, of all sorts, needed to be discovered by experience (and shared with others - this was the age which began the notion of publishing scientific work) and was not imprinted on

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[252] Hart, id., p.174

[253] See A.C. Crombie & Michael Hoskin, "The Scientific Movement and the Diffusion of Scientific Ideas, 1688-1751", Chapter II in C.W. Crawley (ed): The New Cambridge Modern History Vol. IX, (1975, Cambridge U.P., Cambridge).

the human brain by God. Locke frequently used the phrase "tabula rasa" in his writings,[254] whereas to the ancient Greek philosophers, there was no such thing as all objects, including humans, obeyed their inherent natures. Isaac Newton (1642-1727) in his Principia Mathematica published in 1687 had formulated fundamental laws of mechanics and discovered the law of gravitation. Earlier, the French philosopher Rene Descartes (1596-1650) had formulated the concept of nature as a highly complex machine and had even attempted to explain the existence of God in terms of Whole numbers.[255] It seemed that the whole cosmos could be explained in rational terms. This was also reflected in the literature of the time.[256] It was then possible to conceive that observable and rational universalist principles also governed people and society. However, although ideas (and knowledge) might not be innate, they could still be self-evident. (Locke was intensely interested in epistemology, the study of how we know things). But they could also be subject to overriding social limitations.[257]

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[254] See Bronowski & Mazlish, pp.199-203

[255] Ibid.

[256] See, for example, the poetry of Alexander Pope (1688-1744), especially An Essay on Man published in 1733.

[257] There was a sense of confidence and a belief in the ability of humans to classify and control things, but there were social, particularly religious, limitations. Carl Linnaeus founded the science of taxonomy in the eighteenth century. Its goal was to classify every organism on earth. This included humans and, by the criteria Linnaeus had set, humans and chimpanzees would have to be placed in the same genus. However,

> ...he well understood what an abomination, how scandalous such a step would have been judged by the Swedish Lutheran Church - indeed, by every religious establishment of which he knew. So Linnaeus trimmed his sails, made a social compromise, and placed us in a genus by ourselves ... Like Copernicus, Galileo, and Descartes, he was about as brave as his age would allow. (Carl Sagan & Ann Druyan: Shadows of Forgotten Ancestors: A

Living conditions improved, the plague of 1666 being the last one England suffered. As methods of agriculture improved, the population grew, and so did the towns. The result overall was a feeling, as R.G. Collingwood put it, that the problems which humans had tried to solve since time immemorial could be:

> ... restated in a shape in which, with the double weapon of experiment and mathematics, one could now solve ... What was called Nature ... had henceforth no secrets from man; only riddles which he had learnt the trick of answering.[258]

Like the Renaissance, the period that came to be called the Age of Reason returned to the "source": classical Greece. "Noble simplicity" was the true style of art and its classical ideals of perfection and, particularly, balance and harmony.[259] It was also the age in which social contract theories rose to pre-eminence. There was in fact no single social contract theory,[260] but the significance of these was that the

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Search For Who We Are (1992, Random House, New York) at pp.273-4)

[258] R.G. Collingwood: An Autobiography (Pelican), p.55; see also Kelly, p.208.

[259] The Palais Royale in Paris and the Pantheon (Church of Ste-Genevieve) are examples in architecture of the period. So is that of Robert Adam in England (e.g., Syon House in Middlesex). This was more, however, than a slavish imitation of classical art and architecture. According to Middleton:

> The art of ancient Rome had served as a basic source of inspiration for artists in Europe from the Renaissance onwards, and in the late eighteenth century the art of Greece was added to this resource. The architecture, sculpture and painting of the eighteenth century, however, were far wider and more complex in range. They were based on a vision of an orderly world, encompassing and absorbing all knowledge. It seemed for a short time that the universe might be fully understood by man, that all phenomena might be explained. Human activity could be precisely calculated and pursued to clearly defined ends, and eventually pure order and certainty would prevail. (Robin Middleton, "The Age of Reason", Chapter 11 in Hooker, ante, at p.270.)

[260] Klenner has pointed out that there were in fact several theories ranging from those propounded by the ancient Chinese through to the philosophers of the European Enlightenment and up to the work

State was no longer seen as carrying out divine commandments but as putting into effect human interests. Kamenka has remarked:

> The point of the social contract was to establish this new conception of public power and of the relationship between the individual and society. The individual suddenly, and on a general scale for the first time, became the point of it all, standing as citizen in direct and not indirect relationship to public affairs and government, insisting that it existed for his advantage and that alone.[261]

It emphasises individualism and self-determination rather than submission to the commands of God or a king and everybody (theoretically) is born with equal claims to freedom.[262] This was an enormous paradigm shift. Nevertheless, it had distinct limitations. Scientific thought relied on two absolutes: time and space. It was in this period that Greenwich Mean Time was introduced, relying on exact computations of time and, combined with exact computations of position in space (latitude and longitude) could enable ships at sea to calculate their position on the globe. These absolutes remained unshaken for over a century and a half until the

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of present day legal theorists. He points out differences in approach (e.g., the parties to the contract being individuals - as in Hobbes - or entities such as towns), differences in the priority of the idea of contract (e.g., Rousseau considered that the social contract was the foundation of society, whereas Kant considered it to be an implication of social philosophy), differences in the topic of the contract (e.g, the socialisation of humans as opposed to the transformation of society into the State), and differences according to content, terminology and logical consistency. (Hermann Klenner, "Social Contract Theories in a Comparative Survey", in Law in East and West (edited by the Institute of Comparative Law, Waseda University), (1988, Waseda U.P., Tokyo), pp.41-60.)

[261] Eugene Kamenka,"The Anatomy of an Idea", Chapter 1 in Human Rights, (Eugene Kamenka & Alice Ehr-Soon Tay, eds), (1978, Edward Arnold, London), p.9.

[262] Klenner, id., pp.49-50

work of Albert Michelson in the 1880's[263] and, later, Einstein's theory of relativity, which indicated, amongst other things, that there is no such thing as universal time.[264] Despite advances, then, this contrast illustrates the essential difference between an enlightenment approach to scientific theory and that of the modern and post-modern era. It has been explained by Bronowski as follows:

> For Newton, time and space formed an absolute framework, within which the material events of the world ran their course in imperturbable order. His is a God's eye view of the world: it looks the same to every observer, wherever he is and however he travels. By contrast, Einstein's is a man's eye view, in which what you see and what I see is relative to each of us, that is, to our place and speed. And this relativity cannot be removed. We cannot know what the world is like in itself, we can only compare what it looks like to each of us, by the practical procedure of exchanging messages. *I in my tram and you in your chair can share no divine and instant view of* events - we can only communicate our own views to one another.[265]

The prevailing paradigms of the age affect and effect its discourses, including that pertaining to individuals' rights. But the discourse was, once again, disparate, as the following contrast between the writings of Thomas Hobbes (writing on the cusp of the Age of Reason) and John Locke show.

Thomas Hobbes was born in 1588, the year of the Spanish Armada. In a delicious self-exemplification for a man who believed that life in a state of nature was

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[263] Michelson discovered that even if light were fired in different directions its speed was always the same, thus questioning Newton's laws.

[264] Einstein used as an example riding on a beam of light while looking at the time on a clockface to indicate that, while riding on that beam, the time appears to stay the same, but time will continue for those not riding on that beam.

[265] Bronowski: Ascent, p.249

solitary, poor, nasty, brutish and short,[266] he lived in genteel comfort in English society to the ripe old age of ninety-one![267] An undoubtedly bright young man,[268] he was employed for much of his life as a tutor to the nobility. He was forced to flee in 1642 during the Civil War, and was for a time tutor to the future king, Charles II. In 1651 he wrote his most famous work, "Leviathan" - alternately entitled "The Matter, Form and Power of a Commonwealth, Ecclesiastical and Civil".[269]

The "leviathan", or giant, was the State which, like Frankenstein's monster two centuries later, was man-made and not a creation of God. This assumption alone marked a significant departure from earlier thought. Believing that the (observable) nature of man was constant conflict - not exactly a remarkable opinion considering his life experiences - the purpose of the State was to provide peace and security.[270] Man in society surrenders any natural rights he may have for the protection of a sovereign. Authoritarianism was therefore not necessarily bad and the real source of law was consequently the sovereign. In "nature" the lone individual was the prey of others. The first precept of nature was therefore

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[266] Leviathan Pt. I, Ch.13.

[267] As to his life generally, see John Laird: Hobbes (1934, reprinted 1968, Russell & Russell, New York).

[268] He translated Euripides' "Medea" from Greek into Latin iambics at the age of thirteen.

[269] Everyman edition (with an Introduction by A.D. Lindsay), (1914, 1962 reprint, J.M. Dent & Sons, London)

[270] See generally Resch & Huckaby, pp.138-54.

self-preservation. Instead of an asserted natural order of the universe (and of society) there is conflict which necessitates the imposition of order by human contrivance.[271] Hobbes wrote in Leviathan that one of the "diseases of a Commonwealth" was seditious doctrines such as the belief that every individual (or at least, every man) could be the judge of good and evil actions.[272] In other words, political criticism was sedition and should be suppressed. The obligation to obey the sovereign would only end when he was no longer able to provide protection. The approach is contractarian rather than relying on a divine right.[273] In that event, society would revert to a free-for-all state of nature until a new leviathan arises. Kelly, however, has pointed out that the contract was "anomalous" because the chosen ruler is not himself a party to it.[274]

In such a theory of oppositions, whether men are in fact naturally equal becomes irrelevant.[275] The inherent nature of humans is not to be free. The "Leviathan" is in effect the case for absolute sovereignty. Hobbes did not believe in natural law in

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[271] See Charles Landsman, "Reflections on Hobbes: Anarchy and Human Nature", Chapter 11 in Peter Caws (ed): The Causes of Quarrel - Essays on Peace, War and Thomas Hobbes (1989, Beacon Press, Boston). Contrast Paul J. Johnson, "Hobbes and the Wolf-Man" in J.G. van der Bend (ed): Thomas Hobbes: His View of Man (1982, Rodopi, Amsterdam), pp.31-44.

[272] Everyman edition at p.110.

[273] See Jean Hampton: Hobbes and the Social Contract Tradition (1986, Cambridge U.P., Cambridge).

[274] Kelly, p.213

[275] See C.B.Macpherson: "Natural Rights in Hobbes and Locke", Chapter 1 in D.D. Raphael Political Theory and the Rights of Man (1967, London, Macmillan), p.5

the sense of a higher or transcendent standard to which all laws must comply.[276] In recognising no obligation but that imposed by power, a clean break had been made with medieval and post Renaissance beliefs.[277] Significantly, Hobbes stated that:

> ... they that speak of [a law of nature], use to confound jus, and lex, right and law: yet they ought to be distinguished; because RIGHT, consisteth in liberty to do, or to forbear; whereas LAW, determineth, and bindeth to one of them: so that law, and right, differ as much, as obligation, and liberty; which in one and the same matter are inconsistent.[278]

This view of natural law establishes what is right, but it does not establish rights.[279] The sovereign should obey these laws, but if he does not do so, he is usually not accountable to the subject. Positive rules, rather than natural rights, maintained the necessary equilibrium for a reasonable life because absolute monarchy maintained the peace.

Nevertheless, Friedmann sees modern man emerging from Hobbes' political and legal theory "self-centred, individualistic, materialistic, irreligious, in pursuit of organised power."[280]

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[276] Cf Robert P. Russell: The Natural Law in the Philosophy of Thomas Hobbes (1939, Pontificia Universitate Gregoriana, Rome).

[277] J.W.Gough: The Social Contract: A Critical study of Its Development (1957, Clarendon Press, Oxford) p.118.

[278] Leviathan, Ch.14

[279] George Shelton: Morality and Sovereignty in the Philosophy of Hobbes (1992, Macmilan, London)

[280] W. Friedmann: Legal Theory (5th ed, 1967) p.122; see also Kelly, p.213.

John Locke (1632-1704), whose ideas had a significant impact on the American Revolution, had a life story in many ways in diametrical opposition to that of Hobbes.[281] He too was a bright man who became a teacher and then a doctor, entering the service of nobility (the Earl of Shaftsbury) in 1667. His father, however, had fought with the Parliamentary army against Charles I. Furthermore, his noble employer was impeached for treason by Charles II, necessitating flight to Holland for Locke in 1683. While there, he became associated with supporters of William of Orange. When Parliament chose James II's daughter, Mary, and her husband, William, as successors to the throne in 1688, the new king and queen had no title except by vote of Parliament. The principle that the Crown was subordinate to the nation was established. The new regime, however, needed to establish the bases for its own legitimacy. After the Glorious Revolution in 1688, Locke returned to England to accept a sinecure in the Civil Service. His work, "The Second Treatise of Government" was published in 1690 and was a vindication of the political principles of the Glorious Revolution[282] and the substantiation of

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[281] The biographies of Locke include R. Quintana: Two Augustans: John Locke and Jonathan Swift (1978, U. of Wisconsin Press, Madison); M.L. & W.S. Sahakian: John Locke (1975, Twayne Publishers, Boston). Some commentators have claimed that his writing follows Hobbes more closely than originally thought: Leo Strauss: Natural Right and History (Chicago, 1953), Richard Cox: Locke on War and Peace (Oxford 1960). For a contrary view, see Paul E. Sigmund: Natural Law in Political Thought (1971, Winthrop Publishers, Massachusetts), at 85-87.

[282] Although one commentator places the majority of the writing in the period 1679-81: see Sigmund, id., p.82. Contrast Lauterpacht, ante, who quotes Locke himself as admitting that the purpose of the Treatises was to "make good the title in the consent of the people" of King William (in footnote 33 at p.111). Contrast further J.W. Gough who states that the First treatise "was not primarily or in intention an apologia for the Revolution of 1688, though it was subsequently recognised and accepted as such." (John Locke's Political Philosophy (1973, Clarendon Press, Oxford), at p.136.

parliamentary government and the (limited) liberal state (as Hobbes' writing could, mutatis mutandis, be viewed as a justification of absolutism).[283]

Locke dealt not just with arguments of the present efficiency of government, but with its origins. This was necessary for the practical reason that he had to refute the previously popular belief in the divine right of kings and justify the legitimacy of a "revolution". For an explanation of origins, he turned to the notion of the state of nature. This he considered to be a "state of perfect freedom"[284] by which he meant a situation in which people could act without requiring the permission of anyone else, including the right to punish transgressors, but only to the degree necessary to hinder violations.[285] Action was therefore restrained by the Law of Nature.[286] This state was one of equality, but it was independence in a social context. Implicit and explicit[287] in it was its reciprocal notion: the similarly equal rights of others could not be interfered with. The state of nature was governed by the Law of Nature, and the latter could be found by the exercise of reason.[288] One commentator has called this an exercise of putting new wine into old

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[283] The most recent interpretations of Locke's work can be found in Edward J. Harpham (ed): John Locke's Two Treatises of Government: New Interpretations (1992, University Press of Kansas, Kansas City).

[284] Locke, Treatise, II, 4 (reprinted 1887, George Routledge & Sons, London)

[285] Id., II, 2.7

[286] Ibid.

[287] Treatise, II, 6

[288] Ibid.

bottles.[289] These rights were themselves a part of the structure of nature just like the principles of geometry. As such, they were inherently incapable of being surrendered. In Locke, this principle starts to become quasi-constitutional.[290]

Thus Hobbes and Locke had taken diametrically opposite views of humans in a state of nature. To Hobbes, humans were nasty and brutish. It was the authoritarian state which kept them under control. While for Hobbes the purpose of the State was to protect individuals from the state of nature, for Locke it was to act as trustee for the natural rights existing in that state. In the former version, natural rights are in fact surrendered, natural equality becomes irrelevant and individuality is tantamount to sedition. There is not so much a right to revolution as a return to the natural state of a free-for-all if the government looses its grip over society. Rights are little more than the absence of a duty. To Locke, on the other hand, humans had natural rights which, in a society, the government had a duty to protect. Locke's "man", and the state of nature, was characterised by reason. All in the state of nature were equal and independent. By the exercise of reason, no-one ought to harm anyone else with respect to their "property": life, health, liberty or possessions. For Locke, society was a balanced, self-adjusting state (unlike Hobbes' continual struggle) and the duty of government was to see to the continuance of this and to deal with intruders.[291]

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[289] Brown at p.60.

[290] See Kelly, pp.215ff.

[291] Id., pp.207-12

According to Locke, people had joined society to protect their natural rights (and, in so doing, surrendered part of their natural freedom of action) but, precisely because of this, government was a trustee of those rights, and ultimate control was therefore in the hands of the people. (It is significant to remember that the trial of Charles I in 1649 - when Locke was 17 - was on the basis of treason). While Locke recognised the supremacy of Parliament, he did not mean this in the same sense as did Hobbes. There were limits. The legislature was subject to natural law and could be overthrown if it abused this trust.[292]

Significantly, Locke's social contract promotes rights as well as laws. In contrast to Hobbes, it is for the people to judge whether the sovereign has discharged its responsibilities,[293] and the people may legitimately oppose the government, by force if necessary.[294] However, the eventual affirmation by Locke of equality of individuals was not so much the result of egalitarian zeal on his part as the by-product of his argument, the object of which was to vindicate the government's

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[292] He wrote that: "The first and fundamental natural law, which is to govern even the legislature itself, is the preservation of society... [so that people can experience] the enjoyment of their properties in peace and safety." This legislative power was "sacred and unalterable in the hands where the community have once placed it," and thereby created "the bounds which the trust that is put in them [i.e., the members of Parliament] by the society, and the law of God and nature, have set to the legislative power of every commonwealth." (Second Treatise of Civil Government paras.134-42). Locke's concept of property, however, meant "life, liberty and estate", not simply the narrower meaning of the term as we would understand it today. (Two Treatises of Government 2.9, 2.11, 2.19).

[293] Second Treatise, Section 240

[294] Sections 155, 235

right to govern by establishing the basis for this.[295]

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[295] See Brown at pp.59ff. See also Jellinek at pp.71-2 who points out that in the 1669 constitution for North Carolina, which Locke drafted, it was freedom of conscience and religion which were uppermost, not political liberty. Jellinek's apt comment (ibid) is: "This philosopher, who held freedom to be man's inalienable gift from nature, established servitude and slavery under the government he organised without hesitation, but religious toleration he carried through with great energy in this new feudal state."

2.6 The American Revolution and the Declaration of Independence: Self-Evident Truths

Britain in the eighteenth century was unified, politically stable and growing rich, thanks largely to the Industrial Revolution.[296] It was moving into a position by which it could (and eventually would) dominate European politics. (France and Spain were still absolute monarchies; Germany and Italy were a conglomeration of small states.) However, in contrast to the United States, the British position with respect to the "engine" of rights was that Parliament was the reflection, the repository and the guardian of them. In particular the growth of a Parliament comprising a loyal Opposition is seen by Kelly to be a particularly English contribution to the development of rights:

> The phrase 'His Majesty's Opposition', which would have seemed a grotesque and subversive one in the seventeenth century, had to wait until the early nineteenth century to be invented, but the reality which it expresses, the possibility of political hostility to the crown's ministers (the government of the day) coexisting with perfect loyalty to the crown itself and the state's institutions, was the product of the Hanoverian eighteenth century in England.[297]

In America, it was the people who were expressed to be the eminence from which rights flowed. The British perception was therefore a top-to-bottom perspective, whereas the American was the other way around. And this had resulted from

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[296] See Kelly, pp.244ff. On the impact of the Industrial Revolution generally, see R.M. Hartwell (ed): The Industrial Revolution (1970, Basil Blackwell, Oxford); Sima Lieberman (ed): Europe and the Industrial Revolution (1972, Schenkman Publishing Co., Cambridge); Peter Lane: The Industrial Revolution: The Birth of the Modern Age (1978, Weidenfeld & Nicolson, London).

[297] Kelly, p.245

historical circumstance acting upon social perceptions and political structures.

Professor Louis Henkin writes:

> The American and French revolutions, and the documents that expressed the principles that inspired them, took "natural rights" and made them secular, rational, universal, individual, democratic and radical. For divine foundations for the rights of man they substituted (or perhaps only added) a social-contractual base.[298]

I would agree that the view of natural rights in the American Declaration of Independence is secular (as the amendment by Benjamin Franklin mentioned below illustrates) and as a result it is rational rather than divinely inspired and is perceived as being universalistic. But to call it radical, or individual, or even democratic, may be an exaggeration. These latter are more characteristics of the French Declaration. While the American Declaration was an attempt to express the "common stock of eighteenth century political philosophy"[299] and owes much to the writings of Locke (following closely in its argument of the right to overthrow a government to Locke's second treatise on government), it was a politically-oriented document, the equality therein being overwhelmingly political equality, rather than social or economic equality.[300] The leaders of the American Revolution, men like

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[298] Louis Henkin: The Rights of Man Today (1979, Stevens & Sons, London), p.5.

[299] Brown, p.64

[300] At the time in America, up to a quarter or more of labourers owned no land and had few personal possessions of any kind. (Brown at p.67). A fifth of the population were slaves. Yet the right to vote remained for many years along the lines of the English model: restricted to adult male landowners. This did begin to change fairly rapidly, however. Pennsylvania gave all adult men the vote in 1790, Massachusetts in 1820 and New York in 1822. (Brown at p.73). This did

Washington and Jefferson, were not poor backwoodsmen living in log cabins. They lived in fine homes with fine furnishings and owned slaves. They were men of social position. They were members of provincial assemblies.

> The task for them, therefore, was not so much to capture the government as to defend their "rights" from the encroachments of that government. This explains why the American Revolution was begun by the upper class and never became a social revolution to the degree that the French Revolution did. Further, the American Revolution not only started at the impulse of the upper class but largely remained under their control.[301]

The second Continental Congress on June 11, 1776, appointed John Adams, Thomas Jefferson, Benjamin Franklin, Roger Sherman and Robert L. Livingstone to draft a Declaration of Independence.[302] Primarily the work of Jefferson,[303] it was adopted by the Continental Congress in Philadelphia on July 4, 1776. It reads in part:

> When in the course of human events it becomes necessary for one people to dissolve the political bands which have connected them with another and to assume among the powers of the earth the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.
>
> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.
> That to secure these rights, Governments are instituted among Men,

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not occur in Britain until 1918.

[301] Id., p.375

[302] See John H. Hazleton: The Declaration of Independence: Its History (1906, Dodd Mead & Co., New York); David Hawke: A Transaction of Free Men: The Birth and Course of the Declaration of Independence (1964, Charles Scribner's Sons, New York).

[303] See Dumas Malone: Jefferson and His Time, 6 Vols., (published 1948, 1951, 1962, 1970, 1974, 1981, Little Brown, Boston).

> deriving their just powers from the consent of the governed, That whenever any form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundations on such principles and organizing its powers in such form, as to them seem most likely to effect their Safety and Happiness...

Thereupon follow twenty examples of the ways in which George III had been oppressive to the Americans.[304] The document is as much political justification as it is a statement of principles; it is impelled by political necessity ("when in the course of human events it becomes necessary ...") as well as by intellectual or philosophical belief ("the separate and equal station [of States] to which the Laws of Nature and of Nature's God entitle them"). Those beliefs, however, are ultimately intuitionistic ("self-evident"). Jefferson is reputed to have said: "...I turned to neither book nor pamphlet while writing it"[305] and that "all its authority rests on its harmonising sentiments of the day, whether expressed in conversation, in letters, printed essays, or the elementary books of right, as Aristotle,... Locke, ...etc".[306] If the truths set out in the Declaration are self-evident, why was (is) there a need to express them? Because it was the first time in the American colonies that they had been so expressed; because the document is more political justification than philosophical discourse; because Jefferson believed that he was

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[304] For example, by dissolving colonial parliaments, delaying the election of others, hindering population expansion by obstructing the naturalisation of foreigners, not allowing judicial independence, and keeping standing armies without colonial consent.

[305] Brown, p.64; Carl L. Becker: The Declaration of Independence (1922, Vintage Books, New York), p.24.

[306] Ibid. Cf John E. Smith, "Philosophical Ideas Behind the Declaration of Independence" (1977) 3 Revue Internationale de Philosophie 360-76.

setting down on paper the general mood of the colonists.

The first draft of the Declaration of Independence by Thomas Jefferson describes its preambular fundamental principles as "sacred and undeniable". This phrase was later changed, apparently by Benjamin Franklin,[307] to the word "self-evident". These principles are therefore not to be seen as being received by sacred authority but by the free acquiescence of the human mind.[308]

Apart from the quotation given above, the Declaration in fact contains no other principles of fundamental rights; its bulk is a list of grievances against King George. Commentary, and popular conception, however, focus on the former. In fact, these rights are expressed to be contingent upon the "human events" which will justify a right to revolution to secure their exercise. The document is important as an articulation of fundamental principle, but it is primarily justificatory rather than radical in nature.[309]

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[307] Bronowski & Mazlish, p.371; I. Bernard Cohen: Benjamin Franklin: His Contribution to the American Tradition (1953, New York), p.59.

[308] Bronowski & Mazlish, ibid.

[309] See Caroline Robbins, "The Pursuit of Happiness" in Irving Kristol (ed): America's Continuing Revolution: An Act of Conservation (1975, American Enterprise Institute, Washington), who argues that the notion of the pursuit of happiness reflected majority aspirations, not individual ones. See also Garry Wills: Inventing America: Jefferson's Declaration of Independence (1978, Doubleday, Garden City) who argues that the declaration must be read in its eighteenth-century context and that the debt it is often regarded as owing to the writings of Locke has been exaggerated.

For example, ownership of property was at least initially deemed essential to responsible citizenship, with the landless labourer being feared in this respect, while at the same time the excess of power that wealth might generate being acknowledged.[310] The rich might be too powerful, but the poor would be too unruly. An attempt to overcome this factionalism resulted in an institution of representation that persists in America to this day: the Electoral College. The President is not voted into office on a populist vote - he is voted in by a body of citizens, chosen as people of judgement by their neighbours, who would refine public views in the light of wisdom which would best discern the true interest of the country.[311]

In addition, slavery remained lawful and its existence was justified along Aristotelian grounds: slaves were different by nature to other men and therefore had to be treated differently and did not share the "inalienable" rights of others. Although as early as 1758 the Quakers in Philadelphia had voted to exclude members who traded in slaves, and colonies such as Massachusetts had attempted to abolish the slave trade, the issue was predominantly an economic one. Slavery was profitable, and considered necessary by the southern colonies, but not so for those in the north. Jefferson had attempted to censure the introduction of slavery into the colonies by the British in the Declaration, but was forced to withdraw such

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[310] Brown, p.69

[311] Brown, p.72

sentiments out of the necessity to obtain unanimity for it.[312] The decision of the Supreme Court in Dred Scott v Sandford[313] supports the view that neither the Declaration of Independence nor the Constitution or Bill of Rights intended to abolish slavery and, moreover, indicates that the equality referred to in those documents reflected political rather than "natural" concepts. The "self-evident" equality is conditioned by economic and political necessity within current social paradigms. For this reason the effect (rather than the mere imitation) of the Declaration and the Bill of Rights on the constitutions of other countries must be treated with circumspection.[314]

The Declaration was, however, a clear, unequivocal, universalistic and embracive assertion of inalienable rights (unlike some of its English predecessors). But these rights were elaborated upon in the Constitutions of the individual states.[315] After independence, the thirteen colonies decided to devise their own constitutions.

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[312] Brown, p.74. Jefferson was himself a slave-owner although, apparently, a kindly one: David Brion Davis: The Problem of Slavery in the Age of Revolution 1770-1823 (1975, Cornell U.P., Ithaca), pp.169ff. See also John C. Miller: The Wolf by the Ears: Thomas Jefferson and Slavery (1977, Macmillan, London). Contrast Johnson, ante, who notes that Jefferson owned 267 slaves, including a concubine, Sally Hemmings, who bore him several children, also bought "young and able negro men" and "a breeding woman", and who, when one of his slaves ran away, wrote: "I had him severely flogged in the presence of his old companions." (at p.304).

[313] 61 U.S. 1; 19 Howard 393 (1857)

[314] Contrast Patricia L. Hero, "The Influence of the United States Constitution's Bill of Rights Upon the Constitutions of the Countries of the World" (1987) 3 Connecticut Journal of International Law 31 which is a laundry list of corresponding articles.

[315] See Iwe, at pp.103-104.

Two[316] re-invested their old colonial charters as constitutions, the other eleven created new ones, all before 1789. The first was Virginia's in 1776 (which in fact preceded the Declaration of Independence, but only by a short time). It was prefaced by a Bill of Rights. This served as a pattern for six of the others[317] as well as for the Congress of the United States (Jefferson was a Virginian).

The Virginia Declaration of Rights, 1776, states in Article 1:

> ...all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

Article 2:

> ... all power is vested in, and consequently derived from, the People ...

Article 3:

> ... Government is, or ought to be, instituted for the common benefit, protection and security of the people, nation or community; of all the various modes and forms of Government that is best which is capable of producing the greatest degree of happiness and safety ...

The factors to notice with this Declaration are: the notion that the "nature" of people is equality, freedom and independence; the existence of a social contract; as a result of the first two, the rights are not only inherent but also inalienable; these rights are specified (although somewhat vague); governmental power is derived

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[316] Connecticut and Rhode Island

[317] Pennsylvania, Maryland and North Carolina in 1776; Vermont in 1777; Massachusetts in 1780 and New Hampshire in 1783. New Jersey, South Carolina, New York and Georgia did not have constitutions with Bills of Rights but many of the provisions therein were of that character. Jellinek, ante Chap.4.

from the people rather than from the crown or from God; and a strong element of utilitarianism.

One point which the Declaration of Independence and the Virginian Bill of Rights have in common is the pursuit of happiness. While Locke referred to people experiencing "the enjoyment of their properties in peace and safety" and that by property he meant "life, liberty and estate",[318] the phrase used in America was the "pursuit" of happiness. This was a modern addition. Shotwell has remarked that : "... Jefferson, by the deft use of his single phrase, added a whole new province to the field of natural law, carrying it over from the static world of ancient times and the Middle Ages to that of the tumultuous pressures of today."[319] This also meant that individual well-being was the proper province of social policy.[320]

The Virginian Bill goes on to specifically provide for separation of legislative, executive and judicial powers (Art.5); free elections for "all men having sufficient evidence of permanent common interest with and attachment to the community" (Art.6); rights with respect to criminal trials (Arts. 8-10); trial by jury (Art. 11);

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[318] Two Treatises of Government, 2.9, 2.11, 2.19

[319] Shotwell, p.351

[320] Brown, pp.158ff.

freedom of the press (Art.12) and freedom of religion (Art.16).[321] (Virginia also passed a Statute of Religious Liberty in 1785.)

What was the source of the American Bills of Rights? The English sources of the Magna Carta, the Petition of Right 1628, the Habeas Corpus Act 1679 and the Bill of Rights 1689 have some, but few, points in common with the American documents.[322] However, the difference between them lies in the motivation for, and perception of, them. The English versions were of a largely historic and retrospective nature (see above) whereas the Virginian Bill of Rights was expressed to be a set of principles applicable to all people at all times. It is a forward-looking document. It is an expression of individual rights rather than of authority to make laws from which rights might flow as a consequence.

Jellinek has commented:

> The English laws that establish the rights of subjects are collectively and individually confirmations, arising out of special conditions, or interpretations of existing law. Even Magna Carta contains no new right, as Sir Edward Coke, the great authority on English law, perceived as early as the beginning of the seventeenth century. The English statutes are far removed from any purpose to recognise general rights of man, and they have neither the power nor the intention to restrict the legislative agents or to establish principles for future legislation. According to English law Parliament is omnipotent and all statutes enacted or confirmed by it are of

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[321] All references to the Virginia Bill of Rights are taken from the text reproduced in The Universal Declaration of Human Rights and its Predecessors (1679-1948) (Baron F. M. van Asbeck, ed), (1949, E.J. Brill, Leiden), pp.33-36.

[322] Parliamentary supremacy, and certain rights such as freedom from arbitrary arrest.

> equal value.
>
> The American declarations, on the other hand, contain precepts which stand higher than the ordinary lawmaker. ... The American declarations are not laws of a higher kind in name only, they are the creations of a higher lawmaker. ...
>
> The American bills of rights do not attempt merely to set forth certain principles for the state's organization, but they seek above all to draw the boundary line between state and individual. According to them the individual is not the possessor of rights through the state, but by his own nature he has inalienable and indefeasible rights.[323]

If this is correct, is there a truer "source" of the American documents?

Sullivan, in an examination of the Declaration of Independence, considered that five basic doctrines were apparent: the doctrine of equality (all men are created equal); the doctrine of inalienable rights; governments are instituted and that the origin of government is a conscious act; the powers of the government rest on the consent of the governed; and the right to get rid of a government (the right to revolution).[324] He considered that at least the first three of these principles have existed since ancient times,[325] (although, as we have seen, influenced by prevailing social paradigms.) Other authorities cite the writings of Chief Justice

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[323] Jellinek, pp.46-48 (footnotes omitted).

[324] James Sullivan, "The Antecedents of the Declaration of Independence", (1902) 1 Report of the American Historical Association 67 at 67.

[325] The notion of equality of men was advanced by the Stoics, the idea of natural rights was advanced by Cicero, and the belief that governments were consciously instituted by men was held by the Sophists and the Epicureans: ibid., p.73.

Coke, particularly his "interpretation" of fundamental rights under Magna Carta,[326] and the writings of philosophers such as Locke,[327] with which educated Americans would have been familiar.

Jellinek considers the answer to lie in the idea of religious liberty transported to the Americas with the Pilgrims.[328] "The idea of legally establishing inalienable, inherent and sacred rights of the individual is not of political but religious origin. What has been held to be a work of the Revolution was in reality a fruit of the Reformation and its struggles."[329] This helped with the recognition of a right to freedom of conscience and the assertion that this right could not be granted by any earthly power (and, consequently, that it could not be restrained by any earthly power either).

Also, in a frontier the individual literally had a say in establishing the conditions under which he or she would enter the community in the first place.[330] Unlike

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[326] Charles F. Mullett: Fundamental Law and the American Revolution 1760-1776 (1966, Octagon Books, New York), pp.45ff.

[327] See James H. Hutson, "The Bill of Rights and the American Revolutionary Experience", Chapter 2 in Michael J. Lacey & Knud Haakonssen (eds): A Culture of Rights: The Bill of Rights in Philosophy, Politics and Law, 1791 and 1991 (1991, Cambridge U.P., Cambridge).

[328] Jellinek Chap.7.

[329] Ibid, p.77.

[330] An historical example is given by Jellinek:
> On November 20, 1772, upon the motion of Samual Adams a plan, which he had worked out, of a declaration of rights of the colonists as men, Christians and citizens was adopted by all the assembled citizens of Boston. It was

the European philosophers, this was not a matter of intellectual conjecture or ex post facto justification.[331] These conditions were the individual's rights - rights which are claims upon the state rather than springing from the state.[332] The basis is that the people are sovereign: the constitution is an agreement of the people. (In England, it was the established form of government).

However, as Matthew Kramer has pointed out, while the declaration claims to be a product of the people's word, it itself constitutes the people as a people.[333] It is

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> therein declared, with an appeal to Locke, that men enter into the state by voluntary agreement, and they have the right beforehand in an equitable compact to establish conditions and limitations for the state and to see to it that these are carried out. Thereupon the colonists demanded as men the right of liberty and of property, as Christians freedom of religion, and as citizens the rights of Magna Charta and of the Bill of Rights of 1689.
>
> Finally, on October 14, 1774, the Congress, representing twelve colonies, assembled in Philadelphia adopted a declaration of rights, according to which the inhabitants of the North American Colonies have rights which belong to them by the unchangeable law of nature, by the principles of the constitution of England and by their own constitutions.
>
> From that to the declaration of rights by Virginia is apparently only a step, and yet there is a world-wide difference between the two documents. The declaration of Philadelphia is a protest, that of Virginia a law. The appeal to England's law has disappeared. The state of Virginia solemnly recognises rights pertaining to the present and future generations as the basis and foundation of government.

[331] See Michael Zuckert, "Self-Evident Truth and the Declaration of Independence" (1987) 49 Review of Politics 319-39 who argues that the "self-evident" truths were practically rather than cognitively self-evident.

[332] Jellinek, Chap.8.

[333] Matthew Kramer: Legal Theory, Political Theory and Deconstruction: Against Rhadamanthus (1991, Indiana U.P., Bloomington), pp. 120-21.

not a foundation for their authority. In addition, while the formulas were universalist, the practice was not always so. The rights of men did not apply to blacks in the slave states.

Even though imbued as much with political expediency as a ringing endorsement of human rights, the American Declaration had set a standard and a tone for responsible government. The colonies' Bills of Rights had added specific content to this standard. According to Brown, "a genie had escaped from the bottle".[334] It was never to be put back inside it again.

2.6.1 The United States Constitution and the Bill of Rights

The United States' Constitution, when it was first drawn up by the Federal Convention of 1787, did not contain a Bill of Rights. Its preamble simply states that the Constitution has been established "in order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty". It was a blueprint for government rather than a charter of liberties. This was probably for the dual reasons that the newly-established federal body was too busy putting the day-to-day matters of the division of federal and state powers in order to be overly concerned with individual rights, together with the fact that seven of the thirteen

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[334] Brown, p.74

colonies already had Bills of Rights in their own Constitutions.[335] The federal Bill of Rights, really a series of Amendments to the Constitution, did not emerge until 1791.[336]

Of the first ten Articles which were approved in 1791, Articles 1-8 all deal with specific rights (religion, free speech and peaceful assembly; the right to bear arms; no quartering of soldiers in private homes; security and privacy; use of the Grand Jury for indictable offences; basic criminal procedure; and trial by jury). It is a Bill of Rights of specifics, rather than of a general principle of equality. Slavery, for example, was not contrary to the Bill of Rights until the Thirteenth Amendment in 1865. There was no general right to equality.

Article 9, however, adds:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

While the rights were specific, they were not exhaustive. In addition, Article 10

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[335] See Bernard Schwarz: The Great Rights of Mankind: A History of the American Bill of Rights (1992, Madison House, Madison)

[336] Henkin (ante, pp.11-12) also mentions that another reason was that the federal government had powers which were considerably more limited than those of the states. The inclusion of a Bill of Rights was a later addition which was the "price" required by some states for ratification of the Constitution. On the political compromises which surrounded the framing of the Constitution, see Richard Beeman, Stephen Botein & Edward C. Carter (eds): Beyond Confederation: Origins of the Constitution and American National Identity (1987, U. of North Carolina Press, Chapel Hill). See also Russell Kirk: The Conservative Constitution (1990, Regnery Gateway, Washington) who argues that at the time of framing of the Constitution France had fallen into chaos and the Declaration of the Rights of Man was not being implemented; as opposed to the declaration of Independence, the framers of the Constitution had more Burke than Locke in mind.

provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

This is significant. Despite the Bill of Rights being, in the view of one commentator, the result of "cynical political maneuvers",[337] because the non-enumerated other powers were retained by "the people" the clear indication is that Congress is not creating these rights: they are pre-existing.

These documents therefore represent a fundamental paradigm shift, similar in their own way to the discovery of the structure of the solar system by Galileo and Copernicus. Power resides ultimately in the people. It was, however, a paradigm shift not emulated in England where Parliament was supreme. This has had a direct effect on the operation of human rights in Canada and Australia. Rights, as choices between competing values, are determined within the paradigm of parliamentary sovereignty, Parliament being regarded as the synthesiser of community values and its relationship to the country as a whole was considered to be organic rather than confrontational.[338]

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[337] Jack N. Rakove, "Parchment Barriers and the Politics of Rights", Chapter 3 in Lacey & Haakonssen, ante, at p.98.

[338] See Jamie Cameron, "The Original Conception of Section 1 and its Demise: A Comment on Irwin Toy Ltd v Attorney-General of Quebec" (1989) 35 McGill L.J. 253 at p.262.

2.7 The French Revolution and the Declaration of the Rights of Man and the Citizen

> "L'Etat, c'est moi"[339]
>
> "Le principe de toute souveraineté réside essentiellement dans la Nation"[340]

Few events have been so mythologised as the French Revolution.[341] A product of the Age of Reason, the Declaration on the Rights of Man and the Citizen seemed to be a triumph of reason over suspicion - a new way to govern instead of the old forms of unjust domination. The irony of the French Revolution is that, as important as it is in the development of the recognition of principles of individual rights, it was more a collapse than a revolution,[342] and the Declaration it spawned represented not so much a clean break with the past as a reliance on the recently-preceding American Declaration and Bills of Rights. When the Bastille

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[339] Louis XIV

[340] French Declaration on the Rights of Man and the Citizen, Art.3

[341] On the occasion of the two-hundredth anniversary, Scott Sullivan wrote:

> [T]here is a French Revolution for everyone. For French nationalists, it represents the emergence of a nation-state from the ashes of monarchy. For republicans, it is a stage in the development of liberal democracy - despite the embarrassment of Robespierre and the Terror he helped usher in. Marxists see it as an epic of the class struggle in which the feudal order was overthrown. Conservatives fasten on the dignity of Louis XVI as he mounted the scaffold, and the mad courage of Charlotte Corday as she plunged the dagger into Marat's heart. They are all right.

"The Revolution, Warts and All", Newsweek, July 3, 1989, p.35.

[342] See J.F. Bosher: The French Revolution (1988, W.W. Norton & Co, New York); George Rudé: The French Revolution (1988, Weidenfeld & Nicolson, London); William Doyle: The Oxford History of the French Revolution (1989, Clarendon Press, Oxford).

was "liberated", the fortunate recipients were two lunatics, four forgers and an English major.[343] However, that liberation was a symbol of the power of the people. What the revolution did was to help set the ideological agenda for the world for the next two hundred years, particularly with respect to the question of the balance to be struck between the rights of the individual and society.[344]

Often regarded as having been based on Rousseau's ideas, the French Declaration emulates these more in style than substance. French philosophical thought had led the world in the eighteenth century for bold assertions of the value of reason over orthodoxy.[345]

Jean-Jacques Rousseau's (1712-78) most famous concept was that of the "noble savage" (as opposed to Hobbes' brute who would be civilised by society) and his most famous aphorism: "Man is born free and everywhere he is in chains".[346] In a more elegant, but not as famous, aphorism, Kelly has described these words as ones which "gave what might be called the plain chant of natural rights, as Locke

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[343] Louis XVI, in his diary entry for July 14, 1789, wrote "rien aujourd'hui": James T. Shotwell: The Long Way to Freedom (1960, Bobbs-Merrill, New York), p.357 (hereafter referred to as Shotwell).

[344] See Colin Lucas (ed): The French Revolution and the Creation of Modern Political Culture 3 vols, (1988, Pergamon Press, Oxford); Ferenc Fehér: The French Revolution and the Birth of Modernity (1990, U. of California Press, Berkley).

[345] See Anne Sa'adah: The Shaping of Liberal Politics in Revolutionary France: A Comparative Perspective (1990, Princeton U.P., Princeton).

[346] "The Social Contract" (1762), I.I; Resch & Huckaby, pp.172-92.

had intoned them, a polyphonic charm."[347] Rousseau was poor all his life. The turning point in his life came in 1749 when he entered, and won, a contest run by the Academy of Dijon for an essay on the subject "Has the progress of the arts and sciences tended to the purification or to the corruption of morality?". Rousseau's winning answer was strongly for the latter. The "Discourse on the Moral Effects of the Arts and Sciences" has been described as being written in the tone of a Geneva preacher attacking the Whore of Babylon,[348] and as "the most important challenge to science since the Inquisition's sentence on Galileo in 1633."[349] Rousseau's social and economic status influenced his views and gave him an insight into the beliefs of "simple" people. Rousseau's view was that it was not logic or reason which were common to human beings, but emotions. His work was to a large degree the harbinger of the Romantic movement.[350]

Rousseau's thesis, repeated in later works, was that everything that comes direct from God is good; it is humans who then mess things up. The evil was in society, not in "original sin". The problem was how to reconcile the natural man (the "noble savage") with the man in society, or, in other words, how to bring the noble savage into society. He attempted an answer in the "Social Contract"

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[347] Kelly, p.269

[348] F.C. Green: Jean-Jacques Rousseau (Cambridge, 1955), p.104.

[349] Bronowski & Mazlish at p.284

[350] His novel "La Nouvelle Heloise", published in 1761, and his fictionalised treatise on education, "Emile", published in the following year, promoted the notion that proper and natural growth was the result of following the promptings of the heart and of the conscience. This indeed was how the "natural" man could be discovered: the process was introspective rather than analytical, but could be aided by observing nature itself.

published in 1762. Rousseau did not reject society, but rather sought to establish the conditions under which people could live in society and still retain their free will. Freedom existed in freely accepted law. It was the people (as a collectivity) who were sovereign.

Rousseau was not, however, a "liberal" or a believer in individualism.[351] He thought that the way to re-achieve people's natural status was to transform and merge it into the community. Individuality is lost; citizenship is gained.[352] Rights, therefore, neither emanate from the sovereign nor from some extraneous natural rights system, but from the people themselves, who have a duty to participate in government. Davidson and Spegele have said that Rousseau "presupposes strong democracy, a democracy of talkers and doers rather than passive voters",[353] and that "it is a theory directed to showing what human beings owe to society."[354]

Rousseau's thesis was that, in joining society, man surrenders his natural liberties for the "general will" (volonté générale). This was greater than the sum of individual wills and was the basis from which the sovereign was derived. Liberties

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[351] See generally Harold Bloom (ed): Jean-Jacques Rousseau (1988, Chelsea House Publishers, New York).

[352] See Asher Horowitz: Rousseau, Nature and History (1987, U. of Toronto Press, Toronto).

[353] Alastair Davidson & Roger D. Spegele: Rights, Justice and Democracy in Australia (1991, Longman Cheshire, Melbourne), at p.42

[354] Ibid.

had become civil liberties rather than natural ones.

> Rousseau's position was that the laws of society ... are neither God-given, as implied by Luther, not arbitrarily imposed by a tyrant, as in Hobbes, nor natural laws which one simply has to discover, as in Locke. Rousseau's claim was that the laws can and do operate only by the consent of the whole population. They represent the way of life which the society has adopted for itself.[355]

Rousseau's sovereignty does not really rest with the individual, but with the collectivity of individuals who together form the State. The State itself, almost by definition, embodies the general will through the social contract. It has been called "the basis for a new tyranny."[356] Rousseau's thesis also meant that art and knowledge should be subordinate to social needs and the perception of morality.

The influence of "The Social Contract" on the 1789 Declaration of the Rights of Man and the Citizen may, however, have been overstated. The work was not in fact widely read in France until after the Revolution had started.[357] Indeed, rather than the Declaration being a formulation of the social contract according to Rousseau's ideas and the rights enumerated therein being the specifications of that contract, the principal effect of Rousseau's conception of the social contract was the transference to the community of individual rights,[358] which does not strongly

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[355] Bronowski & Mazlish, p.297

[356] Thomas I. Cook: History of Political Philosophy from Plato to Burke (1937, Prentice-Hall, New York), Ch.22.

[357] Wallace K. Ferguson and Geoffrey Brunn: A Survey of European Civilisation (1964, Houghton Mifflin, Boston) at p.596.

[358] See Jean Starobinski: Jean-Jacques Rousseau: Transparency and Obstruction (translated by Arthur Goldhammer), (1988, U. of Chicago Press, Chicago).

emerge in the Declaration.

Jellinek, in closely examining Rousseau's version of the social contract, and comparing it to the Declaration, has commented:

> The social contract [as formulated by Rousseau] has only one stipulation, namely, the complete transference to the community of all the individual's rights.[359] The individual does not retain one particle of his rights from the moment he enters the state.[360] Everything that he receives of the nature of right he gets from the volonté générale, which is the sole judge of its own limits, and ought not to be, and cannot be, restricted by the law of any power. Even property belongs to the individual only by virtue of state concession. The social contract makes the state the master of the goods of its members,[361] and the latter remain in possession only as the trustees of public property.[362] Civil liberty consists simply of what is left to the individual after taking his duties as a citizen into account. These duties can only be imposed by law, and according to the social contract the laws must be the same for all citizens. ...
>
> The conception of an original right, which man brings with him into society and which appears as a restriction upon the rights of the sovereign, is specifically rejected by Rousseau. There is no fundamental law which can be binding upon the whole people, not even the social contract itself.[363]
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> The Declaration of Rights, however, would draw dividing lines between the state and the individual, which the lawmaker should ever keep before his

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[359] "Ces clauses, bien entendues, se réduisent toutes a une seule: savoir, L'aliénation totale de chaque associé avec tous ses droits a toute la communauté" - Du contrat social, I,6.

[360] "De plus, l'aliénation se faisant sans réserve, l'union est aussi parfaite qu'elle peut l'être et nul associé n'a plus rien a réclamer" - ibid.

[361] "Car l'Etat, a l'égard de ses membres, est maitre de tous leurs biens par le contrat social" - id. I,9 [361]12

[362] "Les possesseurs étant considérés comme dépositaires du bien public" - ibid.

[363] "Il est contre la nature du corps politique que le souverain s'impose une loi qu'il ne puisse enfreindre ... il n'y a ni ne peut y avoir nulle espece de loi fundamentale obligatoire pour le corps du peuple, pas même le contrat social." - id. I,7.

> eyes as the limits that have been set him once and for all by "the natural, inalienable and sacred rights of man."
>
> The principles of the Contrat Social are accordingly at enmity with every declaration of rights. For from these principles there ensues not the right of the individual, but the omnipotence of the common will, unrestricted by law. ...
>
> The Declaration of August 26, 1789, originated in opposition to the Contrat Social. The ideas of the latter work exercised, indeed, a certain influence upon the style of some clauses of the Declaration, but the conception of the Declaration itself must have come from some other source.[364]

Jellinek considers that the Bills of Rights of the states of the North American Union were its models.[365] These were well known in Europe at the time, a French translation of them appearing in Switzerland in 1778.[366] Also, Jefferson was American Minister to Paris between 1783 and 1789, and La Fayette, who had commanded an American Division during the War of Independence, submitted to the Drafting Committee for the Declaration a text based on the Virginia Declaration of Rights and the American Declaration of Independence.[367] The

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[364] Georg Jellinek: The Declaration of the Rights of Man and of Citizens - A Contribution to Modern Constitutional History (translated from the German by Max Farrand, 1901, H. Holt, New York; reprinted 1979, Hyperion Press, Westport) pp.9-12 (some of the footnotes have been omitted).

[365] Ibid, Chap. 3. In Chapter 5 he compares the contents of these earlier American Bills of Rights to the French Declaration. The similarities are so strong as to be more than coincidental.

[366] Recueil des loix constitutives des colonies angloises, confederees sous la denomination d'Etats-Unis de l'Amerique-Septentrionale, cited in Jellinek, ibid at p.18.

[367] O'Neill & Handley, ante, at p.7. It is reported that La Fayette had a copy of the Declaration of Independence in one panel of a double frame in his home in Paris. The other panel was apparently for the French version: Louis Gottschalk & Margaret Maddox: Lafayette in the French Revolution: Through the October Days (1969, U. Chicago Press, Chicago), p.8.

history of the rights of human beings from this time onwards became a history of borrowing.

The Declaration of 1789 in fact reflected the views of those men who contributed most to its drafting: La Fayette, Mounier, Talleyrand, Lally-Tollendal and Alexandre de Lameth.[368] Ironically, all were aristocrats except Mounier who was an upper middle class lawyer. Why did they help write the Declaration? Brown suggests:

> ... because they were men of cultivation, their minds kindled by the adventurous, illuminating and liberating thought of the century. Those who themselves held positions of comfort and privilege in a society that they knew to be oppressive ... At the same time, they remained creatures of their own upbringing, with its inculcated expectations and assumptions about the world around them. These were bound to conflict with the principles they had received from the philosophic light and teaching of the time. So long as no political action was stirring in France, they could indulge their liberalism. In America Lafayette and de Lameth had fought to aid its application where the texture of another society and the authority of another king were at stake. But when, in France, itself, the conflict between upbringing and principles was forced into the open by the advance of the Revolution, it was the attitudes inculcated by upbringing that prevailed. All five of these draftsmen became émigrés.[369]

The Declaration was individualist in its tendency rather than egalitarian ("Liberty, property, security..."). The appeal to the upper middle class lay in the abolition of the privileges of the nobility, the removal of barriers to enterprise and liberalism in the economic and market sense.[370] The equality that was possible under these

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[368] A. Goodwin: The French Revolution 5th ed. (1970, London)

[369] Brown, p.77

[370] Brown, p.86

beliefs was interpreted as political and legal equality. Social and economic inequality led some towards a belief in humanitarianism[371] but this remained "on the flank of the main body, which remained tenacious of individualism and the sanctity of property."[372] There were originally no "social" rights in the Declaration: these were added later in the revised Declaration of 1793,[373] which also added "equality" as one of the specified rights[374] and introduced rights with respect to criminal procedure.[375]

The Preamble to the Declaration states in part:

> "... l'ignorance, l'oubli ou le mépris des droits de l'homme, sont les seules causes des malheurs publics et de la corruption des gouvernements ... [ainsi, l'Assemblee Nationale a] résolu d'exposer ... les droits naturels, inalienables et sacrés de l'homme ... afin que les réclamations des citoyens, fondées désormais sur des principes simples et incontestables, tournent toujours au maintien de la Constitution et au bonheur de tous."[376]

The tone is declaratory; natural rights (as well as injustices) are "exposed",

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[371] Id., p.89

[372] Ibid. See also Becet & Colard who call the Declaration "bourgeois" in the sense that it was not welfare-oriented (Jean-Marie Becet & Daniel Colard: Les Droits de l'Homme (1982, Economica, Paris), at pp.29ff. See also the debate in the 1940's to reformulate the declaration, discussed in Virginia A. Leary, "Postliberal Strands in Western Human Rights Theory", Chapter 5 in Abdullahi Ahmed An-Na'im (ed): Human Rights in Cross-Cultural Perspectives: A Quest for Consensus (1992, U. of Pennsylvania Press, Philadelphia), pp.116-20.

[373] For example, Art.17 (freedom of work), Art.22 (the right to education).

[374] Art. 2

[375] Arts.10, 13, 14, 15.

[376] This text is taken from Baron F.M. van Asbeck: The Universal Declaration of Human Rights and its Predecessors 1679-1948 (1949, E.J. Brill, Leiden), p.48.

recognised rather than manufactured. They are stated as operating now and are not mere aspirations for the future. While the statement that "ignorance, neglect or contempt of human rights are the sole causes of public misfortunes and corruptions of government"[377] might be said to confuse cause and effect, it squarely put human rights notions at the centre of the political agenda. There is only a passing reference to a deity (the Preamble stating: "... l'Assemblée Nationale reconnaît et déclare, en présence et sous les auspices de l'Être Suprême, les droits suivants ..."). The notion of natural rights being ordained by God or emanating from God has been entirely swept away, whereas God is a prominent basis for Locke's version of rights.

Article 1 of the Declaration states: "Les hommes naissent et demeurent libres et égaux en droits ...". This is an interesting departure from the American Declaration which enumerated specific rights but did not contain any general equality provision. Such a provision did not occur in the United States until 1865 with the Thirteenth Amendment to the Constitution. Although both declarations were the immediate result of revolution, the American revolution expelled a foreign sovereign. The American "people" presumably felt relatively unified and equal as the oppression was seen as coming from an external source. In France, on the other hand, the revolution had disposed of a French king. The oppression was

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[377] The translations of the Declaration are those of Tom Paine in Rights of Man, printed in Kamenka & Tay at pp.3ff. This was reputedly the first use of the term "human rights" - the French term was "droits de l'homme".

seen as having been internal, so there was a heightened awareness of, and popular clamouring for, provisions to guarantee equality. What is missing, however, is a specific right to equality. According to Becet and Colard, this was because equality was regarded as a general condition on which the other rights rested.[378]

Article 2 continues: "Le but de toute association politique est la conservation des droits naturels et imprescriptibles de l'homme. Ces droits sont la liberté, la propriété, la sûreté et la résistance à l'oppression." Political society is seen as having as its purpose the preservation of natural and inalienable rights on which everyone has an equal claim. Those rights are stipulated as being freedom, property, safety and the resistance of oppression. The difference in emphasis from the American Declaration (freedom, property, safety and resistance of oppression as opposed to life, liberty and the pursuit of happiness) is also perhaps attributable to the differences already mentioned between a revolution in a colony where the king is the outsider and a revolution in metropolitan territory where oppression has permeated most aspects f life. These rights are, nevertheless, "natural" and "inalienable". They are not articulated further, except for liberty, which is described in Article 4 as: "La liberté consiste à pouvoir faire tout ce qui ne nuit pas à autrui; aussi l'exercise des droits naturels de chaque homme n'a de bornes que celles qui assurent aux autres membres de la societe la jouissance de ces mêmes droits. Ces bornes ne peuvent être déterminées que par la loi." Liberty is

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[378] Becet & Colard, ante, at p.26.

therefore something innate in humans which the law may limit only to ensure the same liberty to others. The law governs, but Parliament is not seen, as it was in England, as the generator of those liberties. In fact, Article 2 specifies resistance to oppression as a right. Moreover, Article 16 provides: "Toute société, dans laquelle la guarantie des droits n'est pas assurée, ni la séparation des pouvoirs determinée, n'a point de constitution." England would not have satisfied this criterion.

Article 3 provides: "Le principe de toute souveraineté réside essentiellement dans la nation..." ("The nation is essentially the source of all sovereignty" in the Paine translation). The French word "nation" can in fact be translated as either "nation" or as "people". If the latter is correct, Article 3 reads similarly to the second paragraph in the American Declaration. If Paine's translation is correct, it could be seen as having a different meaning, more akin to the English refraction of rights through a national Parliament which represents the nation. (It was later that the issue would be expanded in England from one of parliament versus the crown to the people versus parliament). However, the people are seen in the French Declaration, as in America, as the source of political power. Law itself is seen, in Article 6, as "l'expression de la volonté générale. Tous les citoyens ont le droit de concourir personnellement ou par leurs représentants à sa formation."

However, it is here that the distinction between every "person" and "citizens" of France emerges. Such a distinction is not drawn in the American Declaration nor

in the American Bills of Rights - perhaps because America (at the time comprising the eastern seaboard states) did not have other populous and long-established countries sharing its borders. Article 6 goes on to provide for equality before the law but reserves for citizens the right of access to public employment and positions, circumscribed only by the talent and worthiness of the person. Indeed, the emphasis on the equality before the law is different to that seen in the American documents where it is only incidental. Again, this can be seen as the result of the difference between the de jure legal freedoms in the English system compared to the use of the Lettre de Cachet under Louis.

What the distinction between people and citizens does, however, is to emphasise a strong connexion with the state to achieve these ends set out in the Declaration. While the rights of man might predate society and be "natural", the rights of the "citizen" are to participate in this society. People are inherently equal in rights (Article 1), but "all citizens" have the right to participate in the processes of government (Articles 6 and 14). The presumption is that only society (or at least one which is based on democratic principles of involvement by the citizen) can guarantee freedoms and liberties. Therefore, while Article 10 declares that "no-one ought to be molested on account of his opinions", and Article 11 provides that the right of thought and opinion is "one of the most precious rights of man", the Article goes on to provide that, as a result, "every citizen may speak, write and publish freely" unless prohibited by laws which, under Article 6, citizens have the

right to participate in the formulation of, even though "law is an expression of the will of the community" (i.e., everybody). Similarly, every "man" has the right not to be arrested or detained except in accordance with the law (Article 7), every "man" is entitled to the presumption of innocence (Article 9) and "no one" ought to be arbitrarily deprived of their property (Article 17). But only the citizen has the power to participate effectively through the state in the determination of those rights and the acceptable limits to them, even though all men "naturally" have ..... Citizens are also seen as owing specific duties to the State, in particular by contributions for the administration of the State, including the troops necessary to guarantee the rights in the Declaration (Articles 12, 13).

The connexion with State interests is also seen where the rights can be abrogated. The right to freedom of expression is limited in article 10 by the requirements of "public order". Even the "inviolable and sacred" right to private property upheld in article 17 can be infringed in the case of "some public necessity". The declaration clearly acknowledges that these rights form part of a certain pattern of social relations and are limited by the social goals which they are intended to serve.[379] Such limitations do not appear in the American documents.

But, it is the laws which govern. Article 4 defines political liberty in terms of the limits "determinable only by law"; Article 5 provides that what is not expressly

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[379] Richard Bellamy, "A Liberal Dose of French Nonsense", The Times Higher Education Supplement, October 12, 1990, p. 15.

prohibited by law should be tolerated; Article 6 provides that "the law is the expression of the will of the community"; Article 7 provides that arrest and detention can only occur "in cases determined by the law"; Article 8 provides that penalties must be set and punishments carried out "in virtue of a law promulgated before the offence"; Article 9 provides for the presumption of innocence and that when detention is necessary it should not be more than is necessary and that the law should set acceptable limits; Article 10, in providing for freedom of opinion (including religious opinion) limits this in cases which disturb "the public order established by law"; Article 11 provides for freedom of expression for every man, "provided he is responsible for the abuse of this liberty, in cases determined by the law".

Like its US predecessors, it is both a comprehensive catalogue of rights (which its English counterparts were not) and an articulation of the rights of the individual with respect to the State. On the other hand, a major contrast between the French and American declarations is that the former was specifically written as part of the national Constitution, which would be interpreted in its light. It was intended to be a major interpretative document of fundamental political significance, not just an ex post facto validation of the revolution.

However, it was precisely as a political document that the French Declaration was a failure. Unlike the Bills of Rights in America which helped to direct the orderly

growth of the new nation, similar principles expressed in the French Declaration were in existence for only a few years before the State effectively disintegrated.[380] Jellinek considers that the answer to this conundrum lies in the very fact of the borrowing from America by the French of ideas which could not produce the same results when transplanted into a different social and political heritage. He says that:

> ...the Americans in 1776 went on building upon foundations that were with them long-standing. The French, on the other hand, tore up all the foundations of their state's structure. What was in the one case a factor in the process of consolidation served in the other as a cause of further disturbance.[381]

However, one aspect of the effect of the Revolution which should be touched on is the effect it had on the conceptions of the public and private spheres of life: a dichotomy which impacts directly on rights. The classic distinction between private rights and public right can lead to perceptions of which ones are or should be paramount, depending on the paradigms employed. For example:

> The classical liberal favours private rights because his is a world of private individuals: the state, and thus political rights, are merely elaborate devices enabling individuals to efficiently pursue their private ends. For the organicist ... public rights and the political participation they secure encourage the individual 'to regard the work of the state as a whole, and to transfer to the whole the interest which otherwise his particular experience would lead him to feel only in that part of its work that goes to the

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[380] The Declaration was formally valid for only four years, including the two years when it headed the first French constitution of 1791, but it has been included in the respective preambular texts of the various constitutions of the République francaise since 1946. Revolution and wartime occupation were the spurs of national conscience with respect to constitutional recognition of individual rights.

[381] Jellinek, pp.44-45

maintenance of his own and his neighbour's [private] rights.'[382]

During the Revolution, privacy was connoted with factionalism, conspiracy and treason. The antidote was publicity.[383] The meetings of the legislature, for example, were held with the attendance of a large, and frequently interjecting, public gallery. Even dress came to be regulated,[384] and forms of language were attempted to be altered.[385]

However, as the urgency of State necessity began to recede in the nineteenth century, the notion of privacy re-emerged as a virtue, exalting the family unit but at the same time contributing to the differentiatior of roles based on gender (with men adopting the public profile and women the private and domestic one).[386]

It was within that domestic sphere that women came to be consciously placed. The Revolution was, perhaps paradoxically, concerned with the "natural" order of

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[382] S.I. Benn & G.F. Gaus (eds): Public and Private in Social Life (1983, Croom Helm, London), p.59. The quote is from T.H. Green: Lectures on the Principles of Political Obligation (1889, Longmans, London) para. 122.

[383] See Lynn Hunt, "The Unstable Boundaries of the French Revolution", in Part I, A History of Private Life: Volume IV From the Fires of Revolution to the Great War, Michelle Perrot (ed.), translated by Arthur Goldhammer (1990, Harvard U.P., Cambridge), at pp.13-14. (Hereafter referred to as Perrot.)

[384] The Convention decreed in April, 1793, that all French citizens had to wear the tricolour cockade: Perrot, id, pp.18-19.

[385] In 1793 the Convention was petitioned to sanction the use of the familiar (and private) "tu" in public to encourage fraternity and equality. The Convention declined: Perrot, id, p.21.

[386] Perrot, pp.30ff.

things.[387] The Revolution had indicated that women could be effectively involved in public life. There was a (largely male) reaction to this upset to the "natural" order of things.[388] Essentially, the French Declaration, despite its groundbreaking nature, was a privileging document dedicated to formal equality.

Summing up this social impact, Perrot concludes:

> The French Revolution had attempted to subvert the boundary between public and private, to construct a new man, and to reshape the daily routine by restructuring space, time, and memory. This grandiose project had been thwarted, however, by individual resistance. Mores had proved stronger than laws.[389]

2.7.1 Reactions to the French Revolution: Burke contrasted with Paine

The failure of France to deliver the promised rights contributed to a growing criticism of natural rights. The two philosophical protagonists with respect to the French Revolution were Edmund Burke (1729-97) and Thomas Paine (1739-1809). Burke was from humble beginnings. He felt a bit of an outsider: as an Irishman in

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[387] The calendar was re-arranged, starting again at Year I in 1792, with the year beginning with the Spring equinox and each day named in honour of a plant or agricultural implement.

[388] On the pervasiveness of the public/private dichotomy, see Hilary Charlesworth, Christine Chinkin & Shelley Wright, "Feminist Approaches to International Law" (1991) 85 American Journal of International law 613 at 626ff. See also Carole Pateman, "Feminist Critiques of the Public/Private Dichotomy" in S.I. Benn & G.F. Gaus (eds): Public and Private in Social Life (1983, Croom Helm, New York), p.281, who argues that the actual line of demarcation between public and private can shift according to time, place and culture.

[389] Perrot, p.99.

England, as a landless M.P. in an age when suffrage related to property ownership, and as the son of Catholics.[390] His idea of the state of nature was more like that of Hobbes than Locke. In "Reflections on the Revolution in France, and on the Proceedings in Certain Societies in London Relative to that Event" (1790), he agreed with the notion of the social contract but thought that natural rights were merely pious abstractions that were ahistorical and while "rude Nature" might be a place where people had individual natural rights, this a different thing to civil and political rights which is what people actually have in society.[391] Society was not the protector of abstract liberties but a contrivance to satisfy wants. The social contract would include fundamental documents like Magna Carta which would bind the king, but these are "chartered rights" rather than natural rights.[392] They are therefore specific to particular societies and relate to historical circumstance. In Burke's social contract the ruler and the people are equal parties to the contract, or co-ordinate parts of the State.[393] The people are therefore not "sovereign" in the sense implied in the Declaration. If the contract is broken and a

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[390] See generally Jeremy Waldron (ed): Nonsense Upon Stilts - Bentham, Burke and Marx on the Rights of Man (1987, Menthuen, London), Chapter 4 (hereafter referred to as Waldron). More detailed biographies are Robert H. Murray: Edmund Burke: A Biography (1931, Oxford U.P., Oxford); Stanley Ayling: Edmund Burke: His Life and Opinions (1988, John Murray, London).

[391] "Reflections on the Revolution in France" in Volume 3, The Works of the Right Honourable Edmund Burke, 3rd. ed. (1869, Little, Brown & Co., Boston), p.310.

[392] Id., p.310

[393] Id, p.258

revolution occurs, this is an exercise of power rather than of rights[394] and it is invalid to turn "a case of necessity into a rule of law."[395] The brokers in this contest were the dominant classes in society. He in fact called the rights of man a "digest of anarchy" in his speech on the Army Estimates in the House of Commons in February, 1790.[396] A little later, the execution of thousands of people in France during the Terror in fact illustrated how fragile the concepts of "reason" and "rights" can be.[397]

Burke in fact supported the cause of the American colonists in the 1770's.[398] His apparent change of heart with respect to the French Declaration was in fact greeted with derision by Paine and, later, by Marx.[399] Waldron has suggested that the difference can be explained by the fact that Burke never saw the Americans as revolutionaries in the radical sense. They had established commercial practices, local administration and were defending these against impositions from England. The French, on the other hand, were demolishing their social structure.[400] "In France, as far as Burke could tell, it was the monarchy that stood for custom and

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[394] Id, p.313

[395] Id, p.253

[396] Quoted in Joyce: The New Politics of Human Rights at p.8

[397] See Marc Bouloiseau: The Jacobin Republic 1792-1794 (trans. Jonathan Mandelbaum) (1983, Cambridge U.P., Cambridge).

[398] See Waldron at pp.79ff.

[399] Ibid.

[400] Id.. p.80

ancient principle while the people attacked it with newfangled metaphysical ideas."[401] It was not so much the revolution itself as the manner of its undertaking which concerned him, especially if this was based on dubious philosophical constructs.

Thomas Paine[402] in "Rights of Man, Being an Answer to Mr Burke's Attack on the French Revolution" (1791-2) refuted Burke's arguments in a synthesis of Locke. Regarded by many as a radical, he may have been the first person to coin the term "human rights" in his English translation of the French Declaration. To Paine, rights were not artefacts "made" by people, but a natural endowment and as such were part of an ongoing social dialogue. Targeting particularly Burke's dichotomy between natural rights and civil rights, Paine wrote that "Every civil right ... is a natural right exchanged."[403] With respect to both civil and natural

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[401] Ibid. Richard Bellamy has written: "The framers of the [French] Declaration ... could reply to Burke that social and economic developments had gradually undermined the historical legitimacy of the ancien regime. Commerce and industry had eroded the viability of feudal relations, creating a need for a new society consisting of independent and legally equal producers who were free top contract and exchange goods with each other without the interferences of government. Their proposed rights of man, far from being abstract and ahistorical, were firmly rooted in the social and economic conditions of the modern world. Burke's picture of french society was simply anachronistic: the droits des seigneurs had had their day." "A Liberal Dose of French Nonsense", The Times Higher Education Supplement, October 12, 1990, p.15.

[402] Biographical detail can be found in A.J. Ayer: Thomas Paine (1988, Secker & Warburg, London); Alfred Owen Aldridge: Man of Reason: The Life of Thomas Paine (1959, J.B. Lippincott, Philadelphia).

[403] "Rights of Man ...", The Complete Writings of Thomas Paine (Philip S. Foner, ed), (1945, Citadel Press, New York), Vol. I, p.276.

rights, neither is granted by society.[404] The difference is an important one. On Burke's approach rights are collateral with respect to the running of the State which ideally ought to be done prudently following precedent. On Paine's approach, the rights of man are themselves the standard for the legitimacy of the government and its actions. They can be used to test new (and existing) laws for unequal effect, since natural rights are enjoyed by everybody equally.[405] Also, if natural rights are imprescriptible[406] then to lose them, as Burke contends happens as a result of entering society, is an impossibility. These are part of the nature of humans and "whatever appertains to the nature of man, cannot be annihilated by man".[407] As Paine's idea of the social contract is one of a contract among the people setting up a trust which only they can alter, the ruler has obligations to the people but no corresponding rights against them.[408]

A major point of departure, however, between not only Paine and Burke but also between Paine and Locke is the notion in Paine that a consequence of non-adherence to natural rights is a warping of the nature of the whole of society: "... by distortedly exalting some men, that others are distortedly debased, ... the whole

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[404] Ibid.

[405] Article 1 of the French Declaration

[406] Article 2 of the French Declaration

[407] Rights of Man, id, p.253

[408] Id pp.379, 381

is out of nature."[409] The notion is one of social cost. Indeed, in "Rights of Man" Paine argues for public support of the elderly and public education for the needy and the working classes.[410] While this is not necessarily argued as a part of the content of natural rights, Paine opened the way for the development of economic and social rights, which are not to be explicitly found in any of the documents produced in England, France or America.[411]

2.7.2 The Contribution of Women: Mary Wollstonecraft contrasted with Hannah More[412]

Another aspect of natural rights at this stage was the treatment of women. Mary Wollstonecraft (1759-1797) was born into an English society which regarded women of the middle and upper classes as primarily decorative domestic objects. The portrayal of life in the novels of Jane Austen gives us examples. In was partly because her own family failed to shelter and provide for her, and also because of her intellectual abilities, that she rebelled against the presumption of female inferiority. She was eventually reviled for it. Her father was an increasingly

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[409] Id p.267

[410] Id p.427-8

[411] Except to the limited extent that such rights were recognised in the 1793 version of the French Declaration.

[412] These are not the only female contributors from the seventeenth to the nineteenth centuries, but they are the two most prominent. For accounts of others, see Dale Spender: Feminist Theorists: Three Centuries of Women's Intellectual Traditions (1983, The Women's Press, London).

unsuccessful merchant (as well as being unstable) and her mother was apparently unloving towards her.[413] Sunstein has commented that: "Out of her early dependence on a man of little dependability and a woman of little affection came a determination to survive through personal strength, as well as a lifelong obsession with her misfortunes."[414] Accepting a job as a paid companion to a wealthy widow, Mary began to distrust the values of high society. She later opened a school in Newington Green, an area with many Protestant nonconformists, in particular the progressive clergyman, Dr. Richard Price, who corresponded with Franklin and Jefferson and who was the first radical intellectual Mary had encountered. This was the spark that set her on the course which was to become her career. According to Sunstein:

> Price's philosophy and political beliefs had a more important influence on Mary Wollstonecraft. She had lived through the American Revolution, the Gordon Riots, agitation for parliamentary reform, without any recorded indication of interest, and there is reason to believe that at that time she substantially accepted the status quo. But everything in her nature and experience responded to Price's views, the liberal platform of the period.[415]

The Dissenters, of whom Price was one, were excluded from education and other civil rights in England. Barred from universities, they formed their own educational establishments and adopted, not surprisingly, a critical approach. They

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[413] A detailed description of Wollstonecraft's early life can be found in Emily W. Sunstein: A Different Face: The Life of Mary Wollstonecraft (1975, Harper & Row, New York), pp.1-147 (hereafter referred to as Sunstein). See also Claire Tomalin: The Life and Death of Mary Wollstonecraft (1974, Harcourt Brace Jovanovich, New York), Chapters 1-4 (hereafter referred to as Tomalin).

[414] Sunstein, p.11

[415] Sunstein, p.96

have been called "nurseries for revolutionaries".[416]

After a period as governess in the household of Lord and Lady Kingsborough, which served to further confirm her distaste for upper class mores, Mary Wollstonecraft determined to begin a career as a writer and found support from Joseph Johnson, a London publisher who expected her to write for the market of women readers which was expanding proportionately to literacy rates. This would especially have been so of the literate and leisured women of the middle class. This was still (and would remain) a time when most women writers wrote in secret (such as Jane Austen) or under pseudonyms (such as the Bronte sisters).

The French Revolution had an effect on Wollstonecraft that:

> ...undermined her lingering respect for establishments. She had been rebellious all her life, for in her experience authority had been more tyrannical and unjust than rewarding or sacred. In effect, she had been going through her own revolution ... The revolution in France spoke not only to her personal revolts, grievances and anger, it demonstrated their legitimacy, connected them to systemic injustice, and stimulated her to believe that fundamental reform could be built into society.[417]

While many in England, including Richard Price, applauded the French reforms and advocated the right of people to chose their government, others reacted with alarm.[418] Burke's "Reflections on the Revolution in France, and on the

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[416] Tomalin, p.43.

[417] Sunstein, p.192

[418] On the complex and diverse effect the revolution had on British thought, see C. Crossley & I. Small (eds): The French Revolution and British Culture (1989, Oxford U.P., Oxford); Seamus

Proceedings in Certain Societies in London Relative to that Event" was in particular a reference to Price's 1789 address to the Society for Commemorating the Glorious Revolution of 1688, in which he advocated resistance to an abuse of power and free choice of government. Mary Wollstonecraft was outraged at this attack on her "hero" and wrote a rebuttal entitled "A Vindication of the Rights of Men". Called "badly organised, swift-paced and intensely subjective"[419] and "a ragbag into which Mary stuffed the ideas she had picked up over the past few years"[420] it was nevertheless a "startling demonstration of the extent to which her personal experience from childhood on had been transformed into radical political conviction."[421] It was, however, published anonymously at first, but a second edition in the same year bore her name. It was a sensation. Its arguments were fundamentally similar to those of Tom Paine's in "Rights of Man", although the latter was perhaps a more substantial refutation of Burke.

The idea of writing "A Vindication of the Rights of Woman" arose as Wollstonecraft realised that the rights of men were to be precisely that: rights principally for males. This particularly became apparent when Tallyrand's new system of national education in France, proposed to the Assembly in 1791,

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Deane: The French Revolution and Enlightenment in England 1789-1832 (1988, Harvard U.P., Cambridge).

[419] Sunstein, p.195

[420] Tomalin, p.95

[421] Sunstein, p.195

confined state education to boys.[422] It was at this point that her radical philosophy and life experience fused to create a work which probably no other person at that time could have written.[423] According to Sunstein:

> Others had argued that law and mores crippled women's potential and forced them into subservience; she was the first to fuse experience, intellect and emotion, to attack the sexual basis of social and religious tradition, and to bring the issue to life as a philosophically based and practicable reform to be incorporated forthwith in a specific society.[424]

The work equates political tyranny with sexual tyranny. Equality was largely to be achieved through education which was aimed at both virtue and independence for women. It was considered repugnant by many, including Hannah More.[425] As the excesses of the French Revolution intensified, radical thought, and radical thinkers, were seen as a threat to British security. Paine in fact had to flee the country in 1792. Mary was later to bewail the fact the French Revolution had in fact achieved little change in principle.[426] Her detractors, such as Hannah More (1745-1833) in "Strictures on the Modern System of Female Education" in 1799, proclaimed that

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[422] Sunstein, p.206

[423] See the Wollstonecraft biography written in the light of feminism by Virginia Sapiro: A Vindication of Political Virtue: The Political Theory of Mary Wollstonecraft (1992, U. of Chicago Press, Chicago). See also Gary Kelly: Revolutionary Feminism: The Mind and career of Mary Wollstonecraft (1992, Macmillan, London).

[424] Sunstein, p.207

[425] Sunstein, p.214

[426] Sunstein, p.234. This is further illustrated by the fact that in 1791 Olympe de Gouges published A Declaration of the Rights of Woman and the Female Citizen which paralleled the French Declaration but was not adopted by the National Assembly. For a discussion of the parallels see Margaret Davies: Asking the Law Question (1994, Law Book Co., Sydney), pp.183-88. De Gouges was eventually beheaded by the Revolutionary Tribunal for her opposition to the Jacobin terror.

rights for women on a par with those for men amounted to an impious discontent with the station assigned to them in the world by God,[427] in other words that they were unnatural. Mary's position was further degraded when a biography was published shortly after her death which made it clear that she had borne one child, and conceived another, out of wedlock.[428] She was anathema for generations.

Approaches such as those of More were more the common stock in the eighteenth century. She believed in innate wickedness and saw education as the process of eliminating this in children. More had been educated by her father in classical history, Latin and mathematics, until the father became "frightened of his own success."[429] She was converted by the "ferociously gloomy Calvinist"[430] John Newton and produced her first work of social piety in 1788 entitled "Thoughts on the Importance of the Manners of the Great to General Society." This set out the theme of most of her writing: the duty of the upper classes to set a good example and of the lower classes to follow it.[431] Unlike Mary Wollstonecraft, her writing

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[427] Sunstein, p.351

[428] William Godwin: Memoirs of the Author of a Vindication of the Rights of Woman (1798, Johnson, London). Godwin was Mary's husband and the father of their child, Mary, who married the poet Shelley and wrote the most famous horror story of all time.

[429] Sunstein, p.23. See also Elizabeth Kowalski-Wallace: Their Fathers' Daughters: Hannah More, Maria Edgeworth and Patriarchal Complicity (1991, Oxford U.P., Oxford).

[430] Paul Johnson: The Birth of the Modern (1991, Harper collins, New York), p.382

[431] See Jeremy & Margaret Collingwood: Hannah More (1990, Lion Publishing, Oxford); M.G. Jones: Hannah More (1952, Cambridge U.P., Cambridge). More's collected works can be found in The Works of Hannah More, 11 vols., (1830, T. Caddell, London).

was direct and succinct. Her works were given by masters to their servants and the rural poor often received at times like Christmas some clothing, food and a work of Hannah More.[432] The bloodthirsty atheism of the French Revolution appalled her. According to Tomalin, "[t]he prevalence of adultery caused her more concern than the starvation suffered by the poor as a result of the French Wars, since starvation could be attributed to the will of God. Her point of view made her popular with the government; she was employed to write calming tracts for the rural poor and ridiculed quietly in London for her concern over the sinfulness of Society."[433] She was, however, immensely popular. She was the first person to sell over one million copies of a book and printings of her works outsold all other authors until Dickens broke her record.[434]

2.7.3 Other Reactions to the French Revolution: Bentham and Law Reform Without Human Rights

Unlike Burke's qualifications in this regard, Jeremy Bentham (1748-1832)[435] had no qualms about radically reforming society, provided that it was done scientifically. Bentham proposed, instead of "natural rights", a "science of law".

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[432] Johnson, ibid.

[433] Tomalin, p.245

[434] Johnson, pp.381-383

[435] For a biographical account, see Charles Milner Atkinson: Jeremy Bentham - His Life and Work (1969, Augustus M. Kelley, New York).

Using this scientific approach, tradition and authority could be safely rejected. Henceforth, legislative reform would not be a matter of well-intentioned but random benevolence, but of logic. His catch-cry of "the greatest happiness for the greatest number"[436] would be a standard by which the efficacy of legislation could actually be measured: a mathematical calculation of the level of "happiness" generated by the legislation. He was a trenchant critic of Blackstone's Commentaries which were a mixture of the common law with natural rights[437] and similarly opposed the natural rights principles upon which the American Declaration of Independence and the French Declaration of the Rights of Man and the Citizen were seen to be based.[438] In fact, the common ground held by Bentham and Burke was an undisguised contempt for the notion of natural rights, which Bentham called "nonsense upon stilts".[439] It was an approach which brought great comfort to the English at this time and helps to explain why Bentham is regarded as the father of utilitarianism when in fact it was not a new doctrine and had in fact been used earlier by David Hume in his "Treatise of Human

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[436] "Introduction to the Principles of Morals and Legislation" (1789): reprinted J.H. Burns & H.L.A. Hart (eds) (1982, Menthuen, London), Ch.1, Sec.5.

[437] Bentham apparently attended Blackstone's jurisprudence lectures and wrote "A Fragment on Government" as a reaction to what he saw as the smug justifications offered of the illogicality of much of the Common Law.

[438] For example, Comment on the Commentaries (1776); Introduction to the Principles of Morals and Legislation (1789).

[439] Anarchical Fallacies, Jeremy Bentham, Works (John Bowring, ed) reprinted by Russell & Russell, New York, 1962, Volume II, p.501. Also extracted in Waldron at pp.46-69, at p.53. See also Ross Harrison: Bentham (1983, Routledge & Kegan Paul, London), Chapter 4.

Nature",[440] and others.[441]

Bentham's doctrine of Utilitarianism was an attempt at the reform of the English legal system which had become ossified and had been allowed to do so because of the fear that, if anything were changed, it would be to invite across the English Channel the calamities which were then racking France.

Bentham objected to natural rights on the grounds that they were individualistic and anti-social. The Jacobin excesses of the French Revolution had convinced him of this. He believed that "natural rights doctrines offered a metaphysical blanket for individuals seeking to protect their privileges or avoid their obligations towards

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[440] David Hume (1711-76) considered that standards of morality and justice were "artifacts". They are not divinely ordained nor are they an integral part of original human nature, nor are they revealed by pure reason. They are the result of the practical experience of humankind. Being a utilitarian, Hume thought that the only consideration in this slow test of time is the utility each rule could demonstrate toward the promotion of human welfare: a Darwinian approach to ethics. (See Bay: The Structure of Freedom pp.31-33; Bronowski & Mazlish, pp433-35.) Human behaviour is therefore not dictated by an unvarying antecedent standard of natural law but by human motives and inclinations. (See Kelly, p.271).

Therefore, we cannot "know" anything about right or wrong. His approach is an illustration of the utilitarian and empirical spirit engendered by the scientific advances of the time.

Hume in fact wrote one of the most notorious statements of colour racism:

> I am apt to suspect the negroes and in general all the other species of men ... to be naturally inferior to the whites. There never was a civilised nation of any other complexion than white ... Such a uniform and constant difference could not happen, in so many countries and ages, if nature had not made an original distinction betwixt these breeds of men. (Quoted in A.T. Yarwood & M.J. Knowling: Race Relations in Australia - A History (1982, Menthuen Australia), p.15).

[441] For example, Helvetius, Holbach, La Mettrie and Condillac.

society as a whole."[442] Claims of rights, in other words, blocked social reform by legitimising individual interests.

Unlike Locke, who considered that government had to protect the life, liberty and property of the individual, and unlike Rousseau, who thought that the government should represent the general will, Bentham thought that the function of government was to promote the greatest happiness for society. This will not mean pleasing everybody, but pleasing the majority ("the greatest happiness for the greatest number"). The principle is utility:[443] the value is happiness (i.e., the residue left from the calculation of pleasure minus pain). The overall result is essentially bookkeeping. But the problem is, whose bookkeeping, and whose happiness? The allegedly neutral calculus of pleasure and pain was anything but. There is no concept in Bentham of limits on the law itself (other than utility, which is used to assess laws rather than to nullify them). He is more concerned with the operation of the law rather than with its bases.

In the "Anarchical Fallacies" Bentham examined the French Declaration article by

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[442] See Richard Bellamy, "A Liberal Dose of French Nonsense", ante, October 12, 1990, p.15.

[443] See D. Lyons: In the Interest of the Governed: A Study in Bentham's Philosophy of Utility and Law (1991, Clarendon Press, Oxford); Douglas C. Long: Bentham on Liberty. Jeremy Bentham's Idea of Liberty in Relation to his Utilitarianism (1977, U. of Toronto Press, Toronto).

article. He does not see government as the result of a social contract[444] but as primarily the result of force, thereafter maintained because of the "happiness" it can provide.[445] He asks himself rhetorically the salient question: "What is the real source of these imprescriptible rights - these unrepealable laws?" and answers: "Power turned blind from looking at its own height: self-conceit and tyranny exalted into insanity."[446] This is invective, not argument. In its blinkered empiricism it indicates that Bentham refused to be affected by the prevailing European intellectual currents of his day. He regards them as a "digest for anarchy" and simply does the intellectual equivalent of adopting the posture commonly attributed to the ostrich. It effectively ignores the questions posed (the existence and appropriateness of natural - or human - rights, the relationship between them and other rights, their use as the basis for the legitimacy of authority, their use as and in a paradigm for the relationship between the individual and the State and between the individual and society) which are still important questions today and which deserve serious debate.[447]

Consequently, Bentham's conceptions of rights were not that they were "natural" but that they were created by the government; and they were created by the

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[444] "Contracts came from government, not government from contracts." Id., p.55

[445] Ibid.

[446] Id., p.54

[447] For critiques of Bentham (including that of H.L.A. Hart) see Bhikhu Parekh (ed): Jeremy Bentham: Ten Critical Essays (1974, Frank Cass, London).

government when it prohibited something.

This approach was not, however, universal. A contrast to the British empirical approach is the approach of German (Prussian) philosophers such as Kant[448] and

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[448] 1724-1804. For biographical detail, see Ernst Cassirer: Kant's Life and Thought (translated by James haden) (1981, Yale U.P., New Haven). For an English language collection of Kant's work see Paul Guyer (ed): The Cambridge Companion to Kant (1992, Cambridge U.P., Cambridge). Kant proposed that humans are in fact the creators of both truth and morality. Human behaviour, Kant argued, presupposes the existence of underlying necessities without which that conduct would be meaningless; and these necessities are pieces of a priori morality. They are imperatives which our moral nature is formed to obey of itself. In other words, they are transcendental propositions the truth of which does not depend upon experience but can be established by considering the nature of reasoning itself. Kant wrote about the functions of human reason in "Critique of Pure Reason", "Critique of Practical Reason" and "Critique of the Power of Judgement"; Friedmann, pp.157ff. These "imperatives" can be hypothetical (or conditional - if I want to achieve X I ought to do Y) and categorical (unconditional) where one particular choice is in itself objectively necessary. Kant believed that natural law was the categorical imperative of an autonomous will. His second formula, which states:"act as if the maxim of your action were to become through your will a universal law of nature", connects reason with a universal law of nature. To act in this way means we are morally autonomous: we are not obeying the orders of someone else but the commands worked out by our own (rational) will. There are few references to God - our own rationality can work out the categorical imperative. As others have a right to their autonomy as well, another formulation of the imperative is: "Act in such a way as to treat humanity, whether in your own person or in that of another, always as the end, never merely as the means." This implies, rather than espouses, equality. It is an appeal to the moral sense innate in human nature. Kant's principles have also been trenchantly subjected to a postmodern critique as follows:

> They claim that rational consciousness has privileged access to its contents and can reflect on the conditions of its own activity. It can thus develop a set of criteria, rules and categories for distinguishing valid from invalid truth claims in an absolute, non-contextual manner. Autonomous consciousness is raised above the contingencies of history and prejudice and declared the legislator of its own eternal rules that are the foundation of knowledge and truth. (Costas Douzinas, Ronnie Warrington & Shaun McVeigh: Postmodern Jurisprudence: The Law of Text in the Texts of Law (1991, Routledge, London), pp.31-2.)

Hegel,[449] which Friedmann[450] calls transcendental idealism.[451] Their inquiries focus on finding fundamental principles through the workings of the human mind, rather than on the observations of and matter.[452] But it was the British approach which Canada and Australia inherited.

The American and French Declarations set out principles that are recognisable in modern human rights law: universality, inalienability and the belief that the rules were rules of law. Henkin[453] contends that the immediate forerunners of

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[449] 1770-1831. For biographical detail, see M.J. Inwood: Hegel (1983, Routledge & Kegan Paul, London). Hegel saw the State as the most important agent of history and the creator and protector of values, including the rights of mankind, which properly belonged to societies or communities rather than to individuals. Kant had believed that empiricism alone was insufficient to explain reality. Human perceptions create rather than merely receive information. There is a connexion between the knower and the known and to Kant it was a priori concepts or principles which helped to supply this nexus. Kant thought that these principles were common to all humans, that there was a "universal and transcendental ego", and that there could be a reality independent of humans: a thing-in-itself behind the thing as it is known. Hegel based his philosophy on this, but went further to contend that there is no "thing-in-itself". There is no "reality" unless it is known by humans. Descartes had said "I think, therefore I am" (Cogito ergo sum) to indicate that thinking proves a person's existence. Hegel's further step was to contend that thinking actually creates that existence. Hegel's method was the dialectic (similar to Socrates) of thesis, antithesis and synthesis. Hegel considered the State to be the synthesis of the thesis of humans seeking to know and the antithesis of the world resisting this impulse. Life is not being, but becoming. It is an evolutionary process and the State is the result of it. History therefore became important. To Hegel, history expressed the dialectic process of change. (Philosophy of Right (trans. T.M. Knox) 1967, Clarendon Press, Oxford).

[450] Legal Theory, Ch. 15

[451] See also Eterovich, ante, at p.140, who draws a distinction between "British empiricism", "French rationalism" and "German idealism".

[452] Friedmann, ante, calls this a "Copernican Turn" in philosophy (p.157).

[453] The Rights of Man Today, ante, at p.11.

articulated human rights occurred with these declarations. They were shaped by (even if they did not directly follow or implement) eighteenth century philosophy and social concerns, but, born of revolution, they were essentially political in nature.

2.8 The Nineteenth Century: An Age of Passion and Positivism

> One impulse from a vernal wood
> May teach you more of man,
> Of moral evil and of good,
> Than all the sages can.[454]

The outstanding hallmarks of the nineteenth century were antithetical: relative stability but with a spate of revolutions in the 1840's; economic progress through the Industrial Revolution but grinding poverty; political progress with an expanding franchise but an age of laissez-faire; scientific and technological advances bringing the world under human domination but also Romanticism;[455] sanctions against slavery and an age of racism Britain, whose Empire became in this century one on which "the sun never set" had, effectively, the whole world as its economic stage. It was also the age of evangelism and the missionary. Western European, and particularly British, ideas, dominated the globe. It was an age of paradox - of idealism wrapped in positivism.[456]

The nineteenth century began with the Napoleonic era and, after it, the Congress of Vienna. The latter, in drawing the political map of Europe, may have set the

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[454] William Wordsworth, "The Tables Turned" (1798), ll.21-24.

[455] For detail on the social impact of romanticism, see Derek Jarrett: The Sleep of Reason: Fantasy and Reality from the Victorian Age to the First World War (1989, Harper & Row, New York).

[456] See David Thomson: England in the Nineteenth Century (1967, Penguin Books, Harmondsworth).

scene for modern multilateral diplomacy,[457] but its overriding concern was with legitimacy rather than with individual (or group) rights.[458] Nationalism and imperialism were also catch-cries of the time, prompting one learned commentator to call the nineteenth century the antithesis of the eighteenth century thesis of liberties.[459] During the century most European States which did not already have one acquired a written constitution. The franchise expanded - although mainly for males. The Industrial Revolution, which had commenced in the previous century, moved into top gear: in particular, steam railways vastly improved transportation for both commerce and for individuals, having an impact on economic, political and private life.[460] It was also the century in which the telegraph and the telephone were invented. While machines could be built which could increase the natural human capacity for productive work (such as steam-driven looms in mills) and for transportation (such as the steam engine), to make the world our own, the ability of humans to master more completely their own existence created new and different problems. One was pollution, which had always existed (low standards of hygiene had made the Plague almost an annual occurrence during parts of the seventeenth century), but not on such a grand scale. The other was the domination of people by machines. Instead of the divine clockwork of the universe regulating

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[457] See generally, Inis Claude: Swords Into Ploughshares (4th ed., 1971, Random House), especially Chapters 1 and 2.

[458] Louis Henkin: The Rights of Man Today, ante, at p.14.

[459] Henkin, id, at p.15.

[460] Kelly, p.303

all matter, the clockwork of machinery, made by humans themselves, came to dominate the pace of work and, eventually, of life itself. It is no accident that it is from this time that notions of sin no longer revolved only around vice, etc, but paid increasing attention to idleness.

New sciences, such as sociology and the Darwinist approach to biology were discovered.[461] Charles Darwin, who published "The Origin of the Species" in 1859 illustrated a view of life as survival dependent upon competition and adaptation. It was a view of life as something dynamic rather than static. However it created a philosophical gap. Evolution was seen to be ethically neutral: it had no higher "purpose" but was merely a savage and selfish battle for survival through dominance. In "The Origin of the Species" Darwin had been careful not to mention humans.[462] However, "there could be no reconciling "The Origin" with a literal rendition of Genesis".[463]

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[461] While politics might be the domain of the rich and powerful, advanced knowledge was a democracy. Much of it was new and lay to be discovered. It was also not compartmentalised as it is today. Physics, chemistry, science, engineering, literature, philosophy and art were seen as a continuum. It was largely the work of the universities which led to this later compartmentalisation. (Johnson, pp.543ff.) There was a unity of vision shared by scientists as well as artists, which makes the study of both apt for an understanding of the time. The fact of Faraday's work with electricity and the fact that Mary Shelley's monster is brought to life by electricity is more than coincidence. Artists were passionately concerned with science rather than alienated by it.

[462] There is only one reference to humans in it, but this admitted that light would be thrown on the origin of "man" and, according to Sagan & Druyan, ante, (p.50, fn24) later editions went so far as to say "much" light would be so shed.

[463] Ibid.

The randomness of natural selection has no clear objective. Contemporary arguments over Darwinism and religion had, at heart, the same foundations as the argument centuries before between Christian dogma and Galileo's planetary system. The publication of the "Origin of the Species" in 1859 and the "Descent of Man" in 1871 (where Darwin confronted human descent) have been called "a second Copernican revolution."[464] The work of Copernicus and Galileo had shown human beings that the earth was not the centre of the universe but revolved around a sun (which is itself not a unique star). While God might still have been the spiritual centre of the universe[465] the first major rethink was possible about the uniqueness of humans and how they came to occupy both their position, and their condition, in the nature of things. The work of Darwin had "reduced" the perspective once again: human beings were animals essentially like any other on the planet in the sense that their development was fundamentally a process of natural (here meant in the sense of random) selection. Thomas Carlyle apparently called it a "Gospel of dirt".[466] But, as a result, the perspective through which society itself was viewed could change.

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[464] Brown, p.202

[465] Contrast Brown, ibid, on this point.

[466] According to Sagan & Druyan p.63, in an unattributed quotation.

The validity of Darwin's work has been questioned, especially lately.[467] Whether Darwin was right or wrong, the social impact of his work is the important issue for present purposes. For example, Darwin's theories spawned a style of social Darwinism, particularly appropriated by the economist Herbert Spencer.[468] Spencer had equated human existence to something like animal evolution. Unlike the noble savage of Rousseau, Spencer's man in the natural state was basically irrational and vicious. Improvement occurred by natural selection. Society was thus a crucible for this natural struggle. The idea of "improvement" might really have been nothing more than social change justified on the basis of a laissez-faire economy, but the view expressed was that the duty of government was to set the suitable limits to freedom of action. Liberty to Spencer was required to facilitate the natural social struggle on the path to social improvement. Equal freedom (within those suitable limits) was thus required - and not a protection of individualism. Society would, in effect, level out rather than sustain peaks and valleys, and this view, as opposed to the liberalism of J.S. Mill, would provide the counterpoint, dichotomy and discord as to the purpose and proper effect of human rights which persists to the present day.[469]

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[467] Richard Milton: The Facts of Life: Shattering the Myth of Darwinism (1992, Fourth Estate); Richard Leakey & Roger Lewin: Origins Reconsidered: In Search of What Makes Us Human (1992, Little, Brown & Co).

[468] For example, "Social Statics", extracted in Resch and Huckaby at pp.244-61.

[469] Friedmann writes of Spencer's theory: "Few legal theories demonstrate more strikingly the impossibility of determining the fundamental values of life scientifically. The evolution of the human species from lower species of animals may be a scientific fact. The conclusions derived from it as to the future social organisation of

Economics, which had been opened up in the previous century by people such as Adam Smith, was used more and more as trade and the population expanded. The effect of these on the concept of the State, particularly when contrasted to previous centuries has been described by Kelly as precluding "the reduction of the state's nature to a simple formula, or the statement of its functions by a simple precept."[470] Locke had written about "life, liberty and property" and Jefferson had amended this to "life, liberty and the pursuit of happiness". While this involved more than property in the sense of real estate or material possessions, it was these that featured in the theories of transcendental freedom. Shotwell has remarked that the "new freedom belonged only to those who had a stake in it, and that stake was property."[471] The result was a belief that the State should not interfere in the marketplace (laissez faire), equating individual rights with self-interest. But there was a reaction to this. The nineteenth century is also regarded as a great age of social reform, so that by the end of the century the notion of the minimal role of the state had started to change to one of acceptable and necessary interventionism.[472] The expanding market economy produced an emphasis on property, but this was tempered by an emerging welfare ethic.

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mankind are no longer scientific facts, but hypotheses based on certain value assumptions." Legal Theory, ante, p.227.

[470] At p.305

[471] Shotwell, p.406

[472] Reform movements of the period included those championed by Elizabeth Fry in prison reform, the Earl of Shaftsbury with respect to factory conditions, Wilberforce and the slave trade, and Francis Place and the development of trade unions. (See Kelly, pp.306ff.)

According to Kamenka:

> The demand for rights in the seventeenth and eighteenth centuries was a demand against the existing state and authorities, against despotism, arbitrariness and the political disenfranchisement of those who held different opinions. The demand for rights in the nineteenth and twentieth centuries becomes increasingly a claim upon the state, a demand that it provide and guarantee the means for achieving the individual's happiness and well-being, his welfare. These two different conceptions of rights ... like the opposed conceptions of "freedom from" and "freedom to", stand in constant danger of fundamental conflict with each other - a conflict that dominates our contemporary world.[473]

But the nineteenth century has also been called "the great age of racism".[474] However, the effect of western European racism was to take the "white man's burden" to other countries. Together with evangelicalism, it was an expansive racism rather than an isolationist one and helped engender - and justify - imperialism.[475] As a result, Western European ideas became dominant.

There was a diffusion of ideas and points of view. The scientific approach opted for certainty and order - and seemed to find it.[476] On the other hand,

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[473] Eugene Kamenka, "The Anatomy of an Idea", Chapter 1 in Human Rights, Eugene Kamenka and Alice Ehr-Soon Tay (eds.) (1978, Edward Arnold, London), at p.5.

[474] Johnson, p.808

[475] For example, the belligerent jingoism of Rudyard Kipling's "Recessional", written for Queen Victoria's Diamond Jubilee in 1897, refers directly to God and expansion: "beneath whose awful hand we hold dominion over palm and pine", even if force is necessary to achieve this: "Lord of our far-flung battle-line".

[476] In 1871 (the same year as the publication of the "Descent of Man") Mendeleev published the "Periodic Table of the Elements". In this, elements were grouped in a grid according to their atomic weights and gaps in the grid actually predicted the existence of three elements which had not been discovered.

Romanticism exalted the capacity for feeling,[477] but it was . . single movement.[478]

As the sway held by Reason began to abate, feelings could come more to the fore. Brown has described this as a shift "from classicism to romanticism, from sense to sensibility, from deism to evangelicalism and from liberalism to socialism".[479] It is also around this time that the new sensibility began to manifest itself in a

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[477] Rather than merely record or stir nationalism, Romantic art encouraged delight in another's joy and compassion in another's sorrow. It arose contemporaneously with idealism of the great social reforms in Britain. At the same time the German philosopher Friedrich von Schelling started a new form of philosophy called "Naturphilosophie" (philosophy of nature). It was an expression of nature as the fountain of power, as though the energy provided by machines was but a weak imitation of the energy and power of nature. Earlier Romantics like Rousseau focused on the individual. The Romantics of the nineteenth century put the individual in perspective: important, but puny when compared with nature.

[478] The styles of Jacques-Louis David, Francisco de Goya (1746-1828), Caspar David Friedrich (1774-1840) John Constable (1776-1837) and J.M.W. Turner (1775-1851) are all different in both subject matter and execution. David painted what was blatant political propaganda (e.g., "Coronation of Napoleon"), Goya depicted the condition of humans in the years of upheaval and shifting power (e.g., "The Third of May 1808"), Friedrich was interested in the mystic sublime (e.g., "The Wanderer Above the Mists"), Constable wished to convey the experience of nature (e.g., "The Haywain") and Turner in the devastating power of nature overriding human forces (e.g., "Snowstorm: Hannibal and His Army Crossing the Alps"). See generally, Robin Middleton, "The Age of Passion", Chapter 12 in Hooker, especially at pp.294-300. Art could also be social and political criticism. Gericault's "La Radeau de la Meduse", exhibited at the Paris Salon of 1819, and later in London, depicted the survivors of a shipwreck who had survived by cannibalism. The matter became a political scandal after the government tried to suppress the incident and it was discovered that the captain, who was largely to blame for it, was appointed through political favouritism. The painting, far from being a celebration of national glory, was implicitly critical of the government.

The poetry of Coleridge and Wordsworth epitomises romanticism in literature. It has been described as a Copernican-type revolution in English literature comparable to the philosophical revolution introduced by Immanuel Kant. (Johnson, at p.360). We also see it in the poetry of Goethe who, interestingly, was also a scientist.

[479] Brown, p.153. It is interesting that Jane Austen wrote in 1811 her first novel, which was entitled "Sense and Sensibility".

concern for the plight of the poor.[480] In addition, concern about animal cruelty arose at this time as well.[481]

Architecture also exhibited an eclecticism of styles,[482] and in an age of reform, it was used to design many new hospitals and prisons.[483] New perceptions of reality were exhibited in art.[484] At the end of the eighteenth century poetry had changed

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[480] The Health and Morals of Apprentices Act was passed in 1802 to limit the working hours of pauper children; the Factory Act of 1819 banned parents from hiring out their children under the age of nine and limited the hours worked by children aged nine to sixteen in the cotton mills to twelve hours a day.

[481] Bull baiting, bear baiting and cock fighting went into decline and were eventually outlawed. The Royal Cockpit at Westminster was demolished in 1816. The Act to Prevent the Cruel Treatment of Cattle (a humane slaughtering measure) was passed in 1822; the Society to Prevent Cruelty to Animals was formed in 1824.

[482] Including a revival of Gothic, a notable example being the British Houses of Parliament constructed 1844-52.

[483] Sing-Sing prison in the United States is an example of deterministic architecture. Prisoners were given separate cells of specified minimum sizes (so that they might repent their ways). Unfortunately, many of them went mad. Architectural form could not always achieve the high aspirations of the reformers.

[484] The first Impressionist group exhibition was held in 1874, and included works by Claude Monet, Renoir, Camille Pissaro, Edgar Degas and Paul Cezanne. The Impressionists were radicals. Painters like Manet subverted artistic traditions in paintings like "Déjeuner sur l'Herbe". With its emphatic "broken" brushwork it was an explicit rejection of the state-sanctioned Salon and illustrated the contrast between the old and the new, the rise of new social classes and the spread of industry. Accuracy is only hinted at, the play of light and atmosphere being paramount. Transience is a part of the very technique. For example, Claude Monet's "Water Lilies (I)" gives a sense of colour and feel, even of movement; it is atmospheric rather than being a snapshot.

Post-Impressionism, the precursor to Modernism, arose in the 1880's. It was not a single school but a kaleidoscope of different styles. Georges Seurat (1859-91) used systematised brushwork, literally "dotting" the colour onto the canvas (a technique known as "pointillism"). On the other hand, Paul Gaugin (1848-1908) used broad, simple tones of colour in a style more intuitive than scientific, while Vincent van Gogh (1853-90) used intense and arbitrary colours. What did unify them, however, was a concentration on human existence rather than political allegory.

as well.[485] Music and popular dancing also changed.[486]

However, despite the apparent pressing for change along the lines of romantic idealism (and it was to become an age in Britain of some significant legal reforms) overall in Europe the political scene was reactionary. Uprisings by German students, Spanish libera's and the Italian "carbonari" were put down and repressed. Johnson has explained this fact in the following way:

> Behind the ostensible Zeitgeist pressing for change, there was a hidden but more powerful Zeitgeist anxious for stability . After two decades of wars and cruelty and privation, most people, whatever their class, wanted to return to the civilised values and the absence of violence which they, or their parents or grandparents, could vaguely remember. In this sense 'repression' was a welcome phenomenon for most people, for those whom a

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[485] The writing of earlier in the century had come to be regarded as decadent and outmoded. William Wordsworth in fact attacked classical poetry and prose as being overly formal and elaborate. Henceforth, writing should be simple, forthright and functional.

[486] The minuet of the ancien regime gave way to the waltz. In comparison to the minuet the waltz was daring (women's dresses twirled up revealing ankles), erotic (the partners held each other) and athletic. Byron in fact wrote a satirical poem entitled "The Waltz":

> Not Cleopatra on her galley's deck,
> Display'd so much of leg, or more of neck,
> Than thou, ambrosial Waltz, when first the moon
> Beheld thee twirling to a Saxon tune!

Ludwig van Beethoven (1770-1827) wrote a new kind of transcendent music. In the eighteenth century music was considered to be appealing to the senses, but little else. Musicians, including composers like Mozart, were treated at best as middle-ranking servants in great households. Beethoven became one of the first "celebrity" composers. This was made possible in part because, from the early nineteenth century, music was seen to contribute to self-awareness which was by then regarded as desirable. The content of Beethoven's operas also differed from his eighteenth century predecessors such as Mozart. The latter often wrote operas of sexual intrigue (e.g., The Escape from the Seraglio, Cossi fan Tutti) whereas Beethoven's "Fidelio" is about fidelity and the brotherhood of mankind.

later age would call 'the silent majority'.[487]

The constitutions of many European States did contain sections with respect to the rights of subjects.[488] These constitutions, however, largely reflected the existing balance of forces in society. Individual liberties might have been given a common recognition, but they were not given a general system of enforcement. They have been called merely "finessed declarations of rights,"[489] and conceded by Lauterpacht as being "a revocable part of the positive law."[490]

As well, the dominant conception of the law itself, ironically in the age of passion, but understandable when considering the total matrix, was that of positivism. John Austin (1790-1859),[491] a disciple of Bentham and the first professor of Jurisprudence at the University of London, was its most famous protagonist. In

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[487] At p.116

[488] For example, Germany. See Georg Jellinek: The Declaration of the Rights of Man and of Citizens (translated by Max Farrand, 1901, H. Holt, New York; reprinted 1979, Hyperion Press, Westport) at pp.4-6. See also the Constitution of the Kingdom of the Netherlands (Grondwet Voor Het Koninkrijt Der Nederlanden) 1815 (extracted in Asbeck, ante, at pp.52-67) which provided for equal protection of person and property (Art. 4), freedom of the press (Art 7), freedom of religion (Arts. 174-180), free elementary education (Art. 201) and relief of the poor (Art. 202). Lauterpacht (International Law and Human Rights, p 89) also mentions fundamental rights being introduced into the constitutions of Sweden (1809), Spain (1812), Norway (1814), Belgium (1831), Liberia (1847), Sardinia (1848), Denmark (1849), Prussia (1850) and Switzerland (1874).

[489] Krieger, ante, p.19

[490] International Law and Human Rights, p.91.

[491] For a life of Austin and the influences on his work (and a defence of Austin against Hart) see W.L. Morison: John Austin (1982, Stanford U.P., Stanford).

"The Province of Jurisprudence Determined" (1832) - in effect Austin's jurisprudence lectures at the university - he stated that law was a command from a political superior (the "sovereign") backed by sanctions to ensure compliance. Such an approach fitted well with codes. What it also indicates, however, is the irrelevance of any transcendent or higher values in the law. What was therefore not law "properly so called" included the law of nature (which was regarded as being merely a moral right) and international law (which was largely customary law at this time). Laws might be good or bad, but they were still the law. Their desirability was another matter entirely.

In Britain, the "sovereign" was Parliament. It was not yet seen as an obstacle standing in the way of rights, but as the guarantor of them. In the previous century and before it had been the defender of liberties against the absolutism of the Crown. Indeed, Walter Bagehot in The English Constitution (1867) referred to cabinet government as the "efficient secret" of the British system of government - there was no notion of this needing scrutiny. In addition, Parliament was dominated through much of the nineteenth century Industrial Revolution by capitalist interests who were prepared to support a positivist system whereby Parliament made the rules and notions of natural law or natural rights which might apply to the mass of workers were seen as effectively irrelevant.

The result of this was that, except for Catholic writers such as Antonio Rosmini

(1797-1855), natural law went into a steep decline in the nineteenth century. (But in a seemingly paradoxical union of natural law and positivism, the century also saw - in 1870 - the introduction of the doctrine of papal infallibility by Pope Pius IX). Kelly says that natural law was in "hibernation" during this period.[492] The rise of nationalism, imperialism, social Darwinism and economic competition all bolstered this development. One reason Australia and Canada did not entrench Bills of Rights into their federal constitutions when they got them may be that these documents were written during the period when Natural Law was in decline. Furthermore, at this time the "rights of man" were, to the extent that they were asserted at all, asserted nationally, rather than internationally. There were few attempts to assert similar rights on behalf of citizens of other states and when this did happen, national self-interest was usually present. While the principles of Locke, Rousseau and Paine were discussed internationally, and had effects internationally, the principle of state sovereignty was even more widely accepted.[493] The abolition of slavery, which did occur in the first half of this

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[492] At pp.333-4. However, as an ameliorating (if not countervailing) factor, the rise of the historical school of law, to some extent started by Burke but brought to fruition by the Germans, in particular Friedrich Carl von Savigny (1779-1861), believed that law should not be studied simply as rules but in the context of what was later to be called the Volksgeist - literally the "folk-roots" - or special history of law in each country. Law was seen as conditioned by the prevailing historical factors which predominated in time and place and which thereby influenced any nation's legal institutions. (On the Vocation of Our Age for Legislation and Legal Science). These institutions could be "natural", but only for that particular time and place.

[493] See The International Protection of Human Rights, Evan Luard (ed.),, (1967, Thames and Hudson, London), Chap.1. For a similar view of the approach to minority rights which came to prominence after World War I, see Chap. 2, "League of Nations' Protection of Minority Rights" by C.A. Macartney.

century, is an example of concern for citizens of other countries, but the abolitionist movement was started by private individuals and organisations rather than by governments, (as discussed in Chapter 3).

2.8.1 Different Approaches to Freedom: John Stuart Mill contrasted with Karl Marx

The interplay of the dominant influences during the nineteenth century raised the question of the function of the State in ordering the relationship between property and welfare in a more immediate, practical and relevant way than ever before. While the theories of Mill and Marx came to opposite views as to how this could be achieved, both theories are premised on the belief that the proper structure of society would enable true freedom to emerge. The major difference between them was whether the latter was to be individual or collective.

John Stuart Mill (1806-73)[494] was the son of James Mill, the Utilitarian who counted Jeremy Bentham among his friends. The younger Mill's education at parental hands was specifically intended to fashion him into the leading apostle of

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[494] For biographical detail, see Peter Glassman: J.S. Mill: The Evolution of a Genius (1985, U. of Florida Press, Gainesville); Michael St. John Packe: The Life of J.S. Mill (1954, Secker & Warberg, London).

the second generation of Benthamites.[495] In fact, in 1822, at the tender age of 16, he established a Utilitarian society.

Because of the remorseless nature of his education at the hands of an over-zealous father, the younger Mill would, for the rest of his life, conceive of freedom as a sphere of private activity within which an individual could be left alone to be themselves.

In 1823, he entered the employ of the East India Company, with whom he was to remain for the next 35 years. His experiences with the company were to become important in his thinking about social theories. Also important was the fact that in 1825 he became active with the London Debating Society. It was there that he encountered (perhaps for the first time in his life) considered and intelligent views implacably opposed to Benthamism.

The turning point in his thinking came in 1826 when (still aged only 20) he apparently suffered a mental breakdown attributed by one commentator[496] to overwork and emotional starvation. The former was apparently salved by rest and the reading of Wordsworth's poetry. The latter was ameliorated by a growing friendship with Mrs. Harriet Taylor, the (usually unacknowledged) joint author of

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[495] See Bruce Mazlish: James and J.S. Mill: Father and Son in the Nineteenth Century (1975, Basic Books, New York).

[496] D.J. O'Connor (ed): A Critical History of Western Philosophy (1964, The Free Press, New York), pp.341-2.

"On Liberty" whom he eventually married in 1851 (she being already married for the first nineteen years of their friendship).[497] These last factors convinced Mill that feelings needed to be cultivated as well as the intellect. The result was a reaction against strict Benthamism. Freedom was to become individual fulfilment. It was a notion of protection from, rather than of subservience to, the possible standardising trends of the social struggle.

In "On Liberty"[498] the argument is that the individual should be protected against the tyranny of the majority. Mill wrote in his opening:

> The object of this essay is to assert one very simple principle ... That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their members, is self-protection. That the only purpose for which power can rightfully be exercised over any member of a civilized community against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. ... Over himself, over his own body and mind, the individual is sovereign.[499]

While the State had a right to interfere when one person's behaviour was harmful to another's, the framework should be such that authority was balanced by liberalism to achieve the goal of the development of individuality.[500] Mill wrote

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[497] See Josephine Kamm: J.S. Mill in Love (1977, Gordon & Cremonisi, London).

[498] Extracted in Resch and Huckaby at pp.226-43. It was first published in 1859, the same year as Darwin's "Origin of the Species".

[499] On Liberty, Chap. 1

[500] Contrast Friedmann, who sees this as more a combining of individual self-assertion with a consciousness of the general good (p.321). Friedmann's conclusion from this (ibid) is that, like Hegel, there is an elimination of the dualism between individual and social interest.

"The Subjection of Women" in 1869 in which he wrote, in the opening paragraph:

> ... the principle which regulates the existing social relations between the two sexes - the legal subordination of one sex to the other - is wrong in itself, and now one of the chief hindrances to human improvement; and that it ought to be replaced by a principle of perfect equality, admitting no power or privilege on the one side, nor disability on the other.[501]

Mill rejects the theory of the social contract, but conceives of society as existing to protect individualistic self-interest from interference from other individualistic or group self-interest. The "welfare" of society is the aggregation of these self-interests.[502]

While ostensibly affirming that "happiness" is the only intrinsic value, Mill conceded that some pleasures could be superior to others. If this is so, it would be no longer possible to calculate the merits of social policies simply by measuring the balance of pleasure and pain expected to be generated by them. This then raises the more complicated problem of defining a person's duties to him- or herself, and to each other, and of determining what the true interests would be.[503] "Liberty" (individual freedom) was, according to Mill, such an interest or intrinsic value. In this respect Mill's approach is different to Bentham's, in that the latter seemed to consider that there was no conflict between individual and general utility.

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[501] J.S.Mill; The Subjection of Women (Everyman's Library Edition, 1970), p.219

[502] Henry D. Aiken, "Mill and the Justification of Social Freedom", Chapter 6 in Nomos IV: Liberty, Carl J. Friedrich (ed.), (1962, Atherton Press, New York), at 129.

[503] Christian Bay: The Structure of Freedom (1970, Stanford U.P., Stanford), p.39.

Friedmann calls Mill's work "a synthesis between justice and utility."[504] "On Liberty" was extremely influential.[505]

Karl Marx (1818-83) who, together with Friedrich Engels (1820-95) wrote the Communist Manifesto (1848)[506] adopted an economic approach to the analysis of society. He was born into a Jewish family in Germany at a time when there was considerable discrimination against Jews.[507] However, he had the upbringing of a child in an educated bourgeois family, studying law at Bonn and then at Berlin. His belief in the falsity of the autonomy of law, politics and economics began when he worked as a journalist in the 1840's and was assigned to work on the deliberations of the Rhineland Parliament on property laws and the impoverishment of the Mosel winegrowers.[508] Studying parliamentary papers in the library of the British Museum for clues as to the effects of the Industrial Revolution, he came to the conclusion that the only solution for the evils it had produced would be the socialisation of the means of production: in other words, the antithesis of laissez faire.[509]

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[504] Ante, at p.320.

[505] See John C. Rees: J.S. Mill's "On Liberty" (constructed from Rees's published and unpublished materials by G.L. Williams), (1985, Clarendon Press, Oxford).

[506] Extracted in Resch and Huckaby pp.263-78.

[507] Waldron, ante at p.119, recounts that Marx's father had to undergo a nominal conversion to Protestant Christianity to retain his position as a legal official.

[508] Waldron, pp.121ff.

[509] Shotwell, p.402

In his theories, the rights of individuals are consequential. Marx considered that the struggle which occurs in society was not a conflict of ideas or beliefs, but a conflict of material interests, the interests of social classes. The institutions which existed in society were those which reflected the interests of the dominant social class of that time and acted to keep them in a position of power. The State was therefore "merely a structure arranged to suit the needs of those in control."[510] In medieval times, for example, the ruling class was the nobility and the forces of production almost entirely agricultural: the structure of the State was feudalism which corresponded to the interests of the nobility and supported their power in this type of economy. After the French Revolution, the ruling class was the bourgeoisie and the forces of production were rapidly shifting from agricultural to industrial as the Industrial Revolution took effect: the structure of the State shifted to broaden the base of power to this wider class and relied for its maintenance on a steady supply of cheap labour for its factories. In such a structure the working class (the "proletariat") was exploited. The final stage, according to Marx, would be the shift of the means of production into the hands of those who actually created the materials: the "dictatorship of the proletariat". In terms of rights, Marx believed that the bourgeois ideology would affect not only the content, but also the form, of rights. He considered that a belief in transcendentals like Natural Law was ahistorical and that there was nothing inalienable or natural about what today we call human rights. If capitalists monopolised the means of production in

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[510] Kelly, p.310

society, individual rights were a bourgeois illusion.[511] Marx analysed the French Declaration of the Rights of Man and the Citizen in On the Jewish Question (1843), considering that the rights expressed in it were the rights of "egoistic" or "isolated" man separated from others in the community[512] (which was the real focus of his interest). According to Marx, liberty is not possible until the class system is destroyed and private property abolished. The distinction between the public and the private, which had been the emerging trend (although interrupted by the French Revolution) should be abolished. The possession of any rights is contingent upon respect for collective interests. Rights are invested more in the proletariat as a class than in the individual.[513]

While the nineteenth century saw many important advances and reforms, it should not be seen as a period of rapid or widespread improvement in individual rights. There was not only economic oppression of large sections of the population but also political repression and what we would now recognise as human rights violations. Economic repression at this time has been described by Shotwell as follows:

> The industrial revolution had no such reign of terror as that of the Jacobins, but, instead of the guillotine, its victims faced wage slavery from childhood to early death. Medical evidence in the Report of the Factory Commission

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[511] See Shestack in Meron, ante, pp.81ff.

[512] Karl Marx & Frederick Engels, Collected Works III (1975, London), p.162.

[513] For detail, see Eugene Kamenka, "Public/Private in Marxist Theory and Marxist Practice", Chapter 11 in Benn & Gaus, ante.

> of 1834 stated that in the Lancashire mills 60 per cent of the workers were under sixteen years of age, and only 6 per cent were above forty.[514]

Women and children also worked in appalling conditions in the mines.

Political repression was common and frequently pervasive.[515] The Reform Bill of 1832, effectively abolishing the "rotten borough" system,[516] meant that Parliament was no longer the exclusive domain of an aristocratic oligarchy. But voting was restricted to land owners,[517] the working class not getting the vote until the reform Bill of 1867 and agricultural labourers being enfranchised by Gladstone's Reform Bill of 1884.[518] The aim of the 1832 bill was the reduction of the interest of the landed interest in parliament, not equal suffrage. The Factory Acts in the period from 1833 to 1845 limited hours of work (for children, to nine

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[514] Shotwell, p.398

[515] For example, there was the right to vote, but this was class-based and there was widespread electoral fraud. In the 1850's the average rate of adult suffrage was ten per cent. In fact, by 1915 it was still only twenty per cent in Austria, a little over nineteen per cent in Sweden, twenty-three per cent in Switzerland and just over seventeen per cent in the United Kingdom. (Robert Justin Goldstein, "Political Repression and Political Development: The 'Human Rights' Issue in Nineteenth Century Europe", in Comparative Social Research, Richard F. Tomasson (ed), (1981, Jai Press, Connecticut), pp.166-198 - hereafter cited as Goldstein). Universal suffrage was not adopted in Britain until after the First World War.

[516] Fifty-six boroughs, with less than 2,000 inhabitants, but returning 111 members to parliament, were abolished.

[517] Only about 750,000 were enfranchised, out of a population of over 10,000,000. This nevertheless represented a 50% increase in the number of eligible voters.

[518] It was not until 1918 that all men over 21 - and women over 30 - got the vote. Women did not receive equal suffrage until 1924. Shotwell notes (at p.373) that it had taken over 600 years for the British Parliament to be representative of the whole nation.

per day, and for women, to twelve per day), prohibited the employment of children in mines and established workplace health and safety rules Contemporary literature, particularly the novels of Charles Dickens, poignantly illustrate this unsatisfactory situation.[519]

There were also restrictions on freedom of expression, including freedom of speech, assembly and the press.[520] There were restrictions on the freedom of workers to organise and to strike.[521]

Positivism was the predominant theory of law: validity of law was more a matter of origins than content. Fundamental law in England meant Parliamentary structure rather than transcendental principle. The rule of law and the meaning of freedom in England were the limits on the exercise of power. The individual had rights because the omnipotent Parliament had not taken them away. Freedom meant political rights in a laissez-faire setting.

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[519] In many of Dickens' novels the plight of the working poor is dealt with (e.g., David Copperfield written in 1850).

[520] For example, in Germany between 1878 and 1890 socialist parties were banned, 1900 people were deported and 1500 jailed. Many newspapers, political associations and labour unions were dissolved. During a peasant uprising in Romania in 1907, 11,000 people were slaughtered. (Goldstein, p.179). In France during the French Revolution, the philosophical basis of which has been touted to be the "rights of man", 20,000 executions took place. During the insurrection of 1848 3,000 people were slaughtered. As a result of the Louis Napoleon coup of 1851 27,000 opponents were arrested and 10,000 were deported. The Paris Commune of 1871 was suppressed by the slaughter of 20,000 people. (Goldstein, p.180).

[521] Trade unions were in fact illegal in Britain until 1824, in Belgium until 1866, in Germany until 1869, in Austria until 1870, in the Netherlands and Hungary until 1872, in France until 1884 and in Russia until 1906. (Goldstein, p.182).

2.9 Conclusions - Rights Discourse and the Lumbering Common Law

A game of chess is not simply the sum of the rules for the movement of each piece. Each individual chess rule is relatively simple. The difficulty of the game is the interaction of all of these rules. Similarly, it is not the soundness of the intellectual design of the theories, discourse and documents which has made them successful - they fitted in with the political and social situations of their (or later) times (e.g., the difference in the political success of the American and French Declarations).

Rights are a solution to a problem posed by a particular stage of social evolution.[522] They are a rhetoric of claims within a particular system. Rights discourse is a similar reflection. What this chapter has shown is that the documents usually relied upon to validate individuals' domestic rights in Canada and Australia have been contextually anchored but manipulated throughout history. As such, neither authorship nor intention can be conclusive as to the documents' coherency or unity. This view is considered to be recent and "postmodern",[523] but in fact it is not. Herbert Marcuse wrote in 1941:

> The content of a truly philosophical work does not remain unchanged with time. If its concepts have an essential bearing upon the aims and interests of

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[522] Timothy O'Hagan: The End of Law? (1984, Basil Blackwell, Oxford), p.2.

[523] See Costas Douzinas, Ronnie Warrington & Shaun McVeigh: Postmodern Jurisprudence: The Law of Text in the Texts of Law (1991, Routledge, London), Ch.2.

> men, a fundamental change in the historical situation will make them see its teachings in a new light.[524]

The construction of freedom (which is traditionally the balance struck between the interests of the individual and the interests of the community), including the legal construction of freedom,[525] depends upon society's organisation (both in terms of general social structure and in terms of its administrative institutions - including the legal system) working in conjunction with its culture and ideology. It is a chronicle of the changes in the types of demands that have been made, as well as of the responses to those demands. However, the relationship is as opportunistic as it may be functional and is not deterministic. While a diachronic development can be seen with seventeenth century advances in political freedom (e.g., habeas corpus), eighteenth century civil liberties (the American and French Declarations), the nineteenth century expansion into reforming legislation (i.e., "freedom to" as well as "freedom from" - such as the 1832 Reform Bill), a synchronic analysis shows that the development was by no means uniform or linear or consistent. Freedom was emerging, but equality as a concomitant remained embryonic in both legal and factual terms until recently,[526] and is still not without problems. Similarly, the factors in this developmental matrix are in free association. Both religious and

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[524] Herbert Marcuse: Reason and Revolution: Hegel and the Rise of Social Theory (1941, Oxford U.P., Oxford), Preface, p.vii.

[525] Friedmann has said: "Every ideal of justice must be taken from political theory" (Legal Theory, p.88).

[526] It is particularly in this regard that I consider that the otherwise very helpful table of "The Stages of Human Rights Development" in Claude, ante, at pp.392-3 is skewed.

secularised ideologies have been used to support bases of political authority. The distinction between the public and the private has been flexible and multidimesional.[527]

There is not, nor has there ever been, a stable, unified ground for, nor an order of true essences of, the question of rights for human beings. The development in the West was one which produced a focus on the individual (if not necessarily on individuality) rather than the group, perpetuated the concentration on the male rather than the female perspective, encouraged a dichotomy between public and private rights (although the boundary line shifted), and promoted civil and political rights rather than economic and social rights.

Invocations to Natural Law and natural rights have masked this changing contextual malleability. Natural Law essentially reflects a belief that humans can recognise directly, through the intellect, that certain propositions about right and justice are true or false. Natural Law has been used, and was useful, because, as Weinreb puts it, "the fundamental assumption of natural law was that the determinate order of human existence is normative."[528] The so-called "natural" nature of the rights generated (itself influenced by prevailing paradigms) has meant

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[527] Contrast the Table of "The Classical Human Rights Model" in Claude, ante, at p.40 which, while useful, is misleading in the presumptions it raises of functionalism.

[528] Lloyd L. Weinreb: Natural Law and Justice (1987, Harvard U.P., Massachusetts), at p.97.

that Natural Law and natural rights have been used to support almost any ideology.[529] On "nature", and laws and rights believed to be grounded in it, postulates such as self-evident, immutable, universal, innate and inalienable rights can be based. For the Greeks, everything obeyed inherent natural laws: natural law was an end rather than a fact. In the Middle Ages, the source of Natural Law was Christian belief. Natural law could be used to show that a law was morally invalid, but the existing matrix did not allow for actual invalidation. (Magna Carta itself was not so much a document depicting higher principles as a political compromise). After the Reformation, Natural Law could be detached from theories of God and sourced in the residue that Aristotle and Aquinas both had acknowledged: human reason. The Renaissance helped to make humans the focus of life, rather than merely a minute part of it as had been the overwhelming medieval approach. However, the approach to natural law was not consistent and could be influenced by the perspective of the viewer. (For Machiavelli, it was simply an irrelevance in the running of the State; for More, it was God's law but would only work in "Utopia"). The Reformation, by freeing the conscience from a salvation monopolised by the Church and making it more person-oriented, allowed reason to be substituted for the pervasive authority of the divine. Natural Law, according to Grotius (who was himself a cleric) was so immutable that it could not be changed, even by God himself.

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[529] Friedmann, Legal Theory, Ch.7

Hobbes saw natural law not so much in terms of ethical precepts but as laws of human conduct based on observation of human nature.[530] The sovereign is utilitarian rather than instituted by a superior sanction or Natural Law. Rousseau - in a sweeping emotionalism rather than a consistent theory[531] - thought freedom and equality existed in the state of nature. A proper social structure restores these to humans, but primarily as civil rights rather than natural rights. Conformity of the individual will to the general will is therefore seen as being consistent with freedom. Locke saw Natural Law as superior to positive law and immutable. The sovereign holds power in trust rather than as a matter of utility. Humans have inalienable natural rights, in which "property" has a prominent place.[532] With Locke, the application of reason to the perception of the state of nature resulted in the rights of life, liberty and property. If legislatures did not apply these as basic principles, the laws thereby made were not really laws at all and could be disobeyed. Natural law became a test for the validity of civil enactments and Natural Law in this context and with this purpose produced natural rights. It was used politically to curb royal power. The normativity produced was not pre-given as in the Middle Ages but could be seen to emanate from human beings in the State. However, when used in the context of the French Revolution, there was a reaction in England against natural rights and a falling back on the "science" of law which mirrored the empirical approach in science generally. This, combined

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[530] Friedmann, id., p.120

[531] Id., p.125

[532] Id., p.123

with the effect of the English Bill of Rights, meant that in England, unlike America and France, fundamental law was not the Constitution based on natural rights, but the traditional forms of government. The link between fundamental law and natural law was severed.

According to d'Entreves, the emergence of natural rights from natural law may have been facilitated by the sloppy use of terminology as much as by anything else.[533] Moreover, Minogue argues that much of the controversy surrounding Natural Law, natural rights and human rights derives from the fact that natural rights are not necessarily derived from Natural Law. Rather, the former was "parasitic upon its better established and more respectable relation. ... Natural law and natural rights are merely different ways of saying the same thing. Natural rights is an assertive and individualistic version of what appears in the bland and urbane philosophy of natural law as an elaborate and compendious account of human moral obligations."[534]

D'Entreves contends that the crux of natural law theory is the relation between law

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[533] At p.59, ante, he states that in English the Latin "ius" may be translated as either "right" or "law" and that: "The ius naturale of the modern political philosopher is no longer the lex naturalis of the medieval moralist nor the ius naturale of the Roman lawyer. These different conceptions have in common only the name."

[534] K.R. Minogue, "Natural Rights, Ideology and the Game of Life", Chapter 2 in Kamenka & Tay: Human Rights, ante, pp.15-17.

and morals,[535] that it is the "point of intersection" between the two.[536] The problem is that these values reflected in the law are said to be "natural". But the values are determined by prevailing social restrictions. What values? Whose values?[537] Natural Law is predominantly an hierarchical paradigm used to legitimate laws by pointing to ultimate authority. For example, gay rights, which would be considered "natural" by most people in the 1990's would have probably been something which would have horrified Locke. More recent writers, while using different approaches, still ultimately rely on the connection Natural Law sets up between the law and morals or values,[538] sometimes as a test for the validity

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[535] d'Entreves, Ch.5. Contrast H. McCoubrey: The Development of Naturalist Legal Theory (1987, Croom Helm, London) who states that morality has been lessened as the transcendental value on which Natural Law has been based since the Reformation and the rise of the social contractarian theories in the eighteenth century. (See particularly the Introduction, pp.ix-xxii).

[536] Id., p.116.

[537] See d'Entreves, pp.7ff. Sinha says that Natural Law, in setting up permanently valid standards, ignores the "historicity" of "man" and also the historical character of the nature of Natural Law itself. ("The Anthropocentric Theory of International Law as a Basis for Human Rights" (1978) 10 Case Western Reserve J. Int. Law 469 at 477). Writers such as Leo Strauss (Natural Right and History, 1953, U. Chicago Press, Chicago) and Heinrich A. Rommen (The Natural Law: A Study in Legal and Social History and Philosophy, 1947, B Herder Book Co., London, translated by T.R. Hanley) argue that the very fact of the historical re-occurrence of Natural Law puts paid to the arguments of its anti-historical quality.

[538] For example, Weinreb, ante, refers to the assumption of an inherent moral dimension in the law (at p.100); John Finnis refers to the requirements of "practical reasonableness" (Natural Law and Natural Rights 1980, Oxford U.P., Oxford); Neil MacCormick sees it in the exercise of a discretion in positive law ("Law, Morality and Positivism" 1 Legal Studies 131); Hart saw a minimum content of natural Law to enable a legal system to survive (The Concept of Law, 1961, Oxford U.P., Oxford).

of the law and sometimes, as with Dworkin, as being implicit in the law.[539]

But, in the context of their application in cases before courts (notions of modern human rights to one side for the moment) how were they applied? Was the natural rights discourse (however it was currently expressed), taken up and hugged to the bosom of the law to ground it on fundamental human values (however they were currently conceived)?

Sir Edward Coke had proclaimed the applicability of natural rights principles in the Magna Carta in his treatises in the seventeenth century. The Common Law was considered to be the expression of commonly shared values and the manifestation of reasonableness and the common good. However, Parliament effectively won the contest with the courts with the Bill of Rights of 1688. Therefore the rule of law, and the primacy of rights of any kind (fundamental or not), became in effect the rule of Parliament.[540]

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[539] Ronald Dworkin: Law's Empire (1986, Harvard U.P., Cambridge), pp.219ff. What were generalised, self-evident, but not always consistent, principles in the natural law pantheon (such as freedom and equality) have now been the focus of detailed analysis. For example, John Rawls: A Theory of Justice (1971, Harvard U.P., Cambridge), which discussed the concepts of liberty and equality as the framework for a just society; Robert Nozik: Anarchy, State and Utopia (1974, Basic Books, New York), which considers liberty to be the primary value in society; Michael Walzer: Spheres of Justice (1983, Basic Books, New York), which considers equality to be the most significant value.

[540] Holdsworth, in The History of English Law (1924), says that idea of the supremacy of law and the supremacy of Parliament merged with the Bill (Vol. 4, p.186). This issue is, however, not without controversy of its own. A.V. Dicey in Introduction to the Study of the Law of the Constitution (10th ed., 1959, Macmillan, London, reprinted from Dicey's 7th edition of 1908) was the champion of parliamentary supremacy, stating that it "has, under the English

In the years 1765 to 1769, Sir William Blackstone wrote his famous Commentaries on the Laws of England. This was an attempt to present a systematic theory of the whole Common Law system. In it, he affirmed the congruence of Natural Law and the laws of England, and asserted - apparently paradoxically - the absolute lawmaking power of the sovereign and the binding character of rights which were anterior to and superior to the formal legal process: "The absolute rights of every Englishman ... as they are founded on nature and reason, so they are coeval with our form of government."[541] Thus he could write that: "The power and jurisdiction of Parliament ... is so transcendent and absolute, that it cannot be confined ... within any bounds"[542] and at the same time state that the "law of nature, being coeval with mankind, and dictated by God himself, is of course superior in obligation to any other ... no human laws are of any validity if contrary to this."[543] This paradox, which Bentham criticised,[544] may be more apparent

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constitution, the right to make or unmake any law whatsoever." (at pp.39-40). This view is not totally agreed with by W.I. Jennings: The Law and the Constitution 5th ed., (1959, Univ. of London Press, London), and N.K.F. O'Neill, "The Australian Bill of Rights Bill of 1985 and the Supremacy of Parliament" (1986) 60 A.L.J. 139, who contend that parliament can make laws binding on its successors (such as manner and form requirements with respect to repeal). However, with respect to parliamentary supremacy in the present (rather than the future), Dicey is agreed with by contemporary commentators: O. Hood Phillips & Jackson: Constitutional and Administrative Law 7th ed., (1987, Sweet & Maxwell, London), Ch.3; C.R. Munro: Studies in Constitutional Law (1987, Butterworths), Chs.4, 5.

[541] Commentaries, Vol. I, p.127.

[542] Id., Vol. I, p.160.

[543] Id., p.41.

[544] See discussion above. Modern scholars, such as those of the Critical Legal Studies school, have also been critical: see, for example, Duncan Kennedy, "The Structure of Blackstone's Commentaries" (1979) 28 Buffalo L.R. 205.

than real. In Blackstone's day Parliament was seen as the repository of individual freedoms against the monarch, and not as itself needing supervision. Blackstone was not talking about judicial review of legislation so much as parliament forfeiting its right to govern if it breached natural laws. Although this is ambiguous in the Commentaries, positive law, if clear, could override Natural Law.[545]

This uneasy co-existence is well illustrated by cases dealing with what today we would recognise as being the abnegation of human rights: slavery.

Slavery, except for medieval villeinage, is thought never to have really existed in England, although some scholarship disputes this.[546] In the colonies slavery was considered to be a necessity. Issues arose as to the protection British law afforded to slaves who had been brought from the colonies into England itself.

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[545] While asserting that a law in conflict with Natural Law was void, this did not apply when the law in question was a clear Parliamentary mandate: "I know of no power in the ordinary forms of the Constitution, that is vested with the authority to control [Parliament]." (Commentaries, Vol.1, p.91). Robert Cover (Justice Accused: Antislavery and the Judicial Process, 1975, Yale U.P., New Haven, at pp.25-26) explains this discrepancy by stating that Blackstone's general principle about the supremacy of Natural Law applied to the obligations of legislators and citizens, in that no legislator ought to make a law contrary to Natural Law and that no citizen had a moral obligation to obey such a law, but that judicial obligation was a different matter. It had to be determined according to constitutional principles which allocated power between Parliament and the courts.

[546] See, for example, Patterson: Freedom in the Making of Western Culture, ante, at pp.349-50 and citations therein. These authors contend that in Norway and Iceland during the Middle Ages slavery played a critical role in the rural economy, as well as in England. Davis remarks that slaves were bought and displayed in the courts of Elizabeth I and the Stuarts, were publicly advertised for sale during most of the eighteenth century, and were bequeathed in wills as late as the 1820's: David Brion Davis: The Problem of Slavery in the Age of Revolution 1770-1823 (1975, Cornell U.P., Ithaca), p.472.

Blackstone's first edition of the Commentaries on the Laws of England published in 1765 (and therefore before the Somerset Case) states:

> The spirit of liberty is so deeply implanted in our constitution and rooted in our very soil that a slave or negro the very moment he lands in England falls under the protection of the laws and with regard to all natural rights becomes eo instanti a freeman.[547]

That spirit, however, was not so deeply implanted that judges like Lord Mansfield could not later qualify it. Moreover, Blackstone himself qualified this statement by stipulating that he meant "pure and proper slavery whereby an absolute and unlimited power is given to the master over the life and fortune of the slave." Anything less would be similar to an apprenticeship, except that it would be for life.[548] In any event, if the slave were taken out of England, the full rigour of slavery would return.

The leading case on this issue occurred in 1772 with Somerset v. Stewart.[549] James Somerset was a slave purchased by Charles Stewart in Virginia and taken by him to England in 1769. Somerset deserted his master, was apprehended and locked on board a ship for transport to Jamaica where Stewart intended to sell him. Before he could be shipped out of England the famous abolitionist, Granville Sharp, had a writ of habeas corpus served on the captain of the ship. Stewart argued that as a slave, Somerset was his absolute and unlimited property by right

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[547] Vol.1, p.127

[548] Vol. 1, p.423.

[549] 98 E.R. 499

of the contract of purchase in a place where slavery was legal (Virginia) and that the abolition of slavery in England itself did not affect this proprietary right.

In earlier cases, Lord Hardwicke, who had done much to fashion the law of Equity, had twice ruled that a slave remained a slave when brought to England.[550] In Somerset, however, it was stated: "In England, where freedom is the grand object of the laws, and dispensed to the meanest individual, shall the laws of an infant colony, Virginia, or of a barbarous nation, Africa, prevail? From the submission of the negro to the laws of England, he is liable to all their penalties, and consequently has a right to their protection."[551] Underneath the patronising tenor of these remarks lies the principle of freedom and equality provided by a law which, at least in England itself, would override any other law to the contrary. This would be so even if that other law was English law operating in another place.[552] Interestingly, the famous phrase attributed to Lord Mansfield ("The air of England has long been too pure for a slave and every man is free who breathes it") does not appear in any reports of the case and is in fact an attribution

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[550] Smith v Gould 2 Salk. 666, 92 E.R. 338 (1706); Pearne v Lisle Amb. 75, 27 E.R. 47 (1749).

[551] At p.501

[552] "An objection has arisen, that the West India Company, with their trade in slaves, having been established by the law of England, its consequences must be recognised by that law; but the establishment is local, and these consequences local; and not the law of England, but the law of the plantations." per Holt J at p.501.

from a nineteenth century source.[553]

The limitations of Somerset's Case are that it was in essence a case concerning a conflicts of laws issue: could extraterritorial effect be given to the laws of Virginia which allowed a master to detain, imprison and transport his slave when the law of England would prohibit this? Lord Mansfield's primary reasoning on this point was that "so high an act of dominion [i.e., keeping a slave to be sold after he had attempted to escape] must be recognised by the country where it is used."[554] In other words, the lawfulness of the act is determined by the law of the place in which it occurs. Therefore, only those justifications for the act entertained by that law can be recognised by the court. Lord Mansfield went on to say: "The state of slavery is of such a nature that it is incapable of being introduced on any reasons moral or political but only by positive law which preserves its force long after the reasons occasion and time itself from whence it was created is erased from memory. It is so odious that nothing can support it but positive law."[555] But positive law will prevail, even over something so odious.[556]

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[553] See Robin W. Winks: The Blacks in Canada: A History (1971, Yale U.P., New Haven) at p.26. The source, according to Winks, is John Lord Campbell: The Lives of the Chief Justices of England (London, 1849), 2, 418.

[554] At p.510.

[555] Ibid.

[556] Apparently, Lord Mansfield was somewhat equivocal about the outcome of this case and had procrastinated in bringing down a definite judgement in it: see Edward Fiddes, "Lord Mansfield and the Sommersett Case", (1934) 200 L.Q.R. 499.

The Somerset Case itself was in legal terms a fairly narrow one, but its effects were enormous. While emancipation did not effectively occur by virtue of mere arrival in England, the case did establish that an escaped slave could not be forcibly removed from England. Stewart's claim was regarded as "opposite to natural justice",[557] English law on this point representing the latter. Freedom was a natural right, and therefore inalienable and not capable of restraint. While the contract to purchase the slave might itself be valid in the place where the contract occurred, once the issue concerns a human being, that is paramount and the matter of the contract secondary.[558] Slavery might be lawful elsewhere, but only if there is a strong positive law basis for it. In the absence of such a positivist base in England, the law was regarded as leaning towards freedom.

Therefore, without the specific abolition of slavery at this time, and without any legislation specifically allowing it, the effect of the Common Law was regarded to operate generally on all people within its jurisdiction, but in a more or less benign fashion rather than in an activist fashion. There is a strong moralistic tone to the judgement and to the arguments before the court. Slavery could exist, but the idiom of natural law expressed the disparity between positive law and morality. Far from being a "seamless web", the law was perceived as a patchwork quilt,[559]

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[557] 98 E.R. 499 at 502

[558] Per Lord Mansfield at p.509.

[559] Robert M. Cover: Justice Accused: Antislavery and the Judicial Process (1975, Yale U.P., New Haven) p. 17.

sometimes tolerating slavery and sometimes not. Accordingly, a slave accompanying her mistress to England and then returning to her place of servitude results in a revival of the right of the mistress to exercise dominion over the slave.[560] Similarly, no action lay by a slave coming to England and continuing his service there to his master for wages on an implied contract.[561] As late as 1860 the Exchequer Chamber held that a contract for the sale of slaves executed by British subjects with a foreigner, and to be performed in a country where the contract was lawful, had to be upheld in a British court.[562] While slavery might have been contrary to the policy of the Common Law, this was not enough to make void a slavery contract validly executed in a foreign jurisdiction. Today, the principles of Private International Law might force a different conclusion[563], but in the nineteenth century an overriding universal illegality was not recognised on this point. In Australia, cases involving the "blackbirding" of South Sea Islanders fared no better, being decided on the strict wording of local legislation.[564]

A general principle of freedom in the Common Law was not, therefore,

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[560] Grace's (Slave) Case [1827] 2 Hag. Adm. 94

[561] Alfred v. Fitzjames (Marquis) 3 Esp. 3

[562] Santos v Illidge & Others (1860) 8 C.B. (N.S.) 861; 141 E.R. 1404.

[563] Oppenheimer v Cattermole (Inspector of Taxes) [1976] A.C. 249 (especially the judgement of Lord Cross at p.278); Lemenda Trading Co Ltd v African Middle East Petroleum Co Ltd [1988] Q.B. 448. See generally P.E. Nygh: Conflict of Laws in Australia, 5th ed. (1991, Butterworths, Sydney), pp.249-252.

[564] For example, The Daphne in 1869: see section 3.3.1 in the next chapter.

paramount. In 1781, in the case of The Zong,[565] slaves were jettisoned from a ship. The case turned not on the murder of these people but on the question of the liability of the insurer to pay where there was a question whether the action had been necessary for the safety of the ship or whether it had been a stratagem to collect the insurance. The question, the court ruled, was not whether the cargo was human, but whether the captain had the right to jettison it as a result of perils arising from the voyage. As the voyage had been made lengthier than normal because the captain had mistaken Hispaniola for Jamaica, and this was the reason that provisions on board were running short, it was held that the insurance was not payable. The issue of humanity was an irrelevance.

In addition, the Common Law did not actively protect or promote freedom. In 1824, in Forbes v. Cochrane and Another[566] thirty-eight of the plaintiff's slaves had escaped from their master's plantation in Florida (where slavery was legal) and fled to a British warship in hostile occupation of the territorial waters of Georgia during the War of 1815. The prevailing jurisdiction was therefore held to be British. The captain of the British ship had refused to return the slaves to their master. The majority of the court held that the slaves became free by virtue of the

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[565] Cited in Palumbo at p.42, and quoted in Denning, ante, as Gregson v. Gilbert (1783) 3 Doug KB 232: the voyage of a slave vessel from Guinea to Jamaica was delayed with 300 slaves on board. They were in want of water and 60 slaves died of thirst and 40 threw themselves overboard. The master and crew threw 150 into the sea in an attempt to save themselves and the remaining 50 slaves. Insurance was claimed on the 150 thrown overboard on the basis that they had been lost by perils of sea.

[566] 2 Barn. & Cress. 448

principle in Somerset, which applied to any place where the laws of England predominated, Best J. holding that that law was based on the law of nature.[567] That the captain of the English ship, in allowing the slaves to remain on board, had committed no act for which the owner could sue was clear. Whether the captain was bound to allow the slaves to remain under that protection was a question expressly left open.[568] Moreover, if the slaves had been actively enticed away from their owner by the captain, the result would have been different,[569] even though slavery is contrary to natural law and is a "crime of the nation and every individual in the nation should contribute to put an end to it as soon as possible".[570] Also, it is unclear whether sending a slave back to a certain death at the hands of the original owners would have amounted to complicity in assault or murder by the senders.

Prior to the recognition of slavery as contrary to international law, the boarding by British sailors of a foreign slave vessel on the high seas was unlawful.[571] Humanitarian principles were no excuse, Sir William Scott (later Lord Stowell)

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[567] At p.471

[568] At p.464

[569] At p.466

[570] Ibid.

[571] Le Louis (1817) 2 Dods 210. The "Le Louis", a French ship, had been set up as a slave trader and was captured by the British pursuant to the Slave Trade Act which authorised the seizure and detention of all vessels engaging in the slave trade. It was held that the Act could not affect any rights or interests of foreigners in a way inconsistent with international law (the "law of nations") because of the equality and independence of sovereign states.

saying:

> To press forward to a great principle by breaking through every other great principle that stands in the way of its establishment; to force the way to the liberation of Africa by trampling on the independence of other states in Europe; in short, to procure an eminent good by means that are unlawful; is as little consonant to private morality as to public justice. ... a nation is not justified in assuming rights that do not belong to her merely because she means to apply them to a laudable purpose; nor in setting out upon a moral crusade of converting other nations by acts of unlawful force.[572]

Several of the cases discussed above were decided after slavery began to become unlawful in international law, despite the fact that international law was regarded as part of the Common Law of England[573] and statutes were, and are, interpreted on the basis that Parliament does not intend to abrogate it (unless an intention to the contrary is clear). Thus the solution to the problem of slavery increasingly had to be found in the realm of diplomacy and politics.

Despite developments through the nineteenth and twentieth centuries, this can also be seen in cases other than those involving slavery.[574] Because the English

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[572] At p.257

[573] Heathfield v Chilton 4 Burrow, 2016 (1767)

[574] Perhaps his most famous indictment of the court system is to be found in Bleak House (1853) where, in the opening chapter describing a particularly unpleasant day in London, Charles Dickens writes:

> ... at the very heart of the fog sits the Lord High Chancellor in his High Court of Chancery. Never can there come fog too thick, never can there come mud and mire too deep, to assort with the groping and floundering condition which this High Court of Chancery, most pestilent of hoary sinners, holds this day in the sight of heaven and earth. ... The Lord High Chancellor ... sitting here ... with a foggy glory round his head, softly fenced in with crimson cloth ... [and] some score of members of the High Court of Chancery ... mistily engaged in one of the ten thousand stages of an endless cause, tripping one another up on slippery precedents,

Common Law was seen as being derived from immemorial custom, community life, transcendent reason, or ancient wisdom, these could be used to interpret, and occasionally avoid, laws inconsistent with these principles. Some of the decisions of Sir Edward Coke discussed above are examples. The notion of "higher" principles was therefore not unknown to common lawyers and therefore the possibility of the reception of Natural Law into the Common Law was distinctly possible.[575] However, as has been shown, Natural Law principles could be a two-edged sword: they could be used equally to defend the divine right of a monarch to rule and to impose restrictions on Parliament.[576]

Coke's judgements and the extent to which they relied on Natural Law are considered above. In the eighteenth century, a case considered by some authorities to be the central case of English constitutional law[577] was decided. In Entick v Carrington[578] the secretary of State had issued a warrant directing the seizure of John Entick together with his books and papers. This was done in Entick's house,

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> groping knee-deep in technicalities, running their goat-hair and horsehair warded heads against walls of words and making a presence of equity with serious faces, as players might.

[575] See Gough Ch.3, Haines Ch.2.

[576] Cotterrell, ante, pp.121ff, who points out (at p.122) that in the United States, with a written Constitution which by 1791 included a Bill of Rights, the Supreme Court resorted to unwritten fundamental law to fill out the meaning of the written document. Britain had no such written constitution and in any event, after 1688, Parliament was recognised as having supreme legislative authority.

[577] D.L. Keir & F.H. Lawson: Cases in Constitutional Law (1967, Oxford U.P., Oxford)

[578] 19 State Trials 1030 (1765)

and he brought an action for trespass, questioning the legality of the warrant. The decision of Lord Camden exhibits many of the characteristics of social contract natural rights theory: that people entered into society to protect their property, and that public power interfering with this right should not be exorbitant and should be exercised only for the public good. The onus of establishing the right to enter private property is on the official who asserts it. However, even though it was held that the slightest invasion of private property was a trespass, the case implies that such interference is legitimate if prescribed by law. Thus, Entick is not so much an example of the application of Natural Law or natural rights but is rather an articulation of the silences of domestic law.[579]

In the nineteenth century the case which has been described as marking the end of overt appeals to notions of fundamental law in the English courts[580] was decided. It was Lee v Bude and Torrington Junction Railway Company[581] which concerned the effect of obligations arising with respect to shares in a company which had been set up by legislation that had been enacted allegedly through a deceit of Parliament itself. Willes J. observed:

> ... Acts of Parliament ... are the law of the land; and we do not sit here as a court of appeal from Parliament. It was once said ... that if an Act of Parliament were to create a man a judge in his own case, the court might disregard it. That dictum, however, stands as a warning rather than an

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[579] See Rolando Gaete: Human Rights and the Limits of Critical Reason, (1993, Dartmouth, Aldershot), pp.138-9.

[580] Gough, pp.203ff.

[581] L.R. 6 C.P. 576 (1871)

> authority to be followed ... If an Act of Parliament has been obtained improperly, it is for the legislature to correct it by repealing it; but so long as it exists as law, the courts are bound to obey it.[582]

Similar sentiments had been expressed by Blackburn J. in Mersey Docks Trustee v Gibbs[583] when he said: "It is contrary to the general rule of law, not only in this country, but in every other, to make a person judge in his own cause ... though the Legislature can, and, no doubt, in a proper case would, depart from that general rule", always provided that its intention to do so were clear.[584]

Fundamental law in the British sense, from which Canada and Australia derived their legal systems, came to be the constitutional structure of Britain: the monarch acting on the advice of the two Houses of Parliament with the courts interpreting the Common Law on the basis of reason.[585] There was simply little place for Natural Law or natural rights unless there were perceived to be gaps in the law. (The approach to and the application of international human rights norms by the courts today is similar).

This has continued into the twentieth century. For example, in The State (Ryan and Others) v Lennon and others[586] the Constitution (Amendment No.17) Act

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[582] At p.582

[583] L.R. 1 H.L. 93 (1866)

[584] At p.110

[585] Gough, p.207

[586] [1935] Ir. R. 170

1931 had created miscellaneous offences in an attempt to keep order in the Irish Free State. It provided for the establishment of a Military Tribunal to try people charged with these offences and to inflict penalties on them if they were convicted. There was no appeal allowed to a court. The police were given special powers of search, arrest and detention. One of the offences operated retrospectively. These provisions were inserted into the Constitution and other Articles in it were to be read subject to them. Ryan applied for habeas corpus against the governor of a military prison in which he was being detained under these provisions. The Supreme Court, by a majority of two to one,[587] held that the Act was valid. The Parliament (Oireachtas) had the power to alter any part of the Constitution, this power not being subject to any fundamental laws or natural rights in the Free State Constitution. This was despite the fact that the Constitution in Article 64 provided that judicial power was to be exercised only by properly appointed judges; Article 72 provided that, with minor exceptions, criminal charges were to be tried before a jury; under Article 2 all governmental authority was expressed to be derived from the people; Article 7 declared the dwelling of a citizen to be inviolable; Article 8 provided for freedom of conscience; Article 9 provided for free expression of opinion; and Article 43 provided that the Oireachtas had no power to create ex post facto offences.

Of the majority, Murnaghan J held that none of the Articles in the Constitution was

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[587] FitzGibbon and Murnaghan JJ., Kennedy CJ. dissenting.

singled out as being fundamental and all were therefore prima facie capable of amendment.[588] FitzGibbon J, the other judge of the majority, considered the wording of the Articles themselves which stipulated, as in Article 6, that "the liberty of the person is inviolable and no person shall be deprived of his liberty except in accordance with law." This was taken to clearly imply the possibility of amendment. His honour referred to Rousseau, Paine, Burke, Bentham, Locke and the French Declaration of the Rights of Man and the Citizen.[589] But, in comparing the decision of the Supreme Court of the United States in Loan Association v Topeka[590] where the Court said that there are private rights in every free government which are beyond the control of the State, with Rousseau's dictum that by joining society every individual subsumes his or her interests to the General Will,[591] he was unable to find any agreement on the matter and concluded: "Nations and Constituent Assemblies are not agreed as to the rights and privileges which have been variously described in different Constitutions as "inalienable", "inviolable", "fundamental", "constitutional" or "guaranteed".[592] Therefore, unless there was an express provision in the Irish Constitution that any of the provisions were incapable of being modified or repealed, the process for this

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[588] At p.240

[589] At pp.230-31

[590] 20 Wall. 655

[591] At p.233

[592] At p.231

in other countries was irrelevant.[593] Fundamentality was therefore a local concept subject to the prevailing legal and social paradigms.

The sole dissentient, Kennedy CJ, relying on the Preamble to the Constitution, which stated that all lawful authority comes from God to the people, and Article 2 of the Constitution, which stated that all governmental powers are derived from the people, found an overall limitation in the Constitution based on Natural Law.[594] His honour did not elaborate on this except to say that he would find it impossible to reconcile Natural Law with laws transfering judicial power to the Executive or the military, including the power to impose the death penalty. From the point of view of the specific words used in the articles, in particular the use of the phrase "except in accordance with law" upon which FitzGibbon J relied heavily, Kennedy CJ stipulated that this means that "ordinary laws" may specify when these rights may be abrogated, but that this cannot be done in a blanket fashion in the Constitution itself.[595] There is a difference between amending laws and amending principles. He said: "... the Constituent Assembly cannot be supposed to have in the same breath declared certain principles to be fundamental and immutable, or conveyed that sense in other words ... and at the same time to have conferred upon

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[593] The essential speculation now, sixty years later, is whether the existence of the Universal Declaration of Human Rights would render a diametrically opposed conclusion on this reasoning.

[594] At pp.204-5

[595] At pp.208-9

the Oireachtas power to violate them or to alter them."[596]

But this was a minority view of that court, and also in later British cases,[597] following with approval Dicey's Law of the Constitution where three traits of parliamentary sovereignty are elaborated: first, the power of any legislature to alter any law, fundamental or otherwise, as freely and in the same manner as other laws; second, the absence of any legal distinction between constitutional and other laws; and third, the non-existence of any judicial or other authority to treat an Act of Parliament as void or unconstitutional.[598]

This issue did arise[599] in the context of Canada and Australian with respect to the

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[596] At p.209, emphases added.

[597] MacCormick v Lord Advocate 1953 Sessions Cases 396: Even though the title Queen Elizabeth II is historically incorrect because she is the first Elizabeth to rule Scotland or Ireland and is a breach of the Act of Union of 1707, if it is conferred or assumed pursuant to an Act of Parliament it cannot be held to be invalid as the Act is for this reason not capable of being held ultra vires. See also Madzimbamuto v Lardner-Burke [1968] 3 W.L.R. 1229, where the Privy Council held that regulations imprisoning the appellant's husband made under legislation introduced by the regime of Ian Smith in Rhodesia, which had unilaterally declared independence from Britain, were void on the grounds of being contrary to British law which was held to be still operative there, including the 1961 Constitution which contained a Declaration of Rights. This was not because of a recognition of higher principles but on the basis that the British law was the "grundnorm" in the positivistic Kelsonian sense. International law with respect to the effect of legislation passed by a government recognised either de facto or de jure was held to be irrelevant (at pp.1248-50). Lord Pearce, dissenting, held that the sovereignty of the British parliament would not operate on the basis of a doctrine of necessity (at pp.1256-7).

[598] Id at p.403 per Lord Guthrie. The reference is to pages 88-91 in Dicey, ninth edition. Note should be made here of the fact that Dicey was writing about a country with an unwritten constitution.

[599] Before the provisions of the Australia Act 1986 and the Canada Act 1982.

Statute of Westminster. Section 4 provides that no future act of the British parliament will extend to the countries of the Commonwealth unless at the request and consent of that country. Could the British parliament repeal the Statute of Westminster? In British Coal Corporation v The King[600] the Privy Council held that, as a matter of abstract law, the British parliament could repeal s.4 of the Statute, but that this was theory which bore no relation to realities. Gough has referred to the "essential futility of argument about sovereignty in its purely legal aspect."[601] But what it also indicated is that the courts and the Common Law were not enough to save rights.

A challenge to the Canada Act 1982 on the basis that it overrode certain treaties with the Canadian Indians was also unsuccessful, as Parliament could clearly do so.[602] A twentieth-century Australian example, prior to the advent of human rights, and again indicating the inadequacies of the Common Law, is the case of R. v Carter; ex parte Kisch.[603] One of the first pieces of legislation of the new Australian Parliament in 1901 was the Immigration Restriction Act which introduced the "White Australia" policy, which endured until 1958. Basically, non-European migrants were excluded. The Act was also used blatantly to exclude

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[600] [1935] A.C. 500

[601] Gough, p.219

[602] Manuel v Attorney-General [1982] 3 WLR 821, especially Slade LJ at p.842.

[603] (1934) 52 C.L.R. 221

entry to people considered politically undesirable through the imposition of literacy tests, which could be conducted in any European language (not just English). The most infamous example of this occurred in 1934 with respect to the entry of Egon Kisch. Kisch was a Czechoslovakian who had been declared a prohibited immigrant under the Immigration Act 1901-30. This was apparently because of his links to the Australian Anti-War Congress. When he arrived in Australia, the captain of the ship detained him on board pursuant to s.13B of the Immigration Act. Kisch jumped overboard onto the dock, breaking his leg in the process and was taken against his will back on board the ship. He then sought an order of habeas corpus to secure his release. Evatt J. ordered that Kisch be released. Despite the fact that Evatt was a supporter of human rights (and was later to become the leader of the Australian delegation to the San Francisco conference and a President of the United Nations' General Assembly) this was not decided on any principles of fundamental rights to freedom of movement or free speech, the right of the Minister for Immigration to exclude aliens from Australia being upheld. Rather, it was because the declaration under which this was done was not specifically specific within the terms of the relevant provisions of the Act.[604] Kisch was thereupon carried from the ship and left at the roadside. He was immediately taken to Central Police station and required to undergo a language test within the terms of s.3(a) of the Immigration Act which provided that a prohibited immigrant included any person who fails a dictation test in "an European

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[604] At p.225-8

language." Kisch turned out to be a linguist, but Customs officials finally caught him out on Scottish Gaelic! Kisch was sentenced to six months imprisonment with hard labour and sought a writ of prohibition from the High Court.[605] Again the case turned not on fundamental principle, but on whether Scottish Gaelic was "an European language" within the terms of the Act. The majority of the court[606] held that it was not. The term was meant to describe "a standard form of speech recognised as the received and ordinary means of communication among the inhabitants of an European community for all the purposes of the social body".[607] Scottish Gaelic did not fulfil this requirement as it was only spoken by a few people in remote parts of Scotland and was an ancient language which "in a modern community ... has not been found a practicable medium for carrying on the affairs of daily life".[608] The dissentient, Starke J., found that, on a grammatical and ordinary reading of the relevant section, Scottish Gaelic was a European language.[609]

An interesting consequence of this case was that after the High Court had held that Scottish Gaelic was not a European language a number of irate Scottish immigrants wrote vitriolic letters to the Sydney Morning Herald newspaper saying what they

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[605] R. v Wilson and Another; ex parte Kisch (1934) 52 C.L.R. 234

[606] Rich, Dixon, Evatt and McTiernan JJ.

[607] Per Rich J. at p.241.

[608] Per Dixon J. at p.245.

[609] At p.242

thought of this decision and of the judges who had made it. As a result, contempt charges were laid.[610] In another positivist approach, it was found that the tone of the letters had been so overdone that no-one would have taken them seriously and, consequently, there could be no contempt.[611]

This is not to say that the Common Law has never resorted to principles of fairness and reasonableness. For example, custom will be given judicial notice if it is "fair, proper, and such as a reasonable, honest and fair-minded man would adopt"[612] or if "it is in accordance with the fundamental principles of right and wrong."[613]

Also, under the principles of Conflicts of Laws (Private International Law) foreign laws or foreign transactions will not be enforced where principles of natural justice, such as the right to a fair trial or freedom of the person, have been disregarded,[614] or where there are moral grounds for doing so, despite the legality of the transaction in the foreign forum.[615] But while issues of public

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[610] R. v Fletcher; ex parte Kisch (1935) 52 C.L.R. 248

[611] Per Evatt J. at p.259.

[612] Produce Brokers v Olympia Oil & Coke Co. [1916] 2 K.B. 296

[613] Robinson v Mollett (1875) L.R. 7 (H.L.) 802, per Brett J.

[614] Cheshire Private International Law (5th ed) (1957, Butterworths, London) pp.154ff; J-G. Castel: Conflict of Laws 5th ed, (1984, Butterworths, Toronto), pp.2-100ff; P.E. Nygh: Conflict of Laws in Australia 6th ed (1995, Butterworths, Sydney), pp.284ff.

[615] Kaufman v Gerson [1904] 1 K.B. 591

policy can be taken into account,[616] these cases revolve around a balance of State policy rather than an assertion of individual rights.

In addition, there are natural law ideas in the law of Equity[617] which was originally intended to soften or modify the injustices of the Common Law[618] and to provide remedies where they might otherwise be inadequate or non-existent.[619] Initially a fragmentary thing, Equity was an exercise in ad hocery rather than an exercise of higher principle until it shed its ex tempore characteristics as it developed positive rules and maxims.[620] Some of the latter include "equity is equality",[621] "he who seeks equity must do equity",[622] "equity will not permit a statute to be used as a cloak for fraud,[623] and "equity looks to the intent rather

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[616] For example, the abrogation of contractual obligations to enemy aliens, even though the contract is still valid in the lex fori (Dynamit AG v Rio Tinto [1918] A.C. 292; the avoidance of contracts which would breach the law of another country on its territory and thereby jeopardise diplomatic relations with that country (Regazzoni v K.C. Sethia (1944) Ltd. [1958] A.C. 301); the protection of moral interests of universal application (Oppenheimer v Cattermole (Inspector of Taxes) [1976] A.C. 249, where the House of Lords refused to give effect to a Nazi decree depriving German citizens of Jewish descent of their German nationality and property).

[617] Maitland Equity p.9. See also Charles Grove Haines: The Revival of Natural Law Concepts (1930, Harvard U.P., Cambridge) who writes that English conceptions of a higher law, especially through the growth of Equity, have similar ideas but different terminology to the concepts of Natural Law.

[618] Dudley v Dudley (1705) Prec. Ch. 241

[619] See R.P. Meagher, W.M.C. Gummow & J.R.F. Lehane: Equity: Doctrines and Remedies (1992, Butterworths, Sydney), Chapter 1.

[620] Id., pp.6ff.

[621] Petit v Smith (1695) 1 P. Wms. 7

[622] Lodge v National Union Investment Co. [1907] 1 Ch. 300

[623] Bannister v Bannister [1948] 2 All E.R. 133

than to the form."[624] There are now also equitable remedies available throughout the law,[625] but Equity and its remedies only apply in selected circumstances and its rules can now be as technical as those of the common law it was originally intended to ameliorate. Similarly, the doctrine of unjust enrichment is one known to the law for centuries,[626] but can be overridden by statute and bogged down with technicalities. Administrative Law concepts such as natural justice are directed towards process rather than outcomes corresponding with a notion of justice.

The Common Law itself has its own presumptions, both with respect to substantive matters such as the compulsory acquisition of private property,[627] as well as in the interpretation of statutes, such as the principal of avoidance of unreasonable or unjust interpretations[628] as well as the presumption that the purpose of any legislation is to preserve and defend the liberty and property of the individual rather than to infringe them.[629] These, however, are rebuttable presumptions rather than inalienable principles. Parliament can infringe them, and sometimes

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[624] Parkin v Thorold (1852) 16 Beav. 59, 51 E.R. 698

[625] See I.C.F. Spry: The Principles of Equitable Remedies (1984, Law Book Co, Sydney).

[626] Moses v Macferlan (1760) 2 Burr. 1005; contrast Baylis v Bishop of London [1913] Ch. 127. See also Brook's Wharf and Bull Wharf v Goodman [1937] 1 K.B. 534. See generally George B. Klippert: Unjust Enrichment (1983, Butterworths, Toronto).

[627] The presumption of a right to compensation upon such an acquisition, unless a contrary intention is expressed in unequivocal terms: Keir & Lawson, ante, pp.8-10.

[628] Grey v Pearson (1857) 6 H.L.C. 61

[629] Heathfield v Chilton 4 Burrow, 2016 (1767)

does, as in wartime.[630]

Criminal Law has furnished many of the rules which are now a crucial part of human rights law, such as the presumption of innocence.[631] It similarly pays due to higher principles, although often in terms of duties rather than rights,[632] and the principles can differ from jurisdiction to jurisdiction.[633]

The notion of reasonableness in the law of Torts is another example, where Donoghue v Stevenson[634] freed the law of Torts from the effects of the doctrine of privity of contract. However, as Friedmann points out,[635] the notions of reasonableness and fairness do not here have the character of absoluteness which marked earlier notions of Natural Law and are essentially a matter of perceived

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[630] R. v Halliday [1917] A.C. 260; Ronnfeldt v Phillips (1918) 34 T.L.R. 556

[631] Woolmington v DPP [1935] AC 462

[632] R. v Dudley and Stephens (1884) 14 Q.B.D. 273; [1881-5] All E.R. 61. In dismissing a defence of necessity in a case concerning cannibalism after a shipwreck, the court said that "to preserve one's life is generally speaking, a duty, but it may be the plainest and highest duty to sacrifice it", for example in war (at p.67). The example of Jesus Christ was also referred to (ibid.). For a valuable commentary on this case, see A.W. Brian Simpson: Cannibalism and the Common Law - The Story of the Tragic Last Voyage of the Mignonette and the Strange Legal Proceedings to which it Gave Rise (1984, U. Chicago Press, Chicago).

[633] There were, for example, both cases and common custom excusing cannibalism in cases of dire necessity, particularly at sea. See Daniel W. Skubik: At the Intersection of Legality and Morality (1990, Peter Lang, New York), especially at pp.147ff where this aspect of the argument in R. v Dudley & Stevens is discussed at length.

[634] [1932] AC 562

[635] Legal Theory, ante, p.136

public policy and a balancing of interests. They are seen very much as a part of the law which allows such interests to be taken into account: there is no notion of principles which are superior to and anterior to the positive law. The recent growth of the law of Restitution also shows no coherent reliance on an ideology of higher principles.[636] The cases establishing this "new" area are built up on choices between interests rather than overtly on "higher" and inalienable principles.

Indeed, English Common Law when examined by the European Court of Human Rights has been found wanting in many areas, such as freedom of expression,[637] privacy,[638] and corporal punishment.[639] Even habeas corpus has been criticised as being too limited.[640] As inheritors of this system, cases in both Australia[641] and Canada[642] exhibit similar problems.[643]

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[636] Sir Robert Goff & Gareth Jones: The Law of Restitution (1978, Sweet & Maxwell, London), Ch. 1; Peter D. Maddaugh & John D. McCamus: The Law of Restitution (1990, Canada Law Book Inc., Aurora), Ch. 1.

[637] Sunday Times Case ECHRR Ser.A, Vol.30 (April 26, 1979)

[638] Malone's Case ECHRR Ser.A, Vol.82 (August 2, 1984)

[639] Campbell and Cosans Case ECHRR Ser.A, Vol.60 (March 22, 1983)

[640] X v United Kingdom ECHRR Ser.A, Vol.46 (November 5, 1981): the limited judicial review provided by habeas corpus of decisions to continue the confinement of a mental patient was held to be inadequate in the light of Art.5(4) of the European Convention on Human Rights and Fundamental Freedoms.

[641] Fischer v Douglas; ex parte Fischer [1978] Qd. R. 27: "... because of the sovereignty of Parliament the subject does not have guaranteed rights" per Dunn J at p.45; Grace Bible Church Inc v Reedman (1984) 54 ALR 571: "... the citizens of this state do not have rights which may not be overridden by Act of the South Australian Parliament" per Millhouse J at p.585.

[642] Marcotte v Deputy Attorney-General for Canada [1976] 1 SCR 108: ambiguous statutes should be interpreted in favour of individual rights and freedoms, but it is otherwise if the plain language or

There has been, therefore, a disjunction between the notions of freedom and equality in rights discourse generally and the way in which those notions are treated (or ignored) in judicial reasoning. What arose, as a result of the developments described in this Chapter, and what Australia and Canada inherited, was a judicial and legislative approach to the rule of law (and hence to the legal notions of freedom and equality) as ultimately being only a limit on the arbitrary exercise of executive power.[644] This has little in common with enforceable rights of the human rights type. It is a distinct contrast to the constitutions of many nations which express these notions as rights.[645] Thus, virtually all nations agree that these rights are to be protected by the rule of law. In Britain, Australia and (until 1982) Canada, this was done through an articulation of the silences of the law more than through an interpretation and application of specific rules. The legal conception of dignity and equality in these circumstances is not based on inherent, inalienable and fundamental rights. One consequence of this is the failure of the law to respond adequately to new templates of reality, as laws with respect to privacy (including, but not limited to, what the concept means, issues of data

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necessary implication of a statute so directs. See also City of Prince George v Payne [1978] 1 SCR 458, especially Dickson J at p.463.

[643] See also the discussion of cases in Chapter 5 below.

[644] See, for example, Dicey, ante, who in Chapters 5, 6 and 7 refers to rights of personal freedom, freedom of discussion and freedom of public meeting in English law in these terms.

[645] In 1947, the UN Economic and Social Council requested the UN Secretariat to compile a document of such constitutions and laws (UN Doc. E/325 (1947) at p.2). The secretariat did so (UN Doc. E/CN.4/AC.1/3). It shows that the vast majority of States did in fact write such principles into their constitutions.

collection, electronic surveillance and news gathering) clearly demonstrate.[646] The law's traditional approach to women is another example,[647] and its inadequacy with respect to the treatment of indigenous people is notorious. The focus is on limitations, rules and procedures, not on rights.[648] The injection of human rights from international law is therefore essential, not merely desirable (as has been in part conceded by the introduction in both Canada and Australia of anti-discrimination legislation).

The demands which have been and remain at the basis of the Universal Declaration of Human Rights have been consistently at the core of social, political, economic and legal life for all of recorded human history. The demands may be universal, the responses have not been so. Freedom is an aspiration, but also an "artefact of civilization",[649] (the antecedents of human rights emerged from political struggles between opposed social forces).

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[646] See Raymond Wacks: Personal Information: Privacy and the Law (1989, Clarendon Press, Oxford). See also Malone v Metropolitan Police Commissioner [1979] Ch 344 and Victoria Park Racing and Recreational Grounds Club Co Pty Ltd v Taylor (1937) 58 C.L.R. 479.

[647] The vast array of feminist literature attests to this point. See generally O'Neill & Handley: Retreat from Injustice, ante, Chapter 5.

[648] The Spycatcher cases in the UK are a good example of this: Attorney-General v The Guardian (No.2) [1988] 3 All E.R. 545: "everybody is free to do anything, subject only to the provisions of the law" (per Lord Goff at p.660). Similarly, in the Spycatcher case in Australia (Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd (1988) 165 CLR 30) an injunction to prevent publication was refused on the basis of the unenforceability of British law in Australia, not because of a right to free speech. See also generally the cases discussed in Chapter 5 at 5.6.

[649] Hayek, ante, p.163

This aspirational artefact is, or should be, an everyday thing, just as art itself is now an everyday thing rather than a collection of museum pieces. We see art (not always good) around us in advertising. It is designed for a mass audience. Similarly, "Pop Art", such as in the works of Andy Warhol (1931-87) (for example, "200 Soup Cans" painted in 1962) represent a clearing away of nineteenth century values and staring the twentieth century in the face. (It is also a comment on the mindless serial repetition and consumerism of modern society.) Sculpture has moved out into the open air, the pieces thus being affected by the world around them, just as the person is determined by his or her political and cultural context. Barbara Hepworth's sculpture "Single Form" in front of the UN Headquarters building in New York City is a good example. In great contrast to the war memorials of earlier times, the Vietnam War Memorial in Washington D.C. is simply a list of names. Krauss has described the Vietnam Memorial thus:

> A combination of necropolis and wailing wall, the meeting of geometry and shapelessness, it is also a witness to the impossibility of representing the 'lessons' to be drawn from this national tragedy. Its silence is testimony to how hollow and presumptuous a lecture would seem, resonating with the certainties of universals and of truth, and to how a generation had looked at th absolutes of reason and found them suspect.[650]

Thus we must consider the question of what the content and application of human rights are at international level (which is considered in Chapter 3) and their effect particularly in the light of any symbiotic relationship between international and domestic law (which is the concern of Chapter 4) to see the impact of these rights

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[650] Rosalind Krauss, "The Last Moderns", Chapter 17 in Denise Hooker (ed): Art of the Western World (1991, Hutchinson Australia, Sydney), p.423.

on the Canadian and Australian domestic legal systems (which is the concern of Chapter 5).

CHAPTER 3

FROM NATURAL LAW TO HUMAN RIGHTS IN THE INTERNATIONAL LEGAL SYSTEM: SYSTEMIC PROBLEMS AND PRODUCTIVE AMBIGUITIES

3.1 Introduction

> Human rights are natural, inborn, inalienable; yet they have a history, they are acquired, and they are increased and developed. Human rights have a universal common basis in human thought and community; yet they are differently interpreted, and their recognition and practice depend on the development of a common understanding of rights and freedoms.
>
> Richard McKeon: Freedom and History and Other Essays[1]

> The reality of human rights is not homogeneous and it is put together by a complex of rhetorical operations.
>
> Rolando Gaete: Human Rights and the Limits of Critical Reason[2]

Rights discourse and international structures are important elements of the developmental matrix of human rights, affecting their juridical foundations, the content of the norms and their operation within the system. The aim of this chapter is to consider the capacity of and the potential for the international legal system to

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[1] Zahava K. McKeon (ed): Freedom and History and Other Essays: An Introduction to the Thought of Richard McKeon (1990, U. Chicago Press, Chicago), p.37.

[2] 1993, Dartmouth, Aldershot, p.34.

recognise and enforce rights attaching to human beings and how this directly affects the type of rights that have actually been produced. The character of human rights is considered in this light.

The chapter begins with a brief examination of the development of a nascent international legal system which came to be focused on States rather than individuals, and in the light of this examines a remarkable event: the de jure abolition of slavery and the slave trade by Britain (and hence also for Australia and Canada) - a coming to grips with the very antithesis of human rights - more than a century before the Universal Declaration of Human Rights. The issues of process which allowed this to happen are considered, showing a conjunction of influences - not theory or philosophy alone, and not international law alone. The reasons why this admirable feat fell short of effecting an introduction of human rights into the international legal system are explained. It was a "nice try", but indicates that international law alone (like domestic law alone - as seen in Chapter 2) was not enough for the task.

This is then contrasted with the process of the formation of the Universal Declaration of Human Rights to see the differences in both scope of coverage and effectiveness. This is done in the light of the increasingly global approach to international organisation: the minorities treaties, the mandate system, ILO labour standards and customary law with respect to the treatment of aliens and

humanitarian intervention are discussed. These were, however, ad hoc exceptions to the general statist approach of international law at the time. The breakthrough came with the United Nations and its Charter, the process of formation of which is examined in the context of its human rights provisions and the distinct limitations inherent in them. Almost despite itself, the system produced the Universal Declaration. How this happened, and the effect of this process on the type of rights produced, is analysed. In particular, the absence of an overt philosophical underpinning in the document (in contrast to its eighteenth century predecessors), and the fact that its operation is predicated on the existence of domestic legal systems to implement its principles and supply its operational boundaries, are considered. Also considered are the participation in this process of Australia (which was an enthusiastic and proactive participant) and Canada (whose participation can be most charitably described as lukewarm and sceptical). The reasons for these divergent approaches are discussed - they provide a paradoxical backdrop to the present domestic situations in which Canada now has its own Bill of Rights and Australia resolutely refuses to introduce one.

The chapter concludes with a discussion of the type of rights human rights are. In the light of recent approaches such as Postmodernism, which rejects notions of a transcendental or universal variety, this is an important question if these rights are to be imported into a domestic legal system.

3.2 The capacity of the international legal system to recognise rights attaching to human beings - the shifting balance between Natural Law and State consent.

There has been an increasing legal protection of the individual within the international system, but that system is less than perfectly structured for this task. Johnston[3] has traced the influence of political thought on international law, starting in Greek antiquity with the contributions of the Sophists, and the Stoics, considering the humanist tradition, the influence of Grotius,[4] and theories relating to diplomacy, revolution, international organisation, conflict management, interests and development.[5] A similar delineation of doctrine can be found in Nussbaum.[6] Interestingly, Johnston also draws connexions between the main periods of

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[3] Douglas M. Johnston, "The Heritage of Political Thought in International Law" in R. St J Macdonald & D. Johnston: The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory (1983, Martinus Nijhoff, The Hague) at 179-225.

[4] Johnston considers that it is not only the Grotian reliance on natural law, which helped in the formulation of an analogy of legal and moral rules governing individuals and States alike, but also the balance struck between idealism and realism that is important: id., pp.184-9.

[5] Id., pp.191-6. See also Morton A. Kaplan & Nicholas de B. Katzenbach: The Political Foundations of International Law (1961).

[6] Arthur Nussbaum: A Concise History of the Law of Nations (1958, Macmillan, New York). Nussbaum compares the views of Hobbes with those of the naturalists such as Pufendorf, Wolff and Vattel (at pp.144-64). He indicates that in United States' courts from 1789 to 1820 the writings of natural lawyers such as these were cited in 142 pleadings, were cited in judgements 69 times and were the subject of quotations in judgements 34 times (at p.162). As Chapter 2 showed, a similar influence was not felt in British courts.

development of international law and cultural characteristics.[7] It is a development which in many respects parallels that described in the previous Chapter. Rights discourse thus had its impact at the international level, but this should not be exaggerated. While Hobbes, Locke and Bentham all had something to say about the relations between States,[8] "the order which was instituted between sovereigns in the Peace of Westphalia (1648) marks the transition from a Christian view of the world as an objective hierarchy of normative meaning to a historically relative consensus."[9] Indeed, at the domestic level philosophers could be main players (Burke was a politician) whereas at international level they became peripheral to the main game.

A significant difference here is also that doctrines are fluid while the international structure within which international law actually exists and works has been relatively static for the last three hundred years (as opposed to the significant structural and political changes at domestic level described in Chapter 2). The oldest frame of reference for International Law was Natural Law, deriving from

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[7] For example, the "classical" period hinging on a concept of perfection, with proportion, balance and consistency; the "romantic" period reflecting the drama of the "Sturm und Drang" of international politics and a search for fundamental solutions: id., pp.197-200. Johnston considers that (at the time of writing) we are in a high romantic period characterised by the "Stockholm" model of systematic problem solving and the "Caracas" model characterised by large-scale law-making through mega-conferences: id., pp.200-204.

[8] For a critique, see Martii Koskenniemi: From Apology to Utopia: The Structure of International Legal Argument (1989, Finnish Lawyers' Publishing Co, Helsinki), at pp.69-71.

[9] Koskenniemi, id, pp.72-3.

times when religion, law and physical nature itself were regarded as being merged. It was useful in developing a trans-community approach but relied on absolutes to justify the authority of rules, which was its main concern.[10] Later developments in positivism (which looks at international law in a more atomistic fashion as being composed of individual sovereign states, purporting to explain the controlling feature of law rather than justify its authority) and the re-emergence after the Second World War of natural law and notions of universalism were not accompanied by a corresponding shift in international structures. The latter remain obdurately Hobbesian, or at best Grotian, whereas a Kantian universalism which can be seen in doctrine and some instruments (and particularly with respect to human rights instruments) is not an overall trend.[11]

Hugo Grotius (1585-1645)[12] is generally reputed to be the "father of International Law",[13] but this is misleading in that the notion of a law of nations - which went beyond the limits of the Roman ius gentium (which was not "international" law as we understand it but Roman law applied to foreigners) - can be found in the

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[10] See Alfred Verdross & Heribert Franz Koeck, "Natural Law: The Tradition of Universal Reason and Authority", in Macdonald & Johnson: The Structure and Process of International Law, ante, pp.17-50.

[11] See Antonio Cassesse: International Law in a Divided World (1986, Clarendon Press, Oxford), pp.31-2.

[12] Or Huig De Groot, as his name is in Dutch.

[13] See, for example, Hamilton Vreeland: Hugo Grotius: The Father of the Modern Science of International Law (1917, reprinted 1986, Fred B. Rothman & Co., Littleton).

writings of Spanish theologians such as Vitoria and Suarez.[14] Many practices, such as the sending and receiving of ambassadors and the conclusion of treaties, go back into antiquity.[15] The legacy of Grotius is that he is acknowledged as being the first person to build such practices into a system of law. Complex and disparate practice was seen to be capable of being organised into standards of conduct which operated internationally rather than merely locally. Unity, and universalism, was at least possible. It was the start of the strengths, and weaknesses, of international human rights law.

Grotius' most important work De Jure Belli Ac Pacis (1625) had a phenomenal theoretical[16] impact, having thirty-four reprintings in the eighteenth century, but it was the result of personal circumstances, events of the times and competing

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[14] Mark W. Janis, "Religion and the Literature of International Law: Some Standard Texts", Chapter 4 in The Influence of Religion on the Development of International Law (Janis, ed) (1991, Martinus Nijhoff Publishers, Dordrecht), especially at pp.61-62; Kelly, pp.200-201. Suarez wrote in De legibus ac Deo legislatore in 1619 that States were members of a universal society with an underlying political and moral unity, from the nature of which laws could be deduced. (See Verdross & Koeck, "Natural Law: The Tradition of Universal Reason and Authority", Chapter 1 in Macdonald & Johnston Structure and Process, ante, at pp.20-21).

[15] See Arthur Nussbaum: A Concise History of the Law of Nations (1947, Macmillan, New York); see also the several volumes of J.H.W. Verzijl: International Law in Historical Perspective (A.W. Sijthoff, Leiden). An encyclopedic overview of the history of international law can be found in R Bernhardt (ed): Encyclopedia of Public International Law (published under the auspices of the Max Planck Institute), Vol. 7 (1984, North-Holland Publishing, Amsterdam), pp.126-273.

[16] Its practical impact has been questioned. See J.G. Starke, "The Influence of Grotius Upon the Development of International Law in the Eighteenth Century", Grotian Society Papers, 1972, C.H. Alexandrowicz (ed), (1972, Martinus Nijhoff, The Hague), pp.162-76.

philosophies.[17] Grotius was a Protestant who had been persecuted - and even jailed - by conservative Calvinists. De Jure Belli Ac Pacis was in fact written in Paris after he had fled his native Holland. He lived in the times of the bloody Thirty Years War, the Reformation, the competition between religious faiths, the discovery and opening up of the New World, and the growth of sovereign States. He needed to find something to moderate the excesses of his time (to some of which he had been subjected himself) which would be accepted by adherents to the competing religious philosophies of his time. In exile in Paris, although in the service of the King of Sweden, he had both the time and the motivation to attempt to do so.

He resorted to natural law, together with State consent.[18] A rule of natural law, according to Grotius, could be proven a priori (by demonstrating its conformity with rational and social nature) and a posteriori (because all civilised nations adhere to it).[19] It is principles of natural law which make the rules of positive law binding, and which furnish the basis for the "policy" decisions underlying those rules (as kings run their own States but have a general responsibility for human society).[20] The law of nations, according to Grotius, is related to the basic

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[17] See generally W.S.M. Knight: The Life and Works of Hugo Grotius (1925, Sweet & Maxwell, London).

[18] See Charles S. Edwards: Hugo Grotius and the Miracle of Holland: A Study in Political and Legal Thought (1981, Nelson-Hall, Chicago).

[19] De jure belli ac pacis I, ch.1, XII(2).

[20] Id., II, ch.XX 44/1

precepts of natural law, such as keeping promises and making reparations for injuries.[21] As a liberal Protestant he rejected the Calvinist belief in predestination. While Natural Law emanated from humans, it can be attributed to God since it is His will that such principles should exist within and for us.[22] Nor was his approach necessarily "secular" but, rather, universalistic.[23] Unlike the Medieval clerics such as Aquinas who had said that natural law was communicated by God to man and was discoverable by human reason, Hugo Grotius based his concept of natural law on reason alone. Natural law was considered to be self-evident in a similar fashion to the truths of mathematics being self-evident.[24] Those truths could remain even if God could be shown to be nonexistent.[25] He wrote in "De jure belli et pacis":

> The law of nature, again, is unchangeable - even in the sense that it cannot be changed by God. Measureless as is the power of God, nevertheless it can be said that there are certain things over which that power does not extend ... Just as even God, then, cannot cause that two times two should not make four, so He cannot cause that which is intrinsically evil be not evil.[26]

Kelly remarks that this separation of natural law from a divine being was attractive to "a Protestant world suspicious of all doctrine carrying a whiff of the medieval

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[21] Id., prolegomena 17; Kelly, p.242.

[22] Id., 8; Kelly, p.226.

[23] See Janis, ante, pp.61-62.

[24] F. Castberg, "Natural Law and Human Rights" in Asbjorn Eide & August Shou (eds): International Protection of Human Rights: Proceedings of the Seventh Nobel Symposium, Oslo, 1977 (1968, Interscience Publishers, Uppsala), pp.16-17.

[25] Kelly, p.225

[25] Book 1, Ch.1, 5

Catholic world of St Thomas."[27] Castberg and D'Entreves have said that this marked a turning point in the history of thinking.[28] The shift from a theological to a humanist version of natural Law would help Natural Law at least appear to support rights in the pluralistic world that was to emerge later. In essence, Grotius wrote that sovereigns could make laws, on the international level as on the domestic, but that they were also bound by those laws, both legally and morally.[29]

In saying this, he had not only laid the foundations of international law, but had helped to introduce two concepts which are fundamental to the development of the law of human rights: the notion of a universal (or at least world-wide) legal system, and the notion that sovereigns were themselves bound by this law. This recognition of universal absolutes is a seemingly strong basis for universal (if not inalienable) rights.

There was never at any time, however, complete agreement as to the basis of the perceived or potential unity or universalism of an international legal system. Historical events may have been a motivating factor for the search for an

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[27] Kelly, p.225. This also explains why Grotius' writings were more "popular" than those of Suarez, for example, a Jesuit priest who relied heavily on the Aquinan view of natural law (see Verdross & Koeck, ante, pp.20-21). Suarez had in fact written about the notion of the common good of mankind (ad bonum universi) which was not to be internationally recognised until the twentieth century (id., p.22).

[28] Castberg, ante, p.17; D'Entreves: Natural Law (1951), p.70.

[29] See Janis, id., at pp.63ff.

international legal system,[30] but the theoretical bases on which some order could be brought to the system varied. The twin pillars at this time were natural law and the notion of consent of states. but the relative influence of each was not constant.[31] As the latter came to predominate, and the former went into decline, the implications for the development of international rules of human rights were significant. International law developed into a state-centred, rather than an individual-oriented, system.

The period from the mid-seventeenth century has been classified by Macdonald, Johnston and Morris[32] as the Classical era of International Law, although some commentators refer to earlier periods.[33] The Treaty of Westphalia in 1648, at the

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[30] The disintegration of the authority of the Pope, the development of the nation-state, the expansion of trade bringing these new entities into increasingly greater contact with each other, the discovery and exploration of the New World creating a necessity for global rules, but in a context in which the imposition of a new political superior would be unacceptable. The result was a more or less Hobbesian condition of natural equality. See generally Encyclopedia of Public International Law, id.

[31] The relative importance given to these two bases differed: positivists, foreshadowed by Gentilis, gave primacy to the consent of states; natural lawyers, such as Pufendorf, relied on notions of natural law which themselves were not uniform; eclecticists such as Grotius relied on both. See generally John P. Humphrey, "On the Foundations of International Law" (1945) 39 A.J.I.L. 231; see also R. St J. Macdonald, D.M. Johnston & G.L. Morris: The International Law and Policy of Human Welfare (1978, Sijhoff & Noordhoff, Netherlands), Ch.1.

[32] The International Law and Policy of Human Welfare, id, at pp.48ff.

[33] For example, Georg Schwarzenberger: Manual of International Law 5th ed., (1967, Stevens, London), p.18; M. Zimmermann, "La Crise de l'organisation internationale a la fin du moyen-age", (1933 II) 44 Hague Receuil 352ff; Robert Ago, "Pluralism and the Origins of the International Community" (1978) 3 Indian Yearbook of International Law 3.

end of the Thirty Years' War, marked the beginning of the modern use of international legal procedures to establish a regional legal order as a response to the evolution of European society into a system of independent and sovereign States.[34] As a result, the developing International Law reflected the concerns of these units: sovereignty, recognition, diplomatic and commercial transactions, war - and not human rights. The writings of Grotius in fact exemplify these concerns, (as do those of other natural lawyers of the eighteenth century such as Christian von Wolff (1679-1754) and Emeric de Vattel (1714-1766)).[35] For Vattel, the origin of natural law was not the rational and social nature of humans as Grotius had thought but the instinct of self-preservation which, in the context of international law, meant the preservation of the State. The State could thus override the natural rights of its citizens. Vattel also drew a structural distinction between natural law which governs the individual in domestic law by producing natural rights, and international law which, while it is derived from natural law, only applies to relations between States.[36] Also, it should be noted that the Natural Law base did not of itself generate a concern for human rights even when

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[34] Macdonald, Johnston & Morris, ante, p.49. See also Antonio Cassesse: International Law in a Divided World, ante, Chapter 2; Leo Gross, "The Peace of Westphalia: 1648-1948" in R. Falk & W.F. Hanrieder (eds): International Law and Organization: An Introductory Reader (1968, Lippencott, Philadelphia).

[35] See Verdross & Koeck, ante, pp.35-39. Indeed, Vattel in Le Droit des Gens (1758) proposed that Natural Law itself prescribes autonomous, independent States, as they have natural rights as do people, but these have not been abridged as there is no social contractarian basis to international society. See the Carnegie edition of Les Droits des Gens (1923, Washington), Introduction.

[36] See Peter Pavel Remec: The Position of the Individual in International Law According to Grotius and Vattel (1950, Martinus Nijhoff, The Hague).

the emerging international law was developed in an area with relative homogeneity in social, cultural and intellectual values.[37] The countries in the region were all Christian. The conflicts of the Reformation and Counter Reformation which did undermine the theological basis of natural law did not significantly alter the content of International Law. Although natural law tends to obscure or dissimilate the antinomies of values that exist in the international system,[38] this was not yet a significant issue. Indeed, during the eighteenth century, it has been argued, De Jure Belli ac Pacis had little effect on State conduct as the book was overtaken by events. It provided a conceptual framework which became more remote from what States actually did.[39]

The period from the nineteenth century to the outbreak of the First World War[40] was a relatively peaceful one in Europe, a major trend of which, from the Congress of Vienna onwards, was the increasing use of international conferences to resolve international problems. The "positivist" theories of Bentham and Austin were also based on the premise of the dichotomy between international law and domestic law with respect to individuals. Law was seen as the product of the will of the law-making agency which can be objectively and empirically ascertained

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[37] W. Friedmann: The Changing Structure of International Law p.5.

[38] See Friedmann: id., p.369.

[39] J.G. Starke, Grotian Papers, 1972, ante, at pp.172-3.

[40] Which Macdonald, Johnston & Morris refer to as the "Golden Age" of International Law· id., p.51.

without any necessary recourse to moral or ethical principles. But there were some major achievements during this period: as well as the International Postal Union being established, slavery and the slave trade were made unlawful.

Post-World War I theorists did not substantially shift from the State-centred (as opposed to individual-oriented) approach. Kelsen's monistic theory, arranging international law and domestic law into one hierarchy, swept away this dichotomy and regarded all law as regulating human conduct, but did not return the individual to central place because of Kelsen's belief that the capacity to enforce the law, rather than the substance of the law, was the most significant criterion with respect to who was a true subject of the law.[41] Thus, while there was nothing theoretically to prevent individuals being the subject of international law, in general this was the exception rather than the rule.[42] Georg Schwarzenberger, taking a different approach, argued that while there was nothing in principle to prevent the individual being a subject of international law, existing practice does not provide enough evidence for the contention.[43] Sir Hersch Lauterpacht argued that individuals could be the subjects of international law but only when when the individual has rights or duties directly under international law (ie, when the

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[41] Hans Kelsen: Principles of International Law, 2nd ed, (1966, Holt, Rinehart & Winston, New York).

[42] Ibid, p.180.

[43] Schwarzenberger: International Law, p.140.

intervention of the State is not necessary).[44]

The doctrine, while not uniform, has been weighted in general against the notion of the individual as a subject of international law. As a result of human rights it has slowly changed in emphasis. Thus Oppenheim, writing in 1912, stated: "Since the Law of Nations is a law between States only and exclusively, States only and exclusively are the subjects of the Law of Nations. ... But what is the real position of individuals in International Law [considering that they are accorded some rights and duties indirectly by international law], if they are not subjects thereof? The answer can only be that they are objects of the Law of Nations."[45] The Lauterpacht revision of Oppenheim, published in 1955, stated that "the Law of Nations is primarily a law between States, [so that] States are, to that extent, the only subjects of the Law of Nations ... [and while individuals may be made subjects of international law by treaty] ... the normal position of individuals in International Law ... [is that] they are objects of the Law of Nations."[46]

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[44] Lauterpacht: International Law and Human Rights (1950, Stevens & Sons, London).

[45] Oppenheim: International Law: A Treatise 2nd ed (1912, Longman, London), pp.362ff., paragraphs 289 and 290 (emphases added).

[46] Oppenheim: International Law: A Treatise 8th ed by H. Lauterpacht (1955, Longman, London) at pp.636 ff., paragraphs 289 and 290. See also Lauterpacht's International Law and Human Rights (1950, Stevens & Sons, London) where he argues: "The question whether individuals in any given case are subjects of international law and whether that quality extends to the capacity of enforcement must be answered pragmatically by reference to the given situation and to thew relevant international instrument." (at p.27).

3.3 The Abolition of Slavery and the Slave Trade: The Dawn of Human Rights or a False Start?

The antithesis of the notion of human rights is slavery. A slave's existence, socially and legally, is through the master.[47] Slavery was practised by many early civilisations and is perhaps the earliest recorded example of inhumanity.[48] Slavery was therefore not a peripheral aberration of society - it was widespread and er[illegible]. Its abolition, even if only in de jure terms, was a major achievement. However, the de jure abolition of slavery occurred well over a century before the emergence of a structured and recognised system of human rights. This indicates that some humanitarian ideals can be achieved without such structured, articulated human rights.

It is also paradoxical that the age in which slavery was most prevalent was also an

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[47] Slaves have been called people who are "natally alienated": see Orlando Patterson: Freedom in the Making of Western Culture (Vol.I) (1991, Basic Books, New York), p.10, hereafter referred to as Patterson.

[48] For a brief exposition of the early history of slavery, see Roger Sawyer: Slavery in the Twentieth Century (1986, Routledge & Kegan Paul, London), Chap. 1. See also McDougal, Lasswell & Chen, ante, at p.477 and the references to anthologies in the footnotes therein. Slavery has been shown to have existed in the Sumerian culture of the Babylonian era up to 4000 years BC. (Westermann, "Slavery: Ancient" (1934) 14 Encyc. Soc. Sc. 74). Prisoners of war, particularly after a "holy" war, were often enslaved. Aristotle thought that some men were "by nature" slaves and that this was both beneficial and just. (Aristotle: Politics I, 4-5). Roman law divided men into two groups: those who were free and those who were slaves. (Justinian: Digest I,3). Roman lawyers looked upon a slave as a "res", applying the same rules as for domestic animals. Pope Nicholas V issued a papal bull granting King Alfonso V of Portugal the right to enslave heathens in areas of Portuguese exploration in order to promote Christianity.

age of high culture: opera developed, Beethoven was producing a revolution in music, and it was the age of Newton, but that culture also reflected the dominant social mores.[49] The trade in slaves began on a large scale in the sixteenth century when Africans were transported to the Spanish and Portuguese - and later, English - colonies in the New World and hit its peak in the eighteenth century when growing wealth increased demands for "luxury" goods like sugar and tobacco. The trade was enormous, profitable, and grew rapidly.[50] By the nineteenth century when slavery was abolished, economic arguments against its abolition were powerful.

How then was abolition possible? The limitations of the Common Law in this regard have been discussed in the previous chapter. The movement for the

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[49] For example, paintings reflected changing attitudes. Van Dyke's portrait of Henrietta of Lorraine with a timid black servant and, later, James Barker's famous painting of Queen Victoria presenting a bible to an African subject - thus symbolising the "white man's burden" and the gift of civilization to the colonies - can be contrasted with the depiction of blacks in Medieval paintings where they are represented as princes and magii and placed next to the Madonna.

[50] It is estimated that in the sixteenth century over 420,000 slaves were taken to European colonies, over 1,300,000 in the seventeenth century, and over 6,000,000 in the eighteenth. By this time England was the world's greatest slave trader. Wealth poured into Bristol and Liverpool as a result. Between 1810 and 1870, when there were treaties prohibiting it, an estimated 2,000,000 slaves were transported. (Michael Palumbo: Human Rights: Meaning and History (1982, Robert E. Krieger Publishing Co., Florida), p.40, hereafter referred to as Palumbo). Other estimates put the total at over fifteen million. (See Anne Trebilcock, "Slavery", Encyclopedia of Public International Law, Vol. 8, pp.481-84 and references cited therein.) A general overview can be found in Peter C. Hogg: The African Slave Trade and its Suppression (1973, Frank Cass, London). An extensive bibliography can be found in Joseph C. Miller: A Comparative Teaching Bibliography (1977, Crossroads Press, Massachusetts).

abolition of slavery emanated principally from high-minded individuals. The Society for the Abolition of the African Slave Trade was established in England in 1787.[51] William Wilberforce was to become its champion in Parliament. However, according to one historian, the principal motivation for abolition on the part of these people was not humanitarianism so much as religion: slavery denied to the slaves the opportunity for salvation and tempted masters to cruelty and fornication.[52] Catherine Hall points particularly to the rise in the late eighteenth century of the reform movement in the Anglican Church known as Evangelicalism, of which William Wilberforce was an adherent.[53] In contrast, other authorities, while admitting the importance of the influence of the churches, warn that this should not be overemphasised.[54]

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[51] A corresponding Societe des Amis des Noirs was set up in France in 1788.

[52] J.C. Furnas: The Road to Harper's Ferry (1956, Faber); J.A. Joyce: The New Politics of Human Rights (1978, Macmillan, London) at p.14.

[53] In Michelle Perrot (ed): A History of Private Life, Vol. 4 (1990, Harvard U.P., Cambridge), p.51.

[54] Gordon K. Lewis: Slavery, Imperialism and Freedom: Studies in English Radical Thought (1978, Monthly Review Press, New York), especially Chapter 1. Quaker opposition to slavery was at first only a minority within that movement and the British Society for the Propagation of the Gospel owned slaves under trust in the West Indies, explaining Church of England hostility to the emancipation movement. See also David Brion Davis: The Problem of Slavery in the Age of Revolution, 1770-1823 (1975, Cornell U.P., Ithaca), Ch.5. See also by the same author The Problem of Slavery in Western Culture (1966, Cornell U.P., Ithaca), where he considers the reasons for the church's apparent about-face on slavery in the eighteenth century. Slavery was in fact abolished by the deist convention of the French Revolution in 1794 rather than by any of the Christian nations, Spain - a strongly Catholic nation - not doing so for nearly another one hundred years.

Along with Lord Wilberforce, Thomas Clarkson (1760-1846) was instrumental in the abolition of slavery by creating in effect the prototype of the modern pressure group. He decided in 1785 (thirteen years after the Somerset case) to devote his life to the abolition of slavery. (Wilberforce did not join the movement until 1787). Clarkson in fact admitted that he first became interested (and then obsessed) with slavery as a matter of his academic reputation at Cambridge rather than for moral reasons.[55] It was, according to Clarkson, the English translation of his essay on slavery written in Latin which got Wilberforce interested, the latter promising to bring the matter up in Parliament - but only after he had quizzed Clarkson for proof of the assertions made in it[56] and he was properly prepared for the debate.[57] In fact, when the Committee for the Abolition of the Slave Trade was set up by Clarkson and Granville Sharp in 1787, Wilberforce was not a member of it.[58]

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[55] He had been a prize-winning Latin student and the Vice Chancellor of Cambridge, Dr Peckard, who was an opponent of the slave trade, offered two prizes in 1785 for the best dissertations in Latin on the topic "Is it right to make slaves of ot ers against their will?". Clarkson was more or less expected to compete and in fact started his research using the documents of a deceased friend who had been in the trade. He won the prize, had become obsessed with the topic, and decided to translate his dissertation into English and publish it. Thomas Clarkson in fact detailed this work in History of the Abolition of the Slave Trade by the British Parliament, 2 vols., (1808, London). Quotes herein are from the 1830 Augusta edition, published by P.A. Brinsmade, cited hereafter as Clarkson.

[56] Clarkson, Volume I, p.94

[57] Id., p.102

[58] Gordon K. Lewis, in Slavery, Imperialism and Freedom: Studies in English Radical Thought (1978, Monthly Review Press, New York), describes Wilberforce's conversion to the abolitionist movement as follows:

> By birth and education a privileged person, he passed through, like his friend the younger Pitt, the usual experience of his type: casual education at Cambridge, the enjoyment of the

In the meantime, after publishing his English translation, Clarkson became aware of the work of Granville Sharp.[59] Before this, he had been unaware that others were working towards abolition, an indication of the disparate nature of the campaign at that time and the lack of publicity of it. Clarkson decided to devote himself full-time to the anti-slavery cause, but only after much anguish with respect to his career prospects, admitting:

> I had ambition. I had a thirst after worldly interest and honours, and I could not extinguish it at once.[60]

Johnson has noted that the principal actors in the anti-slavery movement:

> ... were of the generation which reached maturity during the American War of Independence and were imbued with a strong sense that many things were fundamentally wrong with Britain and required reform. Ending the slave trade was only one of them, but it was the issue which most engaged their strong religious fervour, which was Evangelical ... [61]

These main players were also people of education, comparative wealth (which left them with the large amounts of time usually needed to run effective campaigns) and of comparatively high social station. They were close - socially and politically - to the machinery of the British government. Their social standing therefore

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social life and gambling of the London clubs, an easy parliamentary apprenticeship which might easily have graduated him into the prime ministership itself. All this was changed almost overnight with his encounter with his old schoolmaster Isaac Milner and with Captain Newton, erstwhile captain of a slave ship and himself now a repentant remorsefully aware of the enormity of his calling; the first encounter converted Wilberforce to piety, the second to a recognition of his life work. (at p.37).

[59] Clarkson, Vol.1, p.78

[60] Id., p.87

[61] Paul Johnson: The Birth of the Modern (1991, Harper Collins, New York), p.323.

impacted, in direct proportion, to the influence they could wield for their campaign.

Men like Clarkson were experts at collecting and documenting evidence. Wilberforce was an assured parliamentary speaker, who used wit as well as sarcasm to make his points in an era when debates on reform matters were admitted by one contemporary to be "uncommon dull".[62] But he could also be deferential when and where it counted. Johnson has said: "He had none of the self-righteous incivility of the zealot and always preferred conciliation and diplomacy to hectoring."[63] Skills and personalities were important.

Clarkson's search for evidence took him around the country, particularly to Bristol, Liverpool,[64] and Manchester,[65] as well as to France, bringing back to Britain statistics on the size of slave quarters, testimonies from slaves themselves, specimens of shackles, leg irons and thumbscrews.[66] He uncovered evidence of maltreatment of crews of slave ships as well as of the slaves, and a great deal of

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[62] Thomas Creevy, quoted in Johnson at p.325.

[63] Johnson, p.325. Wilberforce was not, however, a totally cold-blooded analyst. Johnson describes him, when the House of Commons abolished slavery, as sitting in the House, "bent in his seat, his head in his hands, the tears streamimg down his face", with both allies and opponents cheering him. (Quoting R. Coupland: Wilberforce (1923, London) at p.341.

[64] Clarkson, id., Ch.10

[65] Id., Ch.12

[66] See Johnson, ante, at pp.322ff.

the campaign was directed to this aspect.[67] Clarkson's examination of ships' logs indicated that between twenty and fifty per cent of crew members did not make it back to England.

In fact, when the king ordered the Privy Council to inquire into the slave trade in February 1788 (after the Committee had delivered 35 petitions to Parliament) it did so sitting as a Board of Trade.[68] It was thus the trading aspects which were at first the focus of legislative attention. The painstaking evidence collected by Clarkson was useful and much of it was directly incorporated into its report.[69] Indeed, it was Clarkson's dogged persistence in amassing an enormous amount of evidence which helped to dispel some of the misconceptions about the slave trade: that it was a necessary training ground for British seamen; that the slaves were well treated; that slavery was indigenous to Africans and the British were therefore little more than middlemen who were free of culpability.[70] The arguments against the abolition of the slave trade sometimes arose from an inverted humanitarianism. For example, evidence was adduced of the practice of sacrifice in Africa[71] and it was argued that slavery took Africans away from this. There were also powerful

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[67] Clarkson, id., Chs. 5-8.

[68] Id., p.206

[69] Lewis, p.41. See also Davis: The Problem of Slavery, ante, pp.351-3.

[70] Lewis, pp.40-43

[71] Clarkson Vol. I, pp.212-213. Apparently, the King of Dahomey was alleged to have sacrificed 1000 people at a time for ceremonial occasions.

economic arguments about the financial cost to England were slavery to be abolished.[72] In addition, the events of the French Revolution and the publication of Paine's "Rights of Man", while helping to set an intellectual climate of individual rights, were used by the opponents of abolition to exacerbate the fears of English property owners that abolition of slavery was but the first step to the abolition of private property.[73] The emancipation movement was referred to as a "nest of Jacobins"[74] even though it had begun before both the French Revolution and the publication of Paine's book.

The first Act to regulate conditions in the slave trade (but not abolish the trade itself) appeared in 1788 (the year the First Fleet sailed to Australia and in which the convicts suffered appalling conditions - although there was no strong movement to ameliorate those).[75] By the 1790's the continuing multi-pronged campaign forced those who supported the slave trade to concede the moral arguments against it and rely on arguments of military and economic necessity.[76] This meant that the government could, without substantial opposition, introduce legislation to

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[72] Clarkson, Vol. II, pp.46ff. There was apparently seventy million pounds sterling tied up in mortgages over West Indian plantations.

[73] Id. Vol. II, pp.87ff.

[74] Id., p.88

[75] Australia has never officially had slavery, but on convict labour in Australia, see J. Hirst: Convict Society and its Enemies (1983, Allen & Unwin, Sydney), especially at 28-77.

[76] Johnson, id., pp.322ff.

ameliorate the conditions of slaves. The campaign was therefore one of planned strategic development rather than of righteous indignation, demanding everything but going nowhere.

The focus on trade, rather than on slavery itself, resulted in 1806 in an Act to prevent any new vessels engaging in the trade,[77] and the trade was abolished in Britain (but not the Empire) the following year.[78] (It had been abolished by Denmark in 1803).[79] This was not merely a token gesture: it became a transportable offence in 1811.[80]

The campaign moved to the abolition of slavery itself. Boycotting was another stratagem used. This was applied in particular to West Indian sugar produced by slave labour.[81] Lewis has remarked:

> Much of the movement appealed to the sentimental humanitarianism of the [rising middle] class. The drawing room became an abolitionist hotbed. Ladies wore the famous seal depicting the slave donated to the Society [for the Abolition of the African Slave Trade] by Josiah Wedgwood, often inlaid

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[77] Clarkson, Vol. II, Ch.9

[78] 47 Geo. III, c.36

[79] By a royal ordinance made in 1792. The author, who cannot read Danish, has been unable to ascertain whether the elements which appear to have been crucial with respect to British abolition also applied in the Danish situation.

[80] Felony Act, 1811

[81] Johnson notes, at p.324, that William and Dorothy Wordsworth, as well as Samuel Taylor Coleridge, sweetened their tea and coffee with honey rather than sugar for this reason. See also Clarkson, Vol. II, pp.129ff.

in gold in snuffboxes and bracelets.[82]

But opposition to reform was awesome. Interests from the West Indies even went so far as to buy up boroughs to buttress their parliamentary influence. Abolitionist public opinion rose to fever pitch in 1824, sparked, as many great incidents are, by a the fate of a single human being. In 1823 the House of Commons was debating the conditions of slaves in the colonies. As a result, the Colonial Secretary, Lord Bathurst, introduced a total ban on the flogging of women and a ban on the use of whips in the fields. In the island colony of Demerara, there were 78,000 slaves under one charge man, John Smith. The plantation owners attempted to ignore Bathurst's ban and acted as though it had never been made. The slaves learned about it (it is not clear by what means) and misinterpreted it as an act of emancipation. In the ensuing three-day rebellion, one white man was killed, 200 slaves were killed, 47 slaves were executed and others sentenced to 1,000 lashes.[83] Some of the ringleaders belonged to Smith's Congregationalist church. As a result, he was put into prison and sentenced to death. Before the execution could be carried out (it had to be ratified by London) Smith died as a result of prison conditions. According to Johnson, this incident "caused an uproar in Britain and did more than any other episode to inflame mass public opinion against slavery."[84]

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[82] Lewis, ante, p.40.

[83] These figures, and the general description of this incident, are taken from Johnson at pp.326ff.

[84] Johnson, p.326.

Slavery itself was abolished throughout the British Empire in 1834, but this was not a world-wide trend.[85] This was achieved despite the fact that slavery was more profitable than ever before. If Britain ended slavery, there was a worry that its competitors would get the better of it. It was precisely this which was a mighty spur to the British push for the world-wide abolition of slavery.[86] In addition, British military might (and, after Trafalgar, its unquestioned naval supremacy) provided enforcement measures which were backed up by prize money being awarded to ships capturing slave traders. The British campaign against the slave trade saw the transformation of the eighteenth century's biggest slave trader into the primary force for its abolition. Although not simply attributable to a continually improving humanitarian zeal, this was not simply a manifestation of hypocritical self-interest either. There was a price to be paid, as Fairbanks and Nathans describe:

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[85] However, Austria and Chile had abolished it in 1811, Peru in 1821 and Guatemala in 1824. Later, Ceylon and the Dominican Republic abolished it by 1844, Tunisia in 1846, France, Denmark and Hungary in 1848, Ecuador in 1851, Argentina in 1853, Venezuela in 1854, the Netherlands in 1863, Brazil in 1871, Portugal in 1878, Cuba in 1886, Egypt in 1896, Siam in 1905 and China in 1909. See M. Awad: Report on Slavery U.N. Doc. E/4168/Rev.1 (1966).

[86] This was a long and involved process. See ECOSOC Ad Hoc Committee on Slavery Memorandum: "The Suppression of Slavery and of the Slave Trade by Means of International Agreement", UN Doc. E/AC.33/3 (2 Feb., 1950), which mentions the Peace Treaty of Paris, 1814; the Declaration of the Congress of Vienna, 1815; the Peace Treaty of Paris, 1815; the Declaration of Verona, 1822; the Treaty of 1831 (France and Great Britain); the Treaty of 1833 (France and Great Britain); the Treaty of London of 1841; the Treaty of 1845 (France and Great Britain); the Treaty of Washington of 1862; the General Act of the Berlin Conference of 1885; the General Act of the Brussels Conference of 1890; the Treaty of St. Germain-en-Laye, 1919; the Covenant of the League of Nations; the International Slavery Convention of 1926; and the Universal Declaration of Human Rights and its progeny.

> A few statistics will serve to indicate the magnitude and seriousness of the British human rights campaign. In 1846, at the height of the attack on the Brazilian slave trade, 25 of the navy's 239 ships and 2967 of her 36181 sailors were assigned to the West African squadron, whose principal function was to capture slavers. Three years later the navy, which had increased the West African squadron by 2 ships, placed an additional 6 ships on anti-slave-trade patrol off Brazil. British taxpayers spent an estimated 13,000,000 pounds on the campaign against the Atlantic slave trade, much of it for naval patrols. The squadrons also cost the British dearly in lives; from 1830 until the end of the Atlantic slave trade in 1865, 1687 sailors stationed off West Africa, the "white man's graveyard", died. Between 1810 and 1865 the navy seized 1237 ships for engaging in slave trade, the vast majority of which were condemned as slavers, and freed 149843 slaves, about 8 percent of the number estimated to have been successfully carried across the Atlantic.[87]

Also, the planters were immensely rich and powerful.[88] When emancipation occurred in the British colonies, 20,000,000 pounds was paid to them as compensation. (The freed slaves, however, received nothing in the way of compensation).

While a hefty price was paid, the motivation for abolition was not entirely moralistic but was itself partly a result of changing economic structures as well as dialectic. By the early nineteenth century, England had a virtual monopoly of the world's tropical produce, including sugar. The Napoleonic wars resulted in a British blockade which caused a glut. This caused prices to drop. Continuation of

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[87] Charles H. Fairbanks Jr., with Eli Nathans: "The British Campaign Against the Slave Trade", Chapter 3 in Human Rights in Our Time: Essays in Memory of Victor Baras (Marc F. Plattner, ed.), (1984, Westview Press, Boulder), p.33.

[88] For a description, see Gordon K. Lewis: Slavery, Imperialism and Freedom, ante, pp.24-27. Jane Austen's character Sir Thomas Bertram, the owner of Mansfield Park in the novel of the same name, had made his fortune out of West Indian sugar.

supply no longer meant continuation of profits, and slaves were crucial to the continuation of supply.[89] Although abolition was achieved at some cost, slavery was not central to the British economy and became increasingly less important as Britain became an industrial power. The same could not be said for Portugal, whose empire in Africa and Brazil was based on slavery.[90] Britain's efforts in Brazil[91], as well as in the Middle East[92] and in Africa itself[93], required considerable exertion, including the threat and use of force. The Portuguese king had fled Portugal when Napoleon invaded in 1807. Britain as the dominant political and military power of the region after Napoleon's defeat helped the king to regain and retain (from Spanish-equipped rebels) his crown. For this, Britain exacted favourable trade treaties, which made it economically Portugal's superior as well. British abolition of the slave trade in 1807 was, despite an invitation to emulate it, rejected by Portugal at that time. By 1810, however, with the Portuguese royal court in Brazil, Portugal could not afford to displease its mentor and agreed to the gradual abolition of the slave trade in its dominions. By 1815, with the British army in control of Portugal, Portugal agreed to limit the Portuguese slave trade to

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[89] See David Brion Davis: The Problem of Slavery in the Age of Revolution, 1770-1823 (1975, Cornell U.P., Ithaca) pp.56ff.

[90] Fairbanks and Nathans note that after 1810 approximately 60 percent (or 1,145,000) of the slaves imported into the New World went to Brazil whose major crops of sugar, coffee and cotton were all grown with slave labour; ante, p.37.

[91] Id at pp.37-51.

[92] Id pp.51-59.

[93] Id pp.59-61.

the southern hemisphere.

When Brazil seceded from Portugal in 1822, Britain could have assisted Portugal in reclaiming the colony, but it did not. It recognised Brazil, and the price of the recognition was the abolition of the slave trade. Brazil, however, would only agree to this on a deferred basis and British resolve on the matter was weakened by the fear that the United States, which recognised Brazil in 1824, would usurp British influence. A three-year period of grace was therefore agreed upon, during which time a record number of 175,000 slaves were transported to Brazil.[94]

While Britain did pay a price to abolish slavery, it also reaped the reward of hugely increased international prestige. The sacrifice to national self-interest had overall been minimal in comparison. Britain could take advantage of a growing international moral consensus that the slave trade was wrong. The advantageous effect of this, in a world of realpolitik, was that other countries which were opposed to Britain on other political issues were less inclined to exploit the hostility of the slaving states towards Britain to further their own self-interest.

As Fairbanks and Nathans describe it:

> At the Congress of Vienna, Prussia and Russia, the powers most opposed to Britain on political questions, supported Britain on the issue of the slave trade. The result was typified by Brazil, who felt helpless to resist the

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[94] Id, pp.39-40.

"torrent" moving against the slave trade.[95]

There was a slowly rising tide of global action. The eight power declaration in 1815[96] at the Congress of Vienna was reaffirmed in 1822 by Austria, France, Great Britain, Prussia and Russia as the Declaration of Verona. The treaties and declarations of the early nineteenth century held in common a basically exhortatory nature and the principal that the slave trade was repugnant to the principles of justice and humanity. The 1815 Declaration, for example, condemned the slave trade as "repugnant to the principles of humanity and universal morality" and declared that with respect to its abolition the parties were "animated with the sincere desire of concurring in the most prompt and effective execution of this measure, by all the means at their disposal and of acting, in the employment of those means, with all the zeal and perseverance which is due to so great and noble a cause." However, the Declaration also referred to the need to have regard for "the interests, the habits, and the prejudices of [the parties'] subjects" and acknowledged that "this general Declaration cannot prejudge the period that each particular Power may consider as most advisable for the definitive abolition of the Slave Trade". As well as no stipulations as to time, there was no enforcement mechanism either. Slavery was abolished in principle but no specific date for compliance was set. The primary purpose of the Congress was not humanitarian

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[95] Id, pp.64-65.

[96] This was embodied as Annex XV of the Final Act of the Congress and was signed by Austria, France, Great Britain, Portugal, Prussia, Russia, Spain and Sweden.

but political: to re-establish the political balance in Europe, preferably at the pre-revolutionary status quo. The growing economic power of Spain was of concern in this regard. Prohibiting the slave trade would help limit it.

International action also moved into an area considered to be sacrosanct: the right of search and seizure of ships on the high seas. British initiatives in this regard were treated with suspicion by other countries because of British naval superiority. It also ran counter to international law at the time wh n restricted such seizure to belligerent activities or piracy.[97] Therefore, British policy was secured by treaties allowing a right of seizure between the parties and usually provided for tribunals to try captured ships.[98] For example, Britain and France, in the Treaty of 1831, allowed mutual rights of visit and search of each other's ships in certain waters and the Treaty of London signed in 1841 declared the slave trade to be piracy[99] (again, only in certain waters, not globally). The United States did not agree to search and seizure of its ships by foreigners (i.e., Britain) until 1862 with the Treaty of Washington, and this was limited to 200 miles from the coast of West Africa and thirty leagues from the coast of Cuba.

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[97] Le Louis (1817) 2 Dods. 210

[98] On the effects of British initiatives, see H.H. Wilson, "Some Principal Aspects of British Efforts to Crush the African Slave Trade 1807-1929" (1950) 44 AJIL 505. See also Davis: The Problem of Slavery, ante, pp.66ff, who considers that British diplomacy in this issue failed between 1811-1823.

[99] Art. 1

It was not until the treaties at the end of the century (such as the General Act of the Berlin Conference of 1885 and the General Act of the Brussels Conference of 1890) that suppression of slavery as well as of the slave trade was an express object. The Brussels General Act was the most comprehensive treaty to that time, containing over one hundred articles. It contained provisions dealing with economic and military measures (such as the establishment of military stations and the improvement of communications: Arts. 1, 2, 15-17) and for criminal legislation to be introduced, dealing with such things as slave hunting, violence and mutilation (Arts.5, 19). However, it recognised that slavery did exist in the territories of some of the signatories, and bound them to prohibit the importation, transit, departure and trade in slaves (Art.62). It was by no means an attempt to wipe out slavery overnight (which was probably wise) and most of its provisions, apart from the ones already mentioned, were optional.

After World War I, the Convention of St. Germain-en-Laye, 1919, to which the US, Britain,[100] Belgium, France, Italy, Japan and Portugal were parties, endeavoured to secure "the complete suppression of slavery in all its forms and of the slave trade by land or sea."[101] The mandates system of the League of Nations (which is discussed in more detail below) contained, particularly in B and C class mandates, provisions for the suppression of the slave trade in the mandate

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[100] Which signed on behalf of the Dominions, including Canada and Australia.

[101] Article 11(1)

territories, and sometimes for the emancipation of slaves. The International Slavery Convention of 1926, signed by 36 States, was aimed not only at slavery but also at forced labour.[102] The League also set up Committees of Experts on Slavery which had advisory powers and studied documentation submitted to them by governments. They ceased operation with the onset of World War II.

The abolition of slavery and the slave trade did not rely on such overwhelmingly transcendent theories that other forms of labour exploitation (such as the use of children in factories and mines in Britain) were immediately banned as well. Other reforms came later as the developmental matrix changed. There was change, but not a revolution: stability was maintained. Davis calls it a merging of "Utilitarianism with an ethic of benevolence, reinforcing faith that a progressive policy of laissez faire would reveal men's natural identity of interests."[103] It was not a natural law movement, and its effect was important but limited, as the following brief account of the situation in Australia and Canada after abolition indicates.

3.3.1 The Situation in Australia and Canada

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[102] Art. 5. This Convention is discussed in more detail below with respect to developments during the League of Nations period.

[103] Davis: The Problem of Slavery, ante, p.364.

The effect of the events described above, while they indicate a growing universalisation of the unlawfulness of slavery, nevertheless had only limited impact outside the European and North American region - and Africa, from which most of the slaves came - indicating the limitations of international rules at the time.

Slavery existed de facto, if not de jure, in the Australian region of the South Pacific. From the 1860's until well into the twentieth century the islands of the western Pacific acted as a labour pool for Queensland, Fiji and New Caledonia, where natives were better able to endure the tropical climate than were Europeans. Their labour was also much cheaper. Sometimes willingly, sometimes by force, over 100,000 labourers were moved from their island homes to work on European enterprises.[104]

One record of this was published in 1871 by Captain George Palmer R.N.[105] It is a first-hand account of a conspiracy between Sydney merchants, Queensland sugar

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[104] See, for a contemporary account, William T. Wawn: The South Sea Islanders and the Queensland Labour Trade - A Record of Voyages and Experiences in the Western Pacific, From 1875 to 1891 (1893, Swan Sonnenschein & Co., London). A recent exposition by the Australian Human Rights and Equal Opportunity Commission is The Call for Recognition: A Report on the Situation of Australian South Sea Islanders (1992, Human Rights Commission, Sydney). See also C.M. Moore, "Pacific Islanders in Nineteenth Century Queensland", in C. Moore, J. Leckie & D. Munro (eds): Labour in the South Pacific (1990, James Cook University, Townsville); K. Saunders: Exclusion, Exploitation and Extermination - Race Relations in Colonial Queensland (1975, Australia & New Zealand Book Co., Sydney), especially Part 2 "The Black Scourge".

[105] George Palmer: Kidnapping in the South Seas (1871, Edmonston and Douglas), published in facsimile edition by Penguin Books, 1973.

cane planters and "blackbirders" to kidnap Polynesians for work on the sugar plantations of north-eastern Australia. Palmer was the captain of H.M.S. "Rosario". Attempting to uphold what had become the anti-slavery tradition of the British navy, the "Rosario" captured the schooner "Daphne" which was fitted up like an African slaver and carried scores of kidnapped natives. Palmer captured the vessel and took it back to Sydney.

A technicality did, however, exist. Blackbirding was done to provide cheap (rather than free) labour for the cane fields. The natives involved were, more often than not, kidnapped, but they were paid a subsistence wage (in the case of the men found on the "Daphne", six pounds per year for three years) and were guaranteed a return voyage. The motivation for this was in fact racist. The Australian colonies did not want the Pacific Islanders to remain indefinitely. The question which therefore arose was whether these people were slaves within the meaning of existing British laws (which applied to Australia). A further complication was whether the colonies had the power to enact remedial legislation in any event. The Queensland Parliament had passed the Polynesian Labourers Act in 1868 (which had set the six pounds wage and the guarantee of the return journey, as well as setting standards for the living conditions on board ship) but this could not operate outside Queensland.

The Daphne was licensed by the Queensland government to carry 51 natives It

was in fact carrying 107. Originally coming to Queensland, a change of route was made for Fiji. It was apparently made known to the natives that if they refused to work for designated employers in Fiji they would not be taken back home. The Chief Justice, Sir Alfred Stephen, found that the natives were not slaves in any sense of the word nor intended to be dealt with as slaves.[106] Acting under the Polynesian Labourers Act 1868, his Honour found that the Daphne, in engaging Polynesian labourers, was doing nothing more wrongful than if the case had been to import workers from a European country.[107] It was found to be the fact that when the natives were first engaged they had boarded the ship voluntarily. The change of plan to go to Fiji instead of Queensland had apparently been made because a much larger profit could be made in Fiji which was suffering a labour shortage, the sailing time was shorter and the Queensland licence only allowed for the importation of 50 natives. It was found that the natives had been asked for their consent, although the interpreter had not been available for cross-examination in court as he had been left behind in Fiji. The men all signed documents agreeing to three-years' indenture in Fiji. It was argued that they had no real choice. Judge Stephen disagreed. He ruled:

> A good deal of evidence was given in support of the seizure, to show, what nobody disputed, that the 'Daphne' was fitted up for numerous passengers; and so had some of the indications of a slaver, specified in the 2d and 3d Vict. c.73, s.4. But that enactment, as I explained at the hearing, supposing it to apply at all in a case of this kind, was passed in respect of vessels found in very different latitudes, and under very different circumstances,

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[106] Kidnapping in the South Seas, ante, Appendix B.

[107] Id., at pp.215-16 of the Penguin facsimile edition.

> from those in question here. On various parts of the coast of Africa, from which negro slaves were brought, and of the coasts of America to which they were usually taken, a vessel was occasionally discovered having not one single slave, or the traces of one, on board, yet with fittings up, and quantities and kinds of food, ıg unmistakably her employment, - that human beings, and presumabl ɛs, had been or were to be her cargo. Passengers of any kind, in the ordinary sense, did not exist in those regions. The Legislature therefore made the possession of such food and fittings evidence, - until the inference should be rebutted, - but only until then, - that the vessel was engaged in slave trading. But it is absurd to imagine that the enactment was intended or could operate to compel a Court, against the strongest evidence, and in violation of the truth, to pronounce a trading vessel in these seas a slaver, because she had on board, with the necessary fittings, an improper number of passengers; they being free labourers, expressly engaged as such, although copper-coloured, and naked, as is their wont, - whom she was taking to a country where immigrants of that kind, fed on yams and maize and bananas, are proved to be employed solely for wages, with limited terms of service.[108]

The conditions on board the Daphne were that over 100 natives were lodged in a cabin measuring less than 30 feet by 16, lying on shelves with space of two feet nine inches between each and stacked to the deck beams with 26 inches of head room. Other legislation, such as the Master and Servant Acts, were also of little use.[109]

In March, 1869, a petition to the Legislative Assembly of Queensland had called for the repeal of the Polynesian Labourers Act of 1868. However, one of the stated reasons was "that the introduction of an inferior and uncivilised race into this

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[108] Id., at pp.223-4 of the Penguin facsimile edition.

[109] Saunders (ante at p.170) recounts the example of three South Sea Islanders engaged under the Master and Servant Act before the passing of the Polynesian Islanders Act who deserted and were forced to return to their master, despite the court accepting evidence of inadequate rations, improper shelter and floggings, and the islanders being prepared to forfeit all the wages owed to them.

colony, to supplant British and European labourers, is totally subversive of the constitutional principles on which this colony has been founded, and will reduce to a state of inactivity and destitution thousands of the working classes, who have been induced to emigrate to Queensland in the hope of finding here an independent home and permanent employment...".[110]

In 1872, the Pacific Islanders Protection Act[111], relating to islands in the Pacific Ocean not being within Her Majesty's Dominions or within the jurisdiction of any "civilised power"[112], was passed by the British Parliament to prevent and punish "criminal outrages upon natives of the islands in the Pacific Ocean"[113] (i.e., blackbirding). The Act required that a bond of five hundred pounds be paid and a licence obtained before a British ship could carry native labourers from the islands to the Australian colonies.[114] Kidnapping itself was punishable under the Criminal Code of 1899.[115]

The Queensland Parliament passed the Pacific Island Labourers Acts, 1880-86[116]

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[110] Palmer, id., p.232 in the Penguin facsimile edition.

[111] 35 & 36 Vic. c.19, as amended by 38 & 39 Vic. c.51, 46 & 47 Vic. c.39, 56 & 57 Vic. c.54 and 61 & 62 Vic. c.22

[112] Preamble and s.1

[113] Ibid

[114] Sections 3-7

[115] Section 354

[116] 44 Vic. No. 17, 47 Vic. No. 12, 49 Vic. No. 17 and 50 Vic. No. 6.

to regulate and control the introduction and treatment of native labourers in Queensland. These Acts repealed the Polynesian Labourers Act of 1868 and forbad importation of native labour except under government licence and upon payment of a bond.[117] The conditions of the granting of a licence included the proper provision of medicines on board the ship, the minimum age of labourers (16), and stipulated rations of water, food and clothing.[118]

When the Commonwealth of Australia was founded in 1901, the new federal Parliament passed the Pacific Island Labourers Act[119] which rendered obsolete the Queensland legislation. This Act forbad the entry into Australia of Pacific Island labourers after March 31, 1904,[120] with a few exceptions based on strictly limited licences in the intervening period.[121] No existing work agreements would remain in force after December 31, 1906.[122] All Islanders without a valid work agreement could be deported by the Minister for External Affairs.[123] An amending Act was passed in 1906[124] to allow applications for certificates of exemption from deportation on limited grounds such as age, infirmity, marriage to

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[117] Sections 3-8

[118] Section 12

[119] No.16 of 1901

[120] Section 3

[121] Sections 4-6

[122] Section 7

[123] Section 8

[124] Pacific Island Labourers Act 1906, No. 22 of 1906.

a non-islander or ownership of freehold land in Queensland. Simply put, the other states wanted blacks kept out of Australia. The main impetus for the abolition of a form of slavery in Australia was racism.[125] The attitude was prevalent at both state and federal level. One historian has documented at least forty pieces of discriminatory Queensland legislation passed between 1900 and 1940.[126] With respect to the indigenous black population, they could legally be made to work in certain jobs[127] and their pay often disappeared, a matter which is currently before the Queensland courts and the Human Rights Committee in Geneva.

In contrast to Australia, outright slavery did exist in Canada,[128] but its de facto abolition was achieved sooner than in Australia. Accounts date to the sixteenth

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[125] The "white Australia" policy dates from the beginning of federation. During Parliamentary debate in 1901 the Member for Morton said: "My desire is, at the earliest possible moment, to have a "White Australia", and to keep from our shores all coloured labourers of a lower degree of civilisation than our own." (Quoted in Saunders, ante, at p.221.

[126] P. Mercer: White Australia Defied: A Centennial History of Pacific Islander Settlement in North Queensland (1992, James Cook University, Townsville), especially at p.140. For example, the Liquor Act, 1912 prohibited the supply of alcohol to South Sea Islanders, and the Leases to Aliens Act, 1912 and the Sugar Act, 1913 banned island-born Melanesians from cultivating land or growing cane. Similarly, non-Europeans were refused union membership and the Queensland Industrial Court's Sugar Award of 1919 banned "coloured" people from cutting cane and restricted the properties on which they could cultivate it. (Mercer, id., pp.142-5).

[127] Garth Nettheim: Victims of the Law: Black Queenslanders Today (1981, George Allen & Unwin, Sydney), Chapter 9.

[128] See Marcel Trudel: L'esclavage au Canada francais: histoire et conditions de l'esclavage (1960, Presses de l'universite Laval, Quebec); Robin W. Winks: The Blacks in Canada: A History (1971, McGill-Queen's University Press, Montreal) (hereafter referred to as Winks). See also W. Tarnopolsky & W. Pentney: Discrimination and the Law, including equality rights under the Charter, loose-leaf service (De Boo, Toronto), Part I, Chapter 1.

century of slaves being brought to work in New France.[129] This was done on an informal basis, the legal foundation for slavery not being established in New France until the end of the seventeenth century when Louis XIV granted royal permission to import slaves for the purpose of working the mines and collecting pelts.[130] Apparently, the French Code Noir was applied as customary law to the region.[131] The reason for the introduction of the slaves, like the introduction of the Kanakas into Queensland, was pragmatic. But, for similarly pragmatic reasons, slavery never became widespread in Canada. Slavery works best in gang-labour economies based on mass production, like the growing and harvesting of sugar cane or cotton. It does not work so well with respect to the collection of beaver pelts. In addition, African slaves used to the heat work well in a climate like the West Indies (where, at the time, England was exploiting them). They do not work well in a climate like Canada's.

France ceded most of its mainland North American empire to Britain by the Treaty of Paris in 1763. This introduced English law into Quebec, overriding the informally observed Code Noir, but the latter was in fact specifically introduced in 1774 when, under the Quebec Act, Britain restored French civil law to

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[129] Winks, Chapter 1.

[130] Id., pp.4-5.

[131] There is, however, some controversy as to this: see Winks at pp.6-7, and references cited therein.

Quebec.[132] This, together with the British common law cases (discussed in the previous chapter) which, whatever they said about the status of slavery in England, clearly found nothing unlawful about the existence of slavery in the colonies, meant that slavery was legally sanctioned.[133] Moreover, an Imperial Act of 1790 specifically permitted the importation of negro slaves into British North America (in an attempt to encourage immigration).[134] Exact numbers of slaves in Canada are a matter of controversy, as there were many free negroes there as well, particularly refugees from the United States after the War of 1812 and then up to the time of the Civil War,[135] and the terms "slave" and "servant" were often used interchangeably at this time.[136]

The only province to legislate against slavery, and the first to take action against it, was Upper Canada. In 1793 it passed "An act to prevent the further introduction of slaves and to limit the term of contracts for servitude within this province".[137] As its title suggested, and as section 2 specifically provided, it did not abolish slavery by freeing any negroes. It provided for its gradual disappearance by prohibiting "further" importation of slaves, limiting contracts of service or indenture to a

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[132] See generally, Winks, Chapter 2.

[133] Winks notes, at p.25, that legislation in Nova Scotia in the late eighteenth century specifically referred to "negro slaves".

[134] Winks, p.26.

[135] See Winks, Chapters 5 and 6.

[136] Id., pp.45-6.

[137] 1793 Statutes of Upper Canada c.7.

maximum of nine years, and providing in section 3 that children born to slaves were to remain in the service of their mother's master until they reached the age of 25, when they would be discharged. The basis for these changes, as expressed in the Act's Preamble, was the unjustness of a free people introducing slaves, the expediency of abolishing slavery in Upper Canada, and the necessity to do this gradually so as not to violate the right to private property. One out of three, for the times, was not too bad! It in fact was contrary to the Imperial Act of 1790, but was never challenged.[138] This legislation was operative for forty years until it became redundant with the passage of the British Emancipation Act in 1833.

Slavery was not abolished by legislation in any other province, but the courts succeeded in placing limitations on it which had the effect of treating slavery as if it were illegal. Like the decisions in England at this time, they revolved around technicalities rather than fundamental principle.[139] While the cases were not always favourable to the slaves, the effect of them together with the legislation of Upper Canada, according to Robin Winks,[140] was that the growth of slavery was so severely limited that the practice of slavery virtually ended by the 1820's. Unlike Australia, there was sufficient judicial sentiment against slavery in Canada

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[138] By the time the Colonial Laws Validity Act was passed, slavery was illegal throughout the British empire and so this issue never arose.

[139] Winks discusses several at pp.100-110. The technicalities included the freeing of a slave because the relevant statute referred to "houses of correction" which did not exist in Lower Canada, and manipulative interpretations of legislation.

[140] Id., p.110

to compel its de facto demise in a situation where slaves existed, rather than its de facto existence in a place where they did not.[141] Popular opinion, while not at this time fiercely abolitionist was, because of the factors mentioned above, indifferent to it. They would tolerate it, but did not feel that they really needed it. After the 1840's, the influence of British abolitionist thinking increased,[142] although by this time slavery had been abolished (at least de jure) in the empire. Canadian abolition was therefore a product of local and imperial initiative. Unlike Australia, Canada does not appear to have been overtly racist in its motivation for its legislation and positively benign in some of its judicial decisions. However, the influx of negroes from the United States into Canada after 1812 is held by some commentators to mark the beginnings of racism in Canada.[143]

3.3.2 Implications and Inferences

At international law, the rules against slavery and the slave trade acted as exceptions to the accepted principle that State sovereignty allowed nations to treat human beings more or less as they saw fit. There were no notions of universality,

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[141] See also Fred Landon, "Canada's Part in Freeing the Slave", Ontario Historical Society, Papers and Records, 1919, no.17, pp.74-84.

[142] See Allen P. Stouffer, "Michael Willis and the British Roots of Canadian Anti-slavery" (1987) 8 Slavery and Abolition 294-312.

[143] Winks, p.113.

inalienability or fundamentality which later become the hallmark of human rights.

The end of the slave trade and eventually of slavery (at least de jure) on the domestic level in England can be seen to be the result of the matrix comprising: the recognition of Common Law principles which were at least able to favour freedom rather than slavery, except where overridden by legislation; the existence and growth of political pressure groups with dedicated personnel; the personalities and talents of these main players together with their circumstances of social and political influence; the use of publicity, including the use of the boycott; the effect of Evangelicalism; domestic and international economic and political considerations; and the existence of military (particularly naval) power to enforce laws that were eventually enacted.

The appreciation of all these factors is important to understand the juridical demise of slavery and the slave trade. The underlying values related as much to property rights as to human rights. The development of human rights has not been deterministic. It has been the conjunction of social forces with people of specific personalities or obsessions which has been crucial. Without either, the result may have been different.

The initial impetus, however, because of the way Parliament was lobbied, was from the domestic sphere. These influences were strong in England, but not as

strong on the international scene. These, in conjunction with changing economic and political situations and theory, filtered upwards into international law because treaties were necessary - the major enforcement mechanism for combating the slave trade (the search and seizure of ships on the high seas during peace time) was contrary to international law. The impetus for change was generated by domestic concerns. Bi-lateral and multi-lateral treaties were negotiated as much because Britain did not want to become the odd nation out with respect to slavery as with a humanistic drive for reform. And it had the military (especially naval) power to enforce these. There was little change in the doctrine of International Law as a result of these advances.

As seen in Chapter 2, the Common Law was concerned with questions of recognition of laws rather than with questions of individual rights. But there was a less obvious but equally important "trickle down" effect of international values which can be seen once slavery came to be formally condemned at international level. Whereas the cases of the eighteenth and nineteenth centuries ignored the issue of values as part of their decision-making process,[144] by the early twentieth century this had started to change. In Horwood v Miller's Timber and Trading Co Ltd[145] an employee of the defendant company had covenanted with a moneylender, the plaintiff, to assign to him the salary due from the defendants,

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[144] See, for example, the decision of Sir William Scott in The "Le Louis" (1817) 2 Dods. 210 at 249ff.

[145] [1917] 1 K.B. 305

indefinitely. In return, the moneylender would pay off all the employee's debts. This arrangement was to persist even after the moneylender had recovered the amount of the debts. The defendant continued to pay the salary direct to the employee and the moneylender took proceedings against it. The court held that the contract was contrary to public policy. Lord Cozens-Hardy MR stated:

> ... if the contract is one which puts the covenantor in the position ... of [a] villein ... on the ground of public policy the law will not recognise such a thing. No one has the right to deal with a man's liberty of action as well as his property ... Possibly slavery is too strong a word, but it certainly seems to me to savour of serfdom.[146]

This view was followed in later cases.[147]

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[146] At pp.311-312

[147] Naylor, Benzon & Co Ltd v Krainische Industrie Gesellschaft (1918) 87 LRKB 1066

3.4 The League Period: Rights as Exceptions in a State-Oriented System

Even though the de jure abolition of slavery cannot be regarded as the introduction of human rights (as opposed to a human right) into international law, J.G. Starke has remarked that "it is a misapprehension to regard the international protection of human rights as unknown to international lawyers or to diplomatic negotiators before the outbreak of the second world war in 1939."[148] This is correct - there had also been treaties of a humanitarian nature, such as the Geneva Convention of 1864 and the Hague Conventions of 1899 and 1907, which dealt with the relief of sick and wounded soldiers, the treatment of prisoners and the treatment of civilian populations in time of war - but there was no recognition of human rights in a general, universalistic, sense as inherent and inalienable. And there still were not. The advances of the League in this area were of an ad hoc nature seen as exceptions to general principle, lacking a coherent basis for a more expansive and comprehensive structure of legal rights.

The twentieth century, particularly with the establishment of the League of Nations, saw a new respect for international adjudication and arbitration as an alternative to the resort to war. The rule of law appeared to be both revered and useful at international level. In part a response to the slaughter of World War I,

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[148] J.G.Starke, "Human Rights and International Law", Chapter 9 in Kamenka & Tay, ante, at p.116.

the League - established by the Treaty of Versailles in 1919 - ushered in a new approach to the theory of international organisation: it was not simply European or regional, but universalist in nature and directed to the needs of the world community.[149] This was in part because of the growing importance of the United States and the emergence of the Soviet Union.[150] Antonio Cassesse has remarked:

> The [first World] War united the whole world - albeit in a forced and somewhat sinister way. For the first time a conflict assumed such magnitude as to involve all major members of the international community. As a consequence, the international community no longer consisted of groups of States often ignoring one another. The war proved that some major events were crucial to the world community at large.[151]

The perception of those world needs, however, were primarily of collective security, and the Covenant of the League made no specific mention of human rights as a general class of rights. It instead referred to specific problem areas and the focus was upon groups rather than individuals.[152] President Wilson had sponsored an article on religious freedom. Japan proposed rights to racial equality

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[149] Macdonald, Johnston & Morris, ante, p.54

[150] The emergence of the Soviet Union helped create a global outlook but at the same time caused the first major schism in International Law as it proclaimed that all existing legal norms were the upshot of bourgeois and capitalistic tendencies (see the discussion of Marx in the previous chapter) and that the Soviet Union would endorse them only to the extent that they were useful to it. It in fact denounced many existing treaties. See Antonio Cassesse: International Law in a Divided World (1986, Clarendon Press, Oxford), pp.58-60.

[151] Cassesse, Id., p.57.

[152] See John Humphrey: No Distant Millenium: The International Law of Human Rights (1989, UNESCO, Paris), (hereafter referred to as "Humphrey: Millenium"), Ch.4.

through provisions on the equality of nations and just treatment of their nationals.[153] The latter alarmed many States which practised open racial discrimination in their immigration policies.[154] Both suggestions were withdrawn.[155] While human rights in a general sense were not protected, it was decided to protect minorities. This in itself, while not new, was rare.[156] There had been a few treaties which had protected freedom of religion, and therefore protected religious minorities to the extent of the practice of religion.[157] The

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[153] See Paul Lauren, "Human Rights in History: Diplomacy and Racial Equality at the Paris Peace Conference" (1978) 2 Diplomatic History 257.

[154] Such as Australia, as outlined above.

[155] F.P. Walters: History of the League of Nations (1952, London), Vol. I, p.63; John Humphrey, "The International Law of Human Rights in the Middle Twentieth Century", in The Present State of International Law and Other Essays (Maarten Bos, ed.), (1973, Kluwer, Netherlands), pp.75-105; Warwick McKean: Equality and Discrimination under International Law (1985, Clarendon Press, Oxford), pp.15-20. See also Egon Schwelb: Human Rights and the International Community: The Roots and Growth of the Universal Declaration of Human Rights, 1948-1963 (1964, Quadrangle Books, Chicago), pp.19ff.

[156] For example, the Treaty of Kutchuk Kainardji, 1774 (protection of Christian minorities in Turkey); the Final Act of the Congress of Vienna 1815 (protection of minority rights for Poles); the Treaty of Paris, 1898 (protection of minorities in territories ceded from Spain to the United States). See generally C.A. Macartney: National States and National Minorities (1934, London); Julius Stone: International Guarantee of Minority Rights (1932, Oxford). Cassesse, id. at pp.40-42, points out that it was usual in "capitulation" treaties (so-called because they were divided into numbered capitula or chapters) to provide for the treatment of Europeans in non-European countries. Such treaties were made with Moslem rulers (e.g., that between France and the Ottoman Empire in 1740), some Arab countries, Persia, Thailand, China and Japan. The provisions of such treaties were not reciprocal and were not considered to be an infringement of sovereignty, similar to the position pertaining to protectorates: see Rights of Nationals of the United States In Morocco (U.S. v France), I.C.J. Reports 1952, 176. In addition, the individuals concerned were objects rather than subjects of the treaties.

[157] The Treaty of Augsburg, 1555; the Peace Settlement of Westphalia, 1648; the Treaty of Oliva, 1660; the Treaty of Nymegen, 1678; the Treaty of Ryswyck, 1679; the Treaty of Berlin, 1878. See S.P. Sinha, "Human Rights Philosophically" (1978) Indian Journal of

problem had been that the "human rights" provisions inserted into these treaties had often been done as part of the penalty wrought on the vanquished State; there was no reciprocal obligation on the part of the victors.

The minorities question became acute after the First World War because of the territorial changes wrought at the Peace Conferences.[158] The primary concern was therefore for political stability rather than humanitarianism.[159] It was decided to protect minorities in separate treaties concluded specifically for the purpose, rather than in the Covenant.[160] These were imposed on the defeated States after the war (such as Austria, Hungary and Bulgaria) and on newly created or expanded States (such as Poland, Czechoslovakia, Rumania and Yugoslavia). They were therefore by no means seen to be the embodiment of principles of universal application, and as treaties they expressly applied only to the States mentioned in them.[161] They did not give rise to reciprocal obligations, nor did they apply to

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International Law 139 at 141-2.

[158] See Encyclopedia of Public International Law (Published under the auspices of the Max Planck Institute, under the direction of Rudolf Bernhardt), Vol. 8, "Minorities" written by Francesco Capotorti, pp.385-395.

[159] See generally the report written by the Commission on Human Rights for UNESCO entitled "The International Protection of Minorities under the League of Nations", UN Doc. E/CN.4/Sub.2/6 (7 November, 1947).

[160] Humphrey, Present State of International Law, ante, pp.78-82; Humphrey: Millenium, Ch.5.

[161] A portentous omission was Germany, except for its obligations to the population of German Upper Silesia.

members of minority groups who were foreigners.[162] They were in fact undertaken for the primarily political motive of maintaining the peace when former subjects now ruled their former masters and were "sometimes the outcome of incredible and often reprehensible haggling in the 'expert' Committees of the Paris Conference."[163] They were regarded as sui generis exceptions to the accepted view that regulating the way in which a State treated its own nationals was an assault on the doctrine of sovereignty and an interference in matters of domestic jurisdiction.[164] The treaties provided for such things as the protection of life and liberty, religious freedom, equality before the law and the freedom to organise for educational purposes.[165]

They introduced a new order of collective responsibility through the functions of the League Council, a Permanent Minorities Committee and the Permanent Court of International Justice. Importantly, each of the States concerned undertook to recognise within their respective legal orders the minorities provisions as if they were fundamental law which was not subject to amendment by ordinary legislative

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[162] See UNESCO Report E/CN.4/Sub.2/6, ante, Chapter II.

[163] James Avery Joyce: The New Politics of Human Rights (1978, St. Martin's Press, New York), p.31.

[164] McKean: Equality and Discrimination Under International Law, ante, p.23

[165] For example, the minorities treaties of 1919 and 1920, the peace treaties with Germany and the General Convention of Upper Silesia, 1922.

process.[166] Violations could be brought to the attention of the League by any member of the Council.[167] In practice, however, petitions were usually generated initially by minority elements themselves.[168] Several dozen cases did in fact come before the Council and legal aspects of some of them were referred to the Permanent Court for advisory opinions.[169] As a result, while the treaties existed primarily as peace-keeping measures,[170] the right of harmonisation of difference was recognised.[171]

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[166] See Encyclopedia of Public International Law, ante, at pp.387-8.

[167] See Schwelb, ante, pp.20-22; R. Veatch, "Minorities and the League of Nations", United Nations Library: The League of Nations in Retrospect (1983, Walter de Gruyter, New York), pp.369-83.

[168] See UNESCO Report E/CN.4/Sub.2/6, ante, Chapter IV, Sections II,III.

[169] Joyce, ante, pp.28-36; McKean, ante, Ch.2; Encyclopedia of Public International Law, ante, at 387-8.

[170] The Permanent Court of International Justice in the Advisory Opinion on the German Settlers in Poland defined the functions of treaties on minorities as being to "eliminate a dangerous source of oppression, recrimination and dispute, to prevent racial and religious hatreds from having free play and to protect the situations established upon their conclusion, by placing existing minorities under the impartial protection of the League of Nations." (P.C.I.J. Rep. Ser. B (1923), 6 at 25).

[171] In the Advisory Opinion on the Minority Schools in Albania the Court said: "The idea underlying the treaties for the protection of minorities is to secure for certain elements incorporated in a State, the population of which differs from them in race, language or religion, the possibility of living peaceably alongside that population and co-operating amicably with it, while at the same time preserving the characteristics which distinguish them from the majority, and satisfying the ensuing special needs." P.C.I.J. Rep. Ser. A/B (1935) 64 at 17 The same opinion in fact went on to state:

> The first [object of minority treaties] is to ensure that nationals belonging to racial, religious or linguistic minorities shall be placed in every respect on a footing of perfect equality with the other nationals of the State. The second is to ensure for the minority element suitable means for the preservation of their racial peculiarities, their traditions and their national characteristics. These two requirements are indeed closely interlocked, for there would be no true equality between a majority and a minority if the

The Court also favoured an interpretation of these treaties which maximised their value.[172] The effect of this was to extend the prohibition on discrimination of minorities to a respect for their rights.[173] This approach aimed at achieving an effective and genuine equality through the treaties. In the Advisory Opinion on Minority Schools in Albania, for example, the Court found that Albania's obligation, undertaken in a Declaration made to the League Council in 1921, that it would grant minorities equal rights to establish and maintain private schools was not satisfied if Albania abolished all private schools: this would be equality in law but not equality in fact.[174] Prohibitions on differential treatment had in effect become measures of protection. However, the organisational structure for protection of minorities collapsed when the League of Nations went out of existence.

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latter were deprived of its own institutions, and were consequently compelled to renounce that which constitutes the very essence of its being as a minority. (Ibid)

[172] Thus, for example, in the Advisory Opinion on the Acquisition of Polish Nationality the Court refuted a Polish argument that the term "minority" in the 1919 Treaty of Minorities was restricted to persons of Polish nationality insofar as its application to Poland was concerned. (P.C.I.J. Rep., Ser. B, 7, 14 (1927)). With respect to the substance of minority rights, the approach was similar, particularly in those treaties which did not formulate specific duties but simply prohibited "any discrimination" without specifying a standard of comparison. For example, in the Advisory Opinion on the Treatment of Polish Nationals in Danzig P.C.I.J. Rep. A/B 44 (1932) the court adopted a contextual approach, considering the reasons for the setting up of the Free City of Danzig, which was effectively a German enclave surrounded by Poland. Similarly, in the Advisory Opinion on the German Settlers in Poland P.C.I.J. Rep. B 6 (1923) the Court found that the main object of the Minorities Treaty was to prevent discrimination against minorities from any source, whether it be legislative, judicial or administrative (at p.25).

[173] G. Schwarzenberger: International Law Vol.1, 3rd ed (1957, Stevens & Sons, London), p.279

[174] P.C.I.J. Rep.Ser. A/B 64 (1935) at 20.

Another avenue of protection of individuals under the League was the Mandates system established under Article 22 of the Covenant. This also reflected some concern for the human rights of people in those countries.[175] By Article 22(7) Mandatories were required to submit an annual report to the League Council. These would be examined by a permanent Commission (comprised of independent experts rather than government representatives) which would advise the Council on all matters relating to the observance of the Mandate.[176] Mandates were in fact used by the League because of the precedent set by the successful condominium of Great Britain and Egypt over the Sudan. Luard has commented, however, that the Mandate system may have been in effect little more than the rationalisation of colonialism, with lip service being paid to matters of human rights.[177] However, he concedes that:

> The importance of the system was that it did express at least nominal international concern for peoples under the jurisdiction of a single member state. It accepted the principle that the welfare of the inhabitants of such territories must be the primary concern in their administration.[178]

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[175] The Article provided for three categories of Mandate: A, B and C. "A" Mandates were former territories belonging to the Turkish empire; "B" Mandates were territories in Central Africa; and "C" Mandates were Southwest Africa and certain Pacific islands like Papua and New Guinea. The Article provided, in part, that they would apply where the "peoples [were] not yet able to stand by themselves under the strenuous conditions of the modern world." Mandatories responsible for them would guarantee such things as freedom of conscience and religion.

[176] Article 22(9)

[177] Evan Luard, "The Origins of International Concern over Human Rights", Chapter 1 in The International Protection of Human Rights (Luard, ed., 1967, Thames & Hudson, London). See also Henkin, ante, at p.92.

[178] Id., at pp.19-20.

These were attempts to lay down explicit institutionalised restraints on the rights of governments with respect to their own subjects.[179] Also, under the Mandates system individuals and groups could petition the League with respect to alleged violations. However, it has been conceded that by the outbreak of the Second World War the system had effectively ceased to exist.[180]

In the meantime, suggestions had been made to extend the protection of international law to all of a State's subjects. The "International Declaration of the Rights of Man"[181] formulated by the Institut de Droit International (a private body consisting of persons distinguished in international law in Europe, the Americas and Asia) in 1929, was never taken up.[182] Its Preamble reads in part:

> ... the juridic conscience of the civilized world demands the recognition of the individual's rights exempted from all infringement on the part of the State

and refers to the French and American Declarations of Rights and to the

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[179] Advisory Opinion on International Status of South-West Africa, 1950 ICJ Rep., 128.

[180] Opinion of the Secretary-General of the United Nations to the Economic and Social Council, April, 1950: U.N. Doc. E/CN 4/367; Humphrey, id., p.80.

[181] Institute of International Law, Annuaire XXXV (1929), pp.289-300. This is reprinted as an Appendix in Jacques Maritain: The Rights of Man and Natural Law (trans. Doris C. Anson) (1971, Gordian Press, New York), and as Appendix F in F.E. Dowrick (ed): Human Rights: Problems, Perspectives and Texts (1979, Saxon House, Farnborough).

[182] McKean, ante, pp.33-45. See also Alessandra Luini del Russo: International Protection of Human Rights (1971, Lerner Law Book Co., Washington), Ch.III.

Fourteenth Amendment to the U.S. Constitution.[183] The appeal we would recognise today as being to an embryonic human rights, but its basis is positive law supported by a "juridic conscience". Its six Articles provide for life liberty and property,[184] the free exercise of religion,[185] the free use of language,[186] non-discriminatory access to public and private rights, in particular to education and earning a living,[187] the equality provided for is to be "really effective" rather than simply of a formal nature,[188] and a prohibition on States from withdrawing their nationality from a person to deprive them of "the rights guaranteed in the preceding articles."[189] Two features of this Declaration are particularly clear. First, there is no overt philosophic vision underpinning it in the same way as there was in its eighteenth century predecessors. The reference to a "juridic conscience" does not have the same connotations as an appeal to self-evident truths. Second, every Article is expressed as a duty of States[190] rather than as a right of

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[183] Providing due process and equal protection of the laws with respect to the deprivation of life, liberty and property.

[184] Article 1; this is similar to the Fourteenth Amendment and its interpretation by the U.S. Supreme Court.

[185] Article

[186] Article

[187] Article 4

[188] Article 5

[189] Article 6

[190] For example, Article 1 says "It is the duty of every State to recognize for every individual the equal right to life, liberty and property ...", Article 2 says "It is the duty of every State to recognize for every individual the right to the free exercise ... of every faith ..." and Article 3 says "It is the duty of every State to recognize the right of every individual to the free use of the language of his choice ...".

individuals, despite the reference to "rights" in Article 6.

In 1936, a Declaration on the Foundation and Leading Principles of Modern International Law, drawn up at the suggestion of the 1930 Hague Conference on the Codification of International Law and approved by the International Law Association, the Union Juridique Internationale and the Academie Diplomatique Internationale, provided in Article 28 that every State ought to assure to every individual within its territory protection of the right to life, liberty and property without distinction as to nationality, sex, race, language or religion.[191] State sovereignty and domestic jurisdiction, however, remained sacrosanct areas.

The third major area of protection of individual rights under the League was in the area of labour standards.[192] Under Article 23 of the League Covenant the members undertook to "endeavour to secure and maintain fair and humane conditions of labour for men, women and children, both in their own countries and in all countries to which their commercial and industrial relations extend" as well as to undertake to secure just treatment for the native inhabitants of territories under their control.

The League also established a refugees' organisation in 1921 and the work of the

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[191] See Warwick McKean: Equality and Discrimination Under International Law, ante, p.52.

[192] See generally C. Wilfred Jenks: Human Rights and International Labour Standards (1960, Stevens & Sons, London).

International Labour Organisation,[193] which had been set up at the same time as the League, also produced treaties directed towards economic rights. These were, and are, directed to many areas such as hours and conditions of work, health and safety standards, social insurance and collective bargaining procedures.[194] The Preamble to the Constitution of the I.L.O. reads, in part: "Permanent peace can be established only if it is based upon social justice." An annexure to the Constitution is the Declaration of Philadelphia of 1944 which provides that:

> All human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity of economic security and equal opportunity[195]

and that these principles are applicable to all peoples everywhere.[196] This was a far-sighted document, especially considering that it was written during the Second World War.

Treaties with respect to slavery and the slave trade mentioned above were also significant in this period. In 1924 the League set up the Temporary Slavery

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[193] The structure of the I.L.O. was (and is) without precedent as it is tripartite, consisting of representatives of workers, employers and governments. The interests of labour and capital, not just those of sovereign States, participate in the decision-making process.

[194] For a description, see C. Wilfred Jenks, "The International Protection of Trade Union Rights", Chapter 9 in Luard, ante.

[195] Section II(a); Yearbook on Human Rights for 1947 (United Nations, Lake Success, New York, 1949), p.526.

[196] See Joyce, ante, pp.39-41, and the Report to UNESCO by the Commission on Human Rights, UN Doc. E/CN.4/Sub.2/10 (5 November, 1947).

Commission, consisting of eight experts invited to participate on it. It produced a report the following year[197] which was forwarded to the Assembly of the League. The Commission was then disbanded. The report, however, was eventually the catalyst for a new convention dealing with this issue.

The Slavery Convention was signed at Geneva on September 25th, 1926, and was eventually ratified or acceded to by forty-one States. It contained a general prohibition on slavery. The intention, as expressed in the Preamble, was "the complete suppression of slavery in all its forms and of the slave trade by land and sea." Slavery was defined in article 1 as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised." This was an attempt to widen the legal concept to take into account "non-traditional" forms of slavery such as debt slavery, the enslaving of persons disguised as the adoption of children and the acquisition of girls by purchase disguised as payment of dowry.[198] But the treaty left it to the signatories to operate as they saw fit within their territories. Article 2, while providing for the prevention and suppression of the slave trade, provided that the complete abolition of slavery in all its forms would be brought about "progressively and as soon as possible". The concern was that sudden abolition would result in social and

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[197] E/AC.33/2, Part III, pp.10-11.

[198] ECOSOC Ad Hoc Committee on Slavery, "The Suppression of Slavery and of the Slave Trade by means of International Agreement", Memorandum Submitted by the Secretary-General, UN Doc. E/AC.33/3 (2 February, 1950), at p.19.

economic disturbances "which would be more prejudicial to the development and well-being of the peoples than the provisional continuation of the present state of affairs".[199] Article 3 was directed towards the embarkation, disembarkation and transport of slaves in the territorial waters of the Parties and on vessels flying their respective flags, but left it to the[r] to fill in the detail of implementation. While Article 6 provided:

> Those of the High Contracting Parties whose laws do not at present make adequate provision for the punishment of infractions of laws and regulations enacted with a view to giving effect to the purposes of the present Convention undertake to adopt the necessary measures in order that severe penalties may be imposed in respect of such infractions,

the presumption is that the laws are already in place. The admonition is directed to the imposition of penalties rather than to the content of the laws.

There was no provision for enquiries into the existence of slavery and like practices. Article 7 provided that the Parties would communicate to each other and to the Secretary-General of the League any laws enacted with respect to the Convention. Article 9 specifically allowed reservations to be made with respect to parts of the territory administered by the Parties. Britain made use of this with respect to India, and Spain with respect to Spanish Morocco, as did the USA, Burma and Iran. (Australia and Canada ratified without reservation).

In 1930 the International Labour Organisation adopted the Convention Concerning

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[199] Ibid. p.20

Forced or Compulsory Labour,[200] and the other slavery-related issue in the League Covenant was the concern for the traffic in women and children.[201]

Overall, the use of treaties dealing with human rights matters during the League period was an ad hoc, patchwork, affair and most, being specifically designed to operate in conjunction with the League of Nations, did not survive its demise.

Other mechanisms of individual protection were also available under customary international law at this time. They were the protection of aliens by the State of their nationality,[202] and a right to humanitarian intervention (although this is controversial,[203] and indeed remains so[204]). Protection of aliens had and has

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[200] 60 L.N.T.S. 55 (1930) (entered into force May 1st, 1932)

[201] Article 23(c). An International Bureau for the Suppression of Traffic in Women and Children had been established in 1899 and the Paris Agreements for the Suppression of the White Slave Traffic (LNTS, Vol 1, p.83) were signed in 1904 and 1910 by fourteen States. Two further agreements were concluded under the aegis of the League: the 1921 Convention for the Suppression of Traffic in Women and Children (LNTS, Vol. 9, p.415) and the 1933 Convention for the Suppression of Traffic in Women of Full Age (LNTS, Vol. 150, p.431).

[202] Contemporary literature includes Borchard: The Diplomatic Protection of Aliens Abroad (1915); Eagleton: The Responsibility of States in International Law (1928); Dunn: The Protection of Nationals (1932). See also Louis Sohn & Thomas Buergenthal: International Protection of Human Rights (1973, Bobbs-Merrill, New York), Ch.2. More recently, see Richard Lillich (ed.): International Law of State Responsibility for Injuries to Aliens (1983) and The Human Rights of Aliens in Contemporary International Law (1984, Manchester U.P., Manchester).

[203] Compare Richard Lillich (ed.): Humanitarian Intervention and the United Nations (1973, Univ. Press of Virginia. Charlottesville) with Moore (ed.): Law and Civil War in the Modern World (1974). See also Fernando R. Teson: Humanitarian Intervention: An Inquiry Into Law and Morality (1988, Transnational Publishers, Dobbs Ferry) and Sohn & Buergenthal, ante, Ch. 3.

limitations, not the least of which being that, once a matter is taken up by a State, it is the State which has the complete control over its prosecution, including the absolute right to discontinue it for purely political reasons.[205] Also, any monetary settlement that might arise similarly belongs to the State and is computed with reference to the damage to it rather than to the individual.[206] Lillich has therefore commented that "the traditional doctrine of diplomatic protection is not really about the rights of aliens as such, but rather about the rights and duties of States."[207] While the Permanent Court of International Justice had made it clear that "a state is entitled to protect its subjects when injured by acts contrary to international law committed by another state"[208] there was the inbuilt requirement that some existing rule of international law was in fact breached. The League of Nations did not codify this area of customary international law.[209] It remained unclear precisely what standard of treatment would suffice to justify a State taking

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[204] See Philip Alston, "The Security Council and Human Rights: Lessons to be Learned from the Iraq-Kuwait Crisis and its Aftermath" (1992) 13 Australian Yearbook of International Law 107; Nicaraqua v United States of America (Merits) 1986 ICJ Rep., 14.

[205] Administrative Decision No.V. (1924) R.I.A.A. 119.

[206] Rustomjee v The Queen [1875-76] 1 Q.B.D. 487, [1876-77] 2 Q.B.D. 69. It should also be noted that originally the protection of aliens included the use of armed force: See Richard Lillich: The Human Rights of Aliens in Contemporary International Law (1984, Manchester U.P., Manchester), Ch. 1.

[207] Lillich, ante, p.12.

[208] Mavrommatis Palestine Concessions Case (Greece v U.K.) P.C.I.J. Reports, Series A, No.2 (1924), p.12.

[209] Lillich, id., pp.29-32.

protective action.[210] There was nothing in the way of an articulated international benchmark.

Humanitarian intervention, unlike rules with respect to treatment of aliens, could apply when a State treated its own nations "in such a manner as to shock the conscience of mankind."[211] This was done on a few occasions[212] but there was no obligation to intervene; the rule (if that it was) excused the action. The solutions, however, were political rather than humanitarian.[213] The doctrine of state sovereignty, together with the positivist approach dominant at the time, hindered a thorough consideration of a recognised legal basis for proscriptions with respect to the treatment by a State of its own nationals.[214]

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[210] The jurisprudence arises largely out of claims between the United States and Mexico. See for example the Neer Claim (U.S. v Mexico) (1926) 4 R.I.A.A. 60; the Roberts Claim (U.S. v Mexico) (1926) 4 R.I.A.A. 77; the Janes Claim (U.S. v Mexico) (1926) 4 R.I.A.A. 82; the Quintanilla Claim (Mexico v U.S.) (1926) 4 R.I.A.A. 101.

[211] John Humphrey, "Foreword" to Humanitarian Intervention and the U.N. (Richard Lillich, ed.) (1973, Virginia Press).

[212] For example, in 1830 Britain, France and Russia intervened by armed force in the Ottoman Empire, as a result of which Greece gained its independence. For other examples, see James Avery Joyce: The New Politics of Human Rights, ante, pp.21-23, and Sieghart, p.13. Brownlie, however, contends that "no genuine case of humanitarian intervention has occurred, with the possible exception of the occupation of Syria in 1860-61" (International Law and the Use of Force by States, 1963, Oxford U.P., Oxford, p.340; emphasis added).

[213] Joyce, ibid. See also Richard Lillich, "Forcible Self-Help by States to Protect Human Rights" 53 Iowa Law Review (1967-8), p.325; and Brownlie, id., pp.338-42.

[214] Sieghart, pp.13-14. For a current appraisal of humanitarian intervention in the light of the Falklands War, see W.D. Verwey, "Humanitarian Intervention Under International Law" (1985) 32 Netherlands International Law Review 357-418.

Contemporary commentators were still clear that States were the appropriate subjects of international law and the relationship between the State and individuals was essentially a "domestic" matter.[215] If the issues were raised into the international plane, for example as a result of treaty obligations, violation was usually a matter of State-to-State complaint and negotiation.[216] The concern with individuals' rights - where it existed at all - had a basis still dominated by state consent rather than notions of Natural Law. While there may have been some debate on the authority of international rules (eg, as to the origin of a "grundnorm" like pacta sund servanda) this did not extend to their content and its humanitarian (or otherwise) nature (ie, what the pacta actually said).

Thus the development to this stage was of a system where sovereign States were the principal dramatis personae, having goals which could be, and often were, different to those of the individuals who made up the State.[217] As Sir Gerald Fitzmaurice considered (after an historical survey):

> ... if all these things had happened differently ... it is possible that international law would have developed quite differently, as a jus gentium

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[215] Charles C. Hyde: International Law Chiefly as Interpreted and Applied by the United States 3 Vols., (1945, Little, Brown & Co., Boston), Vol.I, p.209; L. Oppenheim: International Law 2 Vols., (7th ed., ed. H. Lauterpacht, 1948, Longmans, Green & Co., London), Vol. I, p.279.

[216] Andrew Martin, "Human Rights in the Paris Peace Treaties" (1947) 24 British Yearbook I.L. 392; Stephen D. Kertesz, "Human Rights in Peace Treaties" (1949) 14 Law and Contemporary Problems 627; Egon Schwelb, "The Austrian State Treaty and Human Rights" (1956) 5 I.C.L.Q. 265.

[217] Cassesse, ante, p.9. Cassesse considers that this is still the case.

> instead of as a jus inter gentes, as a law of the nations or peoples instead of a law between the nations, with the emphasis on the individual wherever he might be found, rather than on the nation-State, and on human values rather than on values of State.[218]

As a result, international law dealing with individuals created rights and duties for States, leaving the individual as an object rather than a subject of international law,[219] although some theorists have hypothesised a more homocentric version.[220]

3.5 The Formation of the United Nations: The Pressure for Rights Attaching to Individuals

> This is no vision of a distant millenium. It is a definite basis for a kind of world attainable in our own time and generation. ... Freedom means the supremacy of human rights everywhere.[221]

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[218] Sir Gerald Fitzmaurice, "The Future of Public International Law and of the International Legal System in the Circumstances of Today", in Institut de Droit International Livre du Centenaire 1873-1973 - Evolution et Perspectives du Droit International (1973, Editions S. Karger S.A., Bale), pp.196-328, at 311-12.

[219] H. Lauterpacht: International Law and Human Rights, ante, pp.7ff.

[220] For example, C. Wilfred Jenks: The Common Law of Mankind (1958); Myres S. McDougal, Harold D. Lasswell & Lung-chu Chen: Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity (1980); C. Black & R. Falk: The Future of International Order (1969). For a discussion, see Julius Stone, "A Sociological Perspective on International Law" in R. St J. Macdonald & D.M. Johnston (eds): The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory (1983, Martinus Nijhoff, The Hague) at 263-303.

[221] President Franklin D. Roosevelt, Message to Congress, 6 January, 1941. (Congressional Record, LXXXVII (1941), 77th Cong., 1st Sess., pp.46-7. Reprinted as Appendix D in F.E. Dowrick (ed.): Human Rights: Problems, Perspectives and Texts (1979, Saxon House,

After the First World War, concerns of a humanitarian nature had been primarily focused upon specific groups (minorities). After the Second World War, the focus shifted to universalistic concerns centred upon the individual. What had caused this shift in concern from specialised group rights to generalised individual rights, and what effect did it have on international law?

There had been a hope that World War I would be the "war to end all wars", that a just and harmonious society would emerge, phoenix-like, from the devastation. There was for a time a rise of ambitious utopianism.[222]

The turn (or collapse) of the economic tide in 1929 and the rise of ideologies like National Socialism swept over this glimmer of hope, replacing it with a sense of crisis. While there were growing social advances, these were countered by economic crises, Civil Wars and the growth of Fascism. As it became apparent that the First World War was not going to be the war to end all wars, and as idealism faded and hardened into resignation and disillusion, "the image of God

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Farnborough), p.150.

[222] In art, the Dadaists, Surrealists, Constructivist and Social Realists all worked in their own way for a re-meshing of cultural life with society, of art with society. Dadaism (a word which did not mean anything at all but simply emphasised its subversive and critical character) used such things as bicycle wheels, hat stands and urinals as art. Mainly German (which had been defeated in the War) it amounted to a questioning of values a reinterpretation of what art in fact is. Surrealism was art opening a route to the "marvellous" (surreal). It was an avoidance of conscious reality relying heavily on dream (or nightmare)-like imagery, a free association technique along the lines suggested by Freud. Examples are the works of Salvador Dali (1904-89) and Rene Magritte (1898-1967).

never fully recovered."[223] The quest was to become one for personal freedom in the light of personal values. The Nazi atrocities - to Jews, Gypsies, homosexuals, Jehovah's Witnesses, the infirm and others - had shocked the world as they were discovered by the advancing Allied armies in 1945. National Socialism has been described as "another offspring of the hybrid that has been the modernist impulse: irrationalism crossed with technicism."[224] Hitler himself talked of National Socialism as a means of creating mankind anew,[225] a making over of people in the new perceived image.[226]

The defeat of the Axis powers in World War II was seen as the supremacy of individualism (democratic liberalism) over Fascist collectivism (totalitarianism).[227] There was a worldwide moral outrage at "the image of a society bereft of the ideals of moral universalism and with an astonishing capacity

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[223] Derek Jarrett: The Sleep of Reason: Fantasy and Reality from the Victorian Age to the First World War (1989, Harper & Row, New York), Introduction at p.7.

[224] Modris Eksteins: Rites of Spring: The Great War and the Birth of the Modern Age (1989, Lester & Orpen Dennys, Toronto), p.303.

[225] Hermann Rauschning: Hitler Speaks (London, 1939) p.242, cited in Eksteins at p.303.

[226] It was not, however, simply the Nazis who advocated a forcible "clean up" of society: the eugenics movement had existed from the end of the nineteenth century, particularly in France. See generally, William H. Schneider: Quality and Quantity: The Quest for Biological regeneration in Twentieth-Century France (1991, Cambridge U.P., Cambridge).

[227] See, for example, Alan S. Rosenbaum (ed.): The Philosophy of Human Rights: International Perspectives (1980, Greenwood Press, Westport), esp. Chap.1.

for self-deception and rationalisation."[228] Outrages had occurred throughout history, but they had never been so widely evident as at the end of the Second World War,[229] and so widely considered to be the result of a philosophy which completely disregarded the dignity of individual humans (as well as of whole groups of people). The widespread knowledge, both during and after the war, of the atrocities sanctioned by the Hitler and Mussolini regimes, together with their aggression to other nations, reinforced a belief in the connexion between the two. Human rights for individuals came to be seen as important for the maintenance of peace as rights for European minority groups had been regarded at the end of World War I.

It was also now recognised that what had taken place in Germany had been largely outside the ambit of international legal control. The time was ripe for international law to appear to take greater control over the actions of States, that the

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[228] Rosenbaum, id, at p.22. As Eksteins has pointed out (ante, at pp.317-18), the assertions of and striving for Aryan racial purity - blond-haired, blue-eyed, square-jawed and powerful - certainly did not apply to the Nazi hierarchy. Hitler was short and dark, Goebbels had a club foot and Himmler looked like a Hollywood caricature of a Nazi. The implicit contradictions and ironies made little difference when overpowered by the energy and fanatical faith demanded by the party. A similar phenomenal capacity for self-deception was to recur in Maoist China: see Jung Chang: Wild Swans (1991, Flamingo, London).

[229] In 1938, when Kristallnacht occurred in Germany, there was universal condemnation, but no action. Similarly, when the "St. Louis", full of Jewish refugees, arrived in the U.S., it was sent back to Europe. The U.S. did start accepting refugees once it was realised how bad the persecution of them was, but at the beginning of the Second World War human rights was not a motivating issue for the U.S. Nor was it for Canada where Jews were also turned away at this time: see Irving Abella & Harold Troper: None is Too Many: Canada and the Jews of Europe 1933-48 (1983, Lester & Orpen Denys, Toronto).

international laissez-faire philosophy was not only outmoded, but dangerous.[230] The change in attitude was rapid, but this in itself is not unusual in international politics when conditions are right.[231]

Roosevelt had indicated the need for an assertion of individual rights in his famous "Four Freedoms" speech to Congress in 1941.[232] Each point stressed an international approach linked with selected aspects of human rights. Eight months later, the Atlantic Charter (a joint declaration of President Roosevelt and Prime Minister Churchill) expressed the hope that, after the defeat of the Nazis, all nations could live in peace and safety, free from want and fear. This was specifically referred to in the Preamble to the Declaration of 26 United Nations of January 1, 1942[233] which made human rights into one of the principal aims of the United Nations and linked the war effort to human rights by stating: "complete victory over their enemies is essential to defend life, liberty, independence, and

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[230] See Humphrey: Millenium, Ch.6.

[231] A recent example was the stunningly fast dismantling of the Communist system in Eastern Europe.

[232] ... we look forward to a world founded upon four essential freedoms. The first is freedom of speech and expression - everywhere in the world. The second is freedom of every person to worship God in his own way - everywhere in the world. The third is freedom from want - which, translated into world terms, means economic understandings which will secure every nation a healthy peacetime life for its inhabitants - everywhere in the world. The fourth is freedom from fear - which translated into world terms, means a world-wide reduction of armaments to such a point and in such a thorough fashion that no nation will be in a position to commit an act of physical aggression against any neighbour - anywhere in the world. (Dowrick, ante, Appendix D)

[233] See Gaius Ezejiofor: Protection of Human Rights Under the Law (1964, Butterworths, London), pp 54ff.

religious freedom, and to preserve human rights and justice in their own lands as well as in other lands."[234] The 1942 Declaration had been signed by all the Allied powers. Led by the leaders of the two most powerful Western nations, there was a coalescence creating a pressure, a desire for and drive towards human rights. Circumstances funnelled a heightened world consciousness, using present experience to draw upon the past and create a new juridical concept.

The creation of the United Nations was a deliberate act of policy, primarily at the instigation of the United States.[235] President Roosevelt was determined to succeed where President Wilson had failed.[236] It was an attempt to keep wartime allied co-operation operating after the war, although it was designed to be "an agency of the world community at large - not as an adjunct of a victorious military coalition."[237] It was to be worldwide in membership and scope.[238]

In addition, it was intended to be seen as a new organisation, not a mere revival of the League of Nations. Unlike the League, its Charter has several references to

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[234] See Schwelb: Human Rights in the International Community. ante, pp.24-5.

[235] Inis L. Claude Jr: Swords Into Plowshares: The Problems and Progress of International Organization 4th ed (1971, Random House, New York), pp.65ff. Generally, see Evan Luard: A History of the United Nations, 2 vols., (Vol.1: 1982, St. Martin's Press, New York), (Vol.2: 1989, Macmillan, London).

[236] A. Glenn Mower Jr: The United States, the U.N. and Human Rights (1979, Greenwood Press, Westport), Chapter 1.

[237] Ibid.

[238] See, for example, Articles 1 and 7 of the U.N. Charter.

human rights but, as Humphrey points out, the Charter very nearly only gave a passing reference to human rights.[239] The Dumbarton Oaks proposals, the blueprint for the U.N. prepared by the United States, the United Kingdom, China and the U.S.S.R. in 1944, only provided in general terms that the new organisation would "promote respect for human rights and fundamental freedoms"[240] and the major powers wanted it to proceed with caution, this promotion of human rights being "in accordance with the principles or undertakings agreed upon by the States members".[241] Human rights were to be first accepted by States through the traditional treaty-making process. The strengthening of the references to human rights was largely the result of the work of smaller nations at the San Francisco conference in 1945, including Australia, and of non-governmental organisations.

The Nuremburg trials added to a disposition favourable to juridical human rights by bestowing a recognised international importance to "domestic" atrocities and branding them "crimes against humanity". It also made it clear that there could be individual responsibility for atrocities, even in time of war. The idea that there are certain inalienable rights attaching to the human condition beyond man-made

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[239] John P. Humphrey, "The U.N. Charter and the Universal Declaration of Human Rights", Chapter 3 in Evan Luard (ed): The International Protection of Human Rights (1967, Thames & Hudson, London), p.39.

[240] Id., p.40; U.N.C.I.O. Doc., iv, 13.

[241] "U.S. Tentative Proposals for a General International Organization", quoted by Cassesse, ante, p.294.

legislation is a natural law notion,[242] and it seemed like the pendulum might be swinging away from positivism and back to such notions. Indeed, although Natural Law did undergo a rapid re-emergence,[243] there was in fact an explosion of legal theories in the twentieth century. Unlike previous periods when approaches to law were more or less consistent, the twentieth century has seen, for example, sociological jurisprudence (which started in Germany and Austria as a reaction to the rigidity of the law and recognised the importance of other factors such as the social composition of juries as having an important input)[244] which indicated that values could validly be incorporated into the legal process. The American, Roscoe Pound, even went as far as to advocate social engineering as a valid pursuit of the law.[245] There were also the American Realists[246] who concentrated on what

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[242] Benjamin Ferencz considers that the roots of crimes against humanity "can be traced to the ethics of Socrates, Plato and Aristotle and the ideas of natural law and justice espoused by theologians like St Augustine and St Thomas Aquinas." (Encyclopedia of International Law, ante, Vol. 8, p.107.

[243] For example, the Frenchman Jacques Maritain: Man and the State (1954) and the German Gustav Radbruch: Vorschule der Rechtsphilosophie (1947) The two formerly fascist regimes, Italy and Germany, adopted constitutions (in 1946 and 1949 respectively) which laid stress on judicial review of laws on constitutional criteria. Article 20 of the German Constitution provided for the principle of constitutional order and the rule of law and that "all Germans have the right to resist whoever attempts to destroy that [constitutional] order, if no other recourse is open." The European Convention on Human Rights and Fundamental Freedoms was adopted in 1950 and established for the first time a supra-national regime for human rights enforcement.

[244] For example, Eugen Ehrlich: Fundamental Principles of the Sociology of Law (1913); Francois Geny: Science et technique en droit prive positif (1914-24)

[245] Roscoe Pound, "A Theory of Social Interests", Proceedings of the American Sociological Society, 15 (1921). Pound proposed that these social interests could be used by courts in the same way that notions of natural rights were resorted to in the past.

actually happens in courts, and the Scandinavian Realists who saw law in psychological terms as a communal set of mental responses to words such as "right" and "duty".[247] There were also the Marxists, as well as the Analytical Positivists, such as Hans Kelsen.[248]

Kelly attributes this trend of diversity to:

> . . the accelerated social and industrial change of the twentieth century; the reaction against the purely formal ... apprehension of law ...; a new appreciation ... of the relevance of the life of the courts to an understanding of the law they were supposed to be administering; together with advances in the relatively new sciences of psychology, sociology, and anthropology. The theories of law born in the early century ... could collectively be called ... 'anti-formalistic' [although the formalism of Kelsen, Marxist views of law and of the hibernating natural law did exist][249]

The Nuremburg Tribunal noted that even though crimes against humanity had neither been codified nor even written down, they represented the accepted standard of behaviour for civilized people. This was transformed into an international standard which would take precedence over national laws.[250] Thus, despite the preponderance of theories, this seemed to opt for the Natural Law approach. However, the notion of crimes against humanity was designed to punish

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[246] For example, Karl Llewellyn: Legal Tradition and the Social Science Method (1931)

[247] For example, Karl Olivecrona: Law as Fact (1939)

[248] Hans Kelsen, "The Pure Theory of Law" (1934) 50 Law Quarterly Review 474

[249] Kelly, pp.358-9

[250] See Cassesse, ante, pp.64ff and 290ff; Egon Schwelb, "Crimes Against Humanity" (1946) 23 British Y.I.L. 178.

large and systematic actions rather than isolated incidents. It amounted to criminal law rather than human rights, and thus represented a reactive description of duties rather than a proactive formulation of rights. Moreover, "crimes against humanity" were defined in the Agreement on the International Military Tribunal for the Punishment of War Criminals as:

> ...inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or connexion with any crimes within the jurisdiction of the Tribunal whether or not in violation of the domestic law of the country where perpetrated.[251]

As persecution had also been directed towards other groups, such as homosexuals, the developmental matrix was such that while it could support the extension of international law to meta-national concerns previously considered to be a matter of State sovereignty, it was not yet ready to face the reality of persecution against groups against which there was still prejudice. Crimes against humanity represented punishment for a constricted group of actions, rather than a guarantee of equality in the future for all those who had been persecuted during the war.

Limited human rights provisions were also included in the peace treaties signed in 1947.[252]

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[251] Cassesse, ante, p.291.

[252] Treaty with Italy (49 U.N.T.S. 3), Art.15; treaty with Romania (42 U.N.T.S. 3), Art.3(1); treaty with Bulgaria (41 U.N.T.S. 21), Art.2; treaty with Hungary (41 U.N.T.S. 135), Art.2(1); treaty with Finland (49 U.N.T.S. 203), Art.6.

3.6 Rights That Almost Weren't: The U.N. Charter, Human Rights and the State-Oriented System

3.6.1 Canadian and Australian Participation in the Formulation of the UN Charter

Canada and Australia were both original members of the United Nations and both participated at the San Francisco conference which formulated the U.N. Charter. Australia, however, played a more active role in the enhancement of the human rights provisions which were eventually incorporated into the Charter than did Canada.

Canada emerged from the Second World War as the fourth power in the free world. As such, it was interested in questions of its representation on the Security Council and the Economic and Social Council to reflect this new status.[253] However, it was also concerned with questions of economic and social co-operation, adopting a functionalist approach[254] which supported, for example,

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[253] Anthony J. Miller, "Functionalism and Foreign Policy: An Analysis of Canadian Voting Behaviour in the General Assembly of the U.N., 1946-66", Ph.D. thesis, McGill University, 1970. This is in contrast to Canada'a isolationist policy after World War I: see Canada and the United Nations, 1945-1975 (1977, Department of External Affairs, Ottawa), pp.4-5. Canada was one of the original eighteen members elected to the Council of ECOSOC in 1946 (id., p.108). See also F.H. Soward & Edgar McInnis: Canada and the United Nations (Prepared for the Canadian Institute of International Affairs and the Carnegie Endowment for International Peace) (1956, Manhattan Publishing Co., New York), pp.10ff.

[254] Miller, ante, pp.91ff.; see also Clyde Eagleton, "The Share of Canada in the Making of the United Nations" U. of Toronto L.J., VII (1948), 351; Canada and the United Nations, 1945-1975 (ante), pp.10ff; F.H. Soward & Edgar McInnes: Canada and the United Nations

economic aid to developing countries on the basis that this would engender global stability. This has been called a theme of "enlightened self-interest".[255] Its support of human rights tended to follow its old allegiances, remaining loyal to the "old" white Commonwealth with respect to racism in South Africa, and usually abstaining in votes in the General Assembly on this issue,[256] while nevertheless genuinely being supportive of the trusteeship system[257] and displaying a functional approach to decolonisation.[258]

The San Francisco conference opened on April 25, 1945. A general election in Canada had been fixed for June of that year. As a result, much of the responsibility for Canadian participation devolved to public servants, even though

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(Prepared for the Canadian Institute of International Affairs and the carnegie Endowment for International Peace), (1956, Manhattan Publishing Co., New York), pp.29ff.

[255] Miller, ante, pp.101-102.

[256] Id., p.277. Miller has contended that Canada was not a "leader" in the U.N. (id., p.287).

[257] See Canada and the United Nations, 1945-1975 (1977, Department of External Affairs, Ottawa), pp.84ff. Canada voted in favour of General Assembly Resolution 2145 (XXI) which terminated the mandate of South Africa over Namibia in 1966 (id., pp.100ff.).

[258] Canadian policy has been expressed as follows:

> The Canadian attitude to the problem of ending colonialism comprises support for the idea of self-determination and the wish to assist in promoting the evolution from colonial rule to self-government and independence of all dependent peoples who desire that status, at a rate governed only by practical considerations of internal stability. Canada recognises that each remaining colonial territory has its own special problems and its own conditions. It has been Canadian policy ... to point out that the principle of self-determination does not always necessarily imply independence.

(Canada and the United Nations, 1945-1975, ante, pp.94-95.)

the Canadian delegation included the Prime Minister, the Minister for Justice and the leader of the Opposition.[259] Apparently, the Prime Minister, Mr Mackenzie King, had become convinced that the United Nations would not work and had written it off as a failure.[260] A member of the Canadian delegation at San Francisco in fact drafted a Charter, the first chapter of which was entitled "The rights of every man" but, according to its author, "it sank without trace"[261], until used in 1947 when the Minister for External Affairs, Louis St. Laurent, was scheduled to deliver a speech on human rights to the Montreal branch of the United Nations Association at which Eleanor Roosevelt would be present. The day before its scheduled delivery, the speech had still not been written. The Canadian author of the draft, Escott Reid, was given the task of writing the speech overnight and used his material from a few years earlier as he was specifically told that there was no time to consult with St. Laurent and simply to put the thing together as he would if he were to deliver it himself![262] The speech also eventually substituted

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[259] Soward & McInnes, ante, pp.22ff. For a description of Canadian participation at the San Francisco conference, see also John W. Holmes: The Shaping of Peace: Canada and the Search for World Order 1943-57 (1979, U. of Toronto Press, Toronto), especially Vol. 1, Chapter 8.

[260] Bruce Hutchinson: The Incredible Canadian (1952, Longmans Green, Toronto), p.403; Soward & McInnes, ante, p.23.

[261] Escott Reid: On Duty: A Canadian at the Making of the United Nations, 1945-1946 (1983, McClelland & Stewart, Ottawa), p. 21.

[262] Id., pp.21-23. In the entire book of reminiscences about Canadian participation at the foundation of the U.N., these three pages are the only references to human rights.

for a Canadian statement on human rights at the first session of the General Assembly.[263] The speech did include a reference to the fact that Canada intended to set up a special committee of both houses of parliament to study the question of the fulfilment of the human rights obligations of the Charter, and this committee was established in 1947, holding several meetings.[264] It had been charged by Parliament with consideration of the implementation in Canada of the human rights provisions of the UN Charter, particularly in the light of the Canadian constitution and laws. The committee's proceedings were taken up largely with evidence from a small number of experts[265] on current developments in international law and the UN with respect to human rights and on the Canadian legal and constitutional situation with respect to such rights. The committee obtained (but only superficially

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[263] The United Nations, 1946: Report of the Second Part of the First Session of the General Assembly of the United Nations held in New York, October 23-December 15, 1946 (Conference Series 1946 - No.3, Department of External Affairs, Ottawa), p.66. The Montreal speech is referred to in a document about the proceedings in the General Assembly as "there was no convenient opportunity in New York for a statement by the Canadian delegation on the substance of the question of human rights and fundamental freedoms." (ibid.). The Report for the Second Session in 1947 (Conference Series 1947, No.1; Department of External Affairs, Ottawa), while it refers to economic and social questions (pp.80-116) and trusteeship questions (pp.117-130), makes no specific references to human rights or fundamental freedoms at all.

[264] Special Joint Committee of the Senate and the House of Commons on Human Rights and Fundamental Freedoms - Minutes of Proceedings and Evidence Nos. 1-7, 1947.

[265] These were R.G. Riddell, Chief of the First Political Division of the Department of External Affairs; E.R. Hopkins, Legal Adviser to the Department of External Affairs; F.P. Varcoe, Deputy Minister of Justice; D.H.W Henry, Law Branch, Department of Justice; and Professor John Humphrey, Director of the Division of Human Rights, United Nations. Other persons applied to address the committee (e.g., representatives of the Jehovah's Witnesses, the Chinese community and Canadian newspapers) but were not heard. The committee held only seven meetings in 1947.

considered) documents considered seminal or helpful in this regard.[266] Its Reports to the Senate and the House of Commons stated that the job given to it was simply too big to do anything other than preparatory work. It invited the Attorneys-General of the provinces and the heads of Canadian law schools to furnish views and opinions "on the question of the power of the Parliament of Canada to enact a comprehensive Bill of Rights applicable to all Canada."[267] Thus, official Canadian participation in human rights matters at the international level appears to have been initially less than enthusiastic. It did not press for membership on the Commission on Human Rights as it otherwise might have done, as a matter of policy.[268] Yet from the beginning, it was considering the domestic implications of the international developments to the extent that a national Bill of Rights was considered as an option from the period pre-dating the Universal Declaration of Human Rights.

The Australian experience and process appears to have been the converse, with a high profile performance internationally (considering Australia's relatively small

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[266] These were: the Magna Carta, Petition of Rights 1627; the English Bill of Rights 1689; the US Bill of Rights; extracts from the Australian Constitution - in particular, s.116 on "freedom" from Commonwealth interference in religion; the constitution of Ireland; the Preservation of the Rights of the Subject Bill 1947 (UK); the Declaration of the Rights of Man and the Citizen, 1789; Professor Lauterpacht's Draft Bill of Human Rights; and Canadian provincial legislation such as the Saskatchewan Bill of Rights Act and the Freedom of Worship Act of Quebec - Minutes of Proceedings and Evidence, id., No.4.

[267] Minutes of Proceedings, id., No.7, pp.iii & v.

[268] See the evidence given to the committee by R.G. Riddell, Chief of the First Political Division of the Department of External Affairs, Minutes of Proceedings and Evidence, id., No.3, at p.46.

position in international affairs) but a serious consideration of options with respect to domestic legal enforcement not becoming apparent until decades later.

Australia emerged from the Second World War as a much lesser power than Canada. In the period prior to the League of Nations Australia's Prime Minister, W.M. Hughes, was openly antagonistic to the idea of international organization on the basis that it would interfere with Australia's restrictive tariff policies and argued for outright annexation of New Guinea as opposed to a mandate over it.[269] He was apparently instrumental in the rejection of the Japanese proposal to insert a principle of racial equality into the League Covenant.[270] Prior to the San Francisco conference, Australia's suggested amendments to the Dumbarton Oaks draft included a widening of the domestic jurisdiction clause[271] and an emphasis on the importance of economic and social welfare as a major objective of the new organisation.[272]

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[269] Norman Harper & David Sissons: Australia and the United Nations (Prepared for the Australian Institute of International Affairs and the Carnegie Endowment for International Peace) (1959, Manhattan Publishing Co., New York), pp.10-12. This account contends that the C class mandate was actually devised by Hughes' own staff. It differed from the others in that it did not impose free trade and equal treatment for the citizens, giving Australia virtual sovereignty over the territory. In fact, the first ordinance passed in New Guinea after the mandate was established applied the Australian Immigration Act to the territory (i.e., the "White Australia" policy). (Id., p.12).

[270] Id., p.12.

[271] Article 2(7).

[272] Harper & Sissons, ante, pp.45-6.

Australian representatives had to travel half-way around the world to get to San Francisco, yet the delegation included the Deputy Prime Minister, the Minister for the Army and, most significantly, Dr. H.V. Evatt the Attorney-General and Minister for External Affairs. Evatt was the judge in the Kisch cases[273] and has been described as follows:

> Dr. Evatt, a man of great intellect and dominant personality, subsequently emerged as one of the outstanding figures of the Conference, the champion of the smaller powers. A liberal socialist and a former member of the Australian High Court, he brought to the Conference a passionate conviction of the need for morality in international affairs, a sense of mission, and a belief in the need for world government by gradual stages. These were combined with a devotion to legal processes and a humourless determination to establish democratic principles as the basis for the conduct of international relations.[274]

The Labor Party was in power in Australia. The Depression in Australia had left an indelible impression on Labor politicians and reinforced suspicion of overseas financial and trading interests.[275] Full employment (to prevent depression) was a Labor Party shibboleth. With respect to the drafting of Article 55(a) of the Charter[276] the term "full employment" was inserted instead of "high and sustainable levels of employment" (which was the favoured terminology of the

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[273] See Chapter 2 above.

[274] Harper & Sissons, ante, p.48. Evatt's dominant role is also conceded by a contemporary and fellow delegation member: see Paul Hasluck, "Australia and the Formation of the United Nations, Some Personal Reminiscences" Journal and Proceedings of the Royal Australian Historical Society 40: 131-178, 1954 at pp.138-9. See also Peter Crockett: Evatt: A Life (1993, .U.P, Oxford).

[275] Harper & Sissons, ante., pp.64ff.

[276] ... the United Nations shall promote ... full employment ...

United States) as a result of the work of the Australian representatives.[277] It was not so much enlightened self-interest as a fanatical adherence to party policy, albeit sincerely held.

With respect to colonialism, there was a strong socialist distrust of European imperialism and a desire to extend the principles of the trusteeship system to all colonies, whether or not they were formerly held as mandates.[278] This, however, did not extend to establishing the principle of an "open door" policy in trust territories, particularly in New Guinea. Australia blatantly maintained a "White Australia" policy until 1966. Originally introduced at Federation partly to give a new nation a sense of identity in a region in which it differed markedly from other peoples, the feeling in favour of it was reinforced as a result of the threat of Japanese invasion of Australia during the Second World War.[279] (The approach to the treatment of the Aborigines in Australia was little better.)[280] Whereas Canada did not have human rights as any apparent priority, Australia did make significant contributions at San Francisco to these issues of employment and the trust territories. It was, however, an unabashedly racist country (and, in many respects, still is). Harper and Sissons have described Australia's attitude as:

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[277] Harper & Sissons, ante, pp.68-9.

[278] Id., pp.69-78

[279] See generally, Humphrey McQueen: The New Britannia (1970, Harmondsworth), and A.T. Yarwood & M.J. Knowling: Race Relations in Australia - A History (1982, Menthuen Australia), Ch. 10.

[280] Yarwood & Knowling, id., at pp.248ff.

> ... reflect[ing] the impact of particular experiences rather than of continuously felt needs; the recollection of the depression of the 1930's, the prediction of a post-war slump, the belief that the military collapse of colonial empires in Asia was the consequence of misrule, the shifting balance of power within the "grand alliance". ... The policies supported and proposed by Australia at San Francisco involved no surrender of sovereignty or freedom of action by the Australian government. The New Guinea mandate could be amended only with its consent. The full employment pledge represented its freely adopted policy and excluded United Nations intervention. Australia accepted certain principles to be applied in the administration of Papua, but these too, required no change in current Australian policy and therefore were accepted willingly. On vital questions such as immigration, tariffs, and territorial integrity, Australia maintained every safeguard.[281]

Australia's trusteeship agreements were over New Guinea[282] and Nauru.[283] Under Articles 76(d) and 80 of the Charter, Australia had the right to control immigration and trade in these territories. Under Article 4 of the Agreement with respect to New Guinea, it had "the same powers of legislation, administration and jurisdiction in and over the Territory as if it were an integral part of Australia." Thus the position that had previously existed under the mandate was reiterated.[284]

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[281] Harper & Sissons, ante, pp.78-80.

[282] Approved by the General Assembly on 13 December, 1946.

[283] An agreement under Australian, New Zealand and British administration, approved by the General Assembly on November 1, 1947.

[284] Harper & Sissons, ante, pp.183-87. With respect to Nauru, Australia was sued by that country in the International Court of Justice for the devastation caused to the island by phosphate mining during the agreement. (The matter was settled prior to a hearing of the merits.) This action might have been impossible until 1975, as up until that time Australia's acceptance of the compulsory jurisdiction of the International Court of Justice under the "optional clause" in Article 36 of its Statute specifically excluded "disputes with regard to questions which by international law fall exclusively within the jurisdiction of the Commonwealth of Australia." The Australian view was that the omission from the trusteeship agreements of a provision for the reference of disputes arising under them to the Court would thereby exclude the Court's jurisdiction. (Harper & Sissons, 188-9).

Nevertheless, Australia from the time of the Paris Peace Conference in 1946 pushed a radical proposal to establish a world court of human rights and was a member of the United Nations Commission on Human Rights from its inception in 1947.[285] In contrast to Canada, Australia actively promoted human rights, but when considered overall, its attitude to them was ambivalent.

3.6.2 The Human Rights Provisions in the U.N. Charter: A Leap Forward By Delphic Utterances

The human rights provisions which were eventually incorporated into the Charter were stronger than those in the Dumbarton Oaks proposals. There were several reasons for this (in addition to the general feeling of revulsion at the Nazi atrocities already mentioned). Some countries, such as the United States and France, already had Bills of Rights in their constitutions. Therefore, even though they might not have wanted to give too much power in this area to the new

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[285] See Harper & Sissons, ante, Ch.9. In the 1949 general election in Australia the Liberal (i.e., Conservative) Party came to power, and held it until the election of the Whitlam government in 1972. A part of the reason for its election was the manipulation of hysteria over the discovery of a Russian spy ring in Australia: see Nicholas Whitlam & John Stubbs: Nest of Traitors: The Petrov Affair (1974, Jacaranda Press, Milton); Robert Manne: The Petrov Affair: Politics and Espionage (1987, Permagon Press, Sydney). The policy of the new government was that the United Nations should be relegated to a subordinate place in world politics in keeping with a strict reading of its Charter. (Harper & Sissons, Ch.10). Australian initiative, which had been significant in the first four years of the U.N. - Evatt had been the third President of the General Assembly - began to wane. With the effects of the Cold War, it remained desultory for two decades.

organisation, the notion of entrenched legal rights to protect individuals was not anathema to them.[286] Others, which had been parties to minority treaties or peace treaties which imposed on them human rights obligations, resented being singled out and wanted to universalise their undertakings.[287] Private organisations also played an important, active, role. These included pacifist, church, Jewish and educational groups,[288] particularly from the United States.[289] In addition, influential individuals, such as Professor Lauterpacht,[290] contributed to the debate.

In the course of the San Francisco conference,[291] three alignments emerged with

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[286] President Truman, addressing the San Francisco conference on June 26, 1945, said: "Under this document [the Charter] we have good reason to expect the framing of an international bill of rights, acceptable to all the nations involved. That Bill of Rights will be as much a part of international life as our own Bill of Rights is a part of our constitution." (U.N.C.I.O., I (1945), 717).

[287] See Louis Henkin: The Rights of Man Today (1979, Stevens & Sons, London), p.95.

[288] See Gaius Ezejiofor: Protection of Human Rights Under the Law (1964, Butterworths, London), pp.54-5.

[289] The U.S. State Department invited 42 private organisations to send representatives to the San Francisco conference to act as consultants to the U.S. delegation: see John Humphrey, "The U.N. Charter and the Universal Declaration of Human Rights", Chapter 3 in Evan Luard (ed): The International Protection of Human Rights, ante, p.40.

[290] He published The International Bill of the Rights of Man in 1945 (Columbia U.P., New York).

[291] For a description of the human rights clauses in the UN Charter and a discussion of how they came to be agreed upon, see Jacob Robinson: Human Rights and Fundamental Freedoms in the Charter of the United Nations (1946, Institute of Jewish Affairs, New York). A discussion of the effect of the human rights provisions of the Charter can also be found in the Report written by Hersch Lauterpacht of the 1948 Brussels Conference of the International Law Association entitled "Human Rights, the Charter of the United Nations and the International Bill of the Rights of Man" submitted to ECOSOC by the

respect to the issue of human rights. The first was of those countries strongly in favour of specific human rights obligations being laid down in the Charter. These were a group of Latin American countries (including Panama,[292] Brazil, Cuba, Chile and Mexico) as well as some Western States (including Australia and New Zealand) and third world countries (such as India). Second were those countries which favoured the promotion of human rights but were wary of an expansion of U.N. authority to lay down definite obligations in this regard: they did not want an international organisation interfering in the way they handled their affairs. These countries were led by the United States[293] and included Canada. The third group were socialist States, such as the U.S.S.R., Byelorussia, Czechoslovakia and the Ukraine, which were in general agreement with the approach of the second group, but placed more emphasis on the right to self-determination (which was strongly opposed by some western colonial powers such as Belgium).[294]

Commission on Human Rights: UN Doc. E/CN.4/89 (12 May, 1948).

[292] Panama even proposed the inclusion in the Charter itself of an International Bill of Rights: Documents of the United Nations Conference on International Organization (1945, U.N. Information Organization, New York) Vol. I, p.560, Vol.III, pp.265-9.

[293] In 1942, a draft Charter prepared by the U.S. State Department actually included a Bill of Rights. This was later dropped as agreement on implementation could not be reached: see "The United Nations and Human Rights", Eighteenth Report of the Commission to Study the Organization of Peace (1968, Oceana Publications, Dobbs Ferry), pp.46-7; Postwar Foreign Policy Preparation, 1939-1945 (1949, Department of State, Washington), pp.115-6, 472, 483-5. See also Mower, ante, Chapter 1, who writes "The United States thus contributed substantially to the creation of a basic inconsistency between the ambitious goals of the UN and its capacity to give effect to them" (at p.8).

[294] See Cassesse, ante, pp.170-171; and the Eighteenth Report of the Commission to Study the Organization of Peace, ante, pp.49-50.

The result, not surprisingly, was compromise.[295] Exacerbating the situation were the influences typical in all international negotiations: diverse interests where, even though there may be general support for rights, local problems preoccupy the participants;[296] different political beliefs;[297] and different religious beliefs. That compromise was encapsulated in the Report of Sub-Committee I/1/A to Committee I/1 which suggested that the U.N. be limited to the promotion and encouragement of respect for human rights, leaving their actual protection as "primarily the concern of each State" unless "such rights and freedoms were grievously outraged so as to create conditions which threaten peace or to obstruct the applications of provisions of the Charter" in which case they would "cease to be the sole concern of each State."[298]

The Charter contains eight specific references to human rights: in the Preamble, and in Articles 1(3), 13(1)(b), 55(c), 62(2), 68 and 76(c). There are also other

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[295] A summary of the competing suggestions can be found in the Eighteenth Report of the Commission to Study the Organization of Peace, ante, pp.50-56.

[296] For example, Arthur N. Holcombe: Human Rights in the Modern World (1948, N.Y.U. Press, New York) at p.8 indicates that countries as diverse as Iceland and Yemen might generally agree on the issue of economic rights, but the problems which preoccupy the people and its government will be very different in an Arctic fishing village when compared to those on a desert date farm.

[297] In the period of the formulation of the Universal Declaration, these were essentially the different ideologies of capitalism and communism; the third world had not at that time emerged as a major influence in the U.N.

[298] See Georg Schwarzenberger: Power Politics: A Study of World Society (1964, Stevens & Sons, London), pp.460-61.

references of a human rights nature, such as to self-determination,[299] economic rights[300] and sexual equality.[301] The width of coverage is therefore much wider than under the League of Nations Covenant or in the Dumbarton Oaks proposals, which had only one express reference to human rights[302] and a couple of references to economic and humanitarian problems.[303] And compared to the minorities treaties of a generation earlier, the scope of the Charter is not confined to a particular group of States nor is it specifically limited to certain categories of rights. It allowed for the beginning of a juridical "universalism".

But despite the expanded coverage and more apparent concern for human rights in the later document, the extent of the obligations with respect to human rights which it imposes needs examination. It is interesting to consider where human rights do not appear in the Charter: while they comprise a specific function of the General Assembly in Article 13, they are not one of the specific concerns of the Security Council (unless their breach threatens international peace and security within the

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[299] Articles 1(2), 55.

[300] Article 13, and Chapters IX, XI, XII.

[301] Article 8 provides that both men and women are eligible to participate equally in the principal and subsidiary organs of the organisation.

[302] In Chapter IX, Section A [illegible] the Economic and Social Council was given responsibility, [illegible] the General Assembly, to "promote respect for human rights and [illegible]damental freedoms".

[303] Chapter I(4), Chapter V(6),(7). The text of the Dumbarton Oaks Proposals is reproduced in L.M. Goodrich, E. Hambro & A.P. Simons: Charter of the United Nations - Commentary and Documents 3rd rev. ed. (1969, Columbia U.P., New York), pp.665-74.

meaning of Article 24, and even then they are not necessarily determinative[304]); they are not specifically sanctioned as a legitimate concern of regional arrangements in Chapter VIII; adherence to them is not a specific criterion of membership to the U.N. except to the extent that violations of them might indicate an unwillingness on the part of the applicant to carry out the "obligations" of the Charter under Article 4(2); and while they are mentioned as one of the Purposes of the U.N. in Article 1, they do not appear in Article 2 as a Principle upon which the U.N. will act when carrying out its functions, except to the extent that Article 2(2) obliges members to carry out in good faith their "obligations" under the Charter.

What "obligations" with respect to human rights does the Charter establish? The opening words of its Preamble ("We the peoples of the United Nations ...") are words of international solidarity addressed to people rather than governments,[305] but there is a distinction drawn in the Charter between the promotion and encouragement of respect for human rights on the one hand, and the protection of those rights on the other. The former is entrusted to the U.N.; the latter remains the prerogative of the member States.[306]

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[304] See Philip Alston, "The Security Council and Human Rights ...", ante.

[305] It is in stark contrast to the Covenant of the League of Nations which begins with the words: "The High Contracting Parties...".

[306] See Schwarzenberger, ante, p.462.

The second preambular paragraph of the Charter states that the peoples of the United Nations are determined "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women ..." This imposes no obligations but "reaffirms" a belief which had seemed dormant during totalitarian atrocities before and during the war. However, dignity, equality and fundamentality are stressed. Interestingly, the paragraph ends "... and of nations large and small." The equality of nations is placed on a par with equality of the sexes (and vice versa). Preambles, while not part of the substantive articles of a treaty are, nevertheless, a part of the treaty and its context, and can be taken into account when interpreting the treaty.[307] The Preamble does not define what "fundamental human rights" are. This, in fact, is done nowhere in the Charter.[308] But it was intended to be a statement of the motivating ideas behind the Charter[309] and can be used to interpret any of the articles in it.[310] They are not necessarily rules of law themselves[311] and may be too vague in any event to

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[307] Vienna Convention on the Law of Treaties, 1969, Art.31(2).

[308] Thus, despite the development of major treaties on the subject, the United Nations Charter does not specifically refer to slavery, although its provisions could be taken to condemn it by implication as it is totally incompatible with them.

[309] U.N.C.I.O. Documents, VI, 446-7

[310] The International Court of Justice held in the South-West Africa Case (Second Phase), I.C.J. Reps, 34, at paragraph 50 of the judgement, that humanitarian considerations can inspire rules of law, and thus the Preamble to the U.N. Charter constitutes the moral and political base of the juridical provisions which follow it. Those considerations of themselves, however, do not necessarily possess a juridical character.

[311] Ibid

be so.[312] But Schachter has argued that the Preamble has an open textured character which, while not creating precise rules of law generates general principles, articulates standards and contributes to a general theory.[313]

On balance, it is true to say that the value of the Preambular statements is more political and ideological than juridical.[314]

Of the substantive articles, Article 1(3) states that a Purpose of the United Nations is to "achieve international co-operation ... in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion." The wording is weak ("co-operation", "promoting", "encouraging respect") and, likewise, so are any resulting legal obligations on the members. The Article has been used, however, to justify action by the organisation itself.[315] This can be important with respect to the restriction provided in Article 2(7). The Article overall is concerned with international peace and co-operation. The placing of human rights in it implies that human rights are directly related to international peace, emphasising the transnational importance of

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[312] This was the contention of Hans Kelsen in The Law of the United Nations (Stevens & Sons, London), pp.9-12.

[313] Oscar Schachter, "The Relation of Law, Politics and Action in the United Nations", Academy of International Law Receuil des Cours, 1963-II, No.109, pp.169ff.

[314] See also Jean-Pierre Cot & Alain Pellet: La Charte des Nations Unies - Commentaire Article par Article (1985, Economica, Paris), pp.4-6.

[315] Certain Expenses of the United Nations Case, I.C.J. Reps, 1962

it and, perhaps, deliberately playing down the radical nature of these rights.[316]

Article 13(1)(b) provides that a function of the General Assembly is to "initiate studies and make recommendations for the purpose of ... assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion." It does little more than empower the General Assembly to adopt a co-ordinating function, leaving it to States to take the initiative. As paragraph 2 indicates[317] it is generally read in conjunction with Articles 55 and 56. Articles 62(2) and 68 are in a similar vein. Article 68 specifically enables the Economic and Social Council to set up commissions for the promotion of human rights. Article 62(2) goes a little further by empowering the Economic and Social Council to "make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all." The Council can only make recommendations, however.

Article 55(c) provides:

> With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations ... the United Nations shall promote ... universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.

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[316] See Henkin, ante, at p.94.

[317] "The further responsibilities, functions and powers of the General assembly with respect to matters mentioned in paragraph 1(b) above are set forth in Chapters IX and X."

This is the strongest provision in the Charter with respect to human rights. While the obligation is on the organisation, and it is to "promote" rather than require observance of human rights, Article 56 provides:

> All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.

In this way, the Commission of Human Rights formulated, and the General Assembly passed, the Universal Declaration of Human Rights. It is the juridical genesis of that document.

The wording of Article 55(c) is considerably stronger than the Dumbarton Oaks proposal which referred only to "promot[ing] respect for human rights and fundamental freedoms."[318] It was an Australian proposal to add "observance" as well as respect for human rights.[319] Article 56 was not represented by a comparable provision in the Dumbarton Oaks proposals. It was a Canadian suggestion that Article 55 be amended to add that "Members agree to co-operate fully with each other and with the United nations" to attain the purposes of the article. It was an Australian suggestion which expanded this version to almost its present wording which read: "All Members pledge themselves to take separate and joint action and to co-operate with the Organization and with each other to achieve

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[318] Chapter IX, Section A(1)

[319] U.N.C.I.O. Vol.III, p.546, Vol.X, pp.80, 270-71, 280, 306, 374, 376.

these purposes."[320] The provision which eventually became Article 56 was confined to international action and did not oblige members to take action apart from the U.N.[321] In addition, co-operation with the U.N. and its organs for the purposes of the respect for and observance of human rights does not necessarily mean that any recommendations of these bodies will, with nothing else, become binding. However, as Goodrich, Hambro and Simons point out,[322] it at least means that members are obliged to refrain from obstructionist tactics and to co-operate in good faith to achieve the goals set out in Article 55.

Despite their shortcomings, Articles 55 and 56 affirmed the principles of universality and of (a limited) non-discrimination which are basic to modern human rights. In addition, they make it clear, for the first time, that action with respect to the rights of individuals is no longer the sole preserve of States.[323]

Article 76(c) relates to the trusteeship system and provides that one of its basic objectives shall be "to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion ...".

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[320] See U.N.C.I.O. Docs., Vol.X, pp.99ff.

[321] Goodrich, Hambro & Simons, ante, regard this as a debateable point: see p.381. A detailed exposition of the course of the drafting of these articles can be found in the Supplementary Paper of Louis Sohn to the Eighteenth Report of the Commission to Study the Organization of Peace (ante) at pp.52-56.

[322] Ante, at p.381

[323] Cot & Pellet, ante, pp.865ff.

At best, it must be admitted, the legal obligations with respect to human rights under the Charter were nebulous, and intentionally so. The emphasis is on "promotion" rather than "protection" of human rights. There is no definition, or description, anywhere in the Charter of the term "human rights". The powers of the General Assembly were weak in this regard, particularly taking the effect of Article 2(7) into account. The powers of the Economic and Social Council are a little stronger, but still only recommendatory.[324] The Genocide Convention was adopted in 1948, and the Treaties of Peace with Italy, Romania, Bulgaria, Hungary, Finland and Austria all contained human rights provisions applicable to all persons under their jurisdiction. Human rights were therefore not totally relegated to a juridical backwater. Disputes as to the peace treaties were to be ultimately decided by an arbitral tribunal the decisions of which were definitive and binding, giving the impression of enforceable human rights, but the process for dispute settlement later proved to be unworkable.[325]

Apart from a few specialised treaties, the obligations on UN members were of co-operation with no specific obligation to take action outside the forum of the U.N. itself. The thrust of human rights was filtered into the Charter through the sieve of international peace and security. The Charter references to human rights are of

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[324] Lauterpacht says that: "The restraint exhibited by these provisions, studiously falling short of conferment of direct executive authority, is impressive in its consistency.", International Law and Human Rights, ante, p.147.

[325] Interpretation of Peace Treaties Case (Second Phase) Advisory Opinion, ICJ Reports 1950, p.221.

more impact in their totality rather than individually. It is only the specific requirements of Article 55, when read with Article 56 and Article 1(3) and the Preamble, that any lasting juridical impact can be discerned. An issue totally untouched by the Charter is, assuming States do have human rights obligations under the Charter as international persons, the extent to which they will apply to dealings with the states or provinces within a federation, the obligations between those states or provinces, and the obligations of the states or provinces to individuals. Although stronger than originally proposed, the human rights provisions in the UN Charter are, to put it charitably, vague. Thus, the elaboration of the meaning of the term "human rights" in the Universal Declaration of Human Rights was not only desirable: it was essential. Without it, the Charter provisions might have amounted to nothing.

3.7 The Universal Declaration of Human Rights: the "true dawn" of human rights.

> The Universal Declaration of Human Rights might well become the Magna Carta for all mankind.[326]
>
> The adoption of a mere Declaration which does not form part of an effective Bill of Rights must, in the condition of the world after the Second World War and having regard to the actual achievement of the Charter, be regarded as a retrogressive step in the historic process of the international protection of the rights of man.[327]

Part A of General Assembly resolution 217 (III) may be the most important juridical document of the twentieth century, representing the true dawn of human rights. Even its title is audacious: the Universal Declaration of Human Rights. Passed on December 10th, 1948, when humans had not even sent a sputnik, let alone a person, into outer space, we declared universally what the metes and bounds of "human rights" were. It was revolutionary, but not a revolution - it was achieved within the system. As much as literature, painting or music, the evolution of the notion of human rights has been a part of the struggle of men and women to articulate the human condition (as seen in the previous chapter). It has been, and still is, a process of description which has metamorphosed into prescription - at once an assertion, an ideal and an injunction. The painting of a human face onto

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[326] Mrs Eleanor Roosevelt, speaking to the General Assembly at the session which voted for the Declaration: 3 UNGAOR 962 (1948).

[327] Professor Hersch Lauterpacht, "Human Rights, the Charter of the United Nations and the International Bill of the Rights of Man", Report delivered to the International Bar Association Conference, Brussels, 1948; made available to the third session of the Commission on Human Rights as UN Doc E/CN.4/89 (12 May 1948).

rights, it is both a term and a conundrum; a category of law and an act of faith.

Passed as a United Nations General Assembly resolution, the Universal Declaration of Human Rights (UDHR) is not binding as a treaty,[328] but with it the United Nations nailed its colours to the mast. A product of its time, it nevertheless hit upon something truly regarded as fundamental and acceptable. It reads more like poetry than a legal document and nearly half a century after its formulation it still appears to be modern, whereas films from the same era appear to us to be dated. It has also spawned an explosion of elaborating documents. It has at the least helped to turn international law from being a purely statist normative system into one in which individuals can be the receptacles of rights, within a structure which is still statist. Yet, the fact that it was adopted at all is extraordinary, given the ideological conflict which began to engulf the United Nations almost from its inception.

As the Universal Declaration of Human Rights is not binding as a treaty, its origins and drafting history assume a particular importance and significance in fixing its influence, especially with respect to its legal character. Importantly, the reciprocal impact between international human rights and domestic legal systems can be seen to have been important from the beginning of its formulation.

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[328] Whether it might be binding now as customary international law is discussed in the next chapter.

As there is a considerable literature in this regard,[329] I do not intend to give a detailed exposition but will rather look at the drafting history in so far as it sheds light on the effect and meaning of the Declaration to indicate the type of rights human rights are in the international legal system, and particularly with respect to implementation (including domestic implementation). I include, where appropriate, an emphasis on the contributions of Australia and Canada.

3.7.1 The mix of law, process and ideology: a productive ambiguity

One commentator has maintained that "human rights did not just happen, they had to be invented".[330] As intimated above, the process of "invention" was itself subject to the intellectual, political and social currents of the time. Human rights were shaped by events (some portentous, some arcane) and evolved through them, this evolution being both Darwinian and Lamarkian in nature,[331] some aspects of

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[329] For example, Hersch Lauterpacht: International Law and Human Rights (1950, Stevens & Sons, London); Rene Cassin: La Declaration universelle et la mise en oeuvre des droits de l'homme (1951, Librarie du receuil Sirey, Paris); N. Robinson: The Universal Declaration of Human Rights: Its Origin, Significance, Application and Interpretation (1958, Institute of Jewish Affairs, New York); E. Schwelb: Human Rights and the International Community: The Roots and Growth of the Universal Declaration of Human Rights 1948-1963 (1964, Quadrangle, Chicago); A. Verdoodt: Naissance et signification de la declaration Universelle des droit de l'homme (1964, E. Warny, Louvain); H. Kanger: Human Rights in the U.N. Declaration (1984, Academia Upsaliensis, Uppsala). Asbjorn Eide et al (eds): The Universal Declaration of Human Rights: A Commentary (1992, Scandinavian U.P., Oslo). See also Humphrey: Millenium, Ch.XIV.

[330] R.J. Vincent: Human Rights and International Relations (1986, Cambridge U.P., Cambridge), p.19.

[331] Jean Baptiste de Lamarck proposed in 1809 the evolutionary theory that acquired characteristics can be transmitted to succeeding generations. As seen in the previous chapter, this can occur with

which may be random and others cumulative.

As already mentioned, the (somewhat limited and unquestionably vague) references to human rights in the U.N. Charter were the result of considerable lobbying at San Francisco rather than the result of initial enthusiasm for human rights. Similarly, according to John Humphrey (the Director of the Human Rights Division of the UN Secretariat for two decades almost from its inception) the first two Secretaries-General were not particularly supportive of human rights either,[332] and the UN human rights program was played down as "an exotic in an international organization".[333] Such were the formidable obstacles to the birth of a legal definition. Moreover, one particularly significant difference between the dynamics of the formulation of this instrument when compared to the motivations for and dynamics of the abolition of slavery in Britain and to the drafting histories of Bills of Rights nearly two centuries before was that the latter were drawn up by small groups of like-minded people (usually men). The Universal Declaration, on the other hand, was the result of the work of nearly every nation on earth, hundreds of representatives and dozens non-governmental organisations. As the

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cultural evolution.

[332] According to Humphrey, Trygve Lie "wasn't particularly interested in human rights": John Humphrey: Human Rights and the U.N.: A Great Adventure (1984, Transnational Publishers, New York), p.3 (hereafter referred to as Humphrey: Adventure). Later, Dag Hammarskjold wanted to liquidate the human rights program in the Secretariat and transfer it to UNESCO (This observation was made by Professor Humphrey in a taped interview which he generously gave the author in Halifax, Nova Scotia, in May, 1989; observations from it are hereafter referred to as "Humphrey: interview").

[333] Humphrey: Adventure p.5

pressure of numbers built, the beast that emerged could not easily be relegated to a quiet corner of international politics. Thus, despite the fact that the Soviet Union had its Gulag, the United States had racial problems, many European countries maintained colonies,[334] and Canada and Australia treated their indigenous minorities badly,[335] the movement for international human rights, after initial enthusiasm from selected individuals, NGO's and some of the South American countries,[336] began to build up a momentum of its own.

1946 was a year in which bombed cities, food shortages and refugees were of more immediate concern to the nations of the world than was articulating human rights.[337] The primacy of post-war reconstruction and of world peace revolving around economic and social problems can be seen in the speeches opening ECOSOC delivered by its President on May 25, 1946,[338] and by the Secretary-General.[339] However, the Commission on Human Rights was established by

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[334] See generally Thomas Buergenthal: International Human Rights Law (1988, West Publishing, St Paul).

[335] In fact, Australia's strong support for human rights (as opposed to the Canadian lack of enthusiasm) may have in part been based on a refusal to acknowledge the shabby treatment of the Aborigines.

[336] See J.F. Green: The U.N. and Human Rights (1956, Brookings Institute, Washington); Tom Farer, "The United Nations and Human Rights: More than a Whimper" in R.P. Claude & B.H. Weston (eds): Human Rights in the World Community (1989, U. Pennsylvania Press, Philadelphia), 194-208.

[337] In fact, a Special Committee on Refugees and Displaced Persons was set up and this issue was treated separately from the rest of "human rights".

[338] ECOSOC Official Records, 1st year, 2nd session, pp.2-6.

[339] Id., pp.6-10

ECOSOC at its first session pursuant to Article 68 of the Charter,[340] as well as a Sub-commission, later raised to the status of Commission, on the Status of Women.[341] According to Humphrey, the creation of a separate Commission with respect to women meant that the organic link between women's issues and the Commission on Human Rights (CHR) was severed.[342] At the same time, the CHR was empowered to establish a Sub-Commission on the Protection of Minorities and a Sub-Commission on the Prevention of Discrimination. In addition a Sub-Commission on the Freedom of Information and the Press was set up. The latter was initially a suggestion of President Roosevelt, while the former two were initiatives of the USSR. As the Cold War started, each of the great powers was playing its trump card.[343] The practical result was that the matters dealt with by these subsidiary bodies were diverted away from the primary concerns of CHR and hence away from specific consideration in the Universal Declaration.

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[340] ECOSOC Official Records, 1st session, pp.163-4; ECOSOC Res. E/20 (15 Feb., 1946); Res. 5(I) (16 Feb., 1946); Res. 9(II) (21 June, 1946).

[341] ECOSOC Official Records, 2nd session, p.402; UN Docs. E/56/Rev.1 and E/84.

[342] It was later severed from the Division of Human Rights in the secretariat as well. Humphrey: Adventure, pp.19-20. An important difference between a Sub-Commission and a Commission is that the latter are comprised of government representatives, whereas the former are comprised of individuals elected in a personal capacity.

[343] Humphrey: Adventure, p.20 The Sub-Commissions on discrimination and the protection of minorities were eventually amalgamated, even though their functions were essentially different (being equal treatment in the first and special treatment - e.g., with respect to languages - in the second). According to Humphrey, States were more interested in policies of assimilation than in cherishing separateness and, as a result, the Sub-Commission has concentrated on the aspect of discrimination. The Sub-Commission on Freedom of Information and the Press was abolished by ECOSOC in 1951. (Id., pp.20-22.

The issue of the formulation of a bill of rights being one of the first tasks of the CHR had been a consideration from the early days of the Preparatory Commission of the UN[344] and was taken up by ECOSOC from its inception,[345] making the preparation of an international bill of rights the first priority for the CHR.[346] The original proposal had been that the CHR would be composed of distinguished individuals elected to it in a private capacity. After an objection by the USSR, this was changed to a compromise situation where ECOSOC would select 18 States and those States would nominate individuals.[347] In effect they could be (and usually were) government representatives[348] thus creating significant potential problems for the formulation of such a sensitive and difficult instrument as the Cold War accelerated. Canada was a member of ECOSOC at this time, but was not on the CHR[349] ; Australia, not a member of ECOSOC, was on the CHR.[350]

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[344] Report of the Preparatory Commission of the UN, PC/20, 23 Dec. 1945 at p.36.

[345] Journal of the Economic and Social Council, 1st year, No.29, at p.521.

[346] UN Yearbook on Human Rights for 1946, p.36

[347] UN Yearbook on Human Rights, 1946 (UN Pubs. 1948.XIV.1), p.230; Report of the Nuclear Commission E/38/Rev.1 and ECOSOC decisions E/56/Rev.1, E/84.

[348] Humphrey: Adventure pp.17-18

[349] Canada was, however, on the Sub-Commission on Freedom of Information and the Press, the first Rapporteur of which was Mr George Ferguson, a Canadian.

[350] The other countries with representatives were Belgium, Byelorussia, Chile, China, Egypt, USA, France, India, Iran, Lebanon, Panama, Philippines, Great Britain, Ukraine, USSR, Uruguay and Yugoslavia. Mrs Eleanor Roosevelt (USA) was the "Chairman" (as she preferred to be called).

The first major issue was the type of document the bill was to become: some opted for a "declaration or manifesto" while others wanted a treaty. The issue was not only ideological but also reflected internal legal requirements.[351] The result (as usual) was a compromise: there would be a three-stage process consisting of, first, a non-binding declaration of rights to be adopted by the General Assembly; second, a convention creating legal obligations with respect to those rights; and third, measures of implementation. The term "International Bill of Rights" was given to the entirety of these proposed documents.[352] From the beginning not only definition, but promotion and observance of human rights was a primary issue, the 1946 Yearbook on Human Rights stating that there should be practical and effective measures of implementation binding on UN members "in accordance with [their] system of government".[353] Thus the issue of the reciprocal impact between international human rights and domestic legal systems was acknowledged from the beginning. In addition, the widest possible input from governments, non-governmental organisations and individuals was sought. The 1946 Yearbook contains texts, statements and studies of the constitutions and legal systems of 74

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[351] For example, in the US the Senate would have to ratify the treaty - the US therefore preferred a declaration which would also be likely to obtain consensus support than would specific treaty ratifications. The United Kingdom, on the other hand, preferred a treaty with specific rather than general obligations binding on the parties to it: E/CN.4/21, Annex B. See generally J. Green: The United Nations and Human Rights (1956) at 25.

[352] 6 U.N. ECOSOC, Supp. 1 (1948); E/600, paragraph 16.

[353] At p.227

countries (effectively, the whole world)[354] and ECOSOC decided that local human rights groups should be established to collaborate with governments with respect to the work of the CHR.[355] There were in addition representatives of the International Labour Organisation, UNESCO and the Preparatory Commission for the International Refugee Organisation present at CHR meetings, as well as consultants from many non-governmental organisations.[356] UNESCO itself set up a Committee on the Theoretical Bases of Human Rights in 1947 which circulated a series of questions on the intellectual and historical circumstances of the development of bills of rights to a select list of scholars around the world.[357]

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[354] In addition, in Doc E/CN.4/AC.1/3/Add.1 the proposed Declaration is considered Article by Article, drawing links between each of them and existing provisions in national constitutions. The document is 408 pages long!

[355] E/56/Rev.1, E/84 (paragraph 5). A similar approach with respect to the work of the Sub-Commission on the Status of Women (the first Vice-Chair of which was the Australian Mrs Jesse Street) was proposed by the USSR, France and Byelorussia, and supported by Australia, in which consultative status would be given to women's groups. The issue was deferred by referring it to a separate committee on consultative status: Report to ECOSOC of the first session of the Sub-Commission on the Status of Women, February 25, 1947, UN Doc E/281/Rev. 1, paragraph 16, footnote 1.

[356] These included the American Federation of Labour, the International Federation of Christian Trade Unions, the Inter-Parliamentary Union, the Catholic International Union for Social Service, the Commission of the Churches on International Affairs, the Consultative Council of Jewish Organisations, the International Abolitionist Federation, the International Committee of the Red Cross, the International Council of Women, the International Federation of Business and Professional People, the Women's International Democratic Federation, the World Federation of United Nations Associations and the World Jewish Congress: CHR Report of second session (December 2-17, 1947) - UN Doc E/600.

[357] This and related documents and commentary can be found in Human Rights - Comments and Interpretations, A Symposium edited by UNESCO with an Introduction by Jacques Maritain (1949, reprinted 1973, Greenwood Press, Westport). A commentary can be found in Richard McKeon, "Philopsophy and History in the Development of Human Rights", in Ethics and Social Justice, Howard E. Kiefer & Milton K. Munitz (eds), (1968, State U. of N.Y. Press, Albany), pp.300-322.

This was done to uncover common grounds of agreement on the intellectual bases of bills of rights and to explain possible sources of difference. Replies were received from well-known figures such as Mahatma Ghandi[358] and Aldous Huxley,[359] as well as from scholars in the Chinese,[360] Islamic[361] and Hindu[362] approaches to human rights. The UNESCO Committee concluded that agreement concerning the philosophic definition of basic terms (like "right") was not required, nor was doctrinal consensus. Concepts of a human rights nature had arisen through history as a result of divergent philosophical approaches and a "productive ambiguity" was acceptable.[363]

As already mentioned, this approach is in stark contrast with the formulation of the eighteenth century Bills of Rights which were written by small groups of educated

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[358] UNESCO Symposium, ante, p.18

[359] Id., pp.199-204

[360] Chung-Sho Lo, id., pp.186-90.

[361] Humayun Kabir, id., pp.191-194.

[362] S.V. Puntanbekar, id., pp.195-198.

[363] See particularly McKeon, ante, pp.303-7. The Committee finally organised a list of fifteen rights under three headings: the first group are specifications of the right to live and include the rights to life, to health, to work, to maintenance in involuntary unemployment, infancy old age and incapacity, and to property (all of which are to be found in the Universal Declaration). The second group are rights providing the intellectual foundations for living well and include the rights to education, to information, to freedom of thought and to self-expression (all of which apart from the right to information are to be found in the Universal Declaration). The third group relate to participation in society and protection from social and political injustice. They include the rights to justice, to political action, to the freedoms of speech, association, worship, assembly and the press, to citizenship, to rebellion and to share in progress. Only a few of the last group of rights eventually found their way into the Universal Declaration.

middle-class men, but it indicates more. The approach was consciously one of synthesis rather than invention and of consensus rather than being in the style of a maverick. The end result was revolutionary in the dictionary sense, but it was not the product of a revolution. And the difference shows.

Implementation and enforcement options at this time included an appendix to the UN Charter,[364] an amendment to the Charter itself as a result of which States could not renounce the Bill of Rights and remain UN members,[365] and an Australian proposal for an International Court of Human Rights.[366] Practice, however, fell short of aspiration in this regard. The CHR was in fact receiving many complaints from individuals but decided that it had no power to deal with them directly and requested the Secretariat to compile a confidential list of these communications (without specifying their contents or authors) which could be circulated to CHR members who could then, if they wished, consult the originals.[367] ECOSOC formally established a procedure based on this CHR view[368] whereby the CHR considered the list at a closed meeting, described by Humphrey as "a farce lasting a few minutes" with the whole procedure being "the

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[364] Id., p.227

[365] Humphrey: Adventure, p.26

[366] Ibid.

[367] Report of first session of CHR: UN Doc E/259, paragraphs 21-23.

[368] ECOSOC Res. 75(V)

most elaborate waste paper basket ever invented."[369] The protection of human rights was not in practice a priority.

In the meantime, in order to facilitate the discussion of the draft bill of rights, the CHR at its first session appointed a drafting committee of its Chairman (Mrs Roosevelt), its Vice-Chairman (Mr Chang of China) and its Rapporteur (Dr Malik of Lebanon) to prepare a first draft.[370] They were totally unsuccessful, largely due to the philosophical and jurisprudential differences between Chang (a positivist) and Malik (a natural lawyer).[371] In addition, the USSR objected to the composition of the drafting committee (it was too small and had no European representation)[372] - and also possibly because it felt it was being excluded from the early drafting process[373] - so Mrs Roosevelt, without reference to the CHR and "probably illegally" according to Humphrey[374] proposed a realistic solution to ECOSOC of an expanded drafting committee (which included Australia).[375] Its

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[369] Humphrey: Adventure, p.28. It can be contrasted with the Resol. 1503 procedure today.

[370] UN Doc E/259, paragraph 10(a).

[371] Humphrey: Adventure, p.29. This is also recounted by Humphrey in his article "The Dean Who Never Was" (1989) 34 McGill L.J. 191, esp. at 197.

[372] Humphrey: Adventure, p.29

[373] Humphrey, "The Universal Declaration of Human Rights: Its History, Impact and Juridical Character", Chapter 1 in Human Rights Thirty Years After the Universal Declaration (B.G. Ramcharan, ed) at 23. (Hereafter referred to as Humphrey: Declaration).

[374] Humphrey: Adventure, p.29

[375] Together with Chile, China, France, Lebanon, the USSR, Great Britain and the USA.

composition was of the representatives of the five permanent members of the Security Council together with Dr Malik of Lebanon (who had great personal prestige), Sen. Santa Cruz of Chile (which was at the time probably the most democratic country in South America) and Australia (which had gained a high reputation for championing human rights at the San Francisco conference through its Foreign Minister, Dr Evatt, who became the third President of the General Assembly - the same session at which the Universal Declaration was voted upon).[376] ECOSOC agreed and instructed the Secretariat to produce a "documented outline" of the bill.[377] In fact, the original drafting committee had sugg ted the Secretariat draw up a draft declaration and it was this, rather than a mere outline, which was presented for consideration.[378] It was prepared by the Director of the Human Rights Division, Professor John Humphrey, and was arguably the first draft ' f the Declaration, an honour often attributed to Rene Cassin.[379]

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[376] These observations are taken from Humphrey: Interview. The Australian representative was Col. Hodgson. Evatt himself played no overt role in the CHR, although he may have been instrumental in instructing Hodgson. This author could in fact find very few references to Dr Evatt in the Dag Hammarskjold Library at UN Headquarters, reflecting the fact that, after San Francisco, his personal role with respect to the development of human rights was at best covert and apparently minimal.

[377] ECOSOC Resol. 46(IV), March 28, 194/

[378] Drafting Committee of CHR, Report, Doc. E/CN.4/21 (1 July 1947), Annex A; E/CN.4/AC.1/3.

[379] See Humphrey: Declaration, p.23, particularly the material in footnote 7; A.J. Hobbins, "Rene Cassin and the Daughter of Time: The First Draft of the Universal Declaration of Human Rights" (1989) Fontanus II, 7-26. Other discussion of the background to the drafting of the Declaration can be found in Kamleshwar Das, "Some Observations Relating to the International Bill of Human Rights" (1984) 19 Indian Yearbook of International Law 1; Nehemiah Robinson: The Universal

It is instructive to consider how Humphrey compiled the draft.[380] There was a great deal of input from the sources already mentioned, as well as several draft declarations which the Secretariat had received from interested individuals ranging from H.G. Wells[381] to Professor Lauterpacht.[382] Needing time to sift through this mass of material, Humphrey took a week off to create a synthesis of the ideas and suggestions. He particularly relied on the document compiled by the American Law Institute[383] in 1944 (the text of which had been sponsored by Panama at San

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Declaration of Human Rights: Its Origin, Significance, Applications and Interpretation (1958, World Jewish Congress, New York); M. McDougal, H. Lasswell & L. Chen: Human Rights and World Public Order (1980, Yale U.P., New Haven).

[380] The information that follows is taken from Humphrey: Interview, unless otherwise indicated.

[381] Wells' "Declaration of the Rights of Man" (1940) read in part:

> Since man comes into this world through no fault of his own, since he is manifestly a joint inheritor of the accumulations of the past, and since those accumulations are more than sufficient to justify the claims that are here made for him it follows:
> (1) That every man without distinction of race, of colour or of professed belief or opinions, is entitled to the nourishment, covering, medical care and attention need to realize his full possibilities of physical and mental development and to keep him in a state of health from his birth to death.
> E/CN.4/Sub.2/7, p.9

It is interesting to note that, because of his enormous prestige at the time, Wells' Declaration was translated into ten languages and dropped by microfilm to the Resistance in occupied Europe during the war. It was also distributed worldwide to 300 editors in forty-eight countries (Joseph Wronka: Human Rights and Social Policy in the 21st Century (1992, University Press of America, Lanham).

[382] An International Bill of the Rights of Man (1944): id., p.10. It can also be found in E/CN.4/89 (1948), pp.36-42.

[383] This document was drafted by a committee of experts set up by the American Law Institute and represented more an international than a purely American viewpoint. The committee consisted of P.E. Corbett (of Yale University), C. Wilfred Jenks (legal adviser to the I.L.O.), Dr Rajchman (a member of the Polish delegation in Washington), Dr Hu Shih (from China), Sen. del Vayo (from Spain), Quincy Wright (University of Chicago), Henri Laugier (Assistant Secretary-General

Francisco, and later at the General Assembly).[384] He decided what to put in, and what to leave out and remained all his life pleased that he left economic, social and cultural rights in the draft. It was a conscious synthesis and there was no overt philosophical underpinning to it.[385] Humphrey himself has written:

> With two exceptions all the texts on which the Director worked came from English-speaking sources and all of them from the democratic West; but the documentation which the Secretariat later brought together in support of his draft included texts extracted from the constitutions of many countries.[386]

In the Humphrey draft,[387] there are four enunciated principles in the Preamble: human rights is the foundation for peace; man has rights but also owes duties to society; man is a citizen of both his State and of the world; there can be no freedom unless war is abolished. Only the first of these made it into the Preamble

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of the UN) and Sen. Alfaro (chairman of the Panamanian delegation to the General Assembly).

[384] Humphrey: Declaration, pp.23-4, footnote 8.

[385] At the interview he told the author: "I wasn't concerned about that at all." When asked whether there might be any covert philosophical underpinning, he admitted to being a social democrat but insisted that the philosophies would have to be found within the documents that he used. Considering that there were so many of these, it is safe to contend that the great "moral" document of international law was, at least in its original draft, philosophically neutral. A discussion of Professor Humphrey's political views can be found in R. St. J. Macdonald, "Leadership in Law: John P. Humphrey and the Development of the International Law of Human Rights" (1991) 29 Canadian Yearbook of International Law 3 at 12ff.

[386] Humphrey: Declaration, p.24. See also Albert Verdoodt who refers to a pan-juridical approach being adopted: "Influence des structures ethniques et linguistiques des pays membres des Nations Unies sur la redaction de la Declaration Universelle des Droits de l'Homme", in Rene Cassin: Amicorum Discipulorumque Liber I: Problemes de protection internationale des droits de l'homme (1969, Editions A. Pedone, Paris), 404-16.

[387] This is Annex A to UN Doc E/CN.4/21 and can also be found in the UN Yearbook on Human Rights for 1947 pp.484-86.

of the Universal Declaration. There was also in the Humphrey draft a specific reference to the exercise of rights being limited by the rights of others and by the requirements of the State and the UN (Art.2). This eventually emerged, in Art. 29 of the Universal Declaration, as "everyone has duties to the community" and rights "shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society." The differences between these provisions are typical of the differences between the first draft and the finished product: the specific reference to the UN is removed and the exercise of rights being limited by the rights and freedoms of others is as the law determines it (i.e., as determined by the State rather than by an appeal to individualism). Generally, however, there is a remarkable similarity in the areas chosen to describe human rights in the two documents.[388] Even the proportion of economic and social rights to civil and political rights is approximately the same (1:4). The general differences between the two documents are that the Humphrey draft has somewhat more emphasis on duties and has more qualifications within each rule, as well as being the more detailed document.[389] Specific differences of content are, in the Humphrey draft, a "duty towards society to present information and news in a fair and impartial

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[388] Articles 3-17, 19-23, 26-27, 30-45 in the Humphrey draft (which has a total of 48 Articles) cover the same ground as do the Articles in the Universal Declaration.

[389] It was written shortly before the CHR decided to compile both a declaration and a covenant instead of a compendious document.

manner" (Art. 18); a specific statement that "there shall be equal opportunity of access to all vocations and professions not having a public character (Art. 24); a provision that "everything that is not prohibited by law is permitted" (Art. 25); a specific right "to resist oppression and tyranny" (Art. 29); a duty as well as a right to work (Art. 37); the rights of minorities being specifically included (Art.46); and various implementation measures. The latter included the right of everyone to petition his government or the United Nations for redress of grievances (Art.28); a specific duty on all UN members to "respect and protect the rights enunciated in this Bill of Rights" and to co-operate with other States to do so (Art. 47); and Article 48 which provided:

> The provisions of this International Bill of Rights shall be deemed fundamental principles of international law and of the national law of each of the Member States of the United Nations. Their observance is therefore a matter of international concern and it shall be within the jurisdiction of the United Nations to discuss any violation thereof.

None of the latter provisions made it into the finished product.

The Humphrey draft was discussed in the drafting committee along with a draft provided by the United Kingdom.[390] A principal difference between the two was that the latter contained no provisions with respect to economic, social and cultural rights. The reason for this was explained in an accompanying draft for a resolution of the General Assembly which stated[391] that these were the function of ECOSOC

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[390] E/CN.4/21, Annex B.

[391] At paragraph III(2)

together with the specialised agencies. In addition, Article V of the draft resolution provided that ECOSOC would be requested to reconsider the terms of reference of the CHR. Economic and social rights were to be directed away from the CHR.[392]

The UK draft also contained a specific derogation clause to operate "in time of war or other national emergency"[393] which the Humphrey draft did not contain. The rights espoused, which were contained in the articles in Part II headed "Definition of Human Rights and Fundamental Freedoms" (and thus presumably excluding others) were: the right to life (Art. 8); a prohibition on slavery (Art. 9); the right to liberty (Art. 10); the right to leave a country (Art. 11); non-retrospectivity of criminal offences (Art. 12): the right to hold religious and other beliefs (Art. 13); freedom of expression (Art. 14); the right to peaceful assembly (Art.15); and freedom of association (Art. 16). Even within these civil and political rights there were no specific references to torture, freedom of movement within a country, the right to legal personality or specific equality in the law, the right to marry, the right to a nationality, or equal opportunity. However, while the range of rights was constricted, the possibilities for implementation were surprisingly broad. (Except in optimum circumstances, the issues of breadth of coverage and effective implementation exist and operate inversely to each other). In the first place, Article

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[392] According to Humphrey, the input received from the International Labour Organisation with respect to economic, social and cultural rights was to the effect that these should be kept broad rather than be specific. He considers that at least part of the motivation for this was a concern of encroachment by the UN into their area: Humphrey: Adventure, p.39.

[393] Art. 4

1 of the UK draft stated that human rights are "founded on the general principles of law recognised by civilized nations." In an explanatory note to the Article, this was meant to be a specific reference to Article 38(1)(c) of the ICJ Statute. The significance of this would be that the ICJ could refer to these rights in cases brought to it. The limitation, however, is that the ICJ refers to general principles only when there are no relevant treaties or customary law to apply, or to support its conclusions with respect to these.[394] It means that, in effect, general principles of law are subordinate to State action. In addition, it must be questioned whether these rights are in fact general legal principles of the generality of civilized nations (as is meant in Art.38(1)(c)) as opposed to general principles of the English legal system.

Article 2 of the UK draft then proceeds to stipulate that it is an obligation under international law for every State to ensure that human rights (as defined) are secured domestically to everyone (nationals and foreigners) by laws which provide effective remedies and are enforced by an independent judiciary. This is a remarkable statement in the light of the present thesis. It is also significant, however, that there is no mention of constitutional entrenchment - the British still do not have a written constitution so the bastion of individual rights after parliament itself remains the judiciary, but within the constrictions mentioned in

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[394] The drafting history of Art.38(1)(c) indicates that it was intended to enable the ICJ to avoid having to declare a non liquet, a situation which applies in many European courts. See generally H. Waldock, "General Course on Public International Law" 106 Haque Receuil 54 (1962 - II).

the previous chapter. This means that, despite some interpretations of Article 38(1)(c) to the effect that it represents the importation of natural law principles,[395] the domestic implementational matrix means that this cannot occur in the British system as parliament has an overriding authority thus depriving the "natural laws" of their paramount status.

Article 3 of the UK draft would have allowed the General Assembly to demand an explanation from any party to the Bill[396] of the manner in which that State's laws give effect to the Bill. Persistent violation of the Bill could result in expulsion from the UN (Art. 7). There was no provision for individual petitions to international bodies. This would mean, in effect, that the State was very much in control, even though the requirement of compliance by domestic laws was a significant advance. It represented at least a recognition that governments themselves might be part of the problem as well as part of the solution and, more importantly, that the first level of responsibility for real implementation is domestic rather than international. As such, it was objected to by the Soviet representative.[397]

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[395] For example, Verdross, Receuil des Cours (1935, II), pp.204-6.

[396] It was to be more in the form of a treaty obligation (Art. 27) than an instrument of consensus.

[397] Mr. Koretsky, a future judge of the ICJ, complained that there would be undue interference with the internal systems of government. The explanation of this can be found, at least in part, in the Soviet (Marxist) approach to the relationship between the individual and the State discussed in the previous chapter. Ironically, the tables turned later when, as the US turned against the human rights Covenants for reasons of internal politics and the UK became concerned about the principle of self-determination which was being written into them, the USSR scored Cold War points by becoming the champion of the Covenants. See the discussion in

By the time the various drafts were being considered by the drafting committee, the decision had been taken to produce a tripartite Bill. Thus, it was felt, a decision had to be made with respect to what parts of the Humphrey draft should go into the Declaration, and which should go into the Covenant.[398] Humphrey considers that this was a "stupid" approach as both documents should overlap rather than contain separate elements.[399] The task of doing this fell to the French representative, Rene Cassin. The result, according to Humphrey[400] and others,[401] was not a first draft but a second draft based on the Humphrey original.[402]

The Cassin draft contains a longer Preamble than did the Humphrey version, but still relied essentially on the notion of the connexion between human rights and world peace. The substance is then divided into eight Chapters. Chapter 1 (Arts.1-6) dealt with "General Principles". Like the Humphrey draft, it referred to individual duties as well as rights, and to the limitation of one person's rights by the rights of others. A significant difference, however, is Article 1 which provided:

Humphrey: Adventure, pp.40-41.

[398] At this stage, it was envisaged that there would be a single Covenant.

[399] Humphrey: Interview.

[400] Humphrey: Interview.

[401] A.J. Hobbins, "Rene Cassin and the Daughter of Time ...", ante.

[402] It is reproduced in E/CN.4/21, Annex D. According to Humphrey: Millenium (at p.149) it was written by Cassin "over the week-end" with the help of Emile Giraud.

> All men, being members of one family are free, possess equal dignity and rights, and shall regard each other as brothers.

It is similar to the first Article which now appears in the Declaration.[403] It introduces a philosophical notion to justify the existence and declaration of these rights, which Humphrey had specifically avoided.[404] Other than this, the contents of the Cassin draft exhibit few significant differences to the contents of the Humphrey draft, other than a re-organisation of them.[405] The Cassin draft, because of the drafting committee decisions, does not contain special provisions with respect to implementation. However, its last two Articles (somewhat

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[403] All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

[404] The further drafting history and meaning of this important Article is discussed below.

[405] Chapter 2 (Art.7) deals with the right to life and prohibits torture; Chapter 3 (Arts. 8-14) deals with rights of "personal freedom" including the right to liberty, privacy, freedom from arbitrary arrest, the presumption of innocence, freedom of movement and he prohibition of slavery; Chapter 4 (Art. 15-20) deals with "legal status", including the right to a legal personality, the right to marry, equal access to private occupations and professions, the right to own property, and access to independent and impartial tribunals; Chapter 5 (Arts. 21-26) deals with "public freedoms", including the freedoms of opinion, expression, assembly and association, retaining the Humphrey right to resist oppression and tyranny; Chapter 6 (Arts. 27-31) deals with "political rights", including the rights to vote, equal access to public offices, but goes further than the Humphrey draft in declaring the necessity of a public force to protect rights and of a duty to perform national service for this end (like the French Declaration) and stressing the need for accountability and liability of public authorities; Chapter 7 (Arts. 32-34) deals with "nationality and protection of aliens" and provides for the right to a nationality and the right of every State to grant asylum; and Chapter 8 (Arts. 35-46) deals with "social, economic and cultural rights", including the right and duty to work, the right to protect professional interests, rights to health care, social security, education, rest and leisure, and the rights of minorities. The economic and social right are in fact slightly more expansive than the Humphrey draft.

incongruously placed in Chapter 8 which specifically deals with economic, social and cultural rights, but obviously meant to apply to the whole Declaration) provide, in Article 45, that the provisions are fundamental principles of international law, an integral part of the municipal law of UN members and are matters of international concern to the UN. This, with minor changes of wording, is exactly what Art. 48 of the Humphrey draft provided. Article 46 of the Cassin version finally provided that each UN member "has the duty to take such legal measures ... as may be necessary within the scope of its jurisdiction to apply and ensure respect for the rights and freedoms proclaimed in the present Bill." This is similar to Humphrey's Article 47, but in fact goes further by stressing legal measures.

The overlap between the two drafts is therefore so considerable that Humphrey's assertion that he was the author of the first draft of the Universal Declaration must be regarded as correct.[406] This is by no means to denigrate the work of Cassin. What it indicates, for the purposes of the present thesis, is that two of the most eminent international lawyers both produced drafts of the Declaration which stressed and recognised the direct impact of international human rights on domestic legal systems. The process, from then onwards, was one of diluting this impact.

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[406] It is also the conclusion arrived at after considerable investigation of the travaux preparatoires - including hand-written notes - by A.J. Hobbins in "Rene Cassin and the Daughter of Time", ante.

The CHR set up three working groups, one to act on each of the three aspects of the Bill of Rights (ie, the Declaration, the Covenant(s) and implementation), the recommendations of which were then discussed by the Commission as a whole. Suggestions with respect to the Preamble, particularly those of the United Kingdom and the United States, avoided references to the direct impact on domestic law and stressed international co-operation, co-ordinated by the UN and its agencies, as the necessary path along which to proceed.[407] Suggestions with respect to the substance of the Declaration reflected the legal and social concerns of the members. For example, strongly Catholic countries like Chile proposed that the right to life explicitly refer to unborn children;[408] the reference in the Humphrey draft to the duty to present information and news in a fair and impartial manner,[409] to which the Cassin draft had added a specific reference to authors, publishers and printers,[410] was objected to by the United States which wanted a free press (which was its first constitutional Amendment) where bad press was believed to be balanced by good.[411]

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[407] The drafting suggestions can be found in E/CN.4/21, Annex E.

[408] E/CN.4/21, Annex F.

[409] Art. 18

[410] Art. 23

[411] Humphrey recounts a part of the debate in this regard where one US delegate (Professor Chaffee) suggested that not only should there be a right of freedom of expression and publication, but that there should be equally a right to freedom of opinion, referring to instances in the United States where people had been obliged to divulge their opinions with respect to Communism to Congressional Committees. Professor Chaffee was dropped as a US delegate the following year: Humphrey: Adventure, pp.51-2.

Implementation was a major problem with respect to achieving consensus. The Secretariat was asked to prepare a Memorandum on implementation, which it did.[412] The questions of the direct applicability of the Bill within States without further domestic implementation, and the Bill becoming a part of the fundamental law of States accepting it, were raised, together with the issue of the possibility of derogations to the Declaration. The Working Group on Implementation considered each of these and thought, first, that there should be no reference to derogations in the Declaration or the Covenant as this would decrease their authority and, particularly in the case of the Covenant, "the fact should be stressed that it was an international obligation, the violation of which was obviously forbidden by international law."[413] While such a view does not establish human rights in a category similar to natural law or jus cogens, it does point to a notion of indivisibility. The Working Group also thought that it was unnecessary to include a specific reference to human rights being a matter of international concern because, as States would have to agree in the first place, this would in itself ipso facto take those matters outside the proper realm of Article 2(7) of the UN Charter.[414] In so far as human rights becoming a part of the fundamental law of the States accepting them, the Working Group drew a strict distinction between the Declaration and the Covenant. It ruled out any question of implementation of the Declaration in this way. The intention was that the Declaration was not to be regarded as legally

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[412] E/CN.4/21, Annex H

[413] E/CN.4/53; Yearbook on Human Rights for 1947, pp.552ff.

[414] Id., Yearbook pp.552-3.

binding.[415] With respect to the Covenant, the Working Group conceded that there can be constitutional difficulties in human rights becoming directly applicable domestically and also with the amendment of municipal laws to comply with such obligations. If the former is possible, it should apply. If not, transformation has to occur. The Working Group adopted, with a slight amendment, an Australian proposal[416] that the provisions of the Convention "must be a part of the laws"[417] of States ratifying it. States, therefore, would have to take action to ensure that their national laws cover the contents of the "Bill" [i.e., the Covenant], so that no executive or legislative organs or government can over-ride them, and that the judicial organs alone shall be the means whereby the rights of the citizens of the States set out in the Bill are protected. This clearly envisages that the main avenue of recourse for individuals is to be the municipal legal system.

In an earlier Memorandum,[418] the Secretariat had suggested that five successive stages be followed with respect to enforcement:

(a) The establishment of the right of the General Assembly and other UN organs to discuss and make recommendations in regard to violations of the Bill;

(b) The establishment of the right of individual petition to the UN;

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[415] Id., Yearbook, p.553.

[416] E/CN.4/AC.4/SR.2

[417] The Australian original had said: "fundamental law".

[418] E/CN.4/W.4, pp.13, 14.

(c) The establishment of a special organ of the UN to supervise and enforce human rights motu proprio;

(d) This organ also to have jurisdiction to consider cases of suspension of the Bill;

(e) The establishment of local agencies of the UN to supervise and enforce human rights.

A reference was also made to the possibility of the Security Council being given a role within Chapter VII of the Charter. These suggestions in effect avoided entirely the hard issue of direct domestic application. The Working Group considered each of these as well. With respect to Suggestion (a), it was pointed out that these powers were already vested by the UN Charter in the General Assembly and ECOSOC.[419] There was no suggestion of the extension of any powers that did not already exist. With respect to Suggestion (b), the Working Group felt that there should be a right of individual petition and that a provision along these lines should be included in the Convention.[420] The United States disagreed, arguing that the UN was not at that stage in any position to take effective action in this way.[421] The Secretariat was to be asked to draw up a scheme of detailed regulations[422] and the general scheme was to be the establishment of a Standing Committee by

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[419] Yearbook on Human Rights for 1947, pp.554-5.

[420] Id., pp.555-6

[421] Ibid.

[422] This was done by 1948: E/CN.4/93

ECOSOC which would, in private session, receive information and petitions and attempt to remedy violations through negotiation.[423] Suggestions (c), (d) and (e) were all regarded as premature.[424]

Australia suggested the establishment of an International Court of Human Rights in a draft resolution presented at the first session of the CHR.[425] This court would have original and appellate jurisdiction, the latter extending to "appeals from all jurisdictions of the courts of the States bound by the obligations contained in the Declaration of Human Rights".[426] It would be open to individuals and States would be expressly bound to comply with its judgements.[427] In addition, the same draft resolution provided in paragraph 7:

> Each of such States [accepting the Declaration] undertakes that the provisions contained in the declaration shall be recognized as fundamental laws and that no law, regulation or official action shall conflict or interfere with those provisions, nor shall any law, regulations or official action prevail over them.

This would have amounted to strong measures of implementation indeed. However,

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[423] Yearbook, ante, pp.557-8

[424] Id., pp.558-9

[425] E/CN.4/15

[426] Paragraph 3

[427] Paragraphs 4, 5. These suggestions were strongly opposed by Rene Cassin of France who considered that allowing individuals to appear in an international court against their own State would be "an ill-prepared revolution in the law, an upheaval which would be all the more dangerous, if ill-prepared, on ount of the great interests involved." (Statement to the third ssion of the CHR at the meeting on 15 June 1948: E/CN.4/147, p.8). e suggested instead a United Nations Attorney-General to control such proceedings (Id., p.7).

by the fifteenth meeting of the CHR, as decisions were being made for the tripartite structure, Col. Hodgson of Australia suggested that the Bill should not be a recommendation but a multilateral convention which would be legally binding on members. In this case: "these States should incorporate the principles laid down in this Bill in their own legislation."[428] In other words, as the aspiration for effective implementation began to fade, traditional methods of implementation of treaty obligations began to be resorted to.[429]

Proposals for domestic implementation and enforcement in the UK draft declaration, the Humphrey draft and the Cassin draft, have been described above. These were also taken into account in the Secretariat Memorandum which concluded:

> The consensus of opinion of the Drafting Committee was that the following three articles should be referred to the Commission on Human Rights for consideration in connexion with the problem of implementation:
>
> Article A
> There is no protection of human rights where the authors of tyrannical or arbitrary acts or their accomplices are not punished and where there is no provision for the liability of public authorities or their agents.
>
> Article B
> The provisions of this International Bill of Rights shall be deemed fundamental principles of international law and shall become part of the national law of each of the Member States of the United Nations. Their observance is therefore a matter of international concern and it shall be

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[428] E/CN.4/SR.15, p.2.

[429] Australia did, however, maintain its support for an International Court of Human Rights and suggested that provision for one be incorporated in the Covenant, submitting to the second session of the Drafting Committee a draft statute: E/CN.4/AC.1/27.

within the jurisdiction of the United Nations to discuss any violation thereof.

Article C
It is the duty of each Member State to take, within its jurisdiction, all measures and legal dispositions for the enactment and effective respect of the rights and freedoms proclaimed in this Declaration. The State shall, when necessary, co-operate with other States to that end.[430]

Proposed Article A was, despite its reference to governmental liability, only declaratory in nature. Proposed Article B provided for direct domestic legal application at the highest level, together with international monitoring. Proposed Article C left it to the States to implement the declaration domestically, with no specified time-frame and making an express concession to internal problems of jurisdiction. None of these proposals was eventually adopted in the Universal Declaration, but a version of Article C can be found in Article 2 of the International Covenant on Civil and Political Rights. The report of the Working Group on Implementation[431] was received by the CHR which discussed it at its thirty-eighth and thirty-ninth plenary meetings[432] but it was decided to take no action on it other than to send copies of it to States and to ECOSOC for consideration and comment.

Domestic legal fundamentality for human rights was an early casualty of the developmental process. The obligations to produce or amend "ordinary" laws in

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[430] E/CN.4/21, Annex H, paragraph 15.

[431] E/CN.4/53

[432] E/CN.4/SR.38 & 39

this regard were vague, although suggestions to this effect had been made by eminent persons.[433] The US and UK drafts mentioned above relied more on recourse at international level than in the domestic sphere. The USSR was openly antagonistic to the whole notion of articulations of domestic implementation, its representative at the CHR plenary session stating that the implementation measures proposed by the Working Group were "contrary to the principles of the sovereignty and independence of States, that they opened the possibility of intervention in the internal affairs of States, and that they therefore were not in conformity with the principles of the United Nations and were inacceptable [sic]."[434] There were not only real legal hurdles to be overcome; from the outset there was a flagrant lack of political will by the major powers on both sides of the Cold War divide.

By the end of its second session in 1947 the CHR had reduced the Cassin draft of the Declaration to 33 articles (from 46) but had not substantially altered the general categories considered to represent human rights.[435] The division into chapters had

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[433] For example, Hersch Lauterpacht: An International Bill of the Rights of Man (1945, Columbia U.P., New York) devoted an entire chapter (Ch. 11) to this issue and proposed international judicial review in which domestic laws inconsistent with the Bill could be struck down (particularly at pp.173-77).

[434] Yearbook, 1947, ante, p 564; the USSR statement at the third session of the CHR can be found in UN Doc E/CN.4/154 (24 June 1948). The Soviet Union was not opposed to implementation as such, but to implementation through international agencies rather than as a purely domestic obligation on States. It regarded this as an interference in matters of domestic jurisdiction (E/CN.4/SR 90, p.6) and emphatically opposed the right of individual petition to international organs (E/CN.4/SR 105, p.10).

[435] See Yearbook on Human Rights for 1947, ante, Annex XIX, pp.541-3; CHR Second Session Report, UN Doc. E/600, Annex A.

been removed and the specific implementation articles had been removed, although Article 32 had adopted a somewhat compromise stance by providing: "All laws in any State shall be in conformity with the purposes and principles of the United Nations as embodied in the Charter, in so far as they deal with human rights." In addition, Cassin's first article[436] had been altered to read:

> All men are born free and equal in dignity and rights. They are endowed by nature with reason and conscience, and should act towards one another like brothers.

The notion of inalienability was beginning to be articulated, and a natural law approach - at least to explain the bases of these rights - was starting to edge its way into the document. The Commission on the Status of Women was responsible during the third session for suggesting the removal of sexism from this article: "men" was changed to "people" and the phrase "like brothers" was altered to read "in the spirit of brotherhood."[437] The CHR spent another (third) session on it[438] and was obliged to send its final draft to ECOSOC, which changed nothing[439] and simply sent it straight on to the General Assembly where it was dealt with in

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[436] "All men, being members of one family are free, possess equal dignity and rights, and shall regard each other as brothers."

[437] UN Doc E/615, p.12

[438] The Report can be found in UN Doc E/800.

[439] According to Humphrey, the reason for this apparent lack of interest was that the body was busy and had no well-defined role to play in human rights. Its members were represented by economists or fairly junior officials and it in effect sat between a commission of experts (the CHR) on the one hand and the General Assembly (which represented the entirety of the UN membership) on the other. It had neither the expertise nor the representation to deal with the draft declaration when it had other pressing matters to attend to: Humphrey: Adventure, p.55.

detail and at length by the Third Committee over 81 meetings.[440] Here the atmosphere was politically charged because of the Cold War. As Professor Lauterpacht contemporaneously remarked:

> The legal, political and philosophical complexities of a Bill of Rights within the State make an instrument of that nature one of exceptional difficulty. In the international sphere these difficulties are multiplied manifold. Their solution requires a combination of courageous and creative statesmanship with the art of constitutional draftsmanship. An International Bill of Rights must be one of the outstanding legal documents of all time.[441]

From the beginning of the Third Committee discussions, Mrs Roosevelt, who was the US representative on that Committee, made it clear that the draft declaration was not a treaty and did not impose legal obligations: it was rather "a statement of basic principles of inalienable human rights, setting up a common standard of achievement for all peoples and all nations",[442] even though it would have considerable weight. She noted her own country's concerns with some of the Articles[443] but called upon the Committee to adopt it without waste of time. The admission from the beginning, therefore, was that the document was potentially flawed, and an indication of general standards for future achievement rather than of

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[440] A/C.3/SR.88-178

[441] H. Lauterpacht, "Human Rights, the Charter of the United Nations and the International Bill of the Rights of Man - Preliminary Report", paper delivered to the International Law Association Brussels Conference, 1948. Made available to the third session of the CHR as UN Doc. E/CN.4/89, 12 May, 1948: at pp.28-29.

[442] A/C.3/SR 89, p.32

[443] For example, the US thought that the article on marriage should not be included at all, that the article on equal access to public employment was too broadly expressed, and that the inclusion of economic, social and cultural rights should not imply the need for direct government action: A/C.3/SR 89, p.33.

current legal obligations, but that it was, despite these shortcomings, so important as to require speedy adoption.

Other delegations, including Canada, expressed similar concerns.[444] Australia advised the Committee to "leave well enough alone."[445] In a prescient statement, the New Zealand delegation expressed concern that, if the declaration were accepted without the covenant, undue importance might be ascribed to it, using it for the purpose of defining the meaning of the human rights references in the UN Charter which was never intended by the CHR.[446] As it took almost two more decades to conclude the Covenants, this is precisely what happened.[447]

The combination of ideological and philosophical differences together with the exigencies of time, all of which was exacerbated by Cold War point-scoring, meant

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[444] For example. Canada remarked that matters relating to property and civil rights came exclusively within the competence of the provincial legislatures and that the extent to which the federal government could act in these areas was thereby circumscribed: A/C.3/SR 90, p.41. New Zealand expressed doubts about a document that appeared to ignore the varying stages of economic and social development of UN members, differences in their internal structures and the non-uniformity of the historical conditions from which they drew their philosophical ideas: A/C.3/SR 89, pp.33-4. South Africa objected in particular to the provisions dealing with freedom to choose one's place of residence: A/C.3/SR 90, p.39. Czechoslovakia claimed that the declaration was an abstract idea which merely reaffirmed the existing order, a middle class ideal like the French Declaration of the Rights of Man and the Citizen which had been"subjected to the searching criticism of Karl Marx": A/C.3/SR 93, pp.70-71.

[445] A/C.3/SR 92, p.55

[446] A/C.3/SR 89, pp.34-5

[447] See also Egon Schwelb, "The United Nations and Human Rights" (1965) 11 Howard L.J 356 at 361.

that the declaration stressed the principles of human rights, but eventually only referred in one Article to individual duties, and merely presupposed the concomitant State duties that would arise.[448] Thus there was a direct and immediate impact because of these factors on the legal effectiveness of the document as an international instrument as well as with respect to the eventual content of the individual articles.

This is not to say that the legal effect of the declaration was written off totally. The Norwegian delegate said that while the declaration was designed to set moral standards rather than to impose legal obligations, it would still be of practical value as it would serve as the basis for discussion of human rights questions in the United Nations.[449] This view necessarily assumed that the discussion of such questions in the UN was possible in that it would not fall within a State's domestic jurisdiction, and not bring Article 2(7) of the Charter into operation. The Belgian delegate was particularly articulate on this point.[450] He pointed out that as a General Assembly resolution, the declaration would not be legally binding, but it would have a legal character as such a resolution. Those parts of the declaration which codified existing customary international law would not lose their binding character because of inclusion in the declaration. With respect to those parts which

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[448] See, for example, the Egyptian proposal to address these issues which was eventually rejected: A/C.3/SR 94-95.

[449] A/C.3/SR 89, p.35.

[450] A/C.3/SR 108, pp.199-200.

did not codify customary law, there would be no legal obligation with respect to implementing them, but there would be an obligation to at least take them into consideration: they had legal force even if they were not strictly binding. In this way, there was at least the beginning of a legal obligation.

By the time the Declaration was sent back to the General Assembly, the preponderance of view was that it was not a legally binding document[451] although there was not unanimity on the point.[452]

Discussion in the Third Committee with respect to the bases of human rights is also informative. Countries such as Brazil considered that the Preamble to the declaration should contain a reference to God as the absolute origin of all rights.[453] In particular, Article 1[454] was the object of much discussion. A

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[451] This can be seen in the speech of Mrs Roosevelt referred to above, which was essentially repeated in the General Assembly: 3 UN GAOR 860-63 (1948). The view of the United Kingdom was also that the declaration was devoid of legal character: 3 UN GAOR 753 (1948).

[452] Belgium repeated its view just referred to: 3 UN GAOR 199-200 (1948); China stated that: "the Charter committed all Member States to the observance of human rights; the declaration stated those rights explicitly.": Id., p.48; Rene Cassin said (probably incorrectly considering the debate) that the Declaration could be considered to be not just a common standard to which the legislation of all member States should aspire but could also "be considered as an authoritative interpretation of the Charter.": Id., p.61.

[453] A/C.3/SR 92, p.55. Brazil also proposed that the second part of Article 1 of the Declaration should read: "Created in the image and likeness of God, they are endowed with reason and conscience, and should act towards one another in a spirit of brotherhood.": A/C.3/215.

[454] This now reads: "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."

reference to humans being endowed "by nature" with reason and conscience, which appeared in the CHR drat removed so as not to imply that it was nature instead of God which endowed humans with these attributes.[455] The references to God were not included either. China indicated the problem of cultural difference when it stated that its ideals, unlike those of the Christian West, stressed good manners, decorum, propriety and consideration for others. It was not, however, going to agitate for the inclusion of these in the Declaration.[456]

There was, overall, an attempt to keep the document religiously and metaphorically neutral. China and Lebanon proposed that the word "born" in the first sentence of Article 1 also be removed as, reminiscent of Rousseau, it implied a particular version of the state of nature.[457] Cassin of France argued that it should be retained as it meant that people were literally born free but might later lose that attribute.[458] The article is a factual rather than an ethical statement and proposals to the contrary[459] were rejected. It is, however, doctrinal in the sense that it states a vision of humans as they are. Proposals to change this to a strictly rights-

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[455] A/C.3/SR 96

[456] A/C.3/SR 96, p.98

[457] A/C.3/SR 96, pp.98-99

[458] Id., p.99

[459] For example, Iran suggested an ethical reading: "All men should be free and equal in dignity and worth and should be entitled to similar treatment and equal opportunities.": A/C.3/237.

based vision[460] were also rejected.

The delegate of the USSR proposed a society-based approach, since it was a person's position in society which determined his or her rights and duties: human rights were not inherent but were derived from the social structure in which a person lived.[461] This proposal reflects the problem of the different perceptions of the relationship between the individual and the State in the UN member countries. This approach was also rejected. Article 1 was meant to be an affirmation of the essential qualities of humans and an affirmation of faith in this belief: freedom and equality were accepted as essential attributes of the human personality even if they were not always legally recognised as such.[462] A Chinese proposal for the first sentence of Article 1 to read "All human beings are born and remain free and equal ..." was also rejected[463] whereas a Belgian proposal[464] to delete the words "by nature" from the second sentence of the Article was successful.

The bases of human rights were purposely left vague in the Declaration. To state that every human being is free and equal provides a principle upon which norms

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[460] For example, Ecuador proposed that Article 1 read: "All human beings have the right from birth to be free and equal before the law and the State should enact the provisions necessary to ensure the enjoyment of that right.": A/C.3/242. A similar proposal was advanced by Venezuela: A/C.3/246.

[461] A/C.3/SR 98, pp.110-111

[462] A/C.3/SR 99. See especially the arguments of Chile at p.120.

[463] A/C.3/SR 99, p.125

[464] A/C.3/234

may be justified, but it does not necessarily require the prescription of a system of inalienable and universal rights (unlike earlier declarations of rights, which were based on natural rights and the social contract theory.) Philosophical theory is the victim rather than the handmaiden of political necessity when the creation process is disparate and multi-dimensional rather than - as with the French and American Declarations two centuries before - the product of a compact and focussed small-group process.

The final vote in the Third Committee on the Declaration was taken on December 6, 1948, and resulted in a vote of 29 votes in favour (which included Australia)[465] none against and seven abstentions (which comprised Canada - chiefly because of its concerns that most of the rights in the Declaration came within provincial jurisdiction[466] - together with the eastern bloc countries of

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[465] The others were the Philippines, Sweden, Syria, Turkey, United Kingdom, USA, Venezuela, Afghanistan, Argentina, Belgium, Bolivia, Brazil, Chile, China, Cuba, Denmark, Dominican Republic, France, Greece, Haiti, Honduras, India, Iran, Lebanon, Mexico, Netherlands, New Zealand and Peru.

[466] Canada and the United Nations 1948, Conference series 1948, No. 1, (Ottawa, 1949), p.91. Canada proposed to have the whole matter of the International Bill of Rights considered by a Joint Parliamentary Committee on Human Rights. In April, 1948, the Secretary of State for External Affairs wrote to the Secretary-General of the UN stating that Canada was unable to make final comments on the Declaration to the CHR because this process had not yet occurred: UN Doc. E/CN.4/82, pp.2-3. It appears that by December of that year matters had simply progressed too fast for Canada to respond as it otherwise might have. The deliberations of the Joint Parliamentary Committee have been discussed above. See also John W. Holmes: The Shaping of Peace: Canada and the Search for World Order 1943-1957 (1979, U. of Toronto Press, Toronto) at 242. Professor Humphrey adds that there may have been political pressure exerted on Canada by the American Bar Association working through the Canadian Bar Association (after the former had failed to convince its own government to change its position) on the basis that the Declaration contained too many socialist ideas, Humphrey: Adventure, pp.78-9. An

Poland, Ukrainian SSR, USSR, Yugoslavia, Byelorussian SSR and Czechoslovakia).[467] At the General Assembly vote four days later the only fundamental change in voting was that of Canada. Horrified at finding the company it was keeping in the circumstances of the Cold War[468] it changed its vote to one in favour, although still retaining its misgivings with respect to the problems created by the federal structure of Canada, the vague and imprecise language of the document and the problem of translating these into domestic law.[469] The lack of strong commitment therefore appears to have been more for legal rather than ideological reasons, but given the generally accepted non-binding nature of the document these reasons have been called a rationalisation and "hardly convincing."[470] There were no votes against the resolution[471] and the eight abstentions comprised the six Communist countries which had abstained in the Third committee plus Saudi Arabia and South Africa which previously did not

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article illustrating the ABA's opinion, entitled "Declaration on Human Rights: Canadian, American Bars Ask Delay of Action" can be found in (1948) 34 American Bar Association Journal 881.

[467] Saudi Arabia and South Africa did not vote.

[468] Humphrey: Adventure, p.72.

[469] Canada and the United Nations, 1948, ante, pp.247-49.

[470] John Humphrey, "The Role of Canada in the United Nations Program for the Promotion of Human Rights", Chapter 25 in Macdonald, Morris & Johnston, ante, at p.613.

[471] GA Res. 217 (III) (1948). The UDHR is in fact Part A of the Resolution. Part B, entitled "Right of Petition", entrusts this matter to the CHR in its discussions on the Covenant. Part C, entitled "Fate of Minorities", refers this matter to the CHR and the Sub-Commission on Minorities. Part D, entitled "Publicity to be Given to the Universal Declaration of Human Rights", is self-explanatory. Part E, entitled "Preparation of a Draft Covenant on Human Rights and Draft Measures of Implementation", assigns this work also to the CHR.

vote.

This was the first time rights of this kind had been spelled out in a way that was more than an immediate reaction to local political necessity (as the great declarations of the eighteenth century had been). Modern human rights were born out of what Lauterpacht called the "devices of transparent artificiality such as the separation of the Bill into a Declaration which is not binding and a Convention which is not enforceable."[472] Nevertheless, the Declaration had brought these generalisations into the mainstream of international law. Although "only" a General Assembly resolution, there were no dissenting votes and to that extent it must be regarded as being of the highest order, even if not incontrovertibly an authoritative interpretation of the Charter.[473] This meant that its content could be, and was, used selectively by States to justify their own political agendas. Australia, for example, had conceded by December, 1947, in the CHR that the Declaration would not entail any legal obligations and as such it "would not in any way affect the lives of men and women."[474] Yet in his speech to the General Assembly on the day the Declaration was voted upon, the Australian delegate said that his government attached "particular importance" to the "right to social security,

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[472] Lauterpacht, International Law Association Conference 1948, ante, p.34.

[473] Although some commentators such as Louis Sohn did claim that this was so: "The Universal Declaration of Human Rights: A Common Standard of Achievement" in Horizons of Freedom 8 (L. Singhvi, ed., 1969); contrast Lauterpacht: International Law and Human Rights (1950), pp.408-9.

[474] E/CN.4/SR 27 (3 Dec., 1947), p.5.

equitable and satisfactory working conditions, rest and leisure and an adequate standard of living to ensure the health and well-being of every man and his family",[475] which was Labor Party policy.

3.7.2 A brief discussion of the contents of the Universal Declaration.[476]

The Universal Declaration of Human Rights (UDHR) contains a seven-paragraph Preamble which begins:

> Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

This important statement indicates that it is human dignity, not States, which is the foundation for world peace. This in itself would make the UDHR a significant document as it heralds the beginning of the shift from an international system based solely on States to one in which individuals have more than a peripheral position. It is also significant in that it is the first international document to expressly apply to everyone everywhere, rather than to specified groups of people.

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[475] UN GAOR, 3rd Session, 181st plenary meeting, 10 Dec., 1948, p.875.

[476] A detailed analysis of the articles can be found in Albert Verdoodt: Naissance et Signification de la Declaration Universelle des Droits de L'Homme (n.d., Editions Nauwelaerts, Louvain-Paris), and also in The Universal Declaration of Human Rights: A Commentary (edited by Asbjorn Eide, Gudmundur Alfredsson, Goran Melander, Lars Adam Rehof and Allan Rosas, with the collaboration of Theresa Swinehart), (1992, Scandinavian University Press, Oslo). A brief description of the attitudes of States to the Articles as seen in the debates can be found in Joseph Wronka: Human Rights and Social Policy in the 21st Century (1992, University Press of America, Lanham), 93-112.

This dignity is inherent and the rights that are seen as resulting from it are inalienable and enjoyed equally. These notions of inherence, inalienability and equality would reverberate through the succeeding decades (together with the notions of freedom and universality) as the leitmotif of human rights.[477] However, as fundamental as these notions are, they are never explained, nor is there any attempt (apart from Article 1) to justify them. Article 1 provides that "All human beings are born free and equal in dignity and rights." Here the fact of being born a human being generates the rights. It is an a priori presumption, and there is no explanation as to why this should be so. There is no reliance upon any natural law or social contractarian notion (unlike the eighteenth century predecessors). Freedom and equality, being the result of birth, are axiomatically inalienable and inherent. As this applies to "all" humans, they are axiomatically universal. The presumptions upon which these rest are precisely that: unexplained presumptions. While Article 1 continues: "They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood", this is no explanation or justification either. This statement does contain echoes of both Enlightenment ("reason") and Romantic ("spirit of brotherhood") philosophies with an ethical overtone ("conscience"). But it is not expressed as an imprimatur. It is rather a plea: we "should act towards one another" in this way. To compound this agglomeration, there are also strong elements of the utilitarian approach: not only

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[477] Note, however, that the notion of inherence is expressed to apply to human dignity, not to the rights arising from it.

are human rights the foundation for "freedom, justice and peace in the world",[478] but disregard for them has "resulted in barbarous acts which have outraged the conscience of mankind",[479] they stave off the need for rebellion,[480] and they are "essential to promote the development of friendly relations between nations".[481] The Preamble is sociological and historical rather than philosophical.

Unlike earlier declarations of rights, the UDHR is enigmatic as to the conceptual foundations upon which it rests. The political reasons for this have been described above. Not the least of the juristic problems that arise is that there is little in the nature of a clear higher law discernible in the document. It is not obviously the descendent of Natural Law - although it may be its cousin. It has antecedents, but not ancestors. In this regard it must be considered as being sui generis. As a result, it has the possibility of being cross-culturally sensitive, even though the list of rights in it displays a Western bias.[482] Its philosophical or moral thrust is that these rights attach to humans because we are born humans: they are not the gift of

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[478] First preambular paragraph.

[479] Second preambular paragraph.

[480] Third preambular paragraph.

[481] Fourth preambular paragraph.

[482] See The Universal Declaration of Human Rights: A Commentary, ante, pp.52-4. Contrast the criticism based on the alleged cultural relativism of the Declaration: Sinha, ante; Jack Donnelly, "Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights" (1982) 76 American Political Science Review ; Johannes Morsink, "The Philosophy of the Universal Declaration" (1984) 6 Human Rights Quarterly. Certainly, the bases of human rights (with which Humphrey was not particularly concerned) can be regarded as culturally neutral. The actual selection of the rights themselves, however, shows a distinct Western bias.

government, and whether that government is a trustee of those rights or not is irrelevant.

There is, however, a close connexion between human rights and legal systems. The Preamble goes on to recognise in the third preambular paragraph the rule of law and that human rights should be protected by it. There is no indication whether this is meant to be international law or municipal law. In the sixth paragraph the members pledge to achieve the observance of human rights in co-operation with the UN. This could be taken to refer to measures at the international level, but there is no reason to assume that it cannot apply to both international and domestic measures, in law and otherwise. The same third paragraph also mentions rebellion against tyranny, but not as part of the rule of law nor necessarily as a right: it is simply mentioned as a fact.[483] This again highlights the casting adrift of the UDHR from overt philosophical underpinnings. It is a very different document to one that would have been written by John Locke, for example. By way of contrast, Article 21(3) does provide: "The will of the people shall be the basis of the authority of government". This is stated as the basis of the right to free elections in that article. Also, Article 16(3) provides: "The family is the natural and fundamental group unit of society ...". This is stated as the basis for the right to found a family in that article. It was originally proposed by the Lebanese delegate,

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[483] The whole paragraph reads:

> Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law

Mr Malik, a natural lawyer, but in an even more pronounced natural law formulation.[484] These, however, are the only articles where any justification or explanation is given. They are the only time that the "will of the people" or a sense of "natural" rights are mentioned. They do not underpin the whole document but rather each is used to sustain the individual article in which it is found.

Tne UDHR then states that by it the General Assembly:

> Proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance ...

The universality of the declaration (and hence of the rights in it) comes not from philosophical or jurisprudential constructs, but from fact and effect. It is a "common standard" for "all peoples and all nations" which should be kept in mind by "every individual and every organ of society". The notion of universality is

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[484] Mr Malik's proposal read: "The family deriving from marriage is the natural and fundamental group unit of society. It is endowed by the Creator with inalienable rights antecedent to all positive law and as such shall be protected by the State and society." (UN Doc. E/CN.4/SR 37, p.11). Apart from the narrowly Western view expressed in this proposal, it is interesting to note that, had this wording prevailed in its entirety, it would have excluded unions now considered to be worthy of protection by anti-discrimination legislation: de facto heterosexual unions and homosexual relationships. It also could have had the added effect of relegating mothers and children to the family unit at the expense of their recognition as individuals. As it stands now, the provision is no guarantee of the rights of women and children per se, and is unquestionably insensitive to gay and lesbian rights. I could find no discussion at all of the latter in any of the records: it can reasonably be assumed that in the social climate of the 1940's the issue was not only not thought about, but was considered to be unthinkable. In this way, by omission and presumption, the seeds of future discrimination were sown.

therefore intended to be transnational, transcultural and even transideological. The title of the Declaration was originally the "International Declaration ..". This was specifically changed to the present title[485] to indicate that the Declaration was not just directed to States but also to individuals and organisations. The notion of universality had no metaphysical intent.

As "rights", human rights within the Declaration are aspirations for a better future rather than a description of juridically enforceable laws. They are expressed in the same paragraph to be a "standard of achievement" which will be attained by "progressive measures" for which promotion of "respect" for them through teaching and education is given equal prominence with their "effective recognition and observance" through (unspecified) national and international measures.

Equal entitlement to human rights is accounted for by the non-discrimination provisions of Article 2:

> Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the ... status of the country or territory to which a person belongs ...

This in itself proved to be an insurmountable difficulty for some countries such as Saudi Arabia which could not subscribe to non-discrimination on the basis of religion, especially with respect to the impact of religion on the right of parties to

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[485] A/C.3/SR 167, p.786

enter marriage and within marriage.[486]

Thereupon, the Declaration essentially divides into three classes of provisions: enumeration of civil and political rights (Articles 3-21); enumeration of economic and social rights (Articles 22-27); and miscellaneous provisions (Articles 28-30). It is telling that there are three times the number of provisions dealing with (traditional Western) civil and political rights than there are dealing with economic and social rights. There is only one article (Article 29) dealing with concomitant individual duties.

Briefly, the civil and political rights are the right to life and liberty,[487] the right not to be enslaved,[488] the right not to be tortured,[489] the right to recognition as a person before the law,[490] equality before the law,[491] the right to an effective

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[486] See, for example, the statement of the Saudi Arabian representative, Mr Baroody, in the Third Committee discussion: UN Doc A/C.3/SR, p.370.

[487] Art. 3: Everyone has the right to life, liberty and security of the person.

[488] Art. 4: No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

[489] Art. 5: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

[490] Art. 6: Everyone has the right to recognition everywhere as a person before the law.

[491] Art. 7: All are equal before the law and are entitled without any discrimination to equal protection before the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination. [Note that this article contains four variations upon the theme of equality before the law: equality before the law simpliciter; equal protection of the law; protection against discrimination; and protection against incitement to discrimination.]

remedy,[492] the right not to be arbitrarily arrested,[493] the right to a fair and public hearing,[494] the right to be presumed innocent of a penal offence until proved guilty,[495] the right to privacy,[496] the right to freedom of movement and residence,[497] the right to seek asylum,[498] the right to a nationality,[499] the right to marry and found a family,[500] the right to own property,[501] the right to

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[492] Art. 8: Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law. [Note that this does not necessarily require that human rights be part of those fundamental constitutional rights.]

[493] Art. 9: No one shall be subjected to arbitrary arrest, detention or exile.

[494] Art. 10: Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

[495] Art. 11: 1. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence. [Paragraph 2 goes on to provide for non-retrospectivity of penal offences and retrospective increases in penalties.]

[496] Art. 12: No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

[497] Art. 13: 1. Everyone has the right to freedom of movement and residence within the borders of each state. 2. Everyone has the right to leave any country, including his own, and to return to his country.

[498] Art. 14: 1. Everyone has the right to seek and to enjoy in other countries asylum from persecution. 2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

[499] Art. 15: 1. Everyone has the right to a nationality. 2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

[500] Art. 16: 1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution. 2. Marriage shall be entered into only with the free and full consent of the

freedom of thought, conscience and religion,[502] the right to freedom of opinion and expression,[503] the right to freedom of assembly and association,[504] and the right to participate in government.[505]

There is little or no elaboration in any of these articles, and purposely so. In Article 17, for example, the right to own property is not specified in the sense of State policy. It can apply equally to a United States capitalist model, a French socialist model or to the traditional communist models. In addition, the use of the word "arbitrarily" with respect to deprivation of property specifically makes this right subject ultimately to the domestic legal system in which the property is

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intending spouses. 3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

[501] Art. 17: 1. Everyone has the right to own property alone as well as in association with others. 2. No one shall be arbitrarily deprived of his property.

[502] Art. 18: Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

[503] Art. 19: Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

[504] Art. 20: 1. Everyone has the right to freedom of peaceful assembly and association. 2. No one may be compelled to belong to an association.

[505] Art. 21: 1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives. 2. Everyone has the right to equal access to public service in his country. 3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

located. The right to a fair and impartial hearing in Article 10 does not articulate what this means, particularly with respect to the right to legal counsel.[506] Even though the "family" in Article 16 is "natural", specifically what it is was unexplained. In addition, a Norwegian proposal in the CHR to include in what is now Article 25 the provision: "Children born out of wedlock are equal in rights to children born in marriage"[507] was defeated, with both Australia and Canada voting against the proposal.[508] There is also no specific mention of minorities.[509]

The next class of provisions in the UDHR are economic and social rights. Briefly, these provide for the right to social security,[510] the right to work,[511] the right to

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[506] A earlier draft of this article before the CHR included: "and to have the aid of a qualified representative of his own choice...". (UN Doc E/600, Annex A, Art.6; Yearbook on Human Rights for 1947 p.541). This inclusion, had it remained, would still not answer the question of the right to such representation at State expense, the issue which concerned the High Court of Australia in Dietrich v R. (1992) 67 A.L.R. 1.

[507] A/CN.3/344

[508] A/C.3/SR 145, p.576. The current provision, now part of Article 25(2) which reads "All children, whether born in or out of wedlock, shall enjoy the same social protection" was voted for by Australia, while Canada abstained (Id., p.577).

[509] The CHR referred the matter to the Sub-Commission on Minorities and a separate resolution was adopted as Res. 217 III (C): UN Doc E/1371.

[510] Art. 22: Everyone, as a member of society, has the right to social security and is entitled to realisation, through national effort and international co-operation and in accordance with the organisation and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

[511] Art. 23: 1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment. 2. Everyone, without any

rest and leisure,[512] the right to an adequate standard of living,[513] the right to education,[514] and the right to participate in the cultural life of the community.[515] Interestingly, and significantly, the right to own property (Article 17) is well and truly placed in the class of civil and political rights. It deals with the right to "own" rather than acquire property and not to be deprived of it arbitrarily. Such concepts were well known and respected in the capitalist West and had traditionally been enshrined in the declarations of rights originating in those

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discrimination, has the right to equal pay for equal work. 3. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection. 4. Everyone has the right to form and to join trade unions for the protection of his interests.

[512] Art. 24: Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

[513] Art. 25: 1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. 2. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

[514] Art. 26: 1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit. 2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace. 3. Parents have a prior right to chose the kind of education that shall be given to their children.

[515] Art. 27: 1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. 2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

countries.

These provisions about economic and social rights are the ones which usually attract the most criticism from Western commentators, despite the fact that freedom from want was one of Roosevelt's Four Freedoms and they were, in essence, present in the Declaration from the first draft by Professor Humphrey and underwent remarkably few substantial changes in the drafting process. Again, their bases are a priori presumptions rather than explanation or justification. Article 22, which provides for the right to social security, stipulates that this is necessary because "economic, social and cultural rights [are] indispensable for ... dignity". Unlike the earlier CHR drafts,[516] which drew no connexions with the earlier articles, a distinct link is drawn between economic and social rights and the human dignity which Article 1 states is the essence of human rights. No other justificatory statements are proffered in this batch of rights. Mrs Roosevelt, in the Third Committee debate, stated that Article 22 was in fact intended to be an introduction to the subsequent articles and that it represented a compromise (through words such as "in accordance with the organisation and resources of each State") between the views of those governments which wanted special recognition given to economic and social rights, and others, such as her own, which considered that the obligations of States in this regard should not be specified.[517] Economic and

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[516] E/600 (1947), Annex A, Article 26.

[517] A/C.3/SR 138, p.501.

social rights were of particular importance to countries like the Soviet Union which had as provisions in its Constitution rights similar to those now appearing in the UDHR.[518] However, such issues were not solely the province of the communist members of the UN; they were also high on the agenda of the Committees and Commissions of ECOSOC[519] as well as of the International Labour Organisation, the Food and Agriculture Organisation and UNESCO. Their introduction into the UDHR was not a Cold War plot hatched by the Communists (although they did make political mileage out of it when they could); it was simply logical - and right - in the circumstances. It was also plainly sanctioned by Article 55 of the UN Charter. However, expressed in terms of rights, these were an innovation in western systems. They recognise that humans have other legitimate needs than political freedom.

These rights are, of course, the ones which "cost". Being aware of this, the drafting process indicates a progressive lessening of the wording from legal obligation to desirable aspiration. This is so with respect to the right to work,[520]

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[518] For example, Art. 118 (the right to work), Art. 119 (the right to rest and leisure), Art. 120 (old age and sickness insurance), Art. 121 (the right to education), Art. 122 (the rights of women), Art. 123 (the rights of all citizens regardless of race and nationality).

[519] For example, the Economic and Employment Commission (E/255, 6 Feb. 1947), and the Social Commission (E/260, 6 Feb. 1947).

[520] For example, Article 23, which provides for the right to work, in earlier CHR drafts provided for express State duties, such as: "The State has a duty to take such measures as may be within its power to ensure that all persons ordinarily resident in its territory have an opportunity for useful work. (UN Doc. E/600, Annex A, Art.23). Interestingly, Australia initially opposed what is now Art. 23(2) - the right to equal pay for equal work - but eventually

and with respect to the right to rest and leisure.[521] Holcombe has commented with respect to the former:

> ... it is hard to know which to admire more, the ingenuity of the framers of this article in finding a formula to which persons of the most contrary opinions could subscribe, or their prudence in declining to commit themselves to a choice between the sides of an irrepressible ideological conflict.[522]

The right to work also bears evidence of sexism: the gender neutralisation of the language adopted in the earlier articles is not reflected here. Article 23(3) prescribes that wages should be adequate to ensure a dignified existence for "himself and his family." The notion of a wage being large enough to support a family was not new but the wording specifically implies that it is a man who will be earning it.

The remaining three articles of the UDHR are a miscellaneous group. Article 28 provides that: "Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized." This is the only time in the UDHR that any sort of relationship between the individual and the international order (as opposed, in effect, to the relationship between the individual

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accepted it out of a "spirit of co-operation." (A/C.3/SR 158, p.691.

[521] Article 4, in earlier drafts, provided: "Rest and leisure should be ensured to everyone by laws or contracts providing in particular for reasonable limitations on working hours and for periodic vacations with pay." (UN Doc. E/600, Annex A, Art. 29(2)). Australia was consistent in its strong support for this article (see A/C.3/SR 150, p.614), whereas Canada doubted the legal enforceability of all of the economic and social rights (see A/C.3/SR 157, where Canada voted against these articles).

[522] Arthur N. Holcombe: Human Rights in the Modern World (1948, New York U.P., New York), p.92.

and the State) is contemplated. Unlike most of the other articles, it is specifically expressed as an entitlement rather than a right, nor is it enforceable, as it relies internationally on State co-operation and domestically on governmental goodwill. The article is an indication of the conditions required for human rights to operate rather than being an enforceable right in itself. (It must be remembered that this was drafted before widespread decolonisation occurred, and the article is also the basis for the Declaration on the Right to Development).[523]

Article 30 is an obvious, although necessary, caution that. "Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein." This is a direction with respect to the interpretation of the UDHR as well as being an indication that any limitations on the enjoyment of rights resulting from this must be applied no further than is necessary to achieve the object of the article, which is to prevent the subversion of the Declaration. It theoretically applies both to prohibit a government from destroying a political opposition, as well as to an opposition group destroying the democratic process through terrorism. However, as one person's freedom fighter is another person's terrorist, Opsahl has noted that: "Only when a third party is

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[523] GA Resol. 41/128 (December 4, 1986). The reference to Article 28 occurs in the Preamble.

entrusted with applying the principle will it become meaningful."[524] This issue does not appear to have crossed the minds of the drafters who were more concerned with preventing a resurrection of Nazism.[525]

Article 29 is the most significant of this group as it is the sole article of the declaration which mentions duties and limitations.[526] There are in fact two sentiments expressed in the first paragraph. First, a recognition (little more than lip-service) that individuals derive not only rights in their community but also owe duties in return. Unlike some of the eighteenth century declarations[527] there is no indication what these duties might be. The UDHR is, on balance, a document which is only inferentially concerned with duties. In this regard it follows the Western European eighteen century natural right traditions and the atomised view of society, as opposed to Eastern societies which, at that earlier time, were

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[524] Torkel Opsahl, "Articles 29 and 30" in Asbjorn Eide et al (eds): The Universal Declaration of Human Rights: A Commentary, ante, at p.465.

[525] Opsahl, id at p.466 notes that there is nothing in the travaux preparatoires that this problem was apparent to the drafters and that the article was entered into the Declaration as a common sense savings clause.

[526] Art. 29: 1. Everyone has duties to the community in which alone the free and full development of his personality is possible. 2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society. 3. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

[527] For example, Article 13 of the French Declaration of 1789 specified the duty to support a public militia.

building social structures based on a hierarchy of obligations,[528] or others.[529] The second sentiment in the paragraph is a belief that humans are social and that society is the milieu in which we can flourish - a view which is Lockean rather than Hobbesian. The link, however, is not drawn between the individual and the State, but between the individual and the "community". The article recognises groups other than States. Indeed, the notion of limitations on freedom can be found in Locke and Hobbes, as well as in Mill and Rousseau, and others. The article does not therefore correlate precisely with any of these. The drafting history of this article has been detailed by Erica-Irene Daes.[530] She argues that Articles 29 and 30 should be read together to elucidate their meaning and application, as no specific duties are listed.[531] The debate which took place in the Third Committee indicates that this provision was an attempt to balance the freedoms enumerated in

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[528] For example, Japan. See Noda Yosiyuki: Introduction to Japanese Law (trans. Anthony H. Angelo; 1976, U. of Tokyo Press, Tokyo).

[529] For example, Melanesian society was based on a system of reciprocal obligations. See Bronislaw Manilowski: Crime and Custom in a Savage Society (1926, Routledge & Kegan Paul, London; republished 1970, Humanities Press, New York).

[530] Erica-Irene Daes: Freedom of the Individual under Law - A Study on the Individual's Duties to the Community and the Limitations on Human Rights and Freedoms under Article 29 of the Universal Declaration of Human Rights (1990, United nations Publications, New York), pp.17ff; UN Publication No. E.89.XIV.5 (hereafter referred to as Daes).

[531] Daes, p.17. She contends that the duties include the duty to respect peace and security, the duty to refrain from propaganda for war, the duty to refrain from advocacy of national or religious hatred, responsibility for the observance of humanitarian law, the responsibility to strive for the promotion of human rights, the duty to protect the human environment, the duty to participate in social progress and development, and duties to other individuals such as the duty to respect their rights under the declaration and elsewhere in international law.

the Declaration with the requirements of the society in which humans must live.[532] But a problem can arise if one of the duties is the duty to obey the laws of the community. There are bound to be disagreements over controversial issues where the exercise of the law can amount to little more than wielding power rather than reflect a balancing of interests. Protests during the Viet Nam War and draft evasion at that time are prime examples.[533] This means, according to Daes, that short of rebellion[534] the individual has a duty to demand a constitutional review of the law and of the legality of any acts perpetrated under it.[535] This means that domestic laws and municipal legal systems, in addition to being the crutch which helps international law operate,[536] in the field of human rights are essential to its functioning. This means that the High Court of Australia and the Supreme Court of Canada not only can be, but are, central players with respect to the international law of human rights.[537]

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[532] Daes, p.19

[533] Daes, at p.56, in fact mentions Australia in this regard, citing the statement of the Prime Minister of the time, the Rt. Hon. John Gorton that: "As to inciting people to break the law, I think there can be no excuse whatsoever for those in a community where the opportunity exists to change the law through the ballot box." In modern political society, it is no longer as straightforward as that!

[534] Rebellion is mentioned in the third preambular paragraph of the Declaration not as a Lockean right, but as a fact which can occur when the rule of law has broken down - precisely because the law does not reflect and protect human rights.

[535] Daes, ibid., p.56.

[536] Cassesse: International Law in a Divided World, ante, p.168.

[537] The extent to which this is in fact so, and the reasons therefor, are discussed in Chapter 5.

The second paragraph of Article 29 states that the limitations on human rights are those that are determined by law and are necessary to secure the rights and freedoms of others (a notion which could have been borrowed from Mill), being the just requirements of a democratic society for the purpose of public order, morality o. the general welfare. There is no indication what any of these terms actually means and the paragraph is an agglomeration of ideas from natural law, positivism, utilitarianism, liberalism and pragmatism.[538] Daes provides a detailed drafting history of this provision as well.[539] The principal concern was again the balance to be struck between the interests of the individual and the interests of society. In particular, concern that this provision might give rise to arbitrary acts led to the inclusion of the third paragraph which provides: "These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations."[540] The purpose was to guarantee the community against any abuse of rights by the individual, not to place the State in a position of supremacy.[541] This is further indicated by the fact that at the Third Committee debate a proposal to add the words "of national sovereignty and solidarity" after the words "requirements of morality" in Art. 29(2) was rejected.[542]

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[538] On the difficulty in giving specific meaning to this paragraph, see John Humphrey, "The Just Requirements of Morality, Public Order and the General Welfare in A Democratic Society", Chapter 7 in Macdonald & Humphrey (eds): The Practice of Freedom, ante.

[539] Daes, pp.70ff.

[540] Daes, p.73 and references cited therein.

[541] Ibid.

[542] Daes, p.74 and references cited therein.

The limitations allowed in Article 29(2) are to be "determined by law".[543] This formulation in fact links with the specific wording of other articles, such as Article 9,[544] Article 11(1),[545] Article 12,[546] Article 15(2),[547] and Article 17(2).[548] Therefore, while these rights may have been expressed in abstract terms, they were never meant to operate in an abstract fashion. In their implementation, local variation was possible.[549] This formulation therefore runs the risk that States could avoid their responsibilities with respect to human rights by enacting domestic legislation. In this regard again, constitutional validity and judicial interpretation of laws become crucial not just to the delivery of human rights, but effectively with respect to the generation of them. This is especially so when the fetter on the ability to enact these limitations requires an application of concepts such as "morality", "public order" and "general welfare", and the system has been shifted away from a natural law base. According to Daes, the principles which should

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[543] The same phrase is found in Art. 4 of the International Covenant on Economic, Social and Cultural Rights and the similar phrases "prescribed by law", "established by law" and "provided by law" can be found in Articles 8(1)(c), 9(1) and 12(3) respectively of the International Covenant on Civil and Political Rights.

[544] "No one shall be subjected to arbitrary arrest, detention or exile."

[545] "Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law ..."

[546] "No one shall be subjected to arbitrary interference with his privacy ..."

[547] "No one shall be arbitrarily deprived of his nationality ..."

[548] "No one shall be arbitrarily deprived of his property."

[549] As a result, the other expressed rights, such as the right to life and freedom from slavery and torture, are technically absolutes and not subject to local variation. This itself is no longer necessarily the case: Handyside Case EHRR Ser. A, No.24.

govern the permissible limitations include the principles of legality and the rule of law, the principle of respect for human dignity, the principles of equality and non-discrimination, basic principles of criminal law such as nulla poena sine lege, principles of natural justice, the principle of proportionality and the principle of good faith.[550] As the learned author finds these principles primarily in international law the circular problem of their application by domestic courts becomes even more intense.[551] However, she also relies on other origins to justify her claims, in particular "the origin of the concepts of freedom and human rights under law in a democratic community."[552]

Starting with ancient Greece,[553] Daes sees a progression in which there is a reliance on higher law which in many countries becomes embodied in the

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[550] Daes, pp.132-6.

[551] The European Court of Human Rights in the Sunday Times Case had to consider the question of an injunction brought against a newspaper based on the English law of contempt which, it was argued, was vague and uncertain, to determine whether a prohibition on freedom of expression had been "prescribed by law". The prohibition was held to be unnecessary in a democratic society - but only by a majority of 11-9 (ECHR Ser. A, No.30, 1979).

[552] Daes, p.137

[553] Daes traces the concept of natural law and the rights such as isonomia (equality before the law), isotimia (equal respect for all) and isogoria (equal freedom of speech) which were enjoyed by the citizens of some of the Greek city-states. (See also Chapter 2 above). The strong Roman reliance on Stoic philosophy and the development of the jus naturale and the jus gentium, the separation by St Augustine of justicia and concordia (roughly equating to the distinction between legal and moral rights), the reliance by St Thomas Aquinas on natural law, the work of Grotius and Suarez which also relied on natural law - Suarez actually wrote "lex injusta non est lex" (De legibus, ac Deo legislatore, 1612, Book II, chap. XIV) - the writings of Hobbes, Locke, Montesquieu, Rousseau and Kant, and the bills of rights of the seventeenth and eighteenth centuries are also canvassed. Daes, pp.138ff.

constitution.[554] She has to concede, however, that this western political and legal structure is not universal: Indian society and the constitutional system which evolved over the centuries recognised the village community as an important political unit and the legal system was directed more to the maintenance of the community than to the vindication of private rights;[555] tribal African society relied on a system of decision-making and dispute settlement based on discussion and consensus rather than on the use of identifiable judicial organs, emphasising duties more than rights and custom more than "legislation".[556]

Daes takes no account of the effect of the developmental matrices and social paradigms on the notions of rights produced. The existence of constitutions containing enunciated rights also does not guarantee their effectiveness. This is where the practical problem lies. Daes considers that the requirements for effectiveness include independence of the courts, tribunals, judiciary and lawyers, the availability of legal aid, an "enlightened democracy" (by which is meant a

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[554] Written constitutions, with references to the rights of individuals appeared in Sweden (1809), Spain (1812), Norway (1814), the Netherlands (1815), Belgium (1831), Denmark (1849), Prussia (1850), and Switzerland (1848, 1874), apart from the Declarations in America and France. The Liberian constitution of 1847 opened with a bill of rights. Latin American countries (such as Columbia and Ecuador) followed suit. During the twentieth century, rights-based constitutions have been adopted by the Weimar republic (1919), the USSR (1936, 1977), China (1931), Afghanistan (1931), Siam (1932), Japan (1946), Italy (1947), Greece (1975), Algeria (1976) and Nigeria (1979). (At pp.142-3).

[555] At p.139. Daes relies particularly on K.M. Panikkar: The State and the Citizen 2nd. ed. (1960, Asia Publishing House, London).

[556] Daes, pp.139-41. A major reference here is A.N. Allott (ed): Judicial and Legal Systems in Africa (1970, Butterworths, London).

representative parliament, a well-informed public opinion facilitated by an independent and fair media, and the inclusion of human rights provisions in the constitution), and limits on legislative, executive and administrative power (including the issue of delegated legislation).[557] Included in this are procedural issues such as judicial review, the office of the ombudsman and human rights commissions.[558]

With this I would agree, except that these, as part of the developmental matrix, will affect the rights themselves, not just the permissible limitations to them.

3.7.3 Some concluding remarks on the Universal Declaration

The Universal Declaration of Human Rights is not a blueprint of human rights. Blueprints prescribe the exact and unchangeable relationship of each element in a system to each other element. The Universal Declaration is more like a recipe: it prescribes the ingredients but necessarily presupposes that prevailing conditions during the process of application are potentially of equal importance with respect to the quality of the final product.

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[557] Daes, pp.143-7.

[558] Daes, pp.148-54.

The UDHR was more in the form of a proclamation that human rights exist, rather than a guarantee of their effective operation. The travaux préparatoires indicate that it was not meant to be the latter and show that further mechanisms, both international and domestic, were contemplated in this regard. Indeed, the presumption in the Declaration is of an underlying domestic legal framework within which these rights can rest.[559] In this way, it can be considered that a necessary implication of the UDHR is of a local community organised according to law. It is this far more arcane paradigm, rather than natural law as such, which is implicit in the instrument. As such, inherent in the instrument is the need for and the presumption of the existence of a framework for the link between international law and municipal law. It is an exercise of rights within a system rather than symbolising a destruction of that system. In this regard it differs from the eighteenth-century declarations, the purpose of which was to legitimise wiping the political slate clean and to regularise starting afresh. As such, the rights within the UDHR do not have to accord with natural law (or other) doctrine: they only need to be possible within a political and legal system.

Thus the traditional rights representing freedom from State interference can be contained in it, together with rights allowing political freedom within the State (such as the right to vote). But what also can be, and are, included are economic

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[559] For example, see the discussion above with respect to the use of the word "arbitrary" and the term "according to law" in the Declaration. In terms of rights for individuals, these have no real meaning outside the context of a domestic legal system.

and social rights which can only be realised by the State. Thus, for example, the well-known complaint by Cranston that economic and social rights "do not make sense"[560] philosophically as human rights may be correct (although this itself is arguable)[561] but it is beside the point. The philosophical bases were not a primary foundation from the first Humphrey draft and philosophical excrescences were systematically removed through the drafting process as the travaux preparatoires clearly show. Also beside the point is the same author's assertion that if it is impossible for a thing to be done (such as providing periodic holidays with pay for everyone under UDHR Article 24) then it is absurd to claim it as a right.[562] A document of human "rights" which is one of aspirations and potentialities is not absurd in this sense.[563] In any event, it should not be forgotten that if the liberal individualist approach is applied to welfare rights the mistaken belief arises that the aim of the latter is equalisation rather than equal opportunity, or of formal equality rather than equity.

In addition, while the Declaration establishes principles rather than rules, these are clearly meant to be legal - rather than merely moral - principles. They were clearly

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[560] Maurice Cranston: What are Human Rights? (1973, Bodley Head, London), p.65.

[561] See, for example, D.D. Raphael, "The Liberal Western Tradition of Human Rights" (1966) 18 Inter. Soc. Sci. J. 22 who argues that economic and social rights are valid rights.

[562] Cranston, ibid.

[563] The issue of what type of rights these are is returned to below.

meant to operate within the most fundamental parts of domestic legal systems. As a "common standard of achievement" - an international yardstick - what is being measured are both the actions and the laws of States, with human rights clearly meant to modify the latter by inclusion in them.

But the UDHR was not remotely the end of the human rights story. Nor was it the beginning. To paraphrase Churchill, it was the end of the beginning. It demystified human rights by outlining them, but in terms more redolent of poetry than legal definition.

Despite the clear fact that the Declaration was drafted specifically not to be a legally-binding instrument, it has flown in the face of its juridical origins (or lack of them) - as well as in a virtual defiance of the ideological, cultural, economic and political diversity of the modern world - to generate an enormous impact, internationally and domestically, legally and morally. At the very least its value to the world is that it contains what Cassese calls "a basic valid nucleus in need of completion."[564] It inspired a cluster of human rights treaties - certainly every one mentioned in the next chapter to which Canada and Australia are parties. It is specifically referred to in other declarations, such as the Declaration on the Granting of Independence to Colonial Countries and Peoples in 1960,[565] in favour

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[564] Antonio Cassese: International Law in a Divided World, ante, p.300.

[565] GA Res 1514(XV), December 14, 1960.

of which all the countries which had abstained from voting for the UDHR, except South Africa, voted. General Assembly resolutions have unanimously proclaimed the duty of States) "fully and faithfully observe" the provisions of the Declaration.[566] It is reflected in many national constitutions.[567] It is influential in guiding the work of non-governmental organisations such as Amnesty International whose Charter is based directly on its principles. The International Conference on Human Rights held at Tehran in 1968 proclaimed unanimously that the declaration "states a common understanding of the peoples of the world concerning the inalienable and inviolable rights of all members of the human family and constitutes an obligation for all members of the international community."[568] It is also referred to in the Helsinki Declaration of 1975 and reaffirmed in the Declaration of the World Conference on Human Rights held in Vienna in 1993.[569] Regional human rights treaties refer to it specifically.[570] According to Professor Schwelb, the Declaration represents a new form of law-

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[566] For example, GA Res. 1904 (XVIII), November 20, 1963, Art.11.

[567] See Egon Schwelb, "The Influence of the Universal Declaration of Human Rights on International and National Law", Proceedings of the American Society of International Law (1959), pp.217ff; A. Glenn Mower Jr: The United States, the UN and Human Rights (1979, Greenwood Press, Westport), pp.58ff.

[568] Final Act of the International Conference on Human Rights 3 at 4, para.2; A/CONF. 32/41; UN Pub. E68 XIV 2.

[569] A/CONF.157/23 (July 12, 1993)

[570] It is referred to in the Preambles of the European Convention on Human Rights and Fundamental Freedoms 1950, the American Convention on Human Rights 1969, and the African Charter on Human and Peoples' Rights 1981.

making.[571] However:

> This change did not originate in the document which did not, and could not, of its own accord, as it were, transform its mission, its function and its legal status. It was the international community, the States which had been instrumental in its creation as well as those which acceded to independence after that time, that used the Declaration for the purpose of fulfilling an assignment greater and more far-reaching than that which had been originally carve out for it. Not as the result of a methodical legislative process, but through unplanned, haphazard action, have governments and inter-governmental organizations, courts and legislatures invested the declaration with an increased and increasing authority and practical importance.[572]

The UDHR as a whole has turned out to be greater than the sum of its parts. The international human rights process has been such that its resulting instruments can act in a synergistic fashion with each other and with domestic legal systems. This has turned out to be of such potency (by accident more than design) that it has shown that the traditional division of international documents into "binding" and "non-binding" is an over-simplification,[573] as is the distinction between "hard" and "soft" law,[574] and the traditional theory that international law applies only to States has had to be revised[575] at least to the extent that individuals may be the objects of rights rather than merely of compassion under international law.

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[571] Egon Schwelb: Human Rights and the International Community (1964) at p.73.

[572] Id., p.37

[573] See Schwelb: Human Rights and the International Community, ante, pp.73ff.

[574] See C.M. Chinkin, "The Challenge of Soft Law: Development and Change in International Law" (1989) I.C.L.Q. 850.

[575] John Humphrey, "The International Law of Human Rights in the Middle Twentieth Century", in Martin Bos (ed): The Present State of International Law and Other Essays (1973, Kluwer, Netherlands), pp.75ff at p.83

But cutting human rights free from specified moorings such as natural law carries with it the risk that the notion may drift like a rudderless ship buffeted by the winds of popular rhetoric. That may be so, but the influential factors are so multifarious and complex that mere populism with nothing else is not strong enough to effect substantial and lasting change. However, the absence of an obvious underlying pattern which is clear and rational, the lack of a sense of inter-relatedness, makes it difficult, if not impossible, to discern clear objectives in the instrument. This apparent functional disjunction is a primary factor in the difficulty of domestic legal implementation. However, this disjunction may be more apparent than real. While it must be conceded that there is no cultural universality, writers such as Sinha have pointed out that the concept of human rights should be distinguished from the catalogues of such rights which are to be found in instruments like the UDHR.[576] He describes it thus:

> The concept [of human rights] is a reformulation of justice for the individual in a particular fashion, namely, that the anthropocentric conditions of man's physical and moral existence be made secure from privation by the powerful and a just system of fulfilment of his needs be achieved. This is undoubtedly an ideal accepted in all societies. Distinguished from this is the matter of specification of those claims and conditions which would promote the achievement of that ideal. Since the world is pluralistic, composed of societies which are culturally, ideologically, and economically different, there can be no single, specific way of going about achieving that ideal. But the ideal, nevertheless, remains universal. Therefore, the human rights theory must recognise certain basic facts about man and his human rights, namely, the historicity of man, his cultural relativity, his ideological relativity, the order of priority

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[576] S. Prakash Sinha, "Human Rights Philosophically" (1978) Indian J.I.L. 139 at 145.

in his human rights, their revisability, and their economic relativity.[577]

What Sinha then does is to reformulate human rights as human needs[578] as others, such as McDougal, Lasswell and Chen,[579] do in terms of values, and the revivalist natural lawyers do in terms of principles.[580] While I respectfully find merit with the passage quoted above, I cannot concur with the extrapolations from it, nor with the other proposed laundry lists. I agree with Fryer's critique when he writes:

> Such methodology strongly suggests the determinative tendency of scholarship which seeks to apply to inexact propositions the exact methodology more appropriate to the natural sciences or to finite proposals. This reductive characterization of the human rights problem also demonstrates the tendency to render manageable an elusive subject matter by precise categorization ... A more moderate, realistic task for legal theory would be premised upon the open-ended character of the domestic and international environment in which human rights subsist. Linguistic manipulations which attempt to fit human rights phenomena into abstract methodology hide the political element, but only for purposes of scholarship. To this extent human rights scholarship is disabled from describing reality ...[581]

It is only such an open-ended approach through which human rights will be able to cope with the emerging modern demands for rights: the right to privacy from

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[577] Ibid.

[578] These are divided into primary needs, which include air food and water, and secondary needs, which include economic betterment and cultural enrichment (id., at p.157).

[579] Myres S. McDougal, Harold D. Lasswell & Lung-chu Chen: Human Rights and World Public Order - The Basic Policies of an International Law of Human Dignity (1980, Yale U.P., New Haven)

[580] John Finnis: Natural Law and Natural Rights (1980, Clarendon Press, Oxford).

[581] Eugene D. Fryer, "Contemplating Sinha's Anthropocentric Theory of International Law as a Basis for Human Rights" (1980) Case Western Reserve J. I. L. 575 at 578-9.

computer invasion, the right to freedom from genetic manipulation, the right to a safe environment as a human right.[582] The rhetoric of rights used in the Universal Declaration reflects the link between human rights and domestic legal systems in the document. Rights are what courts and parliaments are used to dealing with. As a list of rights the Declaration displays some Enlightenment influence. But these rights are open-ended and have no fixed philosophical basis. As such, they carry the seeds of Postmodernism within them. This is both their advantage and their drawback when placed in a domestic legal system.

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[582] See, for example W. Paul Gormley: Human Rights and Environment: The Need for International Co-Operation (1976, A.W. Sijthoff, Leyden) who argues that human rights should be defined to include what surrounds humans, including, for example, household pets, livestock and plants. In contrast other writers, such as Philip Alston, argue that such an expansive approach undermines human rights, particularly if the manner in which such expansion is being achieved is anarchic: Philip Alston, "Conjuring Up New Human Rights: A Proposal for Quality Control" (1984) American Journal of International Law 607-21. Alston in fact takes a different tack by arguing in terms of substantive requirements for human rights, these being that human rights should: reflect a fundamentally important social value; be relevant, albeit to varying degrees, throughout the diversity of world value systems; be eligible for recognition as an interpretation of the UN Charter, a reflection of customary law or a formulation of a general principle of law; be consistent with the existing body of human rights law; be capable of achieving a very high degree of international consensus; be compatible or at least not clearly incompatible with the general practice of States; and be sufficiently precise to give rise to identifiable rights and obligations (at p.615).

3.8 Universality in a Post-Modern World - The challenge to (or of?) human rights?

The human rights revolution may well be the most important development in the cultural history of homo sapiens,[583] fundamentally affecting our perceptions but at the same time affected by them. From the philosophical and jurisprudential point of view, the question of "rights" has generated a vast and diverse literature,[584] although often of an abstract kind in which the objects, we humans, figure little. The discussion of rights in the West has been shaped by the historical traditions outlined in Chapter 2. The discussion of and attitude towards human rights has similarly been shaped, particularly in the context of the politics and compromises leading to its seminal expression in the Universal Declaration of Human Rights (UDHR). The purpose of this section of the thesis is to demonstrate two things.

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[583] Anthony D'Amato, "International Human Rights at the Close of the Twentieth Century", (1988) 22 The International Lawyer 167.

[584] Anthologies on rights, particularly with respect to human rights, include D.D. Raphael (ed): Political Theory and the Rights of Man (1967, Macmillan, London); A.I. Melden (ed): Human Rights (1970, Wadsworth, Belmont); Eugene Kamenka & Alice Erh-Soon Tay (eds): Human Rights (1978, Edward Arnold, London); David Lyons (ed): Rights (1979, Wadsworth, Belmont); J. Roland Pennock & John W. Chapman (eds): Human Rights: Nomos XXIII (1981, NYU Press, New York); R.G. Frey (ed): Utility and Rights (1984, University of Minnesota Press, Minneapolis); Carlos Nino (ed): Rights (1992, Dartmouth, Aldershot). Other works with helpful bibliographical material include: Jeremy Waldron: Theories of Rights (1984, Oxford U.P., Oxford); C.J.G. Sampford & D.J. Galligan (eds): Law, Rights and the Welfare State (1986, Croom Helm, London); Loren Lomasky: Persons, Rights and the Moral Community (1987, Oxford U.P., New York); Jack Donnelly: Universal Human Rights in Theory and Practice (1989, Cornell U.P., Ithaca). A particularly useful essay on recent developments is William A. Galston, "Practical Philosophy and the Bill of Rights: Perspectives on Some Contemporary Issues", Chapter 5 in Michael J. Lacey & Knud Haakonssen (eds): A Culture of Rights: The Bill of Rights in Philosophy, Politics and Law, 1791-1991 (1991, Cambridge U.P., Cambridge).

First, the diverse and sometimes contradictory nature of the jurisprudential approaches which can be used in trying to explain and analyse human rights, and in particular the challenge to human rights of postmodernism. Second, the fact that none of these approaches is on its own sufficient for that task: human rights are as much a challenge to postmodernism as postmodernism is to human rights. However, what will be shown is that this impasse is more apparent than real, and that human rights are sufficiently secure in the international legal system to be useful concepts both within and beyond it.

Our world today is too complex for a complicated notion like human rights to be fully explained by a mega-(or meta-) theory. This is particularly so for human rights where the process of their formulation has been so affected by a multiplicity of views and compromises that it is not possible to isolate a uniform underlying philosophical basis for them. Theories of rights achieve different, and ultimately limited, purposes. For example, the famous analysis of rights and jural correlatives by Hohfeld[585] provides a precise scheme, but it does not necessarily indicate why people are regarded as having rights, what their function is, why some rights are regarded as being fundamental and others not, and has difficulty coping with the difference between positive and negative rights.[586]

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[585] W.N. Hohfeld: Fundamental Legal Conceptions (1919, Yale U.P., New Haven).

[586] Contrast L.H. LaRue "Hohfeldian Rights and Fundamental Rights" (1985) 35 U. of Toronto L.J. 86, who argues that this can be achieved by understanding that privileges are not necessarily coupled with claims. He gives the example of teenage boys having beer and pizza in a pizza parlour. Each boy has a privilege and a claim to his

Rights in general, and human rights in particular, have been examined in the literature from various points of view reflecting various concerns,[587] none of them necessarily representing discreet, mutually exclusive, approaches: epistemology;[588] ontology;[589] moral theory;[590] political theory;[591]

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mug of beer, but when the pizza is placed in the centre of the table and a feeding frenzy ensues, each boy only has a privilege to eat as much pizza as his eating speed will allow. If one boy eats more than the others, those others have not had a claim interfered with (at p.92). Contrast further K.R. Minogue, "Natural Rights, Ideology and the Game of Life", Chapter 2 in Kamenka & Tay (eds): Human Rights, ante, who argues that human rights are used in a political context where the rhetorical partner of a "right" is not a duty but an absence of a right (or a "non-right"). When someone says "I have the right to do X" the correlative implication is not "You have a duty to let me do X", but rather "You have no right to stop me from doing X." (at p.19).

[587] For an incisive overview, see William A. Galston, "Practical Philosophy and the Bill of Rights: Perspectives on Some Contemporary Issues", Chapter 5 in Lacey & Haakonssen (eds): A Culture of Rights, ante.

[588] From an epistemological point of view, human rights can be understood from a foundationalist viewpoint (ie, that they rest upon some general and enduring ("natural") features of human beings - that we are basically moral, that we are needy, that we were created by God, etc). This is an approach typical of many of the approaches seen in Chapter 2. The nearest the UDHR comes to such a foundation is in Article 1, discussed above. Alternatively, an antifoundationalist viewpoint sees this as an "ahistorical nature centre" of rights, regarding rights as fundamentally ethnocentric and local. See, for example, the work of Sinha mentioned ante. See also Richard Rorty, "The Priority of Democracy to Philosophy" in Merrill D. Peterson & Robert C. Vaughan (eds): The Virginia Statute for Religious Freedom (1988, Cambridge U.P., Cambridge), pp.258ff. From either viewpoint, the bases are fundamentally perceptions of the human condition which can be equally demonstrated and refuted by the same analyses.

[589] From the ontological point of view, if human rights are seen as being directed towards relationships (between the individual and the State, between individuals, between groups, etc), critiques can be based on issues such as whether the individual is anterior to, and whether his or her rights are detached from, the society in which s/he lives - or, alternatively, whether these rights in fact derive from that society - assume a primacy. The articles in the UDHR which in any way broach these issues are Articles 1 and 29, discussed above. An example and critique of this approach can be found in Michael Sandel, "The Procedural republic and the Unencumbered Self" (1984) 12 Political Theory 90. See also Galston, ante, at pp.223-7.

[590] These can be classified (as does Galston, ante, at pp.249-57) as moral, non-moral and quasi-moral. The "moral" version regards rights as bedrock in that they are effectively self-evident. An example is Dworkin's statement that the right of each individual to equality of concern and respect is a "postulate of political morality." (Taking Rights Seriously (1977, Harvard U.P., Cambridge), p.272). Dworkin considered that the law consists of principles as well as rules: id., p.29. Also, H.L.A. Hart focused on the equal right to be free as a "natural right." (See, for example, "Are There Any Natural Rights?" in Lyons, ante, at 14-25. See also "Positivism and the Separation of Law and Morals" (1955) 71 Harvard L.R. 593). Hart, who attempted to overcome the limitations of positivism by postulating secondary rules which operated upon primary rules, (The Concept of Law, 1961) regarded that the law itself could only function by way of a shared morality, but did not succeed in indicating how to obtain universal agreement on what this was. John Rawls sees rights arising from a "moral personality" based on a capacity for a sense of effective justice and a power to formulate, apply and act on this. ("Kantian Constructivism in Moral Theory: The Dewey Lectures 1980" (1980) 77 J. of Philosophy 515 at 525). Jack Donnelly considers that our moral nature is the source of human rights. (The Concept of Human Rights (1985, St. Martin's Press, New York), pp.31ff).On the other hand, the "non-moral" version can be found in Robert Nozick who argues that if individuals have a periphery of inviolability (which in itself might be a moral stance), this derives from a non-moral fact about individuals: our existential separation, not a reliance on a notion of a social entity or collectivity of interest. (Anarchy, State and Utopia (1974, Basic Books, New York), especially at pp.32ff). Nozick, whose moral theory is linked to his (rationalist) economic theory considers that the history of the development of rights can be more important to the notion of what is "just" than general theories about how people ought to live in society. Also, Alan Gewirth considers that it is the fact of the capacity of individuals to act upon rational prudence in an amoral fashion which generates rights. Each actor ascribes to him/herself basic rights but cannot claim them without acknowledging the symmetrical claim of others: Alan Gewirth: Human Rights: Essays on Justification and Applications (1982, U. Chicago Press, Chicago). Gewirth is primarily interested in the ability of moral philosophy (rather than a legal system) to deal with issues such as whether the starving have a right to be given food. (See Chapter 8). He looks at the question of human dignity as the basis for human rights and considers that if this is so the emphasis falls on the characteristics of humans, the subjects of rights, to justify our having such rights. Instead, his emphasis is on the objects of rights: "the necessary goods needed for the existence and success of agency" (at p.27). He is interested in why we have human rights and says that:

> Appeal to positive recognition is obviously insufficient for answering these substantive questions. The answer is not given, for example, by pointing out that many governments have signed the Universal Declaration of Human Rights of 1948 as well as later covenants. For if the existence of having human rights depended on such recognition, it would follow that prior to, or independent of, these positive enactments no human rights existed. (at pp.41-2).

Precisely, because "human rights" is a specific term and is different to natural rights and to rights generally. With respect to the

functionalism.[592] A lesser-known approach is "Personalism", which emphasises

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concerns of this thesis, it does not matter whether Robinson Crusoe had human rights on the desert island before Man Friday came along (as Benn & Peters: The Principles of Political Thought (1959, The Free Press, New York) consider that he did not, at p.111). I think the answer to that question is "yes, but they were irrelevant." Human rights as such are part of a process in the attainment of perceived social goals. The contextual essence of any right is the challenge it can make to another's sphere of action. The right provides a framework within which you justify that action viz-a-viz another. If you try to make a souffle, but it falls, the reason may not be just because one of the ingredients was off, but because of a number of contextual factors. The "quasi-moral" version in effect melds the former two by acknowledging widely-shared empirical features of humans (e.g., needs, human nature, the ability to reason) but sees these as being invested with moral significance. Galston (ante, at pp.354ff) subscribes to this view, as does Bedau who considers that there is a "common human predicament" which is created by the similarity of environmental circumstances and biological structure that we all have which guarantees that "our needs and capacities are far more homogeneous than heterogeneous." Into the very process of describing this will be built "certain norms, or the adequate basis for certain norms, that will serve to dictate or direct certain kinds of conduct by anyone who understands the original concept and who applies it to himself and his world." In this way they can be appreciated as rights, even if they look more like social or international goals. ("Why Do We Have the Rights We Do?", in Pennock & Chapman (eds): Human Rights: Nomos XXIII, ante, pp.67ff). A similar, but not identical approach is taken by John O'Manique who argues that the foundations of human rights are to be found in the origins of human development: "Universal and Inalienable Rights: A Search for Foundations" (1990) 12 Human Rights Quarterly 465.

[591] The issues that most arise here are those of the traditional dichotomies of liberalism/socialism, public/private, liberty/welfare. Liberal critiques of rights tend to argue that rights do not need to be reconceived as much as realised. "Socialist" critiques (to use that term in its widest sense) generally consider that rights do exist but that their content should be rejigged to change the emphases (for example, to focus more on welfare rights). The Marxist approach has been discussed in Chapter 2. See generally Tay, "Marxism, Socialism and Human Rights" in Kamenka & Tay (eds): Human Rights, ante, pp.105ff. These are largely issues which relate more to the substance of rights rather than the concept of them. See Galston, ante, pp.235-6).

[592] Functional theories often stress the protective function of rights: for example, Dworkin's view that rights are "trumps" which individuals can use to do, or not do, something which might not otherwise be a part of a goal of the collective. (Taking Rights Seriously, ante). Other functionalist theories go beyond the issue of protection and encompass also a sense of humanity in that they are what allow us to claim to be the equal of anyone else and thereby provide us with "minimal self-respect." (Joel Feinberg, "The Nature and Value of Rights" in David Lyons (ed): Rights (1979, Wadsworth, Belmont), especially at p.87). A similar view is expressed, id, by Thomas E. Hill Jr, "Servility and Self-Respect". See also Galston, ante, at pp.248-9. Other theories in this vein specify what it is that rights protect, and have been classified (for example, by

the concept of personality and the "person" as part of the community, as opposed to the isolated entity of the "individual".[593] Other approaches look at the bases of human rights, such as theories based on natural rights,[594] theories based on

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Galston, ante, at pp.248-9) into "interest" theories (which protect goods or activities) and "will" theories (which protect individual discretion or control). Interest theories, usually associated with Utilitarianism, assert that the function of rights is to promote people's interests by conferring and protecting benefits. Will theories, associated with the Kantian tradition, assert that the function of rights is to promote autonomy by conferring and protecting a person's authority, discretion or control in some area of their life. (James W. Nickel: Making Sense of Human Rights: Philosophical Reflections on the Universal Declaration of Human Rights (1987, U. of California Press, Berkley), pp.19ff). Rights specify the scope of an individual's decision-making capacity under this view.

[593] See Virginia A. Leary, "Postliberal Strands in Western Human Rights Theory", Chapter 5 in Abdullahi Ahmed An-Na'im (ed): Human Rights in Cross-Cultural Perspectives: A Quest for Consensus (1992, University of Pennsylvania Press, Philadelphia). Personalists included Emmanuel Mounier (1905-1950) and Jacques Maritain. The person is thus neither an individual seeking a private good, as in liberalism, nor merely a part of the larger whole, as in Marxism and socialism. Human dignity is seen as having both individual and communal dimensions. This allows rights to be seen as an evolving paradigm in the sense that it can encapsulate the individual liberties which were the basis of the eighteenth century declarations (which reflected the grievances of the times) as well as the more modern grievances of economic and cultural deprivation. See Jacques Maritain: The Rights of Man and Natural Law (trans. Doris C. Anson), (1949, Charles Scribner's Sons, New York). Mounier is best known as the editor of the French journal Esprit (in which discussion of the personalist rewriting of the French Declaration appeared in 1944). For commentary about him see John Hellman: Emmanuel Mounier and the New Catholic Left 1930-1950 (1981, U. of Toronto Press, Toronto).

[594] John Finnis: Natural Law and Natural Rights (1980, Clarendon Press, Oxford); John Finnis: Natural Law 2 vols. (1991, Dartmouth Publishing co., Aldershot); Russell Hittinger: A Critique of the New Natural Law Theory (1987, U. of Notre Dame Press, Notre Dame). See also Lloyd L. Weinreb, "Natural Law and Rights", Chapter 10 in Robert P. George (ed): Natural Law Theory: Contemporary Essays (1992, Clarendon Press, Oxford) who writes:

> Rights are a response to the puzzle of human freedom within a determinate natural order. They accomplish for us what was earlier accomplished, albeit very differently, by moira and then by natural law itself. The connection with natural law is not, therefore, merely verbal. It is an essential part of what we mean when we refer to human freedom and responsibility. (At p.280).

utility,[595] theories based on justice,[596] theories based on dignity,[597] and so on.[598] These may help to explain and justify notions of universality, but run into the problem of validating the selection of the social values upon which they rest. The manipulative way in which this may be done with respect to Natural Law has been illustrated in Chapter 2. Other approaches of less extensive pedigree run into similar problems. For example, McDougal, Lasswell and Chen have attempted to elucidate the way values are shaped and shared in terms of common demands, the factors influencing the effectiveness of these demands and the institutional practices which affect the process: a "policy science" approach".[599] This approach in effect focuses upon authoritative decision-making. As such, it assumes the moral and intellectual rectitude of the relevant participants. The Watergate scandal in the

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[595] For example, the work of Bentham discussed in Chapter 2.

[596] Rawls: A Theory of Justice, ante.

[597] Myres S. McDougal, Harold D. Lasswell & Lung-Chu Chen: Human Rights and World Public Order: The Basic Principles of an International Law of Human Dignity (1980, Yale U.P., New Haven).

[598] See Jerome J. Shestack, "The Jurisprudence of Human Rights", Chapter 3 in Theodore Meron (ed): Human Rights in International Law: Legal and Policy Issues (1984, Clarendon Press, Oxford).

[599] Myres S. McDougal, Harold D. Lasswell and Lung-Chu Chen: Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity, ante. Basing their work on the values they consider to be indispensable to a dignified human existence, the authors isolate "common demands" of respect, power, enlightenment, well-being, wealth, skill, affection, and rectitude (at pp.7-13) in the light of environmental factors (such as over-population) and predispositional factors (such as national parochialism) affecting their achievement (pp.38-47). The process by which these modified demands are transformed into social values is considered in the light of institutional practices which are themselves affected by the participants, their perspectives, the operative situations, the bases of power and the strategies used (at pp.85ff). Human dignity is, in effect, a super-value.

United States has shown that such assumptions cannot lightly be made.[600] Human rights are a part of the process in making the decision as to social values, not in and of themselves the answer. We have to stop thinking of human rights as being something resembling a secular Ten Commandments.

For the purposes of this thesis I am seeking an operational (and not purely functional) approach to help explain both the difficulties in attempting to apply international human rights norms in domestic legal systems and the potential for synergism between the two systems. (I am not attempting a "justification" of human rights in a philosophical or jurisprudential sense). An apparent dilemma highlighted by the multiplicity of theories and approaches is the competition between the issue of the bases on which rights are asserted, on the one hand, and the scope of the validity of those rights, on the other. The question then becomes whether there is any necessary relationship between these two issues. In my view, there can be - and often is - a relationship between them, but it is not necessary for there to be one. In my view, this is particularly so when the validity of international norms come to be determined within the domestic legal field. The

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[600] An example of McDougal applying his own approach can be found in his comment "The Hydrogen Bomb Tests and the Law of the Sea" (1955) 49 American J. of International Law 356-61 where he "justifies" the U.S. testing of the hydrogen bomb on the high seas, interfering with the right in customary law of free passage on the high seas, as it is "indispensable to the security of the free world." (at p.356). For a discussion of the McDougal-Lasswell approach, see "Agora: McDougal-Lasswell Redux" (1988) 82 American J. of International Law 41-57. This approach which attempts to reduce the legal process to certain identifiable factors can be contrasted with the more generalised "popular legal culture" approach: see "Symposium: Popular Legal Culture" (1989) 98 Yale L.J. 1545ff.

very thing which can be a drawback to the domestic recognition of human rights by courts, namely, the apparent unconcern of those courts with higher principles not seen to be generated within the domestic system itself, can in fact be used to overcome this epistemological quandary by making it irrelevant.[601] Courts are more concerned with the process of creation of the right, its precise scope, its operating conditions and its possessors and addressees.

The diachronic analysis in Chapter 2 has shown that these rights have been central to political concerns and have been used as politics as much as law. Notions of what is "good" for human beings have never in this sense really been neutral. They are coloured by what I have called the developmental matrix. This matrix requires an appreciation of individuals and the State or community. The rights produced are not necessarily permanent and are not necessarily intended to provide answers for all the issues confronting that community. But they do protect interests regarded by that community to be vital (even if only some of those interests are in fact protected at any particular time). Rights in this sense are a part of the process rather than necessarily being in themselves the answers to the questions posed. I

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[601] For example, a universalistic assertion can be imported into the domestic legal scene by a court when this assertion is seen to represent communitarian domestic values, and the opportunity to say otherwise remains an option. It was on this basis that the High Court of Australia in the Dietrich case in 1992 was able to find a common law right to representation in a criminal trial on the basis, inter alia, of the UDHR and the ICCPR, without having to bother with epistemological questions at all. The down side of such a scenario is that the court might also find that the international rule does not represent community values and so reject it. The difference that having a Charter of Rights and Freedoms makes (if any) in Canada is discussed in Chapter 5.

therefore agree with Galston when he writes: "The difficulty of coordinating rights with other political values should not be underestimated, but this difficulty should not lead us to the extreme of devaluing rights or of systematically subordinating them to other considerations."[602] Courts, however, baulk at making decisions which appear to be political rather than legal (even though this may effectively be what they are doing). However, Charles Taylor distinguishes between ontological argument and advocacy.[603] In the former, the general structure of relationships between individuals and the community is elucidated. In the latter, a stand is taken on specific issues relating to the status or content of rights. As such, it is not broadly divided into atomistic and holistic versions, but is arrayed along a continuum from individualism to collectivism.[604] Court processes and decision-making are based almost entirely upon advocacy. At the level of domestic legal implementation of human rights by courts, therefore, the extremes of ontological argument can be melded and the philosophical problems become less acute. The problem is not ameliorated, however, when activites of a law reform nature (such as drafting and enacting a bill of rights) are undertaken. Although for Parliament the sky can be the limit (as Chapter 2 indicated) a government is ultimately answerable to an electorate and must justify controversial changes to the law.

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[602] Galston, ante, at p.226.

[603] Charles Taylor, "Cross-Purposes: The Liberal-Communitarian Debate", in Rosenblum (ed): Liberalism and the Moral Life (1989, Harvard U.P., Cambridge).

[604] I am indebted to Galston, p.227, for this interpretation.

It is, however, the most recent variations of rights analyses, including Critical Legal Studies, feminism, and Postmodernism, which tend to be the most critical of human rights because they allege that human rights norms, regardless of their origin or justification, are not doing - or cannot do - the job they were intended to do.

We live not just in an age of change (any period experiences changes) but of rapid change.[605] Little, if anything, seems permanent. Postmodern approaches essentially attempt to deal with transition, as opposed to believing in permanence. Postmodernity has been described as the situation the world finds itself in after the breakdown of the "Enlightenment project."[606] As seen in Chapter 2, modernity or Enlightenment can be seen as lasting (very) roughly from the eighteenth century into the early twentieth (until Einstein's relativity theory). Postmodernism is a reaction against the "modernism" which saw art as a search for unity and order, a medium which could transcend the political chaos and social change of those times. Modernism was an attempt to find absolute grounds and transcendent principles.[607] The Enlightenment model of the rational, autonomous person,

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[605] For example, when I went to school in the 1950's and started to learn to write, this was done with a wooden pen with a detachable metal nib which was dipped into an inkwell. I am writing this thesis on a personal computer.

[606] David Harvey: The Condition of Postmodernity: An Inquiry into the Origins of Cultural Change (1989, Basil Blackwell, Cambridge)

[607] See Margaret Davies: Asking the Law Question (1994, Law Book Co, Sydney), Chapter 7. Davies refers, at p.221, to T.S. Eliot's argument that a "universal book" existed beneath the chaos of texts, and gives Kelsen's grundnorm principle and Hart's "rule of recognition" as examples of this in legal philosophy. It can be seen

placed in a social contractarian context,[608] fitted this approach and bolstered notions of universality underpinning the theory. The Enlightenment project was to show that the medieval past had been based on religious dogma and to recognise new paradigms for society, but it was in fact just as dogmatic. Contextualism was irrelevant[609] and it is not surprising that the predominant model of the law, positivism (which differentiates sharply between law and non-law, seeing the former as internally coherent), enjoyed pre-eminence (especially at the expense of natural law) during the "modern" period. Harvey has said that the Enlightenment thinkers - and the twentieth-century scientific rationalism which grew out of it - "took it as axiomatic that there was only one possible answer to any question ... [and held a belief in] linear progress, absolute truths and rational planning of ideal social orders."[610] This was an intellectual climate in which universalism could flourish. Postmodernity, on the other hand, has been described as "the age of over-exposure to otherness"[611] through information technology, travel and immigration. Thus, truth is regarded as being made rather than found,[612] is

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in part as an emanation of Hegel's dialectical approach in The Philosophy of Right and the theories of Kant discussed in Chapter 2.

[608] See Chapter 2 above.

[609] Gaete, ante, has described it as: "Natural rights preside over positive rights, eternal rights over historically determined rights, absolute rights over bounded rights" (p.14).

[610] David Harvey: The Condition of Postmodernity, ante, p.27.

[611] Walter Truett Anderson: The Truth About the Truth: De-Confusing and Re-Constructing the Postmodern World (1995, G.P. Putnam's Sons, New York), Introduction at p.6.

[612] Richard Rorty: Contingency, Irony and Solidarty (1989, Cambridge U.P., New York), p.3.

contextual rather than objective, and there is a preference for the local and specific over the universal and abstract.

Much postmodern (and related) theory is indebted to writers like Michel Foucault who theorise that laws of understanding, if they exist at all, are not universal, natural or eternal, but rather are historically and linguistically specific.[613] Perception is culturally conditioned. Ideas are part of social and political movements. I have illustrated this in Chapter 2, and I agree with the general principle, if not with all the conclusions to which it is put. Postmodernist and deconstructionist theories have been valuable in shining a light through the more transparent arguments of the common law,[614] although this issue has been tackled by others coming from different perspectives.[615] The issue has essentially become

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[613] For example, Foucault: The Order of Things: An Archaeology of Human Sciences (1979, Tavistock, London). In the Preface of this book Foucault considers a Chinese taxonomy of animals which divides them into such categories as "embalmed" and "drawn with a very fine camelhair brush." The point is to indicate that the reason why we might regard these categories as silly is not because they necessarily are so, but because our own experience makes it difficult for us to accept them as categories of animals. See Davies, ante, at pp.7-8.

[614] Such as the view, particularly subscribed to by Blackstone in his Commentaries, that the common law was "discovered" rather than expressly made by Parliament or the judges - it was an expression of a reality which resulted from the accumulation of custom. See Chapter 2 above. Judges in this sense did not make "bad" law; if they were wrong it was because they simply had not discovered the law at all. See Davies, ante, Ch.2.

[615] For example, Dworkin in Taking Rights Seriously and Law's Empire admits that judges do not simply declare the law, but tries to diminish the spectre of a rampant judicial creativity by referring to the principles, policies and standards - as well as formal rules - upon which the law relies. In Dworkin's view, there can be a "right" way of deciding cases. As a refutation of positivism, this was criticised by Raz in "Legal Principles and the Limits of Law" (1972) 81 Yale Law J. 823.

one of the authority of the law. Postmodernists contend (I think rightly) that this authority does not emanate from a more or less fixed point, which is in contrast, for example, to natural law (which sees law as emanating from "natural" processes) and positivist theories (which regard the law as the result of a more artificial, but nevertheless authoritative, process - Kelsen's "pure" theory of law, for example, attempted to exclude ideals and ideologies). Postmodernism contends that universals were not necessary, one point of view being as good as another. There are no absolute explanations. Smart has written:

> Central to the postmodern condition is the notion that the legitimation procedures of knowledge have been eroded, and that the assumption at the heart of legislative reason of the possibility and/or acceptability of deriving prescriptions from denotative statements is no longer sustainable.[616]

Postmodern approaches are closely related to theories of language and meaning. Indeed, postmodernism, poststructuralism and deconstruction are sometimes used as interchangeable terms. They are all attempts to eliminate stereotypes and value-judgements upon which theories are constructed. None is a theory generic to law and there is debate as to the extent of their useful application here.[617] Structuralism and poststructuralism[618] arose from semiotics, concerning the relationship between language, meaning and the world. Basically, the issue is how

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[616] Barry Smart: Postmodernity (1993, Routledge, London), p.119.

[617] See De Sousa Santos, "Law: A Map of Misreading. Toward a Postmodern Conception of Law" (1987) 14 Journal of Law and Society 279; Hunt, "The Big Fear: Law Confronts Postmodernism" (1990) 35 McGill L.J. 507.

[618] While these relate to postmodernism, they are not identical with it: see Smart, ante, pp.20-28. The intricacies of this distinction I do not consider to be relevant to this thesis.

language works: is it a process of giving names to meanings (which assumes that the meaning comes first) or is it the other way around (with language coming first and then the meaning, i.e., that without language we have no proper way of conceptualising)?[619] Structuralism contended for the latter. In other words, the object or idea (the referent or signified) does not by itself determine the meaning, rather the word (the signifier) carries with it the concept. Poststructuralism builds on this but questions the paradigm necessary for structuralism to operate: the concept of a more or less static environment within which the signifying occurs, i.e., the notion that the process occurs between a thinking individual on the one hand and the external world to which he or she reacts on the other. Poststructuralists contend that the interaction necessary for language to be created itself destabilises the system.[620] Like postmodernism, poststructuralism rejects any simple connexion between an expression like "rights" and a "true" meaning. The system is simply too unstable to provide it. Basically, there is a crisis of representation[621] so that meaning is "sustained through mechanisms of self-referentiality."[622]

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[619] A pioneer in this field was Ferdinand de Saussure: Course in General Linguistics (1959, Philosophical Library, New York). See Davies, ante, pp.229-40.

[620] See, for example, Jean-Francois Lyotard: The Postmodern Condition: A Report on Knowledge (1984, U. of Minnesota Press, Minneapolis); Davies, ante, pp.240-54.

[621] See R. Boyne & A. Rattansi (eds): Postmodernism and Society (1990, Macmillan, London).

[622] M. Poster: The Mode of Information: Poststructuralism and Social Context (1990, Polity Press, Cambridge), p.13, my emphasis.

Deconstruction is a process of undoing assumptions which are implicit rather than explicit in an argument - a dismantling of the structural layers. As language is an attempt to express reality, but is only a metaphor, language must be looked behind to find the underlying thought or true meaning (if there is one). Like peeling (or unpeeling) a fruit to expose the empty core onto which successive layers of meaning have been built. The best known deconstructionist, Jacques Derrida,[623] coined the term "différance" (a purposeful corruption of the French word "différence" which can mean in English either to differ or to defer) to indicate the conceptual instability in language in that meaning is continually deferred. Davies explains this with respect to the application of a law as follows:

> An abstract legal principle refers forwards to the possibility of its application in a particular case, and the case itself refers backwards to the abstract legal principle. Sometimes such a principle is indeed constructed backwards by the judges. The system itself therefore cannot be regarded as either spacially or temporally static. We can not fix it into a stable set of meanings, and nor can we get it right now. The legal system, like other systems of signification ... is inherently dynamic.[624]

There is no essence of meaning and it cannot be reduced to any single extra-textual referent.[625] This does not necessarily mean that there are an infinite number of meanings so much as there is never just one which can(not) represent itself as timeless certainty. The organisation of concepts is based on dichotomies

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[623] Jacques Derrida: Of Grammatology (1974, Johns Hopkins U.P., Baltimore); Davies, ante, pp.254-59.

[624] Davies, ante, p.257.

[625] Derrida's work has been described as signalling the end of metaphysics - Wenche Ommundsen: Metafictions? Reflexivity in Contemporary Texts (1993, Melbourne U.P., Carlton).

(differences) such as masculine and feminine which carry with them a sense of superiority and inferiority. Deconstruction, it is contended, allows us to see not just that one term is inferior to the other, but is in fact essential to an understanding of the other, that the subordinated term is in fact central rather than marginal.[626] We simply cannot understand a concept like "man" unless we appreciate its dichotomy, "woman". This is particularly relevant with respect to arguments of equal rights. Indeed, equality itself can be dichotomised with difference. Terry Eagleton has succinctly remarked:

> Deconstruction has two embarrassments with the phrase "human rights", one with each word. In deconstructive eyes, the whole notion surely belongs to a discreditable metaphysical humanism - which is not to say that it is strategically unusable, just ontologically baseless.[627]

Again, however, such an approach will not necessarily indicate what should be done with the deconstructed concepts,[628] deconstruction being an analytic tool,

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[626] Davies, ante, p.258. A good example of deconstruction applied to the Australian High Court decision in Gerhardy v Brown is Geoff Airo-Farulla, "Dirty Deeds Done Dirt Cheap: Deconstruction, Derrida, Discrimination and Difference/ance in (the High) Court" (1991) 9 Law in Context 102.

[627] Terry Eagleton, "Deconstruction and Human Rights" in Barbara Johnson (ed): Freedom and Interpretation: The Oxford Amnesty Lectures 1992 (1993, Basic Books, New York), at p.121.

[628] This is especially so with documents such as the UDHR which are the result of the input of many people. Deconstruction, coming as it has to law from literary criticism, is an approach fundamentally used on single-author works. Not only is there no meta-narrative, there is no seamless underlying web of values but a cobbled-together exercise in political compromise which deconstruction (or a perusal of the travaux préparatoires) might expose, but not smooth over. Moreover, when the forms of representation are reduced to textuality, it is difficult to argue that written material is ever about anything other than the text itself and its own conventions and methods of production. Breaches of human rights are a reality which pose ethical, not just textual, questions. Nuclear criticism moves away from deconstructive and post-structuralist practices for this reason: see Ken Ruthven: Nuclear Criticism (1993, Melbourne U.P., Carlton).

not a synthesising one.[629] This decision can be political - and arbitrary. But at least it allows us to "unpack" the layers of meaning which have become attached to a concept, or upon which it might be based, so that it can be looked at in a new way. It is a process rather than a solution. It is not primarily concerned with giving a "meaning" to a legal rule. but with identifying the conditions which make a meaning possible.[630] It can uncover "privileging": why, given the dichotomies, one meaning is preferred over the other. It challenges assumptions of legitimacy and can help expose the view that certain concepts are "natural" or politically neutral as a myth. It challenges the view that there is a single correct meaning of a legal norm and indicates that it is possible for a general norm to have a variety of meanings or applications depending on the context.[631] Context rather than the rule is dominant (which is not to say, as some Crits seem to, that the rule means nothing or is useless).[632] What it exposes are the limitations, rather than the uselessness, of a rule. It is that the binary oppositions themselves change and what is regarded as being "outside" or "inside" the law depends on more than what the rules "say". But, as Kuhn recognises, the "decision to reject one paradigm is

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[629] J. Balkin, "Deconstructive Practice and Legal Theory" (1987) 96 Yale Law Journal 743 at p.786.

[630] Airo-Farulla, ante, p.102.

[631] See generally Drucilla Cornell, Michel Rosenfeld & David Grey Carlson (eds): Deconstruction and the Possibility of Justice (1992, Routledge, New York).

[632] See, for example, Stanley Fish, "Dennis Martinez and the Uses of Theory" (1987) 96 Yale L.J. 1773, who contends that when we know that the foundations of a concept are interpretative rather than "natural" we will not necessarily regard them with so much suspicion that we will shake ourselves free of them. Fish calls this a "characteristically left error" (at p.1796).

always simultaneously the decision to accept another."[633] Deconstruction does not provide the basis for the new paradigm, but does show that the paradigm is historically contingent. It does not mean "anything goes".

In particular, it is these approaches which insist upon an interdisciplinary approach to fundamental questions of law, relying equally on an examination of overt admissions and unstated assumptions about the way we see the world. They force us to confront the fact that rules exist because we live them, that we continually create and transform them, that there is no absolute place where they can be fixed and where we can see them in their "final" and perfect form.[634] The problem, however, is with the conclusions which are regarded as necessarily following from this.

The latest most radical critiques, such as those from adherents to the Critical Legal Studies approach, argue that the category of rights is effectively no more than political justification and that rights represent empty, abstract reifications and are inherently unstable and indeterminate.[635] It is not doctrine but the political

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[633] T. Kuhn: The Structure of Scientific Revolutions 2nd ed, (1970, U. of Chicago Press, Chicago), p.77.

[634] See Margaret Davies: Asking the Law Question, ante, Chapter 1. A description of the foundations of CLS can be found in Mark Tushnet, "Critical Legal Studies: An Introduction to its Origins and Underpinnings" (1986) 36 Journal of Legal Education 505.

[635] For example, Mark Tushnet, "An Essay on Rights" (1984) 62 Texas L.R. 1363. For an overview, see J. Boyle: Critical Legal Studies (1992, Dartmouth Publishing, Aldershot). For a critical discussion of CLS in international law generally, see Nigel Purvis, "Critical Legal Studies in Public International Law" (1991) 32

context which determines interpretation and application, legal concepts being "flippable".

Critical Legal Studies writings in particular can be seen as falling into two broad groups: those based on a broad critique of legal ideology and those which cam be termed "nihilist".[636] The former attempts to demystify legal doctrine by placing it in its historical and ideological context to explain why the doctrine says one thing rather than another (i.e., that the doctrine is the result of this response rather than the product of a rational ordering of human affairs).[637] It is also used to demonstrate that legal ideologies like freedom can be used to mask the way legal doctrine can operate in an oppressive fashion (i.e., that the doctrine is not impartial or fair).[638] The nihilist branch of Critical Legal Studies attempts to show that legal doctrine is contradictory, incoherent and indeterminate. This in itself will not necessarily be news to either academics or practitioners. However, this branch of

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Harvard International L.J. 81.

[636] Frank Munger & Carroll Seron, "Critical Legal Studies Versus Critical Legal Theory: A Comment on Method" (1984) 6 Law and Policy 257; William Forbath, "Taking Lefts Seriously" (1983) 92 Yale L.J. 1041. See Davies, ante, Chapter 5. Crits themselves admit that there is considerable controversy within the CLS movement itself. See David Kairys (ed): The Politics of Law: A Progressive Critique (1982, Pantheon, New York), Introduction, especially at pp.6-7.

[637] For example, Elizabeth Mensch, "The History of Mainstream Legal Theory", Chapter 2 in David Kairys (ed): The Politics of Law: A Progressive Critique (1982, Pantheon, New York). See also the articles devoted to historicism in legal scholarship in Volume 90 of the Yale Law Journal (1981).

[638] For example, Roger Cotterrell, "Power, Property and the Law of Trusts", in Critical Legal Studies (Fitzpatrick & Hunt, eds), (1987, Basil Blackwell, Oxford). This is also the aim of much feminist writing.

the "Crits" argues that, as a result, legal doctrine must be rejected and reconstructed.[639] Essentially, the "Crits" assert that it is fallacious to distinguish law from politics, as though it were some form of idealised process.[640] "Truth" is relative to any particular social or historical group and cannot be conceived of independently of socially-conditioned values. Also, because of subjectivity, we cannot conceptualise without language (and all of the semiotic problems mentioned above) so that any "truths" must also be distorted and partial.

Even accepting these criticisms, essentially what this view ignores are two fundamental facts: knowing that the system is full of contradictions and indeterminacy does not necessarily entail that it does not work;[641] and the use of legal doctrine, both inside and outside the courtroom or conciliation hearing, is

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[639] This is a very broad outline only, but sufficient for my present purposes. See Davies, ante, at pp.144-149, and footnotes cited therein, for a helpful overview.

[640] See, for example, David Kairys (ed): The Politics of Law: A Progressive Critique, ante, Introduction. In particular, Kairys considers that four basic assumptions about the law (that it is pre-existing, clear and predictable; that relevant facts necessary for the proper disposition of the case can be objectively ascertained through court procedures and the rules of evidence; that the end-product is the routine application of the law to these facts; and that a reasonably competent judge will be able to arrive at the "correct" decision) are incorrect (at pp.1-2).

[641] This will be particularly a concern of Chapter 5. In my view it is an unfair and an unrealistic exaggeration to say that most litigation or conciliation in matters dealing with matters of the human rights type (such as Charter litigation or discrimination conciliation) really oppress the minorities they are designed to help. They are by no means perfect, but it is the result of what society at the moment will tolerate. Gay rights, for example, did not emerge at the end of World War II, although they could have - the Nazis persecuted homosexuals along with the Jews. The matrix was simply not ready for it. But this does not mean that the Genocide Convention should be rejected as hypocrisy. If law is politics, an incremental approach is - outside of a revolution - the only one likely to succeed.

itself a political strategy to achieve goals incrementally, regardless of the internal consistency of the doctrine.[642] Rights are at the centre of politics as well as law. This does not mean that the overlap between them is complete.

Critical Legal Studies particularly attacks liberal ideology which, as shown in Chapter 2, has been the dominant Western ideology this century.[643] Primarily, liberal ideology emphasises the concept of freedom, by which is meant an absence of interference by the State. Freedom itself can be sub-divided into positive and negative types,[644] and represents a paradigm shift from power to rights. As this entails consideration of limitations on state power, the balance to be struck between that power and freedom becomes a central issue,[645] and who or what makes the decision becomes crucial. As Davies says,[646] the issue of the formal recognition of "rights" becomes more important than their source. It is such rights that the Crits attack on the basis that they mask oppression, particularly since, as they are

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[642] Contrast Kairys, ante, who contends that "the law is a major vehicle for the maintenance of existing social and power relations" (at p.5).

[643] For a liberal rejoinder, see Andrew Altman: Critical Legal Studies: A Liberal Critique (1990, Princeton U.P., Princeton). Interestingly, in recent times liberalism has also come under attack from conservatives: in the 1988 U.S. presidential election campaign, George Bush accused Michael Dukakis of being "a card-carrying liberal".

[644] See Isiah Berlin: Four Essays on Liberty (1969, Oxford U.P., Oxford) and the critique of this in Timothy O'Hagan: The End of Law? (1984, Basil Blackwell, Oxford), pp.116ff.

[645] See, for example, J.S. Mill: On Liberty, discussed in Chapter 2.

[646] Ante, at pp.159-60.

unstable, they can be manipulated politically.[647] Rights can be, in effect, distortions rather than reflections of community values, because the legal order is indeterminate,[648] the value choices inherent in the application of the rules are obscured and especially since rights address symptoms rather than the causes of oppression. This is a trenchant observation, but tends to discount the use of rights as part of a process rather than as ends in themselves. Liberal rights may indeed raise false hopes, but they can be used by oppressed minorities as a starting point for argument, as a strategy to generate solidarity, and as a tool in litigation or conciliation.[649] Practicality can trump theory: rights are simply of more use to

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[647] See, for example, Allan Hutchinson & Patrick Monahan, "The 'Rights' Stuff: Roberto Unger and Beyond" (1984) 62 Texas L.R. 1477. See also by the same authors "Law, Politics and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought" (1984) 36 Stanford L.R. 199 where they write: "Law is not so much a rational enterprise as a vast exercise in rationalization. Legal doctrine can be manipulated to justify an almost infinite spectrum of possible outcomes. ... [It] is nothing more than a sophisticated vocabulary and repertoire of manipulative techniques for categorising, describing, organizing, and comparing; it is not a methodology for reaching substantive outcomes." (at p.204). As Duncan Kennedy bluntly puts it: "Legal thought can generate equally plausible ... justifications for almost any result" ("Legal Education as Training for Hierarchy" in Kairys (ed): The Politics of Law, ante, p.48.

[648] Huthinson and Monahan in 36 Stanford L.R., ante, state that "CLSers ... refuse to hedge on the indeterminacy of the legal order" (at p.205). Owen Fiss in "Objectivity and Interpretation" (1982) 34 Stanford L.R. 739, adopts an intermediate position arguing that while there may be no single, incontestable reading of a legal document like a constitution, the Crits are wrong in suggesting that the range of meanings that are possible is infinite. The range can be reduced because the "interpretive community" defines certain standards of interpretation as authoritative. Hutchinson and Monahan, ibid, retort that this view in fact provides "unwitting support for CLS views" because the notion of the interpretive community simply lends the appearance of coherence (footnote 35).

[649] Some Black writers adopt this viewpoint, such as Richard Delgado, "The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?" (1987) 22 Harvard Civil Rights-Civil Liberties L.R. 301. An example with respect to gay and lesbian rights is Kees Waaldijk & Andrew Clapham (eds): Homosexuality: A European Community Issue - Essays on Gay Rights In European Law and Policy (1993, Martinus Nijhoff Publishers, Dordrecht).

minorities than is critical legal theory. Indeed, it has been shown that it is possible to be critical, even cynical, about the law without being a "Crit". Arthur Leff,[650] for example, was a traditional legal scholar who argued that law was an accumulation of ad hoc compromises. This is certainly the case with respect to the conclusion of international human rights instruments. In addition, while the "nihilist" Crits argue that legal doctrine must be reconstructed, few attempt to do this and, indeed, do not regard it as part of their mission. One notable exception is Roberto Unger[651] who argues for a "structure of no-structure" to guard against the tendencies to "naturalize" an arbitrary vision of society.[652] The circularity of the argument in the CLS context has been brought out by Hutchinson and Monahan when they write:

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[650] See, for example, "Contract as Thing" (1970) 19 American U.L.R. 131; "Injury, Ignorance and Spite - The Dynamics of Coercive Collection" (1970) 80 Yale L.J. 1.

[651] See Knowledge and Politics (1975, The Free Press, New York), where in Chapter 2 he specifically addresses the problems with legislating for freedom. Unger contrasts three theories: (1) the formal theory of freedom, where laws are derived solely from the idea of freedom itself (such as legal positivism) but where the real choices that are made between competing values are ignored; (2) the substantive theory of freedom, where private ends (the competing values) are combined either through an aggregation of them (e.g., utilitarianism) or through setting up dispute-resolution procedures (e.g., the social contract theories of Locke and Rousseau) or through a combination of these last two (e.g., Rawls), with none of the three again able to find a truly neutral way of combining the individual values) and (3) the doctrine of shared values (i.e., a law based on a common core of agreed values), which again denies the subjectivity of these values. See also Unger's Law in Modern Society: Toward a Criticism of Social Theory (1976, The Free Press, New York).

[652] Unger argues, I think correctly, that there is no essential core of human nature: we are neither inherently good not inherently bad. We are what we are because of the social, cultural and imaginative context. We can transcend this context by living a "life of the passions": being neither empty vessels not rational robots, humans are passionate persons whose lives are interconnected. See generally Unger's Passion (1984).

> To sustain any definite vision of future society, the Critical scholars must renege on their basic commitment to social contingency and historical relativity. CLS is ultimately hoisted on its own Critical petard. ... [A] ruthless commitment to the nonnaturalistic premise renders Unger's reconstituted society a falsehood and an illusion; it is only another in an endless series of truces that masquerades as a natural order of right.[653]

Feminism approaches these issues from the point of view of the gendered nature of liberal thought.[654] It can be divided for convenience into liberal and radical feminism.[655] Liberal feminism, while recognising the gendered nature of social systems (and their bias towards men), has been criticised as accepting the liberal value system and of "simply trying to invest women with the opportunities and values of men",[656] particularly with respect to the liberal dichotomy between the public and private domains.[657] Mary Wollstonecraft could have been classified as a liberal feminist in that she substituted "woman" for "man" in the French Declaration. The issue is not simply putting more women into "male" jobs, but of

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[653] "Law, Politics and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought" (1984) 39 Stanford L.R. 199, at p.231.

[654] An early example is Mary Wollstonecraft in Vindication of the Rights of Women, discussed in Chapter 2. More recent discussions of feminism include Catherine MacKinnon, "Towards Feminist Jurisprudence" (1982) 34 Stanford L.R. 703, Ann C. Scales, "The Emergence of Feminist Jurisprudence: An Essay" (1986) 95 Yale L.J. 1373, Margaret Thornton, "Feminist Jurisprudence: Illusion or Reality?" (1986) 3 Australian Journal of Law and Society 5. A critique with respect to human rights law is Andrew Byrnes, "Women, Feminism and International Human Rights Law - Methodological Myopia, Fundamental Flaws or Meaningful Marginalisation?" (1992) 12 Australian Yearbook of International Law 205.

[655] See Davies, ante, Chapter 6, especially pp.190-202.

[656] Davies, ante, p.190.

[657] See Margaret Thornton: The Liberal Promise: Anti-Discrimination Legislation in Australia (1990, Oxford U.P., Melbourne).

recognising the gender bias in the values underlying the legal system itself.[658] The impact is upon the notion of "equality" more than freedom (i.e., that women are treated equally to men rather than equally the connections here with the deconstructionist view of difference/differance are obvious, but the same applies for men too, if they are black, disabled or gay). As Davies has noted:

> It is white middle-class women who have most benefited from the liberal version of women's liberation. And it is clear that Australia's new-found constitutional right to freedom of political expression will not help those who are politically disenfranchised - Aboriginal people, for instance - as much as it will help politicians and the media. It is a fine ideal, but ... the problem is that it is only people with sufficient financial resources who can purchase political influence... So it is important to realise that, although it looks at this stage like an individual right, it is in effect a right of corporate, political or economic power. The point here is basically that "rights" cannot be separated from the political, cultural, and economic context in which they are set.[659]

Radical feminism goes further than the adaptation of existing social structures and values to cater to women's needs. It attempts to locate the basis of subordination so as to be able to transform the balance of power.[660] Thus, for example, rights protecting the family unit can mask the oppression of women within the family.[661] Feminism is a theory of power as much, if not moreso, than a theory

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[658] See R. Graycar & J. Morgan: The Hidden Gender of Law (1990, Federation Press, Sydney).

[659] Davies, ante, pp.192-3.

[660] Davies, id., at pp.193ff especially refers to the work of Catherine MacKinnon.

[661] See H.B. Holmes, "A Feminist Analysis of the Universal Declaration of Human Rights" in C. Gould (ed): Beyond Domination: New Perspectives on Women and Philosophy (1983, Rowman & Allanheld, Totowa).

of the State.[662] It has spawned other approaches which use a similar technique for different goals, such as Critical Race Theory[663] and Queer Theory.[664] Instead of deriving theories from introspection about the philosopher's own needs, these theories say that the stories of people from disadvantaged groups should be listened to so that different (and for them more relevant and valuable) priorities are identified.[665] Looking at the impact of the law on disadvantaged groups will help establish an "anti-subordination perspective" so that the law itself is not used to reinforce patterns of dominance.[666] While law might be a "site of dialogue" the issue in these approaches is whose dialogue is being taken into consideration.

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[662] Catherine A. MacKinnon, "Feminism, Marxism, Method and the State: Towards Feminist Jurisprudence" (1983) 8 Signs 635; Christine A. Littleton, "Reconstructing Sexual Equality" (1987) 75 California L.R. 1278; Ngaire Naffine: Law and the Sexes: Explorations in Feminist Jurisprudence (1990, Allen & Unwin, Sydney).

[663] See Richard Delgardo, ante.

[664] See Wayne Morgan, "Queer Law: Identity, Culture, Diversity, Law" (1995) 5 Australasian Gay and Lesbian Law Journal 1.

[665] See Mari Matsuda, "Looking to the Bottom: Critical Legal Studies and Reparations" (1987) 22 Harvard Civil Rights-Civil Liberties Law Review 325.

[666] See Ruth Colker, "Anti-Subordination Above All: Sex, Race and Equal Protection" (1986) 61 N.Y.U.L.R. 1007 at p.1014.

Where does this profusion of theories and approaches leave us? If rights are indeterminate, manipulable and mask the need for social and political change, is the notion of human rights a contradiction in terms?

As Thomas Kuhn has pointed out, the history of knowledge is an endless series of anomalies and all theorising contains an arbitrary element - a conception of the nature of social reality - that cannot be justified by the methods or structure of the theory itself.[667] Whatever the approach, they are linked to perceptions of fundamental human interests. As White has commented:

> None of the answers commonly suggested to the question "What gives one the right to so and so?" ... shows ... any strictly logical connection between the right in question and the basis suggested for it. All that it is possible to argue is that the suggested basis gives a non-deductive, evaluative reason for possession of the right, a reason which is, of course, often supported by common sense, our shared moral values, the apparatus of the law, some institutionalised system of regulations or conventions, etc.[668]

I have referred to this in Chapter 2 as the developmental matrix. The history of human rights is not a sacred history. This is why, in an international document like the UDHR, those metaphysical traditions had to be - and were - downplayed, even though they might never have been completely eluded. Rights (and human rights)

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[667] T.S. Kuhn: The Structure of Scientific Revolutions 2nd ed, (1970, U. of Chicago Press, Chicago), pp.52ff.

[668] Alan R. White: Rights (1984, Clarendon Press, Oxford), pp.172-3.

can be seen as consequences regardless of their metaphysical validity as "truth" statements.[669] Rolando Gaete has described human rights as:

> ... one of the monumental legacies left by the Enlightenment. They are one of those grand narratives ... that spoke the Truth about the world in order to change it ...[670]

This statement is wrong in two respects. Historically, human rights as we have them from the UDHR (which is their present-day form) owe much to Enlightenment philosophy, but are not the direct legacy of them. Their construction in the 1940's was too fraught by political compromise for such a statement to be accurate. They are more (post)modern than that, particularly when used in conjunction with domestic law. Second, they have never attempted to speak the truth about the "world": they speak about our perceptions of humans in a general sense (and not necessarily about the conditions humans are or were in) to help to change the world (as they have always relied on a domestic legal system for final articulation). Rather than having "prematurely aged among the debris left in the wake of modernity,"[671] they are in fact capable of acting in a postmodern world

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[669] For example, Alf Ross compared rights with the function of taboos in South Pacific islands. A taboo against eating the chief's food results in the violator becoming "tu-tu" and he or she must then go through a purification ceremony. Ross argues that the tu-tu statements are of two classes: a truth statement (whoever eats the chief's food becomes tu-tu) and a rule (a person who is tu-tu must undergo a purification ceremony). The first statement can be skipped without affecting the functioning of the second. The concept of tu-tu (and of "right") is a convenient shorthand which conveys a consequence rather than necessarily a truth statement. It is why natural rights can be used to justify slavery. See On Law and Justice (1959, University of California Press, Berkeley), para. 36.

[670] Rolando Gaete: Human Rights and the Limits of Critical Reason (1993, Dartmouth, Aldershot), p.1.

[671] Id, p.2.

and of being useful there. This is not simply to hide the metaphysical roots under a discourse of pragmatism.[672] It is to put the metaphysical roots into their proper proportionate perspective. Nor is it to regard human rights as a Grand Theory sustainable on its own. It is to show human rights as part of a (continuing) process rather than as an end in itself, as the struggle is not necessarily right against wrong, but right against right.[673] As Gaete himself admits: "It is unnecessary to deconstruct human rights because human rights deconstruct themselves by producing a counterprinciple whenever a principle must be interpreted."[674] Human rights are not the discourse, they are a part of the overall legal discourse and are subject to, and affected by, the historical and ideological contexts in which the discourse takes place. As legal rights they are also part of, and affected and effected by, the processes and structures of the legal system.

Postmodern approaches tend to demonise the effect of the Enlightenment Project, seeing it as a unitary and integrated project when, as Chapter 2 has shown, it was not. Moreover, the Enlightenment was unquestionably an advance which replaced superstition with science and religious dogma with reason. The fact that we now need emancipation from its products does not necessarily entail its wholesale

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[672] Id, p.167.

[673] For a Canadian example, see A. Alan Borovoy: When Freedoms Collide: The Case For Our Civil Liberties (1988, Lester & Orpen Dennys, Toronto).

[674] Ante at p.57.

rejection but rather the re-evaluation of its worth in current conditions.[675] Hunt has called the dichotomy between wholesale endorsement of the Enlightenment Project or its complete abandonment both unhelpful and avoidable, stressing that the discourses of freedom, equality and knowledge remain incomplete.[676]

I agree, but the problem remains how such malleable concepts can be used in legal systems which crave certainty.[677] However, as Stanley Fish has argued,[678] the law is rhetorically resilient in maintaining its formalism: it assimilates extra-legal concerns into its own categories. Thus, concepts expressed as rights do not necessarily have to have a determinable epistemological basis. But the text of a rule does at least contain a core concept upon which reliance must be placed if it is to have any meaning constructed onto it and be able to function.[679] But the

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[675] See J.M. Balkin, "What is a Postmodern Constitutionalism?" (1992) 90 Michigan L.R. 1966, especially at pp.1988-89.

[676] Alan Hunt, "The Big Fear: Law Confronts Postmodernism" (1990) 35 McGill L.J. 507 at pp.515-16.

[677] Hunt, id at p.532 advocates a "grounded relativism". John Hannaford advocates "Legitimate argumentation in the terms of tradition-constituted truth": "Truth, Tradition and Confrontation: A Theory of International Human Rights" (1993) 31 Canadian Yearbook of International Law 151 at p.177. I am not sure that I understand what either of these phrases means.

[678] Stanley Fish, "The Law Wishes to Have A Formal Existence" in Austin Sarat & Thomas R. Kearns (eds): The Fate of Law (1991, University of Michigan Press, Ann Arbor).

[679] For example, Dworkin in A Matter of Principle (1985) wrote that the settled core of a text can impose constraints on an interpreter in that, for example, Agatha Christie wrote murder mysteries and not treatises on the meaning of death (at p.150). To read a Christie novel as anything other than what it is, is to skew its real value by distorting the core. Similarly, Shakespearian plays may be performed in modern dress, but the core at the centre of the plays should remain if we are to appreciate them.

problem is to isolate that core: it may not be immobile nor even in the "text" itself nor necessarily to be found in the intention of the author. It may be in the conventions and practices of the readers.[680] The uses to which Magna Carta has been put, as described in Chapter 2, are examples. What, if anything, is at the "core" of human rights which, if not to act as a justification of them will at least allow them to function in a legal system?

Postmodern theories have opened our eyes to the fact that an approach to law premised on the idea that it can always produce determinate results is fallacious. The reasons to explain this are often sought in extra-systemic factors,[681] thus assuming an internal coherency of the legal system which does not necessarily exist.[682] The distortions are considered to come into the legal system from outside rather than appreciating that the legal system could be, as Robert Gordon put it, "indeterminate at its core."[683] The oscillation between Natural Law

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[680] See Fish, "Wrong Again" (1983) 62 Texas L.R. 299, especially at pp.300ff. Fish argues that interpretation is constrained by interpretive communities: a judge will not make a judgement which appears to his or her peers to be ridiculous.

[681] For example, semantic uncertainty, political preference, judicial incompetence, philosophical/jurisprudential outlook, or different facts (the application of distinguishing earlier cases). (See Martti Koskenniemi: From Apology to Utopia: The Structure of International Legal Argument (1989, Finnish Lawyers' Publishing Co., Helsinki), pp.42-3.

[682] See generally Anthony Carty: The Decay of International Law? A Reappraisal of the Limits of Legal Imagination in International Affairs (1986, Manchester U.P., Manchester); David Kennedy: International Legal Structures (1987, Nomos Verlagsgesellschaft, Baden).

[683] Robert W. Gordon, "Critical Legal Histories" (1984) 36 Stanford L.R. 59 at 114.

theories and theories of State consent are no longer sufficient to explain this. Koskenniemi has referred to descending and ascending theories,[684] concluding that reconciliation is impossible.[685] Although ultimately propounding his own approach, he makes use of the notion of "differance" to explain his view:

> The arguments are meaningful only in mutual exclusion. ... The dynamics of international legal argument is provided by the contradistinction between the ascending and descending patterns of argument and the inability to prefer either. ...[D]octrine is forced to maintain itself in constant movement from emphasising concreteness to emphasising normativity and vice versa without being able to establish itself permanently in either position. ... This will explain why familiar disputes keep recurring ... Law is contrasted to discretion, "positivism" to "naturalism" ... sovereignty to community ... and so on. The result is a curiously incoherent doctrine which is ad hoc and survives only because it is such ... [advancing by] emphasising the contextuality of each solution. ... Modern doctrine ... uses a mixture of positivistic and naturalistic, consensualistic and non-consensualistic, teleological, practical, political, logical and factual arguments in happy confusion ...[686]

Koskenniemi contends that the outcomes can thus never be totally convincing as

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[684] Koskenniemi, id at pp.44-46. The descending theories assume that the law's objectivity lies in its normativity thus making it external to State behaviour as a way to control States. The problem with this argument is that it ultimately relies on a natural law approach, which introduces the problem of the identification of the values and how this is to be done without subjectivity. It also starts to run counter to the fundamental international notion of sovereign equality of States. The ascending theories try to overcome these problems by linking in subjective State acceptance of laws. The problem here is that the element of normativity is weakened when State acceptance is needed for the law to operate. Both approaches are inherently political and subjective. An attempted reconciliation between the two (e.g., through the notion of tacit consent) also fails because it ultimately relies on a notion of "objective interests" (e.g., that the law-applier knows better than the State itself what it in fact has agreed to) or on naturalistic theories like good faith and reasonableness. Both are ultimately subjective.

[685] At p.46.

[686] Koskenniemi, ante, pp.46-7. A good example might be the codification of the law of interpretation of treaties found in Article 31 of the Vienna Convention on the Law of Treaties.

they can always be contradicted. Outcomes can only be really justifiable after a political stand is taken on the relevant issues, rather than assuming that a "privileged rationality" exists which itself will solve the issues.[687] I agree, and feel that this is why such an apparently incoherent system nevertheless can work, even with respect to human rights in the absence of a secure epistemological or ontological basis for it. Human rights can be seen to be compatible with postmodernism where "uncertainty is an uneradicable part of our epistemological predicament."[688] There will be a lessening of the concept of certainty, but this will be to introduce reality rather than anarchy into the system.

This can be seen pessimistically as one outcome being just as valid as any other. It can be seen optimistically as extending the boundaries of traditional legal argument so that lawyers concentrate openly on what we claim the law is really about: justice. However, the international legal system can mask the values on which it is based. Because it is traditionally based on the paramountcy of state sovereignty, it has a parallel with liberal theory in which individualism is central. Each State can propound its own notion of the "Good" and out of these separate decisions could emerge an order which represented a consensus at least acceptable to most,[689]

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[687] Id., pp.49-50.

[688] Charles Taylor: Philosophy and the Human Sciences Philosophical Papers 2 (1985, Cambridge), p.18; Koskenniemi, ante, p.478.

[689] Koskenniemi, ante p.55, in fact says "which everybody therefore has good reason to agree with." In my opinion, this has never really been the case with international law, but I agree with the general thrust of his argument.

perpetuating the public/private distinction, (an example being Article 2(7) of the UN Charter,[690] which is regarded as primarily procedural rather than substantive[691] and as a result the underlying values are masked). However, the UDHR was always intended to be a substantive value-document in that it articulated the fundamental categories of human rights, but with a blind eye turned to its own foundations as a part of the process of political compromise. It became the "value" in the sense that it, rather than appeals to God, nature or natural law, is what is mentioned in the Preamble to every major human rights document since. It never completely subscribed to the public/private distinction in the international sense, as the discussion above with respect to the frequent references to domestic law shows. But the application has been stymied by the re-imposition of the paradigm of State sovereignty.[692] While States have created independent values which generate rights for individuals which States are henceforth obliged to recognise,[693] the power imbalance in the system of enforcement is so great that it is in practice incapacitated. The UDHR enumerates the objects of human rights (i.e., what we have a right to) and makes it plain that human beings are the holders of those rights. But the claim is affected in practical terms because the structure of the international system makes the object of the duties unaccountable in real terms.

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[690] Koskenniemi, id., at p.126.

[691] Id., p.64.

[692] This aspect, with respect to the major human rights treaties to which Canada and Australia are parties, is discussed in the next chapter.

[693] See Louis Henkin, "International Human Rights as 'Rights'" Chapter 13 in Pennock & Chapmen: Human Rights, ante.

The open-ended content of the norms can be stymied by the structures in which they operate, particularly because of their non-synallagmatic nature.

This issue, indicating the interaction of content and structures, and of theory with practicality, is well illustrated by the controversy surrounding human rights as customary international law. As a resolution of the UN General Assembly, the UDHR has never had the binding force of a treaty. An important question is the extent to which it is or can be binding as customary international law. This issue has a practical as well as a theoretical significance: one major right in the UDHR, the right to property,[694] is not replicated in the major treaties; and emerging important elaborations of human rights are to be found in instruments of less than treaty status.[695]

Although not entirely unpredicted,[696] the UDHR came to assume a stature of awesome legal proportions, almost despite itself, and contrary to the express

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[694] Art. 17(1)

[695] For example, the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (G.A. Resol. 36/55, November 25, 1981), the Declaration on the Elimination of Violence Against Women (G.A. Resol. 48/104, December 20, 1993), the Standard Minimum Rules for the Treatment of Prisoners (ECOSOC Resol. 663 C (XXIV), July 31, 1957), and the Recommendations accompanying many ILO Conventions, such as ILO Conventions Numbers 100 (Equal Remuneration), 111 (Non-Discrimination), 156 (Family Responsibilities) and 158 (Termination of Employment).

[696] For example, the naming of it as a "declaration" as opposed to "recommendation" was because of the greater solemnity and significance to be attached to it, and the "strong expectation that members of the international community will abide by it." (UN Secretariat opinion, 1962: E/CN.4/L.610).

intentions of most of its framers. While consistently reiterating the importance of human rights,[697] the International Court of Justice has on several (but not numerous) occasions made remarks - I hesitate to call them definitive pronouncements - on the question of their legally binding nature,[698] often with little explanation or evidence and more in the line of taking judicial notice of a notorious fact. Judge Ammoun in the Advisory Opinion on Namibia wrote:

> Although the affirmations of the Declaration are not binding qua international convention within the meaning of Article 38, paragraph 1 (a), of the Statute of the Court, they can bind States on the basis of custom within the meaning of paragraph 1 (b) of the same Article, whether because they constituted a codification of customary law ... or because they have acquired the force of custom through a general practice accepted as law, in the words of Article 38, paragraph 1 (b), of the Statute.[699]

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[697] For example, early cases include the individual opinion of Judge Azevedo in the Advisory Opinion on Admission of a State to the UN ICJ Reports 1947-8, p.78; and the dissenting opinion of Judge Read in the Interpretation of the Peace Treaties Case (Second Phase), ICJ Reports 1950, p.231. The South-West Africa/Namibia cases are also indicative of this: see the separate opinion of Judge Jessup in the South-West Africa Case (Ethiopia v South Africa; Liberia v South Africa) ICJ Reports 1962, Preliminary Objections, p.356; the dissenting opinion of Judge Tanaka in the South West Africa Case (Second Phase), ICJ Reports 1966, p.315; and the Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa), notwithstanding Security Council Resolution 276 (1970), ICJ Reports 1970, paragraph 134.

[698] For example, in the South-West Africa cases, the notion of the "sacred trust" generated by the Mandate, however, had to be more than a moral or humanitarian ideal, and be clothed in "legal form" and given "juridical expression" before it could generate legal rights and obligations (South-West Africa Cases (Second Phase), ICJ Reports 1966, pp.34-35, paragraphs 49-52. In that case, Ethiopia and Liberia were held not to have sufficient locus standi to obtain a judgement on the merits (at p.51). See also the dissenting opinion of Judge Riphagen in the Barcelona Traction Case, ICJ Reports pp.338-9 and the separate opinion of Judge Morelli in the same case (at p.234), and the opinion of the majority that "on the universal level, the instruments which embody human rights do not confer on States the capacity to protect the victims of infringements of such rights irrespective of their nationality." (p.17).

[699] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970), ICJ Reports, 1971, p.76.

In the Case Concerning United States Diplomatic and Consular Staff in Tehran the Court observed:

> Wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights.[700]

A definitive pronouncement by the Court as to the legally-binding nature of the UDHR at the present time has yet to be made. This may occur with the case currently before the Court brought by Bosnia and Herzegovina against Serbia and Montenegro in the Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide.[701]

The Court's current approach to the identification of customary international law in the Case Concerning Military and Paramilitary Activities in and Against Nicaragua[702] has been criticised,[703] sometimes savagely.[704] In contrast, Meron has argued that the Nicaragua approach is consistent with the Court's dealing with

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[700] ICJ Reports 1980, p.42. See also the dissenting opinions of Judge Guggenheim in the Nottebohm Case (ICJ Reports 1955, at pp.63-4; Judge Azevado in the Asylum Case (ICJ Reports 1950, p.266); and Judge Levi Carneiro in the Anglo-Iranian Oil Case (ICJ Reports 1952, at p.168).

[701] Filed on March 20, 1993, the application specifically refers to alleged violations of all but four articles of the UDHR.

[702] ICJ Reports 1986, p.14.

[703] See, for example, Hilary Charlesworth, "Customary International Law and the Nicaragua Case" 11 Australian Yearbook of International Law 1.

[704] See, for example, Anthony D'Amato, "Trashing Customary International Law" (1987) 81 A.J.I.L. 101.

the customary law of human rights and humanitarian law, given especially the type of rights human rights are,[705] a view which is shared by Nigel Rodley.[706] The special approach which must be adopted when considering human rights as customary law, because of the very nature of human rights, has been alluded to by Theodore Meron:

> Unlike most other fields of international law, the observance of human rights is not based on reciprocal interests of states, but on the broader goal of states to establish orderly and enlightened international and national legal orders. In human rights instruments, the contractual (interstate) elements are far less important than those which are objective and normative. The customary law of human rights is not established by a record of claims and counterclaims between the foreign ministries of countries concerned with the protection of their rights as states and the rights of their respective nationals.[707]

In fact, it has been said that human rights challenges international customary law to change, particularly through its undermining of the notion of absolute State sovereignty.[708]

The question is what sort of evidence is needed to show international customary

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[705] Theodore Meron: Human Rights and Humanitarian Norms as Customary Law (1991, Clarendon Press, Oxford), pp.107-114.

[706] Nigel S. Rodley, "Human Rights and Humanitarian Intervention: The Case Law of the World Court" (1989) 38 ICLQ 321. Rodley calls the Nicaragua decision "reasonable, predictable and very much in line with what [the Court] has said earlier." (at p.327).

[707] Meron: Human Rights and Humanitarian Norms as Customary Law, ante, pp.99-100 (emphasis added).

[708] Isabelle R. Gunning, "Modernizing Customary International Law: The Challenge of Human Rights" (1991) 31 Virginia Journal of International Law 211. The questions of sovereignty and the nature of the subject in international law, and how they have been modified in the context of human rights, is discussed later in this chapter.

human rights law.[709] It remains clear that, for the UDHR to be customary law, both State practice and opinio juris to this effect must be identified.[710] With respect to the first element, there is controversy as to whether statements and declarations, as opposed to action, are sufficient.[711] In addition, the quality of the practice that is sufficient has been variously described by the International Court of Justice as "constant and uniform",[712] "extensive and virtually uniform"[713] and "consistent" without having to be in absolutely rigorous conformity.[714] In the Nicaragua Case it is made clear that General Assembly resolutions, particularly ones to which the relevant States participated, are forms of State practice for these purposes.[715] This may be appropriate for non-synallagmatic type of rights that

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[709] See Bruno Simma & Philip Alston, "The Sources of Human Rights Law: Custom, Jus Cogens and general Principles" (1992) 12 Australian Yearbook of International Law 82, who talk of the identity crisis of customary law (at pp.88-90).

[710] Anglo-Norwegian Fisheries Case, ICJ Reports 1951, p.116; North Sea Continental Shelf Case, ICJ Reports 1969, p.3; Nicaragua Case, ante.

[711] For example, D'Amato considers that State practice in this sense must be actions which have physical consequences, rejecting declarations because of their poor predictive power as to what States are likely to do: The Concept of Custom in International Law (1971) at pp.89-90. According to D'Amato, General Assembly resolutions may satisfy the element of opinio juris (which he calls the "element of articulation") (at pp.78-9). The contrary view is taken by Rosalyn Higgins (The Development of International Law through the Political Organs of the United Nations (1963), p.2), Michael Akehurst ("Custom as a Source of International Law" (1974-5) 47 B.Y.I.L. 1) and Ian Brownlie (Principles of Public International Law 3rd ed (1979), p.5).

[712] Asylum Case, ICJ Reports 1950, p.266.

[713] North Sea Continental Shelf Case, ante, at p.43.

[714] Nicaragua Case, ante, paragraph 186.

[715] See paragraphs 193, 202-205. See also Charlesworth, ante, who contends that: "A constant theme in the Nicaragua treatment of state practice is that words are often more significant than physical actions." (at p.18).

human rights are.[716]

With respect to the second element, there is controversy as to the extent to which this is really separate to the first element[717] and, conversely, how it can be identified as being significant when unsupported by anything other than words (particularly when actual practice is contrary to it).[718] Charlesworth contends that "The Nicaragua analysis suggests that voting for a resolution in an international forum without more provides both adequate state practice and opinio juris for the formation of customary rules."[719] Antonio Cassesse contends that what may be happening now is the building of international law upon statements of principle and that, as such, international law would have shifted from its traditional axiology of power to "imperatives which are a far cry from political and economic realities."[720] Other commentators, such as Sir Robert Jennings, have argued that the orthodox categories of international law set out in Article 38 of the ICJ Statute

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[716] An extension from this, as argued by D'Amato in the context of treaties generating customary law (which he believes they can) is that if a national of State X is tortured by State X, State Y has an entitlement against X that X cease the torture and compensate the individual, who is a "national" of State X but an "international" of State Y. (Anthony D'Amato: International Law: Process and Prospect (1977, Transnational Publishers, New York) at p.145.

[717] See the Nicaragua Case, ante, where the Declaration on Friendly Relations (a resolution of the General Assembly) appears to be sufficient to supply evidence of opinio juris (at paragraph 188).

[718] This problem arose particularly in the Nicaragua Case, ante, where assertions of the illegality of resort to the use of force were unsupported by the actual practices of States: see particularly paragraphs 205-7.

[719] Charlesworth, ante, p.24.

[720] International Law in a Divided World (1986, Clarendon Press, Oxford), p.400.

are, particularly with respect to customary law, outmoded.[721] Louis Sohn, on the other hand, has suggested the redefinition of custom to include international consensus manifested in a non-binding form.[722]

The upshot of this is, in essence, that States could be bound by their voting at international fora. Australia and Canada both voted in favour of the UDHR, Australia because it basically agreed with it and Canada largely for political reasons, as explained in the last chapter. Australia's consent was therefore one of substance, Canada's was one primarily of form. If this recent development means that they, and any country, are bound by their international assertions, then the days of ritual hypocrisy with respect to human rights may come to an end - and not before time! To a limited extent, the ICJ has already recognised in the Nuclear Tests Case[723] the binding force of statements, although in situations where the State-to-State interests involved are more symmetrical than is the case with human rights norms. However, this "new" approach does not completely answer the question of the binding nature of the UDHR itself. Agreements - whether of form or substance - in political institutions are made principally (if not entirely) for

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[721] "The Identification of International Law", Chapter 1 in Bin Cheng (ed): International Law: Teaching and Practice (1982, Stevens & Sons, London)

[722] L. Sohn, "'Generally Accepted' International Rules" (1986) 61 Washington L.R. 1073.

[723] ICJ Reports, 1975

political rather than legal considerations.[724] The answer does not lie only in the content of the UDHR as to what any legal obligations precisely are.[725] Nor does it lie only in the intentions of the framers (what Cheng has described as an opinio juris communis).[726] For a document which is now nearly half a century old, it must be found in these together with the substantial use to which the Declaration has been put in the intervening period. This substantial use, however, has been almost always in other instruments.

The use of the UDHR, in instruments at both domestic and international level, has been considerable.[727] It has been incorporated into the provisions of many national constitutions and laws.[728] It is referred to in United Nations resolutions

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[724] See also Theodore Meron: Human Rights and Humanitarian Norms as Customary Law, ante, pp.878.

[725] For example, Anthony D'Amato's notion of a norm-creating character being evident in written provisions which allows them to generate customary law apart from the otherwise binding or non-binding nature of the instrument: see "Manifest Intent and the Generation by Treaty of Customary Rules of International Law" (1979) 64 A.J.I.L. 892. On the generation of customary law by treaties see Theodore Meron, Id., pp.89-99 and references cited therein.

[726] Bin Cheng, "United Nations Resolutions on Outer Space: Instant Customary Law?" (1965) 5 Indian J.I.L. 23.

[727] See generally the UN publication United Nations Action in the Field of Human Rights, which is updated and republished periodically: 1974, 1980, 1988 (ST/HR/2/Rev.3). The following material is taken from these publications.

[728] Examples of Constitutions which expressly refer to the UDHR are: Algeria (1963), Burundi (1962), Cameroon (1960, repeated in 1972), Chad (1960), Democratic Republic of the Congo (1964, repeated in the Constitution of Zaire, 1967), Dahomey (1964, repeated in 1968), Gabon (1961), Guinea (1958), Equatorial Guinea (1968), Ivory Coast (1960), Madagascar (1959), Mali (1960), Mauritania (1961), Senegal (1963), Togo (1963), Somalia (1960), Rwanda (1962), Upper Volta (1960, repeated in 1970). Laws which expressly refer to it include the Ontario 1951 Act to Promote Fair Employment Practices and the 1954 Act to Promote Fair Accommodation Practices. Also, in 1951

and declarations as imposing a duty of observance.[729] It has been invoked in resolutions regarding concrete human rights situations.[730] It has been invoked in treaties.[731] Significantly, it is referred to in the third preambular paragraph of the

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Paraguay adopted Act No.94 to protect scientific, literary and artistic works which refers to the UDHR in its preamble, as do the Agentinian legislative decree (no.1664) of 1955, the Bolivian legislative decree (No.3937) of 1955, the Panamanian Act (No.25) of 1956, and the Costa Rican Act (No.2694) of 1960. Similarly, laws in Canada, such as the Prince Edward Island Human Rights Code, refer to the UDHR in preambles. Interestingly, I could find no specific reference to the UDHR in any Australian legislation.

[729] Apparently its first use in this way by the Assembly was in 1949 in the famous "Russian Wives Case" where the Soviet Union had refused permission to the Russian wives of non-Soviet nationals to leave the Soviet Union with their husbands: see Egon Schwelb, "The United Nations and Human Rights" (1965) 11 Howard L.J. 356 at 362. See also, for example, Res.315(IV), 17 November, 1949; Res.532B (VI), 4 February 1952; Res.843(IX), 17 December 1954; Res.1510(XV), 12 December 1960; Res.1799(XVII), 7 December 1962; Res.2393(XXIII), 26 November 1968; RES.2857(XXVI), 20 December 1971; Res.3141(XXVIII), 14 December 1973; Res.31/103, 15 December 1976; Res.32/42, 7 December 1977. Declarations in which it is referred to include the Declarations on the Rights of the Child (1959), on the Granting of Independence to Colonial Countries and Peoples (1960), on the Elimination of All Forms of Racial Discrimination (1963), on the Elimination of Discrimination Against Women (1967), on the Rights of Mentally Retarded Persons (1971), on the Protection of Women and Children in Emergency and Armed Conflict (1974), on th Rights of Disabled Persons (1975), on the Use of Scientific and Technological Progress in the Interests of Peace and for the Benefit of Mankind (1975), on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (1975), and on Apartheid in Sports (1977).

[730] For example, Res. 446(V), 12 December 1950, regarding respect for human rights in non-self-governing territories; resolutions concerning the treatment of people of Indian and Indo-Pakistan origin in South Africa, starting with Res. 265(III), 14 May 1949 and continuing through to Res. 1662(XVI), 28 November 1961; resolutions concerning the Mandate of South Africa over Namibia, starting with Res. 1142B(XII), 25 October 1957 and continuing through Security Council Res. 310 (1972), including Res. 2145(XXI), 27 October 1966 terminating the Mandate; resolutions concerned with the human rights situation in specific countries such as Chile (e.g., Res. 3219(XXIX), 6 November 1974).

[731] For example, all of the major human rights treaties mentioned in this chapter specifically refer to it in their preambles. Similarly, regional human rights agreements cite it: the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), the American Convention on Human Rights (1969) and the Charter of the Organization of African Unity (1963), the African Charter on Human and Peoples' Rights (1981), as well as in the Final Act of the Conference on Security and Co-Operation in Europe held at

Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery (1956). As discussed above, conventions on the abolition of slavery and the slave trade were the harbingers of human rights treaties. The successor to that harbinger is now drafted in the light of the UDHR. The UDHR is also referred to in the decisions of national courts[732] and is frequently referred to in the statements of national officials criticising other States for human rights violations.[733] The International Court of Justice has indicated that it is capable of contributing to the generation of obligations "erga omnes".[734] At the world conferences on human rights in Tehran in 1968 the UDHR was acknowledged as "an obligation for the members of the international community."[735] However, at the Vienna Conference on Human Rights in 1993 this had been considerably muted to a statement that, while "reaffirming their commitment to the purposes and principles contained in the Charter of the United Nations and the Universal Declaration of Human Rights",[736] States "emphasised" that the UDHR:

Helsinki in 1975.

[732] The extent to which this occurs is a primary concern of Chapter 5 below.

[733] See generally Oscar Schachter, "International Law Implications of U.S. Human Rights Policies" (1978) 24 N.Y. Law School L.R. 63 at 66-74.

[734] Barcelona Traction Case (Judgement), ICJ Reports 1970, at p.33.

[735] Final Act of the International Conference on Human Rights 3, at 4, para.2 (UN Doc. A/CONF.32/41) (Tehran Conference).

[736] Vienna Declaration and programme of Action, third preambular paragraph: Annex B, Report of the Australian Delegation to the World Conference on Human Rights, Vienna, 14-25 June, 1993, at p.11.

> ... constitutes a common standard of achievement for all peoples and all nations, is the source of inspiration and has been the basis for the United Nations in making advances in standard setting as contained in the existing international human rights instruments, in particular the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.[737]

From the point of view of the UDHR representing customary international law, this statement is a giant step backwards. The implication of the Nicaragua case is that pronouncements, repeated over nearly half a century, can outweigh the original intention of the framers of the UDHR that the Declaration was little more than a manifesto of non-binding principles. At the very least, as Bleicher has pointed out, the "process of re-citation distinguishes those resolutions which express deeply-held, temporally stable convictions from those which are of only passing or mild concern."[738] And Schachter has remarked: "Whatever the doctrinal theory, the political dynamics that mark the demands for human rights make it almost certain that the international law of human rights will continue to have a deeper and broader basis than the treaties alone."[739] Moreover, at least two areas of human rights - slavery and genocide - have been recognised by the International Law Commission as being principles of jus cogens.[740] The ICJ has

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[737] Id., eighth preambular paragraph.

[738] Samual A. Bleicher, "The Legal Significance of Re-Citation of General Assembly Resolutions" (1969) 63 AJIL 444 at 477.

[739] Oscar Schachter: International Law in Theory and Practice (1991, Martinus Nijhoff Publishers, Dordrecht) at p.342.

[740] (1966) 2 Yearbook of the International Law Commission at 247-9. Some commentators go further than this and argue that the entire UDHR is jus cogens: see H. Gros Espiell, "The Evolving Concept of

also recognised genocide as being of this character.[741] Some authors characterise particular rights (as opposed to the entirety of the UDHR) as having attained the status of customary law: Meron thinks the due process guarantees, self-determination, the rights of detainees and the principle of non-retroactivity comply;[742] Lillich considers that the rights to equality and non-discrimination have reached this status.[743]

Because the UDHR is a General Assembly resolution it is often regarded as weak or "soft" law. Indeed, as a "mere" resolution it could presumably be overturned by another General Assembly resolution. The descriptions of its extensive use given above indicate that not only has this never happened, but that it is now a virtual impossibility in any realistic sense. This means that the UDHR must now be more than "soft" law. But, especially since the Vienna retreat, how much more?

As discussed above, the UDHR is the fons et origo of human rights as we know them today. It is not in and of itself the fons et origo of human rights as legal rights and duties: it is a part of the process through which human rights acquire

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Human Rights: Western Socialist and Third World Approaches", Chapter 2 in B.G. Ramcharan (ed): Human Rights: Thirty Years After the Universal Declaration (1979, Martinus Nijhoff, The Hague).

[741] Advisory Opinion on the Reservations to the Genocide Convention, ICJ Reports, 1951, 15 at 23.

[742] Human Rights and Humanitarian Norms, ante, pp.95-6.

[743] R. Lillich, "Civil Rights" in Meron (ed): Human Rights in International Law: Legal and Policy Issues (1984, Clarendon Press, Oxford), at p.151.

that characteristic.[744] The effect, as Rosalyn Higgins has put it, is kaleidoscopic, it being necessary to take into account the subject matter, the binding or recommendatory nature of the document, the majorities supporting its adoption and repeated practice in relation to it.[745] Thus, as Oraa has remarked, a "careful and detailed analysis of each particular right"[746] is needed. It is the strength that the Declaration can lend to the generation of binding norms rather than as a repository of binding norms ipso facto, which is the real issue here.[747] In this regard, the problematic dichotomy around which the literature seems to revolve - whether declarations and resolutions are state practice and opinio juris in the formulation of customary law, or whether they are evidence of those elements - is here beside the

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[744] See, for example, John P. Humphrey, "The Implementation of International Human Rights Law" (1978) 24 N.Y. Law School L.R. 31 at 32-3, who says that the UDHR is part of customary law because of the "juridical consensus resulting from its invocation as law on countless occasions since 1948 both within and outside the United Nations." From a somewhat different approach, the Soviet author G.I. Tunkin came to the same conclusion, but based more squarely on State practice: see "The Role of Resolutions of International Organisations in Creating Norms of International Law", in W.E. Butler (ed): International Law and the International System (1987, Martinus Nijhoff Publishers, Dordrecht), pp.5-19. The chapter also contains a synoptic description of the literature up to that time.

[745] Rosalyn Higgins, "The Role of Resolutions of International Organisations in the Process of Creating Norms in the International System", in Butler, ante, pp.21-30 at p.28. This chapter also contains a useful overview of the literature on the binding effect of UN resolutions.

[746] Jaime Oraa: Human Rights in States of Emergency in International Law (1992, Clarendon Press, Oxford), p.216.

[747] The International Court of Justice has remarked: "It would not be correct to assume, because the General Assembly is in principle vested with recommendatory powers, it is debarred from adopting, in specific cases within the framework of its competence, resolutions which make determinations or have operative design." (Legal Consequences for States of the Continued Presence of South Africa in Namibia, Advisory Opinion, ICJ reports, 1971. at p.50), (quoted by Higgins, ante, at p.24).

point precisely because of the magnitude of subsequent use to which to UDHR has been put. The effluxion of time has shifted the focus of this problem. It is precisely because of that, rather than because of the technicalities of its existence as customary law (or not), which means that the UDHR can be used when international human rights law interacts with domestic law. Thus, for example, the High Court of Australia in the Dietrich case[748] referred to the UDHR as a legitimate elaboration of the content of the right to a fair trial without further explanation:[749] the UDHR is seen as having been accorded a legitimacy which, in practice, can overpower and make irrelevant questions as to its binding authority. The UDHR has been clothed with a legitimacy by the international community which enables it to be used despite the continuing controversies as to its juridical authority.

With respect to Canada and Australia in particular, rather than with respect to the juridical character of the UDHR in general, a more definite opinion may be tendered. In the light of the arguments made above, and considering the actions and pronouncements of these two countries at the time of formulation of the UDHR and since,[750] the UDHR can be regarded as binding customary

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[748] (1992) 67 ALR 1

[749] This point is expanded in Chapter 5 below.

[750] For example, Canada has expressly stated that it considers the UDHR to be an authoritative interpretation of the U.N. Charter: Letter from the Legal Bureau, January 9 1979, reprinted in "Canadian Practice in International Law" (1980) Canadian Yearbook of International Law 326.

international law on them, to the extent that it sets out the basic principles of human rights (as the wording of the UDHR is too vague for it to generate anything more).[751] The elaborative detail of these principles provided by the subsequent treaties will have to be treated, in the case of Canada and Australia, as a matter of treaty law and interpretation.

3.9 Conclusion: The Character of Human Rights

> The language of human rights carries great rhetorical force of uncertain practical significance. That is both its persuasive strength and its legislative weakness.[752]

In the light of the above discussion, I consider it a pointless exercise to attempt a "definition" of human rights for the purposes of this thesis. For example, L.J. Macfarlane considered that the five characteristics which distinguished human rights from other moral rights are universality, individuality, paramountcy,

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[751] Other authors who do not prevaricate about the general standing of the UDHR as customary international law include: Louis Sohn, "The Universal Declaration of Human Rights" (1967) 8 International Commission of Jurists 17; John Humphrey, "The International Bill of Rights: Scope and Implementation" (1976) 17 William and Mary L.R. 527 at 529; Myres McDougal, Harold D. Lasswell & Lung-chu Chen: Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity (1980, Yale U.P., New Haven) at pp.274, 325 and 338; Warwick McKean: Equality and Discrimination Under International Law (1985, Clarendon Press, Oxford), at 276. The matter , however, is still not without controversy: see, for example, J.S. Watson, "Legal Theory, Efficacy and Validity in the Development of Human Rights Norms in International Law" (1979) 3 U. Illinois L.R. 609.

[752] Tom Campbell, "Realising Human Rights", Chapter 1 in Tom Campbell, David Goldberg, Sheila McLean & Tom Mullen (eds): Human Rights: From Rhetoric to Reality (1986, Basil Blackwell, New York), p.1.

practicability and enforceability.[753] Macfarlane's premise that human rights are "moral" rights is itself open to question (at least in the sense that the discussion above has shown that they do not need to be defined this way). Their universality exists to the extent and in the manner flagged above and discussed below, although this is a common element in definitions of human rights, used both by those opposing them,[754] as well as by those supporting them.[755] Their individuality runs into the problem that they are meant to operate in a society and apply to communities and have little real meaning in a purely atomistic context. Their paramountcy raises the question of what they are paramount to, particularly when human rights may clash with each other. Their practicability and enforceability are also not absolutes (as Chapter 4 will show).

All of these characteristics are contextual and any definition or description of human rights must therefore be issue specific rather than a futile (and pointless) attempt at an all-encompassing generality. Yet some attempt must be made to at least map out some operative parameters as "human rights" are not co-terminus with "rights" generally.[756]

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[753] L.J. Macfarlane: The Theory and Practice of Human Rights (1985, Maurice Temple Smith, London), p.3.

[754] For example, Maurice Cranston: What Are Human Rights? (1973, Bodley Head, London), p.36.

[755] For example, Louis Henkin, "Rights: Here and There" (1981) Columbia L.R. 1582 at 1592.

[756] Michael Freeden calls human rights the most basic form of rights, pertaining to what is essentially human, whereas other categories of rights are more specific and limited (such as the right to walk on a pedestrian crossing and have motor vehicles stop for

Michael Freeden describes (rather than defines) a human right as:

> ... a conceptual device, expressed in linguistic form, that assigns priority to certain human or social attributes regarded as essential to the adequate functioning of a human being; that is intended to serve as a protective capsule for those attributes; and that appeals for deliberate action to ensure such protection.[757]

While ultimately still relying on an ideological conception of human rights, the advantage of this description is that it avoids the problem of absolutism and focuses on the process nature of the concept: the public debate that is part of it. It relies on no particular ideological conception or a priori moral principles, while still signalling the worth of the rights-bearer. It looks to structural properties (prioritising, protecting and action-demanding) in the light of "attributes" rather than to prioritising the rights themselves or their specific content.[758] This allows a necessary flexibility when rights clash. Although I would substitute Freeden's phrase "appeals for" with the phrase "appeals for and relies on", it also avoids the right/duty conundrum because it indicates that human rights:

> ... involve not merely a duty (of conduct) for the right-upholder but an attitude of regard to the significant entities who are rights-bearers. This

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you): Rights (1991, U. of Minnesota Press, Minneapolis), p.6. Freeden goes on to say, at p.11, that a satisfactory theory of basic rights will have to satisfy three tests:

> On a primarily philosophical dimension it will have to meet rational and logical standards; on a primarily ideological dimension it will have to be couched in terms that are emotionally and culturally attractive, as well as displaying the minima of rationality; and on a primarily legal dimension it will also have to be translatable into codes of enforceable action.

The problem with human rights is that, as seen above, it may not neatly pass any of these tests.

[757] Id., p.7.

[758] Freeden writes of "flexible rights-clusters" rather than of fixed lists: id., p.101.

> attitude is best not described as a duty at all; it is an ideological or ontological view of the social world. Because rights are value judgements expressing regard for human beings, they accord preference to conduct which embodies that regard over conduct which does not.[759]

This does not so much attempt to define as describe the character of human rights. Such an approach is of use when considering the uses to which human rights may be put in domestic legal systems, although it does not (and cannot) account for the difficulties encountered when human rights become rights specifically meant to operate in a legal system. Here, the impact of systemic problems again arises. There are thus two related problems: the character of human rights (which is dealt with in this Chapter) and the problem of the use of human rights in a legal system (which is dealt with in Chapter 4 with respect to international law, and in Chapter 5 with respect to Australian and Canadian law).

To talk of human rights is to link rights directly to humans, rather than indirectly to us through "nature". To this extent, they are non-traditional rights, as the discussion above with respect to the formation of the UDHR has shown. This link with humans is in fact a link with the perception of what it is to be human: it is a matter of interpretation rather than of objective, fixed ideas (as the postmodernist approaches discussed above indicate).[760] We frequently assert that human rights arise out of the uniqueness of being human and that this is why they are inherent

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[759] Id., pp.8-9.

[760] A similar conclusion, arrived at from a different methodology, can be found in Freeden, Id, pp.61-2.

and inalienable. However, in biological terms we only perceive of ourselves as being unique and in many respects this is quite a false perception. Consider the following description:

> Family ties may be strong and lasting.... mothers will rush to the defence of their children... Orphaned infants are tenderly raised by older siblings. They experience prolonged grief at the loss of a loved one. They suffer from bronchitis and pneumonia, and can be infected with almost any ... disease, including the AIDS virus. The elderly turn grey, get wrinkles, lose teeth and hair. ...When they look in the mirror they recognise themselves. Infants get cranky and irritable when they're weened. [They] form friendships ... [and] share food with relatives and friends. They keep secrets. They lie. They both oppress and protect the weak. Some, despite many setbacks, persistently strive for social advancement ... Others, less ambitious, are more or less content with their lot.[761]

This could be a description of humans. It is in fact a description of chimpanzees, which have been shown to be biologically the closest "relatives" of humans.[762] The biological relationship between humans and chimps is in fact closer than is the biological relationship between chimps and gorillas. An examination of DNA indicates that, at the level of working genes, a 99.6% identical correlation is found between humans and chimps.[763] There is, in other words, only a 0.4% difference in the DNA sequence of humans and chimpanzees. Yet we consider ourselves to be very different. It is a perception which is medieval in the way in which it places humans as the sole centre of the universe of living things (although to further complicate matters, many indigenous peoples have a more synthesised perception

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[761] Carl Sagan & Ann Druyan: Shadows of Forgotten Ancestors: A Search for Who We Are (1992, Random House, New York), pp.282-283 (hereafter referred to as Sagan & Druyan)

[762] Id., pp.276-279

[763] Id., p.277

of humans and the rest of nature). Biologically we are different to other animals, but we are not unique. That has been scientifically proven. But we consider ourselves to be unique. It is a matter of identification. Bronowski has highlighted the human imagination, both scientific and artistic:

> [Other animals] plainly lack the scientific imagination to invent, say, the electric current. But they also lack the poetic imagination, the ability to enter the feelings of others from the inside, that shudders yet delights to give an electric shock - in fun or in the torture chamber.[764]

While some animals do sometimes imitate each other, and even machines can duplicate some human actions, neither can identify with the inner environment of each other, as humans can when we watch a theatrical performance and appreciate the emotion, while simultaneously knowing that it is "make believe".[765] This identification and sense of uniqueness, or the perception of it, is fundamental to the notion of human rights and, in my opinion, is more basic to it than a recognition of an a priori universal moral principles. It is the primary locus of human rights. It can thus tolerate postmodernism but draws the line at an extreme of "anti-humanism". Human rights is not a transcendent concept but rooted firmly in human self-perception. In its present form it is a distinctly twentieth-century phenomenon and could not have arisen at an earlier time in this form, for the reasons described above. Paradoxically, the very fact that we have human rights may itself be the primary indicator of human uniqueness rather than a result of that

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[764] Jacob Bronowski: The Identity of Man (1966, Heinmann, London), p.73.

[765] Bronowski, id, p.77.

uniqueness, even if our perceptions are the other way around. We do not have human rights so much because we are unique; we are unique because we have human rights. Human rights may be the ultimate oxymoron.

Human beings solve problems (rather than just react to situations) by making decisions mediated by values. Human rights are now part of this process. Human rights are more than a collection of legally-worded articles grouped for convenience into a swag of treaties. But humans are not only the measure of human rights, we are also their limitation. Human rights are the result of the reaction between human perceptions of self and community, distilled through the irregular gauze of history and pressed out into a legal matrix. There is no necessary logic to them.

However, while the concept of human uniqueness may be universal, it is not necessarily a standard concept (as the perceptions of indigenous peoples referred to above indicate) and the scope and content of particular rights was a matter of political trade-off. The UDHR has indicated the basic categories of human rights. It gives the appearance of universality, in both the personal sense (with the use of words like "everyone", "no-one") and the territorial sense (it applies to States voting in favour of it and to the territories under their jurisdiction). It is also expressed to apply to nations and to individuals and to organisations. The person, his or her community, the State and the international community are all involved.

But were the human rights instruments dominated by Western thinking and values and in this sense not universal?[766] Such an assertion is too simplistic and is historically inaccurate. In fact, the South American countries, China, India and the Soviet Union participated actively in its formulation. Thus the statement:

> ... in essence the Universal Declaration of Human Rights is a document whose underlying values are democratic and libertarian, based on the notion of atomized individuals possessed of certain inalienable rights in nature. These political values, as distinct from economic rights or communal rights, can be traced directly to the experiences of France, England and the United States. The Declaration is predicated on the assumption that Western values are paramount and ought to be extended to the non-Western world.[767]

is inaccurate in several respects. The argument above has shown that, in "essence", the UDHR is based on a more fundamental conception of humans than this. It was specifically not based on rights "in nature" as no agreement could be reached on this philosophical concept. The fact that economic rights were included shows that the Western influence, while undoubtedly significant and even dominant, was not as pervasive as the above statement suggests. And to say that the political values can be "traced directly" to the French and American Declarations and to the English Bill of Rights has been shown to be exaggerated. As Chapter 2 showed, Lockean rights recognised property but not a universal suffrage, the original ten amendments to the American constitution did not forbid slavery and the French Declaration did not guarantee freedom of association. The process has never been as straightforward as the quotation implies. Also, the UDHR provides a broader

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[766] See, for example, Adamantia Pollis & Peter Schwab (eds): Human Rights: Cultural and Ideological Perspectives (1979, Praeger Publishers, New York), especially Chapter 1.

[767] Pollis & Schwab, ante, p.8.

base than the statement implies. It bears, as Alston has noted,[768] an ambivalent relationship to an already discordant heritage of philosophical theories. Its admonitions to States, organisations, communities and individuals indicates that it is not cast totally in the mold of Western European liberal atomism. (Human rights also now include group rights such as self-determination). It may particularise with Western industrial examples (e.g., periodic holidays with pay) but the right to earn a living and also to have reasonable recreation is not limited to Western conceptions.[769] While the UDHR does contain conventional rights in the Western tradition (life, liberty, security of the person, freedom of expression and association, etc), it also contains more modern-day conceptions (freedom from cruel, inhuman or degrading treatment, freedom of movement and of asylum from persecution), which are based on psychological as well as moral requirements. Indeed, some of the rights, such as the right not to be tortured, are not capable of being given any specific East or West applications. What is overlooked by commentators who notice a western bias in the Declaration[770] is the fact that [illegible] western countries, including the United States, had distinct misgivings

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[768] Philip Alston, "Making Space for New Human Rights: The Case of the Right to Development" (1988) 1 Harvard Human Rights Yearbook 3 at 28.

[769] Waldron calls this the difference between the "concept" and the "conception" of human rights: Nonsense Upon Stilts at p.180.

[770] For example, Sinha refers to the "pluralistic insensitivity of the bill": Surya Prakash Sinha, "The Axiology of the International Bill of Human Rights" Pace University School of Law Yearbook of International Law 1989, 1:21-59 at 21.

about the document.[771] The objections and criticisms have not all come recently from newly-independent former colonies in the third world.

In addition, it has already been seen that many of the Articles can have any real application only when placed into a domestic legal context (i.e., the rights limited "according to law"). The "law" is not specified and can be that of East or West, and the values it embodies atomistic or communitarian. Thus Article 16, which states that "the family is the fundamental group unit of society" appears, in the context of that Article, to refer to the Western nuclear family, based on a heterosexual marriage between the children's parents, rather than on the extended kinship systems found in other places. But this is no necessary conclusion. Even in the West arguments are now being made that the family extends to couples in a de facto relationship and to gay partners with (or without) children. As human rights are part of a process, they need to be refracted through the developmental matrix. They are not merely self-referential if viewed in this way. As such, they are not necessarily limited to Western patriarchal, heterosexist paradigms, although there was in the context of the 1940's a bias in that direction. As such, to contend that "in most states in the world, human rights as defined by the West ... are meaningless"[772] is a misconception of human rights and of their past and

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[771] See discussion above. Also to be noted is that contemporaneously with the voting for the UDHR the American Bar Association expressly disapproved of it: see the criticisms by the ABA President, Mr Frank E. Holman, "An International Bill of Rights: Proposals have Dangerous Implications for US" American Bar Association Journal, 1948: 34, (November), 984-6, 1078-81.

[772] Pollis & Schwab, ante, p.13.

continuing development. It sees human rights as little more than a manifesto. They do not need rethinking as much as they need more sophisticated application. Even in countries where the Western paradigms predominate, human rights instruments are not necessarily embraced: the United States is a party to few human rights instruments.[773] Its own developmental matrix, with a strong domestic recognition of individual rights relying on the domestic legal system and a suspicion of subversion at international level, has resulted in a scepticism for human rights developed at international level.[774] Human rights are universal in the sense that they are universalistic and universalizable.[775]

The cultural context of human rights can be seen in Africa,[776] China[777] and in

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[773] It is not a party to the Genocide Convention (which it signed in 1948 but has not ratified), the International Covenant on Civil and Political Rights (signed in 1977 but not ratified), the International Covenant on Economic, Social and Cultural Rights (signed in 1977 but not ratified), the International Convention on the Elimination of All Forms of Racial Discrimination (signed in 1966 but not ratified), the Convention on the Elimination of All Forms of Discrimination Against Women (signed in 1980 but not ratified), and the Torture Convention. It is a party to the Supplementary Convention on Slavery, the Protocol Relating to the Status of Refugees, and the Convention on the Political Rights of Women, as well as some ILO conventions.

[774] See James Mayall, "The U.S.", Chapter 9 in R.J. Vincent (ed): Foreign Policy and Human Rights: Issues and Responses (1986, Cambridge U.P., Cambridge).

[775] Waldron, ante, p.197.

[776] The Banjul Charter on Human and People's Rights (1981) refers to both individuals and "peoples" and some interpreters prioritise the latter (for example, B. Obinna Okere, "The Protection of Human Rights in Africa and the African Charter on Human and Peoples' Rights: A Comparative Analysis with the European and American Systems" (1984) 6 Human Rights Quarterly 145). Social harmony has priority over individualism, which is somewhat to turn the Western approach upside down (R.J. Vincent: Human Rights and International Relations (1986, Cambridge U.P., Cambridge), p.40.). See generally Chris C. Mojekwu, "International Human Rights: The African

Islamic countries.[778] There is no universality of values, priorities or ways of life and as a result human rights cannot within the text of the relevant instruments represent the value systems of all countries. These can only arise in context and

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Perspective", Chapter 5 in Jack L. Nelson & Vera M. Green (eds): International Human Rights: Contemporary Issues (1980, Human Rights Publishing Group, New York) and Adamon Ndam Njoya, "La Conception Africaine", Chapter 1 in Les Dimensions Internationales du Droit Humanitaire (UNESCO, 1986). The traditional African concept of personhood is the social role played by that person. Rights are contingent upon the social function of a person and are not regarded as being inherent. Thus, barren women are traditionally considered to be less than fully persons. See Rhonda Howard, "Is there an African Conception of Human Rights", Chapter 2 in R.J. Vincent (ed): Foreign Policy and Human Rights: Issues and Responses (1986, Cambridge U.P., Cambridge).

[777] Confucian teaching recognised five basic social relations - ruler and subjects, parents and children, husband and wife, elder and younger brother, and friend and friend - which were connected by mutual obligations rather than by reciprocal rights and duties. In Marxist theory, law is an instrument of State policy rather than an objective body of authoritative rules (Vincent, id., pp.41-2). Alice Ehr-Soon Tay has written that in China "the fundamental rights and duties of citizens are to support the leadership of the Communist Party of China, support the Socialist system and abide by the Constitution and the laws of the People's Republic of China": "Marxism, Socialism and Human Rights" in Kamenka & Tay: Human Rights, ante, p.112. On Asia generally, see Hiroko Yamane, "Asia and Human Rights", Chapter 21 in Karel Vasak (ed): The International Dimensions of Human Rights (revised and edited for the English edition by Philip Alston), (1982, Greenwood Press, Westport), and Sumio Adachi, "La Conception Asiatique", Chapter 2 in Les Dimensions ..., ante.

[778] The religious community of Moslems comes before the individual as it is a "compact wall whose bricks support each other" (Majid Khadduri: War and Peace in the Law of Islam (1955, Johns Hopkins U.P., Baltimore), p.3). Rules of conduct are laid down by religion and individual rights are subordinate to, and are determined by, these religious duties (Vincent, id., pp.42-3. See also Abdul Aziz Said & Jamil Nasser, "The Use and Abuse of Democracy in Islam", Chapter 4 in Jack L. Nelson & Vera M. Green (eds): International Human Rights: Contemporary Issues (1980, Human Rights Publishing Group, New York), and Hamed Sultan, "La Conception Islamique", Chapter 4 in Les Dimensions ..., ante. Thus, the Moslem concept of torture or of cruel, inhuman or degrading treatment is mediated by fundamental religious concerns, but a general belief that such things as torture should not occur remains: see Abdullahi A. An-Na'im, "Toward a Cross-Cultural Approach to Defining International Standards of Human Rights: The Meaning of Cruel, Inhuman or Degrading Treatment or Punishment", Chapter 1 in An-Na'im (ed): Human Rights in Cross-Cultural Perspectives: A Quest for Consensus (1992, U. Pennsylvania Press, Philadelphia).

are not inherent to the right itself.[779] The UDHR is not a declaration of "truth" in the same way that its eighteenth-century counterparts were. It does not represent a closed order which is to be interpreted strictly within the confines of the text itself.[780] To assert that there is some "pristine core meaning" of human rights[781] is both historically and textually inaccurate, as well as functionally

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[779] Thus, for example, Soviet writers could, without embarrassment, discuss human rights in the Soviet system (where economic and social rights were regarded as paramount to civil and political rights). See, for example, V.N. Kudryavtsev, "Human Rights and the Soviet Constitution", Chapter 4 in Philosophical Foundations of Human Rights (1986, UNESCO, Paris). For a general discussion, see David Kowalewski, "The Union of Soviet Socialist Republics", Chapter 19 in Donnelly & Howard (eds): International Handbook of Human Rights. Vladmir Kartashkin, in an argument relating to what I have called the developmental matrix, has written that the socialist conception of human rights does not reject a notion of inalienable rights: it deduces them in a different way to the West by considering them from the position of a person in society and in the process of public production. They are therefore "materially stipulated" and depend upon the socio-economic, political and other conditions of the development of society ("The Socialist Countries and Human Rights", Chapter 20 in Karel Vasak (ed): The International Dimensions of Human Rights, ante, at p.631). This is not to say that this - or any other - approach is a guarantee that human rights will be achieved. In 1932-3 an estimated 3-4 million peasants in the Ukraine starved as a result of unrealistic quotas set by Stalin's administration: V.P. Danilov & N.V. Teptsov, "Stalin's Grim Harvest", reported in the Globe and Mail March 7, 1989. More recently, Indonesia's Foreign Minister, Ali Alatas, addressing the World Conference on Human Rights in Vienna in 1993, who pointed out that the clash is not only one between Eastern and Western values but a "lingering echo of an earlier clash between two Western traditions, between the principle of individual liberty which, for example, Thomas Jefferson passionately espoused and the principle of a strong, lawful authority which Alexander Hamilton just as passionately advocated. On the rights of the individual as measured against those of the State, the view of the latter tradition is that: "When it comes to a decision by a Head of State upon a matter involving its life (the State's), the ordinary rights of individuals must yield to what he deems the necessities of the moment."" (Speech reported in The Australian June 16, 1993, p.9.)

[780] Contrast Gaete, ante, pp.43-4, who I think is wrong on this point and illustrates the limitations of deconstruction in this regard when dealing with documents written by more than one author.

[781] As do Clifford Orwin & Thomas Pangle in "The Philosophical Foundation of Human Rights", Chapter 1 in Marc F. Plattner (ed): Human Riughts in Our Time - Essays in Memory of Victor Baras (1984, Westview Press, Boulder), p.1.

irrelevant. There is not a core "meaning" of human rights so much as a core concept of human rights: the meaning of human rights can change with the context of their application. Thus human rights can be universally meaningful without having to be uniform[782] and thus subversive of non-Western cultures. Values can be articulated in different rhetorical forms,[783] which may embrace duties as much or more so, than rights.

Rights are means, not ends in themselves.[784] We have passed beyond the Age of Reason when the "rights of man" were regarded as something that existed in the abstract, merely waiting to be deduced from first principles by the application of human reason.[785] They must be generated (continually) through a developmental matrix. Thus, "inherent" and "fundamental" rights are subject to change - in content and/or emphasis - as the developmental matrix changes. Areas emphasised

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[782] Cf S Prakesh Sinha, "Human Rights: A Non-Western Viewpoint" (1981) 67 Archiv fur Rechts- und Sozialphilosophie 76 who contrasts the concept of human rights from the catalogue of them. In my view, the catalogue itself is sufficiently flexible to allow a universality without denying the existence or applicability of some parts of the concept. See also Sinha, "Freeing Human Rights From Natural Rights" (1984) 70 Archiv fur Rechts- und Sozialphilosophie 342, where it is argued that "while there are differences among people, there are similarities as well which help us construct universal ethical yardsticks without relapsing into the a priori dogmatism of natural law" (at p.371). I agree that human rights can be, and in fact has been, severed from any necessary connexion with natural law, but the universality of the UDHR is more than that of an "ethical yardstick".

[783] See Alison Dundes Renteln, "The Unanswered Challenge of Relativism and the Consequences for Human Rights" (1985) 7 Human Rights Quarterly 514 at p.517.

[784] See Iredell Jenkins, "From Natural To Legal To Human Rights" in Ervin H. Pollack (ed): Human Rights (1971, Jay Stewart Publications, Buffalo).

[785] See Julian Huxley: Freedom and Culture (1971, UNESCO, New York), p.7.

at particular times have included slavery, self-determination, race, women, children, genocide and torture. These have arisen when they have as the developmental matrix has made them possible (if not necessarily inevitable). A convention on the rights of homosexuals, for example, is no more improbable now than a convention on the rights of children vis-a-vis their parents was fifty years ago, and no less likely in the future. For this reason, the development of human rights, particularly as legal rights, has been uneven, with some greater achievements in areas like self-determination and less success in areas like religious persecution.

The rights in the UDHR relate to each other functionally rather than conceptually. There is a unifying conceptual principle relating to the "human" in human rights but no single unifying concept with respect to the content of the "rights". Galston, commenting on the American Bill of Rights, refers to those rights as performing linked but distinct tasks. As a result, they "stand in the same relationship to one another as do tools in a carpenter's kit."[786] The rights in the UDHR are in this respect similar. As "human" rights they attempt to fuse legal norms to a notion of humanity. The join is not perfect, but nor is it totally incongruous. The document itself implies such a fusion. The traditional use of the term "rights" may be a hindrance to solutions based on human rights if it implies absolute positions, individualism and dichotomy rather than compromise and a sense of common

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[786] Galston in Lacey & Haakonssen, ante, at p.240.

responsibility. It has been suggested that the "rights" discourse is the wrong way to approach human rights.[787] But a legal system does not run on rights alone, but also on principles and policies, no matter how fraught with unrealised assumptions they may be. While principles are not rights, they equally cannot be ignored, particularly by courts. Dworkin contends that they are essential (and not merely discretionary) when deciding hard cases and that they stand behind and inform the rules, thus being controlling agents in the way the rules are applied.[788] Postmodern theorists would argue that they are not so much controlling agents as justifications masking the subjective political, gendered, racist, homophobic, etc, nature of the decision.

Chapter 5 will indicate that it is particularly in this way that the courts in Australia are using human rights. The news is thus both good and bad. It means that privileging may still occur, stories may not be listened to, and that the law might still continue to mask the oppression it professes to eliminate. But postmodern approaches, recognising as they do the contextual, contingent and indeterminate

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[787] Mary Anne Glendon contends that talk of "rights" is designed to end conversation rather than initiate or continue it: Rights Talk: The Impoverishment of Political Discourse (1991, The Free Press, New York), p.9. See also Valerie Kerruish who refers to "rights fetishism": Jurisprudence As Ideology (1991, Routledge, London), Chapter 5.

[788] He refers to the US decision in Riggs v Palmer (1889) 115 NY 506, where a grandson was held not to be entitled to take an inheritance under the valid will of the grandfather he had murdered. The general principle that a wrongdoer should not benefit from his own wrong dictated that the rules with respect to testamentary dispositions should not apply: Taking Rights Seriously, ante, p.23; Laws Empire (1986, Harvard U.P., Cambridge), pp.15-20. The maxims of Equity are used in a similar fashion.

nature of all law, may be the very thing through which human rights may be made both relevant and useable into the twenty-first century. The Universal Declaration was not cast in the mould of objectified truths and it was meant to operate (indeed, can only work) in conjunction with domestic legal systems. But first, in Chapter 4, I must look at how the content of human rights (in particular, the concepts which Australia and Canada have agreed to implement, to what extent, and the symbiosis between the international norms and the domestic legal systems) was fleshed out - and how the systemic problems in them were magnified.

CHAPTER 4

THE INTERNATIONAL HUMAN RIGHTS OBLIGATIONS OF CANADA AND AUSTRALIA: A SYMBIOSIS OF LEGAL SYSTEMS?

4.1 Introduction

> The old international order determines the possibilities perceived by, and hence available to, politicians and governments...[1]

This chapter moves from the question of the fundamental characteristics of international human rights to the question of their substance as legal rights, and the way in which the processes of the international legal system (Allott's "old" international order) directly affects that substance.

The concentration is upon the legal obligations produced for Canada and Australia. The aim of this chapter is to display the international legal matrix applicable to Canada and Australia with respect to human rights and the systemic problems that have arisen, particularly from the point of view of individual resort to human rights. Thus, while the major human rights instruments "unpack" and elaborate upon the basic rights set out in the Universal Declaration of Human Rights

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[1] Philip Allott: Eunomia: New Order for a New World (1990, Oxford U.P., Oxford), p.xv.

(UDHR), the results produced are less than perfect. The reasons for this are explored, and the consequences considered. This directly relates to the substantive rights Canada and Australia are expected by the international community to implement domestically and thus affects the legal notion of equality in each country.

The chapter then provides a synoptic view of the obligations of Canada and Australia under the major human rights treaties to which each is a party. This will show the range and depth of these obligations. Where necessary, the development of the content of the obligations will be discussed to elucidate their meaning and to clarify the implementation obligations (such as they are) for the two countries. The aim will be to highlight the conceptual and institutional limitations of international human rights norms rather than to provide a detailed analysis of every one, to see in general terms what Canada and Australia are obliged to do, and what "rights" are given to individuals.

What will become clear are two things. First, the problems with respect to content, implementation and enforcement of these rights are systemic, where open-ended norms operate in an asymmetrical structure. (Thus, as discussed in Chapter 5, greater links with domestic legal systems may help overcome some of these problems). Secondly, there are already links, both express and implied, between international human rights norms and domestic legal systems to the point where it

can be said that the relationship between the two is substantially (although not totally) symbiotic. Domestic legal systems contribute to the meaning of, and also limit the implementation of, the international norms. This symbiosis was in fact necessary because of the nature and development of the international norms as described in Chapter 3. (This circumstance will help to refine the monism/dualism dichotomy which is a hallmark of the theories discussed in Chapter 5 and also indicates that greater links between the two systems are both plausible and possible).

More than the idea of the "principle of legality" in human rights instruments,[2] the injunction in human rights norms that rights be exercised "according to law" implies, in my view, more than a search for the validity of a norm by reference to a higher norm. As this chapter will show, the asymmetrical structure of the systems makes this difficult to establish. Rather, I use the term "symbiosis" to refer to the express, implied and functional co-dependency of the international and domestic legal systems with respect to human rights norms which affects the meaning, implementation and, ultimately, enforcement of those norms.

The study of the development of international human rights norms within the international system indicates their further isolation from a Natural Law basis. The

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[2] See, for example, Oscar M. Garibaldi, "General Limitations on Human Rights: The Principle cf Legality" (1976) 17 Harvard International Law Journal 503.

notion of universality and inherency - as discussed in the previous chapter - must be qualified by these systemic factors, so that legal principles, rather than God-given "truths", can be seen as the result. Thus, while the general boundaries of international human rights will be seen to have been mapped out, the precise meaning and application of the norms is dependent upon their symbiotic relationship with the domestic legal system. In another context, the separate but related issue of cultural relativism would arise. This is not particularly relevant to the context of the implementation of the norms in Canada and Australia if the values underlying the instruments can be regarded as springing from those in Western Europe. However, an appreciation of the symbiotic nature of the norms highlights another dimension of this problem which can arise in countries where a cultural clash with the instruments is not evident. Because, as will be seen, the domestic laws affecting the international norms were never meant to be restricted to statutes,[3] (and even if they were, the content of statutes is strongly influenced by the legislative bargaining process), the symbiotic relationship allows domestic political will and local morés to affect the implementation and legal meaning of the equality sought to be provided by the international norms.

What has unquestionably been overcome by the treaties discussed in this chapter is that this is no longer, as it was in the past, an exercise in ad hoc solutions, even though the situation is far from perfect. Paradoxically (once again) it will be seen

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[3] For example, the discussion in the Third Committee, 14 U.N. GAOR, 239, UN Doc. A/C.3/SR.956 (1959).

that human rights have been systematised, but that the system is itself their fillip and their limitation. It is to these issues that this Chapter turns.

4.2 The Principal Human Rights Treaties to which Canada and Australia are Parties: The International Obligations.

> Human rights is the idea of our time.[4]
>
> As basic statements of rights [the Covenants] go far beyond what would be required, and as detailed programs to guide government policy they are too cryptic.[5]

While human rights is the idea of our time, its expression in international instruments, while necessary, is not of itself sufficient to ensure observance and enforcement. This chapter examines why this is so. There were initially high ideals for implementation of international human rights into domestic legal systems, as illustrated by the report of the Working Group on Implementation of the Commission on Human Rights which stated that:

> ... the provisions of the Covenant must be part of thew laws of the States ratifying it and ... States ... must take action to ensure that their national laws cover the contents of the Covenant, so that no executive or legislative organs or government can override them, and that the judicial organs alone shall be the means whereby the rights of the citizens of the states set out in the Covenant are protected.[6]

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[4] Louis Henkin: The International Bill of Rights: The Covenant on Civil and Political Rights (1981, Columbia U.P., New York), p.1

[5] Philip Alston, "Making Space for New Human Rights: The Case of the Right to Development" (1988) 1 Harvard Human Rights Yearbook 3 at 31.

[6] "Suggested Measures of Implementation", Memorandum prepared by the Secretariat for the fifth Session of the Commission on Human Rights, UN Doc. E/CN.4/168 (May 5, 1949), pp.3-4, paragraph 7 (emphases added).

What resulted was a notion of domestic implementation qualified by phrases such as "... by all appropriate means ..." or through "... appropriate measures ...".[7] Factors such as the text agreed upon in the instruments, allowable derogations, the advantages and disadvantages of reporting procedures and complaints procedures, and the use of reservations impinge upon implementation and ultimately direct the meaning of the norms. Together with the non-synallagmatic nature of the norms, this exposes a systemic weakness: the paradox that it is governments which are both the main violators of human rights while being in the primary position to guarantee their respect.[8] Human rights treaties are not written like some environmental treaties, such as the Ozone Treaty of 1985[9] which has a Montreal Protocol of 1987 which lays down deadlines for action on control measures. Thus, despite reporting obligations and a limited avenue for individual complaints, the pragmatic decision taken in the 1940's to delay the imposition of obligations of enforcement (especially at the domestic level) has left us with an unfulfilled legacy - one that might at least be partly satisfied by domestic law.

It is therefore necessary to consider the normative parameters set by human rights

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[7] See, for example, ICESCR Art. 2(1); ICCPR Art. 23(4); Race Convention Art. 2(1); Women's Convention Art. 2(1); Children's Convention Art. 2(2).

[8] See also Marc Bossuyt, "International Human Rights Systems: Strengths and Weaknesses" in Kathleen Mahoney & Paul Mahoney: Human Rights in the Twenty-First Century: A Global Challenge (1993, Martinus Nijhoff, Dordrecht), at 47ff.

[9] Vienna Convention for the Protection of the Ozone Layer, Final Act of the Conference of Plenipotentiaries on the Protection of the Ozone Layer, 22 March, 1985, [1987] ILM 1520.

treaties. With the growing number of these, the range of matters covered is increasing and the particularity of them is becoming intensified. The broad sweep of the UDHR was followed by a general elaboration of civil and political rights on the one hand, and of economic, social and cultural rights on the other. More lately, treaties particularising race and sex discrimination, as well as specific prohibitions on torture, have emerged. Other instruments of less than treaty status deal with religious discrimination and the treatment of prisoners. However, while the range is broadening, the scope of these instruments - especially with respect to the underlying assumptions made within the instruments or effectively imposed upon them for reasons of process - remains constricted.

It is neither possible, nor is it necessary, for the purpose of this thesis to undertake an exhaustive analysis of all the provisions in the human rights treaties to which Australia and Canada are parties. Instead, I will concentrate on the principal ones, and describe globally their content ratione loci, ratione materiae and ratione personae, but consider in more detail their scope for, and the consequent obligations of, implementation and enforcement by Canada and Australia, particularly in the light of any symbiotic connexion with domestic laws. In addition, enforcement mechanisms for individuals already available at international law will be considered: it is where they fall short that domestic law must remedy the breach.

In this regard it is both interesting and instructive to note briefly here that the suggestion of the Working Group on Implementation set up by the Commission on Human Rights that the provisions of the Covenant be superior to executive and legislative organs and to governments was made at the suggestion of the Australian representative.[10] Australia also proposed that an International Court of Human Rights be established.[11] As can be seen from the reservations and declarations described below, Australia changed its mind by the time the Covenants were opened for signature. Harper and Sissons describe the reasons for this change as follows:

> Experience with the practical difficulties of international negotiations and its own problems as a colonial power contributed to this changed approach. Idealism became tempered with realism as the "cold war" developed.[12]

4.2.1 The treaties generally

There is a remarkable similarity in the range of human rights treaties to which Australia and Canada are parties There is considerably less similarity in the scope for implementation of them accepted by each country.

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[10] Commission on Human Rights, Second Session, Draft Report of the Working Group on Implementation, UN Doc. E/CN.4/53, 10 December, 1947. The Australian proposal (which initially applied to the composite Bill before the decision was made to start with a Declaration) can be found in UN Doc. E/CN.4/AC.4/SR/2.

[11] See Commission on Human Rights, Report of the Fifth Session [Economic and Social Council, Official Records, Ninth Session, Supp. 10 (E/1371), 23 June, 1949], pp.36-49.

[12] Norman Harper & David Sissons: Australia and the United Nations (1959, Manhattan Publishing Co., New York), p.268.

Australia and Canada are both parties to: the Convention on the Prevention and Punishment of the Crime of Genocide (1948),[13] the Convention relating to the Status of Refugees (1951),[14] the Convention on the Political Rights of Women (1952),[15] the Slavery Convention (1926) as amended by the 1953 Protocol,[16] the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery (1956),[17] the Convention on the Nationality of Married Women (1957),[18] the Convention on the Reduction of

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[13] UNTS, Vol.78, p.277: ratified by Canada September 3, 1952, entering into force for Canada December 2, 1952; ratified by Australia July 8, 1949, entering into force for Australia January 12, 1951 in accordance with Article XIII.

[14] UNTS, Vol.189, p.137: acceded to by Canada June 4, 1969, entering into force for Canada September 2, 1969; acceded to by Australia January 22, 1954, entering into force for Australia April 24, 1954.

[15] UNTS Vol.193, p.135: acceded to by Canada January 30, 1957, entering into force for Canada April 30, 1957; acceded to by Australia December 10, 1974, entering into force for Australia March 20, 1975.

[16] UNTS Vol.212, p.17: definitively signed by Canada December 17, 1953 and entering into force for Canada the same day; definitively signed by Australia on December 9, 1953 and entering into force for Australia on the same day. Note that further amendments to the 1926 Convention listed in the Annex to the Protocol did not come into force until July 7, 1955.

[17] UNTS Vol.266, p.3: ratified by Canada January 10, 1963, entering into force for Canada on the same day; ratified by Australia January 6, 1958, entering into force for Australia on the same day.

[18] UNTS Vol.309, p.65: ratified by Canada October 21, 1959, entering into force for Canada January 19, 1960; acceded to by Australia March 14, 1961, entering into force for Australia June 12, 1961.

Statelessness (1961),[19] the International Convention on the Elimination of All Forms of Racial Discrimination (1965),[20] the International Covenant on Economic, Social and Cultural Rights (1966),[21] the International Covenant on Civil and Political Rights (1966),[22] the First Optional Protocol to the International Covenant on Civil and Political Rights (1966),[23] the Protocol Relating to the Status of Refugees (1967),[24] the Convention on the Elimination of All Forms of Discrimination Against Women (1979),[25] the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984),[26] the

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[19] UNTS Vol.989, p.175: acceded to by Canada July 17, 1978, entering into force for Canada October 15, 1973; acceded to by Australia December 13, 1973, entering into force for Australia March 13, 1974.

[20] UNTS Vol.660, p.195: ratified by Canada October 14, 1970, entering into force for Canada November 13, 1970; ratified by Australia September 30, 1975, coming into force for Australia October 30, 1975.

[21] UNTS Vol.993, p.3: acceded to by Canada May 19, 1976, entering into force for Canada August 19, 1976; ratified by Australia December 10, 1975, entering into force for Australia March 10, 1976.

[22] UNTS Vol.999, p.171: acceded to be Canada May 19, 1976, entering into force for Canada August 19, 1976; ratified by Australia August 13, 1980, entering into force for Australia November 13, 1980.

[23] UNTS Vol.999, p.171: acceded to by Canada simultaneously with the Covenant; acceded to by Australia September 25, 1991, entering into force for Australia December 25, 1991.

[24] UNTS Vol.606, p.267: acceded to by Canada on June 4, 1969, entering into force for Canada on the same day; acceded to by Australia December 13, 1973, entering into force for Australia on the same day.

[25] UNTS Vol.1249, p.13: ratified by Canada December 10, 1981, entering into force for Canada January 9, 1982; ratified by Australia July 28, 1983, entering into force for Australia August 27, 1983.

[26] General Assembly Official Records A/RES/39/46, Supplement No.51 (A/39/51), p.197: ratified by Canada June 24, 1987, entering into force for Canada July 24, 1987; ratified by Australia August 8, 1989, entering into force for Australia September 7, 1989.

Convention on the Rights of the Child (1989),[27] the First, Second, Third and Fourth Geneva Conventions (1949),[28] and International Labour Organisation Conventions Numbers 87 (Concerning Freedom of Association and Protection of the Right to Organize) (1948),[29] 100 (Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value) (1951),[30] 105 (Concerning the Abolition of Forced Labour (1957),[31] 111 (Concerning Discrimination in Respect of Employment and Occupation) (1958),[32] and 122 (Concerning Employment Policy) (1964),[33] as well as several conventions dealing with working conditions

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[27] Official Records of the General Assembly A/RES/44/25: ratified by Canada December 13, 1991, entering into force for Canada January 12, 1992; ratified by Australia December 17, 1990, entering into force for Australia January 16, 1991.

[28] UNTS Vol.75, pp.31, 85, 135, 287: ratified by Canada May 14, 1965, entering into force for Canada November 14, 1965; ratified by Australia in 1958.

[29] UNTS Vol.68, p.17: ratified by Canada March 23, 1972, entering into force for Canada March 23, 1973; ratified by Australia February 28, 1973 entering into force for Australia February 28, 1974.

[30] UNTS vol.165, p.303: ratified by Canada November 16, 1972, entering into force for Canada November 16, 1973; ratified by Australia December 10, 1974, entering into force for Australia December 10, 1975.

[31] UNTS Vol.320, p.291: ratified by Canada July 14, 1959, entering into force for Canada July 14, 1960; ratified by Australia June 7, 1960, entering into force for Australia June 7, 1061.

[32] UNTS Vol.362, p.31: ratified by Canada November 26, 1964, entering into force for Canada November 26, 1965; ratified by Australia June 15, 1973, entering into force for Australia June 15, 1974.

[33] UNTS Vol.569, p.65: ratified by Canada September 16, 1966, entering into force for Canada September 16, 1967; ratified by Australia November 12, 1969, entering into force for Australia November 12, 1970.

on ships.[34]

Instruments to which Canada, but not Australia, is a party are: the two Protocols Additional to the Geneva Conventions of 12 August 1949 (1977),[35] and Organization of American States Conventions such as the Convention on the Nationality of Women (1933),[36] the Inter-American Convention on the Granting of Political Rights to Women (1948),[37] and the Inter-American Convention on the Granting of Civil Rights to Women (1948).[38]

Instruments to which Australia, but not Canada, is a party are: the Convention Relating to the Status of Stateless Persons (1954),[39] the Second Optional Protocol to the International Covenant on Civil and Political Rights (1989)[40] and

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[34] ILO Conventions Numbers 7 (Minimum Age (Sea), 1920); 8 (Unemployment Indemnity (Shipwreck), 1920); 15 (Minimum Age (Trimmers & Stokers), 1921); 16 (Medical Examination of Young Persons (Sea), 1921; 22 (Seamen's Articles of Agreement, 1926); 58 (Minimum Age (Sea) (Revised), 1936.

[35] ICRC Final Act, Diplomatic Conference, 1977, CTS 1991/2: ratified by Canada November 20, 1990 and entering into force for Canada May 20, 1991.

[36] OAS Treaty Series, No.4, CTS 1991/28· acceded to by Canada October 23, 1991, entering into force for Canada on the same day.

[37] OAS Treaty Series No.3, CTS 1991/29: ratified by Canada simultaneously with the previous convention.

[38] OAS Treaty Series No.23, CTS 1991/30: ratified by Canada simultaneously with the previous convention.

[39] UNTS 360, p.130: accede to by Australia December 13, 1973, entering into force for Australia March 13, 1974.

[40] ATS 1991 No.19, acceded to by Australia on October 2, 1990.

International Labour Organisation Conventions including[41] Numbers 11 (Concerning the Right of Association (Agriculture)) (1921),[42] 98 (Concerning the Right to Organise and Collective Bargaining) (1949),[43] 131 (Concerning Minimum Wage Fixing) (1970)[44] and 156 (Concerning Workers with Family Responsibilities) (1981).[45] Australia has also recently ratified two other ILO conventions with the specific aim of broadening the coverage of domestic federal industrial laws: they are Conventions numbers 135 (Concerning Protection and Facilities to be Afforded to Workers' Representatives in the Undertaking) (1971)[46] and 158 (Concerning Termination of Employment at the Initiation of the Employer) (1982).[47]

Instruments to which neither Australia nor Canada are parties are: the International

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[41] Australia is a party to 54 ILO Conventions, almost double the number ratified by Canada. A list of these can be found in Joint Standing Committee on Foreign Affairs and Trade: A Review of Australia's Efforts to Promote and Protect Human Rights, November 1994 (AGPS, Canberra), Appendix 9.

[42] UNTS 38, p.153: ratified by Australia December 24, 1957, entering into force for Australia December 24, 1957.

[43] UNTS 96, p.257: ratified by Australia February 28, 1973, entering into force for Australia February 28, 1974.

[44] UNTS 825, p.77: ratified by Australia June 15, 1973, entering into force for Australia June 15, 1974.

[45] Cmnd. 8773: ratifies by Australia March 30, 1990, entering into force for Australia March 30, 1991.

[46] UNTS 1971 YBHR 312: ratified by Australia February 26, 1993, entering into force for Australia February 26, 1994.

[47] Cmnd. 9078: ratified by Australia February 26, 1993, entering into force for Australia February 26, 1994.

Convention on the Suppression and Punishment of the Crime of Apartheid (1973),[48] the International Convention Against Apartheid in Sports (1985),[49] the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (1968),[50] the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1950),[51] the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (1962),[52] the UNESCO Convention against Discrimination in Education (1960),[53] the Convention on the International Right of Correction (1953),[54] the Maternity Protection Convention (1952),[55] the Equality of Treatment (Social Security) Convention (1962)[56] and several other ILO Conventions, including Conventions numbers 141 (The Rural Workers' Organisations Convention, 1975),[57] and 151 (The Labour Relations (Public Service) Convention, 1978).[58]

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[48] UNTS 1015, p.243

[49] Adopted by GA Resol. 40/64G (1985): UN Doc. A/RES/40/64G

[50] UNTS 754, p.73

[51] UNTS 96, p.271

[52] UNTS 521, p.231

[53] UNTS 429, p.93

[54] UNTS 435, p.191

[55] UNTS 214, p.321

[56] UNTS 494, p.271

[57] UKTS 16 (1978), Cmnd. 7083

[58] Cmnd. 7786

Thus, there is a remarkable similarity with respect to the range of human rights treaties to which Australia and Canada are parties. They are both parties to all the "major" ones and this group is much larger than the groupings indicating dissimilarities. The group of treaties to which both countries are not parties indicates the similarities of values, political alliances (the two apartheid conventions), civil and criminal laws (the conventions dealing with prostitution and marriage), difficulties with specific economic and social rights (the education convention) and attitudes to freedom of the press (convention on the right of correction). The groups where one but not the other country is a party are largely (but not entirely) explained by geographical region (Canada and the OAS treaties) or the relative strengths of trade union organisation or the ease with which international obligations may be imposed by the federal government on the states (Australia's greater adherence to ILO conventions). Overall, the similarities are much greater than the differences in so far as prima facie acceptance of the range of international human rights treaty obligations is concerned. For this reason, and for the purpose of a sharper comparative study, this chapter will deal only with the treaties to which both Australia and Canada are parties.

Differences are apparent in the timing of the acceptance of these obligations. It is tempting, but misleading, to correlate these to the political party in federal power

at the time.[59] This has the danger of overlooking the vicissitudes which determine when a treaty is ready for signature at international level (for example, the 20-year hiatus between the UDHR and the ICESCR and ICCPR). It might be more revealing to look at Canada and Australia's respective timing of acceptances of the treaties to which they are both parties. This, however, reveals an inconclusive result. When looking at which country more readily accepted the obligations, Australia appears to have been more ready on four occasions,[60] Canada on seven,[61] and both of them more or less equal in the remainder.[62] But these figures alone are meaningless. However, if they are correlated with the subject matter of the treaty and its likely impact on the domestic scene, it will be seen that

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[59] For example, the majority of Australia's acceptances fall within periods when the Labor Party was in power. Ian Russell ("Australia's Human Rights Policy: From Evatt to Evans" in Russell, Ness & Chua: Australia's Human Rights Diplomacy (1992, Australian Foreign Policy Papers, ANU, Canberra, pp.3-96) charts the bipolar struggle of the Cold War during the 1950's and 60's when Australian security, as a "European" country on the edge of Asia, was a paramount concern and human rights matters took second place. Australia participated in discussions of the treaties mentioned in this chapter, and signed some of them, but a glance at the dates of ratification provided in the footnotes above indicates that most of them were not ratified until after the election of the Whitlam (Labor) government in 1972. In fact, the ICCPR and the ICESCR were not even signed until then. The current approach - also until recently with a Labor government - is to ratify treaties to facilitate the amendment of domestic legislation. This is expanded upon in Chapter 5.

[60] The conventions relating to genocide, refugees, the supplementary slavery convention, and statelessness.

[61] The conventions on the political rights of women, race, the International Covenant on Civil and Political Rights, the First Optional Protocol, the refugees protocol, and the conventions on torture and equal remuneration.

[62] The slavery Protocol, the International Covenant on Economic, Social and Cultural Rights, and the conventions on the nationality of married women, discrimination against women, children and the right of association.

the Canadian acceptance has been much more ready than that of Australia. This especially shows up in the acceptance of the First Optional Protocol to the International Covenant on Civil and Political Rights, which Canada acceded to simultaneously with its accession to the Covenant in 1976, but which Australia did not accede to until the end of 1991. There has thus been an apparently greater commitment by Canada to domestic enforcement and implementation of its international human rights obligations than has been apparent with Australia.

However, the true extent of this apparent commitment must be examined in the light of the general subject matter of the treaties and the reservations to them made by Canada or Australia. This highlights the considerable differences with respect to the scope of the obligations undertaken with respect to them.

4.3 Treaties with no reservations

Australia and Canada have made no reservations to the following treaties: the Genocide Convention, the Slavery conventions, the Convention on the Nationality of Married Women, the Convention on the Reduction of Statelessness, the International Covenant on Economic, Social and Cultural Rights, the Protocol Relating to the Status of Refugees and the ILO Conventions. The 1956 Slavery Convention does not allow reservations,[63] but all the others do.[64] However, with

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[63] Art. 9

the exception of the International Covenant on Economic, Social and Cultural Rights (ICESCR) these treaties are all unidimensional with respect to subject matter and have a relatively low domestic political impact.

The Genocide Convention is directed towards the destruction of groups rather than to their equality with other groups. It may therefore be thought that it has little practical relevance in countries like Australia and Canada, but this is (or was) not necessarily the case. The Convention provides, in Article I, that the parties confirm that genocide is a crime under international law "which they undertake to prevent and punish." This is a clear obligation of domestic implementation. However, Article II defines genocide as meaning certain acts "committed with intent to destroy" a group. Thus, an element of mens rea must be shown, and the groups are designated to be "national, ethnical, racial or religious." A decision was made not to include political groups or to extend the Convention to cultural genocide, the latter being left to other treaties.[65] One of these acts is the forcible transfer of children of the group to another group. Australia did do this to the Aborigines. However, it would have to be proven that this was done with intent to wipe out

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[64] Note that the Constitution of the ILO provides that ILO Conventions and Recommendations will apply to federal states in the same way as to unitary states, and if there are constitutional limitations with respect to domestic implementation the federal authority will refer the matter to the appropriate state or provincial authority for action (Art. 19(7)). This is not the same thing as not allowing reservations.

[65] See GAOR, Third Session, Sixth Committee, pp.60-115, and p.206 for the decision to drop a reference to cultural genocide. For a brief commentary on the drafting history of the Convention, see Warwick McKean: Equality and Discrimination under International Law (1985, Clarendon Press, Oxford), pp.105-112.

Aborigines, which would be a difficult task for a prosecutor. In addition, Article V obliges the parties to enact the necessary legislation to achieve these aims "in accordance with their respective Constitutions". In the case of Australia, criminal law is a matter of state legislative competence. The real obligation for the Commonwealth is therefore minimal. In Canada, where criminal law is a federal matter, section 318 of the Criminal Code was amended[66] to provide that anyone advocating or promoting genocide is guilty of an indictable offence. While genocide is defined in terms similar to Article II of the Convention, it is not genocide itself which is the offence (which would already be covered by the laws dealing with homicide) but advocating it. And this amendment was not made until 1984. The treaty overall imposes little realistic obligation for Australia and Canada because of local conditions and legal structures, as well as its wording.[67] Unlike later treaties, there is also no provision for scrutiny of compliance by an international committee. Any potential breaches were simply overlooked or ignored, until the recent atrocities in the former Yugoslavia.[68]

The Convention on the Nationality of Married Women is in part an elaboration of

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[66] R.S., c. 11 (1st Supp.), s.1

[67] At the 1989 Annual Conference of the American Society of International Law, Professor Benjamin Ferencz described the genocide Convention as a "fraud" because the people who were most likely to become liable in some way because of it were people in government during World War II. As it was negotiated immediately after the war by many of the people most directly concerned it was a "watered down" instrument: ASIL Proceedings, 83rd Annual Meeting, 1989, at p. 326.

[68] Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina v Serbia & Montenegro), filed on March 20, 1993.

UDHR Article 15 which provides that everyone has the right to a nationality. The Convention provides that neither the celebration nor the dissolution of a marriage will automatically affect the nationality of the wife.[69] While until relatively recently a change in marital status might have affected the domicile of a woman, it would not have affected her nationality in Canada or Australia. In any event, an aggrieved woman is given no avenue of redress directly under the treaty. The domestic impact is again negligible.

The Convention on the Reduction of Statelessness provides that parties to it will grant nationality to various classes of stateless persons within their territory, but makes the granting specifically subject to conditions such as periods of residence and whether a person has criminal convictions.[70] In effect, the State is given the opportunity to deport the person before they qualify to apply for nationality. No redress is given to the aggrieved person directly under the treaty. The potential domestic impact is minimal.

The Protocol Relating to the Status of Refugees amends some provisions of the 1951 Refugee Convention and will be considered below.

The ILO Conventions deal with the right to form and join trade unions, equal pay

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[69] Article 1

[70] Articles 2, 4, 8.

for work of equal value, the abolition of forced labour, non-discrimination in employment and policies of full and productive free employment. As such, they are elaborations of UDHR Article 23 dealing with the right to work and just and favourable conditions of work. However, with respect to domestic implementation and enforcement, all of them are qualified by phrases such as "by such methods and to such extent as may be appropriate under national conditions",[71] "by means appropriate to the methods in operation"[72] and "determined by national laws and regulations."[73] In line with this approach, Australia has made a "federal clause" declaration when ratifying some of these treaties.[74] Alternatively, they posed no perceived threat to the legal and social status quo. Thus, while the Convention (No. 105) concerning the Abolition of Forced Labour, requires parties to undertake "effective measures to secure the immediate and complete abolition of forced or compulsory labour"[75] this term is described as "any form of forced or compulsory

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[71] Employment Policy Convention Art.2; Discrimination in Employment and Occupation Convention Arts. 2, 3. With respect to the latter, the U.K. and Canadian government members ensured that the interpretation of these articles creating no legal obligation to enact legislation if the country concerned decided that it would be ineffective was recorded in the travaux preparatoires (42nd session, 1958, Record of Proceedings). The Soviet Union strenuously criticised this approach: id., p.405.

[72] Equal Remuneration Convention Art. 2.

[73] Freedom of Association Convention Art. 9 (dealing with the right of members of the police force and armed services to organise).

[74] For example, it did so when ratifying ILO No. 135 in 1993. The operative part of the declaration states: "The implementation of the Convention throughout Australia will be effected by the Federal, State and Territory governments having regard to their respective constitutional powers and arrangements concerning their exercise." The effect of such a declaration, and whether it is really a reservation, is dealt with below with respect to the ICCPR.

[75] Art. 2

labour" used as a form of political coercion, or for economic development, as labour discipline, as a punishment for having participated in a strike, or as a means of racial, social, national or religious discrimination.[76] It would not apply to the use of compulsory labour in prisons nor to the obligation of a wife to perform household duties for her husband, which she could be legally compelled to do at the time this treaty became binding on Canada and Australia.

Again, the realistic obligations in these treaties are qualified or are negligible, even though issues like equal pay between men and women, and non-discrimination in employment, were and remain important domestic matters. The soft language allows evasion of obligations through avoidance of domestic implementation. In fact, Australia did not directly implement the Equal Remuneration Convention, which was concluded in 1951, until 1994.[77]

4.4 The International Covenant on Economic, Social and Cultural Rights

Of more potential impact is the International Covenant on Economic, Social and Cultural Rights (ICESCR), to which Australia and Canada have also made no reservations. Australia, together with the Soviet Union and Yugoslavia, had

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[76] Art. 1

[77] By amendments to the Commonwealth Industrial Relations Act.

lobbied strongly for the inclusion of economic, social and cultural rights into the [single] Covenant.[78] This attitude did not change when the federal government changed from Labor to Liberal after the elections in 1949.[79] Canada had opposed their inclusion.[80] There were in fact no such rights in the first draft of the [single] Covenant,[81] although this situation was quickly reversed by the General Assembly in 1950 after what has been described as a "long and acrimonious debate."[82]

Although the original decision had been to draft one Covenant on human rights,[83] and the General Assembly had declared that "the enjoyment of civic and political freedoms and of economic, social and cultural rights are interconnected and interdependent,"[84] it was later decided to split the two,[85] at least partly because

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[78] See Commission on Human Rights, Report of the Sixth Session [Economic and Social Council, Official records, Eleventh Session, Supp.5, E/1681, 29 May, 1950], pp.26-8; Louis Sohn, "A Short History of United Nations Documents on Human Rights", Supplementary Paper to the Eighteenth Report of the Commission to Study the Organization of Peace, The United Nations and Human Rights (1968, Oceana Publications, Dobbs Ferry, New York), pp.104ff.

[79] Harper & Sissons: Australia and the United Nations, ante, p.256.

[80] See Humphrey, Great Adventure, pp.130ff. See also Canada and the United Nations, 1950, Department of External Affairs, Ottawa, Conference Series 1950, No. 1, p.72; and Id, 1951-52, Conference Series 1951, No. 1, p.72. Canada was concerned about the "fundamental difference in the nature" of economic rights as opposed to civil and political rights (id.). It regarded the former as being more responsibilities for states rather than as the rights of individuals.

[81] See Yearbook on Human Rights, 1947 (1949, United Nations, New York), Annex B, pp.546-49.

[82] Matthew C.R. Craven: The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development (1995, Clarendon Press, Oxford), at p.18.

[83] General Assembly Resolution 217E (III) of December 10, 1948

[84] General Assembly Resolution 421E (V) of December 4, 1950

of concerns that the implementation and enforcement procedures might have to be different with respect to the two categories of rights,[86] and partly because of political issues connected with the Cold War.[87] It was stated openly by the General Assembly's Third Committee, when it debated the issue, that the Covenants should be drafted so that they would be acceptable to as many States as possible.[88] They would (like the UDHR) represent a compromise which, "while not ideal, should be regarded as fairly satisfactory."[89] Thus emerged a dichotomy, which is not entirely accurate, between the "classic" civil and political rights into which a State should not interfere (and enforceable through complaint procedures), and the "newer" economic and social rights where active State involvement is necessary (and which are promotional rather than rules capable of immediate application). It is a dichotomy which affects views of domestic implementation and enforcement to this day. It is also a dichotomy not fully followed within the Covenants themselves.[90]

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[85] General Assembly Resolution 543 (VI), 5 February, 1952: G.A.O.R. Sixth Session, Supp. 20 (A/2119). p.36

[86] Economic and Social Council Resolution 384 (XIII), (1951). See generally David Trubeck, "Economic, Social and Cultural Rights in the Third World", Chapter 6 in Theodore Meron (ed): Human Rights in International Law: Legal and Policy Issues (1984, Clarendon Press, Oxford), especially pp.211ff.

[87] Trubeck, ibid.

[88] Report of the Third Committee, UN Doc. A/2808 (29 November, 1954); G.A.O.R. Annex IX 58, pp.7ff.

[89] Id., p.10; see also Sohn, ante, pp.107ff.

[90] For example, the International Covenant on Civil and Political Rights contains the rights with respect to children in Article 24 which are of a promotional nature. The Covenant on Economic, Social and Cultural Rights contains rights to form and join trade unions and to strike (Article 8), free consent for entry into marriage (Article

The ICESCR deals with the right to work (Article 6), conditions of work (Article 7), the right to join trade unions (Article 8), the right to social security (Article 9), the protection to be given to the family (Article 10), the right to an adequate standard of living (Article 11), the right to enjoy high standards of physical and mental health (Article 12), the right to education (Article 13) and the right to take part in cultural life and to enjoy the benefits of scientific progress (Article 15). As elaborations of the UDHR Articles 22-27, with two exceptions the ICESCR adds surprisingly little in the way of substance as opposed to detail, and in one instance falls far short of the UDHR. Of the two exceptions, one is minor and the other major.

The minor exception is the concept of the family in Article 10. While it is still described as "the natural and fundamental group unit of society" the Western bias is lessened in that it is the family which is the dominant concept of this Article, rather than marriage, which is the dominant concept in UDHR Article 16. The paradigm of the nuclear family is not as implicit in the ICESCR as in the UDHR.

The major exception is the introduction of a new right: self-determination, which "all peoples" have a right to. The difficulties with respect to the meaning and

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10) and the right of parents to send their children to private schools (Article 13(3)) which are not of a program nature and are capable of immediate application.

application of self-determination have been dealt with in great detail elsewhere.[91]

The instance of the ICESCR falling short of the UDHR is the notable absence from it (and from the ICCPR) of the right to own property.[92] This was largely because the Commission on Human Rights, and later the General Assembly and its Third Committee, found it impossible to reach agreement on the issue, particularly with respect to the right to compensation in the event of expropriation.[93]

There is little overt philosophical basis to the treaty, which refers in its Preamble to the UDHR and the obligations under the UN Charter. The second preambular paragraph does recognise that "these rights derive from the inherent dignity of the human person", but this is more a recognition of natural rights to explain the treaty than a reliance on Natural Law to juridically validate it. It is also neutral with respect to political or economic systems, and prima facie can apply in socialist and capitalist systems, and in a mixed, centrally-planned or laissez-faire economy,[94]

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[91] See, for example, James Crawford: The Creation of States in International Law (1979, OUP, Oxford), especially at pp.84-106; L.C. Buchheit: Secession: The Legitimacy of Self-Determination (1978, Yale U.P., New Haven); Michla Pomerance: Self-Determination in Law and Practice (1982, Martinus Nijhoff, The Hague).

[92] Article 17 of the Universal Declaration

[93] For an account, see Humphrey: Great Adventure, pp.176ff.

[94] See Committee on Economic, Social and Cultural Rights, General Comment No. 3 (1990), adopted at the fifth session meeting, December 11, 1990: Report of the Fifth Session (26 November - 14 December 1990), ECOSOC Official Records, 1991, Supplement No.3, UN Doc. E/1991/23, paragraph 8.

although some have disputed this.[95] While reiterating the notions of "inherent dignity" and "equal and inalienable rights", and also recognising that individuals as well as States have responsibilities with respect to it, the parties undertake to "guarantee" these rights to everyone without discrimination,[96] and to "ensure" them to both men and women equally,[97] but there is no indication as to how this guarantee is to be met other than "to the maximum of ... available resources, with a view to achieving progressively the full realization of the rights" which may - or may not - include legislative measures.[98] Progressive realisation is the overriding implementation principle in the treaty.[99]

In addition, the obligation-inducing clauses are all of a "soft" variety. Thus, while the "right" to self-determination exists, States have an obligation to "promote the realization" of it.[100] They must "take appropriate steps" to safeguard the right to

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[95] The Covenant was called in the United States' Congress "a document of collectivist inspiration, alien in spirit and philosophy to the principles of a free economy." (Statement by Oscar Garibaldi in International Human Rights Treaties: Hearings Before the Senate Committee on Foreign Relations, 96th Congress, 1st session, 325, 326 (1979), quoted in Philip Alston and Gerard Quinn, "The Nature and Scope of States' Parties Obligations under the International Covenant on Economic, Social and Cultural Rights" (1987) 9 Human Rights Quarterly 156 at p.182 (hereafter referred to as "Alston & Quinn").

[96] Article 2(2)

[97] Article 3

[98] Article 2(1),(2). For more detail on the issue of legislative action see Alston & Quinn, pp.167-69.

[99] For detail of the drafting history of Article 2(1), see Alston & Quinn, pp.223-229, and Craven ante, Chapter 3.

[100] Article 1(3)

work[101] which are described in vocational and economic, rather than legal, terms.[102] The appropriateness of the steps taken is, at least in the first instance, determined by the State itself. Parties to the treaty merely "recognise" all of the rights, with the sole exception of the right to join trade unions in Article 8, where the obligation upon parties is to "ensure" the right. However, this is qualified within the article itself by reference to legal restrictions on the right to strike which are "prescribed by law and which are necessary in a democratic society in the interests of national security or public order."[103] Also, the right of members of the armed forces or the police force to form trade unions can be subject to lawful "restrictions."[104] All of these are also determined (at least in the first instance, and sometimes in totality) by the State itself.

Moreover, Article 4 is a general limitation clause which provides that all the rights (other than the right to self-determination) can be subjected by a State to "such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society." The terms "general welfare" and "democratic society" in Article 4 are also delphic terms on which the travaux préparatoires

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[101] Article 6(1)

[102] Article 6(2)

[103] Article 8(1)(a)

[104] Article 8(2)

throw little light [105] While such limitations are sensible with respect to economic and social rights which cannot be automatically provided by a country, and provide for both a permissive function (allowing for local limitations) as for a protective one (stipulating the limits beyond which the local limitations may not go),[106] they make for obligations in only the most minimal sense. Alston and Quinn, examining the travaux préparatoires of Article 4 to ascertain its meaning have commented:

> ... the permissive function of the limitations clause [in Article 4] is to allow states to impose limitations where: (1) an unlimited interpretation of a right would lead to absurd results and would deny a state the necessary authority to enact detailed regulatory provisions; and (2)the various rights would otherwise clash with each other or with the legitimate interests of the state. Since the limitations clause does not purport to deal with limitations required by inadequate resource availability, and since it is difficult to see how rights such as those dealing with food, health care, housing and clothing are readily susceptible to limitations on the aforementioned grounds, the question of the extent of the applicability of the limitations clause remains uncertain.[107]

Indeed, Article 10(2) provides for "paid leave or leave with adequate social security" for working mothers. Neither Canada nor Australia fully complies in fact with this provision, but neither is in breach of its treaty obligations as long as it agrees that, in a perfect world, working mothers "should have" such support.

The establishment of a Committee on Economic Social and Cultural Rights has only partly overcome this problem. The Committee has addressed this issue as

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[105] See Alston & Quinn, pp.202-5.

[106] See Alston & Quinn, pp.192-199.

[107] Id., p.197. I discuss the phrase "determined by law" in more detail below with respect to the ICCPR.

follows:

> The term "progressive realization" is often used to describe the intent of [Article 2(1)]. The concept of progressive realization constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time. In this sense the obligation differs significantly from that contained in article 2 of the Covenant on Civil and Political Rights ... Nevertheless, the fact that realization over time, or in other words progressively, is forseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world ... On the other hand, the phrase must be read in the light of the overall objective, indeed the raison d'etre, of the Covenant which is to establish clear obligations for states Parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.[108]

The Committee distinguishes between obligations of conduct and obligations of result under the Covenant,[109] with the former having immediate effect. These would include, within Article 2, the obligation to take steps of some sort where necessary, and the obligation not to do so in a discriminatory fashion. This would also entail monitoring the extent of the realisation of the rights in the Covenant and the devising of strategies and programs for their promotion.[110]

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[108] General Comment No. 3 (1990), adopted at its fifth sessional meeting, December 11, 1990: Report of the Fifth Session (26 November - 14 December 1990), ECOSOC Official records, 1991, Supplement No. 3, UN Doc. E/1991/23 (paragraph 9). See also the so-called Limburg Principles formulated by a group of distinguished experts in 1986: (1987) 9 Human Rights Quarterly 121-135.

[109] Id., paragraph 1

[110] Id., paragraph 11. See also Alston & Quinn, at 165-6.

Nevertheless, the focus of the framers of the Covenant was purposely[111] one of implementation rather than enforcement, and no new international machinery was created at that time. Humphrey contends[112] that it is "implementation at the national level with international help."

Issues of implementation and enforcement of all the treaties in fact suffered from a piecemeal approach. To a large extent this was the result of both Cold War rivalries and a lack of commitment to human rights treaties from the very top.[113] There was much debate not only about measures of implementation and enforcement of the treaties, but also of the right of individuals to petition the Commission on Human Rights and other UN bodies, creating a crazy-quilt of measures.[114] What has been more consistent, at least with respect to the "major"

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[111] See John P. Humphrey, "The Implementation of International Human Rights Law" (1978) N.Y. Law School L.R. 31, especially at 37ff.

[112] Id., at p.37

[113] John Humphrey recounts that in 1955 he was told by the then Secretary General, Dag Hammarskjold, that: "There is a flying speed below which an airplane will not remain in the air. I want you to keep the [human rights] program at that speed and no greater." Hammarskjold, more concerned with the "bigger issues" generated by the Cold War, also cut the UN Human Rights Division staff by one third - See Humphrey: Great Adventure at p.205.

[114] These are not of direct relevance to this thesis as they are designed to operate apart from any domestic legal system. They include the Committees and Special Committees of the General Assembly, the Economic and Social Council and its subsidiary bodies, as well as the ILO, UNESCO, the FAO and WHO. (See generally United Nations Action in the Field of Human Rights (1988, UN, New York), ST/HR/2/Rev.3.) For an historical account, see John Humphrey, "The Right to Petition the United Nations" (1971) 4 Rev. des Droits de l'Homme 463. An overview can be found in Christian Strohal, "The United Nations Responses to Human Rights Violations" in Mahoney & Mahoney: Human Rights in the Twenty-First Century, ante, pp.347-60. Also to be mentioned in this regard are procedures such as that under ECOSOC Resolution 1503 (XLVIII), 1970, under which patterns of gross violations of human rights but in a confidential manner and with the

human rights treaties,[115] is the system of periodic reporting. The implementation procedure in the ICESCR has always been supplemented by a reporting procedure.[116] Periodic reports from parties[117] (and also from the specialised agencies)[118] were to be transmitted to ECOSOC which "may" submit "from time to time" to the General Assembly reports with "recommendations of a general

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co-operation of the State against which the allegation has been made. (See M. E. Tardu, "The UN's Response to Gross Violations of Human Rights - the 1503 Procedure" (1980) Santa Clara L.R. 559; a more comprehensive and wide-ranging account by the same author is Human Rights: The International Petition System (3 binders) (1985, Oceana Publications, Dobbs Ferry; see also "An Analysis of the Procedures of the United Nations Regarding Individual Petitions with respect to Human Rights", a Report in (1974-5) 4 Human Rights 217-58). Such solutions are mostly political rather than legal in the nature of their processes. See generally: T.J.M. Zuijdwijk: Petitioning the United Nations: A Study in Human Rights (St Martin's Press, New York). Also to be mentioned, but not otherwise commented on here, is the recent establishment of the office of the UN Commissioner for Human Rights. A development of the original suggestions for an "Attorney-General", (by Rene Cassin, amongst others) its chequered history is recounted by R. St J. Macdonald, "The United Nations and the Promotion of Human Rights" in R. St J. Macdonald, D. M. Johnston & G. L. Morris (eds): The International Law and Policy of Human Welfare (1978, Sijhoff & Noordhoff, Netherlands), pp.203-37 at 223ff, and also in "Leadership in Law: John P. Humphrey and the Development of the International Law of Human Rights", (1991) XXIX Canadian Yearbook of International Law 3 at 75-79. See also the "Note by the Secretary-General" Creation of the Post of United Nations High Commissioner for Human Rights UN Doc. A/7170 (6 August, 1968) and Roger Stenson Clark: A United Nations High Commissioner for Human Rights (1972, Martinus Nijhoff, The Hague). The extent to which the functions of this new position will dovetail with those of existing UN positions remains to be seen.

[115] Into this category I place the ICCPR, ICESCR, and the conventions on race, women, children and torture.

[116] The early history of this prior to the Committee on Economic, Social and Cultural Rights being set up is outlined by Ramcharan "Implementing the International Covenants on Human Rights", Chapter 8 in B.G. Ramcharan (ed): Human Rights Thirty Years After the Universal Declaration (1979, Martinus Nijhoff, The Hague), pp.159-74.

[117] By decision 1985/132, ECOSOC established a two-year periodicity for "first-stage" reports (ie, the rights covered by articles 6 to 9) and a three-year periodicity for "second-stage" (Articles 10-12) and "third-stage" reports (Articles 13-15). It means that reports should be effectively submitted in nine-year cycles.

[118] Article 18

nature" and a "summary" of the information received from the parties' reports and from the specialised agencies.[119] As Humphrey has commented,[120] this added little if anything to the powers already possessed by ECOSOC. This was done purposely to avoid comments being made against particular States and to concentrate upon positive steps which might be taken by the international community as a whole to achieve the progressive realisation of the Covenant.[121] It meant (and largely still means) that parties effectively analyse their own progress, albeit with the assistance of an international committee.[122] Although not specifically provided for in ICESCR, the Committee on Economic, Social and Cultural Rights was established by ECOSOC in 1985.[123] Comprised of eighteen experts elected in a personal capacity, it examines the parties' reports and makes the general recommendations referred to in Article 21, as well as General Comments such as the one referred to above. It has complained about the low level

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[119] Article 21

[120] John P. Humphrey, "The Implementation of International Human Rights Law" (1978) XXIV New York Law School Law Review 31 at 38

[121] See Sohn "A Short History ...", ante, at 163-4; Annotations on the Text of the Draft International Covenants on Human Rights, UN Doc. A/2929 (1955) at 120; reports of the 420th-426th meetings of the Commission on Human Rights, UN Docs. E/CN.4/SR.420-426 (1954).

[122] See David M. Trubeck, "Economic, Social and Cultural Rights in the Third World: Human Rights Law and Human Needs Programs", Chapter 6 in Meron: Human Rights in International Law, ante, p.219. See also General Comment No. 1 (1989) of the Committee on Economic, Social and Cultural Rights where the Committee stated that the reporting procedure is not merely procedural, but encourages States to undertake a comprehensive review of their domestic situation, monitor it, demonstrate that principled policy-making has been undertaken, evaluate the progress made, and lay all this open to public scrutiny. (Report on the Third Session (6-24 February, 1989), ECOSOC, Official Records, 1989, Supp. No.4, Annex III, UN Doc E/1989/22.

[123] ECOSOC Resol. 1985/17 (28 May, 1985)

of interest in its deliberations exhibited by the specialised agencies.[124] Some commentators have been sceptical of the effectiveness of the Committee[125] but some optimism seems to have since emerged.[126]

The reporting system is intended to encourage States to review and monitor their progress, so as to promote principled policy-making.[127] But, as Robertson points out,[128] the effectiveness of a reporting system depends on the co-operation of governments, the possibility of the scrutinising body obtaining further information, that body being composed of independent persons, and the ability to make recommendations about necessary improvements in the domestic law of the relevant State. Delay in filing reports has in fact become a major problem.[129] The

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[124] General Comment No. 2 (1990), adopted at its fourth session meeting, February 1, 1990: Report of the Fourth Session (15 January - 2 February 1990), ECOSOC Official Records, 1990, Supplement No. 3, Annex III, UN Doc. E/1990/23.

[125] Philip Alston, "Out of the Abyss: The Challenges Confronting the New UN Committee on Economic, Social and Cultural Rights" (1987) 9 Human Rights Quarterly 332-81.

[126] Philip Alston and Bruno Simma, "Second Session of the UN Committee on Economic, Social and Cultural Rights" (1988) 82 AJIL 603-15 where the authors see a transition from a sterile formalism to a constructive dialogue.

[127] Committee on Economic, Social and Cultural Rights, General Comment No. 1 (Third Session, 1989), UN Doc. E/1989/22.

[128] A. H. Robertson: Human Rights in the World: An Introduction to the Study of the International Protection of Human Rights 2nd ed., (1982, St. Martin's Press, New York), pp.42-50.

[129] For example, the General Assembly has expressed its "deep concern" over the number of overdue reports for more than a decade (see A/40/600 and General Assembly Resolution 40/116 (13 December 1985). In 1986 there were 460 overdue reports (A/41/510, pp.3-4). At that time Australia had one overdue report under the Women's Convention and Canada had one overdue report under the ICESCR.

reports are also only as good as their content, which is provided by governments and is not likely to be critical nor, in some cases, scrupulously honest. This prompted Theodore Meron to comment in 1986: "... the reporting system, to paraphrase the title of Jacques Brel's play, is alive, but is not well."[130] The problem has also been compounded by the UN's financial crisis which has seen the cancellation of Committee meetings. Six years later Philip Alston wrote that "a body such as the Committee can make some contribution and might be a useful catalyst, but what ultimately matters is what is done, perhaps in conjunction with those measures, at the national level."[131] The Reports indicate more the asserted level of existing compliance of domestic legislation with the provisions of the ICESCR rather than proactive proposals for reform.[132] Although the Reports by Canada and Australia are generally regarded as being good,[133] they tend to look backwards, and only look forwards by implication. There can be a "confess and

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[130] Theodore Meron: Human Rights Law-Making in the United Nations: A Critique of Instruments and Process (1986, Clarendon Press, Oxford), p.237.

[131] Philip Alston, "The Committee on Economic, Social and Cultural Rights", Chapter 12 in Alston (ed): The United Nations and Human Rights: A Critical Appraisal (1992, Clarendon Press, Oxford) at p.508.

[132] See, for example, Canada's First Report on the Implementation of Articles 6-9 in 1981 (UN Doc. E/1978/8/Add.32) and its Second Report on Articles 6-9 (Department of the Secretary of State for Canada, December, 1987) and its Second Report on Articles 10-15 (Human Rights Directorate, Multiculturalism and Citizenship Canada, Ottawa, 1992).

[133] See Daniel Turp, "L'examen des rapports periodiques du Canada en application du Pacte international relatif aux droits economiques, sociaux et culturels" (1991) 29 Canadian Yearbook of International Law 330-54.

avoid" flavour to them. Thus, in its General Comment No. 3 in 1990,[134] the Committee prompted States to consider in their reports the extent to which the rights in the ICESCR might be justiciable by individuals in domestic courts.[135]

Thus, all of the treaties adopted without reservation by Canada and/or Australia are either expressed in terms of weak ("soft") obligation, or when the obligation is "strong" it creates in countries like Canada and Australia which do not live in Third World conditions, a weak impact in any realistic terms upon the legal and social status quo. The impact, if any, of these treaties will be for the future in that retrogressive steps would at least have to be explained and may amount to a treaty breach.

4.5 Treaties with reservations

The question now is whether a different picture emerges with respect to the treaties to which Australia and Canada have made reservations.

In the Convention Relating to the Status of Refugees, the bases set out in the

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[134] Adopted by the Committee at its Fifth Session meeting, December 11, 1990: Committee on Economic, Social and Cultural Rights, Report on the Fifth Session (26 November - 14 December, 1990), ECOSOC Official Records, 1991, Supp. No.3, UN Doc. E/1991/23.

[135] Id., paragraphs 5 and 6.

Preamble are the UDHR, the UN Charter, humanitarian concern for refugees, and practicalities such as consolidation of existing international agreements, the burden of asylum, international tension created by refugee problems, and the need for co-operation between States and the UN High Commissioner for Refugees. There are no appeals to "nature", natural rights or to God. It is a pragmatic document. It relates to refugees who are defined as people defined as refugees in earlier agreements or to any person who:

> ... as a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country ...[136]

In terms of "closure" the date set in the definition primarily orients it to World War II and the Cold War, although the 1967 Protocol now extends this by ignoring the date. Regardless of this, the definition does not apply to people falling outside the five designated attributes. It would not apply on the basis of marital status (for example, to married women fleeing brutal husbands) nor to homosexuals or trade unionists - who were both persecuted by the Nazis - unless they fell within the attributes of "social group" or "political opinion", which would not always be the case. It will also not apply to people fleeing natural disasters or poverty. Its humanitarian focus is limited to Western-inspired civil and political rights and it

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[136] Article 1A(2). It similarly applies to people of more than one nationality and to people without a nationality.

has been criticised as representing a politically partisan human rights rationale.[137] In addition, it is left to the State concerned to determine whether the fears are "well-founded". Furthermore, the treaty expressly provides that the phrase "events occurring before 1 January 1951" can be global or restricted to European refugees.[138] States can declare which interpretation they prefer. Canada restricts it to the European context[139] (although in practice it recognises a wider class than this),[140] whereas Australia does not.[141]

In addition, the Convention "shall not apply" to anyone with respect to whom there are "serious reasons for considering" that he or she has committed crimes against the peace, crimes against humanity or war crimes, other "serious" non-political crimes or has been guilty of acts contrary to the purposes and principles of the UN.[142] The determination of these is left to the State of refuge. When the Convention was concluded, would convictions for homosexual activity or for trade

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[137] D. Matas, "History of the Politics of Refugee Protection" in K. Mahoney & P. Mahoney: Human Rights in the Twenty-First Century: A Global Challenge (1993, Martinus Nijhoff, Dordrecht) at p.620.

[138] Article 1B(1)

[139] In a communication to the Secretary-General of the UN of October 23, 1970: Multilateral Treaties in the Area of Human Rights to which Canada is a Party (as at March 31, 1993), Document prepared by the Human Rights Directorate, Multiculturalism and Citizenship Canada.

[140] See David Matas: Closing the Doors: The Failure of Refugee Protection (1989, Summerhill Press, Toronto).

[141] By a communication to the Secretary-General on July 6, 1970: Human Rights: Status of International Instruments (1987, UN, New York), (ST/HR/5), p.298.

[142] Article 1F

union activity be regarded as serious non-political crimes allowing the exclusion of an otherwise eligible refugee? (A similar provision exists as an exception to the prohibition against réfoulement in Article 33). In addition, Article 3 expresses that the provisions of the Convention must be applied in a non-discriminatory fashion, but only with respect to the attributes of race, religion and country of origin.

A further State-determined qualifier on the application of the Convention is the fact that most of the substantive rights in it[143] only apply to refugees "lawfully" (ie, according to the domestic law) in the territory of the refuge State or "lawfully staying" there. There is one Article[144] which is directed to refugees who arrive, or stay, in the territory unlawfully. The Contracting Parties cannot impose penalties or restrict the movement of such refugees other than is "necessary" and only until their status is regularised - again, according to domestic law and procedure. Australia in fact imprisons South East Asian boat people who arrive in Australia illegally. Many of them remain in detention for several years. The validity of such detention has been challenged - unsuccessfully - in the High Court.[145] Canada introduced the Refugee Deterrents and Detention Act[146]

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[143] Art.15 (association), Arts.17-19 (employment and occupation), Art.21 (housing), Art.23 (public relief), Art.24 (labour legislation and social security), Art.26 (freedom of movement), and Art.28 (issuing travel documents).

[144] Article 31

[145] Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs (1992) 67 ALR 125. This case is discussed further in Chapter 5 below.

[146] 35-36-37 Eliz. II S.C. Chapter 36 (1987)

allowing for detention and denying a right to counsel of choice or an appeal.[147]

In addition to closure ratione personae, there is also a structural closure directly related to the domestic legislative system. Under Article 41 a federal clause is inserted which makes a federal State liable for breaches of the Convention with respect only to those Articles which come within its legislative jurisdiction. For those Articles coming within the jurisdiction of states or provinces, the obligation on the federal government is to: "bring such articles with a favourable recommendation to the notice of the appropriate authorities of states, provinces or cantons at the earliest possible moment."[148] The potential for an ameliorative synergy between international law and domestic law has been severely hobbled by the Convention itself.

This is significant considering the extent to which the very meaning of many of the Articles relies on domestic legal systems. Not only are refugees specifically obliged to conform with the local laws,[149] but the rights are accorded to them to the same extent that they are provided to nationals[150] or to aliens.[151] (In its sole

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[147] See Matas: Closing the Doors, ante, Chapter 9.

[148] Article 41(b)

[149] Article 2

[150] These rights are: religion (Art. 4), artistic rights (Art. 14), association (Art. 15), access to courts (Art. 16), employment (Art. 17), education (Art. 22), public relief (Art. 23), labour legislation and social security (Art. 24).

reservation to the Convention,[152] Canada accords to refugees the same rights to relief and social security as aliens rather than as nationals). The substantive provisions of the Convention are therefore effectively meaningless in the absence of the domestic legal system in which they are to operate. That system, both with respect to rules and structure, directly affects the operation of the Convention which is in a symbiotic relationship with it. The nature of equality under this Convention is therefore dependent upon whatever the local standard provides. There is an assumption (but no obligation) that this will accord with applicable international standards. The only real guarantee in the Convention is non-refoulement (non-return to a place of persecution) in Article 33, but this only applies with respect to the attributes mentioned above together with not having been convicted of a particularly serious crime and th[illegible]eing a danger to the country of refuge. It is also not a guarantee of asylum as the person may be deported to a third country.[153]

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[151] These rights are: the acquisition of property (Art. 13), self-employment (Art.18), professional practice (Art. 19), and housing (Art. 21).

[152] "Canada interprets the phrase 'lawfully staying' as referring only to refugees admitted for permanent residence: refugees admitted for temporary residence will be accorded the same treatment with respect to the matters dealt with in Articles 23 and 24 as is accorded to visitors generally." (Multilateral Treaties ..., ante, p.8).

[153] A more detailed analysis of non-refoulement can be found in Guy Goodwin-Gill: The Refugee in International Law (1983, Clarendon Press, Oxford), pp.75ff. See also Penelope Mathew, "Sovereignty and the Right to Seek Asylum: The Case of Cambodian Asylum-Seekers in Australia" (1994) 15 Australian Yearbook of International Law 35 at pp.57-60.

In addition, the Convention is subject to Article 9 which provides that a State in "time of war or other grave and exceptional circumstances" can take provisional measures "it considers to be essential to the national security".

Reservations are also expressly permitted by the Convention.[154] Canada has made one, which is mentioned above. Australia has no reservations at the moment, but originally made reservations to Articles 17, 18, 19, 26, 28 and 32.[155] These were withdrawn in 1967 and 1971.[156]

While the aim of the Convention is the fair treatment of refugees, the bases of the Convention, the wording of its provisions and the structures and processes of international law within which it works mean that its principal paradigm is the law and legal system of the State of refuge. This is the assumption underlying the document. This impacts directly upon any notions arising from it - such as equality - as well as upon the opportunities for any real enforcement of it. Despite this, Canada (and originally Australia) have made additional reservations to it. The refugee question is both politically volatile and potentially economically draining for the country of refuge. Thus both Canada and Australia took out "insurance" in

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[154] Article 42, but not to the definition article (Art.1), the non-discrimination articles (Arts.3 and 4), the right of access to courts (Art.16(1)), the prohibition on réfoulement (Art.33) and the notification provisions (Arts.36 and 46).

[155] See UNTS Vol.189, p.202.

[156] Status of International Instruments, ante, p.299, footnote 7.

the form of reservations.

In the Convention on the Political Rights of Women, women are declared to be entitled to vote,[157] stand for election[158] and hold public office[159] "on equal terms with men". The Convention's Preamble recites the UN Charter and the UDHR, and the desirability of equalising the status of men and women. Again there is no overt philosophical underpinning, but the paradigm on which the Convention is based is male: equality in this instance is the standard already set by men. All of the rights exist firmly in the public sphere; the private remains untouched. Yet even in this public sphere the Convention is not of an affirmative action nature and is not really of an equal opportunity nature either. Women are "entitled to" or "eligible for" the rights: there is no hint of a program which would be supported, let alone required, to break down the public/private barrier to enable to enable real equality. What is produced is formal equality based on an underlying principle of individual autonomy.

Even within these limitations of application - and in the total absence of any enforcement machinery or monitoring requirements - both Australia and Canada

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[157] Article I

[158] Article II

[159] Article III

made reservations to this Convention. The Canadian reservation[160] imports a federal clause into the treaty, leaving the rights under this Convention in the care of the provinces. The effect is that any possibility of synergism between domestic and international law is exploded by the application of the Canadian Constitution, giving Canadian women few real legal rights under the treaty, except with respect to federal elections, federal office and positions with the federal public service. The Australian reservation[161] exempts the defence forces from the application of the treaty (a situation which would not apply to Canada) and precludes its application to Papua New Guinea.[162] Stereotypes with respect to women in both the developed and underdeveloped social context are therefore imported into the treaty. Australia did not import a federal clause into the treaty. However, the right to vote at federal elections in s.41 of the Constitution[163] is in fact legally dependent upon a pre-existing right to vote in state elections. The effect is therefore exactly the same as in Canada, and for the same reasons of domestic

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[160] "Inasmuch as under the Canadian constitutional system legislative jurisdiction in respect of political rights is divided between the provinces and the Federal Government, the Government of Canada is obliged, in acceding to this Convention, to make a reservation in respect of rights within the legislative jurisdiction of the provinces.": Status of International Instruments, ante, p.317.

[161] "The Government of Australia hereby declares that the accession by Australia shall be subject to the reservation that article III of the Convention shall have no application as regards recruitment to and conditions of service in the Defence Forces.": Status of International Instruments, ante, p.316.

[162] "The Government of Australia furthermore declares that the Convention shall not extend to Papua New Guinea.": ibid.

[163] "No adult person who has or acquires a right to vote at elections for the more numerous House of the Parliament of a State shall, while the right continues, be prevented by any law of the Commonwealth from voting at elections for either House of the Parliament of the Commonwealth.

legal structure.

Thus, the problems found with the treaties where Australia and Canada have made no reservations persist. While the use of reservations may be for purposes of political and economic "insurance", what is indicated here is that the reservations are not the sole villain of the piece. They may be used out of a perception of necessity because of domestic legal structures - in a federation, usually constitutional structures. But often the use of reservations exacerbates these problems not only by restricting the application of the articles ratione materiae, but by importing additional barriers. While these might increase the symbiosis between the international instrument and domestic laws and legal structures, they can directly and proportionately decrease the synergistic potential between the two.

From here onwards, however, there is a significant qualitative difference in the treaties in that affirmative action principles begin to emerge which have at least the potential to make the equality espoused in them real rather than formal. It is not accidental that the first treaty in this vein was a result of the growing international concern about racism and colonialism, and the changing profile of UN membership in the mid-60's away from the "Western European" group of States (which includes Australia and Canada).

It is also from this point that another significant pattern emerges: the infrequent use

of reservations by Canada due to federal-provincial co-operation on treaty ratification due to concerns of the limitations posed by the Labour Conventions Case,[164] and the considerable use of reservations by Australia, most of which persist despite the Dams Case[165] which gave the Commonwealth legislative power to domestically implement treaties regardless of their subject matter.

4.6 Convention on the Elimination of All Forms of Racial Discrimination

In the International Convention on the Elimination of All Forms of Racial Discrimination, the foundationalist bases are those of the UDHR which is recited in the Preamble: the inherent dignity and equality of all human beings. Together with this, however, is a single but multi-faceted allusion to science, morality and social justice as a direct response to colonialism and apartheid.[166] The latter is not so much a philosophy underpinning the Convention as a mish-mash reaction to

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[164] See, for example, the statements by the Canadian representatives during consideration of the fifth periodic report of Canada on the Convention on the Elimination of All Forms of Racial Discrimination to the Racial Discrimination Committee: CERD Report A/36/18 at p.91. The is discussed in detail in Chapter 5.

[165] Commonwealth v Tasmania, ante. This is also discussed in detail in Chapter 5.

[166] "...any doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, socially unjust and dangerous ...": sixth preambular paragraph.

sincerely-felt opprobrium.[167]

There are only eight substantive articles in the Convention, but they are stronger than are the provisions in the treaties examined so far.[168] Racial discrimination is defined[169] more widely than in the purely anthropological sense. It covers discrimination whether expressed positively or negatively and in all gradations from absolute prohibitions to mere preferences. It does not rely on the existence of an intention to discriminate, (thus systemic patterns of discrimination arising from past practices can be covered),[170] and the effect of the discrimination can also fall within any of the gradations from total nullification of a right to a slight impairment of it. This is a strong provision. It is also not limited, as are other conventions like the ICCPR, to rights expressed within the convention itself but prima facie applies to all human rights and freedoms. In addition, while the

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[167] Theodor Meron calls the convention an "imperfect text" due to the speed with which it was adopted and the robustness of the political forces which propelled its conclusion: Human Rights Law-Making in the United Nations: A Critique of Instruments and Process (1986, Clarendon Press, Oxford), p.50. For a description of the drafting history of the Convention, see Natan Lerner: The UN Convention on the Elimination of All Forms of Racial Discrimination (1980, Sijthoff & Noordhoff, Netherlands).

[168] For a critique of the Convention, see Theodor Meron, "The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination" (1985) 79 AJIL 283-318.

[169] "In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms, in the political, economic, social. cultural or any other field of public life.": Article 1(1).

[170] See Meron, ante, p.14

Convention allows reservations, it provides that reservations will not be allowed if they are incompatible with the Convention's object and purpose or inhibit the operation of any of the bodies established under it. The incompatible or inhibitive nature of a reservation is determined by the objections of two-thirds of the States Parties to the Convention.[171] This is also a strong provision intended to maximise the effect of the treaty and not found in the other conventions already considered. In addition, Article 6 provides that "States Parties shall assure to everyone within their jurisdiction effective protection and remedies ... against any acts of racial discrimination." However, the convention does not apply to distinctions based on citizenship or nationality.[172] Thus, abominations like the "White Australia Policy", which Australia maintained until 1966, would have been totally unaffected by it had the Convention applied to Australia at the time. Apart from this restriction and the determination of "appropriate means" to end racial discrimination, there are no overt domestic limitation clauses (with phrases like "according to law") which are found in the ICESCR and, as discussed below, in the ICCPR. However, the convention is expressly restricted to discrimination in public life: the private is bypassed (thus limiting the effect of equality for some sub-groups such as women and gays within racial groups)[173] and effectively

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[171] Article 20(2)

[172] Article 1(2), (3). For a discussion, see Drew Mahalic and Joan Gambee Mahalic, "The Limitation Provisions of the International Convention on the Elimination of All Forms of Racial Discrimination" (1987) 9 Human Rights Quarterly 74-101.

[173] This distinction has been questioned by Meron who points out that the right to "marriage and choice of a spouse" in Article 5 can be regarded as really private in nature: Theodor Meron: Human Rights

leaving it to the States concerned to make the particular decisions as to what "public" means.[174]

There is, however, an affirmative action provision[175] which, while restricted to a "necessity" criterion determined by the State, allows ameliorative action to "ensure" equality. The intention of the Convention is plainly to achieve real rather than merely formal equality.[176] But what sort of equality?

Article 5 prohibits racial discrimination "in all its forms" and particularly lists civil

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Law-Making in the United Nations: A Critique of Instruments and Process (1986, Clarendon Press, Oxford), p.20. I would respectfully disagree as the term "spouse" necessarily implies marriage, and the notion of a valid marriage depends upon a State's public law. The notion of equality in Article 5 of this convention is based on a paradigm of differential treatment between races, not on articulating the basic concepts - such as marriage or freedom of thought and conscience - themselves.

[174] In Australia, this is done in particular by the Racial Discrimination Act (particularly in section 24(2)) which is discussed in Chapter 5. The public/private distinction in the Convention is one subscribed to by Australia in its interpretation of it, as was made clear in the discussion of Australia's initial Report to the Committee on Racial Discrimination: Summary Records of the Reports of the Committee on the Elimination of Racial Discrimination (UN Doc. A/32/18 at p.47, paragraph 175).

[175] "Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination ...": Article 1(4).

[176] This is borne out by the discussion in the Third Committee where it was stated that what is intended is that equality is "actually enjoyed in practice.": 33 UN GAOR Supp. (No. 18), at 110, UN Doc. A/33/18 (1978); see Meron, ante, pp.11-13.

and political rights,[177] economic, social and cultural rights[178] as well as the right of access to any place or service. Both the "capitalist" (civil and political) rights as well as the "socialist" (economic and social) rights are covered. However, with economic and social rights, implementation is to be progressive. Thus, for example, the implementation of the right to work, housing and education in Article 5(e) is to be progressive[179] whereas the right to effective protection and remedies is to be available immediately.[180] Also, some fundamental terms are not defined and can only be defined in the relevant domestic system. Thus "marriage" in Australia is completely prescribed by the Marriage Act 1961. While the Convention specifically provides that no-one shall be prohibited from marrying for reasons based on race, Australian law is totally incapable of recognising Aboriginal customary marriages. What is provided, therefore, is equality between races with respect to locally-based value-notions like marriage, which are themselves unaffected by the convention. Thus Aborigines in Australia are free to enter European-style marriages only. The real meaning of the Convention is again symbiotic with domestic law and as a result may have difficulty giving voice to

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[177] Equal treatment before tribunals, security of the person, the right to vote, the freedom of movement, thought, religion, opinion, expression and assembly, and the rights to nationality, marriage, inheritance and property ownership.

[178] Rights to work, join trade unions, housing, public health, education and participation in cultural activities.

[179] See the opinion of the Committee on the Elimination of Racial Discrimination in Demba Talibe Diop v France (Communication No. 2/1989, adopted 18 March, 1991, 39th session)

[180] L.K. v The Netherlands (Communication No. 4/1991; adopted 16 March, 1993, 42nd session) where the response to racial incidents by police and judicial proceedings was found to be inadequate under Article 6.

another culture.

The Convention is also broad with respect to the entities to which it applies. It is not only directed to the States Parties themselves and their governments and agents: it also applies to individuals, groups and organisations[181] and obliges that both policies and laws be directed to this end.[182] "Effective protection and remedies" against racial discrimination, including "just and adequate reparation", must be "assured to everyone".[183] Also, prejudices must be combated, particularly through education.[184]

In addition, under Article 4 the Parties "condemn" racial propaganda and incitement to racial hatred and violence, and "shall" declare these offences "punishable by law" and "declare illegal" organisations promoting them. The Committee on the Elimination of Racial Discrimination is of the opinion that these provisions are therefore mandatory and must be effectively enforced.[185] While

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[181] "Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization": Article 2(1)(d).

[182] "Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists": Article 2(1)(c).

[183] Article 6

[184] Article 7

[185] General Recommendation XV (Forty-Second Session, 1993), HRI/GEN/1/Rev.1, p.68.

Canada has made no reservations to the Convention, Australia has made one, and it is to this provision.[186] This reservation is expressed to be a "declaration", thus avoiding it being regarded as unacceptable should two-thirds of the Parties object to it within the terms and procedure set down in Article 20(2). Nevertheless, its effect is to modify the effect of the terms of the treaty on Australia and as such it is in international treaty law to be regarded as a reservation.[187] The effect is that Article 4(a) of the Convention does not apply to Australia except to the extent that existing (mainly criminal) laws apply to such situations. Australia has been in a position to introduce such a law federally since at least 1983.[188] It is political will which stymies the potential synergy here and with respect to implementation generally.[189] The federal Parliament recently amended the Racial Discrimination Act by introducing racial vilification provisions.[190] As a result it is considering

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[186] "The Government of Australia ... declares that Australia is not at present in a position specifically to treat as offences all the matters covered by article 4(a) of the Convention. Acts of a kind there mentioned are punishable only to the extent provided by the existing criminal law dealing with such matters as the maintenance of public order, public mischief, assault, riot, criminal libel, conspiracy and attempts. It is the intention of the Australian Government, at the first suitable moment, to seek from Parliament legislation specifically implementing the terms of article 4(a).": Status of International Instruments, ante, p.99.

[187] Vienna Convention on the Law of Treaties, Article 2(1)(d)

[188] Commonwealth v Tasmania & Ors (1983) 158 CLR 1

[189] For example, in 1986 (a decade after the Convention had come into force for Australia) the federal Human Rights Commission in Discussion Paper No. 7: The Aspirations of Aboriginies living at Yarrabah in relation to Local Management and Human Rights found that the laws of the state of Queensland were racially discriminatory and infringed human rights such as political rights, equality before the law, self-determination, freedom of assembly, equal wage rates, and the right to privacy. For details of the laws, see Garth Nettheim: Victims of the Law: Black Queenslanders Today (1981, George Allen & Unwin, Sydney).

[190] Sections 18B-18F, inserted by the Racial Hatred Act 1995.

withdrawing this reservation but has not yet done so.

The Convention also has provisions with respect to implementation and enforcement. A Committee on the Elimination of Racial Discrimination (CERD), comprising eighteen experts of high moral standing, nominated by the Parties but serving in a personal capacity, is established.[191] The Parties must submit periodic Reports to this Committee. This is the only obligatory mechanism of accountability and review in the Convention. Compliance with this obligation has been less than encouraging.[192] There was also a problem with the generality of the material in the Reports, so that the Committee drew up specifications for them.[193] The problem discussed above with respect to the reports to the Committee of the ICESCR being descriptive rather than analytical, and used in a reactive justificatory way rather than for proactive change, equally applies here.[194] The

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[191] Article 8. For a discussion, see Karl Josef Partsch, "The Committee on the Elimination of Racial Discrimination", Chapter 9 in Philip Alston (ed): The United Nations and Human Rights: A Critical Appraisal (1992, Clarendon Press, Oxford).

[192] In the Committee's 1989 annual report to the General Assembly it noted that 196 reports were overdue. Many more were late. In 1989 543 reminders were sent to Parties: The First twenty Years: Progress Report of the Committee on the Elimination of Racial Discrimination (Centre for Human Rights) (1991, United Nations, New York), HR/PUB/91/4.

[193] Guidelines Adopted by the Committee on the Elimination of Racial Discrimination, CERD/C/R 12 (1970).

[194] For example, the Committee's consideration of Canada's second periodic report, while it generally praised the report for its frankness, noted that "no effort was made to relate the various measures described in the report to the specific provisions of the Convention which inspired them and which they were designed to apply." (Summary Report of the Committee, UN Doc. A/9618, p.37). It may well be that this is because the Convention was not necessarily the inspiration for them: States' reports tend to list all applicable legislation which complies ex post facto with the Convention.

time the Committee has to deal with each report is also a problem.[195]

The procedure of the Committee is now such that representatives of States may be - and usually are -present to answer questions and supply further information during the Committee's deliberations (which are held in public), which in itself acts as a spur to compliance.[196] However, the Committee has no power to order States to do or refrain from doing anything so as to comply with the Convention: it can only suggest and recommend.[197] However, these recommendations are communicated, through the Secretary-General, to the State concerned which may comment upon them. The suggestions and recommendations, together with the States' comments, are reported to the General Assembly. The process is therefore less generalised than that under the ICESCR, but the practice of the Committee has not been to single out States for particular mention[198] and cannot result in determinations binding on or against a State. Such implementation, by encouragement and/or the severe gri g of a few government officials before the Committee, is bound to be a hit and miss affair.

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[195] M. R. Burrowes has calculated that in the decade 1970-79 the ratio of meetings to reports was as low as 0.6 and only reached a "high" of 1.5: ""Implementing the UN Racial Convention - Some Procedural Aspects" (1981) 7 Australian Yearbook of International Law 236 at 262-3.

[196] The Committee also has the job of considering State-to-State complaints under the Convention, and its members may form an ad hoc Conciliation Commission to deal with them: Articles 11-13.

[197] Article 9(2)

[198] The First Twenty Years ..., ante, pp. 31-32.

Thus, while the Committee's discussion of Australia's initial Report in 1977 expressed satisfaction with its comprehensiveness[199] and with the broad Australian policy on racial discrimination which relies on more than just legislation, criticism was levelled at the fact that the Racial Discrimination Act makes racial discrimination "unlawful" but does not always make it "illegal" or an "offence" as required by the Convention.[200] This has not been changed in the Act, despite the fact that the matter was raised by the Committee with respect to Australia's Second Report as well.[201] On the other hand, criticism of the procedures under that Act,[202] including the fact that a complainant had to show that his or her race was the dominant reason for the discriminatory action before that action could be regarded as unlawful[203] has led to these matters being amended in the Act. Repeated questioning about Australia's reservation to Article 4(a) has prompted the introduction of federal legislation on racial vilification. Australia's decision to make a declaration under Article 14 in January, 1993,[204] (under which communications alleging violations of the Convention may be

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[199] This satisfaction has continued up to discussions of the latest (ninth) report in 1994: See Report of the Committee on the Elimination of Racial Discrimination (GAOR Official Records, 49th Session, Supplement No.18 (A/49/18) at p.79.

[200] Summary Records of the Reports of the Committee on the Elimination of Racial Discrimination, (UN Doc. A/32/18, pp.44-5.)

[201] CERD/C/16/Add.4; Summary Records of the Committee's deliberations in its Report, UN Doc. A/34/18, pp. 84-5, paragraphs 404, 411.

[202] Id., p.45, paragraph 169.

[203] Id., p.45, paragraph 168.

[204] UN Doc. CN47 - 1993

received from individuals and groups) might also be at least partly attributable to being made to articulate reasons for its shortcomings on a regular basis.

Canada has made no reservations to the Convention. However, the response by, and effect upon, Canada of the reporting system is similarly equivocal. While praising Canada for the multiplicity of mechanisms and agencies dealing with racial discrimination, the responses to Canada's first and second reports[205] questioned whether the requirements of Article 4 of the Convention (dealing with vilification) were adequately addressed by the provisions of the Criminal Code. A later amendment to the Code on this point attracted further criticism from the Committee[206] as it contained exceptions not provided for in the article. And while Canada's Charter of Rights and Freedoms was applauded, the Committee requested more than just description of legislation, wanting to know, for example, how provincial legislation and regulations were brought into line with section 15 of the Charter.[207] (The issue of native rights and the Lovelace case is discussed with the ICCPR below). Canada has not made a declaration under Article 14.

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[205] CERD/C/R.25/Add.5 (CERD/C/SR.97-SR98) and CERD C/R.53/Add.6 (CERD/C/SR188).

[206] CERD/C/R.78/Add.6 (CERD/C/SR297-SR298).

[207] See Canada's seventh and eighth reports (CERD/C/107/Add 8 and CERD/C/132/Add.3) and the discussion by the Committee at its 778th and 781st meetings (CERD/C/SR 778 and 781, March 3 and 4, 1987). To some extent this issue was addressed in Canada's ninth report (CERD/C/159/Add.3) but only in a patchy fashion as the provinces submit their own responses to the federal government for inclusion in the national report.

4.7 The International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR) contains a Preamble that, except for one slight difference in the order of the words,[208] is exactly the same as that of the ICESCR. The same observations made there also apply here. The foundationalist bases are the same (ie, UN Charter obligations as elaborated upon in the UDHR, with lip-service paid to natural rights in the second paragraph). Article 1 on self-determination is also exactly the same (and with the same consequences) as in the ICESCR,[209] Article 3 on the equal rights of men and women is the same[210] and Article 5 dealing with the interpretation of rights in the Covenant so as not to impinge on other rights is essentially the same (except that the second paragraph goes further to state that existing domestic rights shall not be derogated from merely because they do not appear in the Covenant).

However, unlike the ICESCR, the ICCPR aims to introduce obligations on States which can be judicially enforced by individuals. Article 2(1) provides that each State party "undertakes to respect and to ensure" the rights in the Covenant. The

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[208] In paragraph 3 which places civil and political rights ahead of economic, social and cultural rights.

[209] Significantly, in this regard, it must also be noted that this Article is expressly excluded from the terms of the Optional Protocol (discussed below).

[210] The Human Rights Committee in General Comment 4 (Thirteenth Session, 1981) 36 UN GAOR, Supplement No.40 (A/36/40), Annex VII, noted that Article 3 (and also Articles 2(1) and 26 in so far as they deal with discrimination) requires affirmative action designed to ensure the positive enjoyment of rights, not just the passing of legislation.

obligation to "respect" them requires the State to refrain from violations itself, and the obligation to "ensure" the rights means that a State could introduce measures regulating conduct between individuals on the basis of this treaty: there are duties of forbearance as well as of performance.[211] They may thus affect private as well as public domestic law and can apply to the private sphere as well.[212] The Article provides that the rights in the Covenant shall be enjoyed without discrimination on the basis of any "status",[213] thus opening up a possibility for synergy with domestic law.[214] These rights shall be enjoyed by "all individuals"[215] within the

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[211] This distinction was drawn by the Inter-American Court of Human Rights in Velasquez Rodriquez v Honduras (1989) 28 ILM 291, judgement of 29 July, 1988 (Series C, No.4); see also Young, James and Webster v United Kingdom (1981) 4 EHRR 38 where the European Court of Human Rights held that the UK had an obligation under the European Convention to prevent an employer from discriminating against an employee on the basis of refusal to join a trade union.

[212] See the Human Rights Committee Draft General Comment on Persons with Disabilities E/C.12/1993/WP.26 which says that "States need to ensure that not only the public sphere, but also the private sphere, is, within appropriate limits, subject to regulation to ensure the full participation and equality within society for all persons with disabilities" (at p.4, paragraph 11). The reference to "appropriate limits" necessarily accepts a threshold requirement which remains undefined: see Craven: The International Covenant on Economic, Social and Cultural Rights, ante, pp.191-2.

[213] Article 2(1): "... without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status."

[214] Provided the distinctions cannot be objectively justified (as to which see the commentary on Article 26 below) they can be based on "every conceivable distinction" (Manfred Nowak: UN Covenant on Civil and Political Rights: CCPR Commentary (1993, N.P. Engel, Strasbourg) at p.45 - Nowak considers that shoe size might be an applicable criterion, although he concedes that this would be an absurd example, ibid.). Matthew Craven suggests that the distinction can apply to unmarried couples, people with AIDS, homosexuals and the poor, amongst others: The International Covenant on Economic, Social and Cultural Rights, ante, at pp.168ff.

[215] For a discussion of the interpretation of this term, particularly by the Human Rights Committee, see Meron: Human Rights Law-Making..., ante, pp.100-106.

territory of the State and subject to its jurisdiction.[216] They therefore do not apply just to citizens,[217] marking a distinct contrast with eighteenth century documents like the French Declaration of the Rights of Man and the Citizen. Moreover, the State Parties "undertake to take necessary steps" and to "adopt such legislative and other measures" as are "necessary to give effect" to the rights in the Covenant. This includes an undertaking to "ensure" an "effective remedy"[218] for people whose rights have been violated,[219] including violations by people acting in official capacities. These are to be determined by "competent judicial,

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[216] The has been some controversy as to whether the phrase "within its territory and subject to its jurisdiction" can apply to people who have left the state's territory: contrast Egon Schwelb, "Civil and Political Rights: the International Measures of Implementation" (1968) 62 American Journal of I.L. 827 at pp.862-3, who considers that the words impose a limitation on the applicability ratione personae of the Covenant, and Dominic McGoldrick: The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights (1991, Clarendon Press, Oxford), pp.177-82, who argues that this is too narrow an interpretation. The Committee itself appears to favour the wider view: Lopez Burgos v Uruguay, Reports of the Human Rights Committee, UN GAOR (36th Session), UN Doc. A/36/40, p.176.

[217] In General Comment 15 (Twenty-seventh session, 1986), 41 UN GAOR, Supplement No.40 (A/41/40), Annex VI, the Human Rights Committee noted that "In general, the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness" (paragraph 1). It further noted, however, that Article 25 only applies to citizens and that there is no right of entry of an alien into any country and that expulsion of aliens under Article 13 regulates only the procedure and not the substantive grounds for expulsion (paragraph 10). The width of application of the Covenant ratione personae is thus affected by the symbiosis of the Covenant with domestic legal systems.

[218] The Human Rights Committee has held that discretionary remedies such as granting an amnesty do not satisfy this criterion: Mbenge v Zaire Communication 16/1977, UN Doc A/38/40 (1983), p.134.

[219] Note that the European Court of Human Rights, interpreting Article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms has held that the requirement of a remedy applies when a person alleges their rights have been violated (ie, there does not have to be shown to be a violation as a prerequisite to the right of an effective remedy arising: Klass v Federal Republic of germany 2 EHRR 214 (5029/71).

administrative or legislative authorities" which "shall enforce such remedies."

This is strong language indeed with respect to implementation and enforcement. In contrast to the ICESCR, the rights here are of a more immediate (rather than progressive) nature,[220] they are obligations of means as well as obligations of result and can include necessary affirmative action measures.[221] However, these steps of implementation and enforcement are to be taken by a State "in accordance with its constitutional processes"[222] and it is not an obligation of direct incorporation of the Covenant into domestic law.[223] Thus their final content and form is dictated by the domestic legal system and, once again, has no conclusive meaning without that domestic system operating.[224] This has led some commentators to refer to the "accessory character" of these obligations in that the

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[220] See the Australian suggestion to add after the word "adopt" the phrase "within a reasonable time into this Article: E/CN.4/SR.125, 17. This inclusion was eventually dropped: A/5655, paragraph 23.

[221] The Human Rights Committee has observed that Article 3 (the equal right of men and women to enjoy civil and political rights) "requires not only measures of protection but also affirmative action designed to ensure the positive enjoyment of rights.": General Comment 4(13), adopted by the Committee at its 311th meeting, July 28, 1981, UN Doc. CCPR/C/21/Rev. 1.

[222] Article 2(2)

[223] Article 2(2) requires Parties to undertake "such legislative or other measures as may be necessary...".

[224] The Human Rights Committee admitted this in its General Comment 3(13) (adopted at its 311th meeting, July 28, 1981: UN Doc. CCPR/C/21/Rev. 1) when it observed that "... article 2 of the Covenant generally leaves it to the States Parties concerned to choose their method of implementation ..." but went on to caution that "the implementation does not depend solely on constitutional or legislative enactments, which in themselves are often not per se sufficient."

meaning only becomes clear in conjunction with one of the substantive Articles[225] (and can thus be affected if the relevant substantive Article is the subject of a reservation).[226]

4.7.1 Obligations of implementation

Some treaties specifically contain a clause to take into account the problems of domestic implementation of treaties in federal States, making the federal entity liable only for implementing the provisions which fall within its domestic legislative competence.[227] However, the provisions of the ICCPR "extend to all parts of federal States without any limitations or exceptions."[228] This statement appears to give short shrift to the "federal clause" exemptions for which Australia

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[225] See Manfred Nowak: U.N. Covenant on Civil and Political Rights, ante, at pp.33-36. Nowak also describes the drafting history of this Article: id, pp.29-33. A list of successive drafts can be found in Marc J. Bossuyt: Guide to the Travaux Preparatoires of the International Covenant on Civil and Political Rights (1987, Sijthoff & Noordhoff, Dordrecht) pp.52ff. Note however that the Covenant was before the Commission on Human Rights for eight years and then considered by the General Assembly's Third Committee for another eleven. The travaux must therefore be treated with caution: as Frank Newman has said, they "are a happy hunting ground for advocates ... [who] can sift and exploit countless revisions of the text, countless comments by revisers and their colleagues" ("Natural Justice, Due Process and the New International Covenants on Human Rights" [1967] Public Law 274 at p.297).

[226] Fanali v Italy, view of the Human Rights Committee, No.75/1980, at paragraph 13.

[227] For example, the Convention Relating to the Status of Refugees 1951, Art. 41, and its 1966 Protocol, Art.VI.

[228] Article 50. The same provision appears in ICESCR in Article 28.

and Canada (as well as the United States) lobbied,[229] and to preclude anything in the manner of a reservation to it.[230] Article 50 appears to be the very antithesis of a federal clause, supporting Poland's argument before the Commission,[231] that a reservation (if permitted) allows States to avoid their obligations, whereas a federal clause allows federal States to evade them. However, the issue here is complicated by the fact that giving legal effect to these rights under Article 2(2) of the Covenant can be done "in accordance with [a State's] constitutional processes." The obligation of result in Articles 50 and 2(1) is affected by the qualified obligation of means in Article 2(2). Australia in particular made a declaration at the time of ratification to the effect that both Article 2 and Article 50 were to be read "consistent with and subject to" the provisions of Article 2(2),[232] thus

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[229] At the eighth session of the Commission on Human Rights Canada, Australia, India, the US and the UK agreed on a draft federal clause providing that the obligations of a federal government would be the same as for unitary States where the implementation of the provision was wholly or partly within federal jurisdiction. Where such implementation was wholly or partly within the jurisdiction of a state or province the obligation of the federal government would be to bring such provisions to the notice of the appropriate authorities and to the Secretary-General of the UN. (Report of the Ninth Session of the Commission on Human Rights E/2447, pp.151ff). Such proposals were finally rejected in 1954: see Harper & Sissons, ante, pp.265ff.

[230] This was the interpretation of the Secretary-General's annotation of the texts of the draft Covenants presented to the tenth session of the General Assembly in 1955: UN Doc. A/2929 (July 1, 1955) at p.370.

[231] A/C.3/SR.293, pp.141ff.

[232] Status of International Instruments, ante, p.86. This became necessary once the final formulation of the Article was agreed upon, specifically rejecting an earlier proposal of the Commission on Human Rights that the federal clause article specifically state that Parties could make reservations in respect to any provision of the Covenant to the extent that its application fell within the exclusive jurisdiction of the constituent states or provinces: see Vratislav Pechota, "The Development of the Covenant on Civil and Political Rights", Chapter 2 in Louis Henkin (ed): The International Bill of Rights: The Covenant on Civil and Political Rights (1981, Columbia

reinforcing rather than clarifying this dilemma. The declaration went on to emphasise that the federal government will implement the provisions of the Covenant with respect to which it has power, and the states and territories with respect to their heads of power.[233] In Australia, where Criminal Law rests primarily within the jurisdiction of the states and territories, the only articles of the Covenant over which the federal government would have clear and exclusive jurisdiction would be Articles 13 (expulsion of aliens), and 23 (the family and marriage). It would share jurisdiction with the states and territories with respect to the other articles where there might be some element of federal jurisdiction involved (which is, in effect, all the others) but in practical terms the preponderance of implementation remains in the legislative realm of the states and territories.[234] Many Australian states in fact openly opposed the effect of Article 50.[235] The situation in Canada is substantially different. Criminal law there is principally a matter of federal jurisdiction, and while the substance of marriage and divorce is a matter of federal jurisdiction, litigation in matters concerning custody, maintenance and family property fall within the provincial arena. The provinces

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U.P., New York), pp.49-51.

[233] Status of International Instruments, ibid.

[234] The situation under the ICESCR is similar. The federal government would have the jurisdiction to make laws with respect to social security and would have a plenary power with respect to its external territories, but the remainder would need to be implemented by the states.

[235] Tasmania found it "entirely unacceptable"; Victoria said that it would alter the federal balance of the Australian Constitution. See G. Doeker: The Treaty-Making Power of the Commonwealth of Australia (1966, Martinus Nijhoff, The Hague), p.224.

have a property and civil rights power under the Canadian Constitution, so this only partly explains the presence of the Australian declaration and the absence of a Canadian one, despite strong Canadian objections to the absence of a federal clause.[236] The substance of this explanation for Canada lies in the demarcation between treaty-making and treaty-implementing powers in the Canadian Constitution as a result of the decision in the Labour Conventions Case[237] and, as a result, the convening by Canada of a special Federal-Provincial Conference of Ministers in 1975 to review the congruence of domestic Canadian law with the ICCPR.[238] Canada ratified the ICCPR in May 1976 as a result of the unanimous agreement to do so at this Conference.

In 1984, when Australia withdrew most of its reservations, it streamlined, but did not withdraw, its "federal clause" declaration.[239] Since 1983, when the High Court of Australia handed down its decision in the Franklin Dams Case,[240] the

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[236] "... it would not be proper for [Canada] to accede to any international covenant requiring the acceptance of obligations which, because of the nature of its constitution, it does not have the legal capacity fully to implement.": UN Doc. E/CN.4/694/Add.6, March 10, 1954

[237] This is dealt with in detail in Chapter 5.

[238] See Marshall Conley & Daniel Cullen: The Effects of International Human Rights Law on the Canadian Legal and Political System (1989, Acadia University Institute, Wolfville), at p.56.

[239] It now reads: "Australia has a federal constitutional system in which legislative, executive and judicial powers are shared or distributed between the Commonwealth and the constituent States. The implementation of the treaty throughout Australia will be effected by the Commonwealth, State and Territory authorities having regard to their respective constitutional powers and arrangements concerning their exercise.": Status of International Instruments, ante, p.29.

[240] Commonwealth v Tasmania and Ors (1983) 46 ALR 625

federal government has been regarded as having jurisdiction to pass legislation based on treaty obligations, even if those obligations do not otherwise fall within federal jurisdiction, and so it does not need a federal clause declaration, although it finds it politically convenient to retain one.

This "declaration" will in fact be a reservation to the Covenant if it excludes or modifies the legal effect of certain provisions of the Convention in their application to Australia.[241] It has been argued that the "excluding effect" of a reservation has a negating force on a treaty norm, whereas a declaration has no such effect. A declaration in fact asserts the existence and contents of the norm; it is the text of the treaty which has left us in doubt as to the precise meaning.[242] However, the problem with the ICCPR as will be shown below (as well as with other human rights treaties) is that the norms are in a symbiotic relationship with domestic law. In these circumstances a declaration which goes to the implementation of the international norms in the domestic legal system can have an "excluding effect" on

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[241] Vienna Convention on the Law of Treaties, 1969, Article 2(1)(d), accepted as authoritative and applicable to the ICCPR by the Human Rights Committee in General Comment 24(52) UN Doc. CCPR/C/21/Rev.1/Add.6, paragraph 3. See also Alberta Union v Canada (Communication No.118/1982: A/41/40 (1986), p.151, paragraph 6). On the literature as to the difference (if any) between declarations and reservations, and the travaux préparatoires of the Vienna Convention on this poirt, see Frank Horn: Reservations and Interpretative Declarations to Multilateral Treaties (1988, North Holland Publishing Co., New York), Chapter 24. Horn concludes, at p.234: "The nature of a statement being either a true reservation or declaration short of a reservation had to be determined only after a close scrutiny of the effect of such a statement. A statement must have an "excluding" or "varying" effect on the provisions of a treaty. However, there was not much guidance as to how these effects could be established."

[242] Horn, ante, Chapter 25, especially at pp.237-8.

the international norm. The declaratory can in this way become constitutive.[243]

The Human Rights Committee in T.K. v France[244] and M.K. v France[245] had to deal with a French declaration to the Covenant[246] holding it to be sufficiently specific to amount in fact to a reservation.[247] However, an individual opinion in that case stated that an interpretative declaration which deals with how the provisions, or even a specific provision, of the Covenant are to be understood in relation to French law and the French Constitution, cannot turn an interpretative declaration into a reservation.[248] This approach separates the Covenant ratione materiae from the issue of implementation. In my opinion, such a separation is both unrealistic and juridically dubious as it overlooks the effect of the symbiotic relationship established by this treaty. The European Court of Human Rights has also stated that the legal character of a declaration must be ascertained by its substantive content and not by the title given to it.[249] Nevertheless, the Australian

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[243] Contrast Horn who states, at p.238: "It seems a strange contention that by excluding certain possible interpretations the legal effects of certain provisions 'are excluded'." Human rights treaties like the ICCPR are examples where this can in fact occur.

[244] Communication No. 220/1987

[245] Communication No. 222/1987

[246] "In the light of article 2 of the Constitution of the French Republic, the French Government declares that article 27 is not applicable so far as the Republic is concerned."

[247] CCPR/C/37/D/220/1987, Annex, paragraph 8.6

[248] Id., Appendix II to Annex.

[249] Belilos v Switzerland Eur. Ct. H.R., Series A, Vol.132 (judgement of April 20, 1988).

declaration is of a much more general character than were the declarations the subject of the Committee's and the Court's deliberations. It does not seek to formally "interpret" any of the articles but relates to their implementation and so appears to avoid altogether the distinction raised by McRae between "mere interpretative declarations" and "qualified interpretative declarations."[250]

Also, to be a reservation the declaration must modify the legal effect of "certain provisions" of the treaty.[251] This declaration does not expressly relate to any particular article but is a statement of interpretation with respect to the whole treaty and its implementation domestically in Australia. It could be argued that such implementation is a specific requirement in the Covenant in Article 2(2)[252] and Article 50,[253] and that therefore by implication the declaration modifies the legal effect of those specific provisions of implementation. This issue is not, however, as straightforward as it might at first appear. Article 2(2) is an undertaking to take "necessary steps, in accordance with ... constitutional processes". The declaration

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[250] D.M. McRae, "The Legal Effect of Interpretive Declarations" (1978) 49 B.Y.I.L. 155. The distinction between the two, according to McRae, is that the latter will amount to a reservation if an authoritative decision contrary to the interpretation is rendered. This simply would not arise with respect to Australia's declaration because of its nature.

[251] Vienna Convention, ibid.

[252] "... each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant."

[253] "The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions."

relates to those constitutional processes, but does not indicate what "steps" Australia will or will not take. The Dams Case itself does not require federal intervention to implement a treaty obligation, it merely allows it. This has been done in some circumstances, such as with respect to the facts dealt with in the Dams Case itself and in the legislation following the Toonen decision by the Human Rights Committee.[254] It has not been done in other cases where it might legitimately have been, for example with respect to uniform laws dealing with freedom of expression. This situation illustrates the unavoidable link created through the legal regime between the provisions of the Covenant and domestic political will a values. The effect here is to leave the implementation of the ICCPR in limbo in Australia.

Article 50 is a provision dealing with the application of the Covenant ratione loci rather than ratione materiae. The travaux préparatoires indicate that an inequality in the obligations undertaken under the Covenant between federal and unitary States was regarded as being both unfair and contrary to the principle of universality of human rights.[255] It provides that the Covenant "shall extend" to all parts of federal States. In other words, the implementation must be uniform within each State. The precise level or degree of implementation of any of the norms is another matter which, under Article 2(2), is subject to factors such as constitutional

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[254] Human Rights (Sexual Conduct) Act, 1994

[255] See Marc J. Bossuyt: Guide to the Travaux Préparatoires of the International Covenant on Civil and Political Rights (1987, Martinus Nijhoff, Dordrecht), particularly the materials on p.763.

requirements. Article 50 on its own does not therefore impugn the validity of Australia's declaration.

The official Australian view, stated during the Human Rights Committee's discussions on Australia's second periodic report under Article 40, is that what was clearly stated to be a "declaration"[256] is in fact neither a declaration nor a reservation. Rather it was a "statement" which "did not constitute a declaration or a view of how the Covenant should be interpreted, but was rather a statement of its method of implementation."[257] This, perhaps, is taken from the view stated by Sir Gerald Fitzmaurice in his report on the Law of Treaties to the International Law Commission where he stated that reservations did not amount to:

> ... mere statements as to how the State concerned proposes to implement the treaty ... unless these imply a variation of the substantive terms or effect of the treaty.[258]

Considering that implementation is a crucial factor in human rights treaties where the rights are of an non-synallagmatic character, together with the symbiotic relationship between the treaty norms and domestic norms, it can be argued that there is in fact a variation of substance and effect created by the "statement", despite the fact that it is directed to implementation rather than to interpretation per se.

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[256] See Status of International Instruments, ante, p.29.

[257] CCPR/C/SR.809 (11 April, 1988), paragraph 13 (statement by Mr Ford).

[258] (1956) Vol.2, Y.B.I.L.C., p.110, Art.13

In a prescient objection to Australia's reservation/declaration as it was originally worded, the Netherlands communicated to the Secretary-General:

> The reservation that article 2, paragraphs 2 and 3, and article 50 shall be given effect consistently with and subject to the provision in article 2, paragraph 2, is acceptable to the Kingdom on the understanding that it will in no way impair Australia's basic obligation under international law, as laid down in article 2, paragraph 1, to respect and to ensure to all individuals with its territory and subject to its jurisdiction the rights recognized in the International Covenant on Civil and Political Rights.[259]

There have, however, been no objections to Australia's streamlined version of the declaration.

The best that can be said about Australia's declaration is that it may be technically valid but it is certainly juridically dubious. It means that Australia can evade the object and purpose of the Covenant by avoiding the full ramifications of domestic implementation of it, whereas Canada bit the bullet in this regard. Australia can thus effectively ditch its obligations under Article 2(3) of the Covenant to provide an "effective remedy" for violations "determined by competent judicial, administrative or legislative authorities" which "shall enforce such remedies", as the outcome of the Toonen Case illustrates.

The Human Rights Committee has held that if a reservation is contrary to the object and purpose of a treaty (and it regards that it is the body to so proclaim) then the reservation will be severable and the Covenant will be operative for that

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[259] Status of International Instruments, ante, p.51

party without the reservation applying.[260] The Committee has also stated that reservations and declarations should not effectively reduce the obligations under the Covenant to those already in existence in the domestic legal system.[261] If so, the question of the extent to which the main implementation mechanisms of the Covenant (the reporting system and individual complaints under the First Optional Protocol) can achieve these ends becomes crucial, because to the extent that they cannot or do not, the symbiotic relationship between the norms in the Covenant and the domestic legal system in which they are to operate becomes crucial not just to implementation but also as to normative content.

4.7.2 The Reporting System

The principal mechanism for the review of implementation of the ICCPR is again a reporting system.[262] More ambitious plans, such as the Australian suggestion for an International Court of Human Rights, the Uruguayan proposal for a United Nations High Commissioner (or Attorney-General), the French proposal for an International Investigation Commission coupled with an Attorney-General, an Indian proposal to specifically vest the Security Council with powers to investigate

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[260] General Comment 24(52), ante, paragraph 18.

[261] Id., paragraph 19.

[262] The background to the development of the system of implementation has been discussed above with respect to the ICESCR. See also A. H. Robertson: Human Rights in the World: An Introduction to the Study of the International Protection of Human Rights 2nd ed., (1982, St. Martin's Press, New York) at 29-33.

and redress violations, and the Israeli suggestion for a Specialised Agency for the implementation of the Covenants, were all rejected,[263] although the position of Human Rights Commissioner was established in 1994. Article 28 establishes a Human Rights Committee consisting of eighteen members serving in a personal (not State-representative) capacity. Parties to the Convention must submit reports on measures they have adopted to give effect to the ICCPR every five years. The problem of tardy reporting mentioned above also applies here.[264]

The Committee[265] examines States' reports, with representatives present to make statements and answer questions, and transmits its report "and such general comments as it may consider appropriate to the States Parties"[266] which may make comments in response. The States' reports and the Committee's general comments may then sent to ECOSOC. The system does not allow for specific criticism of any particular State but rather reports a summary of the discussions held, unlike the original proposal of the Commission on Human Rights which would have allowed the Committee to state not only the facts in its report but also

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[263] See Sohn, "A Short History of United Nations Documents", ante, at 103-37; Robertson, ibid; Robertson, "The Implementation System: International Measures", Chapter 14 in Louis Henkin (ed): The International Bill of Rights: The Covenant on Civil and Political Rights (1981, Columbia U.P., New York).

[264] For example, Australia's third report to the Committee was due in November, 1991. It is, at the time of writing, only recently been submitted.

[265] For a detailed examination of its functions, see Torkel Opsahl, "The Human Rights Committee", Chapter 10 in Philip Alston (ed): The United Nations and Human Rights: A Critical Appraisal (1992, Clarendon Press, Oxford).

[266] Article 40(4)

its opinion on the question of violation.[267] The Committee, through ECOSOC, would also have had the right to request an advisory opinion of the International Court of Justice. It was the proceedings in the Third Committee which substantially revised the implementation mechanism.[268] The present system is therefore only as good as allowed by the frankness of the reporting States (whose reports can be little more than government position papers), the process burdens on States which have to report under several treaties,[269] the competence and diligence of the members of the Committee, and the time made available for each report to be studied and considered.[270] It is also affected by the extent to which members of the Committee may avail themselves of information other than that provided in the reports (eg, from the specialised agencies referred to in Article 40(3) and from NGO's). Recourse to the latter appears to be limited.[271] The Committee does not

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[267] Proposal for "Article 43": UN Doc. A/2929 (1955). It would have dealt, however, with inter-party allegations of violations of the Covenant.

[268] See Robertson, "Implementation System: International Measures", ante, pp.333-337.

[269] See Effective Implementation of UN Instruments on Human Rights and Effective Functioning of Bodies Established Pursuant to such Instruments (the Alston report), A/44/668 (1989). Some standardisation has been introduced to help alleviate this problem and to make the reporting system more efficient. See Manual for Human Rights Reporting (UN Center for Human Rights, 1991), HR/PUB/91/1.

[270] For a personal account of the Australian nominee to the Committee, see Elizabeth Evatt, "International Machinery on Human Rights" (1988) 4 QITLJ 55. For a critique by a person involved in the preparation of Australia's reports, see Peter Thomson, "Human Rights Reporting from a State Party's Perspective" in Philip Alston (ed): Towards an Australian Bill of Rights (1994, Centre for International and Public Law, Canberra), pp.329-64.

[271] See Dana D. Fischer, "International Reporting Procedures", Chapter 10 in Hurst Hannum (ed): Guide to International Human Rights Practice (1984, University of Pennsylvania Press, Philadelphia), pp.169-172.

make visits to the State concerned to investigate a situation at first hand, Article 40(4) allowing it to study the reports, not the States themselves.[272] The process is one of observations made on the material revealed in the reports and the questions posed by the Committee members. It is one of dialogue (in the form of a long series of questions followed by a long series of responses) rather than rigorous investigation; of assistance to, rather than evaluation of, a State Party, although there have been some limited exceptions, such as the Committee's criticism of Chile.[273] Despite these limitations, the exercise is more than a merely formal ritual, as after the initial State report, subsequent reports are to address questions raised by the Committee and any relevant changes made as a result.[274] Many

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[272] Dana D. Fischer, "Reporting under the Covenant on Civil and Political Rights: The First Five Years of the Human Rights Committee" (1982) 76 AJIL 142 at 146-7. It remains to be seen whether the post of UN High Commissioner for Human Rights created in December 1993 will allow actions such as this to be taken.

[273] See, for example, the debate on the interpretation of Article 40 in Yearbook of the Human Rights Committee, 1979-1980, Summary records of the Sixth to the Tenth Sessions, (1988, UN, New York), CCPR/2, Un Pub. E.85.XIV.12, 231st-234th meetings, pp.397-408, especially the remarks of Mr Walter Tarnopolsky at pp.406-7.

[274] Report of the Human Rights Committee, 36 UN GAOR, Supp. (No. 40) Annex V, UN Doc. A/36/40 (1981). This was in fact a compromise by which a wider interpretation of the use of "general comments" to include observations with respect to specific States (rather than general comments only relating to the process of presenting reports and general comments with respect to the interpretation and implementation of particular articles of the Covenant) was rejected. For differing academic interpretations of the Committee's powers under Article 40(4) see A.H. Robertson, "The Implementation System: International Measures", in Louis Henkin (ed): The International Bill of Rights (1981, Columbia U.P., New York) at 350; Bernhard Graeftath, "Reporting and Complaint Systems in Universal Human Rights Treaties", Chapter 12 in Allan Rosas & Jan Helgesen (eds): Human Rights in a Changing East-West Perspective (1990, Pinter Publishers, London) at 304-307. See also "Statement on the Duties of the Human Rights Committee under Article 40 of the Covenant", the compromise position adopted by the Committee on October 30, 1980: Report of the Human Rights Committee UN Doc. A/36/40 (1981), Annex IV. In 1991 the Committee revised its Guidelines with respect to the format of reports in an attempt to encourage States to address the issues

States have in fact altered their laws and practices as a result of this process.[275] However, this system is not nearly as strong as that provided for under the European Convention for the Protection of Human Rights and Fundamental Freedoms which provides for a Court of Human Rights and a Commission of Ministers which have binding powers on parties.[276] And while the initial report must be made within one year of the Covenant entering into force for a Party[277] the Committee decided that subsequent reports need only be submitted every five years.[278] Under the ICCPR, parties may still ignore any comments made by the Committee with respect to their reports despite the public scrutiny function of the reporting system. If this amounts to a breach of the Covenant, the usual procedures for treaty breach - in so far as they may be useful with respect to non-synallagmatic rights[279] - would apply, together with the voluntary and reciprocal mechanism provided by Article 41 which allows the Committee to receive

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raised with respect to their earlier reports: A/46/40, 206, 207, 208.

[275] See Cindy A. Cohn, "The Early Harvest: Domestic Legal Changes Related to the Human Rights Committee and the Covenant on Civil and Political Rights" (1991) 13 Human Rights Quarterly 295.

[276] A comparison of the implementation systems under the ICCPR and the European Convention can be found in P. van Dijk & G.J.H. van Hoof: Theory and Practice of the European Convention on Human Rights (1984, Kluwer Publishers, Deventer) at pp.46-52.

[277] Article 40(1)(a)

[278] Decision taken under Article 40(1)(b): CCPR/C/19/Rev.1 (1982).

[279] See, for example, the majority decision in the South West Africa Cases (Second Phase), ICJ Reports, 1966, where it was held that a party to a treaty can only bring an action for breach if it suffers some measurable loss resulting from that breach, or if the right to litigate was vested in the complainant by some text, instrument or rule of law. Humanitarian considerations alone were held to be insufficient to achieve this position (at p.34).

complaints by parties that another party is in breach.[280] This process is confidential and an ad hoc Conciliation Commission may be set up under Article 42. This process has never been used and nothing which results from these processes (which are in any event optional) is binding upon a State determined to remain recalcitrant.

A perusal of the reports of Australia and Canada illustrates these issues and shortcomings. For example, the Australian reports are comprehensive, but anodyne. Australia's Second Report, in February 1987, is set out in the manner recommended by the Committee, containing in Part I general information about Australia's political structure, legal framework, human rights machinery and education measures. Part II contains an article-by-article examination of the first 27 articles of the Covenant as they apply in Australia. Part I, containing 43 pages, is brief but honest, admitting, for example, that the Covenant could have the force of law in Australia if the Commonwealth passed legislation based on its external affairs power but that this has not happened for political reasons.[281] Part II, at 280 pages, is lengthy but essentially synoptic. While it is accurate, it manages to slide past important and difficult issues. Thus, for example, the discussion of the right not to be required to perform forced labour in Article 8 admits that under the Queensland Electricity (Continuity of Supply) Act 1985 people could be forced to

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[280] Canada made a declaration under Article 41 in 1979 and Australia in 1993.

[281] Paragraph 54

perform work to restore the supply of electricity. (The Act had been introduced to break a strike by electricity workers.) The federal Attorney-General referred the matter to the Australian Human Rights Commission which found[282] that the Act could amount to forced labour. The Australian report to the Committee simply says of this: "The Commission's Report was forwarded to the Queensland Government. That government advises that it does not consider the Act to be in conflict with the Covenant."[283] Although not stated, this was presumably because the Queensland government classified the electricity strike as one of emergency threatening the well-being of the community within the terms of Article 8(3)(c)(iii) of the Covenant.

Similarly, the discussion with respect to the right to peaceful assembly in Article 21 refers to the Queensland Traffic Regulations where processions upon roads could be banned if, in the opinion of the Police District Superintendent, the procession would breach the peace, cause an obstruction to traffic or "if for any other reason whatsoever it is, in the opinion of the District Superintendent, desirable that such a procession should not be held."[284] No comment whatsoever is passed on the legislation other than an admission, at the end of the comments on this Article, that there were no specific remedies should a lawful assembly be

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[282] Report No.12

[283] Paragraph 239

[284] Regulation 124(3), referred to in the Australian Report at paragraph 517.

improperly interfered with, other than general remedies along the lines of assault or false imprisonment.[285]

The Summary Records of the Committee's consideration of Australia's second report[286] indicate that its members quizzed the Australian representatives on details, such as the powers of the Australian Human Rights Commission and the Ombudsman, the relationship between the Federal Court of Australia and the High Court, and for more precise detail of the incorporation of the Covenant into Australian law. Responding to the issue of the Human Rights Commission's powers, the then Australian Human Rights Commissioner, Mr Brian Burdekin, is described in the Summary Record as saying that "the Commission could inquire into any act or practice that might be inconsistent with or contrary to human rights."[287] While this is quite correct, the response apparently did not allude to the fact that the definitions of "act", "practice" and "human rights" in the relevant legislation make it the most toothless human rights provision in Australian legal history.[288] Details of affirmative action plans with respect to women and Aborigines were also requested.[289] The Australian representatives admitted that,

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[285] Paragraph 521

[286] Human Rights Committee, 32nd Session, 806th-809th meetings; UN Docs. CCPR/C/SR.806-809 (7-11 April, 1988).

[287] CCPR/C/SR.806, paragraph 26

[288] Human Rights and Equal Opportunity Commission Act 1986, s.11(1)(f). This is discussed in more detail in Chapter 5.

[289] CCPR/C/SR.807

while much had been done for these groups, equality had not been achieved.[290] It was also admitted that a system of one-vote-one-value was the policy favoured by the federal government, but that this had not been achieved in all states.[291]

In a Report prepared by the International League for Human Rights,[292] it was suggested that the Australian Human Rights Commission, as an independent body, should be given the responsibility for preparing Australia's reports. While this approach might lessen the "PR" aspect of reporting, it must be questioned whether, given the wording of Article 40, any body other than the government should be supplying the report. In any event, the Australian Human Rights Commissioner was a member of the Australian delegation to the Committee. The League's report, while praising the impressive and ample presentation of Australia's Second Report, is particularly critical of the right of self-determination for Torres Strait Islanders, the inadequacy of the Australian Constitution in terms of the protection of human rights, the low level of staffing and inadequate funding of the Australian Human Rights Commission, the lack of comprehensive community education on human rights, the existence of corporal punishment in schools, aboriginal deaths in custody, and the gerrymandering of elections.

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[290] CCPR/C/SR.808

[291] CCPR/C/SR.809, paragraph 16

[292] Human Rights in Australia: Comments on the Australian Government's Official Report to the Human Rights Committee, prepared by the International League for Human Rights, New York, April, 1988.

The Canadian reports indicate a similar belief that matters of human rights in Canada are, by and large, satisfactory. The first Canadian report in March, 1979, when dealing with Article 2 of the Covenant, recognised that the Covenant did not then have domestic force but stated that people in Canada enjoyed "most of the rights and freedoms recognised by the Covenant, because Parliament has recognised those rights and freedoms in its statutes. ... this recognition or protection is not, save exceptions, subject to any discriminatory restriction. ... Legislation passed by Parliament is of general application ..."[293] Thereupon follows recitations of the writ of habeas corpus and of legislation such as the Criminal Code, the Canadian Bill of Rights and the Canadian Human Rights Act. What is missing is any appreciation of problems of systemic discrimination.

Interestingly, with respect to derogations under Article 4, the report admits that under the War Measures Act[294] the Governor in Council may exercise powers in a way which overrides the Bill of Rights and, presumably, the Covenant. The report then states:

> Notwithstanding that, Canada, by acceding to the Covenant, undertook vis-a-vis the international community to comply with [the Covenant's] provisions, including those set forth in Article 4. It must therefore be assumed, in the absence of express assurances in the War Measures Act, that if ever a situation requiring the application of this Act should arise,

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[293] International Covenant on Civil and Political Rights: First Report of Canada on Implementation of the Provisions of the Covenant, March, 1979, p.12.

[294] R.S.C. 1970, ch. W-2

Canada would fulfil the obligations it assumed under the Covenant.[295] Politically, the Covenant is thus regarded as acting as a brake on the powers under domestic legislation. However, there is no legal guarantee of this, and no perceived need of such a legal guarantee, despite the requirement in Article 2 to "ensure" the rights in the Covenant to everyone. In a similar vein, it was stated, with respect to Article 7, that "torture and the imposition of cruel, inhuman or degrading punishment or treatment are practices contrary to the philosophy of Canadian criminal law."[296] However, the Canadian Bill of Rights in s.2(b) would make inoperative any (federal) legislation which imposes or authorises cruel or unusual treatment or punishment, but the determination on this point would be subject to (domestic) judicial determination.[297]

Unlike the Australian reports, which adopt a global approach, the Canadian reports deal separately with federal, provincial and territory laws and policies as relevant to the Covenant. This makes for an apparently comprehensive treatment, but I will note below (for example with respect to Article 20) Canada's narrow - if not to say impoverished - approach to interpretation of the Covenant's obligations (in contrast to Australia's initial plethora of reservations).

The discussions of the Human Rights Committee with respect to Canada's first

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[295] Id., p.17

[296] Id., pp. 23-4, emphasis added.

[297] See Chapter 5 below.

report indicate that the Canadian delegation (and the Canadian government) acknowledged that Canada's accession to the Covenant and the Optional Protocol had made Canadian authorities more conscious of the need for better defined measures for the protection of human rights.[298] As with Australia, the Committee praised the frankness of the report but wanted more details, particularly as it appeared that the Covenant had not become an integral part of Canadian law, notwithstanding the Canadian Bill of Rights. The Canadian response to Article 4 and its anodyne dismissal of the effect of the War Measures Act mentioned above was particularly noted,[299] as was the apparent Canadian obliviousness to the positive obligations of promotion under the articles, such as Article 19.[300]

Canada's second and third reports to the Committee[301] are shorter than the first, but more pointed. They include less descriptive waffle and lengthy annexes containing legislation, citations of relevant cases and other government documents. They particularly detail the effect that litigation under the Canadian Charter of Rights and Freedoms has had on the legal nature of equality in Canada, indicating the tremendous impact, and the possibility of synergy, that international law now

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[298] Yearbook of the Human Rights Committee 1979-1980, Vol. 1, CCPR/2 (1988), 205th meeting (March 25, 1980), p.316; Summary Records, UN Doc. CCPR/C/1/Add.43.

[299] Id., at pp. 319-20.

[300] Id., p.320

[301] Submitted in 1989 and 1990 respectively, these have been published together by the Human Rights Directorate, Multiculturalism and Citizenship Canada, International Covenant on Civil and Political Rights: Second and Third Reports of Canada, (1990, Ottawa).

can have on Canadian domestic law and the considerably more sophisticated approach to rights now adopted by Canadian courts,[302] and the more rights-conscious approach of the legislature as indicated, for example, by the repeal of provisions of the Indian Act in 1985.

It is therefore possible for the reporting system to generate reports which improve with time and experience, but this is not guaranteed. Canada's second and third reports were a considerable improvement over its first as they address important specifics. On the other hand, Australia's second report was no improvement in this regard on the first and the recently-submitted third report adds nothing new in this regard.

The reporting system, as the principal mechanism for promoting the implementation of the Covenant, is at best a hit-and-miss affair. This is exacerbated by the fact that even though reporting obligations now exist under the other major human rights treaties, there is no integrated system of supervision.

4.7.3 The Optional Protocols

Australia acceded to the Second Optional Protocol to the Covenant in 1990 without

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[302] This is dealt with in more detail in Chapter 5.

reservation. Canada is not a party. Under this Protocol parties agree to abolish the death penalty. Reservations are not allowed, except for "a most serious crime of a military nature committed during wartime."[303] Derogations under Article 4 are expressly excluded[304] and the Protocol applies to all parts of federal States without exception.[305] The Article 41 procedure allowing party-to-party complaints of breach also applies to breaches of this Protocol on the same terms,[306] as does the procedure for complaints by individuals under the First Optional Protocol.[307]

The impact of this Protocol on Australia was negligible, as, despite the fact that criminal law is a matter of state and territory jurisdiction in Australia, the death penalty for civilian crimes was abolished several years ago, although it does (together with the decision in the Dams Case) at least allow the prevention of its re-introduction by one of the states or territories.

Perhaps the most significant aspect of the ICCPR from the point of view of implementation is the First Optional Protocol, to which Canada acceded at the

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[303] Article 2(1)

[304] Article 6(2)

[305] Article 9

[306] Article 4

[307] Article 5

same time as it ratified the Covenant[308] but to which Australia did not accede until 1991.[309] It represents a further wearing down of the classical notion that the individual has no locus standii in international law, although, unlike the Convention on the Elimination of All Forms of Racial Discrimination and the Torture Convention, this right of individual petition is not contained within the Convention itself but in a separate optional Protocol.

By 1950, the Commission on Human Rights had rejected the idea of allowing individuals or non-governmental organisations to make complaints to the Human Rights Committee.[310] The issue was reopened in the discussions in the Third Committee and the Secretary-General was asked to produce an explanatory paper

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[308] May 19, 1976. To 1990, 54 complaints had been lodged against Canada: see Jakob Moller, "Recent Jurisprudence of the Human Rights Committee: A Brief Overview", paper delivered to the UN Workshop on the Optional Protocol, Ottawa, June 17-20, 1990, p.1.

[309] Australian accession had been considered for almost a decade: see A. Rose, "Commonwealth/State Aspects - Implementation of the First Optional Protocol", paper delivered to the symposium on Internationalising Human Rights protection in Australia - Australia's Accession to the First Optional Protocol, University of Melbourne, December 10, 1991. There was in particular some concern about international scrutiny of the treatment of prisoners in Australia: see P. Thomson, "Implications of Australia's Ratification and Potential ratification of International Human Rights Treaties", Proceedings of the 1991 International Law Weekend (1991, Centre for International and Public Law, ANU), 86. See generally Hilary Charlesworth, "Australia's Accession to the First Optional Protocol to the International Covenant on Civil and Political Rights" (1991) 18 Melbourne University L.R. 428, who considers that a further stimulation to accession was Australia's becoming a member again of the Commission on Human Rights in 1991 and, in the same year, the National Report of the Royal Commission into Aboriginal Deaths in Custody recommending accession (at p.429). To date, there has only been one case decided with respect to Australia (Toonen v Australia, Communication No.488/1992, UN Doc. CCPR/C/50/D/488/1992). There have been a number dismissed at the admissibility stage and others are pending a determination of admissibility.

[310] UN Doc. E/CN.4/SR.178 (1950) at 3-4

on the issue of measures of implementation which was done by 1963.[311] By a narrow majority, it was decided to incorporate the right of individual petition (ie, complaint) in a separate optional text.[312]

Under the Protocol, a complaint may be lodged in writing with the Committee by any individual subject to a State's jurisdiction[313] (ie, the person does not necessarily have to be a national of the respondent State). However, as the complaint must come from an "individual" the group right to self-determination in Article 1 of the Covenant appears not to apply,[314] and communications from companies are not entertained.[315] The Protocol applies to all parts of federal

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[311] UN Doc. A/5411 (1963)

[312] The discussions and decisions of the Third Committee are summarised in its Report to the General Assembly, 21 GAOR Annexes, UN Doc. A/6546 (1966). The vote in the General Assembly on the Optional Protocol on December 16, 1966, was 66-2-38 (G.A. Resol. 2200A (XXI), 16 December, 1966).

[313] Article 1. Note that the phrase "within its territory", which can be found in Article 2(1) of the Covenant, is absent. The conundrum discussed above is therefore avoided in the Protocol.

[314] Report of the Human Rights Committee, GAOR 42nd Session, Supplement No. 40, UN Doc. A/42/40, p.106. See also the decision in A.D. v Canada (Communication No. 78/1980) which was held to be inadmissible where a representative of Mikmaq tribal society could not prove that he was personally a victim of a violation of any of the rights contained in the Covenant: Report of the Human Rights Committee, GAOR, 39th Session, Supplement No. 40, UN Doc. A/39/40, pp.200-203, at paragraph 8.2. Contrast, however, Lubicon Lake Band v Canada (Communication No. 167/1984, decision of 26 March, 1990, reproduced in (1990) 11 Human Rights Law Journal 305) where it was suggested (at paragraph 32.1) that a group of individuals who claim to all be similarly affected could collectively submit a communication, provided the other elements of Article 1 (eg, that they are a "peoples") are satisfied.

[315] UN Doc. A/44/40, p.141; communications Nos. 360/1989 and 361/1989.

states without any exceptions.[316] All available domestic remedies must have been exhausted[317] unless these have been unreasonably prolonged.[318] The Committee brings the complaint to the attention of the State concerned which must then submit written explanations within six months.[319] The victim may be asked to submit a further rebuttal to the state's response. The Committee considers these written communications (and does not hear oral submissions from either the complainant or the State Party) in closed meetings.[320] If the complaint is admissible (ie, it is in writing, not anonymous, alleges a breach of the Covenant applicable to the state concerned[321] - and thus reservations must be taken into account[322] - is not an abuse of the process, and domestic remedies have been exhausted)[323] the

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[316] Article 10

[317] Article 2

[318] Article 5(2). On exhaustion of local remedies in this context see P.R. Gandhi, "The Human Rights Committee and the Right of Individual Communication" (1986) 57 British Yearbook of I.L. 232; Alfred de Zayas, Jakob Moller & Torkel Opsahl, "Application of the International Covenant on Civil and Political Rights under the Optional Protocol by the Human Rights Committee" (1985) 28 German Yearbook of I.L. 9; A.A. Trindade, "Exhaustion of Local Remedies under the UN Covenant on Civil and Political Rights and its Optional Protocol" (1979) 28 International and Comparative Law Quarterly 734; C.F. Amerasinghe: Local Remedies in International Law (1990, Grotius Publications, Cambridge); Dominic McGoldrick: The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights (1991, Clarendon Press, Oxford), pp.187-97.

[319] Article 4

[320] Article 5

[321] Complaints cannot be made against other individual .

[322] See, for example, T.K. v France, Communication No. 220/1987, Un Doc. CCPR/C/37/D/220/1987, Annex, paragraph 8.6, where a French reservation with respect to Article 27 was held to preclude a complaint on that Article being admissible.

[323] Articles 2, 3, 5

Committee considers the merits of the case. It then forwards its views to the State concerned and to the individual[324] and includes in its annual report a summary of its activities under the Protocol.[325]

While this process allows the Committee to express its "views" (ie, whether the facts disclose a violation of the Covenant) it is not legally binding and is very much a matter of last resort.[326] It also assumes that domestic remedies, to which it defers, are available and that notice will be taken of the Covenant there.[327]

Some States simply ignore the findings.[328] These views are, nevertheless, legal interpretations of the Covenant of tremendous influence. Moreover, from its 39th session, the Committee decided to adopt "follow up" measures including, in cases where a violation of the Covenant has been found, asking the State to inform the

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[324] Article 5(4)

[325] Article 6

[326] Article 5(2)(a) also requires the Committee to ascertain that the same matter is not being examined under another international investigation or settlement.

[327] Thus, for example, in A and SN v Norway (Communication No. 224/1987) the authors argued that in Norway (as in Canada and Australia) international law was not automatically a part of the domestic legal system without transformation and that exhaustion of local remedies would have been ineffective. The Committee found that the Covenant would nevertheless be "a source of law of considerable weight in interpreting the scope" of provisions of the Norwegian Constitution and that therefore there was "a reasonable chance of challenging" the provisions in a Norwegian Court. Consequently, domestic remedies had not been exhausted and the authors had to return to the domestic courts for relief: Report of the Human Rights Committee, GAOR, 43rd Session, Supplement No. 40, UN Doc. A/43/40 (28 September, 1988), at p.153.

[328] Report of the Human Rights Committee, GAOR 45th Session, UN Doc. A/45/40, pp.144-5.

Committee what remedial action it deems appropriate[329] or in fact suggesting an appropriate remedy itself.[330] In either case, time limits are set for the State to respond (usually 90 days) and the response, or lack of one, is noted in the Committee's Annual Report. The position of Special Rapporteur for the Follow-Up of Views was created in 1990.[331] While these are still not binding measures,[332] they further prod States towards better implementation of their obligation under Article 2(3) of the Covenant to provide effective remedies for violations.

However, the Committee does not act as a court of appeal: it considers whether there has been any breach of the rights in the Covenant as opposed to determining whether a domestic court has, in a general sense, committed an error of fact or law.[333] It deals not with constitutionality per se but with the conformity of the domestic law to the Covenant.[334] On the other side of the coin, this means that a law declared constitutional in the domestic legal sphere could still be found to be in

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[329] Report of the Human Rights Committee GAOR, 39th Session, Supplement No. 40. UN Doc. A/39/40, p.126, paragraph 622.

[330] For example in Toonen v Australia (Communication No.488/1992) the Committee suggested the repeal of sections 122 and 123 of the Tasmanian Criminal Code (CCPR/C/50/D/488/1992, paragraph 10).

[331] Report of the Human Rights Committee, GAOR 45th Session, UN Doc. A/45/40, pp.205-6.

[332] There is also some controversy as to whether the Committee has exceeded its mandate in adopting such measures: see Alfred M. de Zayas, "The Follow-Up Procedure of the UN Human Rights Committee" (1991) 47 The Review (International Commission of Jurists) 28-35.

[333] Pinkey v Canada, Report of the Human Rights Committee, GAOR 37th Session, UN Doc. A/37/40, p.101; J.K. v Canada, Id., GAOR 40th Session, UN Doc. A/40/40, p.215.

[334] Fals Borda v Colombia, Id., GAOR 37th Session, UN Doc. A/37/40, p.193.

breach of the Covenant.[335]

In addition, as the Committee develops its own "jurisprudence" on the Covenant it appears that the symbiotic relationship between the Covenant and domestic norms starts to become better articulated. For example, in Van Duzen v Canada[336] the complaint involved the interpretation of Article 15(1) which provides that: "If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby " In this case amendments had been made to the Parole Act 1970 under which forfeiture of parole upon the commission of another offence was abolished. The complainant argued that he was not receiving the benefit of this "lighter penalty". The Committee noted:

> ... the terms and concepts of the Covenant are independent of any national system of law and of all dictionary definitions. Although the terms of the Covenant are derived from long traditions within many nations, the Committee must now regard them as having an autonomous meaning. ... [T]he meaning of the "penalty" in Canadian law is not, as such, decisive. Whether ... [it] should be interpreted narrowly or widely and whether it applies to different kinds of penalties, "criminal" and "administrative", under the Covenant, must depend on other factors ... [including] the text of article 15(1) ... [and] its object and purpose.[337]

This statement, however, only flags the possibility of an "autonomous meaning" apart from domestic law. Reliance on the text, object and purpose of a treaty is an

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[335] Ibid.

[336] Communication No. 50/1979, Selected decisions under the Optional Protocol (Second to Sixteenth Sessions (1985, United Nations, New York), UN Doc. CCPR/C/OP/1, pp.118-21.

[337] Ibid., paragraph 10.2

uncontroversial approach to interpretation[338] and indicates that the domestic norm is not the sole determinant of the matter. In any event, the Committee found it unnecessary to answer this question as the complainant had been released from custody and its decision was expressed to be made "without prejudice to the correct interpretation of article 15(1)".[339] A little later, in MacIsaac v Canada[340] the Committee found that the Parole Act did not violate Article 15 since the sentencing judge had a discretion as to whether the forfeiture of parole operated or not. But this does not mean that the symbiotic relationship ceases to exist in determining a person's actual rights under the article: it simply means that the factors at the domestic end of the symbiotic link had made an international pronouncement on the matter unnecessary.

We have not yet reached, and may never reach, a stage of total autonomy of the kind hinted at by the Committee. While we might reach it with respect to abandoning the implicit reliance on domestic concepts used in words like "penalty", what about concepts with moral or cultural connotations like "marriage" or "family"? In this regard the Committee has developed the notion of a "margin

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[338] Vienna Convention on the Law of Treaties 1969, Article 31(1)

[339] Id., paragraph 10.3

[340] Communication No.55/1979, discussed below with respect to Article 15.

of appreciation" similar to that used in the European system.[341] Thus, for example, in Hertzberg v Finland[342] the Committee held that restrictions on the broadcasting of programs dealing with homosexuality were not in breach of Article 19(2) of the Covenant (the right to freedom of expression) as Article 19(3) allowed restrictions on this right based on domestic law and necessary to protect public morals and that:

> ... public morals differ widely. There is no universally applicable common standard. Consequently, in this respect, a certain margin of discretion must be accorded to the responsible national authorities.[343]

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[341] See J.G. Merrills: The Development of International Law by the European Court of Human Rights (1988, Manchester University Press, Manchester), Chapter 7; van Dijk & van Hoof: Theory and Practice of the European Convention on Human Rights, ante, pp.87-103. Originally recognised by the European Commission and the European Court of Human Rights to allow a State to deal with public emergencies (Greece v United Kingdom 176/56 Y.B. 2, 182), the issue was not so much whether there was a state of emergency but whether the State reasonably believed that there was. The doctrine has now been extended to cases where no emergency exists but the construction of the provisions of the relevant treaty allows for local variations, but limited by a doctrine of necessity and proportionality which would be left to be determined by the domestic court in "public" cases: Handyside v UK, Eur. Ct. H.R., Ser. A, No.24 (involving the distribution of publications considered to be obscene). But, the balance of these factors appears to be tipped away from the State the more "private" the issue becomes: Dudgeon v United Kingdom (1981) 4 European Human Rights Reports 149 (laws criminalising homosexual activity in private).

[342] Communication No. 61/1979, Selected Decisions under the Optional Protocol (Second to Sixteenth Sessions) (1985, United Nations, New York), UN Doc. CCPR/C/OP/1, pp.124-27.

[343] Ibid., paragraph 10.3. In an individual opinion submitted under Rule 94(3), Mr Torkel Opsahl, with whom Mr Rajsoomer Lallah and Mr Walter Tarnopolsky agreed, noted that the conception and contents of "public morals" are relative and changing. Therefore, State-imposed restrictions must allow for this fact, and if domestic law reflects current moral conceptions this alone might not be enough to justify reliance on Article 19(3) as the criteria set out in the latter cannot simply be applied to self-imposed restrictions. Id., pp.126-7. This approach, based on the dynamics of values, is not reflected in the body of the majority decision.

Similarly, in Hendriks v the Netherlands[344] it was held that the failure of the Netherlands courts to grant a divorced parent access to his son did not breach Article 23 (the equality rights of spouses and the "necessary protection of any children" after a dissolution of a marriage) as it was for the domestic court to determine what was in the best interests of a child in any particular case. Admittedly, a part of the problem is that the procedure of the Committee is such that it simply cannot decide issues of fact such as this. But this situation has a direct impact on the notion of fundamentality of rights. A margin of appreciation introduced either through equivocations in the wording of the text, or as a result of the shortcomings of the monitoring procedures in the treaty, produces a species of "fundamental" right which might have astonished the eighteenth century promoters of such rights, but is a necessary result when the instrument is truly international and the legal structures within which it is to operate are biased in favour of the State and its sovereignty.

Perhaps the best known case before the Human Rights Committee against Canada is Lovelace v Canada.[345] Sandra Lovelace, a Maliseet Indian, claimed that by virtue of the Indian Act[346] she had lost her rights and status as an Indian when she married a non-Indian. The same did not occur to an Indian male who married a non-Indian. The Supreme Court of Canada had held that this effect did not breach

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[344] Communication No. 201/1985

[345] Communications No. 24/1977

[346] Sections 12(1)(b), 14

section 1(b) of the Canadian Bill of Rights which provided for equality before the law without discrimination on the basis, inter alia, of sex.[347] She claimed that this contravened Articles 2(1) (all individuals to be ensured of rights without distinction), 3 (equal right of men and women to rights), 23(1), (4) (protection of the family and the equal rights of men and women during marriage), 26 (equality before the law) and 27 (rights of ethnic minorities) of the Covenant. Canada responded that the Indian Act was designed to protect the Indian minority where, traditionally, it was patrilineal relationships which determined legal rights and where concern existed at the time the Act was passed that Indian land would fall into white ownership by marriage of Indian women to non-Indians.[348] Indians themselves were apparently divided on the equal rights implications of these measures.[349]

Holding local remedies to have been exhausted because of the Supreme Court decision, and also that, even though Lovelace had been married before the Protocol had become binding on Canada, the discriminatory effects of the marriage by

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[347] The Attorney-General of Canada v Jeanette Lavell, Richard Isaac et. al. v Yvonne Bedard [1974] S.C.R. 1349

[348] Human Rights Committee, Selected Decisions under the Optional Protocol (Second to Sixteenth Sessions) (Vol. 1) (1985, UN, New York), UN Doc. CCPR/C/OP/1, p.38.

[349] Ibid. For the historical background, see Anne Bayefsky, "The Human Rights Committee and the Case of Sandra Lovelace" (1982) 20 Canadian Yearbook of International Law 244 at 257-61.

virtue of the Indian Act persisted after the operative date for Canada,[350] the Committee's view was that the effects of the Indian Act violated Article 27 of the Covenant. No opinion was passed on the other Articles referred to in the complaint as they related to events which occurred before the Protocol became binding on Canada.[351] The right to enjoy a minority culture in Article 27 does not expressly or necessarily include the right to live on a reserve, but restrictions in this regard "must have both a reasonable and objective justification and be consistent with the other provisions of the Covenant read as a whole."[352] These other provisions included Article 23 (which had been argued by Lovelace) and Articles 12 and 17 dealing with the right to choice of residence and non-interference with privacy and family (which had not). The Committee felt that, regardless of the other possible justifications for the Indian Act, its practical application in this case was neither reasonable nor necessary to preserve the identity of the tribe.[353]

To date, the only case against Australia to be admitted by the Committee and with

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[350] This was particularly so because the marriage had broken up and Lovelace had returned to her family's reserve with her children, although she had no right to remain there because of the effect of the Indian Act. She also lost the right to various forms of government assistance as an Indian.

[351] However, the individual opinion of Mr Nejib Bouziri was that Articles 2(1), 3, 23(1), (4) and 26 had been breached: Selected Decisions, id., p.87.

[352] Selected Decisions, id., pp.83-87 at paragraph 16.

[353] Id., paragraph 17

views given is Nicholas Toonen v Australia.[354] Toonen is a homosexual man who brought a complaint with respect to the Tasmanian Criminal Code under which consenting sexual contact between adult men in private is a criminal offence.[355] This, he contended, breached Articles 2(1) (all rights under the Covenant to be ensured to everyone without discrimination), 17 (interference with privacy) and 26 (equality before, and equal protection of, the law) of the Covenant. Australia, in which criminal law is primarily a matter of state jurisdiction (and in which Tasmania remains the only state or territory to criminalise consenting adult homosexual behaviour) did not challenge the admissibility of the communication[356] which considerably hastened the resolution of the Committee's views. The communication was admissible with respect to exhaustion of local remedies because there were no effective remedies available: it was the law itself which was the problem and attitudes to amend it were not strong.[357] In addition, the Covenant is not automatically a part of Australian law without transformation into it.[358]

The submission of Australia in response to the complaint incorporated the

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[354] Communication No. 488/1992, views given on March 31, 1994, UN Doc. CCPR/C/50/D/488/1992. The communication was in fact made to the Committee the day after the Protocol became binding on Australia.

[355] Sections 122(a),(c) ("unnatural sexual intercourse" and "intercourse against nature"), and 123 ("indecent practice between male persons").

[356] Id., paragraph 4.1

[357] Id., paragraph 3.3

[358] Ibid.

observations of the government of Tasmania. The latter argued that Article 17 does not create a "right" to privacy but rather a right to freedom from arbitrary and unlawful interference with privacy. It argued that the Criminal Code was neither arbitrary not unlawful as it was, amongst other things, a health measure with respect to the spread of HIV/AIDS and was a moral issue which was best determined domestically. The Australian federal response to this was that the notion of arbitrariness substantially equated with the common law notion of unreasonableness.[359] To be free of arbitrariness, the measures undertaken would have to be based on reasonable and objective criteria and be proportional to the purpose for which they were adopted.[360] Australia conceded that these laws were neither.[361] Nevertheless, it stated:

> ... the State party cautions that the formulation of Article 17 allows for some infringement of the right to privacy if there are reasonable grounds, and that domestic social mores may be relevant to the reasonableness of an interference with privacy.[362]

The Committee essentially agreed with the Australian federal view, although replacing the "reasonable and proportional" test with one involving proportionality and necessity.[363] Even though the Tasmanian Criminal Code had not been enforced for a decade, and Toonen had never been arrested or charged, he was

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[359] Id., paragraph 6.4

[360] Ibid.

[361] Id., paragraphs 6.7-6.8

[362] Id., paragraph 6.6

[363] Id., paragraph 8.3

nevertheless a "victim" within the meaning of Article 1 of the Protocol because he had demonstrated the threat of enforcement of the laws[364] and because of their pervasive impact.[365] Relying on its General Comment 16(32) the Committee reiterated that a law can be arbitrary when it is not in accordance with the provisions, aims and objectives of the Covenant. Rejecting public health issues as a justification for the laws (with respect to AIDS they are neither reasonable nor proportionate in the circumstances), the Committee's view with respect to the morals argument was:

> The Committee cannot accept either that for the purposes of article 17 of the Covenant, moral issues are exclusively a matter of domestic concern ...[366]

It therefore held that Article 17(1) had been violated and that an effective remedy would be the repeal of the provisions in the Code on which the communication had been based. It found that it was not necessary to answer the question whether

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[364] Despite the fact that no arrests had been made under the relevant sections of the Criminal Code for many years, the Director of Public Prosecutions had stated in August, 1988, that prosecutions would be initiated if there were sufficient evidence to do so: id., paragraph 2.2. In fact, Mr Rodney Croome (Nick Toonen's lover) and three other gay men and women presented themselves to the Hobart police after the Committee had given its views - and the Tasmanian government declared that it would not change its laws - to confess to breaches of the Code.

[365] This included discrimination in employment, constant stigmatisation - one member of the Tasmanian parliament had stated that gays were "no better than Saddam Hussein" and another person at a public meeting had suggested that all homosexuals be rounded up and "dumped" on an uninhabited island - vilification and physical violence, amounting to a campaign of "official and unofficial hatred" against male homosexuals and lesbians: id., paragraphs 2.4- 2.6.

[366] Id., paragraph 8.6

homosexuality is a "status" for the purposes of Articles 2 and 26[367] but in a remarkable statement of wide ramifications said: "... the reference to "sex" in articles 2, paragraph 1, and 26 is to be taken as including sexual orientation."[368]

A consideration of both the Lovelace and Toonen cases indicates some of the strengths and weaknesses of the implementation system of the ICCPR. One problem is the length of time it takes to get a "view". Considering that a communication is only admissible after domestic remedies have been exhausted (although the Committee adopted a fairly flexible approach to what this means in these cases) Sandra Lovelace waited another three and one-half years after lodging her communication. Nick Toonen had to wait two and one-quarter, and that period would have been longer had Australia opposed the admissibility of the communication. Another problem is that the process relies substantially on the co-operation of the relevant State. Canada at first did not co-operate with the Committee, leaving unanswered the first two requests for its observations and eventually the Committee decided that the communication was admissible in the complete absence of any Canadian response. On the other hand, the Toonen case was expedited because of Australian co-operation (although Australia did request an extension of time for its submission of observations on the merits of the case). Had international law recognised the state of Tasmania rather than the

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[367] Id., paragraph 8.7. In an individual opinion under Rule 94(3), Mr Bertil Wennergren felt that Article 26 had also been violated: id., Appendix.

[368] Ibid.

Commonwealth of Australia as an international legal person responsible under the Covenant, or had the federal government been of the same opinion as the Tasmanian with respect to homosexuality. the course of the Toonen case could have been different. The international procedure is directly influenced by domestic government policy.

Another issue is the effect the views had on eventual remedies. As Professor Humphrey has remarked, the publicity of the Committee's views is intended to act as an "organization of shame".[369] However, Bayefsky has noted that the publicity surrounding the Lovelace decision in Canada was minimal.[370] And legislative action to amend the Indian Act was neither immediate nor directly attributable solely to the Committee's views.[371] In Australia, the Toonen case received considerable publicity. However, the Tasmanian government remained obdurate, perhaps because of the very publicity intended to induce it to amend its laws Indeed, in the 1996 state elections the government promised to increase the penalty for homosexual behaviour under the Code. Moreover, precisely because of the

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[369] John Humphrey, "The Revolution in the International Law of Human Rights" (1974-5) 4 Human Rights 205 at 214.

[370] Anne Bayefsky, "The Human Rights Committee and the Case of Sandra Lovelace" (1982) 20 Canadian Yearbook of International Law 244 at 261.

[371] Id., p.260-61, 263-4. See also the Canadian response to the Committee's views, not lodged until two years after the adoption of the views, in which the Indian Act remained unamended but was in the process of being so and considerable reference is made to the intervening constitutional amendments, particularly the Charter of Rights and Freedoms: Selected Decisions of the Human Rights Committee under the Optional Protocol Vol. 2, UN Doc. CCPR/C/OP/2, pp.224-5.

publicity surrounding this and similar cases the Committee amended its Rules in 1995 to prohibit either party from publicising the complaint until a final decision is made, which will normally be made public by the Committee itself.[372] Australia was given 90 days in which to transmit its views to the Committee on the measures taken to implement the finding. Because the federal government has no power directly to amend the Tasmanian Criminal Code, it adopted the approach of attempted persuasion. This failed. At the time of writing (well after the 90-day deadline) the federal government has introduced legislation[373] based on its external affairs power which, by force of the Constitution, will override the Tasmanian provisions (but only once a High Court challenge to the Tasmanian laws is brought to establish that inconsistency as the new legislation does not expressly invalidate the Tasmanian law).[374] There is much debate about both the wisdom as well as the legality of such a move with particularly the issue of states' rights featuring predominantly. In the meantime, Nick Toonen and his lover might still be sent to prison.

Both cases, however, illustrate a positive attitude of the Committee towards making the Covenant as effective as possible. The approach to exhaustion of local remedies and to the ratione temporis aspects of the Protocol illustrate this. Its approach to the ratione materiae aspects also appears to be consistent, as its view on the nature

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[372] Rule 96

[373] Human Rights (Sexual Conduct) Act, 1994

[374] This problem is discussed below in Chapter 5.

of arbitrariness (discussed below) shows. Again the interpretation in both cases is to make the Covenant locally effective. Nevertheless, the approach to interpretation tends to be traditional rather than "postmodern". The Toonen case, for example, leaves the issue of morals as a justification for laws invading privacy as wide as it ever was. The equality and equal protection issues arising in Article 26 were ignored by the majority. The equation of "sex" with "sexual orientation", while creating the potential for the further empowerment of homosexual men and lesbians, is simply wrong and reduces sexual orientation to a matter of biology, thus allowing international human rights law to avoid lifestyle issues. The system itself is placed firmly in the Westphalian model where, while individuals now have a foot in the door, the nation-State is the main actor around which the action in the play revolves. This makes the domestic laws which, while they may be found to be arbitrary and thus in contravention of the Covenant, presumptively valid until an individual, within the system, makes a complaint and proves otherwise. And even then an effective remedy might not be forthcoming.

The problems are therefore both of content and of structure, both international and domestic.

The implementation procedure for the ICCPR thus has flaws. The enforcement procedure is effectively non-existent. Problems particularly with respect to the First Optional Protocol include the restrictions on admissibility of complaints, the

requirement that local remedies be exhausted, the margin of appreciation adopted by the Committee, and, in the case of federal nations like Canada and Australia, the fact that the federal government (which is responsible in international law for violations) may have no direct legislative power to remedy the situation. However, it is salutary to remember the caution of the late Walter Tarnopolsky who wrote:

> ... let me remind you again how recently we have come to accept international supervision of domestic implementation of human rights. In other words, it is unfair to gauge progress in this field by measuring from one hundred percent. Rather, one has to measure from zero. And from that point of view there has been progress.[375]

But in the absence of truly effective implementation and enforcement of international human rights norms, their symbiotic relationship with domestic systems becomes crucial, not only to their implementation but also to their very meaning. In the following discussion I will identify this symbiosis as being of three types: express (where direct reference is made in the Covenant to domestic legal systems), implicit (where the terms used are not defined in the Covenant and must rely on domestic definitions) and functional (where human rights are affected by the non-arbitrary operation of the domestic system).

4.7.4 The non-derogable rights: fact or fallacy?

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[375] Walter Tarnopolsky, "Human Rights, International Law and the International Bill of Rights" (1985-6) 50 Saskatchewan Law Review 21 at 37.

Derogations to the Covenant are possible "in time of public emergency which threatens the life of the nation."[376] This is again initially determined by the State concerned (under Article 4(1) its existence must be "officially proclaimed"), proposals to include an automatic review process having been rejected.[377] When it has fallen to be determined by a third party, the results have been varied[378] or inconclusive.[379] Although the extent of derogations must be "strictly required by the exigencies of the situation" and must not be inconsistent with international law

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[376] Article 4. For a discussion, see Thomas Buergenthal, "To Respect and to Ensure: State Obligations and Permissible Derogations", Chapter 3 in Henkin: The International Bill of Rights, ante, and Joan F. Hartmar, "Derogation From Human Rights Treaties in Public Emergencies" (1981) Harvard International L.J. 1. A discussion and references to much of the literature can be found in Meron: Human Rights Law-Making ..., ante, at 86-92. See also Jaime Oraa: Human Rights in States of Emergency in International Law (1992, Clarendon Press, Oxford).

[377] For example, a Belgian proposal in UN Doc. E/CN.4/528 (1951), at 29-30. See also the discussion by Hartman, ante, at pp.21-23.

[378] For example, under the similar terms of the European Convention, the Commission and the Court held in the Lawless Case that such an emergency did exist in the Republic of Ireland (Report of the European Comm. on Human Rights, "Lawless Case" [1960-61], Eur. Court of Human Rights, Ser. B, at 82) and that it did not exist in the Greek Case ([1969] Yearbook of the Eur. Conv. on Human Rights 45 (Eur. Comm. on Human Rights). Note, however, that in both these cases both the Commission and the Court held that it was ultimately up to them to make this decision: the margin of appreciation does not operate as freely with respect to the permissibility of derogations. In Ireland v United Kingdom (EHRR, Ser. A, No.25) the Court held that a wide margin of appreciation was appropriate, even in derogation cases (at para. 207). See generally R. St J. Macdonald, "The Margin of Appreciation", Chapter 6 in R. St J. Macdonald, F. Matscher & H. Petzold (eds): The European System for the Protection of Human Rights (1993, Martinus Nijhoff, Dordrecht).

[379] For example, deliberations of the Human Rights Committee on the Reports under Article 40 by Chile and the United Kingdom: see UN Docs. CCPR/C/SR.127-30, 147-49 (1979) and CCPR/C/SR. 67, 69, 70 (1978); see also the discussion in Hartman, ante, at pp.29-31, and in Meron, ibid.

or involve discrimination,[380] unless this falls to be deliberated in the Human Rights Committee or elsewhere,[381] (either through the reporting procedure, or complaints brought under Article 41 or the Optional Protocol) this extent is also in fact determined by the State Party concerned as the procedures are all of the ex-post facto variety, and place heavy (although not total) reliance on the State's interpretation of the situation.[382] The extent to which a domestic court could intervene in the matter is controversial[383] and, in transformationist countries, virtually non-existent. The strong language succumbs once again to the overriding paradigm of State sovereignty with respect to internal matters, and has prompted

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[380] According to Oraa, the five essential features are that there must be an actual or imminent emergency; it must affect the whole population; it must threaten the very existence of the nation; the declaration of the emergency must be a measure of last resort; and the emergency measures must be temporary: Human Rights in States of Emergency, ante, pp.27-30.

[381] This aspect has been little debated by the Committee: see Hartman, ante, at pp.35ff, and Meron, ibid, although it has adopted the approach that in the absence of justificatory evidence it "cannot conclude that valid reasons exist to legitimise a departure from the normal legal regime prescribed by the Covenant.": UN Doc. A/36/40 (1981) (Landinelli Silva v Uruguay) at 133. (In that case members of certain political groups who had been candidates for election had been deprived of the right of political activity for 15 years on the basis that a state of emergency existed. No distinction was drawn between those who had promoted their political views peacefully and those who had done so by violence. The State had not shown the necessity for this.) The discussion of it under the European Convention by the European Court in Ireland v United Kingdom [1978] Yearbook of Eur. Conv. on Human Rights at para. 80ff. has been described by Hartman as a "near-total abdication to government discretion" (at p.35).

[382] See also the notion of the "margin of appreciation" when determining whether a "state of emergency" exists, where the European Court of Human Rights has held that the domestic government is in a better position than an international court to make the relevant assessment: Ireland v United Kingdom 2 EHRR 25. For a discussion, see Ronald St John Macdonald, "The Margin of Appreciation in the Jurisprudence of the European Court of Human Rights" in International Law at the Time of its Codification: Essays in Honour of Roberto Ago (1987, Dott. A. Giuffre, Milan), pp.187-208.

[383] See Oraa, ante, pp.40-42.

Hartman to write that the right to use derogations reflects "a certain tentativeness about the individual as a subject of international law and grave fears by governments about the consequences of a binding commitment to the international protection of human rights."[384]

There are seven "non-derogable" Articles. Article 4 provides that no derogations may be made to Articles 6 (the right to life), 7 (freedom from torture), 8(1) (slavery), 8(2) (servitude), 11 (no imprisonment merely for failure to fulfil a contractual obligation), 15 (no retrospective criminal offences), 16 (the right to recognition as a person before the law) and 18 (the right to freedom of thought, conscience and religion). These therefore represent fundamental rights under this Covenant of a type which can never be abrogated. However, as Meron cogently points out,[385] the "due process" guarantees of Article 14 are not non-derogable, so that arguably the right to life (which is not expressed as an absolute right but provides that no-one shall be arbitrarily deprived of life) in the non-derogable Article 6 could be affected in such a way that death sentences could be imposed following summary procedures in times of "emergency". In addition, of these non-derogable rights, two are specifically subject to a State's domestic laws,[386] two

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[384] Joan Hartman, "Derogation From Human Rights Treaties ...", ante, p.11.

[385] Human Rights Law-Making, ante, at 93ff.

[386] Articles 6 and 18

have no meaningful operation without State law,[387] and the remaining three are subject to interpretation.[388] Thus, while Canada has made no reservations to the ICCPR, and Australia has made no reservations to these particular articles, their content, as well as application, is neither clear nor uniform so that the domestic legal systems can, and do, have a significant impact on them despite the seemingly "hard" nature of the international rules generated.

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[387] Articles 15 and 16

[388] Articles 7, 8 and 11

Aspects of symbiosis in the non-derogable articles

(a) Article 18: international norms explicitly reliant on domestic law

Article 18 provides that "Everyone has the right to freedom of thought, conscience and religion". This is an elaboration of Article 18 of the UDHR. Its application is qualified by Article 18(3) which provides:

> Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.

While there are thus requirements which set parameters on limitations made to this freedom, all of the words underlined are subject to the discretionary interpretation (and application) of the State, at least in the first instance. Thus, for example, the Human Rights Committee has held that this article does not provide for a right of conscientious objection to military service.[389] In 1993, this was modified but not overturned when the Committee stated:

> The Covenant does not explicitly refer to a right of conscientious objection, but the Committee believes that such a right can be derived from article 18, inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one's religion or belief. When this right is recognised by law or practice, there shall be no differentiation among conscientious objectors on the basis of the nature of their particular beliefs; likewise, there shall be no discrimination against

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[389] L.T.K. v Finland, Communication No. 185/1984, Selected Decisions of the Human Rights Committee under the Optional Protocol, Vol. 2, UN Doc. CCPR/C/OP/2, p.61.

> conscientious objectors because they have failed to perform military service.[390]

The words underlined make it clear that it is still the domestic system which is crucial as to whether conscientious objection to military service will be tolerated. Thus, even though the Committee stated that "paragraph 3 of article 18 is to be strictly interpreted: restrictions are not allowed on grounds not specified there",[391] the article is still ultimately subject to domestic laws and values.

Canada interpreted this article as not requiring any amendments to the Lord's Day Act[392] and stated in its first report to the Human Rights Commission under article 40:

> ... Parliament, when it enacted the Lord's Day Act ... made Sunday, which for Christians is a holy day, a day of rest for all, save those who can engage in work authorised under that Act. Even though the purpose of this Act is to preserve the holy character of the most important day of the week for Christians, it does not restrict freedom of religion as recognised in the present Article. As clearly indicated by Ritchie J. in the decision he rendered on behalf of the Supreme Court of Canada in Robertson and Rosetanni v The Queen (1963) S.C.R. 651 at pages 657 and 658, this Act does not affect or restrict the right of non-Christians to have, and practice [sic], their religion, nor does it affect their right to propagate their beliefs. For non-Christians, the practical results of the Lord's Day Act are financial rather than religious: they are prevented by this Act from working or doing business on Sunday. This is doubtless an inconvenience, but it does not

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[390] General Comment No. 22(48), adopted by the Committee at its 1247th meeting (48th session), July 20, 1993; UN Doc. CCPR/C/21/Rev.1/Add.42 (September 7, 1993), paragraph 11, emphases added.

[391] Id., paragraph 8

[392] R.S.C. 1970, ch. L-13

> constitute a suppression, restriction or violation of their freedom of religion.[393]

There is thus a clear public/private dichotomy in operation in this Canadian interpretation which does not completely accord with the provisions of Article 18(1),[394] but the public/private distinction resurfaces in paragraph 4 which provides:

> The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

The notion of equality is therefore not only imprecise, but skewed. (This has since been somewhat alleviated by the Children's Convention discussed below).

The existence of qualifiers such as "public safety", "public health", "public morals" and others such as "according to law" and "public order (ordre public)"[395] and "national security" (which are indicated below), relate to a

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[393] First Report of Canada on the Implementation of the Provisions of the Covenant, ante, pp.82-3. The modifications to this approach produced by the Canadian Charter are discussed in Chapter 5.

[394] "Everyone shall have ... freedom ... in public or private ... to manifest his religion or belief in worship, observance, practice and teaching."

[395] This phrase was not meant to mean merely public order but rather the civil law notion which was used as a basis for negating or restricting private agreements, or the exercise of police power, and relates to the body of political, moral and economic principles considered essential to the maintenance of the social structure. In the common law context, the term is closer to public policy considerations than indicating merely the absence of public disorder. There were some statements in the Third Committee, however, that the phrase was nevertheless vague: see Sohn, "A Short History ...", ante, pp 111-112. The absence of the French translation of this term in Article 18 leads Nowak to conclude (ante, at p.327) that its meaning here is narrower than the civil law notion.

conception of social interests in the relationship between the individual and society, and thus remain important for four principal reasons. First, while they indicate that governments may be bound by human rights, they are symptomatic of the fact that a precise meaning of many of those rights and freedoms is unobtainable in the absence of the domestic legal system. Second, they are themselves vague. Third, other fundamental terms (such as "marriage" etc discussed below) are not defined in the Covenant and rely on these phrases (especially the phrase "according to law") for meaning. Fourth, the procedural bias is set in favour of the State which retains a default advantage: it can rely on its laws, and it will be up to another State or, where possible, an individual to prove that these laws are contrary to internationally recognised standards of equity and justice. (Hence the discussion of the procedural aspects of enforcement and implementation discussed above is an essential part of the ultimate meaning of these provisions in the domestic context.) Admittedly, the Human Rights Committee has held that in cases where the author of an individual complaint under the Optional Protocol has adduced prima facie evidence of a breach of the Covenant and the relevant State withholds information which is exclusively in its possession, the Committee may consider the allegations substantiated in the absence of satisfactory explanations to the contrary by the State.[396] Thus a State is not always immunised from a burden of proof. But a shift in the burden of proof with respect to facts cannot totally overcome these

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[396] Lewenhoff and Bleier v Uruguay, Communication No. 30/1978, Selected Decisions under the Optional Protocol, Vol. 1, UN Doc. CCPR/C/OP/1, pp.109-12.

systemic factors.

(b) Articles 6, 15 and 16: international norms functionally reliant on domestic laws

Article 6, which provides that "every human being has the inherent right to life", is an elaboration of Article 3 of the UDHR. But this right shall be "protected by law" and no-one shall be "arbitrarily deprived of his life." It concedes that the death penalty exists[397] and is effectively silent on issues such as abortion and voluntary euthanasia. Australia and Canada no longer have the death penalty, but Australia did at the time it signed the Covenant. No execution has taken place in Canada since 1962 and Canada abolished capital punishment except for certain offences under the Code of Service Discipline by the Criminal Law Amendment Act (No.2) 1976.[398] Abortions can be performed in both countries and (to a more limited extent) euthanasia. The notion of the "inherent right to life" in Article 6 is therefore amorphous and consolidates rather than explains the UDHR provision. Inherent rights have been modified by sovereignty: the meaning of the right to life in Canada and Australia cannot be determined by reference to Article 6 alone. The

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[397] Article 6(2): it shall be "imposed only for the most serious crimes". The Human Rights Committee has also admitted that the article does not per se abolish the death penalty: General Comment No.6/16, July 27, 1982, 9 E.H.R.R. 169 at 174.

[398] S.C. 1974-75-76, ch. 105

Human Rights Committee has stated in Camargo v Colombia[399] that Article 6 means that domestic law must control and limit the circumstances in which a person may be deprived of his life by the authorities of a State.

To a large extent, this issue depends on the interpretation of the "arbitrary" nature of the deprivation of life: does it mean "illegal" or "unjust"? The issue is important as the word "arbitrary" or "arbitrarily" appears four times in the UDHR[400] and four times in the ICCPR.[401] If it means the former, then domestic law will decide the issue, even if that law is oppressive. If it means the latter, the precise meaning becomes less clear but can include the term "illegal" as well as elements beyond the strict parameters of domestic law. The issue, as succinctly put by the representative of the United Kingdom to the Third Committee when it debated the UDHR[402] was whether rights should derive from laws, or laws be derived from rights.

Studies of the travaux préparatoires of the UDHR[403] indicate that a wider meaning of "arbitrary", encompassing both illegality and unjustness, was intended.

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[399] Communication No. 45/1979, Selected Decisions under the Optional Protocol, Vol. 1, UN Doc. CCPR/C/OP/1, pp.112-18.

[400] Articles 9, 12, 15 and 17.

[401] Articles 6, 9, 12 and 17.

[402] 3 G.A.O.R. Part I (1948) at p.248. The Australian representative agreed (at p.250).

[403] See in particular Parvez Hassan, "The Word "Arbitrary" as Used in the Universal Declaration of Human Rights: "Illegal" or "Unjust"? (1969) 10 Harvard International Law Journal 225

The Commission on Human Rights and the Third Committee emphasised their concern about oppressive laws and were interested as much in "arbitrary laws" as in "illegal acts."[404] The laws themselves had to be in accordance with standards of equity and justice.[405] The preparatory work of the ICCPR is "less helpful"[406] but indicates a similar meaning.[407] Such an approach in fact runs counter to traditional Australian and Canadian approaches, based on the British model, that the notion of arbitrariness was one to be left to the legislature rather than be subject to interpretation by another body.[408] If the latter were the case, the

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[404] For example, Mr Malik, when Chairman of the Third Committee, explained: "In the wording of the Commission on Human Rights, the word "arbitrarily" was not synonymous with "illegally"; it had a wider scope. The Commission had wished to use a general term suggesting a criterion above and beyond the laws of States, to which those laws should conform." (3 G.A.O.R., ante, at p.348). The Soviet representative had argued, with respect to Article 15 (dealing with the right not to be arbitrarily deprived of a nationality) that such questions: "... fell entirely within the internal competence of each State. To grant nationality or to take it away was a prerogative of sovereign States with which no third party should interfere." (Id., p.355). The majority of the Committee disagreed, M. Cassin remarking: "... no one could be deprived of nationality contrary to existing laws, and those laws themselves must not be arbitrary." (Id., p.358, emphases added).

[405] See Hassan, ante, at pp.242-51; Jimenez de Arechaga, "The Background to Article 17 of the Universal declaration" (1967) 8 Journal of the International Commission of Jurists 34.

[406] Parvez Hassan, "The International Covenants on Human Rights: An Approach to Interpretation" (1969) 19 Buffalo L.R. 35 at 41.

[407] The majority opinion of the Third Committee has been described as defining "arbitrary" as: "a safeguard against the injustices of States, because it applied not only to laws but also to statutory regulation and to all acts performed by the executive. An arbitrary act was any act which violated justice, reason or legislation, or was done according to someone's will or discretion, or which was capricious, despotic, imperious, tyrannical or uncontrolled." (Report of the Third Committee, A/4045 (December 9, 1958), 13 G.A.O.R. Annex, Agenda Item 32, at 7, para. 49 (1958-9); Hassan, ibid. See also Sohn, "A Short History of United Nations Documents on Human Rights", ante, at pp.109-111.

[408] Australia and the United Nations, ante, p.265

Covenants would establish general principles to which domestic law alone would provide the concrete application. This approach thus appears to have been overridden. This is especially so when one also takes into account the protective function of the law contemplated in Article 6.[409] In Barbato v Uruguay[410] the Human Rights Committee said that Article 6 is breached where State authorities, either by act or omission, are responsible for not taking adequate measures to protect a person's life. This would be of direct relevance in Australia to the inquiries with respect to aboriginal deaths in custody.[411] It was not, however, raised as a particular issue there, thus indicating that in any event the effect of a human rights "regime" depends upon education as well as legal structures and normative content.

Articles 15 and 16, which provide for non-retroactivity of criminal offences and the right to recognition as a person before the law, prescribe rights but have no real meaning or operation outside the context of a domestic legal system. The human dignity which they support is a dignity within the parameters set by a functioning domestic legal system. Parliaments in Canada and Australia have the domestic power to enact retrospective legislation, even though this is the exception

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[409] "This right shall be protected by law": Art.6(1).

[410] Communication No. 84/1981, Selected Decisions of the Human Rights Committee under the Optional Protocol, Vol. 2, UN Doc. CCPR/C/OP/2, pp.112-16.

[411] Report of the Royal Commission into Aboriginal Deaths in Custody, 1991 (AGPS, Canberra).

rather than the rule. In MacIsaac v Canada[412] a prisoner alleging that Canada was in breach of Article 15 had been convicted of a crime while on parole. As a result he forfeited, and was required to re-serve, the time spent while on parole by virtue of the Parole Act 1970, which had since been amended so that such forfeiture was no longer automatic. (Article 15 provides that if lighter penalties are introduced, the prisoner is entitled to them). The new amendment, however, did not abolish such forfeiture but no longer made it automatic. The sentencing judge was required to take the facts of each case into account and exercise a discretion in the matter. Consequently, the Committee's view was that Article 15 had not been violated. Similarly, in A.R.S. v Canada[413] the retroactive introduction of supervision with parole under the same Act was held not to be a "penalty".

(c) Articles 7, 8 and 11: international norms implicitly reliant on or affected by domestic laws

The remaining three articles of this non-derogable batch deal with torture (Article 7), slavery and servitude (Article 8(1), (2)) and imprisonment for failure to fulfil a contract (Article 11). All of them need definitions of the principal terms. Article 11 ("No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation") has no counterpart in the UDHR. What is or is not a

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[412] Communication No. 55/1979, Selected decisions of the Human Rights Committee under the Optional Protocol, Vol. 2, UN Doc. CCPR/C/OP/2, pp.87-90.

[413] Communication No.91/1981

"contract" and an "obligation" under a contract needs domestic legal specification: the imprisonment may be lawful or unlawful depending upon whether the domestic system defines the obligation as contractual or not.

With respect to slavery and, since 1984, torture, there are other treaties which may help provide these definitions, but there is nothing within the ICCPR itself. With the exception of a reference to medical and scientific experimentation, Article 7 dealing with torture and cruel, inhuman and degrading treatment is exactly the same as Article 5 of the UDHR, and just as amorphous. It is unclear whether it would apply to domestic violence, for example, although it might as the Human Rights Committee has stated that the scope of the article is wide and could be used to protect "pupils and patients in educational and medical institutions."[414] However, the domestic influences determining the meaning of this Article can be found in the Committee's decisions regarding the extradition of prisoners from Canada to the United States where they could face the death penalty. It has held that this does not prima facie violate Article 7 (or Article 6)[415] unless the manner of execution involves physical or mental suffering.[416] Article 8, paragraphs 1 and

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[414] General Comment No. 7/16, July 27, 1982, 9 E.H.R.R. 169 at 176. See also the decision of the European Court of Human Rights that birching as a form of punishment was degrading and therefore contrary to the corresponding article of the European Convention: Tyrer v U.K. Eur. Ct. H.R., Series A, Vol.26 (judgement of April 25, 1978).

[415] Kindler v Canada, Communication No.470/1991

[416] Chitat Ng v Canada, Communication No.469/1991: extradition to a state where execution would be carried out by asphyxiation with cyanide gas held to be a breach of Article 7.

2 dealing with slavery and servitude are almost exactly the same as Article 4 of the UDHR but with a variation in the setting out. Considering that under the matrimonial laws of Canada and Australia at the time of signature wives could be compelled to return to their husbands, and that the treatment of Aborigines under various Australian Management Acts[417] was immunised from other civil liberties, the amorphous nature of these rights and the lack of a specific analogy in domestic law meant that they were in effect driven by the domestic legal system into an obscure corner of the local juridical consciousness. The first report of Canada to the Human Rights Committee under Article 40, with respect to Article 8, simply stated: "Slavery and the slave trade do not exist in Canada ... Servitude is non-existent in Canada."[418] This bald statement made no attempt to analogise with possible instances of servitude of particular classes of people because such juridical analogies simply did not exist in Canadian law. With respect to the same Article, the Second Report of Australia[419] was a little more detailed but concluded[420]

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[417] For example, the Queensland Aboriginals Preservation and Protection Acts 1939-46 which provided that no aboriginal person would be employed without the permission of the Director of Native Affairs (s.14(1)), the Director could order the employer to pay an aborigine's wages to another person, such as the superintendent of a reserve (s.14(6)), the Director could take possession of and sell or dispose of an aborigine's property (s.16(1)), an aborigine's will was void unless approved and witnessed by the Director (s.16(2)), aborigines could not marry without the Director's consent (s.19), and the Director could remove an aborigine to a reserve without having to show cause (s.22). See also Garth Nettheim: Victims of the Law: Black Queenslanders Today (1981, George Allen & Unwin, Sydney), especially Chapter 2.

[418] International Covenant on Civil and Political Rights: First Report of Canada on Implementation of the Provisions of the Covenant, March 1979, pp.25-6.

[419] CCPR/C/42/Add.2

[420] At p.98

that Queensland legislation designed to break an electricity strike[421] and under which non-employees of the electricity authority could be ordered to work was not a breach of the Article because no penalty for non-compliance was imposed.[422]

Thus, even though all of the above batch of rights are "non-derogable" they do not represent a standard separate from and superior to domestic law. They are in an explicit, implicit or functional symbiotic relationship with it and the nature and effect of the rights is consequentially modified. Often, they are realistically meaningless without it.

4.7.5 The derogable rights: Aspects of symbiosis

(a) Explicit reliance on domestic laws

A connexion with domestic law exists explicitly in all but eight of the other substantive articles of the Covenant, and of those other eight, it is implicit in six of them.

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[421] Electricity (Continuity of Supply) Act 1985

[422] Incredibly, in the Summary Records of the Human Rights Committee's discussions with the Australian representatives on the Second Report, this issue does not appear to have been raised: CCCPR/C/SR.806-809 (April 5, 8, 11, 1988).

Article 9 (the right to liberty and security of the person and freedom from arbitrary[423] arrest or detention), provides that "No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law" and providing an enforceable right to compensation for "unlawful" arrest. While this article is a considerable elaboration upon Article 9 of the UDHR and specifies being informed of the charges and being tried within a reasonable time, it is ultimately linked, and its effectiveness bound to, the domestic criminal law system. It therefore provides a domestically-focussed notion of equality. The Human Rights Committee has admitted as much in its 1984 Report:

> Although many communications submitted to the Committee claim that the victim has been subjected to arbitrary arrest, this allegation has proved to be difficult to establish, since the State parties have been able to show in most cases that the arrest was carried out according to the law of the state concerned. ... [The Committee has found violations of Article 9(1)] where the facts showed no arrest warrant had been issued or that the victim was not released from prison after serving his term ...[424]

Moreover, Canada, in its first report to the Human Rights Committee under Article 40 implied that there is a rebuttable presumption in favour of the consistency of domestic law with the Covenant:

> In Gamracy v The Queen (1974) S.C.R. 640 ... the Supreme Court of Canada held that a peace [sic] officer who arrests someone without a

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[423] There is also therefore a functional connection here: see the discussion above with respect to Article 6 and the meaning of the term "arbitrary". An illustration of its application here is the view of the Human Rights Committee in van Alpen v the Netherlands (Communication No.305/1988) where the detention of a lawyer for over nine weeks to force him to waive his obligation of secrecy with respect to criminal investigations of his clients violated Art.9 even though carried out under Dutch law because it was neither reasonable not necessary.

[424] Report of the Human Rights Committee GAOR (39th Session), Supplement No.40, UN Doc. A/39/40 (1984).

> warrant fully complies with the requirements of [the Criminal Code] if he informs the person that he is being arrested under a warrant in force in the territorial jurisdiction within which the arrestee is found. The court went even farther and stated that it was not part of the officer's duty to obtain the warrant to show the accused, or to ascertain its contents. This being the law in Canada, it can be asked whether a peace officer who arrests an individual after having advised him that he is being arrested under a warrant, informs that person of the reasons of his arrest as he is required to do under the Covenant [in Article 9(2)] if he does not disclose the content of the warrant. If the information provided by the officer in the Gamracy decision is sufficient in the context of the Covenant, Canadian law is consistent with the Covenant; if the information is not sufficient, there will be a conflict between the Covenant and Canadian law. However, until the contrary is demonstrated, it must be presumed that Canadian law is consistent with the first part of Article 9(2) of the Covenant.[425]

The connexion exists expressly in Article 12 (the right to freedom of movement and residence) which is accorded to "everyone lawfully within the territory of a State" and which is specifically restricted where "provided by law" as necessary to protect national security, public order,[426] public health or morals (all of which are determined initially - and, in the absence of an effective and successful challenge, solely - by the State concerned).[427] The same article also provides that "No one shall be arbitrarily deprived of the right to enter his own country" which

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[425] First Report of Canada on the Implementation of the Provisions of the Covenant, ante, p.28, emphasis added.

[426] Here in the sense of "ordre public", roughly corresponding in Common Law terms to public policy considerations.

[427] The notion of the "margin of appreciation" used by the European Court of Human Rights has been described by Francis Jacobs as the area of discretion left to states by the (European) Convention and that: "Interference with the rights guaranteed by the Convention does not have to be shown to be actually necessary ... it has to be shown only that the authorities had sufficient reason to believe that it was necessary.": The European Convention on Human Rights (1975, Clarendon Press, Oxford), at p.201. See also Ireland v United Kingdom (ECHR Ser. A, No.25) where the Court held that a wide margin of appreciation was appropriate (at para. 207).

means that he or she can be if the domestic legal system so provides, as long as the law does not allow exclusion on a discriminatory ground or is applied in an unreasonable manner. These provisions actually mark a regression from the less qualified right in Article 13 of the UDHR on which they are based. The first report of Canada to the Human Rights Committee under Article 40 states that "liberty of movement has not received any general statutory recognition... [but] this lack of express statutory recognition does not affect liberty of movement in any way, however, because, in Canadian law, anything not prohibited is permitted."[428] This is not the point of the Covenant, which requires States to "ensure" the rights to people under Article 2. This situation has been alleviated by the mobility rights provided by section 6 of the Canadian Charter, but this view persists in the Australian Reports.[429]

It exists expressly in Article 13 ("An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law"). This is the nearest in the ICCPR to Article 14 of the UDHR which provides that "everyone has the right to seek asylum". This right has been considerably hobbled by the imposition of domestic law together with the assumption in the article that the State will determine whether the person

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[428] First Report of Canada on the Implementation of the Provisions of the Covenant, ante, pp.51-2.

[429] See Australia's Second Report, ante, p.122, paragraph 309.

concerned is an alien in the first place. In Maroufidou v Sweden[430] a Greek national was expelled from Sweden under the Aliens Act on suspicion that she had been involved in terrorism. The complainant at all times contended that the evidence of this was purely circumstantial. The Committee held that the provisions of the domestic law on which an expulsion is based must be compatible with the Covenant[431] (so that any law at all, however venal, will not suffice)[432] but otherwise, as long as they are applied in good faith and in a reasonable manner, the decision will be one taken "in accordance with law" and therefore will not breach Article 13 (as was found to be the case here).[433]

The connexion with domestic law is also express in the extensive Article 14 which provides for equality before courts and tribunals, a fair hearing, and minimum guarantees for people charged with crimes[434] such as being informed promptly of the charge, having adequate time and facilities to mount a defence, and being tried

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[430] Communication No. 58/1979, Selected Decisions under the Optional Protocol (Second to Sixteenth Sessions) (1985, United Nations New York), UN Doc. CCPR/C/op/1, pp.80 83.

[431] Id., paragraph 9.3

[432] The European Court of Human Rights, in interpreting the similar phrase "determined by law" in the European Convention, has held that the law must be adequately accessible - a person must have an adequate indication of the legal rules applicable to a given case, so that unpublished internal policy directives would not be sufficient for this purpose - and it must be sufficiently precise to enable a person to regulate his or her conduct: Sunday Times Case, 30-2 Eur. Ct. H.R. 30 (Ser.A) (1979).

[433] Id., paragraph 10.2

[434] The ability of the State, as opposed to a third party adjudicator, to determine this issue (thus allowing a State to evade the Article by designating the matter as something other than criminal) is itself open to controversy: see Nowak, ante, pp.243-4.

without undue delay. However, an aspect of this right, namely the right to be assumed innocent until proven guilty, is provided "according to law". This not only means that the reversal of this presumption and the corresponding onus which applies to some criminal offences and can be found operating generally in some countries such as France, is consistent with the provision, but also that the designation of the matter as criminal or civil in the first place is left up to the State.[435] The right to an appeal is also "according to law" as is the right to compensation in the event of a wrongful conviction.[436]

Moreover, the right to legal aid in Article 14(3)(d) exists "where the interests of justice so require". This has been held by the Human Rights Committee not to apply in cases which are trivial or only lead to a light sentence.[437] Thus the notion of justice in this sense is at the control of the State setting the penalties.

Australia originally made several reservations to this article when ratifying the Covenant. As a result, the provision of adequate facilities to prepare a defence did not extend to providing prisoners with all the facilities that their legal

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[435] In J.L. v Australia (Communication No.491/1992) a complaint by a Victorian solicitor about being jailed for refusing to pay for a practicing certificate as a breach of Article 14 was rejected by the Human Rights Committee as not being compatible with the provisions of the Article and that the matter was essentially one of domestic law.

[436] Article 14(5), (6)

[437] O.F. v Norway, Communication No. 158/1983, Selected decisions of the Human Rights Committee under the Optional Protocol, Vol. 2, Un Doc. CCPR/C/OP/2, p.44.

representative might have. The right to have the trial proceed in the accused's presence was subject to the exclusion of an accused whose conduct made it impossible for the trial to proceed (presumably in the opinion of the judge running it). The right to free legal assistance was subject to legal requirements of contribution to cost and was not guaranteed in non-indictable offences.[438] All of these reservations were withdrawn on December 6, 1984,[439] except for one which remains: the right to compensation in the event of a miscarriage of justice, which must be provided "according to law" under the Covenant, is reserved to the extent that the compensation 'may be by administrative procedures rather than pursuant to specific legal provision."[440] There is thus no right to this compensation in Australia. This indicates another aspect of the express, implicit or functional symbiotic relationship between the international norm and the domestic legal system which it is supposed to affect. By actually removing the reference to domestic law, the compensation can be given as a matter of administrative discretion - and quite arbitrarily. This was of recent practical interest in Australia when the conviction of Mrs Lindy Chamberlain for the murder of her baby Azaria (which she had always maintained had been taken by a dingo at Ayres Rock while on a camping holiday) was overturned on appeal. Compensation for the several years Mrs Chamberlain had spent in jail was a matter for the Northern Territory government, and was awarded according to purely political considerations.

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[438] Status of International Instruments, ante, p.87

[439] Id., p.86

[440] Id., p.87

The connexion is express in Article 17, which provides that one's privacy, family, home or correspondence will not be subjected to "arbitrary or unlawful interference", that no one will be subjected to "unlawful" attacks upon their reputation, and that everyone has the right to the protection of the law[441] against such attacks. The wording is almost the same as Article 12 of the UDHR. It does not provide for a right to privacy as such, but rather it provides for freedom from arbitrary or unlawful interference with that privacy The central concept of privacy itself is an undefined given and, in the context of the wording of the Article, relies in the first instance on domestic laws and values. The difference between this Article and its equivalent in the UDHR is in fact the insertion of the term "unlawful". Thus, for example, telephone tapping, if done according to law, is not a prima facie breach of this article. The Human Rights Committee has observed that such a law itself must comply with the Covenant.[442] This means that any law at all might not be sufficient to satisfy the qualification in the Article, and the issue becomes whether the law is "arbitrary".[443] In a somewhat circular fashion, this means that an interference, even if provided for by the law, should be in

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[441] In Pinkey v Canada (Communication No.27/1978: A/37/40 (1982), p.101) the Human Rights Committee held that Canadian laws allowing a discretion to open prisoners' mail and a standard practice that this mail was not opened except in suspicious circumstances did not satisfy the requirement of Art 17(2) that safeguards against arbitrary interference with correspondence should be protected by law. There is thus a positive right to protection in the Article, as well as a negative sanction against interference.

[442] General Comment 16(32), adopted on March 23, 1988: UN Doc. CCPR/C/21/Rev.1

[443] Ibid.

accordance with the provisions, aims and objectives of the Covenant,[444] and also that the application of the law is reasonable and non-discriminatory.

Australia made a reservation (which it withdrew in 1984) to this article when it ratified the Covenant, which provided that it reserved the right to enact laws which impinged on a person's privacy if to do so was "necessary in a democratic society in the interests of national security, public safety, the economic well-being of the country, the protection of public health or morals or the protection of the rights and freedoms of others."[445] This expressly imported the local value system into the right: suspected homosexuals, when homosexuality was illegal and regarded as immoral, could have their mail opened, their telephones tapped and their homes searched for evidence of unlawful deviance. The removal of the reservation in fact makes little practical difference if the laws of the country maintain such a system of values unless those laws can be shown to be "arbitrary."[446] The effect of the symbiosis can be that local values are in effect immunised from the impact of internationally agreed human rights. Thus, for example, the Committee in its General Comment referred to above invited States "to indicate in their reports the

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[444] Ibid, paragraph 4.

[445] Status of International Instruments, ante, p.87

[446] The Human Rights Committee observed (ante): " ... the competent public authorities should only be able to call for such information relating to an individual's private life the knowledge of which is essential in the interests of society as understood under the Covenant." The issue then becomes what are the interests of any society and what is essential to them. Even though these are "as understood under the Covenant", the indeterminacy of the principle and circularity of the argument become apparent.

meaning given in their society to the terms "family" and "home", and indicated that even though the principles of the Covenant prevailed, "the protection of privacy is necessarily relative."[447] Equality is thereby made subject to those local values, which can be disastrous for unpopular minorities.

However, international human rights law, once invoked, can be used to help overcome this problem, as occurred in 1992 when the European Court of Human Rights held that the failure of the French courts and authorities to recognise the new sexual identity of a male to female transsexual by failure to rectify her birth certificate was a violation of her right to respect of her private life.[448] The recent decision of the Human Rights Committee in Nicholas Toonen v Australia[449] discussed above is also instructive, indicating that a notion of necessity and proportionality must be considered when deciding the "arbitrary" nature of an act done "according to law". While this can be seen to allow a margin of appreciation to the State, it is a more stringent approach than that adopted in the European jurisprudence. Nevertheless, the default advantage remains with the State as discussed above until a body like the Human Rights Committee makes such a

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[447] General Comment 16(32), ante, paragraphs 5 and 7.

[448] B. v France, European Court of Human Rights, Judgement of 25 March, 1992, Series A, No. 232-C, (1992) 13 Human Rights Law Journal 358. The court thus distinguished its earlier decisions in Rees v United Kingdom (1986) 9 EHRR 56 and Cossey v United Kingdom (1990) 13 EHRR 622, discussed below, but did not overrule them. The issue of domestic values, in the latter cases with respect to the meaning of marriage, is therefore by no means resolved.

[449] Communication No. 488/1992, views given on March 31, 1994, UN Doc. CCPR/C/50/D/488/1992. The communication was in fact made to the Committee the day after the Protocol became binding on Australia.

pronouncement. What is clear, nevertheless, is that for a government to be able to make arguments that actions are done "according to law", there must be some legal regulation upon which to base them. It means that the holding of personal information in databanks, while it can be done, must at least be regulated by law rather than by governmental whim.

The connexion with domestic law is express in Article 19 (the right to hold opinions and freedom of expression), the latter of which is specifically expressed to be subject to "restrictions ... as are provided by law" on the basis that they are necessary to protect the rights or reputations of others, or to protect national security, public order, public health or morals. It is an elaboration of Article 19 of the UDHR, principally in terms of the qualification to its application just mentioned. Indeed, the Human Rights Committee has stated:

> ... in order to know the precise regime of freedom of expression, in law and in practice, the Committee needs ... pertinent information about the rules which either define the scope of freedom of expression or which set forth certain restrictions ... It is the interplay between the principle of freedom of expression and such limitations and restrictions which determines the actual scope of the individual's right.[450]

For many years in Australia prisoners were held to be incapable of bringing defamation proceedings,[451] as it was not "necessary" to protect the reputation of a felon. Equality is once again subject to local values as refracted through the

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[450] General Comment 10(19), Report of the Human Rights Committee, GAOR, 38th Session, Supplement No. 40, UN Doc. A/38/40, p.109.

[451] Dugan v Mirror Newspapers (1978) 142 C.L.R. 583

domestic legal system.[452] Australia made a reservation to this article also - another one which was withdrawn in 1984 - to the effect that radio and television broadcasting, which is subject to considerable legislative regulation in Australia, could be regulated "in the public interest."[453] The removal of this reservation is not without consequence: the remaining qualifications in the substance of the article relate to defamatory imputations, national security, public order, public health and morals, not to the regulation of broadcasting and telecasting. This corresponds with some, but by no means total, deregulation by Australia in this area. It was part, but not the whole, of the argument of the High Court in the Political Advertising Case[454] which held that a prohibition on political advertising at election times was unconstitutional.[455] This contrasts markedly with the Canadian statement in its first report to the Human Rights Committee under Article 40 in which it said that access to broadcasting "is a privilege and not a right" and that therefore provisions of the Canada Elections Act[456] which determine the period during

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[452] See also, for example, the communication to the Human Rights Committee of Hertzberg v Finland referred to above where the Committee refused to question the decision of the Finnish Broadcasting Corporation that radio and television were not appropriate media in which to discuss issues related to homosexuality on the basis of public morals and the fact that "there is no universally applicable common standard" with respect to them: Selected Decisions under the Optional Protocol (Second to Sixteenth Sessions), UN Doc. CCPR/C/OP/1 (1985) at 126. The Finnish Penal Code at the time made it an offence to "encourage indecent behaviour between persons of the same sex."

[453] Status of International Instruments, ante, p.87.

[454] Australian Capital Television v Commonwealth (1992) 66 ALR 695

[455] This case is discussed in detail in Chapter 5.

[456] R.S.C. 1970 (1st Supp.), ch. 14

which political parties may publish and broadcast election publicity, or limit the amount of money candidates may spend during an election, "are easily justified [within the terms of Article 19], their basis being self-evident."[457] The same report also stipulates that the right to freedom of expression is not absolute and that, as a result, provincial and territory ordinances can impose limitations on it, such as the Northwest Territories Motion Pictures Ordinance[458] which allowed censorship of films that are "injurious to public morals or opposed to public welfare."[459] The clear (and incorrect) impression is that the mere existence of such legislation initiates the legitimate qualifiers to this right in Article 19(3)(b). The domestic laws limiting the freedom must be "necessary". This means that they must be proportional to the end sought.[460] This issue was in fact considered by the Human Rights Committee in 1993 in Ballantyne, Davidson and McIntyre v Canada[461] which involved Quebec legislation which required the use of French only in public bill-posting and commercial advertising outdoors, and in public transport and establishments such as shopping centres indoors (the so-called "outside-inside" laws). The Committee found that restrictions on the freedom of expression must be provided for by law, and be necessary to protect the rights and

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[457] First Report of Canada on the Implementation of the Provisions of the Covenant, ante, pp.83-85.

[458] R.O.N.W.T. 1974, ch. M-14, s.20.

[459] First Report ..., ante, p.164

[460] See Nowak, ante, pp.351-2.

[461] Communications Nos. 359/89 and 385/89 (1993) 14 Human Rights Law Journal 171

reputations of others. (These laws did not relate to national security, public health, morals, etc within the terms of Article 19(3)(b).) It was found that such laws were not necessary to achieve the objectives allowed by Article 19 (for example, it could be provided that all advertising be in both English and French). They therefore contravened Article 19.[462] Significantly, the Supreme Court of Canada had declared these laws to contravene the right of freedom of expression in the Canadian Charter of Rights and Freedoms. This had been overcome by Quebec re-enacting the restrictions and using the override provisions in section 33 of the Charter. In this instance, international human rights law was able to be used to overcome a legitimate use of the letter of domestic law which contravened the spirit of that law. In addition, as the rights in the Covenant cannot be used to limit others, Article 19 has been held to be inapplicable in cases where Article 20(2) prohibiting racial or religious hatred is involved.[463]

The connexion with domestic law exists expressly in Article 21, which provides for the right to peaceful assembly, subject to restrictions "imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public

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[462] Id., paragraph 11.4

[463] J.R.T. and the Western Guard Party v Canada (Communication No.104/1981, A/38/40 (1983), p.231): a complaint by the Western Guard Party which blamed Jews for wars, unemployment, inflation and the collapse of world values, that it was prohibited under the Canadian Human Rights Act from using telephones for these purposes and thus a breach of Article 19 was held to be inadmissible because of Canada's obligation under Article 20(2).

health or morals or the protection of the rights and freedoms of others." The same issues therefore arise again. This is an elaboration of part of Article 20 of the UDHR, and again the elaboration is the qualified application of the article just mentioned. For many years, in the state of Queensland, public demonstrations were banned.[464] The first Canadian report to the Human Rights Committee under Article 40 stated, with respect to the right of peaceful assembly, that "unlawful" assembly and "riot", as determined under the Criminal Code, would qualify this right.[465] A right being qualified because this is "necessary in a democratic society" implies that a balance must be struck between individual rights and the public interest. The latter implies more than mere majoritarianism but includes pluralism, tolerance and broadmindedness so that minorities are treated fairly and a dominant social position is not abused.[466] The problem is that the issue again becomes circular as all these terms are value-laden and fall to be determined in each instance. They are incapable of reduction to a standard irrefutable essence and are culture specific. Thus, in Casada Coca v Spain[467] it was held that restrictions on advertising imposed by the Barcelona Bar were not in breach of Article 10 of the European Human Rights Convention which provided for the right to freedom of expression subject to restrictions necessary in a democratic society. Those

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[464] Traffic Act Amendment Act, 1977 (Qld)

[465] First Report of Canada on the Implementation of the Provisions of the Covenant, ante, p.88.

[466] James, Young and Webster v United Kingdom Eur. Ct. H.R., Series A, Vol.44 (Judgement of August 13, 1981).

[467] Eur. Ct. H.R., Series A, No.285, judgement of February 24, 1994

restrictions, it was held, would differ from one country to another and that the balance to be struck was best left to the national authorities who were in a better position than the court to determine it.

The connexion is also express in Article 22 which provides for freedom of association, subject to restrictions "prescribed by law" on the same grounds of necessity mentioned in the previous articles, but with the addition that laws may specifically regulate (and indeed, prohibit) this right with respect to members of the armed forces and the police. This is an elaboration of the remaining part of Article 20 of the UDHR, the elaboration again being the qualifications just mentioned.

But again the express connexion with domestic law does not entail that the domestic law can make any provisions at all. As mentioned above, the European Court of Human Rights, interpreting the phrase "prescribed by law" in the case of Sunday Times v United Kingdom[468] held that the law in question must be adequately accessible (ie, a person should be able to find out what the applicable rules are) and formulated with sufficient precision so that the person can regulate their conduct accordingly. But this says nothing about the content of that law. In its first report to the Human Rights Committee, Canada openly mentioned the restrictions on this right which were imposed by the Criminal Code, the Combines

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[468] 2 EHRR 245

Investigation Act and the Public Service Staff Relations Act.[469] In 1986 the Human Rights Committee had to decide whether the rights in Article 22 included the right to strike. In J.B. et al v Canada[470] (the "Alberta Union Case") Alberta had adopted the Public Service Employee Relations Act which prohibited employees within its scope from striking. The Committee found the communication to be inadmissible ratione materiae as, after examining the ordinary meaning of paragraph 1 and the travaux préparatoires, it found that in 1952 the Commission on Human Rights had rejected, by a vote of 11 to 6 with one abstention, a proposal to include the right to strike in the article.[471] When the Third Committee discussed what was by that stage two draft Covenants, a right to strike was inserted in what became Article 8 of the ICESCR but not in what became Article 22 of the ICCPR.[472] Thus it concluded that the right to strike was not a part of the right to freedom of association. In a compelling individual opinion, Rosalyn Higgins, Rajsoom Lallah, Andreas Mavrommatis, Torkel Opsahl and S. Amos Wako disagreed, saying that the absence of the express right to strike in Article 22 was no more significant than the fact there is no mention of various other activities, such as holding meetings or collective bargaining. In addition, the presence of a right to strike being expressed in Article 8 of the ICESCR can be

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[469] First Report ..., ante, p.90.

[470] Communication No. 118/1982, Selected Decisions of the Human Rights Committee under the Optional Protocol, Vol. 2, UN Doc. CCPR/C/OP/2, pp.34-39.

[471] Id., paragraph 6.3

[472] Ibid.

explained by the fact that that article is exclusively addressed to rights with respect to trade unions. Article 22, on the other hand, is of more general application and can apply to clubs and societies, where a particular mention of the right to strike would have been inappropriate.

This communication also involved Article 22(3) which provides that parties to ILO Convention No.87 (dealing with freedom of association and the right to organise) remain bound by that Convention. Before this communication was brought, the Canadian Labour Congress had complained under this Convention to the ILO Committee on Freedom of Association alleging a violation because of the prohibitions on strikes in Alberta. The ILO Committee and the ILO Governing Body thereupon recommended that the government of Alberta limit the prohibition on strikes to employees in essential public services only (whereupon Alberta exempted the Liquor Board from the prohibition!).[473] The majority of the Human Rights Committee did not need to consider this issue once it had found the communication inadmissible ratione materiae. The minority considered that Article 22 should have been interpreted in the light of the ILO Convention as interpreted. Nowak[474] considers that the minority view is the correct one.

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[473] See Nowak, ante, p.400.

[474] Ibid.

(b) Implicit reliance on domestic laws

The connexion with domestic law is not express, but implicit, in Articles 8(3), 10, 20, 23, 25 and 26 of the ICCPR.

In Article 8(3) ("No one shall be required to perform forced or compulsory labour"), imprisonment with hard labour, court orders, conditional release from detention, military service, emergency service and civil obligations are expressly exempted. All of these are expressed in legislation or regulations made pursuant to such legislation. Thus the very definition of forced or compulsory labour (which is an elaboration of the provisions against slavery in Article 4 of the UDHR) is determinable by domestic law. As already mentioned, the problem of the Queensland Electricity (Continuity of Supply) Act 1985, which effectively provided for forced labour to maintain electricity supplies during strikes, was referred to - and dismissed - in Australia's Second Report to the Human Rights Committee under Article 40 and the Summary Reports of the Committee's discussions do not indicate that this issue was raised as a matter of concern.[475] Section 380 of the Canadian Criminal Code which Canada, in its first report to the Human Rights Committee under Article 40, admitted forbad work stoppages in the electricity industry as well as for workers in gas, water and railway industries unless in the context of an industrial dispute, was treated in a similar fashion. This was not

[475] CCPR/C/SR.806-809 (7-11 April, 1988).

regarded by Canada as being in any way a breach of Article 8(3) as "freedom of choice in matters of employment does not authorise the commission of illegal acts",[476] the notion of illegality being the province of the State to determine. This approach has been reiterated in later reports.[477]

Article 10 provides that people in detention shall be treated with humanity and with respect for their inherent dignity. It also provides for the segregation of convicted from unconvicted persons and of juveniles from adults. The essential aim of imprisonment shall be reformation and social rehabilitation. This article impacts directly upon the law and policy of imprisonment. It is, however, implicitly subject to the choices already made in the domestic system with respect to the liability for imprisonment in the first place: for example, whether a person can be sent to jail for drunkenness or vagrancy. There is no corresponding article to this one in the UDHR. Australia made, and retains, a reservation to this article. The requirement of separation of convicted prisoners from those on remand is declared to be "an objective to be achieved progressively". The separation of juveniles from adults is "accepted to the extent that such segregation is considered by the responsible authorities to be beneficial to the juveniles or adults concerned."[478] The implicit

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[476] Report of Canada on the Implementation of the Provisions of the Covenant, ante, p.26.

[477] See Second and Third Reports of Canada (Human Rights Directorate, Multiculturalism and Citizenship Canada), (1990, Ottawa), p.6.

[478] Status of International Instruments, ante, p.86

qualifiers as to application have effectively been transformed into express ones by Australia and impact directly upon the notion of human dignity which is the underlying principle of this article. Moreover, the reservation also included a stipulation (later withdrawn in 1984) that humane treatment of prisoners is specifically made subject to the laws in force in Australia - overwhelmingly state and territory laws - with respect to custodial discipline. It significantly did not say that Australia regarded these laws as acceptable under the Covenant. This in fact prompted the following provisional objection by the Netherlands:

> The Kingdom [of the Netherlands] is not able to evaluate the implications of ... [this] part of the reservation regarding article 10 on its merits, since Australia has given no further explanation on the laws and lawful arrangements, as referred to in the text of the reservation.[479]

Touché!

Canada did not make a reservation to this article, but in its first report to the Human Rights Committee under Article 40 it noted that "with the exception of juvenile delinquents, Parliament has not legislated on the pre-trial detention conditions of persons accused of contravening a criminal law. In other words, the provinces and territories are responsible for the detention conditions of such persons."[480] Implicit in this statement is view that the federal constitutional matrix of Canada in the light of the wording of the Article obviated the necessity

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[479] Status of International Instruments, ante, p.51 (objection deposited September 17, 1981).

[480] First Report of Canada on the Implementation of the Provisions of the Covenant, ante, p.42.

for a reservation.

The Human Rights Committee has itself stated that "the modalities and conditions of detention may vary with the available resources, [but] they must always be applied without discrimination, as required by Article 2(1)."[481] However, discrimination in the application of the standards of treatment does not indicate what that basic standard must be: it effectively admits that the basic standard of treatment is reliant upon the State and the Article does not impose standards like those in the 1955 "Standard Minimum Rules for the Treatment of Prisoners".[482] This prompted some States to "interpret" the requirements of separation of convicted from remand prisoners very broadly,[483] but in Pinkey v Canada[484] the Human Rights Committee was of the view that separate quarters (if not separate buildings) were required but that some contact (such as convicted prisoners acting as cleaners in the remand area) was permissible.[485]

Article 20 provides that propaganda for war, and the advocacy of national, racial or religious hatred which incites discrimination or violence, "shall be prohibited by

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[481] General Comment No. 9/16, July 27, 1982: 9 E.H.R.R. 169 at 178.

[482] Adopted August 30, 1955, by the First UN Congress on the Prevention of Crime and Treatment of Offenders. They are not binding.

[483] See Nowak, ante, at p.189.

[484] Communication No.27/1978, A/37/40 (1982), p.101.

[485] Id., at paragraph 30.

law." Implicit in this is the fact that, in the absence of definitions of terms such as "propaganda", "war", "hatred", "incitement", "discrimination" and "violence", it is domestic law which determines its application. There is also no corresponding article in the UDHR to this one. Australia made, and retains, a reservation to this article in the following terms:

> Australia interprets the rights provided for by articles 19, 21 and 22 as consistent with article 20; accordingly, the Commonwealth and the constituent States, having legislated with respect to the subject-matter of the article in matters of practical concern in the interest of public order (ordre public), the right is reserved not to introduce any further legislative provision on these matters.[486]

In effect, this reservation says that Australia is going to do nothing. While it is necessary to balance prohibitions on racial and religious vilification with the right to free speech, freedom of opinion and freedom of association, those latter freedoms do not mean the right to any sort of speech. The balance implied in the reservation is, in fact, no balance at all, as the Human Rights Committee indicated when it stated that Article 20 was "fully compatible with the right of freedom of expression as contained in Article 19."[487] The reservation is hypocrisy wrapped in a lack of political will. Racial vilification is a major problem in Australia at the moment. The laws and constitutional structure of Australia have been used, through the structure of international law which allows reservations to be made to treaties, to produce a symbiosis the effect of which is to blow this human right into

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[486] Status of International Instruments, p.28

[487] General Comment No. 11/19, July 29, 1983, 9 E.H.R.R 169 at 180.

oblivion for all Australians. So much for equality or dignity! It is arguable, and it is my opinion, that this reservation is contrary to the object and purpose of the Covenant. Australia has gone some way to fulfilling its obligations under this Article with the passing of the Racial Hatred Act 1995.[488] It is also considering withdrawing this reservation, but has not yet done so (as the Act only covers racial hatred).

The Canadian response to this article in its First Report to the Human Rights Committee under Article 40 is interesting. Canada made no reservation like Australia's and openly admitted, with respect to paragraph 1 of the article:

> There is no law prohibiting propaganda in favour of war. An individual or organization may, therefore, legally disseminate such propaganda. The Government of Canada cannot do so, however, without breaking the commitments it made by signing the Covenant.[489]

Again, this overlooks the requirements in Article 2 to "ensure" the rights in the Covenant to everybody. The Australian approach was to make many reservations. The Canadian approach was to impute a dichotomy between State action and the actions of individuals denying that the actions of the latter were the responsibility of Canada under the Covenant. Both approaches considerably lessen the (perceived) impact of the Covenant domestically. The Australian approach openly avoids (or perhaps, evades) these. The Canadian approach involved a narrow and

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[488] Discussed above in the context of the Racial Discrimination Convention.

[489] First Report of Canada on the Implementation of the Provisions of the Covenant, ante, pp.86-7.

impoverished approach to human rights, which is in contrast to its approach to racial hatred.[490]

Article 23 is almost the same as Article 16 of the UDHR. It calls the family "the natural and fundamental group unit of society", provides for the right to marry on the basis of mutual consent of the parties, and for equality between spouses. It is with regard to the last matter that the sole difference occurs: the States Parties will "take appropriate steps" to achieve this equality, which is stated as an unqualified right in the UDHR. The terms "family", "marriage", "marriageable age", "consent" and "equality of rights and responsibilities" are all terms totally dependent upon the rules existing in the relevant domestic legal system for their meaning and application, as the Human Rights Committee has conceded.[491] The family values and the notion of equality are therefore locally conditioned. In neither Australia nor Canada[492] are the customary marriages of indigenous peoples recognised. Thus, while the European Commission has interpreted a

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[490] See the Western Guard Party Case discussed above with respect to Article 19. See also R v Keegstra [1990] 3 SCR 697. This case is discussed in detail in Chapter 5.

[491] General Comment 19(39), adopted at its 1002nd meeting, July 24, 1990: UN Doc. CCPR/C/21/Rev. 1/Add 1-4. It was stated:

> The Committee notes that the concept of the family may differ in some respects from State to State, and even from region to region within a State, and that it is therefore not possible to give the concept a standard definition. However, the Committee emphasises that, when a group of persons is regarded as a family under the legislation and practice of a State, it must be given the protection referred to in article 23. Consequently, State Parties should report on how the concept and scope of the family is construed or defined in their own society and legal system.

[492] See, for example, the Indian Act, R.S.C. 1970, ch. I-6, s.88.

similar provision of the European Convention as meaning that while a State may regulate the exercise of the right to marry it may not interfere with the substance of the right,[493] the very notion of marriage itself is still left to be determined by the values existing at the State level,[494] leaving the right of gays or transsexuals[495] to marry in an undetermined grey area and resting on assumptions that may in fact be oppressive.[496] This has been admitted by other UN bodies.[497] The first report of Canada to the Human Rights Committee in fact expressly states that the notion of marriage and family in Canada is subject, inter alia, to the provisions of the Criminal Code.[498] Once again, equality has been domestically skewed. Canada's later reports do not alter this stance and read like a laundry list of (largely provincial) legislation.[499] Australia's reports, while directly addressing controversial and "difficult" issues like the recognition of

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[493] Van Oosterwijck v Belgium (1980) 3 EHRR 557

[494] Thus, for example, the Human Rights Committee held in Balaguer v Spain (Communication No.417/1990) that the protection of children referred to in Art.23(4) only refers to children of "formal" marriages.

[495] Rees v United Kingdom (1987) 9 EHRR 56; Cossey v United Kingdom (1991) 13 EHRR 622.

[496] For example, feminist literature argues that the legal notion of "family" can in fact entrench the oppression of women. This is discussed further below with respect to the Women's Convention.

[497] The Report of the Secretary-General on Preparation for and Observance of the International Year of the Family conceded that social values regarding the functions and roles of families differ and that these should now accommodate the rights recognised as attaching to women and children: E/CN.5/1991/2 (14 December, 1990), p.4.

[498] First Report ..., ante, pp.91-2.

[499] See Second and Third Reports of Canada, ante, pp.37-8.

customary marriages, in vitro fertilisation and domestic violence, read in a similar vein.[500]

Article 25 provides for the right of citizens - this is one place where the rights do not apply to everybody within a State's territory - to take part in public affairs, vote on the basis of universal and equal suffrage, and have equal access to public service without discrimination on the bases set out in Article 2 and "without unreasonable restrictions." It is a slight elaboration of UDHR Article 21. The latter provides the right for "everyone" to enjoy these rights in "his country"; the ICCPR provides that "every citizen" may do so. The significant difference is that a shift has occurred, via domestic laws of nationality and citizenship, as to whether it is the person or the State which makes the decision as to those who may enjoy these rights. In addition, reasonable restrictions to this right are allowed.[501] The Human Rights Committee has acknowledged that curtailment of political participation is a lawful punishment in some countries.[502] The issue becomes, a lawful punishment for what? The Committee has held that it would not be a

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[500] See Australia's Second Report ..., ante, pp.211-30.

[501] See Mikmaq Tribal Society v Canada (Communication No.205/1986): representatives of the Mikmaq tribe had not been invited to participate in constitutional conferences the purpose of which was to identify and clarify aboriginal rights. The Human Rights Committee agreed that this constituted participation in public affairs but held that the restriction was reasonable as every citizen cannot participate in every public affairs issue: "It is for the legal and constitutional system of the State party to provide for the modalities of such participation" and not for affected groups to choose for themselves (paragraphs 5, 6).

[502] Pietroroia v Uruguay, Communication No. 44/1979, Selected Decisions under the Optional Protocol, Vol. 1, UN Doc. CCPR/C/OP/1, pp.76-80.

reasonable sanction for doing something allowed or protected by the Covenant itself, such as expressing a political opinion.[503] This still leaves a very wide leeway of State-determined limitations, even though the Committee has held that such limitations must be justifiable on a basis of proportionality.[504]

At the time of ratification, Australia made a reservation to this article (which it withdrew in 1984). It provided that the reference to "universal and equal suffrage":

> ... is accepted without prejudice to law which provides that factors such as regional interest may be taken into account in defining electoral divisions ...

Until recently, Australia had gerrymandered state elections, particularly in Queensland and Western Australia, where country votes were "worth" almost double that of their urban counterparts.[505] The symbiosis this time operated to limit rather than exclude the right. The result was that the right to equality in a fundamental matter (voting for government) was skewed. This reservation, together with the wording of the article, which provides that all citizens can "take part in the conduct of public affairs", in particular by voting, but providing no elaboration of the mechanics of the voting, promotes form rather than substance. This will be so for all voters, but with respect particularly to women the ICCPR is a little wider than the Convention on the Political Rights of Women (which confines women's

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[503] Ibid.

[504] Ibid.

[505] Queensland Electoral and Administrative Review Commission, Report No. 90/R4, Queensland Legislative Assembly Electoral Review (November, 1990)

political entitlements to voting, and being eligible for election and to hold public office),[506] and a little narrower than the later Convention on the Elimination of All Forms of Discrimination Against Women (which adds the right to participate in the formulation of government policy and in public political non-governmental organisations). What is not covered in the first two treaties is an attack on the systemic exclusion of women from participation in the political process. The rights are formal, public, individualistic and based on a notion of equality where men are the benchmark. While the provisions can apply to any form of participatory political process - liberal democracy, democratic socialism, communism - they address themselves to public symptoms rather than attack underlying causes of real inequality. The Women's Convention does make such an attempt, but it is not entirely successful (as discussed below).

Another issue here is the right of prisoners to vote. Until 1984 Australia had a reservation to Article 25 which in effect meant that prisoners did not have the right to vote.[507] Canada intended to amend its laws[508] in this regard when the Covenant became binding on it, but delays led to a complaint to the Human Rights

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[506] Articles 1, 2 and 3 respectively.

[507] Status of International Instruments, ante, p.87

[508] Canada Elections Act, R.S.C. 1970, ch. 14 (1st Supp.), ss. 14, 21. In its First Report ... to the Human Rights Committee Canada stated: "These restrictions [which included judges, and restricted the right of public servants to run for political office] do not conflict with Article 25 of the Covenant as they can be categorized as reasonable and are, therefore, allowed under that Article." (at p.101).

Committee.[509] The matter was ultimately resolved when the Supreme Court of Canada held in Levesque v Attorney-General of Canada[510] that the right of prisoners to vote in elections was a Charter right and ordered the federal Minister of Justice and the Solicitor General to make the necessary arrangements to put this into effect. This right for prisoners was therefore not secured for prisoners directly through the ICCPR but indirectly through the ICCPR and directly via the Charter. The international legal obligation was simply not strong enough to be used to force the issue. But neither was the domestic remedy, as the matter has been re-litigated.[511]

Article 26 provides that "all persons are equal before the law" and are entitled to equal protection of it without discrimination. It is an elaboration of UDHR Article 7, but is essentially the same as it. It combines three separate, although related, concepts: equality before the law, equal protection of the law, and protection against discrimination. These could alternatively be described as formal equality, material equality and non-discrimination.[512] While this Article provides for a

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[509] C.F et al v Canada Communication No. 113/1981, declared inadmissible for want of exhaustion of local remedies April 12, 1985: Selected Decisions of the Human Rights Committee under the Optional Protocol (Seventeenth to Thirty-second Sessions), Vol.2, UN Doc. CCPR/C/OP/2, pp.13-17.

[510] (1986) 25 DLR (4th) 184

[511] Belczowski v Canada (1992) 9 CRR (2d) 134 (FCA); Sauve v Canada (1992) 7 OR (2d) 481 (Ont CA).

[512] See Torkel Opsahl, "Equality in Human Rights Law with Particular reference to Article 26 of the International Covenant on Civil and Political Rights" in Manfred Nowak, Dorothea Steirer & Hannes Tretter (eds): Progress in the Spirit of Human Rights: Festschrift fur Felix Ermacora (1988, N.P. Engel Verlag, Strasbourg),

separate right to equality and is not merely accessory to the other rights in the Covenant (as is Article 2), it does not however set minimum standards which the (domestic) law must secure. It only provides for equal treatment within the existing domestic legal system. Unlike the Conventions with respect to Race and Women, the term "discrimination" is not defined, although the Human Rights Committee has stated that it should be regarded in similar terms to those other conventions.[513] An Australian declaration made at the time of ratification (but withdrawn in 1984) provided that the object of this provision is equal treatment in the application of the law,[514] thus impliedly excluding such things as a right to legal aid: the law itself did not have to provide for equality. Moreover, the Human Rights Committee has held that the right to non-discrimination arises once the matter is governed by legislation,[515] although when this does happen there must be equality in the application, subject to objective and reasonable criteria.[516] This

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pp.51-65 at 53. A similar conclusion is reached, after an excellent description of the relevant literature and the travaux preparatoires in Marc J. Bos uyt, "The Principle of Equality in Article 26 of the International Covenant on Civil and Political Rights", Chapter 14 in Armand de Metsral et al (eds): The Limitation of Human Rights in Comparative Constitutional Law (1986, Les Editions Yvon Blais, Cowansville).

[513] General Comment 18(37) (Non-discrimination), UN Doc. CCPR/C/21/Rev.1/Add.1 (21 November, 1989), paragraphs 6, 7.

[514] Status of International Instruments, ante, p.88

[515] Broeks v the Netherlands No. 172/1984, Report (1987) A/42/40 Annex VIII.B; Zwaan de Vries v the Netherlands No. 182/1984, Report (1987) A/42/40 Annex VIII.D (unemployment benefits payable to married men but not to married women held to violate Art.26).

[516] Danning v the Netherlands, report (1987) A/42/40, Annex VIII.C (insurance benefits paid to a married person but not payable to a person living in a de facto relationship held not to violate Art.26).

article can now be regarded as creating a separate right to equality in any law and not just with respect to the rights listed in the Covenant.[517] It can also cover indirect, as well as direct, discrimination.[518] But the relevant State must legislate first.

In addition, the Human Rights Committee has made it clear that equality does not always mean identical treatment and that unequal treatment will not breach the Article if the criteria used to justify it are reasonable and objective.[519] The Committee has said that "It is for the States parties to determine appropriate measures to implement the relevant provisions."[520] The problem is the value judgements underlying such concepts which can be attributed not only to governments but also to members of the Human Rights Committee itself.[521]

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[517] For the controversy as to this point, see Opsahl, ante, who quotes Tomuschat as an adherent to the narrower view ("Equality and Non-Discrimination under the International Covenant on Civil and Political Rights" in von Munch (ed): Festschrift fur Hans-Jurgen Schlochauer (1981), and Ramcharan as an advocate for the wider interpretation ("Equality and Non-Discrimination" in Henkin (ed): The International Bill of Rights: The Covenant on Civil and Political Rights (1983)). See now the views of the Human Rights Committee in Zwaan de Vries v The Netherlands and Broeks v The Netherlands, ante.

[518] Bhinder v Canada, Communication no. 208/1986, where the Canadian National Railways required employees to wear hard hats which Bhinder, as a Sikh, could not do. While the Committee ultimately found that there was no breach of Article 26 or Article 18 (freedom of religion) it examined both of these provisions and did not reject either as being inadmissible on the basis of being incompatible with the provisions of the Covenant.

[519] General Comment 18(37), ante.

[520] Id., paragraph 4.

[521] See, for example, the Committee's views in Vos v The Netherlands (Communication No. 218/1986) where Dutch law allowed a man to retain his disability allowance on the death of his wife, but a woman with a disability could not retain her disability allowance on the death of her husband but was entitled to a widow's pension

And Australia made a reservation to this article and others (withdrawn in 1984) which relates generally to convicted persons:

> Australia declares that laws now in force relating to the rights of persons who have been convicted of serious criminal offences are generally consistent with the requirements of articles 14, 18, 19, 25 and 26 and reserves the right not to seek amendment of such laws.[522]

Thus prisoners in Australia did not necessarily receive equality with respect to court procedures, freedom of thought, conscience and religion, freedom of expression, the right to vote and participate in public affairs, as well as with respect to equality before the law where the law itself provides for a different standard. Once again, the Netherlands expressed incredulity at this reservation:

> The Kingdom finds it difficult, for the same reasons as mentioned in its commentary on the reservation regarding article 10, to accept the declaration by Australia that it reserves the right not to seek amendment of laws now in force in Australia relating to the rights of persons who have been convicted of serious criminal offences. The kingdom expresses the hope it will be possible to gain a more detailed insight in the laws now in force in Australia, in order to facilitate a definitive opinion on the extent of this reservation.[523]

In Can , while there was no reservation to the article, a similar provision in section 1(b) of the Canadian Bill of Rights had been interpreted by the Supreme

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instead. Mrs Vos had been divorced from her husband for 22 years at the time of his death and had become disabled at a time when she was supporting herself. The widow's pension was less than a disability allowance. It was found that this distinction was reasonable and objective as it was the man who was usually the breadwinner. Anne Bayefsky has written that "the decision fails entirely to recognize that this legislative distinction bore the hallmarks of classic stereotyping of women.": "The Principle of Equality or Non-Discrimination in International Law" (1990) 11 Human Rights Law Journal 1 at 15.

[522] Status of International Instruments, ante, p.87

[523] Id., p.52

Court of Canada in Attorney-General of Canada v Lavell[524] as not overriding the provisions of the Indian Act[525] under which Indian women lost their registration as Indians when they married a non-Indian (although the reverse did not apply). This was found to be a breach of the Covenant by the Human Rights Committee in the Lovelace Case described above. The Supreme Court in Lavell had followed a narrow approach to equality and non-discrimination, effectively restricting the concept to formal rather than real equality.

(c) Functional symbiosis

Article 24 provides that every child has the right to be registered immediately after birth, the right to a name and nationality, and the right to measures of protection required because of his or her status as a minor. This Article has in part an implicit connexion with domestic law in that the definition of the term "child" remains wholly domestic.[526] However, primarily there is a functional connexion

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[524] [1974] S.C.R. 1349 at 1365-67

[525] R.S.C. 1970, ch. I-6, s.12

[526] The Committee in General Comment 17(35) ante noted that "the Covenant does not indicate the age at which ... [the child] attains his [sic] majority. This is to be determined by each State party in the light of the relevant social and cultural conditions." (at paragraph 4). The only exception to this would occur where the Covenant actually stipulates an age (as in Art.6(5) which prohibits the death penalty being carried out on anyone under the age of 18). The Committee did add, however, that the age at which the child becomes legally entitled to work and assumes criminal responsibility should not be "unreasonable low" (ibid).

with domestic law because the right depends functionally on domestic notions of birth registration, naming rights (eg, the surname which can legally be given to an ex-nuptial child), and nationality.

A functional symbiosis can also be seen in those Articles mentioned above which refer to the operation of the law not being "arbitrary".[527] The remarks already made with respect to them apply equally here.

The only Article in the ICCPR which does not appear to contain express or implied reliance on domestic legal systems is Article 27. This provides that ethnic, religious and linguistic minorities in States "shall not be denied the right" (which is different to saying "shall have the right") to enjoy their own culture, practise their own religion or use their own language. This right depends functionally on the extent to which any group in society (minority or otherwise) may already lawfully enjoy a culture.

Even though the word "lawfully" and similar expressions are not used in these articles, they are functionally bound to these (domestic) notions. Neither of these articles has any direct equivalent in the UDHR. The former is a right of equality

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[527] Articles 6, 9, 12, 17.

which posed for Canada and Australia little problem of compliance.[528] The latter appears to be merely a right of non-interference, although it can be breached when the effect (if not the intention) of laws so provides.[529] It is not surprising that the reports to the Human Rights Committee of both Australia (despite its former declaration) and Canada ignore affirmative action with respect to Article 27.[530] However, the Human Rights Committee in a recent General Comment on this Article stated that "a State party is under an obligation to ensure that the existence and the exercise of this right are protected against their denial or violation. Positive measures of protection are, therefore, required not only against the acts of the State party itself ... but also against the acts of other persons within the State party."[531]

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[528] Australia in fact made a declaration of an affirmative action nature with respect to this article (together with articles 2(1), 25 and 26) to the effect that it "shall be without prejudice to laws designed to achieve for the members of some class or classes of persons equal enjoyment of the rights defined in the Covenant.": Status of International Instruments, ante, pp.87-8. This is in line with the views of the Human Rights Committee which observed that Article 24 requires affirmative action: General Comment 17(35), adopted at the 891st meeting, April 5, 1989: UN Doc. CCPR/C/21/Rev. 1.

[529] Lovelace v Canada (Communication No.24/1977): loss of Indian status upon marriage to a non-Indian; Mikmaq Tribe v Canada (Communication No.78/1980): non-inclusion in constitutional talks - but restriction held to be reasonable; Lubicon Lake Band v Canada (Communication No.167/1984): destruction of economic base because of industrialisation and expropriation.

[530] See particularly the First Report of Canada ..., ante, which, because of the French minority, notes the policy on official languages in Canada and the work of the Multiculturalism Directorate (at p.107). A notion of affirmative action is there, but it is not emphasised or seen as an obligation under this article. In the first Australian reports, the issue of affirmative action is entirely absent and does not arise until affirmative action for women (and not ethnic, religious or linguistic minorities) was introduced by legislation.

[531] CCPR/C/21/Rev.1/Add.5 (April 6, 1994), paragraph 6.1

Overall, the symbiotic relationship between the ICCPR and domestic legal systems can be seen to be pervasive. Although phrases like "according to law", "prescribed by law", "under the law", "lawful", "provided by law", etc were not meant to be merely stylistic variations and can have different shades of meaning,[532] they all relate to a symbiosis which is more than an "interpenetration" of international law and domestic law[533] because there is not just the application or influence of one set of norms in the other system, but the feeding of those norms on each other to give them meaning. In addition, the asymmetry of the international and domestic legal systems with respect to enforcement by individuals indicates little real interpenetration.

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[532] See Oscar garibaldi, "General Limitations on Human Rights: The Principle of Legality" (1976) 17 Harvard International Law Journal 503.

[533] See A. Jacomy-Millette: Treaty Law in Canada (1975, U. of Ottawa Press, Ottawa), pp.178-9, citing European authors such as Louis Cavaré, Edvard Hambro and Paul de Visscher.

4.8 The Women's Convention

The Convention on the Elimination of All Forms of Discrimination Against Women, like the other treaties discussed, has no overt philosophical basis nor incantations to God. It refers, rather, to the UN Charter, the UDHR and to the two Covenants. Its underlying principles in the Preamble are dignity, equality and non-discrimination. It also adopts an holistic approach: equal rights are regarded as being inextricably linked to issues of poverty, the economic order and social progress. In addition, it adopts a proactive approach: "...a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women."[534] However, an express, implied and functional symbiosis with domestic legal regimes is evident, but the preponderance is of the last two types rather than of express symbiosis, because of the paradigm of equality established by the convention.

The definition of the term "discrimination against women" is expressed in Article 1 to mean:

> ... any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

This definition is functionally similar to that in the Race Discrimination

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[534] Fourteenth preambular paragraph.

Convention. The discussion above with respect to that treaty also applies here, except that the definition is not specifically restricted to discrimination in public life.[535] What should be noted, especially, is that marital status is particularly targeted as a cause of discrimination against women (in particular, the domestic legal consequences of that status). Thus domestic laws are of special concern. The Convention aims at de facto rather than just de jure equality.[536] However, the notion of equality in the treaty is that of equality with men. This is a feature of every substantive article in the Convention, with the only exceptions being Article 5 (dealing with the elimination of sexual stereotypes) and Article 6 (dealing with traffic in women and the exploitation of prostitution of women). This has led Shelley Wright to comment that the acceptance of the validity of a male standard "indirectly silences or subverts the value of specifically female experiences" so that maternity and child care is marginalised as requiring "special measures", and ignores the "underlying power imbalance out of which women's experiences are constructed."[537] This includes the proactive Article 5 (which is directed to modification of social and cultural patterns which are "based on the idea of the

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[535] Indeed, the Committee on the Elimination of Discrimination Against Women in its General Recommendation No. 19 (11th session, 1992) on Violence Against Women emphasised that "States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights, or to investigate and punish acts of violence, and to provide compensation." (paragraph 10).

[536] Article 4

[537] Shelley Wright, "Human Rights and Women's Rights: An Analysis of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women", in Kathleen Mahoney & Paul Mahoney (eds): Human Rights in the Twenty-First Century: A Global Challenge (1993, Martinus Nijhoff Publishers, Dordrecht), pp.75-88 at 79-80.

inferiority or superiority of either of the sexes") as the standard of comparison is still with the male norm. The opinion of Judge Tanaka, in his famous dissenting opinion in the South West Africa Case (Second Phase) that "the principle of equality does not mean absolute equality, but recognizes relative equality"[538] does not appear to apply here. Catherine MacKinnon has thus written: "[M]an has become the measure of all things"[539] and Kathleen Mahoney complains of the "male-centred conceptualization of rights which determines the interpretation and application of modern human rights law."[540] Hilary Charlesworth and Christine Chinkin are of a similar view.[541]

The equality aimed for in the Convention is thus skewed towards the standards already existing domestically, including in the law. There is no distinction drawn in this treaty between citizens and other people. Women are equal with men, so that limitations based on nationality, etc, are automatically imported into the ambit of application of this instrument.

In Article 2 the States Parties to the Convention "condemn discrimination against

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[538] [1966] I.C.J. 4, at 311. For a commentary on this judgement, see Warwick McKean: Equality and Discrimination under International Law (1985, Clarendon Press, Oxford), Chapter 14.

[539] Catherine MacKinnon: Feminism Unmodified: Discourses on Life and Law (1987, Harvard U.P., Cambridge), p.34.

[540] Kathleen E. Mahoney, "International Strategies to Implement Equality Rights for Women: Overcoming Gender Bias in the Courts" (1993) 1 Australian Feminist Law Journal 115 at 117.

[541] Hilary Charlesworth & Christine Chinkin, "The Gender of Jus Cogens" (1993) 15 Human Rights Quarterly 63 at 69-74.

women" and "undertake" to embody the principle of sexual equality in their constitution or "other appropriate legislation"; prohibit such discrimination, including through the imposition of sanctions; establish legal protection for the rights of women; refrain from engaging in acts of discrimination against women and ensure that public authorities and institutions do likewise; eliminate such discrimination by individuals, organisations and enterprises; and, to this end, modify or abolish existing laws and practices. This is a comprehensive coverage.[542] However, the extent to which it is an obligation is qualified by the phrase "pursue by all appropriate means". The appropriateness of the means chosen is within the discretion of the State. Canada has stated that it considers that the equality rights in section 15 of the Charter of Rights and Freedoms, which are subject to the "reasonable limits" qualification in section 1, are not contrary to the Women's Convention because "the notion of "appropriateness" would probably encompass that of reasonable limitations."[543] Similarly, Article 24 provides that: "States Parties undertake to adopt all necessary measures at the national level aimed at achieving the full realization of the rights recognized in the present Convention." Thus, the notion of progressive full realisation, and the difference

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[542] Moreover, the Committee on the Elimination of Discrimination Against Women in its General Recommendation No. 19, ante, has stated that the kind of measures to be taken under Article 2 are not restricted to the matters covered by the specific articles of the Convention and can include laws against family violence and abuse, as well as gender sensitive training for judicial and law enforcement officers (paragraphs 12-13).

[543] First Report of Canada under the Convention on the Elimination of All Forms of Discrimination Against Women, Department of the Secretary of State, Ottawa, May, 1983, p.15.

between obligations of conduct and obligations of result discussed above with respect to the ICESCR, also apply here. This Convention is in fact an amalgam of civil and political rights,[544] economic and social rights[545] and rights before the law.[546]

The affirmative action provision in Article 4 (special measures to accelerate de facto equality shall not be deemed to be discrimination) links with the purpose of ensuring the full development and advancement of women in Article 3, the elimination of prejudices and stereotyped sex roles in Article 5, and the suppression of the traffic in and exploitation of women in Article 6. However, once again, Articles 3, 5 and 6 are all expressed to be achieved by "appropriate measures."

In fact, this phrase appears in all the remaining substantive articles of the Convention except for two: Article 9 (women to have equal rights with men to change or retain their nationality, regardless of the effect of marriage) and Article 15 (women to have equality with men before the law, especially with respect to the ability to conclude contracts and to choose their residence or domicile, regardless of marital status).

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[544] Part II

[545] Part III

[546] Part IV

All the other substantive provisions are subject to the "appropriate measures" proviso. Those provisions encompass: equality in political and public life, including the right to vote;[547] the equal right of women to represent their governments internationally;[548] the right to equal access to education, including vocational guidance, equivalent curricula, scholarships, continuing education and sports;[549] the equal right to employment, including equal remuneration, social security, health and safety considerations, and maternity leave;[550] the equal right to health care;[551] equal access to economic and social benefits, including family benefits, bank loans and recreational activities;[552] and equality in matters relating to marriage and family, including equal rights on entry to, during, and at the dissolution of marriage, and the same rights and responsibilities as parents.[553] The specific problems of rural women are also addressed.[554]

The distinct stride forward made by this Convention is that it makes possible at

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[547] Article 7

[548] Article 8

[549] Article 10

[550] Article 11. The Committee on the Elimination of Discrimination Against Women has stated that equality in employment specifically includes freedom from sexual harassment in the workplace: General Comment No. 19 (11th session, 1992), paragraphs 23-25.

[551] Article 12

[552] Article 13

[553] Article 16

[554] Article 14

least the raising of women to the status of men, as well as the introduction of a new concept of the family: both men and women are to have access to family planning,[555] the same rights to decide on the number and spacing of children,[556] equal rights and responsibilities as parents,[557] and a common responsibility in the upbringing of children.[558] This concept of the family is not anchored to any particular model, the Committee on the Elimination of Discrimination Against Women having stated that "the form and concept of the family can vary from State to State, and even between regions within a State."[559] However, in this instance the implied symbiosis with domestic regimes is deplored by the Committee where polygamy is practised, on the basis that this has serious emotional and financial consequences for the women concerned, and calls upon States which have made reservations in this regard to remove them.[560] This, in effect, recognises the symbiosis (and, in this instance, what are considered to be its detrimental effects).[561]

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[555] Articles 10, 12, 14

[556] Article 16

[557] Ibid.

[558] Article 5(b)

[559] General Recommendation No. 21 (Thirteenth Session), UN Doc. E/CN.6/1991/CRP.1, Annex 1

[560] Ibid

[561] See also Hilary Charlesworth, Christine Chinkin & Shelley Wright, "Feminist Approaches to International Law" (1991) 85 A.J.I.L. 613, who point out that the protection of the "family" in human rights instruments "ignore that to many women the family is a unit of abuse and violence; hence, protection of the family also preserves the power structure within the family, which can lead to subjugation and dominance by men over women and children" (at p.636).

Both Australia and Canada have made reservations to this Convention, both countries with respect to the right to equality in employment. The Canadian reservation, made on ratification in 1981, provided that Canada was addressing the issue of equal pay for women and would continue to do so,[562] but implied that equal pay for women was not at that time a reality. Problems of jurisdiction in a federal system are also implied. The reservation was withdrawn on May 28, 1992.[563] The Australian reservations relate principally to maternity leave, stating: "The Government of Australia advises that it is not at present in a position to take the measures required by article 11(2) to introduce maternity leave with pay or with comparable social benefits throughout Australia."[564] This reservation was made just after the decision in the Dams Case referred to above. Thus, the federal government did have the jurisdiction to introduce paid maternity leave in legislation based on this treaty. The Australian position was, presumably, dictated by fiscal and political factors rather than juridical ones. Similarly, the other Australian reservation relates to employment in the armed forces, stating that Defence Force policy excludes women from combat and combat-related duties, and that this is to

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[562] The statement read: "The Government of Canada states that the competent legislative authorities within Canada have addressed the concept of equal pay referred to in article 11(1)(d) by legislation which requires the establishment of rates of remuneration without discrimination on the basis of sex. The competent legislative authorities within Canada will continue to implement the object and purpose of article 11(1)(d) and to that end have developed, and where appropriate will continue to develop, additional legislative and other measures.": Multilateral Treaties in the Area of Human Rights to which Canada is a Party, ante, p.9.

[563] Ibid.

[564] Status of International Instruments, ante, p.143; reservation made upon ratification on 28 July, 1983.

remain.[565]

Australia also made a "federal clause" declaration at the same time, although this time specifically called a "statement". Its wording is exactly the same as that in the reservation to the ICCPR. The remarks made above with respect to that apply equally here. There are clear obligations to eliminate discrimination in the Women's Convention, including through the introduction of legislation - and "national" legislation is specifically included.[566] However, as there is no equivalent in this convention to Article 50 of the ICCPR, it is perhaps more an avoidance of obligations of implementation rather than downright evasion of them.

Once again, implementation is reviewed through a system of periodic reporting. A Committee on the Elimination of Discrimination Against Women is established,[567] consisting of twenty-three people serving in a personal capacity.[568] This Committee considers State reports which must be submitted every four years (after the initial report which must be submitted after one year).[569] The reports indicate the measures adopted to give effect to the

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[565] Ibid. Australia is currently considering the withdrawal of this reservation.

[566] For example, Article 2(a), (c) and Article 24.

[567] For a detailed discussion of this Committee, see Roberta Jacobson, "The Committee on the Elimination of Discrimination Against Women", Chapter 11 in Philip Alston (ed): The United Nations and Human Rights: A Critical Appraisal (1992, Clarendon Press, Oxford).

[568] Article 17

[569] Article 18

Convention's provisions. The Committee is empowered to "make suggestions and general recommendations based on the examination of reports and information received from States Parties."[570] The comments made above on these issues with respect to the ICCPR would normally apply equally here. However, in its sixth session, the Committee decided that its suggestions and recommendations could also be addressed to individual States.[571] It has also issued guidelines as to the form and content of reports so as to standardise them (which were later replaced by Consolidated Guidelines for the Initial Part of States' Parties reports, which were agreed to by the UN treaty bodies as the basis for the preparation of a common "core document" by parties reporting under the treaties).[572] This makes the Committee potentially more effective than the others on which it was based.

Canada's reports to the Committee have been lodged in 1983, 1988 and 1992. They indicate that the Convention has had a significant impact on the Canadian legal system, listing many statutes which were amended specifically to comply with its provisions. However, while much legislation and many cases are referred to, and many real improvements are described (such as the rape in marriage amendments to the Criminal Code) some problems are glossed over (such as the

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[570] Article 21

[571] GAOR, Supplement No. 38, UN Doc. A/42/38, paragraphs 57-58.

[572] See Andrew Byrnes & Johannes Chan (eds): Public Law and Human Rights (1993, Butterworths, Hong Kong), pp.401ff.

legal position of women Indians)[573] and an examination of the state of true de facto equality is missing,[574] although reference is made to bodies such as the Commission on the Status of Women and the Advisory Council on the Status of Women, whose mandates are to consider such problems.[575] The same can be said of the discussion in the report with respect to the measures taken to eliminate discrimination against women in marriage and in family relations. This part of the report is 35 pages[576] of little more than lists of statutes. The problem is that, from the report itself despite the detailed statistical information which was also included, it is difficult to glean precisely what the existing problems are so that this survey can be used to measure the sufficiency of the existing programs. As seen above with the ICCPR, this is a problem endemic to the reporting system where governments are not particularly self-critical nor qualitatively evaluative as opposed to providing quantitative descriptions of improvements.

The Committee considered the initial report of Canada at its 48th and 54th

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[573] First Report of Canada under the Convention on the Elimination of All Forms of Discrimination Against Women, Department of the Secretary of State, Ottawa, May, 1983, pp.20-21.

[574] Thus, for example, while Article 2(g) requires that penal provisions which discriminate against women should be repealed, section 146 of the Criminal Code makes it an offence to have sexual intercourse with a female aged 14-16 years, or to seduce a female 16-18 years or an unmarried female under 21, or to have sexual intercourse with a step-daughter or female employee under the age of 21, only if the woman is of previous chaste character: Report, id., pp.23-4.

[575] First Report, id., pp.25-41.

[576] Id., pp.232-267.

meetings in January, 1985.[577] It considered that while the report was a good, detailed, one it was concerned that:

> ... many of the Conventions provisions, and particularly those of articles 2, 3, 10, 11, 12, 13, 15 and 16, were not being implemented in Canada and that the Canadian Government still had much to do in order to eliminate not only legal but also de facto discrimination against women in its country.[578]

It thought the report tended to gloss over particularly the problems of Indian women,[579] the problems faced by women in employment,[580] the eradication of traditions which disadvantage women[581] and the small percentage of women involved in political life[582] and trade unions[583] in Canada. Thus, the report reflected the genuine political commitment of Canada to eliminate discrimination against women, but lacked relevant detail to enable a proper assessment to be made.

Some of these difficulties were remedied in the second report[584] which includes,

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[577] A/40/45; CEDAW/C/SR.48, 54.

[578] A/40/45, p.10, paragraph 55.

[579] A/40/45, p. 8, paragraph 41

[580] Id., p.9, paragraphs 43, 49 and 51.

[581] Id., p.9, paragraph 44

[582] Id., p.9, paragraph 45

[583] Id., p.9, paragraph 46

[584] Second Report of Canada: Convention on the Elimination of All Forms of Discrimination Against Women, Department of the Secretary of State of Canada, Ottawa, January, 1988.

for example, a section (albeit short) on "Progress and Difficulties"[585] as well as on affirmative action measures,[586] sexual stereotyping[587] and women in politics and public life.[588] Unlike the first report, the second follows the guidelines (unavailable at the time of the first report) about dividing the report into general and specific parts, and detailing federal, provincial and territory measures separately. The thrust of each of these last three is clearly along the lines of the specific concerns raised by the Committee when it considered the first report. Thus, where the process is taken seriously - as is the case for Canada - it can be effective in highlighting major problems to be addressed by the relevant State. This approach is continued in Canada's third report.[589]

Australia's initial report under the Convention[590] was due in August 1984 but was not submitted until October, 1986, and was considered at the seventh session of the Committee in 1988[591] together with a Supplement supplied by Australia in the

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[585] Id., pp.15-16.

[586] Id., pp.23-4

[587] Id., pp.24-5

[588] Id., pp.26-8

[589] Convention on the Elimination of All Forms of Discrimination Against Women: Third Report of Canada covering the period January 1, 1987 to December 31, 1990, Multiculturalism and Citizenship Canada, Ottawa, 1992.

[590] Convention on the Elimination of All Forms of Discrimination Against Women: Report of Australia, Department of Prime Minister and Cabinet, Office of the Status of Women, Canberra, June, 1986; CEDAW/C/5/Add.40 and Amend.1.

[591] A/43/38; CEDAW/C/SR.114 and 118.

same year. It is set out, as requested, into general and specific parts but, unlike Canada, Australia does not separate the discussion between federal, state and territory measures. Considering the federal constitutional issues which impact upon women's rights in Australia (as in Canada) this structure tends to make the description fuzzy when the rights of women in any particular jurisdiction need to be evaluated. The report details the increasing participation of women in the workforce, the increase in childcare facilities, the policy to improve education for women, but admits to disparities in rates of pay,[592] women in managerial positicns[593] and in political representation.[594] Violence against women was also admitted to be unacceptably high.[595] Called a "model report" by the Committee,[596] Australia's response was, once again, characterised by an unblinking honesty. Compared to Canada's initial report, it is a qualitative survey. It is not, however, devoid of governmental gloss. For example, the response to Article 2(a) which requires that the principle of equality of men and women be embodied in national constitutions or other appropriate legislation was:

> The Australian Federal Constitution does not include any specific reference to equal rights for men and women. However, neither the Australian Federal Constitution nor the Constitutions of each of the six states embody discriminatory principles or require the making of discriminatory laws or

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[592] Initial Report, id., pp.98-100

[593] Id., pp.89-90.

[594] Id., pp.51-53

[595] Id., pp.46-47

[596] A/43/38, p.63, paragraph 406

the implementation of discriminatory practices.[597]

While the Sex Discrimination Act 1984 is "other appropriate legislation" in terms of the article, this statement is hardly an adequate response to an article really directed at encouraging States to take measures at the highest possible level. This is particularly so considering that in the Sex Discrimination Act there are a large number of exemptions, particularly with respect to religious bodies which are almost entirely exempted from its provisions.[598] This is admitted in the report[599] but not commented upon. What the statement also ignores are the systemic problems which can cause discrimination even without "discriminatory" laws.

The Committee was concerned about Australia's reservations to the Convention.[600] It also remarked on the fact that ages of marriage and retirement remained differentiated by sex in Australia.[601] Also mentioned were the fact that despite improved education for girls, their drop-out rates remained high,[602] and that despite the existence of childcare facilities, none of these was free or

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[597] Initial Report, id., pp.24-5

[598] Sections 30-44

[599] Id., at p.28

[600] A/43/38, p.64, paragraph 410.

[601] Id., paragraph 415

[602] Id., p.65, paragraph 421

subsidised.[603]

Australia's second report[604] was produced in 1992. It is similar in format to the first and indicates that, in accordance with the Committee's guidelines drawn up at its seventh session, it focuses on information not included in the first.[605] It was prepared by the Office of the Status of Women (a part of the Department of the Prime Minister and Cabinet) with input from all the states and territories, as well as from NGO's.[606] It takes into account the General Recommendations of the Committee.[607] It pays particular attention to three special groups of women: aboriginal and Torres Strait Islander women; women of non-English speaking background; and women with disabilities.[608] It adopts a qualitative, proactive approach, such as recognising the need to address underlying social attitudes which constitute obstacles to women's equality.[609] It addresses the issues raised by the Committee during the discussion of the first report. Thus it indicates that retention

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[603] Id., paragraph 422

[604] Women in Australia: Australia's Second progress Report on Implementing the United Nations Convention on the Elimination of All Forms of Discrimination Against Women, Commonwealth of Australia, June 1992.

[605] Id., p.iii

[606] Ibid.

[607] Ibid.

[608] Id., pp 10-20

[609] Id., p.21

rates of female students at school was proportionately higher than for males by 1990.[610] It admits that the situation with respect to maternity leave was not much better than at the time of the first report, although ILO Convention No. 156 took effect for Australia on March 31, 1991.[611] Child care had become more widely available, and was subsidised by the government although still not free.[612] Uniform marriageable ages were established for males and females in 1991.[613] Problems of the disproportionate representation of women workers in managerial positions remained.[614]

Thus, the reporting system, when it works well, points States in the direction of best implementation of their treaty obligations. It is no guarantee of effective implementation, but it can at least emphasise for States the implicit and necessary connexions between international human rights law and their domestic laws and policies.

Unlike the ICCPR, the Torture Convention and the Convention on the Elimination of All Forms of Racial Discrimination, but like the ICESCR and the Children's

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[610] Id., p. 103. The rates were 70% for females and 58% for males.

[611] Id., p.126

[612] Id., pp.137-8

[613] Id., p.200; Sex Discrimination Act Amendment Act 1991.

[614] Id., pp.121ff. The Committee considered this report in January, 1994. Its deliberations were unavailable to me at the time of writing.

Convention, there is no provision at all in the Women's Convention for individual complaints to be lodged (although the introduction of an Optional Protocol is currently being considered), nor for party-to-party complaints. Thus, the male-oriented approach within the Convention itself, the implied and functional symbiosis of its norms with domestic systems, and the absence of an effective complaints procedure, conspire to mask the real oppression of women that can and does occur, despite the domestic improvements prompted by the reporting system.

4.9 The Torture Convention

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[615] has a relatively short and pragmatically-oriented Preamble which refers to the UN Charter, the UDHR, the ICCPR and the desire to make the struggle against torture more effective. The underlying principle is that of inherent dignity. It is an important instrument but, again, breaks no philosophical ground not already turned in the UDHR.

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[615] UN Resol. 39/46 (10 December, 1984). For a general commentary, see J. Herman Burgers & Hans Danelius: The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1988, Martinus Nijhoff Publishers, Dordrecht).

It has a detailed, exclusive, definition of torture[616] which appears to be self-contained but which must ultimately rely on an interpretation of terms like "severe", "public official" and "official capacity." Such interpretation could rely on domestic legal definitions, although it need not as there are international arbitrations which have dealt with these and similar terms with respect to State responsibility for the treatment of aliens.[617] However, the final sentence of the definition reads: "It [torture] does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions." This quite clearly imports an express and necessary symbiosis with the domestic legal system, making the definition indeterminate.

The definition also relates exclusively to actions in the public rather than the private sphere.

Within these qualifications, the obligations and wording are "strong": each State Party "shall take effective legislative, administrative, judicial or other measures to

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[616] Article 1: ... torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity...

[617] For example: Harry Roberts (USA) v United Mexican States (1951) 4 R.I.A.A. 77; Jean-Baptiste Caire Claim (1952) 5 R.I.A.A. 516; Mallen v USA (1951) 4 R.I.A.A. 173; Janes (USA) v United Mexican States (1951) 4 R.I.A.A. 82; US Diplomatic and Consular Staff in Tehran Case (US v Iran), ICJ Reports 1980, p.3.

prevent acts of torture", with no exceptions allowed, including superior orders;[618] expulsion or return of a person to a country where they are in danger of being tortured is forbidden, with directions how to determine this;[619] each State is to "ensure" that all acts of torture are offences under its criminal law[620] and take necessary measures to establish such jurisdiction, which is done in a co-operative rather than in an overriding fashion;[621] basic procedure in cases of alleged torture is outlined;[622] law enforcement, military, medical and similar personnel are to be educated with respect to the prohibition against torture;[623] procedures with respect to arrest, detention and imprisonment are to be kept under systematic review;[624] and victims of torture are to have an enforceable right of compensation.[625] They are obligations of result.[626]

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[618] Article 2

[619] Article 3. Article 3(2) provides: "For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights."

[620] Article 4

[621] Article 5. Article 5(3) provides: "This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law." In this way, the treaty works co-operatively and concurrently with domestic law, the intention being that it not limit domestic criminal laws already in existence.

[622] Articles 6-9, 12, 13, 15

[623] Article 10

[624] Article 11

[625] Article 14

[626] See Ahcene Boulesbaa, "The Nature of the Obligations Incurred by States Under Article 2 of the UN Convention Against Torture" (1990) 12 Human Rights Quarterly 53.

There is only one article (Article 16) which deals with cruel, inhuman or degrading treatment or punishment. There is no definition of this phrase, although it is again restricted to the public sphere and only applies where the treatment or punishment is meted out by someone in a public and official capacity. Here, therefore, there is a necessary reliance on domestic law to give the article a meaning and application which is simply absent in the treaty. For example, does it apply to the use of corporal punishment in public schools[627] or the treatment of patients in psychiatric institutions? Would sexual harassment in such circumstances be covered? Would female circumcision be covered? Section 12 of the Canadian Charter contains a provision against cruel and unusual treatment or punishment. The Supreme Court of Canada in Smith v R.[628] described cruel and unusual punishment to be such that "is so excessive as to outrage standards of decency." This was held to be so for mandatory seven-year jail sentences for importing narcotics regardless of the gravity of the offence. Obiter, the court held that corporal punishment, lobotomisation and castration would also fall under this heading. On the other hand, indeterminate detention has been held not to violate section 12 in some circumstances.[629] Various child welfare legislation is also referred to in Canada's report with respect to this article, as is legislation with

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[627] See, in the European context, Campbell and Cousens v United Kingdom Ser. A, No. 48, 4 EHRR 293 (European Court of Human Rights, 1982).

[628] [1987] 1 S.C.R. 1045

[629] Lyons v R. (1983) 141 D.L.R. (3d) 376: such a sentence was valid in the case of a dangerous offender whose personality was such that future violent acts could be expected, but the sentence here was subject to periodic review.

respect to sexual harassment[630] and child abuse.[631] The application of Article 16 in Canada is therefore particularised by the local laws on which the meaning of this article relies.

While this is a stronger treaty than the others and in particular forbids derogations in any circumstances, the symbiosis with the domestic legal system is still apparent, but less of an inhibiting factor on the rights as has otherwise occurred. This is possibly due to the fact that this is a treaty dealing with a fairly narrow area, ratione materiae, of human rights.

A Committee Against Torture is established by the Convention.[632] It consists of ten experts of recognised competence serving in a personal capacity. Again, implementation is reviewed through reports submitted by the parties, within one year of the Convention entering into force for them, and thereafter every four years.[633] However, the treatment of these reports differs from that under the regimes so far discussed in two significant respects. First, while the reports are submitted to the Committee through the Secretary-General, the latter has a duty to

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[630] See, for example, the entry for British Columbia in the Report, UN Doc. CAT/C/5/Add.15 (10 March, 1989), at paragraph 65.

[631] Id., paragraph 66

[632] Article 17. For a detailed discussion of the Committee, see Andrew Byrnes, "The Committee Against Torture", Chapter 13 in Philip Alston (ed): The United Nations and Human Rights: A Critical Appraisal (1992, Clarendon Press, Oxford).

[633] Article 19

transmit them to all of the States Parties as well as to the Committee.[634] Secondly, the Committee considers the reports and "may make such comments or suggestions on the report as it may consider appropriate."[635] These are therefore not intended to be restricted to "general" comments and may form part of the Committee's annual report.[636] The Committee thus has the opportunity to formulate and express its opinion on the compliance with the Convention by a party. Problems of tardiness in the submission of reports, and the inadequacy of coverage in some of them, have already arisen.[637]

Canada submitted its first report in 1989.[638] Set out similarly to reports under the ICCPR, the Canadian report refers to the Charter, the Criminal Code, the Bill of Rights and codes dealing with law enforcement officials and the running of penitentiaries to indicate compliance with the obligation under Article 2 to prevent torture.[639] The Criminal Code was amended in 1987 to comply with Article 5.[640] This report does not prevaricate like Canada's first report under the ICCPR - probably, again, because this treaty is more narrowly focused ratione materiae,

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[634] Article 19(2)

[635] Article 19(3)

[636] Article 19(4). See also Rule 68 of the Rules of Procedure of the Committee against Torture, in UN Doc. A/43/46.

[637] See Byrnes, ante, at 525-6.

[638] UN Doc. CAT/C/5/Add.15 (10 March, 1989)

[639] Id., paragraphs 8-14

[640] Id., paragraph 17

but does nevertheless tend to gloss over issues such as whether the amendments to the Criminal Code fully comply with the Convention (for example with respect to the notion of a "public official" and others acting in that capacity).

Australia submitted its first report in 1991.[641] Also like its other reports it is an amalgam of information from the whole Commonwealth rather than being a state-by-state approach and addresses each substantive Article of the Convention, but only after a comparatively long[642] and rambling general introduction dealing with the legal implementation of human rights in Australia. It refers to legislation introduced to comply with the Convention[643] but it tends overall to be a complacent document reiterating the adequacy of the existing provisions and procedures of the criminal justice system, but not mentioning the significant problem of Aboriginal deaths in custody.

In addition, the Committee is specifically given powers to investigate allegations of systematic torture, including on-the-spot inquiries,[644] receive communications from parties that another party has breached the Convention,[645] and receive

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[641] UN Doc. CAT/C/9/Add.8 (September 9, 1991)

[642] Ten pages out of a report of 25 pages.

[643] Crimes (Torture) Act 1988; Extradition (Torture) Regulations.

[644] Article 20

[645] Article 21: like the similar provision in Article 41 of the ICCPR, this can only occur on a reciprocal basis after a declaration has been made. Canada and Australia have both made such a declaration.

communications from individuals alleging breaches.[646] Canada made declarations accepting the last two mechanisms in 1989, and Australia in 1993. The accretion of human rights treaties, which has sometimes been criticised as merely elaborating upon the categories of human rights and doing little else,[647] can in fact be seen to be improving (slowly) with respect to implementation procedures. Enforcement, however, still leaves much to be desired, especially with regard to complaints by individuals. The problems discussed above with respect to the Optional Protocol to the ICCPR also apply here. There have been no such complaints yet brought successfully against Australia under the Torture Convention. The symbiotic relationship between it and domestic systems is still apparent but not here as debilitating of its norms. Although there is little objective meaning in its definitions, and Australian ratification was delayed for almost four years because of concerns of the states with respect to its effect,[648] the sole successful case brought against Canada under it indicates that when the system of international supervision works, it can clearly "overturn" even findings of fact made by a

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[646] Article 22: this is also applicable once a party has declared that it recognises the competence of the Committee to consider such communications. Both Canada and Australia have made such declarations. The procedure of the Committee in this regard is similar to that of the Human Rights Committee, including the requirement of exhaustion of local remedies.

[647] See Philip Alston "Conjuring Up New Human Rights: A Proposal for Quality Control" (1984) A.J.I.L. 607.

[648] See Hilary Charlesworth, "The Australian Reluctance About Rights" in Philip Alston (ed): Towards an Australian Bill of Rights (1994, Centre for International and Public Law, Canberra), pp.21-53 at p.44.

State,[649] but again these findings are not enforceable.

4.10 The Children's Convention

The Convention on the Rights of the Child also contains a Preamble which is pragmatic rather than philosophical. It refers to the UN Charter, the UDHR, and to both Covenants, recognising the necessity for the full development of children and the fact that this sometimes does not occur. It also takes into account, as no prior human rights treaty to which Australia and Canada are parties does, the importance of traditions and cultural values,[650] implying that these can differ, but nevertheless conceding that these are a part of the rights rather than (as is implied in the Women's Convention) a part of the problem. This treaty is thus qualitatively different to other human rights instruments in that it is "up front" about cultural mediation of its principles. It has no necessary "Western" bias. Indeed, it is a treaty more openly of principles than rules.[651]

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[649] Tahir Hussain Khan v Canada (Communication No.15/1994), UN Doc. CAT/C/13/D/15/1994: A claimant for refugee status on the basis that he would be tortured were he to be returned to Pakistan was not believed by Canada, but this was found to be likely and therefore a breach of Art.3 (non-refoulement) by the Committee.

[650] Twelfth preambular paragraph

[651] See generally, Sharon Detrick (ed): The United Nations Convention on the Rights of the Child: A Guide to the "Travaux Preparatoires" (1992, Martinus Nijhoff Publishers, Dordrecht)

Article 1 defines "child" as meaning "every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier." Not only is the very definition symbiotic with domestic law; the definition is interesting for what it does not say. It is a definition which sets the upper age limit for childhood, but sets no lower limit. This was done purposely[652] to avoid the issue of the application of the treaty to abortion and, as has happened with all these instruments, to obtain the largest possible number of parties to the Convention.

While in Article 3 the "best interests of the child shall be a primary consideration" in all actions concerning children, the rights and duties of parents and guardians are expressly recognised. However, the specific standards are to be "those established by competent authorities"[653] and the implementation of the rights contained in the Covenant are to be undertaken through "all appropriate legislative, administrative and other measures."[654] Economic, social and cultural rights are to be implemented by States "to the maximum extent of their available resources."[655] Thus, existing State circumstances, including, but not limited to,[656] the domestic legal system, once again loom large behind the effective

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[652] Detrick, ante, pp 115-23

[653] Article 3(3)

[654] Article 4

[655] Ibid.

[656] Canada made a reservation affecting Article 4 to the effect that, in fulfilling its responsibilities under the Convention, provisions such as those expressed in Article 30 (the right of children in minorities to enjoy their respective cultures) would have to be taken into account. This would mean that appropriate

implementation of the rights.

Thus, every child has the inherent right to life "to the maximum extent possible".[657] The right of the child to registration, a name and a nationality is to be implemented by States "in accordance with their national law."[658] The child has a right to preserve his or her identity "as recognised by law."[659] A child has a right not to be separated from his or her parents except "in accordance with applicable law and procedures."[660] The child has the right to freedom of expression, but this may be subject to restrictions "as are provided by law" and are necessary for the respect of the rights of others or for the protection of national security, public order, public health or morals.[661] The child has freedom of thought, conscience and religion, but subject to "limitations as are prescribed by law."[662] The child has the right to freedom of association and peaceful assembly,

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implementation for aboriginal children would include enjoyment of their own culture, the practise of their own religion and the use of their own language: Multilateral Treaties in the Area of Human Rights to which Canada is a Party, ante, p.9.

[657] Article 6

[658] Article 7

[659] Article 8

[660] Article 9

[661] Article 13

[662] Article 14. It has also been pointed out that this article is narrower than related articles in the UDHR (Art. 18) and the ICCPR (Art. 18). For example, it does not specifically provide for the right to change one's religion. It has been argued that, since the UDHR and the ICCPR are of universal application, and apply to children as well as to adults, the rights as they apply to children have now been circumscribed: David A. Balton, "The Convention on the Rights of the Child: Prospects for International Enforcement" (1990)

but subject to restrictions "in conformity with the law and which are necessary in a democratic society."[663] No child shall be subjected to "arbitrary or unlawful" interference with his or her privacy, family, home or correspondence.[664]

Article 37 provides that States "shall ensure" that children are not subjected to torture or other cruel, inhuman or degrading treatment or punishment. It also provides that children shall not be deprived of their liberty "unlawfully or arbitrarily" and have prompt access to legal and other assistance. Included is the provision that children in detention shall be treated with humanity and separated from adults. Both Australia and Canada have made a reservation to this provision in circumstances where it is not appropriate or feasible.[665]

Other Articles require States to "recognise" such things as the common responsibility of both parents for the upbringing of the child,[666] an adoption system which is the best interests of the child,[667] the entitlement of mentally and

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12 Human Rights Quarterly 120 at 124.

[663] Article 15

[664] Article 16

[665] Multilateral Treaties in the Area of Human Rights to which Canada is a Party, ante, p.9.

[666] Article 18

[667] Article 21. Canada specifically reserved this article to the extent that it will not apply if "inconsistent with customary forms of care among aboriginal peoples in Canada.": Multilateral Treaties in the Area of Human Rights to which Canada is a Party, ante, p.9.

physically disabled children to a full life,[668] the right of all children to the highest attainable standards of health,[669] to social security,[670] to an adequate standard of living,[671] to an education,[672] to rest and leisure,[673] to be protected from economic exploitation,[674] and to be treated with a sense of dignity and worth if accused of a penal offence.[675]

Other Articles require more than a mere recognition of a right: there is a duty on States to take measures to combat the illicit transfer of children abroad;[676] a child's opinion must be given due weight in matters affecting him or her;[677] the child must have access to information;[678] the protection of the child from physical or mental abuse by "appropriate" measures[679] and from sexual exploitation and abuse is required;[680] appropriate measures must be taken for the

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[668] Article 23

[669] Article 24

[670] Article 26

[671] Article 27

[672] Article 28

[673] Article 31

[674] Article 32

[675] Article 40

[676] Article 11

[677] Article 12

[678] Article 17

[679] Article 19

[680] Article 34

physical and psychological recovery of children who are victims of such abuse;[681] and there is a right of children of ethnic, religious and linguistic minorities to enjoy that culture, practise that religion or use that language in community with other members of the relevant group.[682]

There are thus obligations of result as well as obligations of means. There is also an express, implied and functional symbiosis with domestic systems. Like the Torture Convention, the Children's Convention is intended not to limit existing domestic laws which go beyond its provisions. Thus, for example, Article 41 provides that "nothing in the present Convention shall effect any provisions which are more conducive to the realization of the rights of the child and which may be contained in ... the law of a State Party." Nevertheless, the limits of domestic law still affect proper implementation and application. They were also meant to do so, as different cultures and value systems are expressly recognised in the Preamble. The equality of children, as indeed the very definition of "child", remains domestically conditioned, even if a Western bias has been ostensibly removed.

The Convention establishes a Committee on the Rights of the Child, composed of ten experts serving in a personal capacity.[683] Review of implementation of the

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[681] Article 39

[682] Article 30

[683] Article 43

Convention is once again undertaken through a reporting system.[684] This is not as potent as the system under the Torture Convention as it once again restricts the Committee to making "suggestions and general recommendations" on the reports.[685] The drawbacks - and controversy - as to the precise meaning of this phrase have been discussed above.

The initial report of Canada[686] was due in 1994 and was considered by the Committee in May, 1995. Although praised for its efforts with respect to the establishment of a Children's Bureau and a Family Support Enforcement Fund, as well as for the effects of the Charter on children's rights, the Committee was particularly critical of Canada with respect to the effects of the federal division of powers which led to disparities and uncertainty in protection.[687] It was stressed that such a division of powers is no excuse for failure to fully observe the Convention's obligations.[688] This is especially significant considering that Canada was active in the drafting process of this Convention. The initial report from Australia was due in 1993 but was not submitted until 1995.[689] It is Australia's

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[684] Article 44: the first report being due within two years of the Convention coming into force for the State concerned, and subsequent reports due every five years thereafter.

[685] Article 45(d)

[686] CRC/C/11/Add.3

[687] CRC/C/SR.214-217, UN Doc CRC/C/15/Add.37

[688] Ibid, paragraph 9

[689] Australia's Report Under the Convention on the Rights of the Child (1995, AGPS, Canberra)

most detailed report yet,[690] and highlights the federal-state co-operation which characterised Australia's participation in the drafting process of the Convention. Nevertheless, it makes it clear that Australia will not be enacting the Convention as domestic law as compliance was ascertained prior to ratification.[691] The report mentions many initiatives which are of a proactive nature for the benefit of children,[692] and while it is not as backward-looking as some other reports (again indicating the improving standards with respect to reporting) it still is of a justificatory rather than a critical nature and emphasises once more the fact that the symbiotic nature between the international norms and the domestic system influences both the implementation and meaning of those norms. Context becomes paramount, not only nationally but between the states where such things as ages of consent to sexual intercourse, ages of compulsory education, ages at which alcohol may be consumed or tobacco smoked, and criminal liability[693] are different. The "best interests of the child" which Article 3 makes a primary consideration in "all actions concerning children" has no objective meaning, as High Court cases have

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[690] It is over 400 printed pages long and contains several additional annexes.

[691] Paragraph 6 at p.2

[692] Especially in Part A (General Measures of Implementation) which refers to child care policy, social security, child support, health, homelessness, education, employment, Aboriginal and Torres Strait Islander children, access to justice, child abuse, law reform and refugees.

[693] In particular, the Western Australian Young Offenders Act 1994 which limited the rights of repeat juvenile offenders was criticised as breaching the Convention. (This is discussed in Chapter 5). This matter receives a gloss in the Report (pp.36, 376-8).

shown.[694]

There is no provision in the Children's Convention for individual communications or for party-to-party complaints to be made, although consideration is currently being given to the preparation of Optional Protocols on the Sexual Exploitation of Children and Children in Armed Conflict. There is no general Protocol proposed, highlighting the additional problem of recourse to enforcement measures inherent in the status of childhood itself.

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[694] For example, in the Teoh case discussed in Chapter 5.

4.11 Conclusion

> The goal of human rights proponents ... is to make governments meet certain standards of behaviour in their treatment of their own citizenry and to make them do so from outside the domestic legal system where such activity has historically been confined. Rather than relying upon the right of revolution to remedy intolerable government practices, the human rights proponents wish to adopt either a supranational or an international approach.[695]

A quotation such as the one above sees a limited utility of international law in the protection of human rights precisely because it ignores the influence of domestic systems on them, conceiving human rights as natural-law-like concepts superior and anterior to domestic law (which this and the previous chapter have shown they are not). At the most rudimentary level, this influence can be seen in the similarities between the ratione materiae of the international instruments and the domestic documents described in Chapter 2 and the process of picking the categories of human rights described in Chapter 3. This chapter has attempted to contrast the question of the fundamental characteristics of human rights in international law (considered in Chapter 3) with the structure and content of the norms actually produced by the international system, to lay a basis for clarifying the links between international human rights and domestic norms. Those links have been seen to involve an express, implied and functional symbiosis. Thus, even though major instruments like the ICCPR can be regarded as "an instrument of

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[695] J.S. Watson, "The Limited Utility of International Law in the Protection of Human Rights" (1980) Proceedings of the 74th Annual Meeting of the American Society of International Law, at p.1.

constitutional dimension which elevates the protection of the individual against the power of the state to a fundamental principle of international public policy"[696] so that the rights in it should be read broadly and its restrictions read narrowly, those rights, and the restrictions on them, have meaning only in the context of that symbiotic relationship, regardless of the approach taken to treaty interpretation. This is not autointerpretation of the obligations, as the Human Rights Committee has made it clear that the domestic rule will not be determinative and that reasonableness and proportionality, in the light of the purpose of the treaties, are overriding factors.[697] But this situation is a function of the necessary and unavoidable impact of the international and domestic legal systems on each other in the area of human rights. A symbiosis not only exists: it is necessary. Symbiosis is more than the "margin of appreciation" resorted to by the European Court of Human Rights as mentioned above, because it goes to more than the application of the norms but to their very meaning as well. It is also more than the principle of

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[696] Thomas Buergenthal, "To Respect and to Ensure: State Obligations and Permissible Derogations", Chapter 3 in Louis Henkin (ed): The International Bill of Rights: The Covenant on Civil and Political Rights (1981, Columbia U.P., New York), p.90.

[697] I would, in general, agree with Henkin when he writes that the wording of the instruments does not allow for a free and easy autointerpretation and that (in the context of the former Soviet Union):

> [f]reedom of expression ... can be limited [under the ICCPR] for reasons of national security and public order ... [t]hat does not permit extravagant claims of the needs of national security. Nor does it permit identifying that specific, narrow exception, or the equally specific and narrow exception for "public order", with the "needs of Socialism" or the "revolution". That would essentially deny individual rights in the name of an overriding public good as a state perceived it.

Louis Henkin (ed): The International Bill of Rights, ante, (1981, Columbia U.P., New York), Introduction, p.29.

"legality"[698] as it relates to more than the form which permissible limitations on human rights must take.

The notion of legal equality is thus internationally directed, but locally determined. At the international level, the foundations, content, and implementation of human rights and the processes through which they are identified or achieved all have a bearing on the proper understanding of the norms produced, and directly affect consideration of their ultimate domestic impact (which will be the primary concern of Chapter 5).[699] There are now many human rights treaties and other instruments, and several categories of human rights (civil and political as opposed to economic and social; individual as opposed to group rights) and sub-categories within each, sometimes appearing to contradict each other (eg, the right to freedom of expression as opposed to the right to privacy; or the right of women to equality contrasted with the right to freedom of religion). Even within international law, they are not necessarily norms of a symmetrical or synallagmatic contractual type.[700] As the International Court of Justice said with respect to the Genocide

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[698] See Oscar M. Garibaldi, "General Limitations on Human Rights: The Principle of Legality" (1976) 17 Harvard International Law Journal 503 who points out, quite rightly, that the terms "prescribed by law", "according to law", etc are not necessarily synonymous. But the clear link is nevertheless to domestic laws.

[699] This could be called a "regime analysis", but the definitional problems attached to this concept have prompted me to avoid it. See Jack Donnelly, "International Human Rights: A Regime Analysis" (1986) 40 International Organization 599, at 599-602.

[700] In this regard I must disagree with writers such as Professor Rosalyn Higgins who resorts to a fallacious contrast between synallagmatic and non-synallagmatic norms when she writes:

> ... the extent to which Governments have freedom to abrogate contracts, or to be immune from legal

Convention:

> In such a convention the Contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the raison d'être of the convention. Consequently, in a convention of this type one cannot speak of individual advantages to States or of the maintenance of individual advantages or disadvantages to States or of the maintenance of a perfect contractual balance between rights and duties.[701]

This lack of perceived reciprocal interests can create problems of compliance in a system such as international law which is basically horizontal and not administered by some "impartial" third party.[702]

As Chapter 3 indicated, the notions of the universality, inherency and fundamentality of human rights are also far from being straightforward. The result has been a commitment at the international level to general principles or standards,

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> process for such a breach, will depend upon the proper law of the contract. But the prohibition placed upon a Government from the use of torture is not dependent at all, as a matter of law, upon its own legal system: the obligation is one of international law. ("International Law and the Avoidance, Containment and Resolution of Disputes - General Course on Public International Law" Collected Courses of the Hague Academy of International Law, Receuil des Cours, 1991, V, Tome 230, at p. 136.)

In my view, it is so dependent for both meaning and real enforcement. This is not simply espousing a "liberal" point of view anxious to accommodate different cultural and political views and values. It is a result of the very wording of international human rights norms together with the systemic problems inherent in the international legal system. The international principles of human rights may be standard, but their application domestically - in terms of both meaning and enforcement - is not necessarily so.

[701] Reservations to the Genocide Convention, Advisory Opinion,, ICJ Reports 1951, 15 at 23.

[702] Watson, ante, p.3, contrasts the treatment of aliens in international law where reciprocal interests of at least two States are involved.

but an active avoidance of "a conceptual confrontation between ... historical traditions and ideological commitments."[703] The forum has had an impact on the content and structure of human rights and on the mechanisms of enforcement and implementation with respect to them. It has introduced a political constraint into the normative aspirations, creating what Falk has called a tension.[704] While the notion of human rights has by this process been raised as a legal issue, it is difficult to pin down clearly defined legal obligations. This is so from two points of view. From the point of view of content, the norms are not simply imprecise, they were made purposely flexible. The instruments set out what are more in the way of minimum standards which more often than not only become articulated rules once set into the context of a domestic legal system and its norms and values. It has been said that, in this regard, human rights treaties are more like "a series of unilateral adoptions of a common standard."[705] Nevertheless, they do create a core concept if not core rights. Symbiosis with domestic systems provides the contextual metes and bounds to help turn these core concepts into rights. But the indicia of the concept are set by the international norms, it is not solely a matter of individual context or culture. Secondly, from the point of view of their legally binding nature, the documents in which they are contained may be non-binding UN resolutions (like the UDHR) or legally binding treaties (like the instruments

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[703] B.G. Ramcharan: Human Rights Thirty Years after the Universal Declaration (1979, Martinus Nijhoff, The Hague), p.121.

[704] Richard Falk: Human Rights and State Sovereignty (1981, Holmes & Meier Publishers, New York), p.34.

[705] Watson, ante, p.4

referred to in this chapter). As seen above, it has been argued that some human rights are jus cogens. There is thus an indefiniteness about the legally binding nature of the norms, largely created by the processes of their adoption: a creation that appears to be like a Heath Robinson contraption, but is in fact a (necessarily) compromised synthesis of "political ideologies as they converge on the principles of human dignity."[706]

There is also controversy as to whether there is a hierarchy of human rights.[707] While some rights are expressed as being non-derogable,[708] what those rights actually mean remains a problem, as discussed above. Meron, who disagrees with the notion of such a hierarchy, writes:

> The use of hierarchical terms in discussing human rights reflects the quest for a normative order in which higher rights could be invoked as both a moral and a legal barrier to derogations from and violations of human rights. Their introduction into international law was inspired by the national law analogy with its firmly established hierarchical structure. The trend

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[706] Philip Alston & Gerard Quinn, "The Nature and Scope of State Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights" (1987) 9 Human Rights Quarterly 156 at 219.

[707] Contrast Theo van Boven, "Distinguishing Criteria of Human Rights" in Vasak & Alston (eds): The International Dimensions of Human Rights, 1, (1982, UNESCO, Paris), 43, with Prosper Weil, "Towards Relative Normativity in International Law?" (1983) 77 AJIL 413, and Oscar Schachter, "The United Nations and Internal Conflict" in K. Raman (ed): Dispute Settlement Through the United Nations (1977, ...)301 at 305. Meron further notes that the terms "human rights", "freedoms", "fundamental human rights", "fundamental freedoms", "rights and freedoms" and "human rights and fundamental freedoms" are used interchangeably with no "substantive or definable legal difference." (Theodore Meron: Human Rights Law-Making in the United Nations: A Critique of Instruments and Process (1986, Clarendon Press, Oxford), p.178.

[708] Such as the right to life and the prohibitions on slavery, torture and retroactive penal measures in the ICCPR.

> towards the characterization of certain rights as hierarchically superior may also be seen as a response to the proliferation of human rights instruments, sometimes of poor quality and uncertain legal value. When some rights proclaimed by such instruments are questioned, it is not surprising that attempts are made to upgrade other rights by giving them various quality lat 's, on the assumption that the authority of the higher right will not be impugned.[709]

While I would not go so far as to say that the major human rights treaties discussed above are of poor quality or of uncertain legal value, they do have an uncertain legal effect. International human rights instruments do not attempt philosophical or jurisprudential justification of human rights. In addition, the strategies for bringing international human rights to bear on national systems - largely through the reporting procedures - is minimalist in approach and effect. In this sense also the necessity to link them with domestic legal systems is strengthened.

It is also too simplistic to conceive of a scale running from non-law to "soft" law, to "hard" law, to jus cogens. Rather than being linear, these complex linkages in the system may create a legally-binding quality of the norms which is better conceived, as Riphagen contends, as being a circle in which the ends can overlap.[710] Better still, we could conceive them as particles in fluid in a tank. They move about depending upon the forces agitating the tank. There is neither a pre-determined "place" for them nor is there a necessary incremental progression

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[709] Meron, ante, pp.200-201.

[710] As proposed in W. Riphagen, "From Soft Law to Jus Cogens and Back" (1987) 17 Victoria University of Wellington Law Review 81

in importance or effectiveness. While we might be able to explain the situation or a change to it, there is no necessary coherence to it. All the factors can have a effect on the meaning of the norm as much as having a bearing on whether it is more - or less - "secure" in the system. And the norms produced are neither internally complete nor self-sufficient. As norms, they are not self-contained, either within themselves or within one system of operation. This is so not only in the actual content of the rules (especially in those qualified by phrases such as "according to law" mentioned above) but also with respect to their enforcement, which is predicated upon the exhaustion of local remedies.

The discussion in this chapter and in Chapter 3 tends to support the observations of Vratislav Pechota who writes:

> Nothing in the records [of the Commission on Human Rights when drafting the instrument which eventually became the UDHR, the ICCPR and the ICESCR] suggests that the Commission ever felt the need of a uniform theory, let alone ideology, of human rights. ... The goal of the Commission was not to achieve doctrinal consensus but to reach a set of agreements that might be justified even on highly divergent doctrinal grounds.[711]

This means that domestic socio-political values become necessarily implicated and, as Meron puts it, "the very effectiveness of international human rights instruments depends upon their observance and implementation through domestic judicial and

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[711] Vratislav Pechota, "The Development of the Covenant on Civil and Political Rights", Chapter 2 in Henkin, ante, p.36.

administrative agencies."[712]

The linkages between the two systems and their norms are, however, complex and their effects similarly so. This chapter has shown that human rights treaties have continued the ostensibly value-neutral approach, but while they do not overtly rely on Natural Law they are far from value free. Particularly the feminist analyses of human rights referred to above indicate this. This tends to be increased rather than lessened by the symbiotic relationship to domestic systems. Similarly, the very categories of human rights used in international instruments can limit effective equality. The view of the Human Rights Committee in the Toonen case, for example, was that Tasmania's Criminal Code was a breach of the privacy of homosexuals. "Privacy" was a category in the ICCPR which could apply to this case. But the real essence of the case was that the law not only invaded the "in bed" actions of a minority, but that it contributed to the subordination of the group and encouraged violence against its members. The issue was really about the (mis)use of a government's power, but "privacy cannot provide an analytic structure to theorise power."[713] In such a situation, difference is not really

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[712] Theodore Meron: Human Rights and Humanitarian Norms as Customary Law (1991, Clarendon Press, Oxford), p.80 (emphasis added). Meron notes, however, (at p.101) that the uniqueness of international human rights law in this sense should not be exaggerated: other areas, such as sovereign immunity, have been developed largely by national courts and national laws. Also, the law referred to in Article 38(1)(c) of the ICJ Statute has been generated by domestic courts and laws.

[713] Wayne Morgan, "Identifying Evil for What It Is: Tasmania, Sexual Perversity and the United Nations" (1994) 19 Melbourne U. Law Review 740 at p.751.

valued.

"Human rights" are not the end of the story: they are the beginning of it. While the agreed catalogue of human rights comes from the international end of the spectrum,[714] their meaning is influenced by both the international and the domestic ends of that spectrum. A knowledge of domestic legal norms is required before the content and application of "human rights" can be assessed in any realistic sense. And, in practical terms, States - and others - must "do" something about them. Human rights are therefore malleable entities, and their implementation and enforcement is also, and consequentially, malleable. They are not set in concrete and are dynamic rather than static norms. There can also be no privileged "decoder" of human rights. The power which arises from an undisputed right to determine definitions and applications is missing, contributing to indeterminacy. In this sense, commentators like Craig Scott and John Hannaford are correct to talk of a "site of struggle", a "site of dialogue"[715] or a "process of conversation"[716] when explaining rights discourse. The processes of implementation, interpretation and enforcement must squarely face the negotiability

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[714] I am not overlooking here the input into the process of deciding upon that catalogue of the influence of domestic "sources"; I am concerned rather with the ultimate manifestation of the catalogue as norms.

[715] Craig Scott, "International Review and Interpretative Authority", paper presented to the conference Australia and Human Rights: Where to From Here?, Centre for International and Public Law, Australian National University, Canberra, 15-17 July, 1992.

[716] John F.G. Hannaford, "Truth, Tradition and Confrontation: A Theory of International Human Rights" (1993) 31 Canadian Yearbook of International Law 151 at p.185.

which, if anything, is the "inherent" nature of these rights.[717] They are certainly indeterminate and may be manipulable, but, unlike the assertions of David Kennedy,[718] they are not illusory and are more than mere claims.

Thus, in the international system, implementation of human rights can be half-hearted, enforcement can be based on goodwill or political expediency, and individual petitions and complaints - where they are available at all - stymied on a host of grounds. Thus, Watson has commented that:

> The net effect of a [human rights] treaty ... is not very great. Either a state already has the motivation to observe human rights, in which case a treaty adds nothing, or else a state does not have such motivation, in which case a treaty cannot provide it.[719]

This, in my opinion, is overstating the case. Granted that the obligations of implementation and enforcement are not particularly strong, especially when viewed in the light of open-ended norms in symbiotic relationships. But the processes of implementation and enforcement, as hobbled as they may be, nevertheless can provide motivation for improvement in circumstances where a State might not otherwise act. The amendments to the Canadian Indian Act and the introduction of the Australian Human Rights (Sexual Conduct) Act were the direct result of complaints brought by Sandra Lovelace and Nick Toonen under the First

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[717] Hannaford, ibid, contends that theories which conceive of human rights as fixed standards leads to the ossification of human rights and that human rights instruments should be conceived as "rough guidelines."

[718] See David Kennedy: International Legal Structures (1983, Sijthoff & Noordhoff, Dordrecht).

[719] Watson, ante, p.4

Optional Protocol of the ICCPR, rather than the result of internally generated political motivation.

The problem is more with the asymmetry between domestic systems of law and the international legal system: asymmetrical in the contrast between the highly organised legal and political structures within States and the more loosely structured processes of law creation at the international level; in the contrast between the apparently highly structured, legalistic norms produced at domestic level and the more open-ended norms produced at the international level; in the contrast between the highly structured, apparently legalistic adjudicative processes at domestic level and the more loosely-structured, highly politicised processes at international level; and in the contrast between the apparent fragmentation of the structure and processes at international level (with many treaties, other instruments of less than treaty status, different regulatory bodies, and different implementation and enforcement procedures - what Alston has called "the reality of unplanned growth")[720] and the apparent cohesiveness of the structure and processes at domestic level. There is further asymmetry in the contrast between the fact that traditionally the individual has been only an object of international law but is the principal subject of domestic law (with a consequent further asymmetry in his or her ability personally to enforce human rights norms: the duties are owed to individuals but, with a few exceptions, are enforceable by States). There is a

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[720] Philip Alston: The United Nations and Human Rights: A Critical Appraisal, ante, at p.2.

further asymmetry of consequences in the fact that a failure to introduce necessary enabling domestic legislation to implement an international treaty obligation may be a breach of international law, but will not automatically breach domestic law. There is also a crucial asymmetry in the fact that international human rights norms need to be, and are meant to be, implemented in a domestic legal system and may be most effectively enforced there.

The asymmetry is therefore pervasive, affecting and effecting processes and consequences, as well as content and, ultimately, implementation and enforceability. This asymmetry creates the overall impression, and not a necessarily correct impression, that international norms of this type and created in this way are not readily susceptible of domestic methods of legal implementation and enforcement.

Where does that leave the individual and her or his ability to enjoy, and if necessary enforce, human rights? It is through this asymmetrical, fluid, mix that the position of the individual with respect to the State in the light of human rights must be viewed. The individual therefore exists at no immutable fixed point in the system, and the relationships between the elements in the system may vary. Because of the symbiotic nature of the content of the norms and their placement into a structure of asymmetrical dualism, their precise operational parameters, and hence the relationship between State and individual, is fluid.

Similarly, the related question whether the individual has legal rights and duties, as opposed to mere interests, in the system must also be fluid and relative.[721] Human rights have helped break down one aspect of the public/private distinction in international law, with respect to the accepted scope of Article 2(7) of the UN Charter. Human rights are no longer just "domestic" matters. But this is done in a way which is irregular, erratic and sometimes capricious. Again, the issue is largely (although not entirely) one of the procedural status of the individual. As Henkin points out, the claims based on human rights are directed to the individual's own society, not necessarily on other societies.[722] While Article 14 of the UDHR provides for a right "to seek and to enjoy in other countries asylum from persecution" there is no "right" to demand a right of residence in a country where living conditions might be better. Asylum is not even mentioned in the ICCPR.[723] The substance of international human rights norms - including their meaning, implementation and enforcement - is directly affected by the international legal structure because the power arrangements of international law-making are essentially unaffected by those norms. The relationship of individuals to international law is still through the State rather than directly to the international community. (Violations of human rights by non-State actors are actionable on the

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[721] For an overview of the literature on these issues, see Carl Aage Norgaard: The Position of the Individual in International Law (1962, Munksgaard, Copenhagen), Chapters 3-5.

[722] Louis Henkin (ed): The International Bill of Rights, ante, Introduction at p.7.

[723] See also S. Prakash Sinha: Asylum and International Law (1971, Martinus Nijhoff, The Hague) who says "... the individual has no such right [of asylum] of any legal significance." (at p.91).

basis of state responsibility through the victim's State; violations by State actors are sometimes directly actionable but only when local remedies are first exhausted). If the latter applied we might not need domestic enforcement of human rights but action could be taken through the UN as the representation of the international community, or to some other body, or directly to any State concerned. But this is not the structure set up by the relevant instruments. The connection is still via the State. Recent changes to underlying values and motivations - such as the advent of "glasnost" and the decline in the use of human rights as an ideological stick used for Cold War points scoring[724] - have not changed this structural fact. Thus, while the position of the individual as a "subject" of international law has improved, a decentring of the State from the international structure has not occurred. Thus, the international system can tolerate, but cannot really guarantee, rights of the human rights type. That system provides for the rule of law, but allows the whim of States to intrude. While such a restructuring away from the State might be advantageous and is advocated, for example, by Critical Legal Studies scholars, I consider the possibility of any such restructuring to be unrealistic. The better, and more realistic, option to reclaim

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[724] This is, unfortunately, only a decline. At the World Conference on Human Rights held in Vienna in 1993, human rights might have advanced from being seen by cynics as an ideological cover for realpolitik. Unfortunately, the vision which encapsulated for those present the true extent of the effectiveness of, and genuine belief in and commitment to, human rights by governments was the ban on the Dalai Lama of Tibet, a Nobel Peace Prize winner, from attending the opening ceremony at the apparent insistence of China, which resulted in a boycott of the opening ceremony by fourteen other Nobel Peace Prize winners (The Australian, June 15, 1993). The message was one of compromise and ritual hypocrisy rather than of human rights being an inherent and inalienable defining characteristic of every human being.

human rights for individuals is to consider their enforcement in the forum where individuals have a great deal more (although by no means total) power: at the domestic level.

But there is no direct obligation in any of the instruments discussed in this and the previous chapter to incorporate them directly into domestic law. Nevertheless, as Louis Henkin has written: "International human rights obligations are met when, and only when, national laws and institutions meet the minimum international standards and give effect to the minimum of human rights."[725] The issue of the domestic legal system, and how it can cope with the concept of human rights, is thus crucial. It is to this issue, in the context of Australia and Canada, that the next chapter turns, particularly to see whether some of the problems just mentioned might be ameliorated, particularly when concerns of a human rights nature today are not just of the individual-vs-the State variety, but also involve person-to-person interaction.

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[725] Henkin, ante, p.14

CHAPTER 5

HUMAN RIGHTS NORMS AND THE DOMESTIC LEGAL SYSTEMS OF CANADA AND AUSTRALIA: FROM SYMBIOSIS TO SYNERGY?

5.1 Introduction

> Genuine tragedy represents the drama of right against right. There is no consolation of a final, right answer. Antigone is right and Creon is right. In an era struggling to free itself from metaphysics, a struggle which defines postmodernism, human rights ... are the stage where the dramas of right against right and principles against principles are performed.[1]

The clash of right against right in the transformation of international human rights norms into domestic legal systems may be problematic and dramatic, but is not tragic. It represents a contrast between the apparent primacy of jurisdictional principles at the domestic level and the apparent primacy of normative standards (with weak enforcement mechanisms) at international level. Aubert refers to this as a "tension between ideology and technique."[2] As seen in Chapters 3 and 4, the development of international human rights norms has been the result of political compromise reacting to historical circumstance. In addition, the symbiotic relationship revealed in Chapter 4 indicates that the international norms are not internally complete and self-sufficient in any event. The international norms provide for the articulation of human rights as minimum standards of conduct, and

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[1] Rolando Gaete: Human Rights and the Limits of Critical Reason (1993, Dartmouth, Aldershot), at p.170.

[2] Vilhelm Aubert: In Search of Law: Sociological Approaches to Law (1983, Barnes & Noble, Totowa) at p.152.

can thus supplement the deficiencies of national laws, but are cryptic with respect to their implementation and enforcement. The primary burden with respect to the latter therefore falls upon domestic legal systems and national institutions, whether that implementation and enforcement comprises education, investigation, conciliation, adjudication or legislation. The domestic legal order becomes the filter through which an international policy of human dignity becomes practice. Thus, in practice (if not in theory) human rights are not of the "one size fits all" variety; they are constructed as much by the law as of the law.

Chapters 3 and 4 dealt with the sources of international human rights norms and the problems with the content, implementation and enforcement of those norms. This chapter deals with the resort had to those norms in the legal systems of Canada and Australia and the problems, overt and inherent, with this. The aim of the chapter is to examine the effectiveness of human rights as legal rights in Australia and Canada. This is the result of the combination of the international norms (and their drawbacks) with the structural characteristics of the domestic systems (the constitutional division of political power; the exercise of judicial power). This combination creates the periphery within which international human rights norms may be domestically implemented and enforced. This is further exacerbated with respect to individuals by procedural problems such as rules with respect to locus standi.

The chapter begins by examining the theoretical underpinnings of the reception of international law into domestic systems (particularly, the monism/dualism debate) and then considers the cultural factors in the developmental matrix which influence social perceptions of, and receptiveness to, human rights such as general public awareness and legal traditions.

The two countries are assessed with respect to whether, or to what extent, international human rights norms are the engine driving the domestic systems of rights delivery, how they do or can fit into these systems, and whether the result is a synergy of the two systems creating more than the sum of the individual component parts.

The complex developmental matrix of human rights described in Chapters 2 and 3 feeding into the international legal system as described in Chapter 4 has left us with open ended rights and few solutions to questions such as the specific content of the rights, the justification of them, and access to them. Some human rights are negative in character, some are positive in character; some are absolute, most are not; most are individualistic, but some are group-oriented; new ones, which do not easily fit the old paradigms (such as the right to development, the right to peace and the right to a clean environment), are emerging.[3]

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[3] See Victor Mavi, "The Challenges to Human Rights Theory", Chapter 7 in Hanna Bokor-Szego (ed): Questions of International Law: Hungarian Perspectives (Vol. 5) (1991, Akademiai Kiado, Budapest).

These issues must be confronted and resolved at the domestic level, according to the systems dominating there. These systems bring their own special problems to bear. This chapter looks in broad focus at the effect of the Canadian Charter of Rights and Freedoms, comparing it to the failure of Bills of Rights in Australia. It then narrows the focus to consider the rights and freedoms (express, implied and constructive) otherwise in the constitutions of Australia and Canada,[4] then at rights specifically implemented by legislation, and then at the situation with respect to the courts and the common law. Domestic legal systems can be both rigid (facilitating at least some reliability and predictability) and flexible (allowing for application to new circumstances). They are also reflexive and self-addressing, defining the limits of their own constitutional validity.[5] Constitutionalism can turn a value into a legal artefact, sharpening rather than modifying existing domestic distinctions such as that between the public and private spheres. This chapter considers whether human rights can ameliorate this situation, or whether they become swamped by constitutionalism in the domestic sphere.

Are human rights ultimately implemented, or compromised? The process of their translation into domestic legal systems holds the key to the answer to this important question.

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[4] Because of the impact of the Charter in Canada, the emphasis here will be on Australia.

[5] Timothy O'Hagen: The End of Law? (1984, Basil Blackwell, Oxford), at p.4.

5.2 Theoretical Underpinnings: Help or Hindrance?

The relationship between international law and domestic law relates to both the concept of law (and especially notions of natural law described in Chapter 3) and the structure of the international and domestic legal systems, particularly in the light of the law-creating processes in each. The theory of this relationship essentially revolves around variations of the theme of the unity or plurality of these systems (usually referred to as monism and dualism). Both monism and dualism can act as vindications of international law in the domestic setting. It was in fact nineteenth century German theory which took the lead in the debate of the relationship between international and domestic legal systems, for historical reasons. The problems posed by German unification, with a Reich formed out of formerly sovereign entities, acted as the spur to considerations of the divisions between international and constitutional law.[6] To forge a new national constitution, but to placate the yearnings for sovereignty of the formerly independent entities, an application of Hegel's general theory of law was used to place the State (and its will as expressed through the interplay of constitutional powers) paramount. International law was binding only as an expression of States' will, and the State was superior to and antecedent to the international community. This was in fact a

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[6] See Luigi Ferrari-Bravo, "International and Municipal Law: The Complementarity of Legal Systems", in R. St.J. Macdonald & Douglas Johnston (eds): The Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory (1983, Martinus Nijhoff, The Hague), pp.715-44, at 729ff.

form of monism sometimes referred to as "inverted monism"[7] which regarded municipal law as superior to international law (as the latter is regarded in effect as being a derivation and external manifestation of the former). It denied the existence of international law as a distinct, autonomous, body of law.[8] This view never became a predominant line of doctrine[9] and particularly for its assertion that municipal law will predominate in both national and international tribunals, it is generally derided.[10]

Against this, Triepel[11] developed a dualist or pluralistic approach which is also associated with Hegelianism.[12] Law is an act of sovereign will. Municipal law is the manifestation of this will internally directed; international law is the (external) manifestation of a collective act of sovereign wills. International law and municipal law are therefore two quite separate spheres of action with respect to origins, subjects and subject matter. If the sovereign, through municipal law, exceeds its

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[7] D.P. O'Connell: International Law, 2nd ed (1970, Stevens, London), p.42. O'Connell cites Bergbohm's Staatsverträge und Gesetze als Quellen des Volkerrechts (1876).

[8] Antonio Cassese: International Law in a Divided World (1986, Clarendon Press, Oxford), p.18.

[9] Luigi Farrari-Bravo, id., p.729

[10] Erica-Irene A. Daes: Status of the Individual and Contemporary International Law: Promotion, Protection and Restoration of Human Rights at National, Regional and International Levels, Human Rights Study Series No. 4, E.91.XIV.3, (1992, United Nations, New York). At p. 4 Daes calls inverted monism "no more than an abstraction."

[11] H. Triepel: Volkerrecht und Landesrecht (1899), translated in 1923 as Droit International et Droit Interne: see O'Connell, ibid.

[12] But different to the inverted monism of Bergbohm in that Triepel distinguished between State will as internally manifested and State will as externally manifested: see O'Connell, id., at p.43.

competence under international law, the latter may be breached, but the former is not void as a result. Thus, two contradictory norms can be simultaneously valid. As a reaction to the earlier German theory, Ferrari-Bravo has called this "a vindicatio in libertatem of international law."[13]

This approach was followed by other scholars, such as Anzilotti, who (unwittingly) posed a seminal question for human rights when he wrote that "international law is by its very nature unable to bind individuals, ie, to confer upon them rights and duties" and that if it did so "such an attempt ... would not be a rule of international law, but a rule of uniform municipal law common to several States."[14] Such a theory in fact complements the British (and Canadian and Australian) distinctions between the prerogatives of the Crown (eg, the right of the Executive to enter into treaties and participate in international relations) and the prerogative of Parliament with respect to domestic law-making.

This theory presumes that international norms will need to be transformed into the legal system, to turn them into municipal norms. More often than not, this is so, particularly because of the structure and processes of the municipal system. However, the presumption in the dualist theory that the subjects and subject matter of international law and municipal law are separate has been shown in the

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[13] Luigi Ferrari-Bravo, id, p.729.

[14] Il Diritto Internazionale nei Giudizi Interni (1905), p.177, translated by O'Connell, id, at p.42.

preceding Chapters to be fallacious with respect to human rights. There is in fact a symbiotic relationship between the two.[15] In addition, the separateness of the origins of domestic and international human rights norms is only true in the mechanical sense. What this theory does is to give hierarchical primacy to domestic law in the domestic system.

The development of monistic theory must also be appreciated in historical perspective. It rose to prominence after the First World War when the issues of the liability of Germany and of individuals like the German Emperor were being considered.[16] The issue was the liability of people or organs under international law when the impugned actions were not unlawful under domestic law. The same fundamental issue arose again with the prosecution of the war criminals at Nuremberg and Tokyo after the Second World War. However, these, and the protection of minorities under treaties after the First World War, were the only instances in practice of consideration being given to this issue until the recent issue of liability for war crimes in the former Yugoslavia arose for consideration. These situations must therefore be regarded as exceptional rather than indicative of a

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[15] Luigi Ferrari-Bravo, id., in fact names his chapter "... Complementarity of Legal Systems." As seen in the previous two Chapters of this thesis, and as will become apparent in the present Chapter, the systems are not complementary.

[16] See Luigi Ferrari-Bravo, id., pp.731ff.

trend prompting the emergence of theory.[17] However, in addition to this, new constitutions were emerging, such as that in Germany,[18] which pledged fidelity to international norms.[19] It was this which brought the issue squarely for consideration at the domestic level, and it was exacerbated by the sharp rise in the number of treaties (international law had been predominantly composed of customary rules until this period).

Monism has been described as "an emanation of the Kantian philosophy which favours a unitary conception of law."[20] It assumes a common field of operation of both international and municipal law. The capacities of States derive from the idea of law (not just from their sovereign will) and jurisdiction to exercise these capacities is granted by and limited to that law. If the limits are exceeded, the acts are invalid. All law is regarded as ultimately being concerned with individuals, the "State" being an abstraction and in reality the agglomeration of individuals.[21] Monism (like dualism) had a variety of manifestations, sometimes categorised into

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[17] See also the debate between Schwarzenberger (a dualist) and Lauterpacht (a monist) as to whether international law ever really creates duties for individuals: Georg Schwarzenberger, "The Problem of an International Criminal Law" (1950) 3 Current Legal Problems 269ff.; Hersch Lauterpacht: International Law and Human Rights (1950, Stevens & Sons, London), pp.10ff.

[18] Article 4 of the Weimar Constitution of 1919 read: "The universally recognised rules of international law are valid as binding constituent parts of the law of the German State."

[19] Ferrari-Bravo, id., pp.733ff.

[20] O'Connell, ante, p.39.

[21] See particularly Lauterpacht: International Law and Human Rights, ante.

"radical" monism and "moderate" monism.[22] Hans Kelsen is regarded as an exemplar of the former. Considering "will" to be only an "anthropomorphic metaphor",[23] Kelsen wrote that norms exist because a previous norm (ultimately leading back to a "grundnorm") prescribes that a norm-maker may bring it into existence. For legal purposes, that grundnorm is pacta sund servanda.[24] Law is thus binding on subjects independently of their will and international law and municipal law form one unified normative order. Indeed, the latter derives its binding force from the former.

This theory also bolstered international law by placing a new emphasis on the its role as a controlling factor in State conduct.[25] It appears to overcome the dichotomy seen by the dualists with respect to origins, subjects and subject matter. It also consequentially does not require transformation of international law into a domestic legal system, although whether the incorporation is automatic, as opposed to being an adoption which is still ultimately dependent on the will of the State concerned, is not axiomatic.[26] However, in avoiding some problems monistic

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[22] See Karl Joseph Partsch, ante, p.240.

[23] Hans Kelsen: Principles of International Law (1952), p.408.

[24] Principles of International Law, ante; see O'Connell, ante, pp.40ff.

[25] For monism particularly applied to human rights, see H. Lauterpacht: International Law and Human Rights, ante.

[26] See Felice Morgenstern, "Judicial Practice and the Supremacy of International Law" (1950) 27 British Yearbook of International Law 42.

theory raises another: the issue of the primacy of international law and domestic law when the norms contradict each other. For dualists this problem does not arise. For Kelsen, the question was a political one which was outside his "pure theory of law." Other "radical" monists regarded municipal law as deriving its authority by way of delegation from international law which determines the territorial and personal sphere of validity of national systems of law.[27] For all of them, municipal law inconsistent with international law was void. The "moderate" monists asserted that municipal law contrary to international law is not void ab initio; it is still binding internally.[28] International law, rather than delegating power to States, determines a margin of action for each State.[29] A State which does not act within that proper margin has a duty to correct its actions, so that ultimately international law supersedes domestic law, but in the meantime domestic courts may apply the domestic standard which is internationally wanting. A more cynical (or perhaps realistic) view refers to the "dédoublement fonctionnel" which occurs when people must act in situations involving these issues.[30]

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[27] See J.G. Starke, "Monism and Dualism in the Theory of International Law" (1936) 17 British Yearbook of International Law 66 at 77.

[28] See Rosalie P. Schaffer, "The Inter-Relationship Between Public International Law and the Law of South Africa: An Overview" (1983) 32 International and Comparative Law Quarterly 277 at 281.

[29] A. Verdross, "Coincidences: Deux théories du droit des gens apparues à l'époque de la création de l'Académie de droit international" in R.J. Dupuy (ed): The Hague Academy of International Law: Jubilee Book 1923-1973 (1973), 84-89.

[30] Georges Scelle: Manuel de droit international public (1948, Paris), pp.17ff.

While this accords with reality. it does little to enhance the consistency of the monist theory. And while the false dichotomies of the dualist approach are avoided, monism evades the political component of international law by ignoring the fact that many developing countries are suspicious of forms of supranationalism based on norms many of which were formulated to the advantage of, or at least reflecting the values of, the developed (and usually capitalist) world.

Monism is also of little real help with the more difficult problem of whether international law is available to a judge in a domestic court for a decision where, normatively, the domestic law is valid but is different to international law. The issue of the distinction between formal validity and the material content of norms is not successfully resolved and resort must ultimately be had to factors considered "extralegal",[31] illustrating how important these are (and, indeed, how they are in reality a part of the system).

Indeed there has been no necessary correlation between the theories themselves and their champions' approach to jurisprudence generally: positivists like Jellinek and Triepel were dualists, whereas the positivist Hans Kelsen was a monist, as were many natural lawyers.[32] Apart from the air of unreality of these theories, their

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[31] For example, Verdross relied on general principles of justice rather than pacta sund servanda: "Le fondement du droit international" Haque Receuil, Vol. 16, (1927), p.287.

[32] See Arthur Nussbaum: A Concise History of the Law of Nations (1958, Macmillan, New York), pp.232ff and 276ff.

apparent simplicity and clarity is not matched by consistent doctrinal underpinning.

Compromise positions between the extremes of monism and dualism have been attempted. Philip Allott has argued on the basis of an interrelationship between international law and municipal law which sets intrinsic limits to State power.[33] The most well known theory is perhaps that of Sir Gerald Fitzmaurice[34] who argued that a fundamental mistake made by both monist and dualist theories was to assume that international law and municipal law operated simultaneously in a common field, leading, for the monists, to the problem of subordination of one to the other and, for the dualists, to the problem of co-ordination between self-existent independent orders.[35] According to Fitzmaurice, each is supreme in its own field. However, unlike dualist theory, they are not entirely separate. He wrote:

> Formally ... international and domestic law as systems can never come into conflict. What may occur is something strictly different, namely a conflict of obligations, or an inability of the State on the domestic plane to act in the manner required by international law. The supremacy of international law in the international field does not in these circumstances entail that the judge in the municipal courts of the State must override local law and apply international law. Whether he does or can do this depends on the local law

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[33] Philip Allott: Eunomia: New Order for a New World (1990, Oxford U.P., Oxford), pp.313-14.

[34] G. Fitzmaurice, "The General Principles of International Law Considered from the Standpoint of the Rule of Law" (1957-II) 92 Receuil des Cours 5.

[35] He also criticises the monist theory for what he considers to be the fiction that States are the aggregate of the individuals who make them up. According to Fitzmaurice, without the state as an indivisible entity with its own personality, international law would not be possible (at p.77).

> itself and on what legislative or administrative steps can be or are taken to deal with the matter.[36]

This is sometimes referred to as the theory of harmonisation,[37] co-ordination[38] or relativism. International law does not invalidate domestic law but attempts to set limits to it by making the State liable for breach on the international plane. This approach has been described as indicating a preference for practice over theory.[39] It looks at the two basic questions these theories attempt to answer (whether municipal law derives its competence from international law and whether, in cases of conflict, international or municipal norms will prevail) and finds both wanting. Monism basically treats the municipal legal system as a derivation of the international, ignoring the realities which divide them. Dualism treats them as being competitive regimes, ignoring the autonomous but concordant bodies of doctrine directed to the aim of basic human good.[40] Monism contends that municipal law contradictory to international law is void; dualism contends that in this situation such a law is void only in international law. But the question of the jurisdiction of courts in cases of such conflict is in both theories deduced from the same major premise on which the question of validity is determined.[41]

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[36] Id., pp.79-80.

[37] O'Connell, ante, Schaffer, ante.

[38] Ian Brownlie: Principles of Public International Law 4th ed (1990, Clarendon Press, Oxford), pp.34-5.

[39] Brownlie, ante, p.35.

[40] O'Connell, ante, pp.43-44.

[41] Ibid.

Harmonisation theory treats these questions as requiring different premises for a proper solution. There is no a priori mandate to treat one system as being ultimately normatively superior to the other. The decision is made by applying the jurisdictional rule operating in the forum where the question must be decided. While appearing close to dualism, harmonisation allows the possibility of a domestic court applying international norms, even in the absence of an express constitutional authorisation to do so. According to this view, international law can form part of municipal law, and be available to a municipal judge, other than through express inclusion by the municipal system.

O'Connell describes this as follows:

> The judge, when faced with a conflict between international law and municipal law, is in the presence of two texts of distinct formal origin, but claiming the same juridical substratum for their legal value. The substratum is not destroyed by virtue of the formal delimitation of domains of application. The judge is bound by the demarcation of these domains, but must not assume that there is any inherent incompatibility between them. Rather, he must give effect to both, within the limits of the competence conferred upon him, presuming that when he applies international law he encounters no obstacle from municipal law, and vice versa. Niboyet has summed up the point in an arresting simile: "These are two forces which do not meet ..., they are not like a gear, but like two wheels revolving upon the same axis." The dualist has them revolving on two axes.[42]

Harmonisation theory therefore appears to be the one best suited to justifying the application of international human rights norms by domestic courts. But it has a massive drawback in the reliance on presumption that municipal law will throw up

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[42] O'Connell, id., pp45-46. The reference is to Mélanges R. Carré de Malberg (1933), p.415.

few obstacles to this application. In fact, as seen in Chapter 4, it is not only that municipal law may throw up such obstacles, but that the international and domestic legal systems are asymmetrical with each other. The problem is one of validity and content (ie, what precisely international law obliges States to do) and structure. The problem with all the theories is that they rely on the assumption that the legal systems involved are more or less static and composed of clearly defined norms.[43] Neither is the case. The true situation is more than a mechanical operation between two sets of rules. While normative hierarchies do remain influential,[44] it is the process of interaction between international and domestic rules in the context of the particular norms involved and the processes of the forum recognised as legitimate for this task which must be examined. Both the norms and the structures in which they operate are historically, geographically and culturally contingent. Because of the profound influence of symbiosis seen in Chapter 4, the approach must be less hierarchical and more synthetic. In my opinion, with respect to the interaction between international human rights norms and domestic legal systems, it is only this contextual approach which is satisfactory - megatheories are neither realistic nor satisfactory.

As Alan Hunt has written (albeit in another vein but equally applicable here): "The question is no longer how to interpret the text; rather it is about the legitimacy of

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[43] See Christoph Schreuer: Decisions of International Institutions Before Domestic Courts (1981, Oceana, London) at pp.160ff.

[44] Cf Schreuer, id., p.161

the legal discourse as a mechanism of power disguised as the pursuit of interpretive truth."[45] In reality, it must be considered whether international and domestic tribunals exhibit any awareness of these theoretical controversies. At international level the approach has been remarkably consistent with the line that a State cannot plead the provisions of its own law as a defence to a breach of an obligation under international law,[46] but this approach has not been subjected to theoretical explanation. Municipal law is used as evidentiary fact before these tribunals.[47] At the domestic level, the approach to questions of the relationship between international law and domestic law is primarily dictated by the constitution and the cases reflect this bias.[48] This has led the editors of the ninth edition of Oppenheim's International Law to comment that "the doctrinal dispute is largely without practical consequences."[49] Brownlie suggests that the whole debate has

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[45] Alan Hunt, "The Big Fear: Law Confronts Postmodernism" (1990) 35 McGill Law Journal 507 at p.513.

[46] The most famous instance is perhaps the Alabama Claims arbitration (1872), Moore, Arbitrations, i. 653. Both the Permanent Court of International Justice (The Wimbledon 1923 PCIJ, Ser.A, no.1, p.29; the Free Zones Case 1929 PCIJ, Ser. A, no.24, p.12) and the International Court of Justice (the Fisheries Case ICJ Reports (1951), 116 at 132; the Nottebohm Case ICJ Reports (1955), 4 at 20-21) have held similarly, as has the Permanent Court of Arbitration (see Georg Schwarzenberger: International Law, Vol I, 3rd ed (1957, Stevens & Sons, London), pp.68-9). It is now codified in the Vienna Convention on the Law of Treaties 1969, Art.27.

[47] Case Concerning Certain German Interests in Polish Upper Silesia, PCIJ, Ser. A, no. 7, p.19.

[48] The ninth edition of Oppenheim's International Law edited by Jennings and Watts (1992, Longman, London), Vol. 1, pp.63ff, refers to the Constitutions of Austria, Belgium, the Federal Republic of Germany, France, Greece, Ireland, Italy, Luxembourg, the Netherlands and Switzerland as examples.

[49] Id., p.54.

been misleading because it has been conducted at too high a level of generality.[50]

In a comment which is particularly appropriate in the context of the domestic recognition of international human rights norms, Greig has written:

> International law and municipal law have so many points of contact, especially with the gradual extension of the rules of the former to cover situations hitherto considered solely the concern of the latter, that the adoption of an a priori approach will either result in the over-simplification, or the distortion, of what is basically a complex problem. It is important, therefore, to concentrate, not on whether a theoretical framework can be constructed to demonstrate the similarities or differences of the two legal orders, but on the view that a court will be most likely to take in a given case.[51]

The examination must therefore now turn to the domestic factors influencing this issue: does the constitution expressly provide for the application of international norms? Is prior domestic approval necessary for such things as the ratification of treaties? When legislation is enacted in accordance with international law, what degree of variation is allowed? What rules of statutory interpretation exist to direct consistency between international and domestic laws? In cases of express conflict, which prevails?

In other words, the domestic systems are still essentially concerned with hierarchy. Given the open-ended nature of international human rights norms discussed in the last chapter, their placement in such an hierarchical system does not augur well for

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[50] Brownlie, ante, 3rd ed, at pp.44-49, 58-59.

[51] D.W. Greig: International Law 2nd ed (1976, Butterworths, London), p.53.

the possibility of synergy.

5.3 The Developmental Matrix: Cultural Attitudes to Rights in Australia and Canada

An adequate debate about how well rights are protected cannot rest solely on issues of constitutional design. The "political culture" must also be taken into account.[52] Before embarking on an examination of the technical aspects of the problem of international human rights norms in the Australian and Canadian legal systems, and in line with the approach adopted in the previous chapters, it is necessary to consider, even if briefly, a general social factor directly impacting upon this question: whether Australia and Canada possess a "culture of rights". This is important because it directly affects the speed and extent to which legislation and constitutions are aligned to international principles within a State, even though it may be argued that those principles lack a truly international cultural legitimacy. It is part of the matrix through which notions of equality and social justice, and their meaning, are conceived and supported.

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[52] See Brian Galligan, "Australia's Political Culture and Institutional Design", in Philip Alston (ed): Towards an Australian Bill of Rights (1994, Centre for International and Public Law/Human Rights and Equal Opportunity Commission, Canberra), pp.55-72, at p.65. Galligan describes "political culture" as the set of shared ideas, assumptions, preferences and customs that are usually taken for granted but which are essential to the operation of a political system and being a significant factor in accounting for political habits and rhetoric, the "collective unconscious of politics." (at p.58). This can account as well for the silences in public discourse.

This issue with respect to Canada and Australia is not, however, straightforward. Neither country can now be said to be monocultural and, indeed, each has policies expressly contrary to this. The views of indigenous peoples and migrants, as well as of groups whose expectations are not necessarily of the majoritarian perspective (such as women, gay men and lesbians, and people with disabilities) further muddy these waters. However, this is more with respect to the content of rights. My concern here is broader: namely, with the use of legal rights generally to vindicate a demand and, in particular, of the perceptions of the proper role of government and law in this process. Rights awareness is an important factor in the effective use of human rights in a domestic context.

In particular, what has been described as "the special symbiotic connexion that was established between ideas of rights and ... institutions at the nation's founding"[53] in the case of the United States was absent when Canada and Australia achieved nationhood. However, as Chapter 2 has shown, a reliance on such a connexion should not be taken too far as rights documents are themselves a makeshift and opportunistic mixture of the fundamental and the specific.[54] The perceived connexion can, however, be significant as it purports to add the weight of the law to political demands or to justifications of public policy. The political becomes the

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[53] Michael J. Lacey & Knud Haakonssen, "History, Historicism and the Culture of Rights", Introduction to their book A Culture of Rights: The Bill of Rights in Philosophy, Politics and Law 1791 and 1991 (1991, Cambridge U.P., Cambridge), p.3.

[54] As Lacey and Haakonssen concede: id., p.8.

legal.

In the history of neither Canada nor Australia can there be seen to be an embracing of the notions of fundamental rights per se. In Canada, despite the existence of the Charter, the process has been one of ad hoc political expediency. In Australia, fundamental rights are still often regarded with suspicion. In neither place has there been an underlying commitment to the idea of human rights. This helps to explain the type of rights we do have domestically and the processes by which they may be enforced.

From their beginnings, both Canada and Australia have been frontiers. Human struggle and economic growth based largely on an abundance of natural resources have been common features from the start of European settlement. But the motivation for that settlement was different in each case.

European interest in Canada really began with the fur-trade monopoly charters granted by Henry IV of France at the beginning of the seventeenth century.[55] Expansion was done by company men in the company interest. Such a person was Samuel de Champlain who established his main post in Quebec in 1608. The area became the royal province of New France in 1663, with a French provincial

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[55] See Kenneth McNaught: The Penguin History of Canada (1988, Penguin Books, London), Chapter 2 (hereafter referred to as McNaught). On the historical background to Canadian federalism see also C.B. Martin: Foundations of Canadian Nationhood (1955).

government and law. However, the interest was not purely economic as the weakness of "government" of the area allowed other interests to enter. McNaught has argued that "the missionary zeal of the counter-reformation led to the early establishment of French Canada's most enduring purpose: the preservation and extension of a specifically Catholic French civilisation in North America."[56] The seeds of a future dichotomy having a significant impact on attitudes to rights were laid.

English interest began around the same time, but particularly in 1670 when Charles II granted a monopoly to the Hudson's Bay Company which allowed the latter not only trade privileges but also the right to govern all the land draining into the Bay.[57] The French recognised this English possession, as well as those in Newfoundland and Acadia (Nova Scotia) by the Treaty of Utrecht in 1713 after the War of the Spanish Succession.[58] Quebec was taken by the British in 1759 and the remaining French possessions were formally ceded to Britain after the Seven Years War by the Treaty of Paris in 1763. While this represented a British victory, it created in the new possession a substantial minority which was more articulate and powerful than the indigenous population. When it was found that the French could not be swamped by English-speaking immigration, alliance with the leaders

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[56] McNaught, p.24

[57] McNaught, p.33

[58] French Acadians refused to take the oath of allegiance to the British Crown. They were ruthlessly expelled in 1755: McNaught, pp.37-39.

of the French community was sought by the Quebec Act in 1774, but the impact of the French Revolution prompted the division of Quebec into two separate provinces of Upper and Lower Canada along ethnic lines by the Canada Act of 1791,[59] presumably to ease tension between the two ethnic groups.[60]

This situation has been described by McNaught as follows:

> By 1791, then, British North America was a strange constitutional mélange: Newfoundland, a crown colony in the Gulf; Prince Edward Island, Nova Scotia and New Brunswick, royal provinces with single elective assemblies; Cape Breton Island with conciliar appointive government; Upper and Lower Canada as established by the Canada Act; Rupert's Land under a charter company and comprising the western country drained by rivers emptying into Hudson Bay; and the far northwest to the Pacific and Arctic oceans claimed by Britain but without any local constitution or any defined southern boundary.[61]

The problems of this constitutional mish-mash were exacerbated by the aspirations of widely-scattered pioneer farmers, the national consciousness of French Canadians, and the effects of being a neighbour of the United States, a combination which encouraged criticism of the existing forms of government.[62] Dissatisfaction was compounded by a savage economic depression in 1837 and rebellion broke out, although this was quickly put down.

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[59] McNaught, Chapters 4, 5

[60] See Seerp B. Ybema: Constitutionalism and Civil Liberties (1973, Leiden U.P., Leiden), pp.9ff.

[61] McNaught, pp.62-3

[62] McNaught, Chapter 6

The Colonial Secretary, Lord Melbourne, appointed the Earl of Durham Governor-General of British North America with the special task of investigating the colonies. The recently-evolved British cabinet system (ie, "responsible" government where the ministry held office as long as it retained the support of the majority of the legislature) was thought to be a way of removing the principal source of trouble in the colonies by making the ministers responsible to the assembly rather than directly to the governor.[63] The Durham Report found that the determination of the French to retain their own culture was at the core of the problem as it had created a struggle of races rather than of principles.[64] In fact, it was the Report itself, which was bitterly resented by French Canadians, which helped to do this. It recommended responsible government and the separation of local from imperial jurisdictions, and also the union of Upper and Lower Canada so as to establish English laws (and also result in the absorption of the troublesome French-speaking population).[65] McNaught notes the irony of the situation by writing:

> [The Report's] basic constitutional liberalism, which was to pave the way for the long-term survival of a French-Canadian nation and for the development of a multi-racial and freely associated Commonwealth of

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[63] See McNaught, Chapter 7, who also points out that the concept was deceptive in its simplicity in that it would be difficult for a governor appointed in London to be responsible both to the colonial legislature and to the imperial authority (at p.92).

[64] McNaught, id pp.93-4, attributes this to the fact that the chief source of information for the commission of inquiry was the English-speaking business community, which complained of the French majority's refusal to vote for taxes for municipal improvements.

[65] Ybema, ante, p.11.

Nations, thus stands in ironic relationship to its Anglo-Saxon racism.[66] The 1840 Act of Union did create a single province in the St. Lawrence-Great Lakes area, but the recommendation of responsible government was not adopted. Instead, the governor was told to choose his advisers from people whose principles were in accordance with majority feeling in the assembly: a "kind of half-way house to responsible government"[67] which, however, became a precedent followed by successive governors and indicated that Canada could not be properly governed without the French, and could be governed with them.[68]

Responsible government followed in the other provinces.[69] Tolerance, and good government, was seen to emanate from a legislative union. Arguments with respect to the union were based on utility and necessity rather than rights, and when rights were alluded to, they were the rights of the colonists to the principles of the British constitution, i.e. to the traditional British doctrine of rights discussed in Chapter 2.[70] French claims to the retention of French language, customs and laws were

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[66] McNaught, p.94

[67] McNaught, p.96

[68] McNaught, p.99. Responsible government did follow not long after, the first to achieve it being Nova Scotia in 1846.

[69] See R.I. Cheffins & R.N. Tucker, "Provincial Constitutions and Civil Liberties", Chapter 3 in Macdonald & Humphrey (eds): The Practice of Freedom: Canadian Essays on Human Rights and Fundamental Freedoms (1979, Butterworths, Toronto), pp.40-42.

[70] See Ronald Manzer, "Human Rights in Domestic Politics and Policy", Chapter 2 in Robert O. Matthews & Cranford Pratt (eds): Human Rights in Canadian Foreign Policy (1988, McGill-Queen's U.P., Montreal), pp.24-5. Manzer points out that the high point of the use of natural rights arguments as justification for political demands occurred in the prelude to the 1837 rebellions with the Six Counties

based on natural justice, not natural rights.[71]

Confederation began to be discussed in earnest in 1864.[72] The issue of central versus provincial authority was on the agenda from the beginning, not only for the French to maintain their cultural differences, but also for the maritime provinces.[73] The British North America Act of 1867 which created Canada was legislation of the British Parliament and reflected British (rather than American) constitutional attitudes. The provinces were not regarded as being sovereign entities which delegated their powers to a central authority (as had been the case in the United States). Nor were "the people" the source of parliament's power. The Canadian constitution flowed directly from Britain's imperial power, and survival meant retaining the attachment to the mother country as anti-American feeling was still strong.[74] Indeed, an effect of the latter was the stressing of central authority so as to avoid arguments which contributed to the American Civil War: the federal government was given specific important powers (including that with respect to Criminal Law, defence, trade and commerce, taxation, and banking) and the

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Address adopted at a mass meeting at St. Charles and in William Lyon Mackenzie's draft constitution, which both show the clear influence of the American Declaration of Independence. Manzer concludes, however, that "the American doctrine of natural rights as justification for political demands apparently died with the defeat of the rebels in 1837." (at p.27).

[71] Id., pp.25-27

[72] McNaught, Chapter 9

[73] Prince Edward island did not join the union until 1873, and Newfoundland did not join until 1949.

[74] See McNaught, pp.131ff.

residual powers left after the granting to the provinces of specific areas of jurisdiction. The latter, however, included "property and civil rights" as well as education (with respect to which the federal government was given specific power to remedy infringements of the educational rights of minorities), illustrating the effect of provincial concerns.[75] In addition, the administration of justice was left to the provinces, but Ottawa appointed and paid judges above the county level, a system which left Quebec's Civil Law intact and left considerable power to the provincial courts to interpret the meaning of "property and civil rights." There was, however, no flowering of the recognition of rights. Increased immigration in the latter part of the nineteenth century increased both productivity and social tension.[76] The immigrant "threat" was used as an excuse to restrict labour union rights,[77] and as socialism and organised labour were not powerful forces in Canada until after the first World War governments paid little attention to issues of reform or social welfare.[78] (This is in distinct contrast to the socialist tendency of

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[75] The British North America Act is discussed in more detail below.

[76] McNaught, pp.194ff.

[77] For example, the Industrial Disputes Investigation Act 1907 prohibited a prima facie right to strike in industries under federal jurisdiction. This was declared invalid by the Privy Council in 1925 on the ground that it infringed upon provincial jurisdiction: Toronto Electric Commissioners v Snider [1925] AC 396. The contest between federal power under s.91 of the BNA Act and provincial power under s.92 began in earnest.

[78] Manzer (ante, p.27) has written that "a doctrine of individual rights that involves claims to "social" or "economic and social" rights has been part of the left-wing tradition in Canadian politics but has been only weakly articulated and generally subordinate in political discourse to the mainstream liberal doctrine, which focuses on traditional political and civil rights."

government in Australia at the same time). Interpretation of the provincial "property and civil rights" power (including by the Supreme Court) also put paid to national social reforms.

Canadian treaty making power was confirmed at the Imperial Conference of 1923. When Dominion autonomy was achieved in 1931 by the Statute of Westminster, Canada retained the Privy Council as its final court of appeal in most cases and, because an amending formula could not be agreed upon by Canadians, amendments to the British North America Act had to continue to be made by Great Britain.[79]

Canada's approach to human rights in the immediate post-World War II period has been discussed in Chapter 3. As one significant contemporary protagonist noted: "The very concept of an International Bill of Rights seemed to be foreign to Common Law traditions and the parliamentary system as they had developed in Canada."[80] Indeed, another commentator has referred to the sexist and racist laws passed by Canada in the period between Confederation and 1960.[81] A catalyst for internal change was the reassertion of French-Canadian aspirations in the 1960's leading to the establishment of a Royal Commission on Bilingualism and

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[79] McNaught, pp.235-6

[80] John Humphrey, "The Role of Canada in the United nations Program for the Promotion of Human Rights", Chapter 25 in Macdonald, Morris & Johnston: Canadian Perspectives on International Law and Organization, ante, at p.615.

[81] G.A. Patmore: An Inquiry into the Norm of Non-Discrimination in Canada (1990, Industrial Relations Centre, Queen's University, Kingston), Chapter 3.

Biculturalism in 1963 which declared that Canada was passing through the greatest crisis in its history.[82] It adopted the proposition of an English-speaking and a French-speaking nation. In 1968, Pierre-Elliott Trudeau was elected Prime Minister on a "Just Society" platform. He advocated the entrenchment into the constitution of a Bill of Rights[83] which would guarantee not only traditional civil liberties, but also language and educational rights. His view was to reassert a tolerant Canadianism which would make the whole of Canada, and not just Quebec, the homeland of French Canadians.[84] The Official Languages Act was passed in 1969 and a new position of minister of state responsible for multiculturalism was established in 1972. The broadening race question, due to further immigration and a growing attention paid to the plight of indigenous minorities, contributed to the establishment of human rights commissions.[85] Socio-economic measures to minimise regional and class disparities were introduced, such as the major expansion of unemployment insurance in 1971.[86]

Changes of a human rights nature were occurring rapidly. However, significant sections of Quebec wanted autonomy and one group, the Front de Libération du Québec, kidnapped Richard Cross, the senior U.K. trade commissioner in

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[82] See McNaught, Chapter 20

[83] There was already a Bill of Rights Act (which is discussed below) which was not part of the Constitution.

[84] McNaught, pp.311-12

[85] These are selectively discussed below.

[86] See McNaught, pp.328-32

Montreal, and Pierre Laporte, the Quebec Minister of Labour and Immigration, in 1970, murdering the latter. These events led to a swing of public support towards federalism and away from separatism, but Quebec's demands to control provincial social-cultural affairs remained[87] (and a referendum dealing with secession was only narrowly defeated in 1995). In 1976 the Parti Québecois, the major plank of whose political platform was secession, won the Quebec election, but the issue of secession was defeated in a referendum in 1980. Premier Lévesque thereupon shifted to a crusade for provincial rights, supported by other provinces, especially Premier Lougheed of Alberta. This has led Kenneth McNaught to write that "the most serious opposition to the Trudeau government was to be found in the provincial capitals rather than across the floor c ' ; Commons in Ottawa."[88] Thus, the question of rights was predominantly a constitutional question. As amendment of the constitution had under the Statute of Westminster remained within the power of the British Parliament, a major problem had emerged which threatened to tear Canada apart. The solution favoured by Prime Minister Trudeau was patriation of the constitution and the inclusion within it of a Bill of Rights. There was much debate, sometimes acrimonious, about this course.[89] It was agreed to submit the constitutional package to the Supreme Court for an opinion

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[87] See McNaught, pp.321-2. McNaught also notes that with immigration "every Canadian is now a member of a minority" but that the context of English-French relations remained central to the constitutional debate (at p.328).

[88] McNaught, pp.342-3

[89] See McNaught, pp.347-50

which held, by seven votes to two, that it was legal.[90] The Canada Act and the Constitution Act were passed in Westminster in 1982. The Charter of Rights and Freedoms is discussed in more detail below. The point to be made here is that while spurred by the desire for rights, it was ultimately the result of the realpolitik of the late twentieth century acting within the given legal framework. While a new constitution was created and important rights were enumerated in it, the procedure was traditional and evolutionary, not revolutionary, as indeed it had always been. Moreover, Canadian values in this respect have been described as being conservative with a priority given to order and with pluralism forced upon them by circumstances.[91] There was no strong culture of rights. Now, largely because of the Charter, there is at least a greater awareness of them.

Unlike the mercantile interests which lay behind Canada's early European settlement, Australia had been set up as a penal colony. Its beginnings were the very antithesis of human rights - civil, political, economic or social. Transportation of convicts was described by contemporaries as being worse than that seen in the slave trade.[92] The treatment of prisoners after they had arrived, particularly at

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[90] Reference re Amendment of the Constitution of Canada (1981) 125 DLR 1 (SCC). The reasons for the decision were not as unanimous, nor as clear, as the result. The case is discussed in more detail below.

[91] Donald V. Smiley, "Rights, Power and Values in Canadian Society", Chapter 1 in Macdonald & Humphrey (eds): The Practice of Freedom, ante.

[92] Paul Johnson: The Birth of the Modern: World Society 1815-1930, ante, pp.250ff. In the Second Fleet, 753 convicts - men, women and children - were crammed into three ships. During the voyage, 267 died. Upon arrival in Sydney, another 124 died almost immediately.

institutions such as Port Arthur, ?s some of the worst in modern history. Some historians point to the fact that most of these prisoners had committed fairly trivial offences or were in effect political prisoners, especially the Irish.[93] Others contend that this is nothing more than "a stout and consoling fiction",[94] because one-half to two-thirds were recidivist offenders, eight in ten were convicted of theft and only a minute fraction could be said to have been political prisoners. Nevertheless, these beginnings are believed (and it is still the popular belief in Australia) to have engendered an attitude which has had a profound impact on the Australian acceptance of human rights notions. Robert Hughes has described this as follows:

> Mateship, fatalism, contempt for do-gooders and God-botherers, harsh humour, opportunism, survivors' disdain for introspection, and an attitude to authority in which private resentment mingled with ostensible resignation -such was the meagre baggage of values the convicts brought with them to Australia. They also brought, if men, the phallocracy of the tavern and ken, and, if women, a kind of tough passivity, a way of seeing life without expectations. What they bequeathed to their native-born Australian offspring, the Currency of the colony (as distinct from the Sterling, or English-born free settlers), was summed up by the Australian poet James McAuley in the 1950's as:
>
> a futile heart within a fair periphery.
> The women are hard-eyed, kindly, with nothing inside them:
> The men are independent but you could not call them free.[95]

Indeed, antagonism between the emancipated convicts and the free settlers exposed

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[93] For example, Johnson at p.251.

[94] Robert Hughes: The Fatal Shore: A History of the Transportation of Convicts to Australia, 1787-1868 (1987, Collins Harvill, London) at p.159. Hughes relies on the work of historians Manning Clark and Lloyd L. Robson.

[95] Robert Hughes, id., p.175.

a large portion of humbug and moral snobbery having been imported into the colony as well. For example, to this day many of Sydney's finest buildings were designed by the convict (forger) Francis Greenway. Despite the visual grace of his work the free settlers objected when Governor Macquarie commissioned him to build them.[96] Contemporary court cases held that an emancipated convict could not legally acquire property, sue or give evidence in a court.[97] In 1824, lists of persons eligible to sit as jurors in civil cases were nailed to the doors of places of worship in Sydney. The name of every person who had not come free to the colony had been omitted.[98] While there might have been engendered an irreverent attitude to authority, the result was not freedom or tolerance. The introduction of trial by jury in criminal cases, which was introduced on an optional basis in 1833, was vociferously opposed in some quarters as meaning that cattle-stealers would try their comrades and receivers of stolen goods would try, and acquit, thieves.[99]

The issue has been further elucidated by Manning Clarke who wrote:

> The foundations of authority in the Old World were absent in rural society in New South Wales. In England, Scotland and Ireland the local Justice of the Peace lived in an imposing mansion; in New South Wales he often lived in a sod hut. In England, Scotland and Ireland the local Justice was distinguished by dress, speech and deportment from those to whom he

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[96] This is described by Johnson at p.257.

[97] Manning Clarke's History of Australia, abridged by Michael Cathcart (1993, Melbourne U.P., Melbourne), pp. 73-4, (hereafter referred to as Manning Clarke).

[98] Id., p.103

[99] Id., pp.140-1

> dispensed justice; in New South Wales, bush life stripped away most of these external differences between man and man. In England, Scotland and Ireland the labour pool was a cornerstone in the building of hierarchy and authority; in New South Wales the labour shortage eroded the authority of the master and strengthened the power of the servant. In New South Wales, convict servants, ticket-of-leave holders, and emancipists and their slave-masters had stripped away all the ideological mumbo-jumbo with which in the Old World the exploitation of man by man was softened and concealed. This left terror as the nexus between master and servant.[100]

Thus, when transportation began to be scaled down in 1840 and ultimately to cease,[101] its social effects remained. Universal franchise was actively opposed, especially by the landed classes,[102] and when the right to vote was introduced in 1842, it was restricted on a means-tested basis for both voting and standing for election. The Legislative Council set up in New South Wales comprised 36 members, but only 24 were elected, the remainder being nominated. Of those 24 elected members, only three were elected by the inhabitants of Sydney and Melbourne (which contained 27% of the population) and the other 21 by the landed interests in the countryside.[103] The inhumanities of transportation and the convict system had bred a hankering for independence, but not equality. As Manning Clarke expressed it, there was a fear that "the men of good sense and reputability were about to be overmastered by the illiterate and the vulgar."[104] By 1850, the elective franchise was extended to the £10 householder under the Australian

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[100] Manning Clarke, p.203

[101] This occurred in 1853, but more as a result of the gold rush than for reasons of humanity: Manning Clarke, pp.236ff.

[102] Manning Clarke, pp.207ff.

[103] Id., pp.208-11

[104] Id., p.208

Colonies Government Act. This was not done out of egalitarianism, but to quell "democratic turbulence" showing that "once again a prolific source of revolution had been dried up by the English genius for compromise, or the policy of the embrace of moderates and the isolation of revolutionaries by the established order."[105]

It was the gold rush, which subverted the social order, that was the immediate spur in the colonies to seek full self-government and the form agreed upon, like its predecessor, was based on means-tested voting and a Parliament (in New South Wales) of two Houses, the Lower to be fully elected, but the Upper to be (and to remain until only a few years ago) nominated by the Governor.[106] It was also the gold rush, and the licence tax associated with its mining, which created Australia's most famous attempt at revolution: the Eureka Stockade in 1854 opposing the licences. It was not an uprising based on populist or fundamental rights, and was put down by government troops in a skirmish lasting fifteen minutes.[107] Yet it remains to this day a potent symbol of a dogged (and largely imagined) individualism. In fact, a Commission of Inquiry did alter the tax, expand the franchise and increase the number of seats in the Victorian Legislative Council (including a new seat in Ballarat, where the Stockade had been located). But the

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[105] Id., p.217

[106] Id., pp.237-9

[107] Id., Book 4, Chapter 4

uprising was largely deplored in the cities and the template was set for reform by constitutional and peaceful (and bourgeois) means.[108] This has been summed up by Manning Clark as follows:

> ... as a colonial bourgeoisie they were too timid or too cowardly to become masters in their own house and too dependent both on the goodwill of the squatter in their own country and on the capitalist in Britain to take up the cry of freedom and independence for the Australian colonies, far less the cultivation of an Australian national sentiment. This dependence of the colonial bourgeoisie on London, and their success in educating the working class in their own values laid the firm foundations for conservatism in Australia. ... The bourgeoisie were the victors in the battle for wealth on the fields: the ... dream [of some visionaries] of a glorious future for humanity had fallen on stony ground.[109]

The same year as the Eureka Stockade was also that of the famous charge of the Light Brigade in the Crimean War. The British aristocracy was beginning to be singled out by the Australian press as being senile and lacking purpose.[110] The middle class, at the forefront of the Industrial Revolution, were regenerating the nation in Britain. As a result, progress in Australia was not seen to be based upon severance of ties with Britain (which in any event provided the capital for Australian expansion) but rather linked to the values of the emerging middle class there.

The gold rush also saw another important development: the arrival of 4000 Chinese

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[108] Id., pp.264-5

[109] Id., pp.265-6

[110] Id., p.267

with "peculiar" language, dress and habits.[111] Racism, which had been endemic at the settlement of Australia, began to flourish.[112] Treatment by both emancipated convicts and free settlers of Australia's indigenous peoples was at best one of benign neglect and at worst of active genocide. Johnson describes an example:

> When Nathaniel Lowe of the Fortieth was charged with murdering an aborigine, his counsel, Dr Robert Wardell, argued that the very trial was irregular since because aborigines were not allies, subjects or enemies of the king of England, they did not have the status of human beings, and killing them was not murder. Wardell quoted a German anthropologist to the effect that the aborigines were cannibals, and Christians had a moral right to exterminate such grievous sinners. Lowe was acquitted without being called to give evidence.[113]

While social attitudes began to change, radically in the second half of the twentieth century because of international influences, the legal assumption that the Aborigines had no proprietary rights whatsoever was a fiction created at settlement and not overturned by the legal system until 1992.[114] Racism survived federation.[115]

At federation in 1901, the principal political planks of Australia's first

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[111] See generally, id., Book 4, Chapter 6.

[112] See generally Terry Irving, "Sources of Australian Intolerance: Some Reflections" in George Shaw (ed): A Pluralist Australia (1984, Australian Studies Centre, Brisbane), 34-43.

[113] Johnson, ante, at p.263.

[114] Mabo v Queensland (No.2) (1992) 107 ALR 1

[115] See, for example, Raymond Evans: The Red Flag Riots: A Study of Intolerance (1988, U. of Queensland Press, St. Lucia)

Commonwealth government were a White Australia, compulsory arbitration of industrial disputes, adult suffrage and old age pensions.[116] The mix of individualism but not equality, of economic protection but not social rights, persisted.[117] Neither the federal constitution, nor those of any of the states, paid much attention to rights.[118] Those documents, like the Anglo-white majority of the population, were self-satisfied in this regard. They are not ideological documents.

Nevertheless, from before the First World War, Australia was a world leader in social reforms, such as workers' rights and votes for women.[119] Again, these were not ideological but rather pragmatic developments. There was in fact a suspicion of ideology (and largely there still is). At the Constitutional Conventions held through the 1890's to debate the new federal constitution, the possibility of including a Bill of Rights similar to that in the US Constitution (on which much of the Australian version was based) was rejected. The myopic self-satisfaction is well illustrated by the comment of Sir John Cockburn at the 1897 Convention when he said: "Have any of the colonies ... ever attempted to deprive any person of life,

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[116] See Manning Clarke, Book 5, Chapter 4.

[117] See The Oxford History of Australia, Vol. 3, Glad Confident Morning 1860-1900 by Beverley Kingston (1988, Oxford U.P., Melbourne).

[118] This is discussed in more detail below.

[119] See Alice Ehr-Soon Tay (ed): Teaching Human Rights (1981, Australian Government Publishing Service, Canberra), Introduction.

liberty or property without due process of law?"[120] The British style of Parliamentary democracy together with the Common Law were believed to be more than sufficient protection of freedoms.[121]

Nevertheless, a national referendum in 1951 to outlaw the Communist Party in Australia was defeated. This may have been due more to an unwillingness to change rather than a spirited resurgence of interest in fundamental liberties. For Australia, the fillip for human rights came from external sources, both in the juridical and literal senses. It was the work of the UN in human rights, and the Australian participation in it described in Chapter 3, which helped put human rights on the domestic political agenda, not initially the demands of powerful local minorities, which had been the case in Canada. Overseas trends, recognising the previously invisible problems of women, migrants, indigenous peoples and gays, were taken up in Australia rather than being grounded there. Juridically, a strong, one could justifiably say misplaced, faith in the Common Law has started to crumble before the effect of treaties. Fundamental rights, and fundamental change, has been seen as coming from "outside". Many people are suspicious of it.

As a result, achievements in the political arena in human rights in Canada, such as the agreement on the Charter, have been more successful than in Australia where

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[120] Quoted in Tay, id., at p.3. See also J.A. La Nauze: The Making of the Australian Constitution (1972, Melbourne) at p.231.

[121] See The Oxford History of Australia, Vol. 4, The Succeeding Age 1901-1942 by Stuart Macintyre (1986, Oxford U.P., Melbourne).

(as described below) three attempts at a national Bill of Rights failed dismally.

Thus, in both Canada and Australia, the approach to rights has been constitutionally oriented and pragmatic, rather than revolutionary and ideological. This constitutional orientation focuses much of the concern onto issues of distribution of law-making powers (both between federal and state/provincial entities, and between courts and legislatures) and away from a functional orientation on the interplay between the political and social realities of life in Canada and Australia. This affects the type of rights accepted into the political and legal systems of each country and has also led to the apparently ironic (but explainable) diametrical opposition of the existence of a Bill of Rights in Canada and the absence of one in Australia.

5.4 The Impact of a Federal Constitution on Human Rights and Vice Versa

Despite the fact that, historically, international law ignored the constitutional characteristics of federal States, assimilating them to unitary models, consideration of the constitutional matrices in federations like Canada and Australia, which affect the power of governments or courts to implement or recognise human rights, cannot be ignored. In both Canada and Australia the constitution is the principal measuring rod for the domestic validity of all acts done by both federal and state/provincial governments. Federal Constitutions divide the law-making power between the federal and state or provincial governments, and so distribute the power to legislate on matters of human rights, both in the sense of conferring the power to create binding human rights obligations in international law (principally, the power to conclude treaties) and the power to implement those international obligations, qua international obligations, domestically. This power sharing in federations does not in itself necessarily promote human rights - legislation, if within such power, can be valid regardless of its human rights content. However, whereas parliamentary sovereignty in a unitary system means that legislation can rarely be challenged simply because of its content, that content can become a significant issue upon which validity may rest in a federal system.

Constitutions represent choices made among a range of possibilities, both at the

time of their implementation and in later interpretation and application. There is thus no necessarily "ideal" constitution: each one represents and reflects value choices made on behalf of the society in which it operates. Allott has remarked:

> The constitution is a becoming not a being. However, if the constitution of a society is a process, it is a particular process, the process of a particular society. The constitution is not merely potentiality. It is the particular potentiality of a particular society, the product of its particular willing and acting throughout the whole social process.[122]

We have seen in the previous chapters that international human rights are the result of, and are part of, a complex matrix of historical opportunity - an outgrowth of attitude, opinion, politics and law. The transfer of international human rights into a domestic system thus transports the product of one complex matrix into another complex matrix of constitutional structures, legal theory, political will and social attitudes. But the division of legislative, executive and judicial powers in a federation does not always coincide with the subject matter and implementation and enforcement procedures contemplated in international human rights treaties. A further complicating circumstance is the fact that, while international human rights norms usually need placing in domestic law to give them meaning (as discussed in the last chapter) domestic law does not necessarily need them to give it meaning. This creates a dissonance in the process of domestic implementation which impacts upon the effectiveness of human rights domestically.

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[122]Philip Allott: Eunomia: New Order for a New World, ante, p.139.

5.4.1 Bills of Rights

A. Canadian Bills of Rights: A Qualified Success After a False Start

Like Australia, the Canadian Constitution[123] did not originally contain a Bill of Rights, although it did contain a few rights of a human rights nature.[124] References to international human rights in constitutions are now common.[125] Canada has managed, unlike Australia, and with no amending process in the original Constitution, to introduce and entrench a Bill of Rights.[126]

Emerging, as did the classical Bills of Rights, out of a "backdrop of political confusion,"[127] the Charter of Rights and Freedoms[128] was part of a political package involving patriation of the Canadian Constitution which "generated pat 'ic flag-waving, protest marches organised by the Parti Québécois opponents in Montreal, and the mute resistance of native peoples wearing black arm

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[123] British North America Act 1867 30 & 31 Victoria, c.3 (UK)

[124] These are discussed below.

[125] See Antonio Cassese, "Modern Constitutions and International Law", (1985/III) 192 Receuil des Cours 331-475.

[126] Provincial Bills of Rights are discussed below with respect to legislation other than constitutions.

[127] As described by David Milne: The New Canadian Constitution (1982, James Lorimer & Co, Toronto), p.15.

[128] Part I of the Constitution Act 1982, being Schedule B of the Canada Act 1982 (UK), c.11.

bands."[129] Although its contents owe much (although not all) to international human rights norms, its completion was due to political factors rather than a devotion to human rights.

Until 1982 there was no formula for amending the Canadian Constitution, as agreement on the matter had until that time been absent,[130] resulting in the retention by Britain of this power under s.7 of the Statute of Westminster.[131] This is one of the reasons why the earlier attempt at a Bill of Rights, the Canadian Bill of Rights 1960,[132] is a statute with no constitutional status. It consists of only a commendable but conservative (and ultimately meaningless) preamble[133] and five sections.

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[129] Milne, ante, p.14.

[130] The main stumbling blocks were the linguistic division between English- and French-speaking Canadians, and the variations of size, power and wealth of the provinces. See Milne, id, Chapter 1.

[131] There were, however, several amendments made by the British Parliament under a variety of formulae for federal and provincial consent: See Milne, id, Table 1 (pp.26-29).

[132] S.C. 1960, c.44

[133] It states that the founding principles of Canada are "the supremacy of God, the dignity and worth of the human person and the position of the family in a society of free men [sic] and free institutions" and that this freedom can only be grounded on "respect for moral and spiritual values and the rule of law" in the context of "respect of Parliament for its constitutional authority." These high-sounding words can mean almost anything. In view of the fact that the Bill of Rights only applies to federal legislation, they mean almost nothing. On the other hand, Tarnopolsky has argued that the preamble ought to be significant in determining the broad concepts in the substantive sections (The Canadian Bill of Rights, 2nd rev ed, 1975, McClelland & Stewart, Toronto, pp.117-20). However, it is almost never referred to, one exception being McKercher J in Thomas v Thomas (1961) 35 WWR 481, which was overruled by the Court of Appeal (1961) 35 WWR 23, but without comment on the application of the preamble.

The Canadian Bill of Rights emerged after the UDHR and the European Convention but before the major international human rights treaties (other than the Genocide Convention) were concluded. The influence of human rights on its formulation may thus be thought to be non-existent, but this is in fact not precisely the case. As discussed above, the Canadian Parliament set up a joint committee of the Commons and the Senate in 1947-8 to consider Canada's obligations under the UN Charter and the UDHR, and in 1950 a Special Committee on Human Rights and Fundamental Freedoms was set up by the Senate which held eight public sessions.[134] The Bill was largely the "baby" of Prime Minister John Diefenbaker who had campaigned for a long time for a Canadian Bill of Rights.[135] His enthusiasm, however, was buoyed by the public consideration of the human rights provisions of the UN Charter, the UDHR and the human rights provisions of the constitutions of the newly emerging States in the post-war world, together with a concern for the position of migrants from Europe in the post-war Canada,[136] and concern about the treatment of Japanese-Canadians during the war and the treatment of suspected Soviet spies after it.[137] Another factor was the

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[134] Tarnopolsky: The Canadian Bill of Rights, 2nd rev ed, (1975, McClelland & Stewart, Toronto), pp.12-13.

[135] See Bora Laskin, "Canada's Bill of Rights: A Dilemma for the Courts?" (1962) 11 International & Comparative Law Quarterly 519, especially at pp.526ff.

[136] Ibid. Laskin also refers to Diefenbaker's speech to the House of Commons in 1958 during debate on the Bill (September 5, 1958, House of Commons Debates at p.4639), where Diefenbaker refers to the Bill as "action to be taken to carry out one of the major principles of the Charter of the United Nations."

[137] See Walter Tarnopolsky: The Canadian Bill of Rights, ante, pp.4-5.

embarrassment or shame felt with respect to Canada's refusal to admit Jewish emigrants during World War II.[138] It was, nevertheless, much criticised.[139] It was submitted to scrutiny by another Parliamentary Committee in 1960, the paucity of references to human rights reflecting the underdeveloped state of human rights in international law at that time.[140] It was, however, passed unanimously. The preamble was apparently added at the last minute.[141] However, both it and section 1 expressly refer to "human rights".

Bora Laskin described the Bill as "steer[ing] a middle course between a mere

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[138] See Irving Abella & Harold Troper: None is Too Many: Canada and the Jews of Europe 1933-1948 (1986 Lester & Orpen Dennys, Toronto).

[139] See, for example, (1959) 37 Canadian Bar Review, several articles in which discuss the proposed Bill, mostly in critical terms: Bora Laskin, "An Inquiry Into the Diefenbaker Bill of Rights" (p.77ff); Edward McWhinney, "The Supreme Court and the Bill of Rights - The Lessons of Comparative Jurisprudence" (p.16ff); Louis-Philippe Pigeon, "The Bill of Rights and the British North America Act" (p.66ff).

[140] Special Committee on Human Rights and Fundamental Freedoms: Minutes of Proceedings and Evidence 1960 (Queen's Printer Ottawa). See, for example, the evidence of Mr Irving Himel, Secretary of the Association for Civil Liberties, who introduced copies of the European Convention and an early draft of the Covenant into his evidence: Minutes 3:171-2 (July 19). Professor Maxwell Cohen also gave evidence, but spoke almost entirely on philosophical and jurisprudential issues, although he had drafted a preamble for the Bill which included in one of its clauses "Whereas these rights and freedoms now have received international recognition and further enlargement under the United Nations Charter and the Universal Declaration of Human Rights": Minutes 5:375 (July 21).

[141] Laskin, ante, p.527. However, Tarnopolsky, ante at pp.117-18, notes that its drafting had been in process for a while. It says in part that "the Canadian nation is founded upon principles that acknowledge the supremacy of God, the dignity and worth of the human person, and the position of the family in a society of free men and free institutions ... and [is] desirous of enshrining those principles and the human rights and fundamental freedoms derived from them in a Bill of Rights." Human rights are thus not seen as anything different to Canadian values and policy.

innocuous statement or declaration of principles on the one hand and an affirmative, enforceable set of directives on the other."[142] The Bill does not "make" anybody "do" (or refrain from doing) anything. The significant points about the Bill of Rights (which is still in force)[143] are as follows. First, as an ordinary statute it can be amended or repealed at any time. Second, it only applies to federal legislation.[144] This is a major limitation in a constitutional system where the power to make laws on property and civil rights are expressly reserved to the provinces,[145] although relieved by the fact that criminal law is a matter of federal legislative competence[146] and the fact that some provinces passed their own Bills of Rights.[147] It is in fact precisely because of these constitutional divisions of power that it only applies to federal acts. Third, it is by no means a radical Act. It "recognises" and "declares" the existence of (rather than creates) in Canada the rights to life, liberty, security of the person, enjoyment of property, due process in the deprivation of property, equality before and equal protection of the law, and the freedoms of religion, speech, assembly, association and the press,

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[142] Laskin, ibid.

[143] There are two provisions in the Bill which are not duplicated in the Charter: s.1(a) due process with respect to the protection of property and s.2(e) fair hearing for the determination of rights and obligations. For a detailed comparison see Peter Hogg, "A Comparison of the Charter of Rights with the Canadian Bill of Rights", Chapter 1 in Beaudoin & Ratushny (eds): The Canadian Charter of Rights and Freedoms 2nd ed (1989, Carswell, Toronto).

[144] Section 5

[145] Constitution Act 1867 s.92(13)

[146] Constitution Act s.91(27)

[147] For example, Alberta Bill of Rights R.S.A. 1980, c.A-8.

"without discrimination by reason of race, national origin, colour, religion or sex."[148] It thus does not exhibit an intention to create new rights. Considering that it only applies to federal legislation, this section (and the preamble) become somewhat hollow rhetoric,[149] although one authority proposes a way around the notion of "frozen rights" in the Bill.[150]

Fourth, it is to be used as an instrument of interpretation of federal legislation, the latter being "construed" and "applied" so as not to abrogate it, particularly where the criminal process is concerned.[151] Two interpretations are possible of this provision.[152] It could mean that federal statutes must be construed in the light of the Bill and then applied as so construed, even when contrary to the Bill. On this view, the Bill merely establishes a rule of construction. Alternatively, after construing the statute the courts should only apply it if in the application it is

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[148] Section 1

[149] For example, in Walter et al v Attorney-General of Alberta [1969] SCR 383 the Supreme Court of Canada upheld the validity of the Alberta Communal Property Act as valid provincial legislation regulating landholding despite the fact that communal landholding was a fundamental tenet of the Hutterite religion.

[150] Dale Gibson in The Law of the Charter: General Principles (1986, Carswell, Toronto), considers (at p.25) that what s.1 is doing is recognising the social fact that Canadians have long honoured the ideals of broadly phrased rights and freedoms. The rights and freedoms mentioned in s.2 represent a new and extended basis for the legal protection of these. The difference is between the rights themselves and the implementation of them. While this is an attractive argument, the judicial authorities used to support it are, in my opinion, not convincing.

[151] Section 2

[152] See Peter Hogg: Constitutional Law of Canada, 3rd ed (1992, Carswell, Scarborough), pp.782-5.

consistent with the Bill. On this view, the Bill can be used to make inconsistent legislation inoperative. Hogg prefers the latter view,[153] but the cases are equivocal on the point. In R v Drybones[154] the Supreme Court held by majority that s.94(b) of the Indian Act, which made it an offence for an Indian to be intoxicated away from a reserve, was inconsistent with s.1(b) of the Bill of Rights which provides for equality before the law, and was therefore inoperative.[155] This was achieved by adopting a purposive interpretation of the section in the light of the Bill as a whole.[156] The minority considered that if the Bill had been meant to have this effect it would have said so and the primary canon of construction is to follow the intention of Parliament as expressed both in the Bill and in the other legislation.[157] Other obiter remarks have followed the majority view in Drybones[158] and Laskin J in Hogan v The Queen[159] described the Bill of Rights

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[153] Id, at p.783, particularly because of the use of the "notwithstanding" provision in the section is unnecessary if the section is merely to establish a rule of construction.

[154] (1970) 9 DLR (3d) 473

[155] Per Ritchie J, with whom Fauteux, Martland, Judson, Spence and Hall JJ agreed; Cartwright CJ, Abbott and Pigeon JJ contra.

[156] "This proposition [that the Bill of Rights cannot render legislation inoperative] appears to me to strike at the very foundations of the Bill of Rights and to convert it from its apparent character as a statutory declaration of the fundamental human rights and freedoms which it recognises, into being little more than a rule for the construction of federal statutes" (per Ritchie J at p.481).

[157] Per Cartwright CJ at p.476, expressly overruling himself on this point in Robertson and Rosetanni v The Queen (1964) 41 DLR (2d) 485 at p.490.

[158] For example, Attorney-General for Canada v Lavell [1974] SCR 1349 per Ritchie, Abbott and Laskin JJ; R v Burnshine [1975] 1 SCR 693 per Laskin J; Attorney-General for Canada v Canard [1976] 1 SCR 170 per Beetz J; R v Miller & Cockriell [1977] 2 SCR 680 per Laskin CJ. See also Berend Hovius & Robert Martin, "The Canadian Charter of Rights and Freedoms in the Supreme Court of Canada" (1983) 61

as a "quasi-constitutional instrument." In Singh v Minister of Employment and Immigration[160] the Supreme Court split on this issue. Beetz, Estey and McIntyre JJ held that the provisions of the Immigration Act which effectively denied applicants for refugee status an oral hearing were inoperative because they were inconsistent with the right to a fair hearing under s.2(e) of the Bill. Dickson CJ and Wilson and Lamer JJ decided the case on the basis of s.7 of the Charter. In MacBain v Lederman[161] the Federal Court of Appeal held that provisions of the federal Human Rights Code were inoperative for inconsistency with the same provision of the Bill of Rights because they raised a reasonable apprehension of bias on the part of the Commission, which could select members of a tribunal to hear complaints under the Code in which it was in effect the prosecutor.[162]

However, since Drybones (which dealt with legislation passed before the Bill of Rights) there has been no clear majority statement of the Supreme Court holding legislation inoperative because of the Bill of Rights, especially when legislation post-dating the Bill is concerned (where the maxim that Parliament cannot prevent

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Canadian Bar Review 354 at pp.355-6 and cases cited therein.

[159] [1975] 2 SCR 574 at p.579

[160] [1985] 1 SCR 177

[161] [1985] 1 FC 856 (CA)

[162] Section 7 of the Charter was held not to apply because the procedure did not involve the "life, liberty and security of the person", but it did involve "rights and obligations" under s.2(e) of the Bill.

the implied repeal of an earlier statute by a later one[163] operates). Also, although the Bill has been held to apply to administrative acts taken pursuant to federal legislation,[164] a restrictive approach to the meaning of the term "rights and obligations" in s.2(e) has meant that this avenue has rarely been used.[165] It has also been argued that, despite s.2(d), there was no right against self-incrimination under the Bill because of the obligation under s.5 of the Evidence Act to answer questions.[166]

The cases also exhibit an adherence to formal rather than substantive equality.[167]

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[163] Ellen Street Estates Ltd v Minister of Health [1934] 1 KB 590 at p.597; R v Therens [1985] 1 SCR 613 per Le Dain J at p.639.

[164] Leiba v Minister of Manpower and Immigration [1972] SCR 660: deportation order held to be invalid, inter alia because of the absence of a fair hearing due to failure to provide an interpreter.

[165] Mitchell v The Queen [1975] 2 SCR 570: the right to a fair hearing did not apply to the suspension or revocation of parole by the National Parole Board because this did not affect the "rights" of the parolee (even though it might cause forfeiture of his statutory and earned remissions).

[166] James Leavy, "The Structure of Human Rights in Canada" in R. St. J. Macdonald & John Humphrey (eds): The Practice of Freedom (1979, Butterworths, Toronto), p.53. See also Berend Hovius, "The Legacy of the Supreme Court of Canada's Approach to the Canadian Bill of Rights: Prospects for the Charter" (1982) 28 McGill Law Journal 31 who argues that the cases set up a conundrum in that if the Bill only declares existing rights, former statues cannot be overridden, and under traditional canons of interpretation, later statues cannot be either (at p.42).

[167] Attorney-General of Canada v Lavell (1974) 38 DLR (3d) 418: an Indian woman who lost her Indian status under s.12(1)(b) of the Indian Act when marrying a non-Indian (where the same would not happen to an Indian man) did not infringe equality before the law under s.1(b) of the Bill of Rights as this only required equality in the administration of the law by law enforcement authorities. See also Bliss v Attorney-General of Canada [1979] 1 SCR 183: s.46 of the Unemployment Insurance Act which denied unemployment benefits to pregnant women and new mothers was held not to infringe the equality provision because it applied to pregnancy not being of the female gender.

This timidity on the part of the court to give the Bill a more purposive interpretation has been criticised.[168] Conklin attributes this not to the wording of the Bill, but to the "passive, apolitical self-image of the judiciary"[169] which takes the norms as given and rather concentrates on their "objective" application, ignoring that the content of a rule affects its scope and reach. Such an approach, however, would be regarded as too "political" for a court to undertake.[170]

Fifth, although the Bill of Rights applies to federal laws enacted before or after it,[171] the federal Parliament may nevertheless declare Acts to operate "notwithstanding the Canadian Bill of Rights."[172] It also provides for a mechanism whereby the Minister of Justice shall[173] examine Bills and other statutory instruments for consistency with the Bill of Rights.[174]

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[168] Hogg, ante; Dale Gibson: The Law of the Charter: General Principles (1986, Carswell, Scarborough), pp.26-7; Walter Tarnopolsky, "The Supreme Court and the Canadian Bill of Rights" (1975) 53 Canadian Bar Review 649 at p.671; Gaven Brodsky & Shelagh Day: Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back (1989, Canadian Advisory Council on the Status of Women, Ottawa), at pp.14-15 & 31-2.

[169] William E. Conklin: Images of a Constitution (1989, U. of Toronto Press, Toronto), at p.88.

[170] Id., pp.92ff.

[171] Section 5

[172] Section 2. Apart from the original s.6 in the Bill which amended the War Measures Act and deemed the latter not to be an abrogation of the Bill, this provision has only been used once: Public Order (Temporary Measures) Act S.C. 1970-71-72, c.2, s.12 (which was introduced to deal with the FLQ crisis in 1970 discussed above).

[173] This was originally not a mandatory requirement. The section was amended in 1971 pursuant to the Statutory Instruments Act.

[174] Section 3

Even within this narrow ambit, the Bill has been restrictively interpreted, in contradistinction to similar cases brought under the Charter.[175] Hogg considers that the reason is principally the clearer constitutional character of the Charter together with the "demonstrably justified" limitations allowed in the Charter's section 1.[176] This, in my opinion, is only part of the answer. In Robertson and Rosetanni, the holding that the Lord's Day Act prohibiting Sunday trading was not inconsistent with freedom of religion relied primarily on a parochial view of that freedom[177] and on an equally myopic view of the effect of the Act in question.[178] This is a refusal to see the purpose of the Bill of Rights, let alone the effect of the Act on Jews, Moslems, etc, because it focuses on the relationship between the store owner and the State rather than on the interests of the employees. It holds that there should be a day of rest for workers, as there should be, but enshrines Sunday rather than some other day as that day, thus avoiding the requirements of religions other than those of mainstream Christianity and thus privileging the position of the latter. Similar views were held in Smythe v The

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[175] For example, mandatory Sunday closing did not offend the Bill of Rights (Robertson and Rosetanni v The Queen [1963] SCR 651) but was contrary to the Charter (R v Big M Drug Mart [1985] 1 SCR 295); a police demand for a breath test did not offend the Bill of Rights to the extent that a breath test taken contrary to the Bill would be inadmissible evidence (Hogan v The Queen (1974) 48 DLR (3d) 437), but was contrary to the Charter (R v Therens, ante).

[176] Ante, at p.789.

[177] For example, Ritchie J said that "freedom of religion" had to mean what it did in Canada in 1960 (at p.654), which is hardly introducing an internationally-recognised right, even with the possibility of local variations.

[178] Ritchie J held that its effect was principally on trading, not religion (at pp.657-8).

Queen[179] where the notion of equality before the law in s.1(b) was held to mean the prevailing conception under British and Canadian law.[180] In Louie Yuet Sun v The Queen[181] and Rebrin v Minister of Citizenship and Immigration[182] the issue was the due process clause of the Bill of Rights applied to deportation orders made against illegal immigrants under the Immigration Act. In both cases Kerwin CJ held that the complainants had not been deprived of their liberty except by the due process of the law (ie, the Migration Act).[183] This is reading "due process" as though it meant "according to law".[184] Judicial myopia (or what Conklin has called the judges' image of the constitution)[185] caused by a refusal to confront the policy decisions inherent in human rights issues is the reason for these decisions. They ignore the UDHR and the fact that several of the provinces had enacted anti-discrimination legislation by the 1970's.[186] These cases represent an approach similar to that in Australia at the same time and indicate that, even with a Bill of

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[179] [1971] SCR 680

[180] At p.686: the election by the Attorney-General to proceed under the Income Tax Act either by indictment or summary conviction did not infringe the Bill of Rights.

[181] [1961] SCR 70

[182] [1961] SCR 376

[183] Louie at p.72; Rebrin at p.381.

[184] See Tarnopolsky, "The Supreme Court and the Canadian Bill of Rights" (1975) 53 Canadian Bar Review 649 at p.654.

[185] William E. Conklin: Images of a Constitution, ante.

[186] For example, the approach in Attorney-General for Canada v Lavell discussed above can be contrasted with Street v Queensland Bar Association, discussed below, where the Australian Constitution was held to be interpreted in the light of advances in both state and federal discrimination laws.

Rights setting out a catalogue of human rights, the application of this leaves much to be desired when done in the absence of an appreciation of the international norms,[187] at least to the extent that these may highlight the policy issues underlying the catalogue.[188] It is a "frozen" approach reminiscent of the 1928 decision of the Supreme Court of Canada which held that the word "persons" in section 24 of the then Constitution did not include women,[189] leading to a Privy Council appeal and Lord Sankey's famous dicta of the "living tree" approach to constitutional interpretation.[190] The Bill of Rights was treated as a fossil rather than a living tree. Thus, in Whitfield v Canadian Marconi Co[191] a clause in an

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[187] See Tarnopolsky: The Canadian Bill of Rights, ante, p.173 who, in discussing the inconsistencies in the cases (as at 1975), suggests that international covenants could be relied upon, and that it is to the human rights concepts in these and as reflected in the common law that s.1 refers, rather than freezing the Bill in the context of Canadian statutes existing as at August, 1960. Tarnopolsky uses this approach in particular (at pp.170-73) to explain the inconsistencies in the decisions of Ritchie J in Robertson and Rosetanni v The Queen ("It is to be noted ... that the Canadian Bill of Rights is not concerned with "human rights and fundamental freedoms" in any abstract sense, but rather with such "rights and freedoms" as they existed in Canada immediately before the statute was enacted." [1963] SCR 651 at p.654); in Drybones (" ... I do not consider that the provisions of s.1(b) of the Bill of Rights are to be treated as being in any way limited or affected by the terms ... of the Indian Act." [1970] SCR 282 at p.296); and in Attorney-General of Canada v Lavell ("In my view the meaning to be given to the language employed in the Bill of Rights is the meaning which it bore in Canada at the time when the Bill was enacted, and it follows that the phrase "equality before the law" is to be construed in the light of the law existing in Canada at that time." (1973) 38 DLR (3d) 481 at p.494). The courts did not take up this suggestion.

[186] See Berend Hovius, "The Legacy of the Supreme Court of Canada's Approach ...", ante, who considers that it was the court's unwillingness to adopt an individual rights approach, rather than the wording of the Bill of Rights or its status as "ordinary" legislation, which resulted in its limited effectiveness.

[189] Reference as to the Meaning of the Word "Persons" in Section 24 of the British North America Act, 1867 [1928] SCR 276

[190] Edwards v Attorney-General of Canada [1930] AC 124 at p.136

[191] (1968) 68 DLR (2d) 251

employment contract prohibiting staff at an Air Force radar station from fraternising with the local Indians and Eskimos was held not to infringe the right to freedom of association under the Bill of Rights because the contract was a voluntary and temporary limitation on this freedom done for a lawful government purpose. On the other hand, the Charter decisions in Big M Drug Mart and Therens both emphasised that the Charter goes further than declaring existing (domestic) rights: it is a new affirmation of rights and freedoms in Canadian law and is a standard for both present and future legislation. As such, the Bill of Rights decisions were expressly held to be inapplicable to cases where the Charter applied. Although still in operation, the Bill of Rights is little argued.[192]

So how did the Charter come about?

Just as Mr Diefenbaker had been the prime mover of the Bill of Rights, Pierre Elliott Trudeau was instrumental with respect to the Charter. He had argued in favour of one since he was a law professor and produced a White Paper[193] when in only his second year as a member of Parliament. He produced another after

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[192] The only recent resort to it I could find is Re Deputy Sheriff and The Queen et al. (1992) 90 DLR (4th) 680, which held that the right to the enjoyment of property in s.1(a) does not extend to corporations, in this case a bank which argued unsuccessfully that a priority with respect to outstanding income tax achieved under the processes of the Income Tax Act should not deprive it of monies owing to it by the taxpayer. However, such a holding is not new, the Ontario County Court holding in 1972 that the Bill of Rights did not extend to corporations: Regina v Colgate-Palmolive Ltd (1972) 8 CCC (2d) 40.

[193] A Canadian Charter of Human Rights (1968, Queen's Printer, Ottawa)

becoming Prime Minister.[194] The first major step towards the Charter occurred in 1971 with the so-called Victoria Charter which included patriation of the power to make future amendments to the Constitution and entrenched some fundamental rights, subject to an override, but equivocated on the issue of language rights as a political trade off with those provinces opposed to them.[195] This agreement failed when Quebec refused to ratify it. Provincial politics was to prove crucial in the development of the Charter, the influence of francophone Quebec having already been manifested by the 1968 Official Languages Act. The victory of the separatist Parti Québécois at the 1976 Quebec elections "shocked English-speaking Canada out of its complacency"[196] on matters of constitutional rapprochement (even though the 1980 referendum on secession was convincingly lost). But the provincial issue was not simply the demands of Quebec. Other provinces which were not necessarily opposed to Bills of Rights[197] were concerned with the administrative nuts and bolts - and costs - of a Charter. The right of witnesses to give evidence in either English or French, for example, entailed cost. Equality rights threatened on the one hand provincial power to regulate the professions or to give job preferences to their residents, and on the other they threatened the running

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[194] The Constitution and the People of Canada (1969, Queen's Printer, Ottawa).

[195] The text of the Victoria Charter (the Canadian Constitutional Charter 1971) can be found in Anne Bayefsky: Canada's Constitution Act 1982 and Amendments: A Documentary History (1989, McGraw-Hill Ryerson, Toronto), Vol. 1, pp.214ff.

[196] Milne, ante, p.39.

[197] For example, Saskatchewan had a Bill of Rights which predated the federal Bill of Rights by many years.

of provincial affirmative action programs. The right to hold property threatened land control measures in provinces like Prince Edward Island and Saskatchewan.[198]

In 1978 a Bill[199] for a new Constitution, including a Charter of Rights and Freedoms, was introduced into the Canadian Parliament. This was discussed at several Premiers' conferences[200] and by Parliamentary Committees.[201] When Trudeau and the Liberals lost office in May 1979 the momentum for constitutional change slackened. However, by December of the same year Trudeau was back in office (and the 1980 Quebec referendum on secession was pending). Arguing against secession, the Liberals promised, if the proposition were defeated (which it was), a patriated Constitution, language rights and a Charter of Rights. The Charter was back on the agenda, and that agenda was unabashedly political. When discussions with the provinces broke down, the federal government decided to take unilateral action,[202] but the problem was (again) the lack of an express amending formula in the British North America Act and whether amendment was possible without provincial consent. It is unnecessary to go into the details of the politicking

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[198] See Milne, ante, Chapter 2.

[199] Constitutional Amendment Bill (Bill C-60) (1978)

[200] See Bayefsky Documentary History Vol. 1, pp.437-529, Vol. 2, pp.549ff.

[201] Bayefsky, id, Vol 1, pp.414-36.

[202] See "Proposed Resolution for Joint Address to Her Majesty the Queen Respecting the Constitution of Canada", tabled in the House of Commons and the Senate, October 6, 1980, in Bayefsky Documentary History, ante, Vol. 2, pp.743ff.

here.[203] The matter was ultimately brought to a head by the judicial process. When an appeal court in Newfoundland unanimously held that the federal package was unconstitutional, and the matter was headed for the Supreme Court, the government agreed to wait for the court's ruling, and not to proceed with its plan if the Supreme Court ruled against it. For their part, the opposition agreed to allow the matter to progress through Parliament so that the court would have a completed document to consider. If held valid, the matter would be put to a vote of Parliament with a limit of two days on the debate.[204] Just before the Supreme Court hearing, the Quebec Court of Appeal held by majority that the package was valid. At the same time, the Parti Québécois was re-elected. Its leader, René Lévesque, made a pact with seven other dissenting provinces to block the federal plans.

The constitutional package comprised many elements. Of chief importance here, apart from the Charter, was the patriation of the Constitution. The dissenting provinces, jealous of their jurisdictions and mindful of the economic imbalances between them, had always insisted that the issue of division of powers be settled

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[203] For a first-hand account, see Joseph M. Weiler & Robin M. Elliot (eds): Litigating the Values of a Nation: The Canadian Charter of Rights and Freedoms (1986, Carswell, Toronto), especially the chapters "The Negotiation of the Charter: The Federal Government Perspective" by the Hon. Jean Chretien (pp.5-11), and "The Negotiation of the Charter of Rights: The Provincial Perspective" by James Matkin (pp.27-48). See also Edward McWhinney: Canada and the Constitution 1979-1982: Patriation and the Charter of Rights (1982, University of Toronto Press, Toronto); Roy Romanow, John Whyte & Howard Leeson: Canada ... Notwithstanding - The Making of the Constitution 1976-1982 (1984, Carswell, Toronto).

[204] Milne, ante, pp.99-100.

prior to patriation occurring. The Lévesque formula called for patriation and a further modified constitutional amending formula. The significance of this has been described by Milne in these terms:

> [This proposal] demonstrated the premiers' retreat from their long-standing demands for a settlement of the division of powers prior to patriation. ... It signified that if bargaining were to reopen, their chief interest would be their amending formula. Since satisfaction of that demand would require from them a concession of equal importance to the federal side (patriation having already been conceded), it invited a trade-off with the Charter of Rights.[205]

It was thus politics more than high-minded principle which propelled the introduction of the Charter.[206] The next step was now up to the Supreme Court. Given the situation just described, the matter was on a knife-edge.

However, Reference re Amendment of the Constitution of Canada (Nos. 1, 2 & 3)[207] did not produce a definitive victory for either side. The court held unanimously that the federal proposal would affect the powers of the provinces and the federal-provincial relationship, without specifying which provincial powers would be affected. By a majority of six[208] the court held that it was a constitutional convention that proposals affecting provincial constitutional rights were not sent to the monarch (for transmission to the UK Parliament to request

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[205] Milne, ante, pp.101-102.

[206] See also Michael Mandel: The Charter of Rights and the Legalisation of Politics in Canada (1980, Wall & Thompson, Toronto), pp.32ff.

[207] (1981) 125 DLR (3d) 1

[208] Martland, Ritchie, Dickson, Beetz, Chouinard and Lamer JJ; Laskin CJ, Estey and McIntyre JJ contra.

enactment) without first obtaining a "substantial measure" of agreement of the provinces, because of the federal nature of Canada as established by the Constitution. The passing of a resolution without such agreement would be "unconstitutional in the conventional sense." No view was expressed as to the quantum of provincial agreement. By a majority of seven,[209] the court held that the agreement of the provinces to a constitutional amendment was not legally required by the Constitution.

Thus, the court's response was that the federal proposals, if sent to the UK without provincial agreement, would be legal, but improper and unconstitutional as a matter of convention (rather than law). The government could act as it had proposed, but ought not. A balance had to be struck between power and principle.[210] As Milne comments:

> By giving each side a victory but neither a decisive win, the result constituted a virtual order to return to the bargaining table. Moreover, the rejection of unanimity [with respect to provincial agreement to the changes] had the effect of withdrawing blocking power from provincial hard-liners and of opening the way for a deal based on substantial agreement only.[211]

Indeed, Quebec's claim to a veto was rejected by the Quebec Court of Appeal.[212]

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[209] Laskin CJ, Dickson, Beetz, Estey, McIntyre, Chouinard and Lamer JJ; Martland and Ritchie JJ contra.

[210] Milne, ante, p.133.

[211] Id., p.134.

[212] This was upheld by the Supreme Court of Canada, Re Objection by Quebec to Resolution to Amend the Constitution [1982] 2 SCR 793. What was required was "substantial agreement", which was satisfied by the agreement of all the other nine provinces. The issue was in fact moot as the Constitution Act 1982 had been passed by the time this case was heard.

Even the courts' decisions pushed the protagonists into the political avenue for Charter implementation. This had both the positive aspect of making lobby groups prominent in the final negotiations (such as with respect to women's rights and native rights)[213] and the negative aspect of sowing the seeds of future discontent when, with Quebec the sole dissentient, the new Constitution was regarded as a victory for anglophone Canada. Thus the final versions of s.33 (the "notwithstanding" clause)[214] and s.28 (rights and freedoms being guaranteed equally to men and women) emerged, with the latter not subject to the former. The Supreme Court decisions also have their academic detractors.[215]

The Charter was t is not the resolution of Canada's constitutional problems so much as the beginning of new ones. It was part of a process which reflected shifts in the balance of power between the federal and provincial governments[216] (as well as between Canada and the UK) as much as, if not more than, an adherence to human rights. Indeed, one study of the debates in both the House of Commons

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[213] See Milne, ante, Chapter 5; McWhinney: Canada and the Constitution, ante, Chapter 11 ("New Players, New Peoples Power").

[214] For the history of this clause in particular, see Peter W. Hogg: Constitutional Law of Canada 3rd ed (1992, Carswell, Scarsborough), section 36.2 (pp.892-4).

[215] See Peter Russell, "The Supreme Court Decision: Bold Statecraft Based on Questionable Jurisprudence" in Peter Russell et al (eds): The Court and the Constitution (1982, Institute of Intergovernmental Relations, Kingston), pp.1-33, who thinks that the provinces should have won the case on the basis of law alone.

[216] See Michael B. Stein, "Canadian Constitutional Reform, 1927-1982: A Comparative Case Analysis Over Time" in Harold Waller, Filippo Sabetti & Daniel J. Elazar (eds): Canadian Federalism: From Crisis to Constitution (1984, University Press of America, Lanham), pp.215-33.

and the Senate in 1980-81 as well as submissions to the Joint Senate/House Committee discloses little evidence of direct influence of human rights norms in the process.[217] However, the same study concedes the influence of these, even if not articulated,[218] and another refers to them as "the necessary and pervasive context" surrounding the introduction of the Charter.[219] Tarnopolsky, on the other hand, considers that the influence of international human rights was crucial.[220] Certainly, a perusal of the Minutes of the Joint Committee indicates that there was considerable attention drawn to Canada's human rights obligations by witnesses such as the Canadian Bar Association, the Canadian Human Rights Commission, the New Brunswick Human Rights Commission (which included Professor John Humphrey and Sandra Lovelace in its delegation) and many interest groups including the Canadian Association for the Mentally Retarded, the National Association of Women and the Law, and the Canadian Jewish Congress.[221] It

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[217] Maxwell Cohen, "Towards a Paradigme of Theory and Practice: The Canadian Charter of Rights and Freedoms - International Law Influences and Interactions" in Jerzy Makarczyk (ed): Essays in International Law in Honour of Judge Manfred Lachs (1984, Martinus Nijhoff, The Hague) pp.65ff at p.75.

[218] Id, p.76

[219] John Claydon, "International Human Rights Law and the Interpretation of the Canadian Charter of Rights and Freedoms" (1982) 4 Supreme Court Law Review 287.

[220] See Walter S. Tarnopolsky, "The Canadian Experience with the International Covenant on Civil and Political Rights seen from the Perspective of a Former Member of the Human Rights Committee" (1986/7) 20 Akron L.R. 611.

[221] Canadian Special Joint Commission of the House and the Senate on the Constitution: Minutes of Proceedings and Evidence 1980-81 - my references are drawn from 5:7-9 (14 November), 7:99-100 (18 November), 10:30-31 (23 November), 11:27-35 (24 November), 15:17 (28 November), 22:54 (9 December).

was these political factors together with the particular problems of ethnicity and race in Canada for which international human rights provided an acceptable ideology and language.[222] It is significant, and in direct contrast with the Australian experience described below, that there was little vociferous opposition to the notion of a Charter as such. But the sources were various, even acknowledging the vital (but not exclusive) part played by international human rights in supplying either ideology, legitimacy or content. A perusal of the Appendices to Trudeau's 1968 paper,[223] and my own conversation with one key figure in the formulating process,[224] indicate that the Charter was partly political trade-off, partly the result of the influence of human rights (including the UDHR, the ICCPR, the Race Discrimination Convention, and the ICESCR), and partly the result of other documents such as the European Convention on Human Rights and the US Constitution's Bill of Rights. All of these together supplied the legitimising context, with the content (like the UDHR before it, and the Queensland Bill of Rights after it[225]) being the result of unabashed random borrowing together with local innovation, despite the fact that there are some clear parallels between some

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[222] See Alan C. Cairns: Charter versus Federalism: The Dilemmas of Constitutional Reform (1992, McGill-Queen's University Press, Montreal), pp.30-31.

[223] A Canadian Charter of Human Rights, ante.

[224] Interview with Mr Fred Jordan QC, Department of Justice, Ottawa, May 23, 1989. Mr Jordan indicated that the earliest drafts for a Charter drew heavily on the ICCPR but that this influence waned as other influences made themselves apparent. There remain some fairly clear, if not exact, parallels between the Charter and the ICCPR, such as s.15 of the Charter which obviously draws heavily on Art.26 of the ICCPR.

[225] Discussed below.

parts of the Charter and the ICCPR.[226] In fact, the use of international human rights norms as the juridical basis of the Charter was considered,[227] but (except for the reference to international law in s.11(g)) was ultimately rejected.[228] It is significant that the very name of the Charter is not the "Canadian Charter of Human Rights ...". Indeed, the term "human rights" is now here to be found in it, in contrast to the Bill of Rights where such references can be found in both the Preamble and section 1. However, the selection of the categories of rights and freedoms owes much (but by no means all) to international norms.[229]

The Charter divides rights and freedoms into fundamental freedoms,[230] democratic rights,[231] mobility rights,[232] legal rights,[233] equality rights,[234]

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[226] For example, section 11(g) of the Charter owes its wording to Article 15 of the ICCPR: see Minutes, ante, 7:92 (18 November 1980), 36:12-13 (12 January 1981).

[227] The draft tabled at the Meeting of Officials on the Constitution by the federal government in January 1979 contained a first clause which specifically referred to the UDHR and the ICCPR and required that the Charter contain rights and freedoms consistent with these: Anne Bayefsky: Canada's Constitution Act 1982 and Amendments: A Documentary History (1989, McGraw-Hill Ryerson, Toronto), Vol. 2, p.537.

[228] See the documents in Bayefsky, id, pp.537-624.

[229] See Anne Bayefsky: International Human Rights Law: Use in Canadian Charter of Rights and Freedoms Litigation (1992, Butterworths, Toronto), Appendix I, which gives a section by section cross-reference to similar international norms.

[230] Section 2, dealing with the freedoms of conscience, religion, thought, belief, opinion, expression (including freedom of the media), peaceful assembly and association.

[231] Sections 3-5, dealing with the right to vote, maximum duration of parliaments and the requirement of parliaments to sit at least once a year.

[232] Section 6, dealing with the right of citizens to enter, leave and change residence in Canada.

and minority language educational rights.[235] It also provides that English and French are the official and equal languages of Canada,[236] and the non-abrogation of any existing Aboriginal rights and freedoms[237] or of any other existing rights and freedoms.[238] While there is a large degree of overlap between the Charter and international human rights norms, the Charter is by no means a vehicle of incorporation of the latter into Canadian law.[239] In it there are no prima facie rights to property,[240] education,[241] legal personality,[242] privacy,[243] marriage,[244] equal pay for equal work,[245] or self-determination.[246] There are

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[233] Sections 7-14, dealing with the rights to life, liberty, security of the person, rights against unreasonable search and seizure, arbitrary detention, and rights in criminal proceedings, including the rights against self-incrimination and cruel and unusual treatment or punishment.

[234] Section 15, dealing with the right to equal protection and equal benefit of the law.

[235] Section 23 provides for the right to primary and secondary school instruction in English or French.

[236] Sections 16-22.

[237] Section 25. The rights of Aboriginal peoples are dealt with more extensively in Part II of the Constitution Act (ss.35, 35.1).

[238] Section 26.

[239] See John Humphrey, "The Canadian Charter of Rights and Freedoms and International Law" (1985-6) 50 Saskatchewan L.R. 13. For a detailed comparison of the provisions of the Charter and the ICCPR, see Walter Tarnopolsky, "A Comparison Between the Canadian Charter of Rights and Freedoms and the International Covenant on Civil and Political Rights" (1982-3) Queen's Law Journal 211.

[240] UDHR Art.17

[241] UDHR Art.26

[242] ICCPR Art.16

[243] ICCPR Art.17

[244] ICCPR 23

also no prima facie freedoms from torture,[247] slavery and other forms of servitude,[248] or from imprisonment for failure to fulfil a contractual obligation.[249] Some of the limitations or exceptions are different.[250] Some of these omissions may, in the practical sense, be unimportant. For example, slavery as such does not exist in Canada. But, as discussed in Chapter 3, slavery, the prohibition on human beings being treated as chattels, is the most fundamental human right of all. What these omissions indicate is the political rather than the humanitarian motivation underlying the introduction of the Charter. "Motherhood" principles are left out. The Charter is thus not a domestic implementation of the ICCPR (which in itself is not a breach of the Covenant: Article 2 does not require constitutional entrenchment, but there must be some effective remedy). The courts also have recognised this fact: indeed the introduction of the Charter has had little impact on the traditional transformationist approach of domestic Canadian courts to implementation of international law as such.[251]

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[245] UDHR Art.23

[246] ICCPR Art.1

[247] ICCPR Art.7

[248] ICCPR Art.8

[249] ICCPR Art.11

[250] For example, the "fundamental justice" exception in s.7 of the Charter, where the equivalent in ICCPR Art.6 is being "arbitrarily deprived" of life.

[251] Re Vincent and Minister of Employment and Immigration (1983) 148 DLR (3d) 385 at p.397; Re Mitchell and R (1983) 150 DLR (3d) 449; R v Videoflicks Ltd (1984) 14 DLR (4th) 10 at pp.35-6; Re R and Warren (1983) 6 CRR 82 at p.86.

Detailed consideration of selected Charter provisions will be undertaken below where a more immediate and direct comparison with the Australian system can be undertaken. At this point, I want to emphasise the significant general features of the Charter. The obvious, but significant, difference between the Bill of Rights and the Charter is that, as a part of the Constitution, it is entrenched and cannot be amended or repealed by another Act without recourse to the amending mechanism now provided in the Constitution.[252]

Section 1 guarantees the rights and freedoms "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." A similar, but not identical, provision, can be found in UDHR Article 29(2) discussed in Chapter 3, and also in some paragraphs of the European Convention[253] and the ICCPR.[254] In particular in the two Conventions, the limitations exist as qualifications to the ambit of application of particular rights: there is no general limitation clause. Much has been written about the words in section 1.[255] In my view, the most important feature of them is their revolutionary nature in the erstwhile existing Canadian legal system. What they do

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[252] Constitution Act 1982, Part V (ss.38-49).

[253] Articles 8(2), 9(2), 10(2), 11(2).

[254] Articles 18, 19, 21, 22.

[255] See Hogg, ante, Chapter 35; David McDonald: Legal Rights in the Canadian Charter of Rights and Freedoms 2nd ed (1989, Carswell, Toronto), Chapter 4; Sidney Peck, "An Analytical framework for the Application of the Canadian Charter of Rights and Freedoms" (1987) 25 Osgoode Hall Law Journal 1.

is to place the burden of proving justification for a suppression of rights on the suppressor. Thus in R v Oakes[256] section 8 of the Narcotic Control Act, which reversed the onus of proof in charges relating to narcotics trafficking, was held to contravene s.11(d) of the Charter (the right to be presumed innocent). Justification for s.8 would have to be established by the government, including the availability or not of alternative measures.[257] According to Dickson CJ, writing for the court, establishing justifiable limits to Charter rights involves a two-stage process. First, the objective of the limitation must be considered and must relate to concerns of a democratic society that are pressing and substantial rather than trivial, to warrant outweighing a constitutionally protected right or freedom. Secondly, and additionally, the means chosen to achieve this objective must be reasonable and demonstrably justified.[258] They must be proportional, in the sense that they must balance the interests of society with those of the individual or group.[259] Proportionality involves first, that the measures are designed to achieve the objective by being rationally connected to it rather than being arbitrary. Secondly, they should impair as little as possible the right or freedom in question. Thirdly, there must be proportionality between the effects of those rights-limiting measures and the objective.[260] "The more severe the deleterious effects of a measure, the

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[256] (1986) 26 DLR (4th) 200

[257] Per Dickson CJ at pp.226-7.

[258] At pp.227-8.

[259] Ibid.

[260] Ibid.

more important the objective must be if the measure is to be reasonable and demonstrably justified in a democratic society."[261] This approach (sometimes referred to as the "least intrusive means"[262] approach) has been treated as definitive,[263] although it has since been qualified[264] and is also subject to a "margin of appreciation".[265] Although far from perfect, it nevertheless represents a major shift in focus from establishing the existence of rights to establishing the justification for limiting them. It is also a much more detailed and articulated approach than that exhibited by the Human Rights Committee when considering the meaning of arbitrariness in the ICCPR, as discussed in Chapter 4. This approach is not, however, generated as much by international as domestic values, to the extent that judicial notice (rather than hard evidence) of "a general knowledge of our history and values and ... the broad design and workings of our society"[266] can suffice. Thus, in Morgentaler, the Court referred to a variety of evidence

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[261] At p.228.

[262] Robert Sharpe, "The Impact of a Bill of Rights on the Role of the Judiciary", paper presented to the conference "Australia and Human Rights: Where to From Here?" A.N.U., Canberra, July 16, 1992. This is also referred to by Hogg as the "least drastic means": ante, section 35.11 (p.877).

[263] Edwards Books and Art Ltd v The Queen (1986) 35 DLR (4th) 1; Smith v The Queen (1987) 40 DLR 435 at p.482; Hufsky v The Queen [1988] 1 SCR 621 at p.634; Morgentaler v The Queen (1988) 44 DLR (4th) 385.

[264] See the discussion with respect to R v Keegstra, below.

[265] Edwards Books, ante: an exemption from the Ontario Sunday-closing law granted only to retailers employing no more than seven people and using no more than 5000 square feet of retail space was held by majority to be valid. See Hogg, ante, section 35.11(b) (pp.878-882).

[266] Jones v The Queen (1986) 31 DLR (4th) 569 per La Forest J (speaking also for Dickson CJ and Lamer J) at p.594.

concerning abortion. In Oakes itself Dickson CJ does refer to an obscure treaty to determine the justification of the limitation,[267] but not to some considerable jurisprudence on the issue by the European Court of Human Rights.[268] The notion of a "democratic society" has been similarly discussed,[269] but this is not referred to in Oakes either. One recent, and very detailed, academic study of section 1 places emphasis on factors other than international law.[270] However, this does not mean that human rights norms are ignored. Dickson CJ wrote in Slaight Communications v Davidson:

> ... Canada's international human rights obligations should inform not only the interpretation of the content of the rights guaranteed by the Charter but also the interpretation of what can constitute pressing and substantial s.1 objectives which may justify restrictions upon those rights.[271]

There are other such references to human rights norms, but they are not

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[267] At p.229 he refers to the Single Convention on Narcotic Drugs 1961, to which Canada became a party on March 30, 1961.

[268] For example, Klass 1978 ECHRR Ser.A, No.28, 21; Young, James & Webster 1981 4 EHRR 38; Dudgeon 1981 23 ECHRR Ser.A, No.45, 23. See also the decision of the European Commission in X and Church of Scientology v Sweden (1979) 16 Eur. Comm. of Human Rights Decs. and Reports 68.

[269] Its characteristics are pluralism, tolerance and broadmindedness: Handyside Case 1976 ECHHR Ser.A, No.24, 21 at p.23.

[270] Andrée Lajoie et al, "Les Représentations de Société Libre et Démocratique à la Cour Dickson: La Rhétorique dans les Discours Judiciaire Canadien" (1994) 32 Osgoode Hall L.J. 295: the authors consider that the expression "free and democratic society" owes much to the conceptions of the judges and the expectations of the "audiences" of the court, which includes those of the judges themselves, rather than to international law.

[271] [1989] 1 SCR 1038 at pp.1056-7.

abundant.[272] This is not surprising as, despite similarities, there are significant differences between section 1 and its international counterparts. In particular, the international limitations are based on a test of necessity[273] rather than reasonableness. The Charter standard has been held to constitute a lower test,[274] although there are instances where Canadian courts have found both approaches to be relevant.[275]

The phrase "prescribed by law" in section 1 does have exact or nearly exact

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[272] For example, Hirt v College of Physicians and Surgeons (1985) 17 DLR (4th) 472: Macfarlane J used the limitations clauses in the ICCPR to demonstrate the reasonable limits in a free and democratic society; International Fund for Animal Welfare Inc v Canada [1989] 1 FC 335: MacGuigan J used Art.19(3) of the ICCPR and Art.11(1) of the ICESCR for similar purposes. See William Schabas: International Human Rights Law and the Canadian Charter: A Manual for the Practitioner (1991, Carswell, Toronto), pp.67-70 for some other (but not many) cases.

[273] See ICCPR Articles 12 (freedom of movement), 18 (freedom of thought, conscience and religion), 19 (freedom of expression), 21 (right to peaceful assembly), 22 (freedom of association). Also, the necessity test exists in the European Convention for the Protection of Human Rights and Fundamental Freedoms in Articles 2 (right to life), 5 (right to liberty), 8 (right to privacy), (freedom of thought, conscience and religion), 10 (freedom of expression) and 11 (freedom of association).

[274] Reich v College of Physicians and Surgeons of the Province of Alberta (No. 2) (1984) 8 DLR (4th) 696, per McDonald J at p.711. See also the decision of the European Court of Human Rights in Handyside v United Kingdom, ante, which held that limits on freedom of expression which are "necessary in a democratic society" are not those synonymous with reasonableness.

[275] Reference re French Language Rights of Accused in Saskatchewan Criminal Proceedings [1987] 5 WWR 577, Cameron J of the Saskatchewan Court of Appeal. I am indebted for this observation to William A Schabas: International Human Rights Law and the Canadian Charter: A Manual for the Practitioner (1991, Carswell, Toronto), p.72. The learned author also mentions on the same page two other cases (neither of them from the Supreme Court) where the approach seems similarly equivocal. This is not, in my opinion, convincing authority for the relevance of the international tests to s.1 of the Charter.

international counterparts,[276] although it does not appear to have been examined by Canadian courts in its international context[277] as much as the notion of justification in a free and democratic society.[278]

These references to human rights norms indicate four things. First, they are used more to "inform" rather than be the basis of the value considerations. Secondly, the paucity of reference to them indicates that local values, especially if in conflict with them, will be paramount. Thirdly, the effect nevertheless becomes of a self-referential nature for human rights. The symbiotic relationship between the international norms and the domestic legal system described in Chapter 4 is not only reflected but strengthened (at least to the limited extent that such reference is made) by the reliance. Fourth, a limited synergy can occur. In discussing the reasonable limits to freedom of expression, for example, references to Article 19(3) of the ICCPR relate to limitations on privacy where privacy as such is not a

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[276] ICCPR Articles 18, 19, 21, 22. European Convention Articles 8, 9, 10, 11.

[277] For example, the decisions of the Human Rights Committee in Pinkey v Canada (No.27 of 1978) [1981-2] 2 YHRC 385 which held that the term "prescribed by law" is a safeguard against arbitrariness; and Maroufidou v Sweden (No.58 of 1979) [1981-2] 2 YHRC 318 which held that the term "in accordance with law" means that the state law should be applied reasonably and in good faith: see Chapter 4 above.

[278] R v Andrews (1989) 43 CCC (3d) 193 Cory J in the Ontario Court of Appeal held that provisions against hate propaganda in the Criminal Code were justifiable, inter alia, because they enacted Canada's obligations under the Racial Convention. I am again indebted to Schabas, ante, for this reference (at p.75). He also draws attention to the references to European cases in Oakes in determining reasonable limits on reverse onus provisions. Again, there are not many cases referred to.

Charter right but its effects are felt in Charter litigation.[279] However, I cannot go so far as Schabas who writes:

> From this already abundant case law, it can thus be seen that international human rights law is a rich reservoir of material for the interpretation and application of section 1. As we have seen, the provision was inspired by the international instruments, and Canada's courts have little difficulty returning to the source for additional inspiration. It will be interesting to see how they will react to future development in international law, and to observe the interaction of two "living trees", the Canadian Charter and international human rights law.[280]

The case law is not "abundant" with international references. While section 1 may have been based on international counterparts, it is significantly different to them. International norms may well be a rich reservoir for interpreting the section, but they are by no means determinative of that interpretation. The worthy, and in my opinion worthwhile, vision of two living trees of interpretation remains precisely that, a largely unfulfilled aspiration.

The approach to section 1 relies crucially on a judicial determination (however obtained) of the purpose of the imposed limitation and then a measurement of these against the judicially perceived values of a democratic society. These are indeterminate processes. Nevertheless, this approach (despite the paucity of reliance on international human rights norms) is one of upholding the people's

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[279] See La Forest J (in dissent) in Edmonton Journal v Attorney-General of Alberta [1989] 2 SCR 1326 at p.1374.

[280] Schabas, ante, at p.76.

rights and freedoms (rather than the administrative objectives of government)[281] as being the principal aim. The limitations must be "prescribed by law" (ie, they must arise through statute, regulation or common law), which means they must be reasonably specific and not the subject of an uncontrolled discretion.[282] They must be important, use the least restrictive means to achieve their purpose, and the onus is on the government to prove this, although where the line is precisely to be drawn is for the government to decide (ie, the limitation must be objectively reasonable rather than being the limitation the court itself might have devised).[283]

However, the Supreme Court has held that there is a difference between limiting a Charter right, in which case s.1 applies (and the limit might or might not be justified), and totally abrogating such a right, in which case s.1 cannot be satisfied

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[281] Singh v Minister of Employment and Immigration (1985) 17 DLR (4th) 422: a s.1 argument by the government that allowing full procedural rights at immigration appeals would place an unreasonable burden on the Immigration Appeal Board was specifically rejected by Wilson J at p.469 as rendering Charter guarantees illusory. Contrast Lamer J in Reference re s.94(2) of the Motor Vehicle Act (BC) (1985) 24 DLR (4th) 536 where he says that administrative efficiency might be arguable in exceptional conditions such as natural disasters, epidemics, etc (at p.561). See also Dickson CJ in Edwards Books and Art Ltd v R (1987) 35 DLR (4th) 1 who accepts administrative convenience as a factor to take into account in the design of an exemption to Sunday-closing legislation (at p.44).

[282] Re Ontario Film and Video Appreciation Society and Ontario Board of Censors (1983) 147 DLR (3d) 58, affirmed (1984) 5 DLR (4th) 766: the Ontario Theatres Act contravened the Charter by authorising the Board to censor "any film" without setting a standard (eg, "sexually explicit films") by which the discretion was to be exercised.

[283] Edwards Books, ante.

and the limitation is unconstitutional.[284] It is with respect to this classification that the Oakes test has been modified by later cases which, in my opinion, better accord with international human rights norms (even if the court does not appear to realise this). Oakes tended to treat rights as absolute, rather than contingent or contextual, and after finding the right then applied section 1 to it to see if limitations on it were justified. Such an approach avoids coming to terms with the significant fact that human rights norms, as seen in Chapters 3 and 4 above, are not absolute and in fact have to be balanced against each other. It artificially separates the issue of entitlement to rights from the question of their application in particular circumstances, thus reifying the right. It also gives the impression that the process of the court is value-free. A partial, but not complete change, to this approach can now be seen in cases such as R v Keegstra.[285] This case involved a high school teacher who as part of the teaching program described Jews to his students as "treacherous", "subversive", "sadistic", "money-loving", "power hungry" and "child killers." He was convicted under the provisions of section 319(2) of the Criminal Code for promoting racial hatred. This provision was upheld by a majority of the Supreme Court as justifiable under section 1 of the Charter. In a contextual approach, but applicable to the analysis of section 1, not to section 2(b) itself which was said to require a large and liberal interpretation,

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[284] Contrast Ford v Attorney-General of Quebec [1988] 2 SCR 712: a complete prohibition on the use of languages other than French on commercial signs could not meet the proportionality test; and Irwin Toy Ltd v Attorney-General of Quebec [1989] 1 SCR 927: restrictions (but not a total ban) on the content of advertising directed at children held to be valid.

[285] [1990] 3 SCR 697

the majority held that contextual values and factors had to be weighed. Part of that context specifically included a reference to the prohibition on racial propaganda in ICCPR Article 20(2)[286] and to the fact that the Racial Convention guarantees the freedom of expression in Article 5 in the context of prohibiting racial discrimination (thus implying that it is not an absolute right), as well as to decisions made under the European Convention.[287] Dickson CJ writing for the majority found that there was a "powerfully convincing legislative objective"[288] in limiting freedom of expression in cases such as this. On the other hand McLachlin J (also writing for Sopinka J in the minority) held, quite logically and compellingly, that a fundamental difference between the right to freedom of expression in the Charter and the right found in international instruments was that the latter contain express internal limitations whereas the Charter right is not so limited, adding: "All this suggests that the framers of the Charter envisaged freedom of expression as a comprehensive, fundamental right of great importance."[289] On this specific point, the effect is not any different to that of the majority. However, in the section 1 analysis it allows the international instruments and jurisprudence to be distinguished, and not applied to this case at all.

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[286] And also referring to its interpretation by the Human Rights Committee in Taylor & Western Guard Party v Canada 38 UN GAOR, Supp. No.40) (A/38/40) 231 (1983) which held that s.13(1) of the Canadian Human Rights Act prohibiting hate messages by telephone was not a breach of the ICCPR, particularly because of Art.20(2).

[287] At pp.752-4

[288] At p.758

[289] At pp.807-8

Thus, international human rights norms can be applied as part of the context to determine whether a limitation on a right is justifiable. They were not used in this case to determine the meaning of the right in the first place. The only decision (which I could find) which in fact uses the contextual approach as part of a section 2 analysis is that of Wilson J in Edmonton Journal v Attorney-General for Alberta[290] holding that restrictions on the publication of judicial proceedings relating to matrimonial disputes did not infringe the Charter because the right to freedom of expression can vary with the context, political freedom of expression demanding greater protection than the public disclosure of the details of a matrimonial dispute. Her honour does not, however, particularly rely on international human rights norms in this case. Considering, however, the use of these as context in Keegstra, this could have been done.

The Court's approach is, however, different with respect to the more general equality rights in s.15 of the Charter.[291] Here, the court has accepted that "discrimination" means more than differential treatment and that the effect of the treatment must be considered (and hence that equality means more than merely formal equality). There is thus a qualifying factor in s.15 itself, apart from the

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[290] (1989) 64 DLR (4th) 577 at 582ff.

[291] Andrews v Law Society of British Columbia [1989] 1 SCR 143: a requirement of Canadian citizenship for admission to practise law in British Columbia held to violate sections 1 and 15.

issue of justification in s.1 (on which the court split).[292] This conclusion was arrived at without express reliance on international human rights norms, but on U.S. jurisprudence and existing Canadian anti-discrimination legislation (so there may have been some indirect reliance on human rights norms). Moreover, the only express reliance on international human rights is in the separate judgement of McIntyre J[293] where he refers to the European Convention on Human Rights, but only to distinguish the rights enumerated there from those in the Charter where a two-stage process is required (first, for the complainant to establish an infringement of a Charter right, and second, for the government to justify the infringement). This approach again favours treating Charter rights differently to international human rights in that it sees the former as absolute rather than qualified rights per se. The discussion above shows that section 1 was introduced for political rather than jurisprudential reasons attached to an appreciation of the nature of human rights. Its use by the court tends to skew Charter rights away from international human rights. There was some hope after Andrews that the dicta in that case, which favour a purposive and contextual approach, could be used to advocate real equality for disadvantaged groups.[294] Without a contextual and

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[292] Dickson CJ, Wilson and L'Heureux-Dubé followed the Oakes line of "pressing and substantial" government concerns; McIntyre and Lamer JJ held that a legitimate exercise of legislative power in the light of the desired social objective would be enough; La Forest J disagreed with McIntyre's result but appeared to agree with his reasoning about s.1.

[293] At pp.177-8

[294] N. Colleen Sheppard, "Recognition of the Disadvantaging of Women: The Promise of Andrews v Law Society of British Columbia (1989) 35 McGill L.J. 207.

purposive approach to rights (rather than only to equality before and under the law) based on an appreciation of the meaning of international human rights norms, this promise may be largely unfulfilled.

Nevertheless, both the "traditional" Oakes approach and its later modifications indicate that Charter rights are not residual rights, which, more often than not, is the case for human rights in Australia.

However, Charter rights are not universal rights: section 32 limits their application to federal and provincial governments and parliaments. This is, however, an expansion of the ambit of application of the Bill of Rights, although it has been criticised as being an unnecessary limitation as well as an undesirable one.[295] It means that the Charter has no direct application to private relations, although it might indirectly apply to them if the matter is sufficiently connected to government action. Thus, in Retail, Wholesale and Department Store Union v Dolphin Delivery Ltd[296] the Supreme Court held that the Charter did not apply to an injunction granted by a court to restrain a secondary boycott (on the basis that a proposed picket would amount to the tort of inducing a breach of contract) because the plaintiff was a private party, the court was not a part of "government", and the

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[295] Dale Gibson: The Law of the Charter: General Principles (1986, Carswell, Toronto), Chapter 3. See also Edward Belobaba, "The Charter of Rights and Private Litigation: The Dilemma of Dolphin Delivery", Chapter 2 in Neil Finkelstein & Brian Rogers (eds): Charter Issues in Civil Cases (1988, Carswell, Toronto) for an overview of academic criticism, especially at p.30.

[296] [1986] 2 SCR 573

injunction related to a common ght for an entity which was not part of the government. It will be different if some form of direct and precisely-defined government action is present.[297] Thus the court referred, with apparent approval, to Re Blainey v Ontario Hockey Association[298] where the Ontario Human Rights Commission, acting under the Ontario Human Rights Code, had refused to take up the case of a 12-year-old female hockey player who complained of sex discrimination because of exemptions in the Act, which the Ontario Court of Appeal held infringed s.15 of the Charter.

However, Dolphin Delivery, written by McIntyre J for six other members of the bench,[299] has been called a "fumbled analysis"[300] and "a cancer on the moral authority on which the very life of the judiciary depends."[301] It proclaims (without really giving reasons) that courts are not part of government (at least in so far as intended in s.32). The Charter is therefore limited to the legislative, executive and administrative branches of government, and will only apply to common law rules where this is the basis of some "government" action.[302] Just

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[297] Per McIntyre J at p.603.

[298] (1986) 26 DLR (4th) 728

[299] Dickson CJ, Beetz, Estey, Chouinard, Wilson and Le Dain JJ.

[300] Belobaba, ante, at p.31, who also writes (at p.33) that "Dolphin Delivery doesn't deliver."

[301] David Beatty, "Constitutional Conceits: The Coercive Authority of the Courts" (1987) 37 U. Toronto L.J. 183 at p.191.

[302] At p.599; McIntyre J specifically rejected the opinion of Professor Hogg on this point (in the 1985 edition of Constitutional Law in Canada at p.677) that where the Common Law has crystallised

where the lines are to be drawn on this issue has led to a confusing and apparently contradictory set of decisions.[303] Peter Hogg explains the difference by reference to a "control test" relying on an institutional or structural link with government.[304] He also refers to two cases which appear to contradict Dolphin Delivery on the application of the Charter to the courts. In R v Rahey[305] the Supreme Court held that a delay of eleven months after nineteen adjourned applications in a criminal trial was a breach of the right to be tried within a reasonable time under s.11(b) of the Charter. The Court ordered a stay of the proceedings. Dolphin Delivery was not mentioned in any of the judgements. British Columbia Government Employees' Union v British Columbia[306] involved an injunction made by a judge to prevent picketing outside his court. An application to the Supreme Court to set aside the injunction on the basis that it infringed the right

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into a form enforceable by the courts then the Charter can apply to it.

[303] The Charter will apply to the by-laws of a provincially-created municipality (Re McCutcheon and Toronto (1983) 41 O.R. (2d) 652) but not necessarily to the by-laws of a provincially-created corporation (Tomen v Federation of Women Teachers Associations of Ontario (1987) 61 O.R. (2d) 489). It will apply to the mandatory retirement policies of a provincially-funded hospital (Stoffmann v Vancouver General Hospital (1986) 30 DLR (4th) 700) but not necessarily to those of a provincially-funded university (Re McKinney and the Board of Governors of the University of Guelph (1986) 57 O.R. (2d) 1). It will apply to the professional disciplinary proceedings of a Law Society (Re Klein and Law Society of Upper Canada (1985) 16 DLR (4th) 488) but not necessarily to those of a real estate board (Re Peg-Win Real Estate Ltd and Winnipeg Real Estate Board (1985) 19 DLR (4th) 439. I am indebted to Belobaba, ante at pp.37-38, for these insightful comparisons. Many more instances can be found in Canadian Charter of Rights Annotated (Canada Law Book Inc, Aurora) at pp.27-3ff. See also the discussion in Chapter 29 of McDonald: Legal Rights in the Canadian Charter, ante.

[304] Peter Hogg: Constitutional Law of Canada, ante, at p.841.

[305] [1987] 1 SCR 588

[306] [1988] 2 SCR 214

to freedom of expression under s.2(b) of the Charter was unsuccessful on the basis that it was justified under s.1. However, the Supreme Court held unanimously (on this point) that the court order was subject to Charter review. Dickson CJ, writing for the court, did refer to Dolphin Delivery but distinguished it on the basis that it involved a "purely private dispute."[307] The Supreme Court has thus not expressly overruled Dolphin Delivery but appears not to be committed to the decision. Hogg reconciles these cases on the basis that Dolphin Delivery involved two private parties and a court order based on a common law rule applicable to them. He continues:

> Where, however, a court order is issued on the court's own motion for a public purpose (as in BCGEU), or in a proceeding to which government is a party (as in any criminal case, such as Rahey), or in a purely private proceeding that is governed by statute law, then the Charter will apply to the court order.[308]

Regardless of this apparent reconciliation, the situation remains unsatisfactory, particularly in an era not only of increasing privatisation of government services but also of concerns about person-to-person interaction. Where the action relates to a statute, the Charter can apply as the statute is the result of an action by parliament. Where an action relates to a common law right, the situation is equivocal. As Gibson points out,[309] the situation can become acute when areas of

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[307] At p.243

[308] Constitutional Law of Canada, ante, pp.844-5.

[309] Dale Gibson, "What Did Dolphin Deliver", Chapter 4 in Gerald Beaudoin (ed): Your Clients and the Charter - Liberty and Equality Proceedings of the October 1987 Colloquium of the Canadian Bar Association in Montreal (1988, Les Editions Yvon Blais, Cowansville), at p.79.

the law determined by both statute and common law, such as defamation, are involved. Conversely, however, where the action is clearly by the government, the Charter will apply, even in cases where the exercise of power is within the prerogative powers of the Crown.[310] This is therefore not a public/private distinction: public matters which do not bear sufficient connexion with government are not affected by the Charter,[311] whereas private matters which are regulated by statute are so affected and common law rules affecting private relationships might also be affected.[312] While this in itself might be regarded as a welcome advance, the limitation on the application of the Charter imposed by s.32 as interpreted, which reflects the traditional liberal view of a Bill of Rights as a restriction on governmental power over people, hobbles the Charter's potential to act as a synergising instrument between international human rights norms and Canadian law. It also undermines the fundamental nature intended of international human rights.

Another limitation, which has no precedent in any international human rights norms, but which has turned out not to be such a hobbling factor as might have

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[310] Operation Dismantle, discussed below.

[311] Dolphin Delivery

[312] R v Salituro [1991] 3 SCR 654: in a case where a husband was convicted of forging his wife's endorsement on a cheque made out to both of them, it was held that a rule making an accused's spouse an incompetent witness for the prosecution would not apply to the case of irreconcilably separated spouses because the sexual equality provided for by the Charter overrode the public policy of preserving the marriage bond where the latter had become a sham.

been thought, is to be found in s.33. This section provides that the federal or provincial parliaments may declare their Acts to "operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter." The operation of such a notwithstanding clause is for five years[313] but can be renewed.[314] This provision thus applies to the fundamental freedoms, the legal rights and the equality rights of the Charter, but not to anything else. It means that in these areas a parliament can opt out of the Charter, and for any reason - or no reason. This is in distinct contrast to the ICCPR where the rights to life, freedom of thought, conscience and religion, freedom from cruel treatment, and non-retroactivity of criminal offences are non-derogable at all times and where in any event derogation (when allowed) can only occur in times of public emergency.[315] A complaint to the UN Human Rights Committee is a possibility in such cases.[316] The inclusion of this provision was the result of the political trade off to get the provinces (except Quebec) to agree on the Charter formula.[317] The Supreme Court has held that the section is a manner and form requirement: there must be an express rather

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[313] Section 33(3)

[314] Section 33(4)

[315] ICCPR Article 4(2)

[316] See William A. Schabas: International Human Rights Law and the Canadian Charter: A Manual for the Practitioner, ante, pp.125-6, who also notes that the preamble to the 1988 Emergencies Act declares that the Charter will apply to it in accordance with the provisions of the ICCPR.

[317] See Hogg, ante, p.892. This background is in contrast to s.1, which had been around in draft form from at least the time of the third Constitutional Conference in 1971: see Tarnopolsky: The Canadian Bill of Rights, ante, p.18.

than implied reference to s.33, and this will be sufficient to bring the section into operation - the rights being overridden do not have to be specifically identified, a blanket reference to all the relevant Charter sections is sufficient.[318] The provision has, however, not been much used except by Quebec which in 1982 placed an override clause in all its statutes[319] (a practice which it has since abandoned). The only other province to use it has been Saskatchewan.[320] The federal government has never used the power.

The section has its detractors[321] as well as its supporters.[322] On either view, what s.33 means is that human rights in Canadian domestic law are not inalienable.

To the extent that human rights are available under the Charter, they are enforceable in a court which can order "such remedy as the court considers appropriate and just in the circumstances"[323] and any laws which are inconsistent

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[318] Ford v Quebec (1988) 54 DLR (4th) 577

[319] An Act Respecting the Constitution Act 1982, S.Q. 1982, c.21

[320] The SGEU Dispute Settlement Act, S.S. 1984-85-86, c.111

[321] John Whyte, "On Not Standing for Notwithstanding" (1990) 28 Alberta L.R. 347; Leo Panitch & Donald Swartz: The Assault on Trade Union Freedoms: From Consent to Coercion Revisited (1988, Garamond Press, Toronto).

[322] Paul Weiler, "The Evolution of the Charter: A View from the Outside" in Weiler & Elliott (eds): Litigating the Values of a Nation: The Canadian Charter of Rights and Freedoms (1986, Carswell, Toronto); Hogg: Constitutional Law of Canada, ante, pp.898-901; Lorraine Weinrib, "Learning to Live with the Override" (1990) 35 McGill L.J. 541; P. Russell, "Standing Up for Notwithstanding" (1991) 29 Alberta L.J. 293.

[323] Section 24(1)

with it can be struck down as the Charter is part of the Constitution and s.52(1) provides: "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." There is thus a clear mandate in this respect which was controversial under the Bill of Rights. This section also indicates, as even McIntyre J in Dolphin Delivery conceded,[324] that "law" in s.52 includes the common law, and therefore the Charter, as part of the Constitution, will apply (within the limits of s.32) to the common law. These provisions also put paid to any equivocations of the applicability of judicial review. In addition, the reference to "anyone whose rights or freedoms .. have been infringed" has been held to apply to both real and artificial persons, such as corporations,[325] although the application of rights and freedoms to the latter is constricted by the nature of the person.[326] This marks a distinct synergy as human rights norms in international instruments do not apply to artificial persons [327]

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[324] At p.595

[325] Big M Drug Mart, ante, Irwin Toy, ante; Ford v Attorney-General of Quebec, ante.

[326] See Irwin Toy, below. See also the decision of the Supreme Court in R v C.I P Inc (1992) 71 CCC (3d) 129, where it was held that a corporation was entitled to be tried within a reasonable time in accordance with s.11(b) of the Charter, but that the presumption of prejudice arising from lengthy delays is normally one which relates to the liberty and security of an individual. In the case of a corporation, it would have to show that the delay irremediably prejudiced its ability to defend itself.

[327] Hence, the purposeful references to "individual" rather than to "person". See Nowak: UN Convention on Civil and Political Rights, ante pp.39-40.

Remedies available under s.24 allow a wide judicial discretion[328] and have included the return of property seized in violation of the Charter,[329] reduction of a prison sentence,[330] a declaration of eligibility for parole,[331] a stay of proceedings,[332] damages,[333] and injunctions.[334] This breadth of remedy indicates that, because of the Charter, Canadian constitutionalism has broken out of the paradigm limited to the division of government powers and the doctrine of ultra vires.[335] It makes groups like women, gays and aborigines constitutional "somebodies".[336] Unlike Australia, the Canadian Supreme Court has read into s.52 a wide range of remedies for unconstitutional laws: striking down the legislation; severance of an offending provision; either of the first two with a temporary suspension of the declaration of invalidity to allow the legislature time to rectify the inconsistency; reading down the offending provision; reading in an

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[328] R v Mills [1986] 1 SCR 863 per McIntyre J at p.955.

[329] Laqiorqia v R [1987] 3 F.C. 28

[330] R v Charles (1987) 36 C.C.C. (3d) 286

[331] R v Gamble [1988] 2 SCR 595

[332] R v Mills, ante.

[333] R v Germain (1984) 53 A.R. 264 at pp.274-5. See generally Ken Cooper-Stephenson: Charter Damages Claims (1990, Carswell, Toronto).

[334] See Robert Sharpe, "Injunctions and the Charter" (1984) 22 Osgoode Hall L.J. 473.

[335] See Brian Morgan, "Charter Remedies: the Civil Side After the First Five Years", Chapter 3 in Neil R. Finkelstein & Brian MacLeod Rogers (eds): Charter Issues in Civil Cases (1988, Carswell, Toronto).

[336] See Alan C. Cairns: Charter versus Federalism: The Dilemmas of Constitutional Reform (1992, McGill-Queen's University Press, Montreal), pp.68-9.

appropriate provision.[337] The third and fifth options are not available in similar circumstances in Australia. This broad range is possible because of s.1 of the Charter and the test set out in Oakes. All unconstitutional legislation will not be unconstitutional to the same extent because of the discretionary balancing the court must undertake in s.1 with respect to its perceptions of government objectives and proportionality.

An additional effect of these forms of remedies for unconstitutional laws is the fact that other rights can effectively emerge from the Charter. Thus the Schachter case mentioned above indicates that economic rights are not totally excluded from the Charter.

Overall, the Canadian Supreme Court is acutely aware of the substantial differences between the Charter and the Bill of Rights, holding that, as a result,

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[337] Schachter v Canada (1992) 93 DLR (4th) 1 at pp.27-28. In Schachter, the Unemployment Insurance Act 1971 allowed 15 weeks of parental leave to either parent of a newly-adopted child, but 15 weeks leave to the mother only of a newly-born child. The federal court found this to contravene s.15 of the Charter. To strike the sections down would have meant nobody received any such leave, so the court ordered that the leave benefits applying to natural parents should be the same as those applying to adoptive parents. The Supreme Court allowed the appeal on this point, holding that reading in must follow the objective of the legislature and should not be done where it involves an insupportable intrusion into budgetary matters. It held that the appropriate case here would have been to declare invalidity and suspend. (In fact, the impugned legislation had been amended in 1990). This case was applied by the Ontario Court of Appeal in Haig v Canada (1992) 94 DLR (4th) 1 where the ground of sexual orientation was read into the Canadian Human Rights Act, and by the Newfoundland Supreme Court in Newfoundland (Human Rights Commission) v Newfoundland (Minister of Employment and Labour Relations (1995) 127 DLR (4th) 694 where sexual orientation was read into the Newfoundland Human Rights Code.

narrow and technical interpretations are inappropriate because "with the Constitution Act 1982 comes a new dimension, a new yardstick of reconciliation between the individual and the community and their respective rights."[338] As such, interpretation must be purposive and, as well, the Charter must "be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers."[339] Dickson CJ characterised the purposive approach as follows.[340] First, the meaning of the right or freedom in question should be ascertained by analysing its purpose, ie, by considering it "in the light of the interests it was meant to protect."[341] This purpose can itself be ascertained by considering four factors: (1) the character and the larger objects of the Charter itself; (2) the language chosen to articulate the right or freedom; (3) the historical origins of the concepts enshrined; and (4) the meaning and purpose of other rights and freedoms in the Charter (if applicable).[342] Finally, the definition given to a right or freedom should be a generous one rather than a narrowly legalistic one, considering the need to give to individuals the full benefit of the Charter, but being careful not to "overshoot the actual purpose of the right or freedom" by ensuring that it is contextually placed into its "proper linguistic,

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[338] Law Society of Upper Canada v Skapinker (1984) 9 DLR (4th) 161 at p.168. Significantly, this was the Court's first Charter case.

[339] Hunter v Southam Inc (1984) 11 DLR (4th) 641 per Dickson J at p.650. See also Dickson's judgement in R v Big M Drug Mart Ltd (1985) 18 DLR (4th) 321 at p.359.

[340] Big M Drug Mart, ante.

[341] At p.359

[342] At pp.359-60.

philosophic and historical contexts."[343]

The Constitution is therefore no longer restricted to considerations of the distribution of governmental powers, but is now directly concerned with the rights of individuals.[344] In addition, it is not just the purpose, but also the effect of legislation which must be considered by the court.[345] The approach here is therefore different to traditional constitutionalism: it is not just a characterisation exercise looking for the "pith and substance" of the law and ignoring its effects.[346] The approach to Charter interpretation is therefore one of adopting a purposive approach to the rights and freedoms in it, looking at both the purposes and effects of the impugned legislation, and then applying section 1 through a consideration (as discussed above) of the purposes, means and effects of permissible limitations to the Charter.[347]

The problem, however, is that this process is not determinative. A purposive

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[343] At p.360.

[344] Reference re s.94(2) of the Motor Vehicle Act (1985) 24 DLR (4th) 536 at p.544.

[345] Big M Drug Mart, ante, per Dickson J at p.350. Thus for example the purpose of legislation may be to provide for a uniform day of rest for workers but the effect of it may be to infringe religious freedom for some workers. See also Edwards Books, ante.

[346] Bank of Toronto v Lambe (1887) 12 App. Cas. 575: a provincial tax applicable to (amongst others) a bank was held to be valid even though it had a significant effect on banking which itself is outside provincial jurisdiction.

[347] See Sidney R. Peck, "An Analytical Framework for the Application of the Canadian Charter of Rights and Freedoms" (1987) 25 Osgoode Hall L.J. 1.

approach did not prevent the decision on the narrow application of the Charter in Dolphin Delivery. The factors in cases like Big M and Oakes do not "dictate" any particular meaning but instead produce indeterminacy.[348] Purposes may in fact be more indeterminate than the text they are supposed to illuminate as there is no single "purpose" of a right or freedom.[349] Thus, the purpose must be selected, allowing for what some commentators call judicial policy-making rather than this approach acting as a constraint on either the actions of government or the role of the court.[350] Instead of measuring legislation against the Constitution,[351] the margin of appreciation becomes a margin of manipulation.

However, there is not an infinite range of purposes. To what extent might resort to human rights ameliorate this situation? Canada's international human rights obligations are relevant to Charter interpretation, and it is in this way (despite the lack of any effect of the Charter on the transformationist approach to domestic implementation of international law) that the Charter may in fact become a vehicle through which international human rights norms are domestically implemented. Apart from the general rule of statutory interpretation that legislation be interpreted

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[348] See Peck, ibid.

[349] Joel C. Bakan, "Constitutional Arguments: Interpretation and Legitimacy in Canadian Constitutional Thought" (1989) 27 Osgoode Hall L.J. 123

[350] See, for example, Richard Devlin, "Ventriloquism and the Verbal Icon: A Comment Upon Professor Hogg's 'The Charter and American Theories of Interpretation'" (1988) 26 Osgoode Hall L.J. 1, who calls the purposive approach "circular and self-fulfilling" (at p.13).

[351] See Morgentaler, ante, per Dickson CJ at p.46.

as far as possible in conformity with international law,[352] and the "living tree" doctrine of constitutional interpretation,[353] the use of human rights in Charter interpretation can go further than this. There is some authority for a presumption in Canadian statutory interpretation that ambiguities should be resolved in favour of the liberty of the subject.[354] International human rights can form part of the historical background used in Charter interpretation,[355] although for the reasons of the development of the Charter described above, this should be approached in a circumspect rather than in a cavalier fashion. However, the courts have gone tentatively beyond this, largely on the basis of the large degree of similarity between the categories of many Charter rights and human rights. Dickson CJ held that international human rights "provide a relevant and persuasive source for interpretation of the provisions of the Charter."[356] He added that the Charter should be interpreted to provide at least the level of protection afforded by those instruments:

> The content of Canada's international human rights obligations is, in my view, an important indicia of the meaning of "the full benefit of the

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[352] Re Powers to Levy Rates on Foreign Legations [1943] SCR 208; Daniels v White and the Queen [1968] SCR 517.

[353] Edwards v Attorney-General of Canada [1930] AC 124 per Lord Sankey at p.136.

[354] J. Willis, "Statute Interpretation in a Nutshell" (1938) 16 Canadian Bar Review 1 at pp.22-3. Gibson in Law of the Charter: General Principles, ante, examines this presumption (at pp.61-2) and finds that there are some, but not plentiful, examples of its application, more often as a matter of result rather than of conscious resort to it.

[355] Big M Drug Mart, per Dickson CJ at pp.360-61.

[356] Reference re Public Service Employee Relations Act [1987] 1 SCR 313 at p.349.

> Charter's protection" [as provided in Big M Drug Mart]. I believe that the Charter should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.[357]

This is a "safety-net" approach to the use of human rights norms. It is an acknowledgment that interpretation of the Charter needs more than traditional forms of abstract legal analysis or the employment of traditional adjudicative facts. It uses international human rights law, but more as a substitute for the latter than the former. International human rights norms cannot be used to interpret into the Charter something clearly contrary to it, particularly if the wording in the Charter is different to the wording of the international norm.[358] Human rights instruments to which Canada is not a party may also be used in interpretation, but only as supportive argument as to the validity of a particular interpretation[359] or to identify the purpose and characteristics of a right.[360] But human rights instruments to which Canada is a party appear to be used in the same way: as an exotic species of fact in the case rather than as legal norms.

An empirical analysis of the use of international human rights norms by Canadian courts in fact reveals surprisingly little reliance in quantitative terms. Schabas,

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[357] Ibid.

[358] As in fact occurred in the Public Service Employee Relations Act reference.

[359] Allman v North West Territories Commissioner (1984) 8 DLR (4th) 230

[360] R v Mills [1986] 1 SCR 863

writing in 1991, identified 184 cases, and 35 of those are pre-Charter cases.[361] Considering the hundreds of Charter cases decided up to that time (and there is no apparent increase in the use of international norms in the last couple of years) it must be taken as an empirical given that proportionately little use is made by Canadian courts of international norms. The question must then become how influential or significant such reliance, when occurring, has been.

There is no clearly predominant approach to reliance on international human rights norms by Canadian courts.[362] This is not despite, but to a large degree precisely because of, the Charter. The foregoing analysis has shown that the Charter cannot realistically be regarded as a direct incorporation of Canada's international human rights obligations. They are often overlooked, not only in the cases but also in academic commentary.[363] However, because many of the Charter's provisions are at least partly derived from these international obligations, even if only with respect to categorisation and the use of some of the phrasing (such as the limitations on rights), this together with the general presumption against the violation of international obligations opens the door to the use of the international

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[361] See Schabas, ante, Appendix II.

[362] See Anne Bayefsky: International Human Rights Law: Use in Canadian Charter of Rights and Freedoms Litigation (1992, Butterworths, Toronto), Chapters 4 & 5.

[363] For example, a detailed empirical analysis in F.L. Morton, Peter H. Russell & Michael J. Withey, "The Supreme Court's First One Hundred Charter Decisions: A Statistical Analysis" (1992) 30 Osgoode Hall L.J. 1, does not consider the court's resort to human rights at all.

norms. but does not compel their use.

The general Canadian approach, like the Australian, is to resort to international norms in cases of ambiguity,[364] but to ignore them if they are in conflict with domestic law.[365] But courts do not always justify why they do or do not resort to international norms. Considering that there is no overriding obligation to resort to them, the attitudes of judges to the Charter in general can be as important as the domestic status of the international norms themselves as an indicia of their use.[366] For example, Gold has categorised the judges of the Supreme Court into Charter resisters and Charter enthusiasts, who both work within the framework of the purposive approach.[367] The "resisters" rely on the text of the Charter and consider it improper to read in anything not there.[368] On the other hand, the "enthusiasts" read the text as the departure point for an inquiry into the meaning of

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[364] For example, Re R. and Warren (1983) 6 CRR 82; R v Videoflicks Ltd (1984) 14 DLR (4th) 10.

[365] Re Mitchell and R (1983) 150 DLR (3d) 449

[366] See generally Leon Trakman: Reasoning With the Charter (1991, Butterworths, Toronto). Significantly, human rights is hardly mentioned in this book.

[367] Marc Gold, "Of Rights and Roles: The Supreme Court and the Charter" (1989) 23 University of British Columbia L.R. 507. He places McIntyre J as an example of the resistor, and Wilson J as an example of the enthusiast.

[368] Thus, for example, in Morgentaler v The Queen (1988) 44 DLR (4th) 385, McIntyre J dissented from the majority (who struck down the abortion provisions of the Criminal Code as being contrary to s.7 of the Charter) on the basis that there is nothing explicitly about abortion in the Charter. Similarly, in Reference re Public Service Employee Relations Act (Alberta) [1987] 1 SCR 313 McIntyre J, this time writing for the majority, held that the right to strike was not included in the freedom of association in s.2(d). (Gold, ante, pp.510-13).

the rights and freedoms in the Charter.[369] In addition, the issue of adducing evidence can also be significant, Gold pointing out that "resisters" tend not to require evidence be led to establish the first branch of the Oakes test (ie, that the legislative objective is of sufficient importance to warrant a Charter limitation) but instead accept the stated objective and its importance at face value, whereas, the "enthusiasts" tend to require evidentiary proof of the assertion.[370] Gold considers that these are essentially backward- or forward-looking approaches. To what extent do human rights norms inform the forward-looking approach? The answer is, not necessarily at all. International human rights are not mentioned at all in Morgentaler, except by McIntyre J to indicate their absence in the Charter and their presence elsewhere.[371] Even Wilson J, who specifically refers to the relevance of human dignity as a concept pervading the whole Charter,[372] makes no reference at all to international human rights.

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[369] For example, in the same two cases, Wilson J argued in Morgentaler that the right to liberty in s.7 includes the right whether or not to carry a foetus to term, and in the P.S.E.R. Act reference that the right to strike is included in freedom of association. See the discussion in Gold, ante, at pp.513-16.

[370] Ante, at pp.521-23. He also refers (at p.524) to Jones v The Queen [1986] 2 SCR 284, a case involving legislation allowing parents to educate their children outside approved schools only if the parent was certified as giving the child adequate instruction, where La Forest J upheld the law under s.1 (even though he thought it was a prima facie breach of freedom of religion) by taking judicial notice of the importance of education in society, whereas Wilson J held that the government had not lead sufficient evidence that certification was the least drastic means of ensuring that the children were sufficiently educated. Gold draws similar conclusions from Edwards Books, ante (at pp.525-6).

[371] At p.469 he refers to Art.4(1) of the American Convention on Human Rights 1969 which provides for the right to life starting at the moment of conception.

[372] At p.486.

Other cases have, however, mentioned them, but the approach lacks consistency. R v Oakes, in particular the decision of Dickson CJ referred to above, is a prime example of the use of human rights norms, where the reversal of the onus of proof was held to be contrary to section 11(d) of the Charter, inter alia, because Article 11 of the UDHR and Article 14 of the ICCPR provide for the presumption of innocence until "proved guilty", and the onus for doing this in this case rested on the State (the court significantly not following the Bill of Rights decision in R v Appleby).[373] In R v Konechny[374] Lambert JA (in dissent) held that mandatory lengths of prison sentences for driving offences were contrary to section 9 of the Charter having regard to the ICCPR as they were of an arbitrary nature.[375] In Reference re French Language Rights of Accused in Saskatchewan Criminal Proceedings[376] the Saskatchewan Court of Appeal held that the failure to proclaim a provision in the Criminal Code with respect to the right to use French as well as English in criminal proceedings infringed section 15 of the Charter because it amounted to discrimination under the Race and Womens Conventions as well as ILO 111, and because there are no implied rights in s.15, only those limitations in section 1.[377] Section 11(g) of the Charter, dealing with non-

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[373] Oakes, ante, at pp.214-15.

[374] [1984] 2 WWR 481

[375] At p.489.

[376] [1987] 5 WWR 577

[377] At pp.601-2. The latter conclusion was arrived at (at p.606) by an indirect application of international law, referring to a passage by Professor Anne Bayefsky in Bayefsky & Eberts (eds): Equality Rights and the Canadian Charter of Rights and Freedoms (1985) at p.77 where she refers to the European Court of Human Rights

retroactive operation of criminal law and the only provision which expressly refers to international law, has been interpreted in the light of the latter to uphold the validity of legislation dealing with war crimes,[378] despite its extra-territorial effect and the fact that from the point of view of purely domestic law it represented a retroactive criminal law otherwise prohibited by the Charter.

The analogies drawn to international law are, however, sometimes dubious. Problems with respect to the use of European Convention cases to interpret section 1 have already been mentioned. Another example occurred in Re Luscher and Deputy Minister, Revenue Canada, Customs and Excise[379] where the Federal Court of Appeal held unanimously that a ban on books of "an immoral or indecent character" infringed the right to freedom of expression in section 2(b) of the Charter as it was a vague, and therefore an unreasonable, limit in terms of section 1. It came to this conclusion with the help of the European Convention and the decision of the European Court of Human Rights in the Sunday Times Case,[380] which had held that the limitation on the freedom of expression in the European Convention, which was that the limitation be imposed "as ... prescribed by law and ... necessary in a democratic society", required that the legal prescription not be

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decision in the Golder case which held that there was no room for implied limitations in s.8(1) of the European Convention when a provision in some ways similar to s.1 of the Charter existed in s.8(2).

[378] R v Finta (1989) 61 DLR (4th) 85

[379] (1985) 17 DLR (4th) 503

[380] (1979) 2 EHRR 245

vague. This analogy was therefore not entirely apt.

Sometimes the application of the international norm is actually wrong. In Attorney-General of British Columbia v Craig[381] it was held that the European Convention, which like the Charter provides for the trial without unreasonable delay of a person who has been "charged", could not support an argument that delays prior to the charge being laid could be taken into account. This is in fact not how the European provision has been interpreted by the European Court of Human Rights, which has held that the provision should be interpreted in a substantive rather than in a merely formal way.[382] This case is not an isolated instance.[383] Indeed, the cavalier references to binding and non-binding norms referred to above have gone in at least one case so far as to claim that the European Convention on Human Rights can be relied upon by Canadian courts because Canada is a party to that treaty![384]

Sometimes the judicial references to international norms contradict each other. This has happened, for example, with respect to whether there is a right to strike in the Charter. In Re Service Employees' International Union, Local 204 and Broadway

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[381] (1984) 8 DLR (4th) 156

[382] Deweer v Belgium (1980) ECHR, Ser. A, Vol. 35, at paragraph 46; Corigliano v Italy (1982) ECHR, Ser. A, Vol. 57, at paragraph 34.

[383] See Bayefsky, International Human Rights Law, ante, Chapter 7 entitled, significantly, "Mistakes".

[384] Alberta Court of Appeal in R v Robinson (1989) 73 C.R. (3d) 81, at p.110.

Manor Nursing Home[385] legislation to restrain inflation which temporarily banned the right of workers to collective union bargaining and the right to strike was held by a majority of the Ontario High Court to infringe the right to association in section 2(d) of the Charter. There is no specific Charter right to join trade unions or to strike in the Charter, but the freedom of association was read to include these particularly by reference to ICCPR Article 22(1) and ICESCR Article 8(1) where both of these are specifically mentioned in the context of association.[386] A similar conclusion in a similar fact case was reached by the Saskatchewan Court of Appeal by similar reasoning.[387] However, in Public Service Alliance of Canada v The Queen in Right of Canada[388] the Federal Court held that similar legislation did not infringe section 2(d) of the Charter because while the freedom of association included the right to form trade unions, it did not extend to the right to strike, Reed J specifically disagreeing with the interpretation in the Broadway Manor case on this point, and holding that even though the right to strike is specifically mentioned in international instruments, it had not been imported into the Charter along with the freedom of association.[389] A similar conclusion was arrived at by the Alberta Queens Bench in Re Alberta Union of

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[385] (1983) 4 DLR (4th) 231

[386] At pp.280-81.

[387] Re Retail, Wholesale & Department Store Union, Locals 544, 496, 635 and 955, and the Government of Saskatchewan (1985) 19 DLR (4th) 609

[388] (1984) 11 DLR (4th) 337

[389] At pp.352-54.

Provincial Employees and The Crown in Right of Alberta,[390] where Sinclair J expressly held that there was no right to strike in customary international law either because of the lack of "universal consent".[391] This divergence amounts to more than a matter of differing applications due to domestic context. It indicates a fundamental difference in judicial attitude to the connexion (or not) between international law and domestic law, despite the acknowledged borrowing of the Charter from the former. The first three of these cases were appealed to the Supreme Court (known as the "Labour Trilogy" cases)[392] which held the legislation constitutional in all cases. An individuals' right to form an association does not extend to guaranteeing to the association the power to carry out its essential objectives as this would confer on the association rights more extensive than those accorded to individuals under the Charter. This is hardly a purposive approach. The right to strike is clearly an individual's right in international law even though usually exercised as a member of a group and can be subject to legitimate limitations.[393] The majority of the court in these cases considered that the right to strike was something left to the fine tuning and balancing of the political process rather than one decided on legal principle. It ignores the international legal principle and also refuses to see that legal principles can be

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[390] (1981) 120 DLR (3d) 590

[391] The requirement in international law at the time was "constant and uniform", not universal, usage. See Cohen & Bayefsky, "The Canadian Charter of Rights and Freedoms and Public International Law" (1983) 61 Canadian Bar Reivew 265 at 283-4.

[392] [1987] 1 SCR 313, 424, 460 respectively.

[393] ICESCR Art.8(1)(d)

imbued with policy considerations such as these. Not surprisingly, international human rights were not considered by the Supreme Court in these cases.

This blinkered and parochial view of the Charter has surfaced in other cases. Thus, it has also been held that as the right to self-determination in the ICCPR and the ICESCR has not been specifically referred to in the Charter, the international norms with respect to it are of no relevance in Charter litigation.[394]

Frequently, reference to international human rights norms does not produce a result which might be regarded as purposive, particularly if domestic law is regarded as being expressly contrary to the international norm. Thus, in Re Mitchell and The Queen[395] Linden J of the Ontario High Court held that the ICCPR could be used to interpret the Charter, but that Article 15 of the former had no application to section 11(i) of the latter because of the difference in wording whereby the Charter provision made it clear that obtaining the benefit of a lesser sentence because of a change in the law only applied until the time of sentencing. The same judge held, on similar reasoning, that Article 14(3)(a) of the ICCPR, which provides for being promptly informed of a charge, had no effect on the manner chosen by the Crown of proceeding by way of indictment or summary proceedings.[396] This is in fact a

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[394] Penikett et al v The Queen (1988) 43 DLR (4th) 324

[395] (1983) 150 DLR (3d) 449

[396] Re Warren, Klagsbrun, Boyle and Costigan (1983) 35 CR (3d) 173

non-purposive approach to the international norm, no attempt being made in these cases to investigate any international cases interpreting these articles or the history of their formulation. Similarly in Re Allman and Commissioner of the Northwest Territories[397] the Court of Appeal held, without examining the meaning of or background to the international norms, that the right to freedom of expression and opinion in the UDHR, the ICCPR and the European Convention had no application to a Charter challenge (under sections 2(b) and 6(2)(a)) to legislation prescribing a three-year residency requirement for voting in a plebiscite. Similarly, in R v Keegstra[398] the Supreme Court held that provision in the Criminal Code banning the promotion of racial hatred infringed the freedom of expression under s.2(b) of the Charter but were justifiable under (an admittedly human rights-oriented approach to) section 1. This is not only a non-purposive interpretation of the international norm, but simply wrong. The right to freedom of expression has never meant the right to say anything at all.

Sometimes , the international norm is simply not applied. In Mills v The Queen[399] Lamer J in dissent held that the provisions of Article 8 of the UDHR and Article 2(3) of the ICCPR could be used with respect to section 24 of the Charter to interpret the "competent" court to hear a matter as including one which can give an effective remedy, including avoiding unreasonable delays (there had

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[397] (1984) 8 DLR (4th) 230

[398] (1990) 1 CR (4th) 129

[399] [1986] 1 SCR 863

been a 19-month delay between charge and committal proceedings). The majority of the court, however, did not discuss the international norms with respect to this issue, holding that a magistrates court had not acted outside its jurisdiction in hearing the matter even though it could not decide the Charter issue of unreasonable delay. Considering that section 26 the Charter provides that any rights or freedoms already existing in Canada are not abrogated by the Charter, and that customary international law has long been regarded as part of the law of Canada, the refusal to apply the UDHR may be wrong.

Sometimes the international norms are misapplied with respect to both international law and the Charter. Thus, for example, the first cases dealing with equality rights in section 15 held that the section applied only to the grounds mentioned in the section, or to analogous ones,[400] whereas the provisions on which s.15 is based (Articles 2 and 26 of the ICCPR) are not so restricted and the legislative history of the section as well as statements about it in Canadian Reports to the Human Rights Committee clearly indicate that it was intended to be of an open-ended nature.[401] Approaches to customary international law have also been wrong.[402]

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[400] Andrews v Law Society of British Columbia (1989) 56 DLR (4th) 1; Reference re Workers Compensation Act 1983 (Newfoundland), ss.32 & 34 (1989) 56 DLR (4th) 765; R v Turpin [1989] 1 SCR 1296.

[401] See Bayefsky, International Human Rights Law, ante, pp.97-98. The Report referred to is Canada's Supplementary Report to the Committee in October 1984 together with the statements of Ambassador Beesley found in the Summary Record of the 558th Meeting, October 31, 1984, UN Doc. CCPR/C/SR.558, at p.4.

[402] For example, Sinclair J in the Alberta Union Case, ante, insisting on "universal consent" to the customary rule.

This problem can become exacerbated when there are qualifiers in the sections themselves.[403] The balancing of these with the limitations in section 1 are not necessarily the same thing when international law is properly considered, but they are often regarded as being so.[404]

The use of international human rights norms, while agreed to be acceptable, is thus not consistent. A good illustration is R v Kopyto[405] where it was held that a contempt conviction against a lawyer was a breach of his Charter right to freedom of expression because the contempt law failed the section 1 test. International law, particularly the European Convention, was referred to in order to decide the latter issue. Not only is this approach fraught with the difficulties of difference in the wording between the Convention and the Charter mentioned above (and the Convention was applied nevertheless) but also many other sources were referred to, including cases from Australia, New Zealand, the UK and the US. No mention was made of the fact that the European Convention is not in any way legally binding on Canada. Indeed, in all the cases no distinction seems to be drawn between binding and non-binding international norms, or between conventional and customary norms. The international norm in this case was simply tipped into the

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[403] See sections 6, 7, 8 and 11.

[404] See Wilson J in Thompson Newspapers Ltd v Canada [1990] 1 SCR 425 who called the reasonableness requirements in s.1 and s.8 "tautologous' (at p.501). An argument for separate consideration of sections in these circumstances (but for different reasons) can be found in Gibson: Law of the Charter: General Principles, ante, at p.110.

[405] (1987) 39 CCC (3d) 1

judgement as extra ballast. Charter applications of international human rights norms are approached in the same way in which those norms were used to formulate the Charter in the first place: it is a scissors and paste approach.[406] Thus, while the Charter is basically liberal in nature, recognising a zone of autonomy for the individual, it also contains affirmative action elements such as minority language rights. The interpretation, particularly as international human rights norms are concerned, shows a similar eclecticism. The overall effect is of a patchwork quilt rather than a seamless web.

There are also "no go" areas in the Charter. While the distinction is not exactly that between the public and the private, there has to be some connexion with government. Thus it has been pointed out that while anti-trust (anti-combine) legislation might be struck down by the Charter, the combine itself will generally be immune from a Charter challenge.[407] As a result, the courts also find difficulty in dealing with rights of an economic nature. The confusion over the right to strike discussed above is an example. Liberty and equality rights do not always apply to corporations.[408] Property rights do not exist in the Charter and

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[406] See Edward McWhinney, "The Canadian Charter of Rights and Freedoms: The Lessons of Comparative Jurisprudence" (1983) 61 Canadian Bar Review 55 at p.63.

[407] See A.C. Hutchinson & A. Petter, "Private Rights/Public Wrongs" (1988) 38 U. of Toronto L.J. 278.

[408] Irwin Toy Ltd v Attorney-General of Quebec (1989) 58 DLR (4th) 577; Edmonton Journal v Attorney-General of Alberta (1989) 64 DLR (4th) 577.

the courts have been reluctant to read them into it[409] but have effectively done so by categorising things like the right to practise a profession as being personal rights.[410] Social welfare rights do not expressly exist in the Charter either and, although they might be interpreted into it through the right to life, liberty and security of the person in section 7, the courts have avoided t sue.[411]

Nevertheless, the Charter, and through it international human rights norms, have had a profound, if qualified, effect in Canadian law. A considerable amount of legislation has been amended specifically because of the Charter.[412] The Charter has increased the relevance of international law to domestic law, as evidenced by the increasing reference to international human rights in non-Charter cases.[413] References to international norms are also no longer resorted to only in cases of ambiguity: they are used more readily as part of the ordinary process of interpretation[414] (but in this process, will not overturn clear domestic law).

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[409] Irwin Toy, ante.

[410] Wilson v British Columbia Medical Services Commission (1988) 53 DLR (4th) 171

[411] Irwin Toy, ante, at p.633; Schachter v Canada, ante.

[412] An example occurred in 1985 with Bill C-27 which is entitled "An Act to amend certain Acts having regard to the Canadian Charter of Rights and Freedoms." Over 30 Acts are amended in it.

[413] For example, Mercure v Attorney-General of Saskatchewan (1988) 48 DLR (4th) 1: language rights in Saskatchewan legislation interpreted in the light of Art.27 of the ICCPR; Québec (Commission de la santé et de la sécurité du travail) v Bell Canada (1988) 51 DLR (4th) 161: pith and substance of Quebec health and safety legislation interpreted in the light of Art.7 of the ICESCR.

[414] See Bayefsky: International Human Rights Law, ante, pp.72-74.

Despite the overriding effect given in the Charter to Parliamentary sovereignty, the Charter has acted as a bridge (not always used) between domestic and internationai law, so that as a result it becomes possible to enforce the latter in the absence of express incorporation. The Charter can also serve to frustrate domestic rules which might otherwise restrict the domestic application of human rights. And human rights working through the Charter have also altered the political power equation in Canada in that the political process is no longer driven only by mainstream political parties.

However, the approach to the international norms is not a properly comparative one. In many of the cases discussed above a verbal similarity between the Charter and an international norm was considered sufficient to trigger an application of the latter to the former, sometimes with skewed (or downright wrong) results. It is a superficial approach devoid of a consideration of the context (and hence purpose) of the international norms.[415] This has the potential of reaping the worst of both worlds when the international norm is recognised as a law but treated more like a fact in the case. Being treated like a fact in the case leads to the lack of distinction mentioned above between binding and non-binding norms. The European Convention is treated as being as equally authoritative as the ICCPR for Canada. But being recognised as law applicable to Canada (particularly in the case of customary international law), it is not possible (as, for example, in cases involving

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[415] See McWhinney, "Lessons", ante, at p.64.

private international law) for expert evidence on what the fact really is to be introduced. Treaties may be proved by the production of a Queen's Printer copy.[416] There appears to be little practice of requiring proof of the law,[417] let alone what it really means and how it should properly be applied.

Human rights are thus used to justify Charter decisions, not to legitimise them in the juridical sense. The Charter is not entirely based on human rights norms, nor is it a direct domestic transformation of them, but it is considerably based on them. This minimalist approach to human rights in Canadian law means that opportunities for synergy are lost, particularly when the indeterminate quality of the rights is accepted and the court focuses on competing social interests without straining them through the sieve of human rights.[418] If this were done, it might help (but will not necessarily lead to) an expansion of what Beatty has called the "limits no judge will cross "[419] Whether judges ought to do so, for example, by deciding cases with respect to economic rights that effectively give the courts power over the

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[416] Canada Evidence Act RSC 1985, c. C-5, s.20(c). There is similar provincial legislation.

[417] See Bayefsky: International Human Rights Law, ante, pp.137-39.

[418] For example, the majority decisions in Morgentaler and Edwards Books, ante. See also Andrews v Minister of Health for Ontario (1988) 49 DLR (4th) 584 where an argument brought by a lesbian couple that the Ontario Hospital Insurance Plan contravened s.15 of the Charter because it applied only to heterosexual couples was rejected by the court on the basis that lesbian couples are differently situated to heterosexual couples and that the equality right mandated that each should therefore be treated differently. It is the correct theory of equality but the wrong application of it.

[419] David Beatty: Human Rights and Judicial Review: A Comparative Perspective (1994, Martinus Nijhoff, Dordrecht), p.347.

public purse, is itself a controversial issue.[420] But conceding that it is judicial reasoning and legal doctrine as much, if not more than, the constitutional text which determines the rights people have,[421] a resort to human rights norms has the potential to drag the discussions out of the four corners of that text. However, because of the limitations of the international norms (as discussed particularly in Chapter 4 above) there is no guarantee that their use will also drag those same discussions out of "a narrow liberal conversation to a multifaceted and human context" for which Trakman argues.[422] But they may help to do so. For example, Trakman argues that the Oakes test requires a court to decide whether governmental objectives are proportionately related to the means of effecting them, but not to decide whether those objectives are substantively fair apart from evaluating them in relation to their effects.[423] I agree. But resort to human rights in Oakes and other cases resorting to international law led to an evaluation of those objects and effects and the proportionality of the means of implementation in the light of human rights as a standard which implicitly relates to an internationally accepted level of fairness. Critical Legal Studies has shown that the view that judges combine a priori principles of law with rational methods of reasoning to

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[420] Contrast, for example Beatty, ibid, who regards such as situation as one of "regression" (at p.350), with Leon Trakman: Reasoning With the Charter, ante, who argues (but not using human rights as the basis) for Charter rights to be conceived communally and collectively rather than individually and personally.

[421] As Beatty concedes (ante, at p.360).

[422] Reasoning With the Charter, ante, p.2.

[423] Id., at p.17.

arrive at an objective (and "just") result is fallacious. There is no "core" meaning of the rights at international level (as discussed in Chapters 3 and 4). Their meaning at domestic level is determined by reference to the permissible limitations on them. If we concede the personal and political element in legal reasoning, a resort to human rights norms will not provide a legitimate objective "meaning" of a right or freedom, but may (within their limitations) at least provide a common starting point for, and a focus to, an otherwise disparate discussion, recognising and allowing a reflection upon social interests regarded to be legitimate concerns of legal discourse. They can be used with the domestic system to construct, rather than merely to verify, rights and freedoms particular to the society which the court serves. They can also be used to help make an interpretation truly purposive rather than merely expansive.

B. Bills of Rights in Australia: A Sorry Story

The history of attempts to introduce Bills of Rights into Australian law is one of failure and hysteria. In comparison with Canada, despite all the shortcomings and compromises there, the Australian record is an embarrassment.

A conscious decision was taken at federation not to incorporate a Bill of Rights into the Constitution. Despite being modelled on the Constitution of the United States, at the end of the nineteenth century the overriding determination of the colonies was to preserve the maximum possible autonomy for the new states.[424] This, together with the predominance of the Diceyan view of Parliamentary supremacy and the prevailing belief in the philosophy of Utilitarianism[425] (as opposed to the predominance of the theory of natural rights a century before) combined to produce a document that reflected a smugness about the protection afforded by the legal system of the greatest empire the world had seen. Also, there were no references to rights in the colonial constitutions to draw upon (as, indeed, there still are none, with the sole ironic exception of Tasmania).[426]

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[424] This is discussed in more detail below with respect to the provisions of the Australian Constitution.

[425] See R.C.L. Moffat, "Philosophical Foundations of the Australian Constitutional Tradition" (1975) 5 Sydney Law Review 59 at p.85.

[426] Constitution Act 1934 (Tas) s.34, which refers to freedom of conscience and the practice of religion subject to considerations of public order and morality. This is ironic because it was Tasmania's laws which were the subject of scrutiny, and found to be wanting, by the Human Rights Committee in the Toonen Case referred to in the last chapter.

An early attempt at a step in the direction of constitutional human rights was taken by Dr Evatt who, as Attorney-General, wanted increased Commonwealth powers to facilitate economic security and social justice once the Second World War ended and reconstruction commenced. The Constitution Alteration (Post-War Reconstruction and Democratic Rights) Bill strengthened s.116 of the Constitution (the prohibition on legislative favouritism of religion) by extending it to the states, included the guarantees of the freedom of speech and expression, and proposed to transfer other powers otherwise within the residual powers of the states to the Commonwealth. It failed at a referendum.[427] In 1967 the Constitution was amended by repealing the former s.127 (under which Aborigines were not counted in the census) and extending the race power in s.51(xxvi) to include them.[428]

This, however, was just tinkering. The first full attempt at a Bill of Rights occurred in 1973 when Lionel Murphy, then federal Attorney-General, introduced the Human Rights Bill[429] into the Senate. It was based on the ICCPR, even though at that time it had not been ratified by Australia. As legislation rather than a constitutional amendment, it was nevertheless to be applicable to the states and territories (overriding inconsistent legislation by virtue of s.109 of the Constitution) and would also have the effect of overriding Commonwealth legislation unless the

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[427] See Geoffrey Sawer: Australian Federal Politics and Law 1929-1949 (1963, Melbourne U.P., Melbourne), p.172.

[428] Constitutional Alteration (Aboriginals) Act 1967

[429] No. 202 of 1973

latter expressed otherwise (similar to section 33 of the Canadian Charter, but only applicable to the Commonwealth.) A Human Rights Commissioner would settle complaints brought under it and enforcement was to be brought through the Australian Industrial Court. It was an amalgam of a Bill of Rights together with a Human Rights Commission. There was strong adverse public reaction to it. The Bill was not re-introduced into Parliament after the double dissolution of the latter in 1974, as sleeping dogs were left to lie in an explosive political climate (there was a constitutional crisis with the Whitlam government eventually being sacked by the Governor-General in 1975).

In the meantime, Australia slowly began to accede to human rights treaties. It ratified the International Labour Organisation Convention No. 111 in 1973, later setting up Committees on Discrimination in Employment. The Racial Discrimination Act (which is discussed in more detail below) was passed in 1974 and corresponded with the coming into force for Australia of the Convention on the Elimination of All Forms of Racial Discrimination. The office of the Commissioner for Community Relations was established under that Act. In 1976 the International Covenant on Economic, Social and Cultural Rights came into force for Australia, but no legislation was passed to implement it. In 1977 Attorney-General Ellicott introduced a Human Rights Commission Bill which was the result of extensive consultations with the states after the disaster of the Murphy Bill. As a result, it contained no provisions binding on the states. The politicking

had thus not been as successful as in Canada. Also, there was no situation where a political trade off with the states might have included state support for the Bill. When Mr Ellicott resigned as Attorney-General later the same year the Bill was set aside and it eventually lapsed with the occurrence of general elections later in the year.[430]

In 1979 a re-introduced Human Rights Commission Bill was even weaker than the 1977 version: the functions of a Human Rights Commission were to be directed to promoting the understanding and acceptance of human rights rather than to the resolution of complaints. The only dispute-settling function it was to have would arise if one of the parties were the Commonwealth or if the dispute involved Commonwealth legislation. The ICCPR, on which it was largely based, was not being implemented in terms of Article 2. Indeed, it was another Article which led to the failure of the Bill. This was Article 6: the right to life. In the House of Representatives (after the Bill had been passed by the Senate after much debate) a "right to life amendment"[431] was introduced which would have interpreted this provision as applying to the unborn child. The Bill was allowed to lapse after rejection of the amendment by the Senate and the dissolution of Parliament for another general election in October 1980.[432]

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[430] See Peter Bailey: Human Rights: Australia in an International Context (1990, Butterworths, Sydney), pp.106-108.

[431] House of Representatives, Hansard, 28 February 1980, pp.532-3.

[432] See Bailey, ante, pp.109-110.

This rather pathetic history of desultory commitment to human rights coloured by political opportunism nevertheless saw the federal government, in August 1980, ratify the International Covenant on Civil and Political Rights despite parliamentary rejection of the various Human Rights Bills (but subject to the many reservations discussed in Chapter 4). The next year, as part of an election commitment, the Fraser government passed the Human Rights Commission Act. It came into force on Human Rights Day 1981 (December 10 - the anniversary of the General Assembly vote on the UDHR) and was based (for the purposes of its validity under the external affairs power) on the ICCPR, and the UN Declarations on the Rights of the Mentally Retarded, the Rights of the Disabled and the Rights of the Child. The latter had been included principally to defuse the abortion debate which had arisen as a result of the right to life in the ICCPR. The effect, however, was to elevate the status of the Declarations in Australian law to that of the conventions. It was a step forward, but one taken for political reasons rather than ideological commitment, and for reasons of legal necessity: this was legislation, not a constitutional amendment like the Charter, and so it had to be based on a head of power, the external affairs power.[433]

The Act, which was not a Bill of Rights, set up a Human Rights Commission, the functions of which under s.9 were to examine Commonwealth legislation for

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[433] The ramifications of this power are discussed in more detail below with respect to constructed or constructive constitutional rights.

consistency with the Covenant and the declarations (although it was state and territory laws which accounted for most infringements), to inquire into and conciliate complaints of discrimination, to report on Australian compliance with the Covenant and Declarations when requested to do so by the Attorney-General,[434] to promote an understanding and acceptance of human rights in Australia, and to undertake research and education programs. Its human rights mandate was therefore comparatively narrow. Unlike the Racial Discrimination Act (discussed below) it did not apply to state laws and actions taken under them. However, a result of the research programs was the publication of Professor Alice Tay's seminal work in surveying the human rights literature relevant to Australia.[435] An example of the education programs was devising a national program for the teaching of human rights in schools, which was met by a howl of protest from right-wing groups on the basis that it was indoctrinating school children with socialism[436] and which was eventually abandoned.

The Commission was also given the task of conciliating complaints under the existing Racial Discrimination Act, integrating the Office of the Commissioner of

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[434] It produced several reports, including those on the Citizenship Act (Report No.1), the deportation of convicted aliens (Report No.4), the Commonwealth Crimes Act (Report No.5), the supply of heroin to terminally ill patients (Report No.11), the Queensland Electricity (Continuity of Supply) Act (Reports Nos.12 and 14), the Migration Act (Report No.13), and freedom of expression and the Broadcasting and Television Act (Report No.16).

[435] Alice Ehr-Soon Tay: Human Rights for Australia, Human Rights Commission Monograph Series No. 1 (1986, AGPS, Canberra)

[436] See Bailey, ante, pp.124-6.

Community Relations into it. As a result, the latter lost its independent reporting powers and the Commissioner, the Labour-Party appointed Al Grasby, was made redundant, leading Senator Gareth Evans to quip that the Act (which was a Liberal Party initiative) should have been called the "Al Grasby Defenestration Bill". (When the Sex Discrimination Act was passed in 1984, the Commission also took over similar functions under it.) The Act contained a sunset clause under which the Commission would cease to exist in five years (December 10, 1986), ostensibly to force a "re-think" of the value of a Human Rights Commission and related legislation.

In 1983, another attempt was made at a Bill of Rights, this time by a Labor government. The strategy behind it was similar to that used in Canada with the 1960 Bill of Rights: it would be introduced as "ordinary" legislation and later incorporated into the Constitution. Deferred until after the 1984 election, this Bill was never introduced into Parliament. It was to be a touchstone of interpretation: courts would be required to interpret all legislation in the light of it, existing Commonwealth legislation inconsistent with it would be impliedly repealed, inconsistent state legislation would have been inoperative to the extent that s.109 allowed, and the Human Rights Commission was to be given the power to investigate and report on the practices of Commonwealth, state, territory and local governments which infringed it. Courts were given limited powers to make

declarations and orders under it, but it was intended to be "a shield not a sword,"[437] and as such was arguably a breach of the requirement to give effective remedies for human rights violations in Article 2 of the ICCPR, considering that there was little other legal protection of human rights in Australian law at the time. Nevertheless, despite its inherent weakness it did not get anywhere because after the election the Prime Minister appointed a new Attorney-General. In 1985 that new Attorney, Lionel Bowen, introduced a new Australian Bill of Rights Bill. This was part of a package to replace the existing Human Rights Commission (on which the sun would soon set) with a new Human Rights and Equal Opportunity Commission. The ICCPR was the Schedule to the Bill and the principal juridical engine behind it. The Bill of Rights itself (which was s.8 of the proposed Australian Bill of Rights Act) contained 32 Articles based on the rights in the ICCPR, subject to a "demonstrable justification in a free and democratic society" limitation borrowed from section 1 of the Canadian Charter. Australia had withdrawn most of its reservations to the ICCPR the year before (as discussed in Chapter 4). The only articles of the ICCPR not enacted in the Bill were Article 20 (the prohibition on war propaganda and incitement to racial or religious violence) and Article 14(6) (the right to judicially-determined compensation for miscarriages of justice) to which Australia had retained reservations. The other article reserved by Australia (Article 10(2), (3) dealing with the segregation of accused, convicted,

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[437] Statement by Gareth Evans in J. Faine & M. Pearce, "An Interview with Gareth Evans: Blueprints for Reform" (1983) 8 Legal Service Bulletin 117 at 118. The anxiety of the government to minimise controversy is clear in this statement.

adult and juvenile prisoners) was accommodated in Article 31 of the Bill by prefacing the right to such segregation with the phrase "so far as is practicable".

As legislation rather than a constitutional amendment, the Act and its Bill of Rights bound the Commonwealth and the territories, but applied to the states and to individuals only to the extent that the Constitution already allowed. It impliedly repealed inconsistent Commonwealth and territory (but not state) legislation. Later Commonwealth Acts had to be interpreted in the light of it and, if inconsistent, the Bill of Rights would prevail, unless the later Act specifically provided otherwise[438] (as Lionel Murphy's Bill in 1973 had provided). It was therefore not something which overrode federal parliamentary sovereignty, although again the opt-out did not apply to the states. The functions of the proposed new Commission (essentially, complaint handling processes) would, however, apply to individual actions and to the states. It did not allow courts to make declarations and orders as the Evans Bill had done, in contrast to which it was more cautious.

The debates in Parliament about the Bill were, up to that time, the third longest in the history of federation (beaten only by the debates surrounding the nationalisation of banks and the dissolution of the Communist Party) and amongst the most acrimonious, despite the fact that this was arguably the most anodyne version of the Bill of Rights so far. The Liberal Party Opposition attacked the Bill as an

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[438] Clause 12

affront to the Australian way of life as well as an attack on the states.[439] The Australian Democrats, who held the balance of power in the Senate, opposed the Bill for diametrically opposite reasons: they thought it did not go far enough. Together, they dragged out the debate which, despite its length, only discussed the first few clauses of the Bill, and was eventually withdrawn from the Senate (even though it had been passed by the House of Representatives where the government had a majority) by a humiliated government before the sun was to set on the Human Rights Commission Act. The result was a hastily re-drawn Human Rights and Equal Opportunity Commission Act 1986 and a re-arranged Commission, both of which are discussed below.

The lack of a culture of rights in Australia (as discussed above) contributed to an hysterical reaction to the direct introduction of human rights by legislation into Australia, resulting in an uneven and sometimes desultory national implementation of human rights, hedged by political opportunism.

The Australian Constitutional Commission, which had been established in 1985 as part of the government's push for a Bill of Rights, recommended to the government in its first Report the inclusion of two democratic rights in the

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[439] In an example of the ignorant depths to which the debate sank, the Leader of the Liberal Party, Mr John Howard (who is now the Australian Prime Minister), called it "an attack on the States, an attack on parliaments and an attack on the common decency which has guided individual rights in Australia for almost 200 years." Reported in the Courier-Mail, August 15, 1986, p.4.

Constitution: the right to vote and a modified principle of "one vote, one value."[440] It also recommended the amendment of sections 80 (trial by jury), 116 (religion) and 51(xxxi) (acquisition of property on just terms) in the Constitution to extend them to the states and territories.[441] It also recommended a broadening of the discrimination provision in s.117.[442] Its final Report also recommended the addition of a Bill of Rights to the Constitution, modelled on the Canadian Charter, with a set of guaranteed rights, including the freedoms of conscience, religion, thought, belief, opinion, expression, peaceful assembly, association, movement, freedom from cruel, degrading or inhuman treatment, unreasonable search and seizure, discrimination on grounds such as race, sex and political belief, and also criminal process protections. Unlike the Canadian Charter, there would be no possibility for legislative override of any of these guaranteed rights.[443] The Hawke government adopted the first Report. Australia had returned to tinkering around the edges of human rights. In September, 1988, a referendum to amend the constitution as recommended (except for the proposals concerning s.117)[444] was

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[440] Australian Constitutional Commission: First Report, Vol. 1 (1988) pp.196-7, 227-8.

[441] Id., pp.588, 602, 620.

[442] Id., pp.88-9.

[443] Australian Constitutional Commission: Final Report (1988), p.492

[444] Constitution Alteration (Fair Elections) Bill 1988, Constitution Alteration (Rights and Freedoms) Bill 1988 Constitution Alteration (Parliamentary Terms) Bill 1988 and the Constitution Alteration (Local Government) Bill 1988.

held. The Australian people resoundingly rejected the proposals.[445] Not surprisingly, the recommendation in the final Report for a Bill of Rights was allowed to sink like a stone. It has not since been refloated.

A similar fate has befallen attempts at state level to introduce Bills of Rights or similar.[446] These were all attempts at selective but nevertheless direct legislative implementation of Australia's international human rights obligations, although mediated by the fact that other countries' domestic legislation (in particular, the Canadian Charter) were used as models.

Human rights norms have therefore been treated with suspicion in Australia. As a result, it has been Human Rights Commissions and in a lesser fashion the courts, rather than the parliaments, which have made the running with respect to human rights. The situation is slowly changing, although it will be a long time before a

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[445] See H.P. Lee, "Reforming the Australian Constitution: The Frozen Continent Refuses to Thaw" [1988] Public Law 535.

[446] An early attempt was that of the Premier of Queensland, Mr G.F.R. Nicklin, who, in his 1957 policy speech, promised constitutional amendments modelled along the lines of the UDHR. In 1959, the Constitution (Declaration of Rights) Bill was introduced into the Legislative Assembly. It included the right to vote, the right to personal freedom and enjoyment of property, the independence of the judiciary, and the supremacy of Parliament (as the representative of the people). See Queensland Parliamentary Debates, 9 December 1959, p.985. The Bill did not proceed past the Committee stages. More recently, in Victoria, see Victorian Parliamentary Legal and Constitutional Committee: Report on the Desirability or Otherwise of Legislation Defining and Protecting Human Rights (1987), and the Declaration of Rights Bill 1987; in Queensland, see Electoral and Administrative Review Commission: Report on the Review of the Preservation and Enhancement of Individuals' Rights and Freedoms (1993) and the Queensland Bill of Rights 1993; in the ACT a draft Bill of Rights was presented for public comment in 1994.

government girds its loins to the task, given the history of Bills of Rights in Australia and the political opportunism shown by both major parties in either supporting or opposing them. A part of this change is reflected in the recognition of rights in the law in the cases discussed in this chapter, particularly those of Kirby P in the New South Wales Court of Appeal. (Significantly in this regard, his Honour's elevation to the High Court was announced in December, 1995). It is also partly reflected by slow but significant changes in the out-of-court statements made by judges. Thus, in 1986 the Chief Justice of the High Court, Sir Harry Gibbs said: "If society is tolerant and rational, it does not need a Bill of Rights. If it is not, no Bill of Rights will preserve it,"[447] a statement dazzling in its smug simple-mindedness. In 1987 when he became Chief Justice Sir Anthony Mason used his official swearing-in ceremony to argue that Australia had no need of a Bill of Rights.[448] He has since changed his mind, but in an argument based on the desirability of balancing political decisions with judicial ones, not on human rights obligations.[449] A similar approach (but one cautioning against an over-politicised judiciary) has been expressed by the new Chief Justice of the court, Sir Gerard Brennan.[450] Also, the Law Council of Australia, which opposed the 1986 Bill, in

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[447] Reported in the Courier-Mail, August 15, 1986, p.4.

[448] Reported in The Australian, February 7, 1987, p.3.

[449] A. Mason, "A Bill of Rights for Australia?" (1989) 5 Australian Bar Review 79; unpublished address to the Australian Bar Association, Townsville, July, 1988, quoted in Peter Bailey: Human Rights: Australia in an International Context, ante, p.45.

[450] Hon. Justice Gerard Brennan, "Courts, Democracy and the Law" (1991) 65 Australian Law Journal 32 at p.38.

1995 sponsored a national conference in Sydney, the outcome of which was a strong support for a Bill of Rights.

5.4.2 The Impact on Human Rights of the Division of Legislative Power in a Federation

> Human rights are now established in conception and principle and are national and international law for many nations. ... But in a world of nation-states, the strength of commitment to human rights and the extent to which it is realized depend on the particular state and its institutions; the condition of human rights thus differs markedly in different societies.[451]

In the absence of a Bill of Rights, the provisions of the Constitution and other legislation become crucial in the delivery of human rights in Australia. What follows here in the comparisons between Canada and Australia therefore must necessarily concentrate on the Australian situation.

The Constitution of Australia, like the British North America Act,[452] is in fact a British Act, indeed it is a section of a British Act.[453] Its wording, however, is Australian rather than British, having gone through several drafts at national constitutional conventions in the 1890's, acceptance by a referendum of the people of the colonies (so it was not just a politicians' charter), and enactment by Britain

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[451] Louis Henkin: The Rights of Man Today (1979, Stevens & Sons, London), p.31.

[452] 30 & 31 Victoria, c.3 (1867). It is now the Constitution Act 1967.

[453] Constitution of Australia Constitution Act 1900 (63 & 64 Victoria, Ch.12), s.9

without major change.[454] Australia is a vast continent and still sparsely populated. Federation, of which Canada was then the only already-existing "British" model, would provide some measure of collective protection. The Canadian decision to federate had in fact been done as a pragmatic gesture to establish a unity where there was a francophone society in Quebec, established political communities in the maritimes, economic disparities between the provinces, and the American Civil War raging across the border.[455] Despite the differences, a strong central government was seen as a necessity so that projects such as a national railway (particularly to the ice-free maritime ports) and the advantages of economic union could be realised. Indeed, all the Canadian colonies were not in fact united in 1867: s.146 of the BNA Act specifically provided for their future inclusion, and Newfoundland did not join until 1949! In contrast, the Australian colonies had not (and have not) suffered the centrifugal forces towards secession which to this day are a significant part of Canadian politics.[456] But with no (at

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[454] See generally, J. Quick & R.R. Garran: The Annotated Constitution of the Australian Commonwealth (1901, Angus & Robertson, Sydney; reprinted 1976, Legal Books, Sydney); J.A. La Nauze: The Making of the Australian Constitution (1972, Melbourne U.P., Melbourne).

[455] See Michael Burgess (ed): Canadian Federalism: Past, Present and Future (1990, Leicester U.P., Leicester), Introduction; Richard E. Johnston: The Effect of Judicial Review on Federal-State Relations in Australia, Canada and the United States (1969, Louisiana State U.P., Baton Rouge), pp.15-25. See generally D G. Creighton: The Road to Confederation: The Emergence of Canada, 1863-1867 (1964, Macmillan, Toronto).

[456] The notion of the competing centrifugal and centripetal forces in Canadian federalism is described in Bruce W. Hodgins et al (eds): Federalism in Canada and Australia: Historical Perspectives, 1920-1988 (1989, The Frost Centre for Canadian Heritage and Development Studies, Trent University, Peterborough, Canada), Chapter 1. The only remotely serious threat of secession by a state in Australia occurred when Western Australia hreatened to secede in

that time) articulate ethnic minorities to contend with, an approximation of political parity and experience between the colonial governments and no nearby war to trouble them, they were able to retain the luxury of being jealous of their powers in the 1890's. The Canadian model (with reservation of power to the federal government which could disallow provincial legislation,[457] appoint judges to provincial courts,[458] appoint the provincial Lieutenant Governors,[459] and unilaterally bring local works within federal jurisdiction by declaring them to be for the general advantage of Canada[460]) was seen as too centralised for the liking of the Australian colonies. The United States Constitution became the basic model,[461] but without the elaborate system of checks and balances of the latter, and without a Bill of Rights.[462] The end of the nineteenth century was not an age

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1931: see (1933) 9 Australian Law J. 141.

[457] Section 90. This power has not been used since 1943: Hogg, ante, p.112.

[458] Sections 96, 101. In Australia, judges on state courts are appointed by the state Governor on the advice of the state government.

[459] Section 58. In Australia, the state Governors are appointed by the Crown on the advice of the state government.

[460] Section 92(10). There is no equivalent in the Australian Constitution.

[461] See Erling M. Hunt: American Precedents in Australian Federation (1968, AMS Press, New York).

[462] See Michael Coper: Encounters With the Australian Constitution (1987, CCH Australia, Sydney), Chapter 2; La Nauze, ante, pp.227-32. One of the more arcane reasons for the absence of a Bill of Rights is the fact that of the "founding fathers", the one who most wanted to press for an American-style Bill of Rights, Andrew Inglis Clark, fell ill with the 'flu when the drafting team went on an Easter weekend cruise in 1891 on the launch Lucinda on the Hawkesbury River, near Sydney, to begin the drafting. Without Clark's presence, there was no-one to push for a Bill of Rights. This, together with the other factors discussed above, meant that a Bill - which Australia has since debated three times - might have happened

of revolutions and declarations, as had been the case a century before. Philosophical considerations with respect to change were not urgent.[463] Moreover, Australia's founding fathers were political pragmatists rather than philosophers and were living in a country and in an age which was smugly self-satisfied with the existing English common law system and its perceived protection of rights. As O'Neill and Handley have aptly noted:

> Almost all of [the founding fathers] ... were parliamentarians and many of them either were, or had been, premiers or senior ministers in the governments of the various Australian colonies. ... They were not concerned about the rights of humankind nor did they see their role as one of creating an Australian federal parliament and a government that was required to guarantee, uphold and preserve the rights of the people. On the contrary their aim was to achieve some hard, practical, political goals. They wanted a federal government structure weak enough to ensure that the States and not the Commonwealth held the real political power, but strong enough to ensure free trade between the former colonies, a uniform Australian tariff, uniform defence and appropriate parliamentary protection of the political interests of the less populous States.[464]

The Australian Constitution says little about rights but a lot about government power. It establishes a bicameral Federal Parliament with the monarch as Head of State and a Governor-General to represent her.[465] Like Canada, responsible (rather than representative) government is introduced by requiring that Ministers be

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at federation, but did not. See generally Geoffrey Sawyer: The Australian Constitution (1988, AGPS, Canberra), Chapter 1.

[463] See R.C.L. Moffatt, "Philosophical Foundations of the Australian Constitutional Tradition" (1965) 5 Sydney Law Review 59 at 85-6.

[464] Nick O'Neill & Robin Handley: Retreat From Injustice: Human Rights in Australian Law (1994, The Federation Press, Leichhardt), p.44.

[465] Chapter I, Parts I-III; Chapter II.

members of the Senate or the House of Representatives.[466] Australia has, however, always been more democratic than Canada in that both Houses of federal Parliament are elected,[467] whereas the Senate in Canada is appointed by the Governor-General and tenure is continuous until the Senator reaches the age of 75.[468] (The idea behind this was that the Senate was to be modelled on the British House of Lords).[469] Judicial power is expressly vested in the High Court of Australia and any other Federal Courts the Parliament creates.[470] The BNA Act did not expressly establish the Supreme Court of Canada, but left the matter up to Parliament[471] which created the Supreme Court in 1875.[472] The practical effect of this was to allow greater leeway in the powers of the court. Thus, unlike the Supreme Court of Canada,[473] the High Court was not given a power in the Constitution to give advisory opinions, and an attempt to do so by later legislation

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[466] Section 64

[467] Constitution, ss.7, 24. A remnant of an elected Upper House did persist in New South Wales until recently.

[468] Constitution Act ss.24, 29

[469] See Burgess: Canadian Federalism, ante, p.147.

[470] Chapter III

[471] Section 101

[472] Supreme Court Act, RSC 1952, c. 295, s.3

[473] Supreme Court Act s.53. The ability to answer "references" when this power is conferred by legislation was upheld by the Privy Council in Attorney-General of Ontario v Attorney-General of Canada [1912] A.C. 571. Although occasionally refusing to answer questions which are too vague or not legal questions, Hogg (ante at p.218) calls the court "astonishingly liberal" in the questions that it has elected to answer.

was struck down by the High Court itself as being unconstitutional.[474] Had the Australian High Court been recognised as having an advisory power the development of the cases discussed below may have been considerably different and a lot less haphazard.

Like Canada (for those provinces which had them), the existing constitutions of each state (colony) are expressly preserved,[475] but are subject to the federal constitution and any inconsistencies between federal and state laws result in the invalidity of the latter to the extent of the inconsistency.[476] The Constitution may be amended by a referendum receiving the affirmative vote of the majority of the electors overall and the majority of the electors in the majority of the states.[477] Unlike Canada, where the lack of an amending procedure (until 1982) had been used as an indicator of the essential reliance upon existing British authority,[478] constitutional amendment was always a part of the Australian Constitution, but change was clearly weighted in favour of the states. Even with the power to

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[474] Re Judiciary and Navigation Acts (1921) 29 CLR 257: it was held that the Constitution expressly establishes legislative, executive and judicial powers, and that the introduction of an advisory power would be the exercise of a judicial power not contemplated in, or interpretable into, the relevant sections (ss.71-77) of the Constitution, which set out the limits to judicial power. This narrow reading was, until recently, typical of High Court interpretations of the Constitution.

[475] Section 106

[476] Section 109

[477] Section 128

[478] See Hogg, ante, p.5; Hodgins et al, ante, p.60.

amend, of 42 referendum proposals since federation, only eight have passed. As seen above, no amendments along human rights lines have passed. The issue is thus not merely that of the existence of a constitutional mechanism for change: the cultural factors mentioned above are crucial.

Even though there are some constitutional provisions which are of the human-rights-type, they represent a sprinkling of a few guarantees and immunities: an unimpressive list even at the time they were formulated. Without an activist High Court (and sometimes even with one) the Australian Constitution can be an obstruction to social and legal change, and even discourage constructive thought on social issues.[479] The primary intention at the time of drafting was to guarantee intercolonial free trade and to avert the threat of incursions to private property by the nascent Labor Party.[480] Individual rights would be taken care of by the combination of responsible government and the democratic process.[481] This approach created a flaw in the system so far as human rights are concerned - what

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[479] See Sol Encel, "The Social Impact of the Australian Constitution", Chapter 5 in Legislation and Society in Australia, Roman Tomasic (ed), (1979, George Allen & Unwin, Sydney).

[480] Id., p.116. See also R.S. Parker, "Australian Federation: The Influence of Economic Interests and Political Pressures", in Historical Studies, 1st series, J.J. Eastwood &F.B. Smith (eds), (1964, Melbourne U.P., Melbourne), pp.152-78.

[481] Brian Galligan, "Australia's Political Culture and Institutional Design", in Towards an Australian Bill of Rights, Philip Alston (ed), (1994, Centre for International and Public Law/Human Rights and Equal Opportunity Commission, Canberra), pp.55-72, especially at pp.65ff.

Encel has called problems which can be circumvented but not solved[482] - in that instead of giving primacy to the individual, public trust is placed in the political system working through Parliament as the protector of individual rights (which Chapter 2 showed was the typical English development). The effective transfer of power to political party machines and the bureaucracy has put paid to this cosy attitude. Indeed, it was shown to be fallacious in the 1930's with the Kisch case discussed in Chapter 2, and again in the 1950's when the Menzies government tried to ban the Communist Party (see below).

Thus, despite the American model, the fundamental Australian constitutional tradition is effectively English: the Crown is central, individual rights and freedoms are subject only to the laws enacted by Parliament and are (so the assumption goes) adequately protected by responsible government, the democratic system and the Common Law. The reception of English law into Australia at European settlement did mean that Common Law protection, such as the presumption of innocence, a right to a fair trial, the doctrine of ultra vires with respect to actions by government officials, the independence of the judiciary and a notion of at least formal equality before the law, were imported with it.[483] The same can be said for Canada, where the preamble to the BNA Act stated that Canada would have a "Constitution similar in principle to that of the United

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[482] Ante, at p.119

[483] Mabo v Queensland (No. 2) (1992) 175 CLR 1 at p.80

Kingdom", which was interpreted to mean the inclusion of the recognised "original" personal freedoms.[484] The precise meaning and application of any of these could, however, be delineated (and effectively limited or denied) by Parliament (although, as discussed below, the approach of the High Court now appears to be changing in this regard). It is Parliament which was sovereign, not the people. A departure from the English approach to the American is that, with a written constitution in a federal system, and with specifically created federal courts, judicial review of legislation is a necessary corollary.[485] However, it can only be review of what the constitution is already seen to provide, particularly if, as in Australia, it does not contain a Bill of Rights.

The division of legislative power in the Australian Constitution is dealt with in section 51, which gives 39 specific heads of power to the federal government, leaving the unspecified residue to the states. Those s.51 powers given to the Commonwealth which are relevant to this enquiry as having a potential bearing on

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[484] Saumur v City of Quebec [1953] 2 SCR 299 at p.399. See also James Leavy, "The Structure of the Law of Human Rights", Chapter 4 in R. St.J. Macdonald & John Humphrey (eds): The Practice of Freedom (1979, Butterworths Toronto), pp.54-55.

[485] Australian Apple and Pear Marketing Board v Tonking (1942) 66 CLR 77, per Rich J at 104; Australian Communist Party v Commonwealth (1951) 83 CLR 1, per Fullagar J at 262. On the development of Australian judicial review see Brian Galligan: Politics of the High Court: A Study of the Judicial Branch of Government in Australia (1987, Queensland U.P., St. Lucia). The situation in Canada was not quite so straightforward, it being argued that the framers of its Constitution did not intend to introduce judicial review: see B.L. Strayer: The Canadian Constitution and the Courts 3rd ed (1988, Butterworths, Toronto), Chapter 1. This issue is now moot since the introduction of the supremacy clause in s.52(1) of the Constitution Act 1982.

human rights are: naturalisation and aliens;[486] marriage;[487] divorce and matrimonial causes;[488] invalid and old age pensions;[489] the provision of other pensions;[490] the service and execution throughout the Commonwealth of civil and criminal process and judgements of state courts;[491] the recognition of the laws, acts, records and judicial proceedings of the states;[492] laws for the people of any race for whom it is deemed necessary to make special laws;[493] immigration and emigration;[494] the influx of criminals;[495] external affairs;[496] the acquisition of property on just terms from any state or person for any purpose with respect to which the Commonwealth has the power to make laws;[497] industrial conciliation and arbitration in disputes extending beyond the limits of one state:[498] matters

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[486] Section 51(xix)

[487] Section 51(xxi)

[488] Section 51(xxii)

[489] Section 51(xxiii)

[490] Section 51(xxiiiA): inserted by an amendment in 1946 (No.81, 1946, s.2)

[491] Section 51(xxiv). Note that, unlike the Canadian Constitution, this does not involve a general power as to criminal law.

[492] Section 51(xxv)

[493] Section 51(xxvi). Note that this paragraph originally added: "other than the Aboriginal race." See below.

[494] Section 51(xxvii)

[495] Section 51(xxviii)

[496] Section 51(xxix)

[497] Section 51(xxxi)

[498] Section 51(xxxv)

referred to the Commonwealth by any state;[499] and matters incidental to any of the above.[500] There are two features of this list to note at this stage. First, only a few of these matters (which are discussed below) have been used in a way in which their human rights potential has been recognised or realised.

Secondly, s.51 does not use the word "exclusively". Some of its powers can be exercised concurrently by the states unless the constitution specifies otherwise (as it does in s.52)[501] but they are residuary rather than reserved powers.[502] If the Commonwealth has manifested an intention to "cover the field" on any s.51 matter its legislation will override that of the states by virtue of s.109.[503] The basic test of the validity of a Commonwealth law is whether it falls within a head of power in s.51.[504] There is no need for a grant of power to be located for a state law to

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[499] Section 51(xxxvii)

[500] Section 51(xxxix)

[501] Which relates to the seat of government and the control of the Commonwealth public service.

[502] R v Barger (1908) 6 CLR 41 per Higgins J at 84-5; R v Phillips (1970) 125 CLR 93 per Windeyer J.; Amalgamated Society of Engineers v Adelaide Steamship Co. Ltd. (the Engineers' case) (1920) 28 CLR 129.

[503] For an attempt to comprehensively tease out the exclusive powers of the Commonwealth and the states, see R.D. Lumb: The Constitution of the Commonwealth of Australia Annotated (1986, Butterworths, Sydney) at paragraphs 694-7.

[504] Attorney-General (Commonwealth) v Colonial Sugar Refining Co (1913) 17 CLR 644. There have also been suggestions that there is an implied Commonwealth power in the constitution, the so-called nationhood power - an inherent power to make laws which are necessary to express the nationhood of Australia: New South Wales v Commonwealth (the Seas and Submerged Lands Act case) (1975) 135 CLR 337 per Barwick CJ at 373-4, Gibbs J at 388-9, Mason J at 470, Murphy J at 505 (stressing the importance of the regulation of the territorial sea by the Commonwealth for the whole nation); but

be regarded as valid, unless the law is to have extraterritorial effect, in which case it must be shown to be connected with the "peace, welfare and good government" of the state.[505] The issue is thus principally one of "characterisation" of the Commonwealth law: it is valid if it can be logically characterised as being "with respect to"[506] one or more of the heads of power listed in s.51. Even if it can be regarded as a law with respect to other matters it is valid as long as its legal effect relates to a s.51 power, even if its practical effect or evident purpose relates to something outside s.51.[507]

This situation in recent times has meant that the Commonwealth government has been able to introduce human rights legislation even if it might in some way impinge upon the legislative competence of the states. Thus, the arcane difference

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contrast Commonwealth v Tasmania (the Franklin Dam case) (1983) 46 ALR 625 where a provision in a Commonwealth Act purporting to authorise control over property within a state where the property is "part of the heritage distinctive of the Australian nation", it being "appropriate that measures for the protection or conservation of the property" be taken by the Commonwealth parliament "as the national parliament" (s.6(2)(e)), were held invalid by Gibbs CJ and Wilson, Deane and Dawson JJ (the other members of the bench not deciding). The reasoning was that a coercive power declaring conduct to be unlawful and imposing penalties should not be enacted otherwise than under a head of power under s.51. For a critique, see Leslie Zines: The High Court and the Constitution 2nd ed (1987, Butterworths, Sydney), pp.263-8.

[505] Millar v Commissioner for Stamp Duties (1932) 48 CLR 618; Broken Hill South Ltd v Commissioner of Taxation (NSW) (1937) 56 CLR 337; Australia Act 1986, s.2. For a commentary, see P.J. Hanks: Australian Constitutional Law: Materials and Commentary 4th ed (1990, Butterworths, Sydney), pp.196-227.

[506] The words of s.51 immediately before the 39 paragraphs listing the powers.

[507] Fairfax v Commissioner of Taxation (1965) 114 CLR 1; Murphyores Incorporated v Commonwealth (1976) 136 CLR 1. See Leslie Zines: The High Court and the Constitution (1987, Butterworths, Sydney), Chapters 2 and 3.

between residual and reserved powers in a Constitution can have a bearing upon human rights (and has been particularly significant in Australia with respect to the use of the external affairs power, as described below). In Canada, by way of contrast, the principal division of legislative powers occurs in sections 91 and 92 of the Constitution Act. Although section 91 gives to the federal Parliament a residual power "in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the provinces", it is given specific exclusive jurisdiction over 29 matters. In so far as they are relevant to human rights, those matters include the regulation of (all) trade and commerce, unemployment insurance, Indians, naturalisation and aliens, marriage and divorce, criminal law and penitentiaries.[508] These laws may be made "for the peace order and good government of Canada" (hereafter referred to as POGG). The powers reserved exclusively to the provinces in section 92 which relate to human rights include provincial prisons, management of hospitals, asylums, and charities, the solemnisation of marriage, property and civil rights, the administration of justice and the imposition of fines and penalties for a breach of provincial laws.[509] There is no POGG power under s.92: the law must be "in relation to" the relevant matter. There is no ancillary power with respect to either class of exclusive power (as the federal Parliament has in Australia). In addition, s.92A which was added in 1982 gives to each province the exclusive power with respect to laws governing

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[508] Section 91(2), (2A), (24), (25), (26), (27), (28) respectively.

[509] Section 92(7), (12), (13), (14), (15) respectively.

non-renewable natural resources and electrical energy. (It is unlikely that the Franklin Dam case, which is so important in the development of laws based on treaty obligations in Australia, could arise in the Canadian context.) The federal Parliament is given power with respect to old age pensions.[510] There are also some protections in the Constitution with respect to the right to separate (religious) schools,[511] free trade among the provinces,[512] and the use of English and French in the legislatures.[513]

The differences between Canada and Australia with respect to the division of power occur in relation to the impact due to the type of division, as well as with respect to the differences in the categories included in or omitted from the respective divisions. Although the powers of the provinces, like those of the federal Parliament, are as ample and plenary as the BNA Act allowed,[514] having two lots of exclusive powers reserved to the federal and provincial legislatures makes it difficult for the provinces to pick up the legislative slack as the states can in Australia (where there are only two exclusive Commonwealth powers and neither relates to human rights). Thus, the Privy Council in Union Colliery v Bryden held: "The abstinence of the Dominion Parliament from legislating to the

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[510] Section 94A, added by the Constitution Act 1964, 12-13 Eliz. II, c.73 (UK).

[511] Section 93

[512] Section 121

[513] Section 133

[514] Hodge v The Queen (1883) 9 App. Cas. 117

full limit of its powers could not have the effect of transfering to any provincial legislature the legislative power which had been assigned to the Dominion by virtue of s.91 of the Act of 1867."[515] Nor will the reverse apply where an exclusive provincial power is involved, although there are some exceptions.[516] Although there is no ancillary power in the Canadian Constitution, there may be effective concurrent application depending on the categorisation of the pith and substance of legislation which may incidentally affect other matters,[517] or depending upon the aspect in which the law is viewed and used.[518] However, in Canada exclusivity is the rule and concurrency the exception; in Australia, concurrency is the rule and exclusivity the exception. The Canadian structure has the potential to stymie the development of human rights.

With respect to the difference in categories, the principal differences at federal level are that in Canada all trade and commerce (not just the inter-provincial variety) and criminal law are federal matters. The latter particularly is a significant

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[515] [1899] AC 580, per Lord Watson at p.588.

[516] For example, provincial power in s.92A(3) with respect to the export of natural resources is obviously meant to be concurrent with the federal trade and commerce power; federal power over old age pensions in s.94A is meant to be concurrent with provincial powers with respect to property and civil rights.

[517] For example, federal divorce law may also validly affect matters of child custody: Papp v Papp [1970] 1 O.R. 331. However, note the problems with this approach discussed in Hogg, ante, at pp.407-409.

[518] Laws with respect to driving offences may have both a provincial aspect with respect to property and civil rights, and a federal aspect with respect to criminal law: O'Grady v Sparling [1960] SCR 804; Stephens v The Queen [1960] SCR 823; Mann v The Queen [1966] SCR 238.

human rights category which is principally governed by the states in Australia. The principal omissions from the Canadian federal categories of exclusive power are the requirement that the acquisition of property must be on just terms, and the external affairs power. While section 132 does provide that the federal government has "all powers necessary or proper for performing the obligations of Canada or of any province thereof ... towards foreign countries arising under treaties between the empire and such foreign countries" it is not an exclusive s.91 head of power which can override provincial powers: it is subject to s.92 provincial powers[519] and has not been developed into anything like the potential for domestic implementation of international human rights obligations as has the external affairs power in Australia.

The principal difference at state and provincial level is that in Australia there are no enumerated exclusive state powers into which the Commonwealth must not intrude (a situation bolstered by the Commonwealth's ancillary power) whereas in Canada there are, the one of principal interest being that over property and civil rights. This head of power does not, however, equate to what today we would call "civil liberties." Originally included in 1867 for no more than the pragmatic reason to assure Quebec the continuation of its own Civil Law system,[520] it refers

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[519] Attorney-General of Ontario v Attorney-General of Canada discussed below with respect to treaty powers.

[520] See Peter A. Russell, "The Jurisdictional Pendulum within Canadian Federalism, 1860-1980", Chapter 2 in Burgess: Canadian Federalism, ante, at pp.41-2.

principally to private rather than public rights, many of the latter being expressly included elsewhere in the Constitution[521] and the power itself being circumscribed by exclusive federal powers exercised under s.91.[522] The power has thus been described as relating to "those parts of private law which relate to property and its uses, to successions, contracts, delicts or torts, status of persons, commercial matters and the like ... [excluding] the special matters of private law assigned to the federal Parliament under section 91."[523] However, with increasing government regulation, many areas once considered to be private law are now "public" (for example, labour relations, insurance, business, marketing).[524] The parameters of the power have been adjusted accordingly, but there has also been considerable concurrent federal legislation because of the approaches to "double aspect" and "pith and substance" mentioned above. There has thus been a muddying of the constitutional waters, but with respect to human rights matters the issue is becoming moot because of the effect of the Charter.

Consequential Limits on Legislative Power

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[521] For example, the (pre-Charter) right to vote is a constitutional right definable by the legislature under its powers in s.92(1): Cunningham v Tomey Homma [1903] AC 151.

[522] Such as with respect to trade and commerce, banking, bills of exchange, bankruptcy, patents, copyright and marriage and divorce.

[523] F.R. Scott, "Dominion Jurisdiction Over Human Rights and Fundamental Freedoms" (1949) 27 Canadian Bar Review 497 at p.509. See also Hogg, ante, pp.538-40.

[524] See Hogg, ante, Chapter 21.

The intention of the founding fathers in Australia had been that the colonies would continue to be the predominant entities in the new federal system. However, perceptions changed to a more centralised focus after World War I (helped by the recognition of an Australian treaty making power discussed below). Thus, the approach adopted by the High Court from 1920 onwards was that the court should determine the width of the federal power: there are no state powers to construe as the states simply retained the powers not otherwise within federal competence. Even though there could be some overlap (which might be handled by s.109) the doctrine of the Engineers' case declared it to be a "fundamental and fatal error" to approach the question by trying to determine the exclusive powers of the states and thus cut the federal power down accordingly.[525] The practical effect of this, contrary to what had originally been anticipated by the founding fathers, was that in rejecting the Canadian constitutional model of granting express exclusive powers to the states, greater central power in Australia was the result.[526] This may be a plus for human rights implementation where the federal government is more committed to human rights than are the states. It also has the advantage of promoting nationally consistent implementation. However, even though there is the potential for stretching federal power to its limits, this has, until recently, rarely been done as Australian federal governments have tended to be less than enthusiastic in the domestic implementation of human rights. Furthermore, the

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[525] (1920) 28 CLR 128 at p.154

[526] See Leslie Zines, "A Legal Perspective", Chapter 2 in Australian Federalism (Brian Galligan, ed), (1989, Longman Cheshire, Melbourne).

Engineers doctrine had within it the seeds of a problem. The approach adopted by the Court was one of cut-and-dried legalism. The Constitution had to be read according to the natural meaning of the words. This approach masks the value choices which must necessarily be made by any judge who is searching for a "natural" meaning. It also produces an approach to constitutional interpretation which treats the Constitution like any other Act of Parliament. It refuses to be swayed by new needs in changing times or policy arguments, placing the document in a concrete slab moulded by the concerns of a group of small colonies in 1900. As Latham has aptly commented:

> [The Engineers case] ... cut off Australian constitutional law from American precedents, a copious source of thoroughly relevant learning, in favour of the crabbed English rules of statutory interpretation...[527]

The Canadian experience was to some extent the reverse: from an initial stance of strong centralism the possession by the provinces of exclusive heads of legislative power has meant that, if not a total shift to decentralisation, there has been a "pendulum" effect and a lessening of the intended centralism.[528]

In either case, what must also be remembered is that the potential for stretching any power, federal or state, to its limits necessarily depends on what those limits are. In a federation a government cannot simply deem a matter to be within a head

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[527] R.T.E. Latham: The Law and the Commonwealth (1949, Oxford U.P., Oxford), p.563.

[528] See Peter A. Russell, "The Jurisdictional Pendulum within Canadian Federalism, 1867-1980", Chapter 2 in Michael Burgess: Canadian Federalism, ante. See also Hodgins et al: Federalism in Canada and Australia, ante, pp.21-23.

of power. Heads of power are not only enabling: they represent at the same time express limits on power. With respect to human rights, this issue in Canada has been somewhat subsumed by the considerations of the meaning and effect of section 1 of the Charter discussed above, although there is some pre-Charter authority for implied limitations on the ability of a government to do such things as exclude the supervisory power of courts over inferior tribunals.[529] In Australia, which without a Bill of Rights must be examined more closely in this regard, the strict Engineers doctrine refuted the existence of any implied limits to Commonwealth power, but the High Court has since found them although, in the light of Engineers, it has implied them only from the terms of the Constitution itself and not from any extraneous sources. The existence of implied constitutional limitations means that such rights as may arise directly or by implication from the Constitution are not of a paramount quality.

In Australia, the precise extent of the implied limits to the powers of the Commonwealth, precisely because these limits are discerned by implication, has not been the subject of comprehensive discussion by the courts. However, a breach of the implied limitations may render invalid a law which is otherwise supported by a paragraph in s.51.[530] Thus it has been held that a Commonwealth power cannot be used in a way that would amount to an amendment of the constitution

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[529] Bradley v Canadian General Electric Co. (1957) 8 DLR (2d) 65

[530] The State of Western Australia v The Commonwealth (1995) EOC 92-687; Re State Public Services Federation; Ex parte Attorney-General (WA) (1993) 178 CLR 249 at 271-2.

other than by means of s.128.[531] The Commonwealth cannot use its powers in a way which singles out one of the states for discriminatory treatment.[532] The Commonwealth cannot interfere in the internal administration of state matters.[533] The Commonwealth cannot interfere with the separation of legislative and judicial powers contemplated by the Constitution.[534] The Commonwealth cannot impair the ability of a state to function as such,[535] nor impair the very existence of the

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[531] R. v Burgess; Ex parte Henry (1936) 55 CLR 618, per Latham CJ at 642, Evatt and McTiernan JJ at 687: the use of the external affairs power on which to base legislation cannot be done in a way which purports to give the Commonwealth a power over the entirety of the subject matter of the treaty disproportionate to the treatment of that subject matter in the treaty itself.

[532] Queensland Electricity Commission v Commonwealth (1985) 159 CLR 192: Commonwealth legislation based on the International Covenant on Civil and Political Rights specifically to override Queensland laws which forbad strikes in the electricity industry and provided for compulsory labour were held to be invalid.

[533] Melbourne Corporation v Commonwealth (1947) 74 CLR 31: Commonwealth law requiring the state governments to "Bank Commonwealth" held invalid. But a law issuing a command to states is different to one which merely has consequences on the legislative sphere of competence of the states. Bank of NSW v Commonwealth (Bank Nationalisation Case) (1948) 76 CLR 1: the states are not subjects of the Commonwealth and the Constitution does not authorise the Commonwealth to make laws which restrict or control a state in the exercise of its executive authority.

[534] Brandy v Human Rights and Equal Opportunity Commission (1995) 69 ALJR 191: the Commonwealth cannot give to the federal Human Rights Commission the power to make final binding determinations in discrimination cases when it has not been set up as a court.

[535] Koowarta v Bjelke-Petersen and Others, below; Commonwealth v Tasmania, below; State of Western Australia v Commonwealth, ante: Commonwealth legislation to implement the effects of the Convention on Racial Discrimination, a UNESCO Convention and the Mabo decision (discussed below) respectively, held valid, because even though the Commonwealth cannot impair the capacity of a state to function, it may pass laws which affect the ease with which the state may otherwise carry out those functions. This implied prohibition has thus not been allowed to unnecessarily impinge on human rights.

states.[536] It should be noted that these limitations are principally on the extent to which the Commonwealth may affect the states. This is significant if uniform laws based on human rights are to apply in Australia.[537]

There is also an obiter dictum to the effect that the Commonwealth cannot make laws which impinge upon "the underlying equality of the people of the Commonwealth under the law of the Constitution."[538] As well as being obiter, the basis of this statement was not explained. Presumably, it rests upon the right to vote, the limitations on Parliament and the concept of judicial review in the Constitution. It might be used to import human rights concepts into the Constitution. However, as discussed below, the Australian Constitution is more concerned with the equality of the states rather than the equality of the people. The judgement also expressly concedes that this implication can be overridden by the express provisions of the Constitution.[539] Indeed, these cases dealing with implied limitations on Commonwealth power are directed to the question of legislative hierarchy rather than looking for limitations on the power of a government lest it

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[536] Victoria v Australian Building Construction Employees' and Builders Labourers' Federation (1982) 152 CLR 25 per Mason J at p.93; followed by Brennan J in Dams case (1983) 158 CLR 1 at pp.213-15 and reiterated by him in Queensland Electricity v Commonwealth, ante, at p.231.

[537] Until the Engineers' Case the reverse was also held to apply: D'Emden v Pedder (1904) 1 CLR 91: Commonwealth postal officials were immune from the payment of state stamp duty on salary receipts. Now, this situation would be more likely to be handled as a s.109 matter.

[538] Queensland Electricity Commission v Commonwealth, ante, per Deane J at pp.247-8.

[539] At p.248

trample on people's rights.[540] The judgements do not refer to human rights but to the ambit of specific constitutional powers. They refer to formal rather than substantive equality.[541] They strictly dissect legal from "political" questions. They do not lift their eyes above the Constitution to the wider human rights ramifications around which they could (and should) revolve. As such, they can, as in the Queensland Electricity Commission case, strike down legislation which in fact promotes Australia's international human rights obligations. This formalism has been manifest in other cases[542] and produces merely formal rather than substantive equality.

The notion of a doctrine of legal equality as an implied limit on governmental powers arose again in Leeth v The Commonwealth.[543] This case concerned the validity of Commonwealth legislation[544] which provided that the minimum terms

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[540] For example, in the Queensland Electricity Commission Case the difference between the majority view (which held that laws attempting to override Queensland's laws which amounted to a breach of freedom from forced labour were invalid because they discriminated against Queensland) and the dissent of Brennan J (who held that they were in part valid) was whether it was the court or the Commonwealth who should make the decision as to where the burden of the matter to which the law is directed should lie.

[541] Contrast, significantly, the dissent of Brennan J in the Queensland Electricity Commission Case where he would allow Commonwealth laws which treat a state differently to others where the circumstances are different (at p.240). Note, however, he leaves the determination of the latter to the government as a political question.

[542] For example, in Street v Queensland Bar Association, discussed below.

[543] (1992) 66 ALJR 529

[544] Commonwealth Prisoners Act 1967, Crimes Legislation Amendment Act (No. 2) 1989

of prison sentences (and of non-parole and remission conditions) with respect to federal offenders be assimilated to the terms and conditions applicable for similar offences imposed by the state in which the sentence was being served. This in effect meant that a prisoner might be better or worse off depending upon the state in which the sentence was served. The majority of the court[545] held that the legislation was valid. However, in a joint judgement Deane and Toohey JJ referred to "the essential or underlying theoretical equality of all persons under the law and before the courts"[546] implied in federation. Considering that the states are merely artificial entities, "the parties to the compact which is the Constitution were the people of the federating Colonies."[547] Their honours continue that "it would be somewhat surprising if the Constitution ... embodied a general principle which protected the States and their instrumentalities from being singled out by Commonwealth laws for discriminatory treatment but provided no similar protection of the people who constitute the Commonwealth and the States."[548] For the reasons given above, this is historically inaccurate. If this "equality" did exist it did not extend so far as to give the vote to women and aborigines, as discussed below. Parliament was seen as the ultimate protector of human rights, and was openly allowed to infringe them, as the real purpose behind the race power (also discussed below) illustrates. What is happening in this judgement is a

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[545] Mason CJ, Dawson, McHugh and Brennan JJ.

[546] At p.541

[547] Ibid.

[548] Ibid.

reading of current conceptions into a document which was the product of its time (a situation similar to that where Magna Carta has been used in the absence of a Bill of Rights).

This equality is not found by their honours to lie in international law (which is not referred to in the judgement) but in the Common Law based on the writings of Dicey[549] and Holdsworth[550] and includes equality in the law and equality before the law. This is seen to be the implicit basis of the Constitution for three reasons: the conceptual basis of the Constitution is the agreement of "the people" to form the federation, implicit in which is their equality; the separation of judicial powers in Chapter III must imply legal equality as the provisions are not mere labels but are concerned with matters of substance; and the number of specific provisions, such as sections 24, 25, 92, 116, and 117 which reflect (rather than exclude under the expressio unius rule) the doctrine of legal equality.[551] This approach is fraught with difficulties. The problems with the express rights in the Constitution are dealt with below. Breathing substance rather than form into the separation of powers provisions is a welcome and continuing (if still tentative) trend in Australian constitutionalism. (The other dissentient, Gaudron J, took a different approach, holding that the conferral of "judicial power" on courts under Chapter

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[549] Introduction to the Study of the Law of the Constitution, 10th ed, 1959, p.193.

[550] A History of English Law 1938, Vol. 10, p.649.

[551] At p.542

III to do things like incarcerate Commonwealth prisoners itself implies that proper judicial processes, which includes equality before the law, be followed.)[552] The theme of the Constitution being based on "the people" is a major theme which is developed in the later cases dealing with implied rights (as opposed to implied limitations) in the Constitution. This first flowering of it is significant. It is a pity that it is based on an historical misconception and a complete disregard for human rights norms. Instead of applying current international legal obligations, it re-writes history to enable "extraneous factors" to be avoided. Most importantly, their honours concede that this equality may be overridden by the specific imprimatur of the Constitution,[553] thus indicating the shaky foundations of their reasoning. In a Constitution where the people's rights are overwhelmingly limitations on the actions of governments, any underlying equality is in fact a weak concept. Without more, it is ultimately the triumph of form over substance, despite the assertions of judges to the contrary.[554] Even Gaudron's less radical approach - which recognises equality before the law but does not come to grips with the notion of equality in the law (an issue of some significance with respect to the express rights in the Constitution discussed below) - is found wanting with respect to the full implementation of basic human rights norms in a situation which Gaudron herself concedes is "manifestly absurd"[555] when the legal consequences of a breach of a

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[552] At p.549

[553] At p.543

[554] For example, Deane and Toohey JJ at p.542.

[555] At p.547

Commonwealth law will vary according to the location of the court which hears the case. Human rights, for all their open-endedness would be a stronger and more coherent foundation for rights than those found by the dissenting judges in Leeth.

There are now also the limitations on Commonwealth action as a result of implied constitutional freedoms.[556] As these are particularly important which respect to domestic implementation of human rights they are dealt with in more detail below. At this stage it is sufficient to remark that these freedoms are also in fact constitutional limitations on the sphere of government action. They are thus not as radical as they would appear and are in fact an extension of the traditional English approach to freedoms outlined in Chapter 2.

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The rights of a human rights nature within or sustainable by the Australian Constitution I identify as being of three types: express rights, implied rights and constructive rights.

5.4.3 Express Constitutional Powers and Human Rights

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[556] For example, Australian Capital Television Pty Ltd v Commonwealth (1992) 177 CLR 106: Commonwealth laws banning political advertising during elections held to be invalid as a breach of a right to freedom of political speech implied by the provision in the Constitution for a Parliament and elections.

There are some express rights in the Australian Constitution which are entrenched in the sense that Parliament cannot alter them by ordinary legislation without first resorting to the referendum procedure in s.128. However, the nearest the Constitution does get to such express rights is in the form of specific and ad hoc rights - not statements of general principle - and they have been interpreted in a narrow fashion. As Bailey rightly comments,[557] they do not really refer to rights in the same way that human rights instruments generally do, but rather refer to particular issues. They operate more as express limitations on the power of the Commonwealth than provisions directed specifically to the rights of the people of Australia.

With respect to political rights, section 41 provides that "no adult person who has ... a right to vote at [state] elections ... shall ... be prevented ... from voting at [Commonwealth] elections." Other provisions relate to voting for the House of Representatives and the Senate (direct choice of the people, with the number of representatives from each state proportional to their respective populations);[558] and electors have only one vote each.[559] These do not provide for the right to vote but rather sanctify the colonial electoral practices existing at federation. They are largely mechanical provisions and provide that you could not be prevented

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[557] Peter Bailey: Human Rights: Australia in an International Context (1990, Butterworths, Sydney), p.84

[558] Sections 8, 24, 30

[559] Sections 8, 30

from voting if you had that right in a state election. According to the High Court they do not provide a prima facie entitlement to vote throughout Australia,[560] (an interpretation which may in fact be wrong),[561] and as they leave the actual qualifications for voting to the Parliaments, these sections do not guarantee universal adult suffrage, the High Court specifically rejecting the interpretation of American case law on similar sections of the United States Constitution.[562] Thus, while women gained the right to vote in South Australia in 1894, they did not gain it in Victoria until 1908.[563] All Aboriginal people could not vote until 1962.[564] When some states lowered the voting age from 21 to 18, this was held not to

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[560] In Re Pearson and Others; Ex parte Sipka (1983) 152 CLR 254, only Murphy J held that s.41 conferred a right to vote. The majority of the court held that the section only applied at the date of federation (ie, it was a mechanical provision of a transitional nature and operated until the federal government legislated upon the matter, which it did with the Commonwealth Franchise Act 1902).

[561] See Adrian Brooks, "A Paragon of Democratic Virtues? The Development of the Commonwealth Franchise" (1993) 12 U. of Tasmania L.R. 208, who traces the drafting history of s.41 and examines its wording, concluding that the section refers to people not being prevented from voting if they were enfranchised in the colonies, and not, as particularly Brennan, Deane and Dawson JJ intimated in Pearson, that the section refers to people enfranchised by virtue of sections 8 and 30 of the Constitution itself (at p.246).

[562] Attorney-General Ex Rel McKinlay v Commonwealth (1975) 135 CLR 1, especially the decision of Barwick CJ who stated that, as Australia had responsible rather than representative government, it was Parliament rather than the people which was sovereign, specifically rejecting the arguments in cases such as Wesberry v Sanders (1964) 376 U.S. that the phrase "chosen by the people" is a constitutional guarantee of both democracy and (as far as practicable) the equal value of all votes.

[563] See Jocelyn A. Scutt: Women and the Law (1990, Law Book Company, Melbourne), pp.14-15. Women could vote in federal elections from 1902. What s.41 did to was to ensure that women who did have the vote at federation (those living South Australia and Western Australia) would not lose it. See also Brooks, ante.

[564] Scutt, ibid.

automatically entitle people to vote in federal elections where the voting age was 21.[565] While the provisions in the Constitution provide for one vote per elector, they do not guarantee the equal value of those votes.[566] With the exception of Murphy J, the technically narrow interpretation of this section by the High Court has rendered a dead letter[567] of this the most fundamental of democratic rights.[568]

The Constitution can indeed stymie other possible avenues to approach these

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[565] King v Jones (1972) 128 CLR 221. The decision in this case was justified on the basis that the right of "adults" to vote in federal elections meant adults as understood at federation. Again, the provision has been interpreted as being transitional in nature rather than of a rights-generating type.

[566] While the requirements of proportionality of numbers of members with the populations of the states in s.24 might be used as a safeguard, it is a weak one. The High Court effectively endorsed 10% variations in the populations of electorates in Attorney-General Ex Rel McKinlay v Commonwealth (1975) 135 CLR 1 with three judges declaring it to be a matter of degree (Stephen J at 44 and McTiernan and Jacobs JJ at 36), two not making comment on the issue (Gibbs CJ at 62 and Mason J at 68) and only Murphy J stating that there should be equality in electorates (at p.56). In the 1987 Report of the Advisory Committee on Individual and Democratic Rights Under the Constitution by the Constitutional Commission (1987, AGPS, Canberra), it was noted that the variation in the numbers of voters in electorates could be massive. For example, in the Queensland Legislative Council, the seat of Manly had 23,013 electors and the seat of Roma had 7,918; in the Western Australian Legislative Assembly the seat of Murdoch had 30,074 electors and the seat of Murchison-Eyre had 3,850; and in the Tasmanian Legislative Council the seat of Huon had 18,458 electors while the seat of Gordon had 5,390.

[567] The Constitutional Commission recommended the repeal of this section, given its interpretation as a provision of a principally transitional nature: Report, ante, para 4.16(v).

[568] With respect to the related human right to stand for election (UDHR Art. 21; ICCPR Art.25), a challenge to the requirement under the Commonwealth Electoral Act 1918 that candidates pay a deposit, on the basis that this was contrary to fundamental principle in Magna Carta and the Bill of Rights 1689 (and interestingly not on the basis of human rights) was rejected by Wilson J on the basis that the Court had to construe the Constitution, and not other laws, to determine the validity of a Commonwealth Act: Re Cusak (1986) 66 ALR 93 at 95.

questions. The more recent practice of the High Court in implying from the structure of the Constitution (rather than from the interpretation of any particular provision of it) a right to freedom of political speech[569] is insufficient to revive this section, Lazarus-like, without the High Court specifically overturning its earlier decisions on it. The most recent High Court decisions have upheld the validity of laws which penalise advocating a voting method other than preferential voting,[570] and which establish unequal representation.[571] The cases on the section do not have human rights as the basis for their arguments. Even the

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[569] Australian Capital Television v Commonwealth, discussed below.

[570] Langer v Commonwealth of Australia & Ors (1996) 134 ALR 400. At the recent federal elections, Albert Langer suggested that people who disliked both major parties could put them both last on the ballot (and thus depriving them of the preferences of the minor but unsuccessful candidates). His catch-cry was "1-2-3-3, Tweedledum and Tweedledee". Under the Electoral Act such a vote would be valid and formal (and at least useful for the parties placed first and second) as the numbering would be assumed to be accidental. But, to protect the preferential voting system, it is contrary to the Act and a criminal offence to advocate voting in such a way (s.329A). The case revolved around s.24 (composition of the House of Representatives) rather than s.41 of the Constitution, buts its ramifications on the latter (and, indeed, the fact that s.41 was considered to be irrelevant) are significant. By a 5-1 majority the High Court held the provision to be valid, rejecting the argument that it amounted to an abrogation of the right to free political speech because it allowed Langer to state the true legal position of such a vote as long as he stopped short of advocating voting in that way. Only Dawson J (who is not a proponent of implied rights to free speech!) held that the section was in effect an attempt to keep voters in the dark about the legality of such a vote. It therefore struck at the voters having a true and informed choice, advocating that people follow a course of action being "the very essence of political discussion." International human rights are mentioned nowhere in any of the judgements. Albert Langer went to jail for contempt of court because of his "advocacy".

[571] McGinty & Ors v State of Western Australia (1996) 134 ALR 289: the principle of representative democracy is only a constitutional imperative to the extent that this can be implied in the text and structure of the Constitution (per Brennan CJ); there is no implication in the Constitution of "one vote, one value" (per Dawson J, Gummow J agreeing); this will be so particularly for state elections (per McHugh J).

dissenting judgements of Murphy J which resort greatly to policy issues are locally focused, or rely on U.S. precedents, rather than having a clear human rights focus. Perhaps even more significant, in the light of the "culture of rights" aspect of this issues discussed above, is the fact that a referendum in 1988 to introduce into the Constitution the principle "one person, one vote, one value" was rejected, the proportion of the Australian population voting in favour of it being only 37.44%, the lowest such percentage in any referendum in Australia's history! The interpretation of the Constitution, lacking a human rights base, cannot save this situation and the result is that the "universal and equal suffrage" required by UDHR Art.21(3) and ICCPR Art.25(b) is only partly guaranteed in Australia and is nothing like the right to vote provided by section 3 of the Canadian Charter (which, additionally, is one of the provisions not subject to the s.33 override). The Canadian right is, however, subject to section 1 limitations, which have been imposed,[572] and the Supreme Court has also held that while the right to vote confers on the citizen "effective representation" in a legislature, this does not mean that absolute parity of voting power is required.[573] Canadians nevertheless have

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[572] Limitations such as citizenship, mental capacity and age qualifications have been placed on the right to vote, and prisoners cannot vote: see Canada Elections Act, R.S.C. 1985, c. E-2, ss.50-51.

[573] Saskatchewan Electoral Boundaries Reference [1991] 2 SCR 158: special treatment of sparsely populated areas is acceptable because of the greater difficulty in representing them. In this case a 25% variation from the electoral quotient between districts generally, and a 50% variation in two rural districts was held to be constitutional, even though this meant that the most populous district was almost double the size of the least populous. This case also rejected the U.S. approach in Wesberry v Sanders, ante, as had the High Court of Australia in McKinlay, ante, and now McGinty, ante. Contrast, however, Dixon v Attorney-General of British Columbia (1989) 35 BCLR (2d) 273, where McLachlin J held that the electoral boundaries in British Columbia violated s.3 and stipulated a time

greater voting rights than do Australians as they are provided by the rule of law rather than political expediency.

With respect to civil rights, s. 80 provides that "the trial on indictment of any offence against any law of the Commonwealth shall be by jury ..." This does not provide for a prima facie right to a jury trial. It only applies to trials on indictment. It does not prevent the Commonwealth changing any offence from one tried on indictment into one tried summarily,[574] although there has been a line of strong but minority dissent on this point.[575] It does not place any restriction on the power of the Commonwealth to define what is encompassed by the term "offence".[576] It only applies to Commonwealth offences and not to state laws. While it must be remembered that trial by jury did not initially apply in colonies set up primarily as jails (despite the Bill of Rights 1688),[577] this limitation has a

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period within which the government should reform them. Despite the flexibility which must pertain, it is the rule of law rather than the whim of politicians which ultimately determines voting parity in Canada, and the enforceable means to produce it.

[574] R v Archdall and Roskruge Ex parte Carrington and Brown (1928) 41 CLR 128

[575] R v The Federal Court of Bankruptcy; Ex parte Lowenstein (1938) 59 CLR 556 per Dixon and Evatt JJ at 581; Kingswell v The Queen (1985) 159 CLR 264 per Deane J at 300.

[576] Kingswell, ante: a federal law can validly distinguish between the factual elements of an offence as opposed to facts relevant to sentencing, relegating the latter to a judge without a jury. Note, however, the strong dissenting judgements of Brennan J (at p.296) and Deane J (at p.318), particularly the latter who argued that the decisions on s.80 which deprive it of operation as a fundamental law are wrong.

[577] See David Neal: The Rule of Law in a Penal Colony (1991, Cambridge U.P., Melbourne), Chapter 7.

particularly restrictive current application in a constitution which leaves criminal law within the purview of state powers. It has also been held that this section has nothing to do with any privilege against self-incrimination,[578] so that the latter has no constitutional protection. However, the right in s.80 cannot be waived[579] and therefore, within its obvious limits, it can be seen to be in the nature of a guarantee, although a capricious one[580] as the Commonwealth may decide that an offence is to be tried summarily, but if it is tried on indictment the accused must accept a jury trial whether she or he wants it or not - the reverse of the position in the United States and Canada.[581] The section has been treated as being of a procedural rather than of a substantive nature,[582] despite strong dissent on the point[583] and the optimistic assertions of some commentators that this position is

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[578] Sorby v Commonwealth (1983) 152 CLR 281

[579] Brown v The Queen (1986) 160 CLR 171

[580] Id., per Gibbs CJ at p.166.

[581] The Criminal Code permits an accused in the case of certain offences to waive trial by jury if the attorney-general also consents: ss.536, 558-65. However, see R v Turpin (1989) 69 C.R. (3d) 97 where the Supreme Court of Canada held that s.11(f) of the Charter did not grant any right of unilateral waiver in the accused.

[582] "What might have been thought to be a great constitutional provision has been discovered to be a mere procedural provision" per Barwick CJ in Spratt v Hermes (1965) 114 CLR 226 at 244.

[583] See the dissenting judgements of Brennan and Deane JJ mentioned above. See also the dissenting judgements of Murphy J in Yaqer v R. (1977) 139 CLR 28 at p.52 (where he argued that a direction by a judge to a jury to convict a person who had pleaded not guilty breached s.80), and Hammond v Commonwealth (1982) 152 CLR 188 at p.201 (where he argued that s.80 could be used to guarantee the privilege against self-incrimination in a case where a person charged with an offence but not yet convicted was called to give evidence on matters relating to that offence before a Royal Commission). Murphy J also held in Li Chia Hsing v Rankin (1978) 141 CLR 182 at 201 that s.80 entrenched a basic right to trial by jury in the Constitution, "at least in serious criminal cases."

changing.[584] The recent decision in Cheatle v R.[585] held that s.80 requires a unanimous verdict by a jury as this promotes debate in the jury room and gives the accused the true benefit of any reasonable doubt.[586] This view was arrived at, however, along strict interpretationist lines and a consideration of the history and function of the jury in English criminal history. Fundamental law means history, not general principles of human dignity applied to present needs. The cases revolve around separation of powers rather than human rights.[587] The referendum in 1988 referred to above also proposed the amendment of this section to make it more substantive. This also was met with a resounding rejection by the Australian voters. Additionally, because of the foregoing, there are no federal constitutional guarantees for related matters, such as the right not to be deprived of liberty except by law, the presumption of innocence, double jeopardy, speedy trial, access to courts, the right to an interpreter and the right to legal representation. The latter has since been interpreted into the Common Law[588] but it and the other matters are not constitutional guarantees in Australia along the lines of UDHR Arts. 10 and 11, and ICCPR Art.14, and also fall far short of the legal rights guarantees in sections 7-14 of the Canadian Charter, despite the fact that the application of these

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[584] See O'Neill and Handley, ante, at pp.54-5 who point to the changed approach of the High Court to human rights questions in cases such as Street v Queensland Bar Association (1989) 168 CLR 461.

[585] (1993) 116 ALR 1

[586] At p.7

[587] Re Tracey; Ex parte Ryan (1988-89) 166 CLR 518: offences by members of the armed forces can be tried under the Defence Forces Discipline Act 1982 by a tribunal and without an indictment.

[588] Dietrich v R. (1992) 177 CLR 292

sections is by no means clear cut.[589]

Section 116 provides that "the Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for" any Commonwealth office. The section is cast not so much in terms of rights or freedoms but in terms of prohibitions on legislation and administrative action by the Commonwealth, thus being qualitatively different to the freedom of religion provided for in section 2(a) of the Canadian Charter. There is no definition of the term "free exercise", and the cases have adopted a narrow interpretation of it. In Krygger v Williams[590] the High Court held unanimously that conscientious objection to military service on religious grounds was not protected by this section as military service has nothing necessarily to do with the exercise of a religion. An artificial distinction is drawn between religious conscience and the exercise of a religion. The section has also been effectively interpreted as being secondary to overriding social requirements.[591] As Rich J

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[589] See Hogg, ante, Chapters 44-51.

[590] (1912) 15 CLR 366

[591] Adelaide Company of Jehovah's Witnesses Incorporated v The Commonwealth (1943) 67 CLR 116: orders issued under the National Security (Subversive Associations) Regulations on the basis that the activities of the appellant were prejudicial to the defence of the country were held (unanimously) not to infringe s.116. Similarly, polygamy could be regulated (per Williams J at 159). Note that the regulations were nevertheless held to be invalid because they went beyond the defence power in s.51(vi), leading Bailey, ante, to comment that "this is a clear reflection of the low threshold of protection the Court was prepared to accord religious belief and practice: a law could be invalid as beyond the defence power, yet operative in relation to s.116" (at p.96).

commented: "Freedom of religion is not absolute,"[592] a phrase which, while in itself correct, was used by the Supreme Court of South Australia to justify a decision that there was no inalienable right to freedom of religious worship and expression in the Common Law.[593] A similarly narrow approach has been adopted with respect to the meaning of the phrase "establishing any religion,"[594] although the term "religion" itself has, in other circumstances, attracted broader interpretations.[595] Section 116 only applies to the Commonwealth and has no influence on state laws and practices.[596] Despite a valiant attempt by Murphy J to apply this section as a "constitutional guarantee of freedom of and from religion"[597] it has been specifically held not to be "the repository of some broad statement of principle concerning the separation of church and state",[598] the High

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[592] Id., per Rich J at p.150.

[593] Grace Bible Church v Reedman (1984) 36 SASR 376: religious school required to be registered under the Education Act 1972 (SA) despite the fact that this was considered contrary to their religious beliefs by the adherents of the religion.

[594] In Attorney-General for Victoria Ex Rel Black v Commonwealth (1981) 146 CLR 559 the concept of establishing a religion was analogised to the setting up of a religion, the court rejecting an argument that government financial aid for church schools amounted to some form of establishment, even though it might indirectly assist the practice of a religion.

[595] In Church of the New Faith v Commissioner of Payroll Tax (Victoria) (1983) 154 CLR 121 it was held that Scientology was a religion for the purpose of exemption from the obligation to pay payroll tax on the salaries paid to its priests because it was a code of conduct based on the supernatural.

[596] Three states in fact banned Scientology, although they later repealed the legislation: Psychological Practices (Scientology) Act 1965 (Vic); Scientology Prohibition Act 1968 (S.A.); Scientology Act 1968 (W.A.).

[597] Attorney-General (Victoria) v Commonwealth, ante, at 623

[598] Id., at p.609 per Stephen J.

Court rejecting the decision of the United States Supreme Court in Everson v Board of Education[599] on this point, prompting Murphy J to retort that the section was being interpreted "as if it were a clause in a tenancy agreement rather than a great constitutional guarantee."[600] It is seen and treated as merely an obscure[601] fetter on Commonwealth legislative power.[602] Thus, the deportation of a Moslem Imam was held to be a valid exercise of ministerial discretion under the Migration Act 1958 and did not infringe s.116 as long as it was done for reasons other than to put an end to the expression of opinions of a purely religious character.[603] Similarly, the Full Court of the Family Court of Australia has held that s.116 does not apply in cases where a decision as to the custody of a child is made on the basis that it is or is not detrimental to the child to be brought up adhering to the practices of a particular faith.[604]

There is no provision in the Constitution as to beliefs generally. For example, in

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[599] 330 US 1 (1946)

[600] Murphy, ante, ibid.

[601] Even contemporary commentators could not fathom why it was in the Constitution at all: see Quick & Garran, ante, at 953. Moreover, it is in Chapter V of the Constitution which deals with the states!

[602] Attorney-General (Victoria) v Commonwealth, ante, at p.603 per Gibbs J. See also Wilson J at pp.652-3.

[603] Lebanese Moslem Association v Minister for Immigration and Ethnic Affairs (1986) 67 ALR 195

[604] In the marriage of Firth and Firth (1988) FLC 91-971. children placed in the custody of the wife rather than with her parents who were members of a religion known as the Brethren.

Australian Communist Party v The Commonwealth,[605] legislation to ban the Communist Party was held to be invalid because there was no head of Commonwealth power to justify it, not because of a right to freedom of opinion or belief. (A pre-Charter case in Canada decided similarly.)[606] Murphy J dissenting in R. v Winneke; Ex parte Gallagher[607] held that the Royal Commissions Act 1902 (Cth) breached s.116 because it required people to explain their religious beliefs, or lack of them, before they would be permitted to give evidence on affirmation rather than on oath. He is the only judge to have adopted this point of view. A limited implied right to freedom of expression has since been implied in the Constitution[608] but not based on this section which has been interpreted into something which is nothing like UDHR Arts. 18 and 19, and ICCPR Arts. 18 and 19. Indeed, the Australian cases read like many pre-Charter Canadian cases relying on form[609] rather than substance and effect.[610] Even though section 2(a) of the

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[605] (1951) 83 CLR 1

[606] Switzman v Elbling [1957] SCR 285: a Quebec law authorising the padlocking of premises used to propagate communism held to be invalid as it encroached on the exclusive federal power with respect to Criminal Law.

[607] (1983) 152 CLR 211 at 227

[608] Discussed below.

[609] For example, the Hamilton Street Railway Case [1903] AC 524: Ontario's Lord's Day Act held to be a matter of Criminal Law and thus within the exclusive jurisdiction of the federal Parliament; Lieberman v The Queen [1963] SCR 643: provincial legislation requiring pool halls and bowling alleys to be closed at midnight and all day Sunday held to be valid because it was "primarily concerned ... with secular matters" (per Ritchie J at p.649.

[610] R v Big M Drug Mart [1985] 1 SCR 295: the federal Lord's Day Act struck down as contrary to the freedom of religion under s.2(a) of the Charter as the purpose of the Act was to compel the observance of the Christian Sabbath.

Charter is subject to both section 1[611] and section 33, it applies to both religious practices and beliefs,[612] overcoming the artificial distinctions which plague the Australian cases and is thus closer to the obligations in ICCPR Article 18 despite the issues of characterisation which still arise and allow legislatures to evade the freedom[613] and the impact of other sections of the Constitution.[614]

Section 51 (xxiiiA) of the Australian Constitution provides that the Commonwealth has power with respect to laws providing medical and dental services and various forms of pension, "but not as to authorise any form of civil conscription". This has been held by the High Court not to affect matters incidental to the provision of those services, such as using prescribed forms or providing information to a Minister.[615] The more direct meaning of "civil conscription" has never been litigated, but the political motivation for this provision was the concern of the Australian medical profession that a form of nationalisation, similar to that in the

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[611] R v Edwards Books and Art [1986] 2 SCR 713: the Ontario Retail Business Holidays Act which required retail stores to close on Sundays upheld (inter alia) because of s.1 (the secular purpose of providing a common pause day in the retail trade).

[612] Big M, ante.

[613] For example, one of the reasons for the decision in Edwards Books was that the legislation related to property and civil rights in the province.

[614] For example, the issue of state aid to denomination schools does nor arise in Canada in the same way as in Australia because of the guarantees in s.93 to Catholic and Protestant schools. However, the issue of state aid to denominational schools other than these was expressly left open by Dickson J in Big M (at pp.340-41).

[615] General Practitioners Society v The Commonwealth (1980) 145 CLR 532, distinguishing British Medical Association v Commonwealth (1949) 79 CLR 201.

UK, might be introduced.[616] It was never intended, and unless greater reliance is placed on human rights it is unlikely to be interpreted, to be anything like the prohibition on servitude in UDHR Art. 4 or against forced and compulsory labour in ICCPR Art. 8(3).

With respect to economic rights, section 51(ii) provides that the Commonwealth cannot discriminate between the states in its tax laws, customs and excise duties and bounties are to be uniform (sections 88, 90), the Commonwealth cannot give preferences in trade, commerce or revenue to one state over another (s.99), the Commonwealth can make laws forbidding unreasonable preferences or discrimination between the states with respect to railways (ss. 102, 104), and state public employees are not to be deprived of any substantive rights if they transfer to the Commonwealth public service (s.84). These rights are principally directed at the maintenance of the position of the states and are only indirectly economic rights enjoyed by the people. They also say nothing about minimum standards but rather are directed towards non-discrimination on the basis of whatever standards, good or bad, exist. Some commentators also argue that the full potential of the discrimination and equality rights underlying these provisions has never been fully grasped by the legal profession,[617] others contend that the interpretation of these

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[616] Bailey, ante, pp.89-90

[617] For example, Bailey, ante, at pp.99-101.

sections has been reduced to a mere formalism.[618] These provisions are ultimately constricted by the situations to which they are principally directed (ie, the positions of the states) and by their wording.[619] They are not economic rights indispensable for dignity referred to in UDHR Art. 22 or applicable to the right to an adequate standard of living provided by ICESCR Art.11. However, apart from taxation arrangements, there is nothing similar in the Canadian Constitution.

Similarly, section 92 provides that "trade, commerce and intercourse among the states ... shall be absolutely free." For a provision which seems, on its terms, to be straightforward, this section has given rise to an abundance of hair-splitting statutory interpretation which Geoffrey Sawer has referred to as "gothic horrors and theological complexities."[620] The problem is that the section does not say

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[618] For example, Leslie Zines: The High Court and the Constitution 2nd, ed (1987, Butterworths, Sydney), Chapter 14.

[619] Thus, for example, Menzies J distinguished between establishing a discriminatory law under s.99, which would infringe the section, and the operation of rules which might have discriminatory effects, which would not: Conroy v Carter (1968) 118 CLR 90 at 103. See also Elliott v The Commonwealth (1936) 54 CLR 657.

[620] In a book review in (1977) 8 Federal Law Review 376 at 377. See also Leslie Zines: The High Court and the Constitution (1987, Butterworths, Sydney), Chapter 8 entitled "Section 92: An Abundance of Theories". The section was used, for example, by the High Court and the Privy Council to strike down legislation for the nationalisation of the banking industry, on the basis that reasonable regulation (as opposed to restriction) of trade is permissible: Commonwealth v Bank of New South Wales (1949) 79 CLR 49; a law will be invalid if it restricts trade directly, but not if it does so indirectly or consequentially: ibid. Michael Coper has written of this case that "the Privy Council ... completed the conversion of section 92 from a guarantee of free trade, in the sense of the converse of protection, into a guarantee of free enterprise" (Encounters With the Australian Constitution 1987, CCH Australia, Sydney, at p.297) and Davis has described the reasoning as "a twilight world of tautology, judicial gropings and microscopic distinctions." ("The Australian Bank Nationalisation Case" (1950) 13 Modern Law Review 107 at 110). However, within six years the Court

what trade and commerce are to be free from. The approach to this provision can be one directed to individual rights or to the rights of the states. For example, Barwick CJ in Northeastern Dairy Co v Dairy Industry Authority of New South Wales[621] called the protection of the individual central to s.92,[622] whereas Mason J (as he then was) said in the same case that s.92 has a predominantly public character to which the rights of the individual were merely incidental and consequential.[623] In Uebergang v Australian Wheat Board[624] Gibbs and Wilson JJ considered that the issue was one of balance between the two.[625] Whether the profusion of cases favoured a nineteenth-century economic liberalism (laissez-faire)

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went into what Coper has called "a schizophrenic phase" of cases consisting of "an uneasy marriage of legalism and pragmatism" (ante, at p.298-9). The Court held that restrictions on the production of goods did not infringe the section (Grannall v Marrickville Margarine Pty Ltd (1955) 93 CLR 55), nor did fixing the price at which goods could be sold (Wragg v New South Wales (1953) 88 CLR 353). Road taxes could be levied on interstate hauliers (Armstrong v Victoria (No. 2) (1957) 99 CLR 28). Now, the freedom is seen as being one from discriminatory burdens in the protectionist sense (and is not of the laissez faire variety): Cole v Whitfield (1988) 62 ALJR 303: importation into Tasmania of crayfish legally caught in South Australia but declared undersized by Tasmanian Regulations held not to infringe s.92.

[621] (1976) 134 CLR 559

[622] At p. 582

[623] At p. 615

[624] (1980) 145 CLR 226

[625] Their honours said: "Absolute freedom of interstate trade commerce and intercourse requires that the citizens of this Commonwealth shall within the framework of a civilised society be free to engage in these things. The difficulty is that the trend of political theory and practice is to develop and strengthen that framework more and more and often at the cost of individual liberty ... This Court ... must therefore do its best to preserve balance between competing interests, a balance which favours freedom of the individual citizen in the absence of compelling considerations to the contrary." (at p.300).

approach or something less than this has been canvassed in detail elsewhere.[626] The wash-up of the chequered development of the section is that the human rights potential of it has effectively been ignored due to the necessity for the court to decide specific issues brought before it,[627] particularly in cases interpreting the "trade and commerce" aspect of this section. In this regard, the existence of a power in the High Court to give advisory opinions as can the Supreme Court of Canada might have set the direction of these decisions onto a different course. Thus, in 1939 the High Court rejected a s.92 challenge to a compulsory marketing scheme for milk in New South Wales because the scheme served the social purpose of ensuring the quality and regular supply of milk as well as purely marketing purposes.[628] While the result may be one of social policy, the judicial approach is one of narrow interpretative legalism. The potential of s.92 was left to lie dormant. A similar section of the Canadian Constitution[629] has not been subjected to the same degree of scrutiny largely because of the exclusive federal power over all forms of trade and commerce, whether interprovincial or not, and (now) the existence of the Charter. However, considering the limited application of the latter

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[626] See P.J. Hanks: Australian Constitutional Law: Materials and Commentary, 4th ed (1990, Butterworths, Sydney), pp.690-702.

[627] See Cole v Whitfield (1988) 62 ALJR 303, which in a rare unanimous judgement attempted to clear up the mess of case law which had evolved around s.92, and which held that the approach should be one towards looking for discrimination in the challenged law, both on its face and in its operational effect. However, the judgement does not stray from its main purpose into considerations of wider human rights significance.

[628] Milk Board (New South Wales) v Metropolitan Cream Pty Ltd (1939) 62 CLR 116

[629] Section 121

to economic rights, the Canadian section might be used in the future to help generate these to the limited extent made possible by the section.

The cases dealing with the "intercourse" (ie, movement) aspect of s.92 (which has no equivalent in the Canadian section)[630] have because of their nature been more promising in relation to human rights. In Gratwick v Johnson[631] the war-time National Security (Land Transport) Regulations which forbad interstate travel except by permit or for defence personnel were unanimously held to contravene s.92. Still, the object of the section is interstate matters. A limited freedom which can only apply once a state border is crossed is not, and cannot be, a solid foundation for any human right in the sense contemplated by the instruments discussed in Chapter 4. Moreover, I agree with Coper who writes that "there is an almost perverse contrast between the High Court's misconceived elevation of section 92 of the Constitution - a section intended to do no more than prevent the component parts of the new nation from pursuing parochial protectionist policies - into a guarantee of personal economic liberty [as it was before Cole v Whitfield], ... and the court's near emasculation of any section of the Constitution which does have a hint of intended protection for individual rights or personal freedoms."[632] The interpretation, however, has not been totally broad. The most recent cases to deal with the section (and which also deal with implied constitutional rights and are

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[630] Atlantic Smoke Shops v Conlon [1943] AC 550

[631] (1945) 70 CLR 1

[632] Coper, ante, p.316

discussed in more detail below) have adopted a restrictive rather than a broad interpretation of it from the point of view of economic rights. It has been held not to apply to laws restricting advertising,[633] laws restricting the dissemination of information,[634] or laws restricting the practice of giving advice to immigrants,[635] because, even though the section is not confined to the physical carriage of goods among the states and can encompass all modern forms of communication, it does not apply when a burden is imposed which applies if a state border is not crossed.

An economic right in the Australian Constitution which does on its terms directly ~ect individual rights (and of which there is no direct Canadian equivalent)[636] is section 51(xxxi) which provides that the Commonwealth has the power to acquire property from a state or an individual for Commonwealth purposes "on just terms." The purpose of this provision was not to protect a right to property but to ensure that the new Commonwealth government had an acquisition power[637] and

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[633] Australian Capital Television Pty Ltd v The Commonwealth (1992) 177 CLR 106, at pp.191-6.

[634] Nationwide News Ltd v Wills (1992) 177 CLR 1, at pp.53-61, 83.

[635] Cunliffe v The Commonwealth (1994, 68 ALJR 791, at pp.804, 817-8, 825, 836, 846, 852-3.

[636] The Supreme Court has held, however, that there is a common law right to compensation for property acquired by the government, but that this may be ousted by statute: Manitoba Fisheries Ltd v The Queen (1978) 88 DLR (3d) 642. It is therefore not a guaranteed right in Canada.

[637] Quick & Garran, ante, pp.640-1

to act as a fetter on that power[638] rather than establishing a positive right for the individual. But here, judicial interpretation has been regarded as showing a bias in favour of the property owner.[639] The provision has been interpreted as relating to any tangible or intangible thing[640] and has been used to strike down forced acquisitions not only of land but also of produce.[641]

If it is found that the terms of the acquisition have not been just, the acquisition is void: the court does not modify the terms until they are just.[642] Also, "just terms" does not necessarily imply the payment of the "full pecuniary equivalent of the property taken."[643] The court looks for just terms simpliciter and not for the most just terms possible in the circumstances. However, what this provision does not do is provide the wrongfully dispossessed owner with a remedy: that must lie in a common law action (eg, for trespass or conversion) on the basis that the

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[638] Bank of New South Wales v Commonwealth (1948) 76 CLR 1 per Dixon J at 350.

[639] Bailey, ante, pp.101-2; P.H. Lane: A Manual of Australian Constitutional Law 4th ed (1987, Law Book Company, Sydney), p.169, who exaggeratedly calls this provision "a Bill-of-Rights provision".

[640] Minister for the Army v Dalziel (1944) 68 CLR 261: the right to possession under a lease was held to be covered by the section; Georgiadis v Australian and Overseas Telecommunications Corporation (1993-4) 179 CLR 297: the section extends to the extinguishment by legislation of a cause of action against the Commonwealth.

[641] McClintock v Commonwealth (1947) 75 CLR 1 (forced sale of pineapples under the National Security (General) Regulations struck down).

[642] Grace Bros Pty Ltd v The Commonwealth (1946) 72 CLR 269 at 290.

[643] Id., p.285.

acquisition has been rendered unlawful.[644] On the other hand, if no compensation - just or unjust - has been paid, the court will read into this provision a promise to pay just compensation.[645] Moreover, this provision will only apply to acquisitions by the Commonwealth, not by the states, but it has been suggested that its effect may stretch to acquisitions not for the Commonwealth or its instrumentalities if done pursuant to a Commonwealth law.[646] The High Court has, however, been reluctant to go too far in this direction. In the Dams case,[647] it was argued by Tasmania that a World Heritage listing which prohibited development in a wilderness area in South West Tasmania amounted to an acquisition not on just terms. Of the four judges of the High Court who addressed this issue, three[648] held that s.51(xxxi) did not apply because the Commonwealth had not acquired any proprietary interest in the land. The fourth judge to address the issue, Deane J, held that the requirement of just terms could apply to situations where the Commonwealth gained a benefit, such as preserving land in fulfilment of Australia's international obligations.[649] The majority view, however, is that

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[644] Johnston Fear & Kingham & The Offset Printing Co Pty Ltd v The Commonwealth (1943) 67 CLR 314 at 327; Nelungaloo Pty Ltd v The Commonwealth (1952) 85 CLR 545 at 568.

[645] Minister of State for the Army v Dalziel (1944) 68 CLR 261 at 290-1.

[646] For example, acquisitions to which the Commonwealth Trade Practices Act 1974 might apply: Trade Practices Commission v Tooth (1979) 142 CLR 397 per Barwick CJ and Mason and Aickin JJ.

[647] Commonwealth v Tasmania (1983) 158 CLR 1

[648] Mason, Murphy and Brennan JJ.

[649] At p.283

acquisition is considered in economic and proprietary terms. Thus in Clunies-Ross v Commonwealth[650] the decision of the majority of the court implied that the acquisition of the Clunies-Ross estate in the Cocos Islands for the purpose of removing a feudal overlord[651] was not an acquisition for a Commonwealth purpose when the principal object was to deprive the owner of it but not then use it in a manner relating to a Commonwealth power. Although deciding the case on other grounds and leaving the precise extent of the application of s.51(xxxi) open,[652] this avoidance of the human rights perspective of the section is disappointing but continuing.[653] While the judgement of Murphy J in Clunies-Ross held that the reasons for the acquisition in that case did amount to an acquisition for Commonwealth purposes, it relied on American precedent and doctrines such as "eminent domain" rather than human rights.[654] The majority relied, in part, on Magna Carta, thus illustrating the problems of skewed application of this overrated instrument as described in Chapter 2.

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[650] (1984) 155 CLR 193

[651] See Tahmindjis, "Australia, the Cocos Islands and Self-Determination" (1985) 1 QIT Law Journal 177.

[652] At p.201

[653] For example, in Australian Capital Television Pty Ltd v Commonwealth (1992) 177 CLR 106 Brennan, Dawson and McHugh JJ held that legislation requiring free time for electoral broadcasts did not amount to an acquisition of property under this section. The other judges did not mention this section. In Health Insurance Commission v Peverill (1994) 179 CLR 226 retrospective legislation reducing the amount of money claimable by doctors who "bulk billed" for certain procedues under Medicare was held not to be an acquisition of property by the Commonwealth because the right to receive a benefit under a statutory duty to pay is not an antecedent proprietary right incapable of variation (per Mason CJ, Deane and Gaudron JJ at p.237; Brennan J at p.243).

[654] At p.209.

The protection given by s.51(xxxi), as wide as it might be or become, is therefore not of the "fundamental" or "universal" kind by which human rights are usually characterised. It is not the right to property provided for in UDHR Art. 17. This can particularly be seen where this power is operating in conjunction with others in s.51 and where, considering that validity need only be established on one head of power, it is effectively overridden by that other power. Thus, for example, in Re Dohnert Muller Schmidt; Attorney-General (Cth) v Schmidt,[655] acquisitions made under the Trading With the Enemy Act 1939 were held to be a valid exercise of the defence power in s.51(vi). In any event, it was held that s.51(xxxi) only applied to legislative acquisitions, not to executive acquisitions.

There is also a form of equality right in the Australian Constitution. Section 117 provides that "a subject of the Queen" who is resident in any state "shall not be subject in any other state to any disability or discrimination which would not be equally applicable to him [sic] if he were ... resident in such other state." This equality only applied, and still only applies, to "subjects of the Queen" (now, in the present Australian context, to Australian citizens),[656] not to everyone present in Australia (as human rights norms would generally require). The section also says nothing about the standard of treatment, only that there must be no differential application of it based on residence in another state. It is not a "due process"

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[655] (1961) 105 CLR 361

[656] Street v Queensland Bar Association (1989) 168 CLR 461, per Deane J at p.525, Dawson J at p.541 and Toohey J at p.554.

clause[657] like the provisions in UDHR Art. 7 and ICCPR Art. 26. In addition, commentators have referred to its "disappointing, narrowly technical construction by the High Court."[658] For example, the section has been interpreted not to apply to discrimination based on domicile rather than residence,[659] nor to discrimination based on former interstate residence.[660] Thus, in Henry v Boehm[661] the South Australian Rules of Court requiring that legal practitioners who sought admission to practice in that state had to be resident there for three months before admission if they already practised somewhere else (and also that the admission would only be granted beyond 12 months if the person continually resided in South Australia during the first 12-month period) were held to be valid. This was because they applied equally to South Australians as to others and would apply, for example, to a person domiciled in South Australia who happened not to be resident there, as well as to non-domiciled non-residents. There was a strong

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[657] Coper, ante, calls it "the due process clause that never was" (at p.338.

[658] Bailey, ante, p.103. See also Hilary Charlesworth, "Individual Rights and the Australian High Court" (1986) 4 Law in Context 52, who refers to an "impoverished notion of constitutionality" at p.55.

[659] Davies and Jones v Western Australia (1904) 2 CLR 29: Western Australian death duties which were imposed at half the normal rate where the property passed to persons resident and domiciled in Western Australia were held not to infringe s.117.

[660] Lee Fay v Vincent (1908) 7 CLR 389: the Western Australian Factories Act 1904 which prohibited the employment in a factory of any "person of the Chinese or other Asiatic race" unless that person worked in a factory on or before November 1, 1903, did not contravene s.117 when an employer was prosecuted for employing a Chinese who had worked in a factory in Victoria before that date but who was, at the time of the prosecution, a resident of Western Australia.

[661] (1973) 128 CLR 482

dissent by Stephen J[662] who rightly pointed to the fact that what should have been done was to compare the situation of the ant (who lived in Victoria) with a person who was a resident of South Australia. The former would have to abandon his home for a considerable period to comply with the Rules, whereas the latter would not. In 1989 the High Court changed direction on this point in Street v Queensland Bar Association[663] where the court recognised that the introduction of anti-discrimination legislation in Australia had given a new gloss to the term "discrimination".[664] As these laws in Australia are based on Australia's human rights obligations, a synergistic effect between human rights norms and the Constitution can be discerned, but only of an indirect kind and only relating to the interaction between domestic norms (as Australia's international human rights obligations are not referred to in the case, but rather cases from the US, Canada, the ICJ and the European Court of Human Rights dealing with the meaning of discrimination).[665] In that case, two barristers who practised in New South Wales sought admission to the Queensland Bar, where the relevant Admission Rules stipulated that to be admitted, the perso- would have to practise principally in Queensland. This was found unanimously to contravene s.117 as shown by a

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[662] At pp.499-507.

[663] (1989) 168 CLR 461

[664] Mason CJ referred to English and Canadian cases in discrimination law (at p.487); Brennan J referred to the Canadian Supreme Court and adverse effect discrimination (at p.508); Gaudron J compared developments in discrimination law in Australia, Canada, the U.K. and the U.S. (at p.566).

[665] See, for example, Brennan J at pp.508-12, Gaudron J at pp.571-3, McHugh J at pp.582-3.

comparison of the actual position of the applicants with the position they would have been in had they resided in Queensland (ie, the approach of Stephen J in Henry v Boehm). The court wanted to give "full effect" to the section, in particular Deane J[666] and Gaudron J[667] who criticised the earlier decisions as ignoring substance in favour of form.

The approach in Street is a potential way out of the traditional High Court approach to constitutional rights, which is to ignore or deny that the sections contain any issues of policy, politics or philosophy. It represents a marked difference to the approach to discrimination evidenced by the Court in Gerhardy v Brown,[668] particularly with Brennan J stating that where differential treatment is "relevantly and necessarily different" this does not amount to discrimination. The High Court's more recent decision in Western Australia v Commonwealth discussed below in the context of s.109, and Leeth v The Commonwealth discussed above with respect to implied limitations, also represent this changed - and more accurate - approach to equality.

But section 117 requires an inter-state element to be present. In Re Loubie,[669] for example, the Queensland Bail Act 1980 provided that bail would not be granted to

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[666] At p.527

[667] At p.569

[668] (1985) 159 CLR 70

[669] [1986] 1 Qd R 272

people charged with offences who were ordinarily resident outside Queensland, in circumstances where other people would have been granted bail. Loubie, a resident of New South Wales, was refused bail. The Supreme Court of Queensland held that this contravened s.117 However, what s.117 and judgements on it do not do is invalidate a requirement or condition which discriminates against residents of other states. Rather, the provision is rendered inoperative in the circumstances of the case with respect to inter-state residents only.[670] Any potential impact of these judgements to improve the human rights situation in Australia (particularly because the High Court has no power to give advisory opinions) only operates in an ad hoc fashion

In addition, the notion of "discrimination" is one which emerges elsewhere in both the express rights of the constitution[671] and in the implied prohibitions.[672] Yet there is no consistency in its application. It is used as a notion not necessarily tied to international human rights moorings which might give it both consistency and direction. While Street may point the way to an approach to constitutional interpretation based more on issues of policy (and this was done in the Dams case in 1983 where the judgements were full of policy arguments) the lack of reliance

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[670] See also Dennis Rose, "Discrimination, Uniformity and Preference - Some Aspects of the Express Constitutional Provisions", Chapter 6 in Leslie Zines (ed). Commentaries on the Australian Constitution: A Tribute to Geoffrey Sawer (1977, Butterworths, Sydney).

[671] For example, in the current interpretation of s.92: Cole v Whitfield, ante

[672] Queensland Electricity Commission v Commonwealth, ante.

on international human rights norms means that this progress too is likely to be ad hoc. Indeed, Deane J begins his judgement in Street by cataloguing the rights in the constitution to show that it is misleading to state that Australia does not have a Bill of Rights.[673] He refers to the sections mentioned above, and nowhere to human rights norms. Such misplaced confidence does not augur well for any real progress and is in stark contrast to Canadian cases dealing with the meaning of discrimination which do at least pay lip service to the international norms.[674] Section 117 of the Australian Constitution is, for reasons more than just its expressed ratio materiae, a far cry from the equality provision of s.15 of the Canadian Charter. Indeed, in a case similar to Street, Andrews v Law Society of British Columbia[675] the Supreme Court of Canada had little difficulty holding that a requirement of Canadian citizenship for admission to the legal profession in British Columbia was a prima facie breach of s.15. The Court split, however, on whether the rule could be justified under section 1, holding by majority that it could not be as the government's concerns were not sufficiently pressing and substantial to warrant overriding a Charter right. In Australia a general rule of

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[673] At pp.521-2

[674] See, for example, Reference re French Language Rights of Accused in Saskatchewan Criminal Proceedings [1987] 5 WWR 577 at p.602 where Cameron JA refers to the Racial Discrimination Convention, the Women's Convention and ILO 111 when determining that the meaning of discrimination includes discriminatory effects. This, however, takes up only two sentences in the entire judgement (at p.602). The European Convention on Human Rights is also referred to (at pp.605-6) but only to distinguish it from the Charter on the basis that the rights there have internal qualifiers whereas in the Charter the qualification occurs separately in s.1. (This case was decided before the Supreme Court decision in Andrews v Law Society of British Columbia).

[675] [1989] 1 SCR 143

equality does not exist. In Canada, such a prima facie rule exists and it is laws contravening this right which must be justified by the respondent in the case. In Australia, the operation is more like the Canadian case of Law Society of Upper Canada v Skapinker[676] where, on similar facts to Andrews but before section 15 became operative, a unanimous Supreme Court held that citizenship restrictions on admission to the bar were not a breach of the mobility rights under s.6(2)(b) of the Charter[677] did not guarantee the right to work. Australia is still stuck in this bind of characterisation.

Express Powers and Problems of Structural Hierarchy

The difference between reserved and residual powers, and the fact that in Canada both the federal and provincial governments have their own sets of exclusive powers whereas in Australia these are only assigned to the federal government with a large area of potential concurrent power, raises another significant issue of structure. The express Australian constitutional powers are not exclusive and there is nothing to prevent a state, in the exercise of its residual powers, from enacting laws to pick up the slack. However, state powers, being residual, are not constricted in the same way as are Commonwealth laws in that they do not have to be legitimised by reference to an enumerated head of power. They could either

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[676] (1984) 9 DLR (4th) 161

[677] "... every person who has the status of a permanent resident of Canada has the right ... to pursue the gaining of a livelihood in any province"

accord with or depart from Australia's international human rights obligations, provided that there is no Commonwealth legislation to override them by operation of s.109. Interestingly, there is no equivalent provision in the Canadian Constitution (where, because of the dual sets of exclusive powers, the issue is more likely to be one of validity of legislation rather than paramountcy), although it is regarded as being read into the Constitution because of the notwithstanding clause in the opening words of s.91.[678] Where it does apply, however, it has been narrowly construed in Canada to apply only to express contradiction, the Supreme Court rejecting the "covering the field" test which is used extensively in Australia.[679]

But this provision, which has the advantage of enabling the Commonwealth to override state laws which breach Australia's international human rights obligations, can also backfire. There are two tests for inconsistency under s.109: the direct inconsistency test and the indirect inconsistency or "covering the field" test.[680] The "covering the field" test involves determining the "field" the Commonwealth law covers and then deciding whether that law shows an intention to cover that field to the exclusion of any state laws on the same subject matter.[681] If the

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[678] Re Exported Natural Gas Tax [1982] 1 SCF. 1004; Hogg, ante, pp.418-19.

[679] Mann v The Queen [1966] SCR 238; Schneider v The Queen [1982] 2 SCR 112; Irwin Toy, ante; Hogg, ante, pp.423-29.

[680] Clyde Engineering Co Ltd v Cowburn (1926) 37 CLR 466

[681] Ex parte McLean (1930) 43 CLR 472 at 483.

Commonwealth law does not evidence an intention to cover the field, there may still be a direct inconsistency where a particular provision of a Commonwealth law is impinged upon or derogated from by a state law and the two cannot be obeyed simultaneously.[682] The inconsistency can be with respect to rights as well as duties.[683]

It is particularly with respect to the "covering the field" test (which has been criticised as a misinterpretation of s.109)[684] that many, although not all, of the problems for human rights based legislation have occurred. Thus, in Viskauskas & Anor v Niland[685] the plaintiffs had refused to serve three people in the bar of their hotel because of their race. The complainants brought an action for racial discrimination under the New South Wales Anti-Discrimination Act. The plaintiffs

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[682] Federated Sawmill Employees of Australia v James Moore and Sons Pty Ltd (1909) 8 CLR 465 at 500.

[683] Clyde Engineering v Cowburn, ante, per Knox CJ and Gavan Duffy J at p.478.

[684] See Vince Morabito & Henriette Strain, "The Section 109 "Cover the Field" Test of Inconsistency: an Undesirable Legal Fiction" (1993) 12 U. of Tasmania L.R. 182. The authors argue that this test is in accordance with neither the ordinary meaning of the term "inconsistent" nor with the intentions of the founding fathers, and is not supported by persuasive policy arguments. They point out that even if Commonwealth law covers the field on a particular topic, it does not necessarily mean that Commonwealth and state laws on that topic will be contradictory or incompatible. With respect to the way that this interpretation has applied to cases involving anti-discrimination laws, I agree with them. Contrast Christopher Gilbert: Australian and Canadian Federalism 1867-1984 (1986, Melbourne U.P., Melbourne) who writes at p.125 that "the "covering the field" definition of the rule in s.109 is a logical corollary of the Engineers principle of [wide] interpretation of Commonwealth legislative powers." With respect, its application has been neither logical nor fair in the cases dealing with discrimination law.

[685] (1983) 57 ALJR 414

argued that the relevant provisions of the state Act were inoperative by virtue of inconsistency with the federal Racial Discrimination Act. The High Court held that there was no direct inconsistency between the two Acts as it was possible for a person to obey both laws simultaneously. However, the Court found that the Commonwealth Act was intended to cover the entire field of racial discrimination in Australia in order to avoid inconsistencies of application between states. As a result, the provisions of the state Act upon which the complainants had brought their action were inconsistent with it and therefore were inoperative. It could be argued from this case that the Commonwealth intends to cover the field with respect to the implementation of all its human rights treaty obligations.[686] However, precisely because of this case the Commonwealth amended the Racial Discrimination Act by inserting a new section 6A in 1983 which reads:

> This Act is not intended, and shall be deemed never to have been intended, to exclude or limit the operation of a law of a State or Territory that furthers the objects of the [International Convention on the Elimination of All Forms of Racial Discrimination] and is capable of operating concurrently with this Act.

Similar provisions were included in the federal Sex Discrimination Act[687] and the Disability Discrimination Act[688] when they were passed. This, however, was not, and is not, the end of the problem. In University of Wollongong v Metwally & Ors[689] a complaint of racial discrimination by a Ph.D. student was brought

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[686] See Hanks, ante, p.355.

[687] Sections 10(3), 11(3)

[688] Section 13

[689] (1984) 158 CLR 447

against Wollongong University under the New South Wales Act after s.6A had been inserted into the Racial Discrimination Act, but concerning discrimination which had occurred before the insertion of that section. The High Court held that the new section could not retrospectively validate inconsistent state provisions as the latter could become (re)operative only from the date the amendment commenced despite the deeming provision in s.6A. This is because it is s.109 which pre-empts the state law and not federal Parliament. Section 109 is self-executing once the conditions for its operation exist.[690] Zines has commented that this decision is "difficult to understand from the viewpoint of pure logic, once one accepts (and no one denied it) that the Commonwealth has, generally speaking, power to make a retrospective law."[691] He goes on to point out, however, that two of the judges were particularly concerned about protecting the citizen from the injustice of not knowing the existence of inconsistencies because of the operation of retrospective laws and that s.109 may develop into a constitutional guarantee protecting the individual against the abuse of power.[692] Nevertheless, the complainants in both of these cases were subject to racial discrimination but had no remedy because of the operation of the Australian Constitution, and two of the judges specifically rejected the view that s.109 operates as a guarantee of rights or

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[690] At pp.455-8, 473-4, 478-9.

[691] The High Court and the Constitution, ante, p.334

[692] Id., p.335. The two judges concerned about this issue were Gibbs CJ at p.458 and Deane J at p.477.

immunities[693].

Continuing problems in this regard include the fact that some state anti-discrimination legislation has a more limited operation than does the federal legislation.[694] It is arguable (but has never been litigated) that state legislation which curtails the fuller effect given to the international Conventions upon which the federal legislation is based is inconsistent with that legislation as a matter of direct inconsistency. Additionally, as the principal argument on this point in Viskauskas was that the Commonwealth could only fulfil its obligation under the Racial Discrimination Convention "if its enactment operates equally and without discrimination in all the States"[695] because state laws might allow for exceptions which would lead to inconsistencies in the application of the Convention in Australia, the saving provisions in the federal legislation cannot preserve state legislation which produces a situation where laws dealing with discrimination operate differently in different states and territories (as they would not be capable of truly concurrent operation with the federal law).[696] However, as we have seen in Chapter 4, not all topics in human rights demand a single code of application.

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[693] Dawson J at p.486; Mason J at p.463.

[694] For example, the New South Wales Anti-Discrimination Act does not apply to discrimination on the bases of sex, marital status, disability or homosexuality in businesses employing fewer than six people: ss.25, 40, 49D, 49ZH. The federal legislation is generally not so limited.

[695] At p.290

[696] See Greg McCarry, "Landmines Among the Landmarks: Constitutional Aspects of Anti-Discrimination Laws" (1989) 63 Australian Law Journal 327.

Indeed, the symbiosis described there actually militates against this. The judges tend to look for rules which can be administered in a centralised fashion and are free from ambiguity and subjective values. This is simply not the case with international human rights norms.

Inconsistency can also apply where the state law does not extinguish some right but replaces the right with a different one.[697]

Inconsistency does not, of course, operate only with respect to Commonwealth and state laws which are both directed to discrimination. In Dao & Anor v Australian Postal Commission,[698] for example, two Vietnamese women were denied employment with Australia Post after failing to meet height and weight requirements in the Postal Services Act 1975 (Cth). They brought a complaint of discrimination on the grounds of race and sex under the New South Wales Anti-Discrimination Act. The High Court held that there was a direct inconsistency between the Commonwealth requirements and the operation of the New South Wales Act with respect to employment by Australia Post, the latter Act therefore being inoperative with respect to Australia Post workers. Similar situations have

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[697] The State of Western Australia v The Commonwealth (1995) EOC 92-687: the Western Australian Land (Titles and Traditional Usage) Act 1993 held to be inconsistent with the Commonwealth Native Title Act 1993.

[698] (1987) 162 CLR 317

occurred with respect to the Life Insurance Act 1945 (Cth)[699] and the Commonwealth Banks Act 1959 (Cth).[700]

Similar situations can occur with respect to state land rights legislation. In Gerhardy v Brown[701] the High Court held the Pitjantjatjara Land Rights Act 1981 (S.A.), which vested title in certain land in the Pitjantjatjara tribe and made any non-Pitjantjatjara (white or aboriginal) who trespassed on the land guilty of an offence, was contrary to section 10 of the Racial Discrimination Act, but saved by the affirmative action provisions of section 8 of that Act. However, the High Court has since corrected its erroneous view of "discrimination" in The State of Western Australia v The Commonwealth.[702]

The effect of s.109 and its significance on and for human rights in Australia is

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[699] AMP Society v Goulden & Ors (1986) 160 CLR 330: the basis of a discrimination complaint by a blind person against an insurance company held to be inconsistent with the Commonwealth Act.

[700] Commonwealth Banking Corporation v Duncan (1988) EOC 92-216: NSW Anti-Discrimination Act held to be inapplicable to employees of the Commonwealth Bank because the provisions of the Commonwealth Banks Act covered the field.

[701] (1985) 159 CLR 70

[702] (1995) EOC 92-687: The Native Title Act 1993 (Cth) was held not to contravene s.10 of the Racial Discrimination Act even though it treated Aborigines and Torres Strait Islanders with rights to native title better than indigenous people without those rights or non-indigenous people. The judgement specifically refers to literature explaining that non-discrimination does not necessarily mean equal treatment: W. Sadurski, "Gerhardy v Brown v The Concept of Discrimination: Reflections on the Landmark Case that Wasn't" (1986) 11 Sydney Law Review 5; W. McKean: Equality and Discrimination Under International Law (1993) at 288; I. Brownlie: The Rights of Peoples in Modern International Law (1983) at 10; Australian Law Reform Commission, Report No. 31, The Recognition of Aboriginal Customary Laws (1986) Vol. 1 Paras 148, 150.

therefore totally arbitrary - the courts look to hierarchy rather than content, much less to human rights.

Inconsistency is not limited to legislation. It can also occur with respect to the operation of federal industrial awards.[703] The same tests for inconsistency are used in these cases and may in fact save the state law from being inoperative, which may have significant human rights implications.[704] But once again, these human rights ramifications are ad hoc, arbitrary and often the unintended by-product of the application of formalism and legal hierarchy.

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[703] Industrial Relations Act 1988 (Cth) s.152: federal awards and agreements are to prevail over inconsistent state laws. Thus, in Metal Trades Industry Association of Australia & Ors v Amalgamated Metal Workers' and Shipwrights' Union & Ors (1983) 152 CLR 632, the High Court held that the New South Wales Employment Protection Act 1982, which provided a procedure for termination in the case of redundancy, was inconsistent with several federal awards dealing with termination of employment.

[704] Ansett Transport Industries (Operations) Pty Ltd v Wardley (1980) 142 CLR 237: Ansett Airlines had discriminated against Wardley by refusing her a job as a pilot because of her sex, and argued that this was permissible because of the provisions of federal awards regulating the employment and dismissal of commercial pilots. The majority of the High Court (Stephen, Mason, Murphy and Wilson JJ, Barwick CJ and Aickin J contra) held that those awards did not intend to cover the field of employment of pilots, were not directly inconsistent with the provisions of the Victorian Equal Opportunity Act and had to be read against the general law of the land. See also R. v Sex Discrimination Board; Ex parte Cope (1980) 26 SASR 197 where the Supreme Court of South Australia held that the dismissal provisions of the federal Metal Industries Award did not exclude the operation of the Sex Discrimination Act 1975 (S.A.). But contrast Australian Broadcasting Commission v Industrial Court of South Australia (1977) 138 CLR 399 where a South Australian statute allowed employees to challenge terminations on the ground that they were harsh, unjust and unreasonable, and Commonwealth legislation dealing with the ABC which allowed temporary officers to be employed by the ABC on whatever terms and conditions the ABC saw fit to impose. A temporary officer fired by the ABC was held by the High Court to have no recourse to the South Australian provisions because the federal Act intended to cover the field with respect to the ABC's relations with its employees. Gilbert, ante, remarks that these cases are difficult to reconcile (at p.124).

It may be concluded that the Australian Constitution is more concerned with the powers of governments than with the rights of people. There are some express rights of a human rights type in the Australian Constitution which, directly or indirectly, impact upon freedom. But the tradition of parliamentary sovereignty rather than the sovereignty of "the people" (the development of which was traced in Chapter 2) has left a lasting legacy on both Australian constitutionalism and, as a necessary corollary now, the impact of human rights norms in Australia. Constitutional rights and freedoms were essentially limitations on an otherwise omnicompetent power of government action rather than being the type of rights found in the French Declaration of the Rights of Man and the Citizen or in the United States Bill of Rights, or now in the Canadian Charter of Rights and Freedoms. Indeed, the Australian cases dealing with express constitutional rights read like many of the pre-Charter Canadian cases, where rights and freedoms were upheld consequentially as a matter of determining the jurisdictional pith and substance of the legislation.[705]

In addition, the most expansive interpretations of these "rights" have been given to those dealing with property rather than with equality. This appears to be an

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[705] For example, in Union Colliery of British Columbia v Bryden [1899] AC 580 a B.C. law prohibiting "Chinamen" from working in mines was held invalid, but because its pith and substance was the exclusive federal power over naturalisation and aliens. See also Switzman v Elbling above. In a converse fashion, see Co-Operative Committee on Japanese Canadians v Attorney-General for Canada [1947] AC 87 where the deportation of Canadians of Japanese descent by the federal government was held to be valid because the matter did not fall within any provincial competence and the courts refused to find any limitations on the federal residuary power.

interesting, if not downright paradoxical, preference for economic rights in a country the traditions and value system of which have favoured civil and political rights - until it is realised that the right here is to retain property one already owns. The concerns of minorities such as Aborigines, Torres Strait Islanders, Chinese and South Sea Islanders were treated in a patronising, and often racist, fashion at federation, and this was effectively locked into the Constitution by its silence on these matters. Together with the predominant interpretative approach (at least until recently) of a "strict and complete legalism",[706] this resulted in a legal climate unreceptive to human rights norms. The situation with respect to women was little better,[707] and that with respect to other minorities such as people with disabilities and gay men and lesbians, was far worse. Australian law was simply blind to their needs. Thus, the privileging and oppression of a century ago has been locked into Australian legal structures. The key to unlock this situation has so far not been found in direct Constitutional amendment,[708] as it has in Canada. Synergy with international human rights norms is almost always absent or, when present, is only of an indirect kind.

The most significant domestic human rights developments, therefore, have been with respect to what I would classify as constructive human rights provisions in the

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[706] Sir Owen Dixon: Jesting Pilate (1965, Law Book Company, Melbourne) at p.274.

[707] See generally Jocelyn Scutt: Women and the Law, ante.

[708] See the discussion above with respect to the work of the Constitutional Commission.

Constitution and implied rights which the High Court is now finding in both the words and structure of it. This situation is the converse to that in Canada where express constitutional rights are now the principal engine for propelling human rights into "mainstream" law.

5 4.4 Implied Constitutional Rights and Human Rights

The Canadian courts have suggested, then rejected, and then qualifiedly resurrected, the notion of implied rights in the Canadian Constitution. In the Alberta Press Case[709] the government of Alberta had come to power on a pledge to create a new economic order in the then depressed province. It passed legislation to create a Social Credit monetary system in the province which was subject to much ridicule in the media. As a result, companion legislation was passed which gave the government the right to require any newspaper to publish government statements of correction and amplification. If the newspaper refused, it could be closed down. By way of obiter dictum[710] it was held by three members of the court that the companion legislation could also be invalid as it infringed rights implied in the Constitution by, first, the Preamble which refers to the Canadian Constitution as being "similar in principle to that of the United Kingdom" (and hence including the liberties existing in the UK in 1867, including the right to free speech), and secondly, because the creation of representative government by the Constitution required free and reasonable discussion of government policy. To interfere with the latter would be to interfere with the

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[709] Reference re Alberta Legislation [1938] SCR 100, affirmed by the Privy Council in [1939] AC 117.

[710] The Social Credit legislation was held to be invalid as it encroached upon the exclusive federal powers relating to currency, banks, and trade and commerce. As a result, the legislation dealing with the press failed as well.

working of Canada's parliamentary institutions.[711] While the second argument may carry some weight, the first is dubious: in 1867 the British Parliament could legislate away common law rights. The implied rights approach was followed in a few cases,[712] but appeared to be disapproved of in Attorney-General for Canada v Dupond[713] where Beetz J, writing for the majority of the Supreme Court, held that Quebec legislation outlawing public assemblies in an attempt to curb political unrest was valid and that arguments based on the Alberta Press Case should be rejected because "none of the freedoms referred to is so enshrined in the Constitution as to be above the reach of competent legislation."[714] However, in a post-Charter case in 1987 the same judge held (again by obiter dictum) that "quite apart from Charter considerations, the legislative bodies in this country must conform to these basic structural imperatives [of the Constitution] and can in no way override them."[715] A list of obiter dicta is not strong authority for implied rights in the Canadian Constitution. Since the enactment of the Charter, this issue

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[711] At p.134

[712] R v Hess No. 2 [1949] 1 WWR 586: s.1025A of the Criminal Code 1927 held to be invalid as it denied bail to an acquitted person if the Attorney-General decided to appeal the acquittal which was held to be contrary to UK principles which included Magna Carta; Saumur v City of Quebec [1953] 2 SCR 299: three judges of the Supreme Court held on the basis of Alberta Press that a law forbidding distribution of written material in the street without prior approval (in this case, by Jehovah's Witnesses) was invalid. Also, one judge (Abbott J at p.328) in Switzman v Elbling, ante, held in an obiter dictum that the Quebec Padlock Law would infringe the implied rights i the Constitution.

[713] (1978) 84 DLR (3d) 420

[714] At p.439

[715] OPSEU v Ontario [1987] 1 SCR 2 at p.57.

for Canada is effectively moot[716] except to the extent that the arguments might be raised in areas untouched or little affected by the Charter. To date, this has not occurred.

Individual rights and freedoms have been more consequential or residual than direct in the Australian Constitution. The Australian Communist Party Case[717] mentioned above is frequently held up as a shining example of the rule of law championing civil liberties.[718] In fact it turned on constitutional interpretation,[719] and on implied powers only to the extent that judicial review of legislation was a necessary implication of a federal constitution. Put briefly, the Liberal-Country Party coalition won the federal election in 1949. One of their election promises was to ban the Communist Party. As a result, the Communist Party Dissolution Act 1950 was enacted. The recitals in the Preamble of this Act stated that it was based on the defence, incidental and executive powers of the Constitution,[720] and that the aim of the Party was to overthrow the Australian

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[716] See, for example, Hogg, ante, at p.777

[717] Australian Communist Party v Commonwealth (1951) 83 CLR 1

[718] See G. de Q. Walker: The Rule of Law: Foundation of Constitutional Democracy (1988, Melbourne U.P., Melbourne) at p.227; George Winterton calls the case "a celebrated victory for the rule of law" (although he concedes its shortcomings): "Dissolving the Communists The Communist Party Case and its Significance", in Seeing Red: The Communist Party Dissolution Act and Referendum 1951: Lessons for Constitutional Reform (1992, Evatt Foundation, Sydney).

[719] Alastair Davidson & Roger Spegele remark that "the Court was driven by its own legalism to declare the law invalid": Rights, Justice and Democracy in Australia (1991, Longman Cheshire, Melbourne), at p.17.

[720] Sections 51(vi), 51(xxxix) and 61 respectively.

government. Under the Act the Communist Party was declared an unlawful association and abolished, with its property vested in a government receiver who would discharge all liabilities and remit the balance to the government. Affiliated organisations could also be declared unlawful, with the same consequences. It was an offence, punishable by five years imprisonment, to be a member of the Communist Party or of an affiliated organisation.

The Communist Party and several trade unions challenged the constitutional validity of the Act. All of the judges, including the dissentient Latham CJ, held that the Commonwealth had the power to protect itself from subversion, whether from the express powers relied upon in the recitals to the Act or upon an implied legislative power to do so.[721] However, it held that it is one thing to prohibit subversion and leave it to the courts to determine in any given case whether people or organisations were guilty of it,[722] and quite another to declare a party to be guilty in the Preamble of an Act. What was triumphant in this case was the axiom of judicial review: it is the court which must determine whether legislation is within power, not for the Parliament merely to declare that it is.[723]

Latham CJ, in dissent, found that the question of determining the enemies of the

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[721] Per Dixon J at pp.187-8; Fullagar J at p.260.

[722] As in the Commonwealth Crimes Act 1914, s.24C.

[723] As Fullagar J stated, in a frequently-quoted phrase, "a stream cannot rise higher than its source" (at p.258).

nation was a political one and outside the proper consideration of a court.[724] The question for the court to determine was whether there was a real connexion between the legislation and the dangers the Parliament had identified. The other judges did not share this view. The law must be objectively tested against a head of constitutional power[725] and the Court could not allow the opinion of Parliament to be the decisive factor (although it will give great weight to its opinion) as this would be "deserting its own duty under the Constitution"[726] except perhaps in the "supreme emergency of war."[727] This was in effect a precursor to the proportionality test adopted by the court forty years later.

The decision was, and remains, of monumental political importance in Australia. Justice Michael Kirby has written that the former situation in South Africa would have been a model for what Australia could have become had the legislation been upheld.[728] It is also a remarkable decision given its context: the Communist Party had triumphed in China a few years before, Australia was fighting the Communists in Korea and there was national hysteria about Communism, as the "Petrov Affair" shortly afterwards showed. But what is also (now) remarkable is the fact that the

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[724] At p.154

[725] Per Dixon J at p.195

[726] Per McTiernan J at p.207

[727] Per Dixon J at pp.197-8

[728] Justice M.D. Kirby, "H.V. Evatt, The Anti-Communist Referendum and Liberty in Australia" (1991) 7 Australian Bar Review 93 at pp.100-101.

Universal Declaration of Human Rights was voted upon affirmatively by Australia only three years before. Australia had been instrumental in its formulation, as described in Chapter 3, yet it was totally ignored in the judgement, despite the fact that the Act was a flagrant breach of Articles 18, 19 and 20 of it. The case has nothing to do with the merits of the legislation from the point of view of individual rights (although some commentators do see it this way).[729] Fullagar J openly stated that "nothing depends on the justice or injustice of the law in question. If the language of an Act of Parliament is clear, its merits and demerits are beside the point."[730] The other judges were of similar views.[731] This is despite the fact that from earliest times the High Court had said that the most appropriate interpretation of the constitution is generally the broad rather than the narrow approach.[732] But it was a broad approach to Commonwealth powers, not to the rights of the citizen. I agree with Brian Galligan who writes: "The Communist Party Case was not primarily about civil liberties but about the limits of legislative and executive power and supremacy of the judiciary in deciding such questions,"[733] an approach identical to earlier cases.[734] In this regard, the

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[729] For example, E. Campbell & H. Whitmore: Freedom in Australia (1973, Sydney University Press, Sydney), p.329.

[730] At p.261

[731] Latham CJ at 152-3; Dixon J at 202-3; Webb J at 242; Kitto J at 272.

[732] Jumbunna Coal Mine N.L. v Victorian Coal Miners' Association (1908) 6 CLR 309 at 367-8. More recently, see Commonwealth v Tasmania (1983) 57 ALJR 450 at 487, 528.

[733] Brian Galligan: Politics of the High Court, ante, p.203.

situation is in many ways similar to that of the contest between Coke CJ and King James described in Chapter 2. In fact, the High Court had not long before this case upheld the convictions of Communists for seditious utterances.[735] And if the Act had been the legislation of a state, it would without question have been held to be within power. (Interestingly, the converse situation occurred in Canada.)[736] In this regard, the High Court was not so different to the Supreme Court of the United States in Dennis v United States,[737] although it appeared to be different. The Australian government continued to refuse passports to Communists until the 1960's, including to Australian citizens such as Wilfred Burchett the journalist. This was not judicially remedied until 1988 when the High Court held in Air Caledonie International v The Commonwealth[738] that "the right of the Australian citizen to enter the country is not qualified by any law imposing a licence or "clearance" from the Executive, but this as a matter of taxation law rather than

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[734] For example, in Ex p. Walsh and Johnson; In re Yates (1925) 37 CLR 36 the High Court held that Communists cannot be deported by the Commonwealth because they are not "immigrants" under the Immigration Act once they have made permanent homes in Australia.

[735] Burns v Ransley (1949) 79 CLR 101; R. v Sharkey (1949) 79 CLR 121.

[736] Switzman v Elbling [1957] SCR 286: the Supreme Court of Canada held that the Act Respecting Communistic Propaganda 1937 (Quebec) was invalid because it involved the exclusive federal power over Criminal Law rather than the provincial power over property and civil rights. It did not matter that the federal Parliament lacked any similar inclination to restrict Communism.

[737] (1951) 341 U.S. 494: provisions of the Smith Act 1940 (18 USC par 2385) making it a crime to advocate the overthrow of the government were upheld, notwithstanding the First Amendment of the U.S. Constitution.

[738] (1988) 165 CLR 462

human rights.[739] Similarly, in Davis and Others v The Commonwealth of Australia[740] the issue was the prohibition in the Australian Bicentennial Authority Act 1980 (Cth) of the use of expressions such as "200 years", "Australia", "Sydney", "First Settlement" and "Expo" when used in conjunction with "1788", "1988" or "88". This was to allow the Authority the sole right to control promotions during the bicentennial celebrations. The provisions were held to be partly invalid because they exceeded what was reasonably adapted to achieve valid constitutional ends.[741] References are made in the judgements to "freedom of speech" without articulating where this freedom comes from. The decision is again one with reference to legislative power rather than the people's rights.

The notion of implied rights in the Australian Constitution is not new, although it has had a chequered history. In 1912 in Re Smithers; ex parte Benson[742] the issue was the validity of New South Wales legislation which made it an offence for people convicted of certain crimes in other states to enter New South Wales. Griffith CJ and Barton J considered the law to be invalid because of an implied

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[739] At p.469. The matter at issue in this case was an immigration clearance fee charged to airlines with respect to passengers entering Australia. It was held that in so far as this fee related to Australian citizens it was a "tax" and, as such, breached s.55 of the Constitution which provides that laws imposing taxation can deal only with taxation and not other matters.

[740] (1988) 166 CLR 79

[741] Per Mason CJ, Deane and Gaudron JJ at p.100 ("This extraordinary intrusion into freedom of expression is not reasonably and appropriately adapted to achieve the ends that lie within the limits of constitutional power."). See also Brennan J at p.116.

[742] (1912) 16 CLR 99

right of personal movement throughout the federation to go to the seat of government to assert claims.[743] This approach was dealt a severe but, as it turned out, not fatal blow with the literalism that arose as a result of the Engineers' case. Implied rights underlying the Constitution are not abnegated under the expressio unius rule because of express rights found in it; rather the latter are regarded as a manifestation of the former.[744]

It was particularly Murphy J who (often as a lone dissentient) articulated a view of rights arising from the broader considerations of the Constitution rather than from its particular provisions. He held that the provision for elections to Parliament "require freedom of movement, speech and other communication, not only between the States, but in and between any part of the Commonwealth ... freedoms so elementary that it was not necessary to mention them in the Constitution."[745] In McGraw-Hinds (Aust) Pty Ltd v Smith he found an implied constitutional right to freedom of communication[746] and in Sillery v The Queen an implied

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[743] Per Griffith CJ at p.108; Barton J at p.109-10. Isaacs and Higgins JJ held that the law contravened the freedom of intercourse provision of s.92. Isaacs J held that a reading of the text of the Constitution led to the conclusion that the legislation was invalid.

[744] Leeth v The Commonwealth (1992) 66 ALJR 529, per Deane and Toohey JJ at p.541.

[745] Ansett Transport Industries (Operations) Pty Ltd v Commonwealth (1977) 139 CLR 54 at p.88.

[746] (1979) 144 CLR 633 at 667-70. The bases for this finding were the use of analogies from US Supreme Court cases and also the Canadian cases of Re Alberta Legislation (1938) and Switzman v Elbling & Attorney-General of Quebec (1957).

constitutional freedom from cruel and unusual punishment.[747] In Buck v Bayone[748] he found that freedom of movement was "a fundamental right arising from the union of the people in an indissoluble Commonwealth." In other cases, such as Miller v TCN Channel Nine Pty Ltd,[749] he stated that a Constitution based on responsible government and democratic principles was necessarily one of a free society so that freedoms such as the freedom of communication could be implied. None of the other judges in that case (including Mason, Brennan and Deane JJ who were later to be instrumental in considering implied rights) thought this approach worthy of consideration! However, in none of the above cases did Murphy J refer to human rights as the basis for his decisions,[750] relying principally on decisions of the US Supreme Court.

Consideration of implied constitutional rights in Australia arose in earnest in 1992. Nationwide News Pty Ltd v Wills[751] involved limitations on freedom of expression. Under an amendment to the Industrial Relations Act 1988 it was made an offence, by writing or speech, to bring a member of the Industrial Relations

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[747] (1981) 35 ALR 227 at 231-5: the Commonwealth Crimes (Hijacking of Aircraft) Act 1972 provided for a punishment of life imprisonment. Murphy (for once in the majority) held that this meant a maximum sentence rather than a mandatory one. His basis was US cases and the 1689 (UK) Bill of Rights.

[748] (1976) 135 CLR 110

[749] (1986) 161 CLR 556

[750] He did refer to human rights in some other cases, which are mentioned later in this chapter.

[751] (1992) 66 ALJR 658

Commission into disrepute.[752] The court held unanimously that the amendments were invalid. Three of the judges specifically considered the interaction between fundamental rights and the reasonable proportionality of the law to the object to be attained.[753] The amendments purported to protect the Commission from both justifiable as well as unjustifiable criticism, a situation which does not apply even to courts of law. However, there was no overt reliance in the case on international human rights provisions or the notion of fundamental freedoms which might exist superior and anterior to the constitution. Brennan J noted:

> A court will interpret laws of the Parliament in the light of a presumption that the Parliament does not intend to abrogate human rights and fundamental freedoms ... but the court cannot deny the validity of an exercise of a legislative power expressly granted merely on the ground that the law abrogates human rights and fundamental freedoms or trenches upon political rights which, in the court's opinion, should be preserved. A function of that kind may be conferred on a court exercising a jurisdiction to review judicially laws enacted under a Constitution containing a Bill of Rights, but our Constitution does not contain a Bill of Rights. ... The courts cannot assume a jurisdiction which the Constitution does not confer.[754]

These implications thus arise from the Constitution itself and not from extraneous sources. The Engineers doctrine does not prevent this, but necessarily supplies the limitation. For Deane and Toohey JJ, the implied freedom of communication arises out of the concept of federalism with its division of legislative powers, the

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[752] Section 299(1). This amendment was a reaction to an article about the Commission entitled "Advance Australia Fascist" which was published in The Australian on 14 November, 1989.

[753] Deane and Toohey JJ in a joint judgement and Brennan J. For Dawson J, who adopted the "traditional" approach, the issue was essentially whether the provisions came within a head of Commonwealth power, which they did not: at p.683.

[754] At p.667

separation of legislative and judicial powers, and the doctrines of representative democracy and responsible government upon which the Constitution rests.[755] Freedom of discussion is essential to, and inherent in, these. In a significant shift in approach, their honours say that central to these is "the thesis that all powers of government ultimately belong to, and are derived from, the governed" which vests legal sovereignty in the people.[756] Brennan J said that these doctrines are intended to make "the legislative and executive branches of the government of the Commonwealth ultimately responsible to the people."[757] These views are inconsistent with the traditional approach to the Australian Constitution and mark a clear break with the past (where ultimate power is regarded as vesting in Parliament and the Crown). But being anchored to the Constitution the freedom of speech as it arises here is necessarily limited to one with respect to political and related matters. In this context, it might only apply with respect to the Commonwealth and its government, but some of the judges indicate that it will also apply to the states.[758] This change is not achieved through a recognition of human rights. It is seen as a consequence of the change in the nature of constitutional monarchy in Australia and the development of the Crown as an Australian sovereign through legislation such as the Australia Act. There is thus a distinct difference here to the earlier approaches of Murphy J who relied upon

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[755] At p.679

[756] At p.680

[757] At p.669

[758] Joint judgemert of Deane and Toohey JJ at p.682.

implications arising from the nature of Australian society. There is a tendency to conflate legal sovereignty with political sovereignty which is not explained in the judgement, and it further illustrates the historical inaccuracies with respect to the development of Australian political sovereignty which were discussed above in the Leeth decision.

However, a further important consequence of this new approach has been what Brian Fitzgerald has called "colonising the core powers" of the Constitution.[759] Freedom of communication arises in the Constitution because its structure provides for such things as elections and the need for the people to know and discuss the policies of the candidates. Parliament is given certain core powers in the Constitution. To say that these powers are given to parliament as the fiduciary of the people is to turn a subject-matter power into a purposive power in which (as we will see below) the Court has said it, rather than Parliament, has the obligation to test with respect to the reasonable proportionality of the legislation made under the power against the goals to be achieved.[760] Thus the stranglehold of Dicey may be lessened. It is an alternative to the "peace, order and good government" approach in Canada.

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[759] Brian Fitzgerald, "Proportionality and Australian Constitutionalism" (1993) 12 U. of Tasmania L.J. 263 at 299

[760] Fitzgerald then goes one step further and contends that "purpose becomes the dominant theme in characterising the core" (id., at p.299). In the light of cases, many of which were decided after Fitzgerald's article was written, I must respectfully disagree. Proportionality is still used, but in a different way. See the discussion below with respect to the Cunliffe case.

Contemporaneously with Nationwide News, the High Court heard Australian Capital Television Pty Ltd v The Commonwealth[761] which involved a challenge to the Political Broadcasts and Political Disclosures Act 1991. This Act attempted to ban political advertising by radio and television during election periods. There were exceptions for news and current affairs items, "talkback radio" programs, and other special items. For the purpose of disseminating information from political parties, broadcasters were obliged to provide "free time" for recognised political parties for their respective policy launches and for political broadcasts. The Commonwealth's stated purpose was to safeguard the integrity of the political system by reducing the pressure on political parties and candidates to raise substantial sums of money in order to engage in television and radio campaigns. This pressure might render them vulnerable to corruption.[762] Television and radio advertising during election campaigns was also stated to have the effect of trivialising the issues because of the nature and brevity of such advertising. Additionally, removing the high cost of political advertising was stated to place all the community on an equal footing in so far as the use of the public airwaves is concerned.

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[761] (1992) 66 ALR 695

[762] A more cynical view was that the Labor Party government was low in election funds and wanted to muzzle the other political parties.

A Senate Select Committee on Political Broadcasts and Disclosures had reported[763] in 1991 that only five countries of those examined allowed paid political advertising.[764] In several, it was found that paid political advertising is not permitted at all[765] or is not permitted during an election period.[766] The important fact to be gleaned from the survey is that a limitation on the exercise of free speech in these circumstances is not uncommon in Western democracies and societies like Australia's. In addition, vast sums are in fact spent in Australia on such advertising.[767]

Nevertheless, the High Court by a 5-2 majority, found that the provisions introduced by the Act were invalid as they contravened an implied right to free speech in the Constitution.

This right was found not from implications in the text of the Constitution but again from implications from the structure set up by it. This structure is one of representative and responsible government: the constitution provides both for

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[763] The Political Broadcasts and Political Disclosures Bill - Report by the Senate Select Committee on Political Broadcasts and Disclosures, November, 1991 (AGPS, Canberra).

[764] Australia, Canada, New Zealand, Germany and the United States.

[765] France, Norway, the United Kingdom, Sweden and the Netherlands.

[766] Denmark, Austria, Israel and Japan.

[767] More than $15 million was spent during the 1990 federal election campaign: House of Representative, Parliamentary Debates (Hansard), 9 May, 1991, p.3480 (Second Reading speech).

voters to elect members to parliament and for those members to be responsible to the electorate. The test, according to Mason CJ, for drawing implications from this structure woul ' be that "the term sought to be implied must be logically and practically necessary for the preservation of the integrity of that structure."[768] His Honour thought that "freedom of communication, at least in relation to public affairs and political discussion"[769] met such a test as the communication of views between members of parliament and candidates with the electors, and also among the electors themselves, was essential as the structure relied on people being adequately informed of the facts and all relevant arguments.[770] In this way, representation and accountability could be preserved. Because the provision of "free time" was limited to political parties and candidates, this left no scope for other interest groups such as trade unions and social welfare groups to air their views.[771] It effectively meant that they were excluded from an essential element which allowed the structure to function properly: communication.

While this view subscribes to the necessity of a robust exchange of views, it ignores the fact that it was paid advertising, not news and current affairs reporting, which was banned. It assumes that the only access to the media is by the avenue of

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[768] At p.701

[769] At p.703

[770] At p.703, quoting Lord Simon of Glaisdale in Attorney-General v Times Newspapers Ltd [1974] AC 273 at 315.

[771] At p.700

payment. As such, it is naive of the realities of media manipulation by interest groups through skilful use of the press release. It also makes the enormous, and not necessarily correct, assumption that paid advertising in fact fulfils the role of communication which is attributed to it, rather than being emotional manipulation. The judgement appears to be looking for substance, but in reality relies on mere form. It also appears totally unconcerned with the effect that the communication seen as essential to the maintenance of the representative structure of the constitution is effectively available to the highest bidder. The judgement is a strong evocation of rights, but it is a laissez-faire view of them.

This freedom of communication is restricted to matters of public affairs and political discussion, but within those bounds, it is unlimited,[772] includes all the steps which are directed to the people electing their representatives and making their views known to them (including the right to participate and associate as well as to communicate)[773] and can include other levels of government besides the federal.[774] Gaudron J suggested that further implications of such a structure would be freedom of movement and freedom of association, "and, perhaps, freedom of speech generally".[775] As her honour rightly remarks: "Obviously, the

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[772] Mason CJ at p.703

[773] Per McHugh J at p.743

[774] Deane and Toohey JJ at 716; McHugh J at 747; Gaudron J at 736-7.

[775] At p.735

Constitution does not postulate a society that is free and democratic only at election time. Nor, but perhaps not so obviously, does it postulate a society that is free and democratic only with respect to matters which the Constitution entrusts to the Commonwealth."[776]

Such freedoms, however, are nevertheless seen as arising from the constitution. They are not seen as fundamental notions having a quality and status, like natural law, which is superior to and anterior it, which themselves act as a check on government power. This is made clear by Gaudron J (who, ironically, was the judge who hypothesised the widest implications from the structure) when she said:

> ... the detailed provisions [in the constitution] with respect to elections reveal that the Constitution is for a Commonwealth which is a free society governed in accordance with the principles of representative parliamentary democracy even though that is not stated in terms. Because s.51 confers power "subject to [the] Constitution", the legislative power conferred by that section is confined by that consideration ... s.51 does not authorise laws which are inconsistent with the free and democratic nature of the Commonwealth. Thus ... the power conferred by s.51 does not extend to the making of laws that impair the free flow of information and ideas on matters falling within the area of political discourse.[777]

The issue which this raises is: what is the situation with laws that are not expressly "subject to the constitution"? For example, s.122 confers upon the Commonwealth the power to make laws with respect to the Territories and is not subject to the constitution since the Commonwealth can act there as a State government would.

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[776] At p.736

[777] At p.736

Gaudron J simply says: "That is not a question that need be answered in this case."[778] As a result, from the point of view of identifying constitutional rights, this case is ultimately unsatisfying.

The two dissenting judges, Brennan and Dawson JJ, disagreed with the conclusion of the majority, but for starkly different reasons, and the distinction between them itself illustrates the transition of approaches currently being adopted by the court to the Constitution (as well as the fact that the approach does not necessarily guarantee the outcome). Brennan J accepted that there is an implied right of freedom of communication in the constitution, holding:

> ... the legislative powers of the Parliament are so limited by implication as to preclude the making of a law trenching upon that freedom of discussion of political and economic matters which is essential to sustain the system of representative government prescribed by the Constitution.[779]

He therefore extends the application beyond the strictly political to include economic matters, but still subscribes to the general restriction that the limits of consideration are those "prescribed by the Constitution." As a result, his Honour makes the salient point that individual rights are not fundamental to the Australian legal system. It is the Constitution which is fundamental, rights implied from it are consequential or residual rather than being the starting point from which the legitimacy of government regulation must be judged. He says:

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[778] At p.736

[779] At p.708

> ... unlike freedoms conferred by a Bill of Rights in the American model, the freedom [of communication implied in the Australian constitution] cannot be understood as a personal right the scope of which must be ascertained in order to discover what is left for legislative regulation; rather it is a freedom of the kind for which s.92 of the Constitution provides: an immunity consequent upon a limitation of legislative power.[780]

The court nevertheless cannot avoid balancing the interests involved. The extent to which it effectively takes up this challenge is questionable. Mason CJ had used a test of reasonable necessity:

> Whether those restrictions are justified calls for a balancing of the public interest in free communication against the competing public interest which the restriction is designed to serve, and for a determination whether the restriction is reasonably necessary to achieve the competing public interest.[781]

Brennan J proposed a proportionality test:

> ... it is necessary to ascertain the extent of the restriction, the nature of the interest served and the proportionality of the restriction to the interest served.[782]

It is submitted that the Mason test is the stricter one, requiring that the restriction be necessary to achieve the purported goal (and thus leaving it open to show that the goal might be achieved by other means) whereas the Brennan test of proportionality more narrowly focuses on the restriction and the goal requiring that the former not be extreme, regardless of the other options available. This view effectively allows to the Parliament what the European Court of Human Rights has

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[780] At p.708

[781] At p.705

[782] At p.708

called a "margin of appreciation"[783] in that in considering the implied freedom of communication, contemporary and relevant political conditions - not just the wording of the constitutional text - can and should be taken into account, and this can only be properly done by Parliament itself.[784] The job of a court then becomes one of ascertaining whether that political decision could have been reasonably made.[785] Brennan J thought that, on the evidence presented, it could.

Dawson J, on the other hand, found that no implied rights were infringed in this case. Contrasting the Australian constitution with that of the United States, his Honour pointed out that there is no expression in the former similar to the opening words of the US constitution which say: "We the People of the United States ... do ordain and establish this Constitution ...". As the Australian constitution was an Act of the British Parliament it does not derive its force from a power residing in the people. Consequently, "if implications are to be drawn, they must appear from the terms of the instrument itself and not from extrinsic circumstances."[786] This is not to say that individual rights can never be implied in the constitution nor that freedom of communication can be dispensed with in a free society.[787] Rather, the

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[783] The Observer and The Guardian v United Kingdom (1991) 14 EHRR 153 at 178

[784] Brennan J at p.712

[785] At p.712, relying on Gerhardy v Brown (1985) 159 CLR 70 at 138-9; Richardson v Forestry Commission (1988) 164 CLR 261 at 296; South Australia v Tanner (1989) 166 CLR at 167-8, 179-80.

[786] At p.721

[787] At p.724

issue is in the manner in which these freedoms are to be protected: in Australia, that manner is not in the form of individual rights specifically written into the constitution, but in the absence of any curtailment of them.[788] The result of this reasoning is a strict demarcation between legal and political questions. As his Honour was able to find that the electors had available to them means other than television and radio to be informed, he found himself unable to conclude that the restrictions on the electronic media were incompatible with what he nevertheless found to be a constitutional requirement for the electorate to be informed. The consequence was: "That being so, it is not for the Court to express any view whether the legislation goes far enough or further than is necessary to achieve its object. These are matters for Parliament and not the Court."[789]

Overall, all the judgements adopted a "transformationist" approach to the recognition in Australian law of international human rights: the latter are relevant only to the extent that they have been otherwise adopted into Australian law. Despite the several references to freedom of speech, freedom of movement and freedom of association, none of the judgements pays any heed to the documents which are now seminal in this respect - the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, both of which impose binding legal obligations on Australia with respect to international law. For the

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[788] At p.722

[789] At p.725

purposes of the "Political Advertising" case, these documents might as well never have existed. While six of the seven justices of the court, including one of the dissentients, found there to be implied freedoms in the Australian constitution, indicating that the omnipotence generally agreed to attach to the British Parliament in Diceyan terms does not attach to the Australian, these freedoms not only arise from that document, they are shackled to it. The decision in this case is therefore not a radical one. Indeed, on its facts it supports free speech for those who can afford to buy it and assumes that the more speech we have the freer we will be, but overturns legislation designed to give access to the media on the basis of ability to pay.[790] Free speech seems to have almost a symbolic value for the majority of the court, with actualities ignored. The judgement does not go into the depth found in Canada where distinctions have been drawn between the form and content of speech[791] or between speech and action.[792] Even though there is a reliance on reasonableness and proportionality (as Charter cases must undertake with respect to s.1), there is a significant difference between the judgements in the application of these and the purpose of the exercise is to identify the right through governmental limitations, rather than assess the validity of the limitations themselves in the light of an established right.

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[790] See Deborah Cass, "Through the Looking Glass: The High Court and the Right to Speech" (1993) 4 Public Law Review 229, where different critiques of free speech theory are applied to the judgement.

[791] R v Keegstra (1990) 2 SCR 727

[792] Irwin Toy Ltd v Quebec (Attorney-General) (1989) 1 SCR 927

This issue has been highlighted in the latest case to consider implied freedom of speech, the 1994 decision in Cunliffe v The Commonwealth.[793] This case involved amendments to the Commonwealth Migration Act 1958 which restricted the giving of immigration assistance except by registered agents who had to satisfy certain eligibility requirements and who had to pay a fee of $1000 for registration. The plaintiffs were lawyers, who were not so registered, and who had been accustomed in their practices to giving immigration advice in non-litigious matters (the amendments exempted "immigration legal assistance" from the requirement of registration). They argued that this infringed the implied constitutional right to freedom of communication.

The Court held 4-3 that the legislation was valid. All of the judges found that the legislation could be valid as an exercise of the aliens power in s.51(xix) of the Constitution and so the issue of an implied right of communication limiting the exercise of this power became central. Of the majority, Dawson and McHugh JJ held that there was no implied freedom of communication in the Constitution other than what might be inferred from its express terms (as opposed to its structure).[794] Brennan J found that the implied right was restricted to communication about political matters[795] and "to control the giving of

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[793] (1994) 68 ALJR 791

[794] At pp.834 and 852 respectively.

[795] He summarises, at p.814, the earlier judgements on the point as referring to communication "in relation to public affairs and political discussion", "on political and economic matters",

immigration assistance ... is not to impose a restriction on political discussion."[796] He distinguished political debate from the control of matters which might itself become a matter for political debate.[797] The implied right is a negative one and as such is not "a personal right ... amenable to definition and expansion by judicial declaration."[798] The fourth member of the majority, Toohey J, thought that the right to freedom of communication did apply to the legislation under consideration because it related to "the communication of information and the expression of opinions regarding matters that involve a minister of the Government."[799] However, he thought that the restriction did not go beyond what was reasonably necessary for an ordered and democratic society in that its aim was to improve the standard of advice given to immigrants.[800]

The three members of the minority all felt that the legislation was partly invalid and that an implied right of freedom of communication applied to it - Mason CJ because the right "necessarily extends to the workings of courts and tribunals" and

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"political discourse", "participation, association and communication in respect of the election of the representatives of the people", "discussion of governments and governmental institutions and political matters", and "communication of information and opinions about matters relating to the government of the Commonwealth."

[796] At p.815

[797] Ibid.

[798] At p.814

[799] At p.843

[800] At p.845

advice from lawyers is relevant to this,[801] Deane J because "it extends to the broad national environment in which the individual citizen exists and in which representative government must operate,"[802] and Gaudron J because "given the multicultural nature of Australian society [the legislation] operates in one of the most important of all areas of political communication."[803]

These three judgements are important because of the realistically wide view that they take of the influence of politics in modern Australia, and also because their outcome ultimately relies on the view taken of reasonable proportionality of the legislation to the restrictions it imposes on freedom of communication. In an ironic twist, it is the views of Brennan J, a member of the majority, which help in this analysis. His honour rightly points out that there are two different applications of the proportionality test. Where "purposive powers" are involved (ie, powers like the incidental power which is not described by reference to a class of legal, commercial, economic or social activity - such as trade and commerce, or marriage - or by specifying some class of public service - such as postal installations or lighthouses - or by naming a recognised category of legislation - such as taxation or bankruptcy)[804] the proportionality test is used to determine whether a law

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[801] At p.799

[802] At p.819

[803] At p.847

[804] See Stenhouse v Coleman (1944) 69 CLR 457 per Dixon J at p.471.

achieves a purpose or object that attracts the legislative power, as occurred in the Dams Case and the Lemonthyme Forest Case[805] where the extent to which the external affairs power could apply was in issue[806] (ie, a characterisation approach). On the other hand, in cases where legislative powers are qualified by an express or implied limitation, like the Political Advertising and Nationwide News cases, a law will not be supported by a power if it infringes the limitation on that power, unless that infringement is merely incidental and the law is reasonably proportionate to its purpose or object.[807] This was perhaps put more succinctly by Gaudron J who wrote:

> [The test for a purposive law] is whether the law is reasonably capable of being viewed as appropriate and adapted to achieving the purpose in question. Where the implied freedom is concerned, the test is more direct: it is whether the law is reasonably appropriate and adapted to the relevant purpose.[808]

Dawson J stated the difference this way: "The question in testing the validity of legislation which is reliant upon a purposive power is what it operates for, not what it operates upon."[809] These approaches nudge remarkably close to the proportionality test used in s.1 of the Canadian Charter and can be just as value-laden. However, here they are being used in an attempt to locate a right by reference to limitations on government power. As such, it is an exercise in the

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[805] At p.811

[806] These cases are discussed in detail in the next section on constructive rights.

[807] At p.812

[808] At p.848

[809] At p.830

location of human rights in the Australian legal system rather than in the definition of those rights. Thus, while in questions involving the characterisation of a law to determine its constitutional validity a certain margin of appreciation is left to the government, this is not so here and the court must make the determination.[810] It is therefore precisely here that some judges baulk at making "political" decisions.[811] On the other hand, Mason CJ had no such qualms. He said that the legislation would be valid if it is "reasonably appropriate and adapted to the preservation or maintenance of an ordered society under a system of representative democracy and government" and that to determine its reasonable appropriateness to that objective "calls for a weighing of the public interest in free communication as to political matters and the competing public interest sought to be protected and enhanced."[812] He thought that in general the legislation satisfied that test because it meant that only competent people would be giving immigration advice. However, to the extent that it restricted lawyers giving advice, it was not reasonably appropriate and adapted to its objects. Deane, Toohey and Gaudron JJ all applied this test by distinguishing between the operation of the restriction in the legislation on people giving the advice for a fee and its operation on those people who gave the advice for free. All were of the opinion that with respect to the

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[810] Per Mason CJ at p.800

[811] For example, Dawson J in Cunliffe said that the issue was "a matter for the Parliament" (at p.833).

[812] At p.799

former, the legislation was reasonably proportionate to its ends.[813] With respect to the latter, there was a difference of opinion. Deane and Gaudron JJ felt that the legislation was not proportionate as it militated against assistance being given to migrants.[814] Toohey J thought that it was proportionate because it sought to protect migrants from exploitation.[815]

Thus, the problems identified with this test in the context of Canada also arise in Australia. The proportionality test is not merely procedural: it can be substantive in the Australian context. However, it is the legitimacy of the means to an objective, rather than the desirability of the objective itself, which is assessed by the court. In the context in which this applies in Australia, it means that the courts slide past the issue of what rights are. Thus, in the latest case,[816] implications arising from voting for governments under constitutions did not extend so far as to affect disparities of voting power in those elections, as any implications drawn must be logically or practically necessary to preserve the integrity of the constitutional structure: underlying or overarching doctrines explaining this are not themselves independent sources of power, or obligation, conferred by the Constitution.[817]

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[813] Deane J at p.823, Toohey J at p.844, and Gaudron J at p.849 (although her honour says at p.850 that the restriction is not proportionate with respect to lawyers involved in court proceedings).

[814] Deane J at p.824; Gaudron J at p.849.

[815] At p.845

[816] McGinty & Ors v State of Western Australia (1996) 134 ALR 289, holding that legislation which did not provide for the equal value of votes was valid (as discussed above).

[817] Per McHugh J at pp.355-6.

That these principles apply (or not)[818] at the state level as well as the federal was alluded to (in obiter) in Nationwide News[819] and Australian Capital Television,[820] and confirmed by the court two years later in Theophanous v Herald & Weekly Times Ltd[821] and Stephens v West Australian Newspapers Ltd.[822] Both these cases involved defamation proceedings brought by politicians against newspapers, the first as a result of a letter to the editor accusing an MP of bias and the second because of an article calling an overseas trip by six politicians a "junket of mammoth proportions." Because the constitutions of the states contain provisions for voting, the same implication of political free speech arises, although it is not an absolute freedom and will be subject to the restrictions imposed on statements made with malice or with reckless disregard to the truth.[823]

The leading judgement in both cases was a joint judgement of Mason CJ with Toohey and Gaudron JJ. Deane J formed the other member of the majority in both cases. The joint judgement, following the dicta in the Australian Capital Television and Nationwide News cases found an implied right of political communication.

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[818] McGinty, ante.

[819] Per Deane and Toohey JJ

[820] Per Mason Cj, Deane, Toohey and Gaudron JJ

[821] (1994) 68 ALJR 713

[822] (1994) 68 ALJR 765

[823] Theophanous, at pp.717-8; Stephens at p.769 (per Mason CJ, Tochey and Gaudron JJ), 770 (per Brennan J), 782-3 (per Deane J), Dawson and McHugh JJ contra.

They found that the notion should be a wide one because of the constant flow of political information, ideas and debate across all levels of government and that it was not restricted only to matters relating to the federal government.[824] However, to attract the freedom, the speech does have to be political and "comment by a television entertainer would not ordinarily attract the constitutional protection" whereas discussion of persons engaged in activities that have become the subject of political debate, such as trade union leaders and political and economic commentators, would.[825] It can include "all speech relevant to the development of public opinion on the whole range of issues which an intelligent citizen should think about."[826] The statements in both cases were found to be protected. While couched in terms of a restriction on legislative and executive power, rather than a source of positive individual rights, (ie, as freedom "from" rather than freedom "to") the implied freedom may nevertheless help shape the Common Law.[827] The latter is thus influenced by the constitutional implications, rather than the other way around.

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[824] At p.717

[825] At p.718. Reports which are clearly not political and not covered by the freedom: John Fairfax Publications Pty Ltd v Doe (1995) 130 ALR 488 (publication of the "jockey tapes" in which the police had inadvertently discovered horse race "fixing" when tapping telephones for information about drug importation held not to be covered by the implied freedom). The difficulty here is in the grey areas, such as whether an entertainer satirising political happenings would be covered. See George Williams, "Engineers is Dead, Long Live the Engineers!" (1995) 17 Sydney Law Review 62 at 65-6.

[826] Ibid., referring with approval to E. Barendt: Freedom of Speech (1985) at 152.

[827] See Sally Walker, "The Impact of the High Court's Free Speech Cases on Defamation Law" (1995) 17 Sydney Law Review 43.

Deane J argued strongly for implications of rights arising from the Constitution despite what might have been intended by its framers. In an argument similar to the "living tree" argument of Canadian constitutionalism, he said:

> ... to construe the Constitution on the basis that the dead hands of those who framed it reached from their graves to negate or constrict the natural implications of its express provisions or fundamental doctrines would deprive what was intended to be a living instrument of its vitality and its adaptability to serve succeeding generations.[828]

Ignoring for the moment the assumptions made with respect to "natural implications" and "fundamental doctrines", as well as the question-begging reference to original intention, this approach is one well suited to a greater domestic implementation of human rights. However, his honour nowhere mentions human rights, but rather resorts to "contemporary social and political circumstances and perceptions"[829] to provide the content of the freedom. In this he is explicit, whereas the other members of the majority (who also said that the intentions of the framers should not be determinative) are implicit. It is a policy approach which the minority judges specifically reject.

Dawson and McHugh JJ retained their consistent line that implications of freedom of communication cannot be sustained.[830] Brennan J, while agreeing that such implications were sustainable, felt that they did not apply in this case. Extrinsic

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[828] At p.744

[829] At p.745

[830] At p.756 and 758 respectively.

sources should not be resorted to.[831] What could be used was the Common Law itself, as it was in a symbiotic relationship with the Constitution.[832] The precise relationship is not spelled out, but in practical terms in this case it means that the freedom is not absolute and the Common Law rules with respect to recklessly untruthful statements and malice will apply.[833] Gaudron J, in not such explicit terms, held similarly to her judgement in the Political Advertising Case when she said that: "As the implied freedom is one that depends substantially on the general law, its limits are also marked out by the general law."[834] Therefore, in situations where there was no inconsistency between the Constitution and the Common Law (if there were, the Constitution would prevail) the Common Law may inform the text and the implications of the Constitution by helping to ascertain the limits of a constitutional freedom. Brennan J considers that there is only a limited possibility of any inconsistency as these two areas of the law are directed to different ends: the Constitution deals with the structure and powers of the organs of government, while the Common Law deals with the rights and liabilities of individuals inter se.[835] This seems to be an almost obtuse statement considering the impact of this case. His honour does concede, however, that "theoretically it may be possible to postulate a constitutional imperative which limits or qualifies a

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[831] At p.728

[832] At p.727

[833] At p.734

[834] At p.737

[835] At p.734

common law rule affecting the rights and liabilities of individuals inter se" but sees problems with it, such as whether the Common Law rule is abolished or restricted by the Constitutional implication, and if so, how is the former to be read down in the light of the latter.[836] This approach sees the problem in terms of hierarchy. It is an illustration of the law in Australia groping for notions of fundamentality and, as yet, not finding any. The consequences of this approach are that the Common Law is not advanced by the Constitutional implications; instead, it is part and parcel of them. The Common Law balance already existing in defamation law between political discussion and protection of reputation was imported into the freedom. Brennan J rejected the use of decisions on the Canadian Charter on the basis that there was no relevant parallel between the Charter and the Australian Constitution. What was not canvassed, and what may help drag the Brennan approach into a more rights-useful mode, and lessen the dangers inherent in the explicit but uncontrolled policy approach of Deane J, is the fact of the symbiotic relationship that already exists between Australian law (including the Common Law) and international human rights norms, as explained in Chapters 3 and 4. This would provide an arguable and a more consistent and considered basis for the approaches. It would also accord more with Australia's obligation to implement human rights domestically. The High Court is still debating whether the implied constitutional freedoms extend to freedoms of participation and association.[837]

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[836] Ibid.

[837] See, for example, Australian Capital Television case (1992) 177 CLR 106 per Gaudron J at p.212 and McHugh J at pp.231-2.

What is clear is that as a result of these decisions Australia is recognised as having freedom of political discussion, not freedom of expression as found in UDHR Article 19 and ICCPR Article 19(2), or in section 2(b) of the Canadian Charter, where despite difficulties of interpretation and application,[838] including reasonable limits with respect to such things as trade marks and censorship, the freedom clearly applies to such things as access for purposes of court reporting[839] and commercial expression,[840] prompting one commentator to note that the Canadian courts tend to interpret the section 2 rights widely and "leapfrog" to a section 1 analysis.[841]

By comparison, a recent example of the constricted approach to this freedom in Australia is Minister for Foreign Affairs and Trade & Others v Magno & Another,[842] where the Political Advertising case and Nationwide News, (as well as Dietrich and Mabo which are discussed below) were all referred to. The case involved the placing of white crosses on a grass verge outside the Indonesian embassy to protest the massacre of Timorese civilians by the Indonesian military in Dili in 1991. The crosses were removed pursuant to Regulations made under the

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[838] See A. Wayne MacKay, "Freedom of Expression: Is It All Just Talk?" (1989) 68 Canadian Bar Review 713.

[839] Re Southam Inc. and The Queen (No. 1) (1983) 41 O.R. (2d) 113

[840] Irwin Toy, ante.

[841] Irwin Cotler, "Freedom of Expression", Chapter 17 in Armand de Mestral et al (eds): The Limitation of Human Rights in Comparative Constitutional Law (1986, Les Editions Yvon Blais, Cowansville), at p.375.

[842] (1993) 112 ALR 529

Diplomatic Privileges and Immunities Act 1967 which declared that certain provisions of the Vienna Convention on Diplomatic Relations[843] "have the force of law" in Australia. The issue before the Federal Court of Australia was whether the Regulations which authorised the Minister to have objects such as the crosses removed (because, in his opinion, their removal would be an appropriate step to take within the meaning of the Convention)[844] were valid. The majority of the court found that they were. Gummow J reiterated in detail the traditional approach to the recognition of international law by Australian courts,[845] effectively holding international law to be irrelevant in this case. As the regulations did not authorise the formation of an opinion which would be contrary to the Act, they were valid.[846] French J was of a similar opinion.[847] The majority focused on the procedural niceties rather than issues of substance. It was the dissentient, Einfeld J, who did the latter. Although accepting that international obligations are not usually relevant until incorporated directly into domestic law[848] he found that the right to freedom of expression was an essential consideration in the application of the

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[843] In particular, Article 22 which obliges parties to take all appropriate steps to protect the premises of another State's diplomatic mission against intrusion, damage or the impairment of its dignity, and Article 29 which obliges parties to take all appropriate steps to protect diplomatic agents from attacks on their person, freedom or dignity.

[844] Reg. 5A

[845] At pp.534-6

[846] At p.541. The court did not have to decide whether in fact the Minister's opinion had crossed this boundary.

[847] At p.558

[848] At p.565

articles of the Convention which had been so incorporated.[849] He further found that it was the intention of parliament (and not just the force of the international obligations alone, nor as a result of an implied right to political free speech) that this consideration should be balanced against the impairment to the dignity of a foreign embassy:

> ... the question of whether [the regulations] represent an authorised means of implementing the Convention obligation to prevent the impairment of the dignity of the diplomatic missions in Australia in general, and of the Indonesian Embassy in particular, must thus be approached in the context of, and as a balance between, two separate emanations of Australian parliamentary intent: the purposes and functions of the regulations in the context of their enabling Act and purpose, and the internationally recognised fundamental human right of freedom of speech as applicable in Australia.[850]

Finding the regulations not to be reasonably proportional to the right of free speech and expression,[851] his Honour found them to be invalid. While this appears on the surface to be a political judgement on the advisability of the Minister's decision, it is not. The regulations allowed for the removal of objects impairing the dignity of an embassy, but not for the removal of people who, presumably, could not be prevented from holding the crosses while in a protest procession outside the embassy. His Honour found this distinction to be "artificial and arbitrary."[852]

It therefore does not follow that the application of international human rights

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[849] At pp.566-7

[850] At pp.568-9

[851] At pp.577-9

[852] At p.578

obligations will necessarily entail a usurpation by the judiciary of the valid exercise of a discretion by the Executive. The situation so far indicates, however, that human rights are usually overlooked or regarded as irrelevant. And even when they are considered the approach is superficial. Thus in Magno none of the judgements considers the problem of the clash between two international legal obligations: preventing the impairment to the dignity of a diplomatic mission under Article 22 of the Vienna Convention on Diplomatic Relations and the rights to freedom of speech and assembly under Articles 19 and 21 of the ICCPR. Einfeld J in Magno said:

> ... Australians must be taken to have no constitutional or legislative guarantee of most of the rights in the ICCPR, other than those which the High Court is from time to time in individual case situations willing to imply. Such uncertainty about the ability of citizens to have their fundamental rights implemented in law, as opposed to loudly trumpeted and supposedly understood and accepted, may be unique for any people in the world.[853]

Such a situation is not unique, as a cursory glance at statements made in United Nations debates by regimes with the most appalling human rights records will show. His Honour went on to say[854] that he thought that the Australian parliament had no intention for such a situation to apply here. However, because of the Australian Constitution and the interpretation of it, and the limited recognition of international human rights norms by Australian courts, this situation does apply in Australia more often than not. The solution is either the adoption by the

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[853] At p.572

[854] Ibid.

Australian judiciary of a new paradigm with respect to the recognition of international human rights law[855] - an unlikely occurrence at the moment considering the fundamentally traditional approach to this matter in the latest cases - or the exercise of a political will indelibly stamped with the courage of its convictions.

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[855] As many commentators see the approach of the High Court with respect to implied freedom of expression as itself a paradigm shift from the Engineers approach: see for example A.R. Blackshield, "The Implied Freedom of Communication" in Geoffrey Lindell (ed): Future Directions in Australian Constitutional Law: Essays in Honour of Professor Leslie Zines (1994, Federation Press, Sydney), pp.232-68.

5.4.5 Constructive Constitutional Rights and Human Rights

The significance of constructive constitutional rights in Canada is not eliminated by the existence of the Charter because of the matters the Charter does not cover or the areas in which it does not operate. However, that significance is considerably lessened, whereas in Australia constructive constitutional rights have become the principal mechanism by which Australia has implemented its human rights obligations federally. Constructive rights provisions in the Australian Constitution (ie, express provisions which do not on their face provide for rights but which, because of they way they operate in the context of the Constitution, allow such rights to be imported into Australian law) are generated by the "external affairs" power in section 51(xxix) and the race power in s.51(xxvi).

The race power gives to the Commonwealth the power to make special laws with respect to the people of any race. Originally, the power expressly did not extend to the making of laws for the Australian Aborigines, whose welfare was thus left almost exclusively to the tender loving care of the states.[856] (This was altered after a referendum in 1967 which also removed s.127 - which provided that Aborigines would not be counted in any national or state census - from the Constitution.)[857] The original purpose behind the introduction of this power was

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[856] On the problems with this situation in Queensland, see Garth Nettheim: Victims of the Law: Aboriginal Queenslanders Today (1981, George Allen & Unwin, Sydney).

[857] Act No. 55, 1967, s.3

to enable the Commonwealth government to exclude Kanaka labourers who were being imported to work on Queensland's sugar cane farms for lower wages than paid to whites. (The implications for this with respect to violation of customary international law relating to slavery are discussed in Chapter 3). This head of power was based as much on racist concerns for a "white Australia" as on economic ones. Indeed, the leading contemporary commentary on the Constitution makes it plain that discrimination under this provision was a distinct possibility.[858] It was never intended to be of a human rights nature; rather, the intention was exactly the reverse. This provision, moreover, is narrow in its scope in that it allows the Commonwealth to make laws for "the people of any race for whom it is deemed necessary to make special laws." The majority of the High Court in Koowarta v Bjelke-Petersen[859] held that this means that the laws must be directed to a particular race and people of that race must need the special provisions in them. The power cannot be used as the basis for laws of general application like the federal Racial Discrimination Act 1975 (which is based on the external affairs power). It has, however, been used to vindicate rights. In particular, it was the basis for the Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975 and the Aboriginal and Torres Strait Islanders (Queensland Reserves and Communities Self-Management) Act 1978 which were enacted specifically to counteract restrictions on the ability of

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[858] Quick & Garran, ante, pp.622-3.

[859] (1982) 153 CLR 168

Aborigines and Torres Strait Islanders to own property, move residence and work under Queensland law.[860] After failing to persuade the Queensland government to amend its laws, s.51(xxvi) provided the basis for what Charlesworth has called "a rare confrontation" between the federal and a state government over human rights.[861] It provided another such confrontation in 1995 in The State of Western Australia v The Commonwealth.[862] In that case the validity of the Commonwealth Native Title Act 1993 (and its overriding effect on the Western Australian Land (Titles and Traditional Usage) Act 1993 by virtue of s.109 of the Constitution) was upheld by the High Court as a valid exercise of the race power. In this case, the High Court, while not resiling from the limitation that the laws must be "necessary" and "special", being directed to people of a particular race, held that the Native Title Act conferred a special form of title uniquely on certain Aboriginal and Torres Strait Islander groups.

Other than these instances, the race power has been little used. Political will was not strong enough to generate the rights that might have been. The analogous provision in Canada is section 91(24) which gives the federal Parliament exclusive powers over Indians and Indian reserves. It is thus a specific power, narrower than

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[860] See Garth Nettheim: Out Lawed: Queensland's Aborigines and Islanders and the Rule of Law (1973, Australia and New Zealand Book Company, Sydney).

[861] Hilary Charlesworth, "The Australian Reluctance About Rights", in Philip Alston (ed): Towards and Australian Bill of Rights (1994, Centre for International and Public Law/ Human Rights and Equal Opportunity Commission, Canberra), pp.21-53 at p.35.

[862] (1995) EOC 92-687

the Australian which refers to "people of any race" and thus is not what I classify as a constructive constitutional power with respect to human rights. As seen above, the Bill of Rights, after the initial success of the Drybones case was interpreted narrowly and did not provide equality for Aboriginal peoples.[863] Section 88 of the Canadian Indian Act[864] provides that aboriginal peoples are subject to "all laws of general application" in a province. While this means that there are circumstances where aboriginal laws might predominate,[865] provincial laws validly enacted within a provincial head of power will generally apply to Indians.[866] Racist legislation which fell within a head of power could be valid.[867] Thus, the situation is one where direct implementation of government policy can be undertaken, even if this does not necessarily accord with human

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[863] For example, Attorney-General for Canada v Lavell [1974] SCR 1349: women Indians lost their Indian status when marrying out of the tribe in circumstances where a man would not; Attorney-General for Canada v Canard [1976] 1 SCR 170: a law requiring succession to property of a deceased Indian having to be administrated by an official of the Department of Indian Affairs held to be valid.

[864] R.S.C. 1985, c.I-6

[865] For example, Casimel v Insurance Corporation of British Columbia (1993) 106 DLR (4th) 720 where Inuit adoptions were recognised for the purposes of death benefits. See H. Patrick Glenn, "The Common Law in Canada" (1995) 74 Canadian Bar Review 261 at 277-8.

[866] Four B Manufacturing v United Garment Workers [1980] 1 SCR 1031: provincial labour laws applied to a shoe-manufacturing business operating on an Indian reserve.

[867] Union Colliery of British Columbia v Bryden, ante, where a provincial law prohibiting "Chinamen" from working in mines was held to be invalid because it encroached on the exclusive federal power with respect to aliens; Co-Operative Committee on Japanese Canadians v Attorney-General for Canada, ante, where deportations of Japanese Canadians by the federal government was held to be valid because it fell within the federal residuary powers.

rights and is indeed driven by a racist ideology.[868] However, today it is the section 15 equality rights in the Charter together with sections 25 and 35-37 (which preserve existing rights and land claims) which are more important. They might also be used to import Canada's treaty obligations into Canadian domestic law,[869] although this has not yet happened. Ultimately, the most significant thing here is not the preservation of rights so much as what those rights are recognised as existing. Aboriginal title to lands is specifically recognised in Canada,[870] whereas in Australia the legacy of the doctrine of terra nullius has only recently been overturned.[871]

More important for human rights in Australia, however, has been the external affairs power. In a prescient statement, Quick and Garran surmised that the external affairs power "may hereafter prove to be a great constitutional battle-ground."[872]

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[868] See Bruce Ryder, "Racism and the Constitution: The Constitutional Fate of British Columbia Anti-Asian Immigration Legislation, 1884-1909" (1991) 29 Osgoode Hall L.J. 619.

[869] Hogg points out that section 35 of the Constitution Act which protects the rights created by treaties entered into with Indian tribes might extend to rights created by international treaties.

[870] See for example Calder v Attorney-General of British Columbia [1973] SCR 313; R v Sparrow [1990] 1 SCR 1075. This is particularly a result of the Royal Proclamation of 1763 which recognised Indian lands and prohibited their purchase.

[871] Mabo v Queensland (No.2). This is discussed in detail below with respect to judicial approaches to human rights matters.

[872] Quick & Garran, ante, at p.631.

There are now two aspects of the external affairs power which are significant to the impact of human rights: the treaty making power, and the power to implement treaty obligations domestically.

(a) Treaty making power

As section 51(xxix) of the Australian Constitution is not an exclusive Commonwealth power, some controversy surrounded the question as to whether the states could also conduct external affairs.[873] However, the argument that the states could exercise a concurrent external affairs power was unanimously rejected by the High Court in 1936,[874] reaffirmed in 1975[875] and 1982,[876] and subsequent practice has confirmed this view.[877] The situation is similar in

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[873] For the history of these developments, see Ramesh Chandra Ghosh: Treaties and Federal Constitutions: Their Mutual Impact (1961, The World Press Private Ltd, Calcutta), pp.53-55.

[874] R v Burgess; Ex parte Henry (1936) 55 CLR 608, Latham CJ saying at p.645 that this "follows the evident intention of the Constitution."

[875] "Whilst the power with respect to external affairs is not expressed to be a power exclusively vested in the Commonwealth, it must necessarily of its nature be so as to international relations and affairs. Only the Commonwealth has international status. The colonies never were and the States are not international persons.": New South Wales v Commonwealth (1975) 135 CLR 337, per Barwick CJ at p.373.

[876] "The ramifications of such a fragmentation of the decision making process as it affects the assumption and implementation by Australia of its international obligations are altogether too disturbing to contemplate.": Koowarta v Bjelke-Petersen (1982) 153 CLR 168, per Mason J at p.225.

[877] Contrast G. Sawyer, "The External Affairs Power" (1984) Federal Law Review 199; M. Crommelin, "Comment on the External Affairs Power", id, p.208. See also Zines: Commentaries on the Australian Constitution, ante, who supports the view that the states have no external affairs power (at p.37). Note also that in 1952, in

Canada, whose Constitution is in fact silent on treaty-making per se. However, the Supreme Court in the Labour Conventions Case made it clear that this power "resides in the Parliament of Canada,"[878] although on appeal the Privy Council made no comment on this point. Like the Australian states, the provinces can enter into valid agreements with foreign countries,[879] but these must be regarded as sui generis agreements and they are usually made pursuant to some umbrella agreement between Canada and the other country. Gotlieb has argued that the power is an exclusively federal one as it is the Governor-General (not the Lieutenant Governors) to whom the imperial prerogative powers were delegated, as well as the fact that it is the federal Parliament alone which has residuary powers and the POGG power.[880] The provinces have also never been recognised in

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a memorandum addressed to the Secretary-General of the United Nations, Australia stated: "although the Australian Constitution is federal in character, the component states have no international status, and the making of treaties is a function of the federal executive alone": UN Legislative Series, ST LEG/SER B/3, 1952. This view has not been challenged internationally: see Henry Burmester, "A Legal Perspective", Chapter 9 in Brian Galligan (ed): Australian Federalism (1989, Longman Cheshire, Melbourne), especially at pp.199-200. Note however that there is nothing to prevent a state from making an agreement of a contractual nature with a foreign country, and states often have permanent representatives in foreign countries (eg, all the states have Agents-General in London).

[878] [1936] SCR 461, per Duff CJ at p.488

[879] Attorney-General for Ontario v Scott (1956) 1 DLR (2d) 433: an agreement between Ontario and Great Britain for co-operative enforcement of maintenance orders held valid. For further examples, see Elliot J. Feldman & Lily Gardner Feldman, "Canada", Chapter 7 in Hans J. Michelmann & Panayotis Soldatos (eds): Federalism and International Relations: The Role of Subnational Units (1990, Clarendon Press, Oxford).

[880] A.E. Gotlieb: Canadian Treaty-Making (1968, Butterworths, Toronto), pp.28-30.

practice by any federal government to have an independent treaty-making power.[881] The generation of human rights norms at international level can therefore only be done in both Australia and Canada by the federal government.

While the external affairs power has been a part of the Australian Constitution since its inception there is no similar general power in the Canadian Constitution, and before 1919 both Australia and Canada had virtually no treaty-making power in any event. Although they did sign treaties in their own names and had been allowed by Britain to accede to or withdraw from some commercial treaties on their own volition,[882] the practice of negotiation of treaties was that the Imperial Government took the lead (although sometimes with a significant role played by the colony concerned) and the treaty would be signed by Britain together with the colony after it had been approved by the Colonial Office and the Board of Trade.[883] The rationalisation for this was that to do otherwise would harm the unity of the empire.[884]

This began to change after the First World War (because of the great Dominion

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[881] See generally A. Jacomy-Millette: Treaty Law in Canada (1975, U. of Ottawa Press, Ottawa), Part II, Chapter II.

[882] See R.B. Stewart: Treaty Relations of the British Commonwealth (1939, New York)

[883] See Ghosh, ante, Chapter 1. Original drafts of what is now s.51(xxix) of the Australian Constitution referred to a power with respect to "external affairs and treaties." The reference to treaties was dropped on the ground that it was otiose.

[884] Id., pp.11-13.

contribution to the Allied war effort) when Full Powers were issued to the Dominion representatives to sign the Peace Treaties. However, these were signed for the "British Empire" (and not separately by each Dominion) and were later ratified by Britain, but only after the approval of the Dominion Parliaments.[885] It was not until the Imperial Conference in 1926 that it was declared that the Dominions and Britain were autonomous equal communities within the Empire and entitled to direct their own domestic and external affairs.[886] This new status was given statutory recognition by the United Kingdom in 1931.[887]

Once it was recognised that the Dominions had full treaty-making power, that power could be exercised subject to their Constitutions.[888] In Australia, the power, as a prerogative of the Crown under the Common Law,[889] is exercised

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[885] Ibid. See also Gotlieb: Canadian treaty-Making, ante, pp.6-10, and Jacomy-Millette: Treaty Law in Canada, ante, Part I.

[886] Ghosh, id., p.14

[887] Statute of Westminster 1931 (UK) 22 Geo. V, c.4 (1931)

[888] See Leslie Zines, "The Growth of Australian Nationhood and its Effect on the Powers of the Commonwealth", Chapter 1 in Zines (ed): Commentaries on the Australian Constitution: A Tribute to Geoffrey Sawer (1977, Butterworths, Sydney); D.P. O'Connell & James Crawford, "The Evolution of Australia's International Personality", Chapter 1 in K.W. Ryan (ed): International Law in Australia, 2nd ed (1984, The Law Book Company, Sydney); James Crawford: The Creation of States in International Law (1979, Oxford U.P., Melbourne), pp.238-46.

[889] Note, however, that some commentators refer to the acquisition of full treaty making power by the Dominions by way of devolution of prerogative from the Crown as a fiction: Richard E. Johnston: The Effect of Judicial Review on Federal-State Relations in Australia, Canada and the United States (1969, Louisiana State U.P., Baton Rouge), Chapter 5; Geoffrey Sawyer, "Execution of Treaties by Legislation in the Commonwealth of Australia" (1956) II University of Queensland L.J. 297.

through the executive authority vested in the Queen and exercised by the Governor-General.[890] The Governors of the states are appointed separately as representatives of the Crown for state purposes, and unlike Canada they are not responsible to, nor agents of, the Governor-General.[891] There has been no transfer of the prerogative treaty making power to them. For this reason, treaty making in Australia is exclusively a federal power. This is so even for treaties on matters which are within the residuary legislative competence of the states. There is also nothing legally to prevent a treaty being concluded on matters which are contrary to existing state or federal law, but while it would bind the Commonwealth in international law it would not be automatically binding in Australian (or Canadian) courts,[892] and the Australian Constitution "attempted no ... departure from settled common law doctrine; the exercise of treaty-making power was not to create municipal law."[893] The situation in Canada is similar.

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[890] Section 61; R v Burgess; Ex parte Henry (1936) 55 CLR 608, per Latham CJ at 644; Commonwealth v Tasmania (1983) 57 ALJR 450 per Dawson J at p.562. Note that it is not entirely clear that s.61 is the true basis for this power (there having been no treaty making power for Australia in 1901) but this is now the accepted view: see O'Connell & Crawford, ante, p.28. Note further that in international law it may otherwise be recognised that persons other than the Governor-General are now recognised as having these powers for certain treaties: Vienna Convention on the Law of Treaties Art. 7(2).

[891] New South Wales v The Commonwealth (1932) 46 CLR 155 at 220.

[892] Administrator of German Property v Knoop [1933] Ch. 439; Republic of Italy v Hambros Bank Ltd [1950] Ch. 314; Attorney-General for Canada v Attorney-General for Ontario [1937] A.C. 236: "... the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action. Unlike some other countries, the stipulations of a treaty duly ratified do not within the Empire, by virtue of the treaty alone, have the force of law." (at p.347).

[893] Koowarta v Bjelke-Petersen (1982) 153 CLR 168, per Stephen J at p.212.

Although at one time challenged by Quebec,[894] treaty-making is performed by the federal government because of the Crown prerogative over foreign affairs and treaties which was formally delegated to the Governor-General in 1947.[895]

As an exercise of executive power, no approval of the federal legislature is required for a treaty to be ratified.

In Canada, it was made clear fairly early that a treaty could be made on any subject matter, even if that matter fell within the jurisdictional competence of the provinces.[896] As will be explained in the next section, domestic implementation of the treaty in Canada is another matter entirely. There is thus a bifurcation between the power of the Canadian federal government to conclude treaties and to implement them by legislation. This bifurcation has resulted in, and indeed necessitated, the extensive federal-provincial consultation process which has taken place in Canada before ratification of human rights treaties, as described in Chapter 4. Interestingly, what was also seen in that Chapter was that Canada became a party to most human rights treaties, and to the Optional Protocol of the

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[894] See Jacomy-Millette, ante, pp.54ff.

[895] RSC 1970 Appendix II, No.35.

[896] References re The Weekly Rest in Industrial Undertakings Act, The Minimum Wages Act, and the Limitation of Hours of Work Act (1936) 3 DLR 673: these were treaties dealing with matters which fell within the property and civil rights exclusive power of the provinces. This part of the case was not considered by the Privy Council: Attorney General for Canada v Attorney-General for Ontario (the Labour Conventions Case) [1937] AC 326.

ICCPR, before Australia. Again, the context must be taken into account, constitutional considerations being important but not the total explanation.

In Australia, particularly before the extent of the external affairs power began to be clarified, Commonwealth governments were reluctant to ratify treaties impinging on areas of state legislative competence without the prior approval of the states, and on a few occasions declined to ratify treaties when the states did not unanimously concur with the ratification.[897] However, this approach continued even after the High Court in the Burgess case[898] made it clear that it could, within limits,[899] have done so.[900] This in fact meant that Australia became a party to relatively few treaties[901] and contributed to the problem of federal state clauses in treaties and in reservations (rather than in co-operative federalism) made upon ratification, as discussed in Chapter 4 above. The issue is still significant.

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[897] For example, in 1929 the Commonwealth failed to ratify the Protocol on Arbitration Clauses of 1923 and the Convention on the Execution of Foreign Arbitral Awards of 1927 for this reason. See Ghosh, ante, pp.267-9.

[898] See below

[899] "The legislative power in s.51 is granted "subject to this Constitution" so that such treaties and conventions could not be used to enable the Parliament to set at nought constitutional guarantees elsewhere contained such, for instance, as ss.6, 28, 41, 80, 92, 99, 100, 116 or 117.": R. v Burgess; Ex parte Henry (1936) 55 CLR 608, per Evatt and McTiernan JJ at p.687.

[900] For example, several ILO Conventions, and in particular Convention No.47 (Forty Hour Work Week) were not ratified, or ratification was delayed, for this reason. Evatt and McTiernan JJ in their joint judgement in Burgess actually refer to this convention and expressly state on the Commonwealth's then approach: "In our opinion such a view is wrong." (1936) 55 CLR 608 at 682.

[901] See Crock, "Federalism and the External Affairs Power" (1983) 14 Melbourne U.L.R. 238 who points out that by 1957 Australia had ratified only 20 out of 107 ILO conventions (at pp.345ff).

Ratification of the ICCPR was delayed partly because of state concerns[902] as were ratifications of the Conventions on Torture and the Rights of the Child, as well as the adoption of the First Optional Protocol of the ICCPR.[903]

Australia has attempted to come to grips with this problem, but not particularly successfully. In a practice instigated by Prime Minister Menzies in 1961, the government agreed not to ratify or accede to a treaty until it had been laid on the table of both Houses for twelve sitting days.[904] This practice has fallen into desuetude. In 1977 the Commonwealth adopted Guidelines on Treaty Co-Operation, the purpose of which was not to share treaty making power with the states but rather to keep them informed of what was going on.[905] Principles and Procedures for Commonwealth-State Consultation on Treaties were adopted at the Premiers Conference in 1982 and endorsed by the Commonwealth in 1983.[906]

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[902] See G. Doeker: The Treaty-Making Power of the Commonwealth of Australia (1966, Nijhoff, The Hague), pp.223ff.

[903] See Hilary Charlesworth, "Australia's Accession to the First Optional Protocol to the International Covenant on Civil and Political Rights" (1991) 18 Melbourne U.L.R. 481.

[904] See N.D. Campbell, "Australian Treaty Practice and Procedure", Chapter 3 in K.W. Ryan (ed): International Law in Australia, 2nd ed (1984, Law Book Company, Sydney), especially at pp.53-55.

[905] See Henry Burmester, "A Legal Perspective", Chapter 9 in Brian Galligan (ed): Australian Federalism (1989, Longman Cheshire, Melbourne), p.203.

[906] See Galligan, ante, Appendix.

These were updated in 1992[907] and a Commonwealth-State Standing Committee on Treaties was established. Under these principles and procedures, the Committee meets at least twice per year, the states are informed of any treaty discussions in which Australia is considering participation and this consultation is continued through to the implementation stage when treaties bear on state interests. When the twice-yearly tabling of treaties in Parliament is done, some of the treaties have already been ratified. It is done for the information of Parliament. State views are taken into account (but are not determinative) and representatives of states are included in delegations where appropriate. With respect particularly to human rights treaties, the Standing Committee of Attorneys-General has a standing agenda item on human rights. (This Committee is also used as the co-ordinating point for consultations in the preparation of Australia's reports under the treaties. In appropriate cases, industry and other interest groups are consulted.)[908] Again, this is not mandatory[909] and the system is not foolproof as the states sometimes

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[907] See Brian Opeskin, "The Role of Government in the Conduct of Australia's Foreign Affairs" (1994) 15 Australian Yearbook of International Law 129 at pp.136ff. A copy of the Principles and Procedures is reproduced as Appendix Four in A Review of Australia's Efforts to Promote and Protect Human Rights, Joint Standing Committee on Foreign Affairs, Defence and Trade (1994, AGPS, Canberra).

[908] See Australia and International Treaty Making: Information Kit, October, 1994 (Commonwealth Government)

[909] In a joint Press statement on January 13, 1994, the National Farmers' Federation, the Australian Mining Industry Council, the Council for International Business Affairs, the Metal Trades Industry Association, the Australian Chamber of Commerce & Industry, the Business Council of Australia, the Environment Management Industry Association, and the National Association of Forest Industries called for more consultation in the treaty making process.

pass legislation contrary to Australia's human rights obligations.[910]

There have also been suggestions to alter the fact that federal Parliament has no formal constitutional role in the treaty making process[911] and to rennovate the system generally.[912] The treaty making process is thus not a populist one. It is primarily an executive process. However, criticisms from the industry groups mentioned above that the process is undemocratic miss the most important issue. It is not the number of participants in the treaty making process which matters. It is the evolving effect treaties have come to have on Australia's domestic concerns

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[910] In evidence to the joint Standing Committee on Foreign Affairs, Defence and Trade in 1993, the Principal International Law Counsel from the Attorney-General's Department said: "We have close contact with the states and territories; we rely on them for information when preparing reports. In that sense we are informed of adherence [to human rights obligations]. ... But there are instances such as the WA legislation relating to juvenile justice; that happened more or less before anyone realised because of the push for it in WA." (A Review of Australia's Efforts to Promote and Protect Human Rights, ante, p.41). Counsel was referring to the Western Australian Crime (Serious and Repeat Offenders) Sentencing Act 1992, which was aimed at "hard core juvenile criminals" and under which indeterminate detention was mandatory for repeat juvenile offenders, which was a clear breach of Australia's obligations under Article 40(a) of the Convention on the Rights of the Child. The provision was later extended to adults to overcome this problem.

[911] In 1983, Senator Brian Harradine introduced a private member's Bill to this effect: Treaties (Parliamentary Approval) Bill. The latest, in May, 1995, is by Senator Bourne: A Bill for an Act to Provide for the Parliamentary Approval of Treaties and for Related Purposes.

[912] The Report of the Senate Legal and Constitutional References Committee "Trick or Treaty? Commonwealth Power to Make and Implement Treaties" (1995, AGPS, Canberra) recommends that treaties be required by legislation to be tabled before both Houses of Parliament for at least 15 sitting days prior to signature or ratification (Recommendation 8); that a Parliamentary Committee on Treaties be established which will, inter alia, prepare a treaty impact statement (Recommendation 10); and that the proposed Treaties Committee should investigate the issue of requiring Parliamentary approval of treaties (Recommendation 11).

which is the real issue, beyond the motivations which lay behind the original exercise of executive discretion.

(b) The treaty implementing power

The Canadian Constitution specifically provides in section 132 that the federal Parliament and government have "all powers necessary or proper for performing the obligations of Canada or of any province thereof, as part of the British Empire, towards foreign countries arising under treaties between the Empire and such foreign countries." On its face, this section appears to conclusively answer the question of the power to implement treaties. But it does not. The development of this issue in Canada has revolved around four references to the Supreme Court. The first[913] involved the interpretation of Canada's obligations under Article 405 of the Treaty of Versailles which required parties to "bring the recommendation or draft convention [of the International Labour Conference] before the authority or authorities within whose competence the matter lies, for the enactment of legislation or other action." The court held that there was no obligation on Canada to enact legislation but only to bring the matter before whichever authority was competent to legislate on employment standards, leaving it to that body to decide what to do. The case is interesting on a number of points. As legislation based on

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[913] In the Matter of Legislative Jurisdiction over Hours of Labour [1925] SCR 505

the treaty was not in issue, it would not have arisen in Australia where the High Court has no authority to answer references. Consequentially, the issue of interpreting a treaty directly, without reference to actions taken by a federal or provincial government, was undertaken - which would also not arise in this way in Australia. For Canada in particular, the significance of this case is that it set the tone for domestic implementation of treaties: the approach, even in a reference, was one of choosing (usually between) the exclusive spheres of authority established by sections 91 and 92 of the Constitution.

The next case has already been mentioned: Re the Regulation and Control of Aeronautics in Canada.[914] This did involve legislation: federal legislation implementing the 1919 Convention relating to the Regulation of Aerial Navigation. This was a treaty to which section 132 of the Constitution clearly applied. However, in what must be regarded as obiter, Lord Sankey stated that the subject matter of the treaty, being one of national interest and importance, was one which fell within the POGG power of the federal government,[915] thus recognising that new technology had created a new field of jurisdiction not contemplated in 1867 - and interpreting the Constitution so that it could cope.

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[914] [1932] AC 54

[915] At p.78

In the same year, Reference re Regulation and Control of Radio Communication[916] was decided. This also involved the validity of federal legislating implementing a treaty, the 1927 International Radiotelegraph Convention. The difference here was that this treaty had been signed by Canada along with, but independently of, the United Kingdom. It was thus not one to which s.132 necessarily applied (a view agreed with by the Privy Council) and it was argued by Quebec and Ontario that in such a case implementation was a matter of provincial authority under s.92(13) (property and civil rights) and s.92(16) (matters of a local nature in the province). The Privy Council rejected this argument, holding that the subject matter fell within the exceptions to provincial power in s.92(10) as well as the federal residual power.[917] Again in what is arguably only an obiter dictum, Viscount Dunedin stated: "... though agreeing that the Convention was not such a treaty as is defined in s.132, their Lordships think that it comes to the same thing ... It is Canada as a whole which is amenable to the other powers for the proper carrying out of the convention; and to prevent individuals in Canada infringing the stipulations of the convention it is necessary that the Dominion should pass legislation which should apply to all dwellers in Canada."[918] This approach did not interpret s.132 in the light of modern conditions, but rather introduced an approach based on what is "proper" and "necessary" for Canada, concepts which are not explained in the judgement.

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[916] [1932] AC 304

[917] At pp.314-17

[918] At pp.311-13

From these cases, the assumption was made by the federal government that it had exclusive power to implement treaties. This assumption was laid to rest shortly afterwards, in 1937, in the Labour Conventions Case.[919] This involved the validity of three federal statutes[920] which were part of Prime Minister Bennett's "New Deal" for a depression-era Canada. They were based on three ILO Conventions which Canada had ratified.[921] After being held valid because of the equal division of the Supreme Court on the matter (essentially, on the one hand, following the Aeronautics and Radio cases and, on the other, seeing a bifurcation between the power to create treaties and the power to implement them), the case went to the Privy Council, which followed the latter approach, holding that the earlier cases were not authority for a general exclusive power with respect to treaties being conferred on the federal government. In the much quoted phrase of Lord Atkin:

> It must not be thought that the result of this decision is that Canada is incompetent to legislate on performance of treaty obligations. In totality of legislative powers, Dominion and Provincial together, she is fully equipped. But the legislative powers remain distributed, and if in the exercise of her new functions derived from the new international status Canada incurs obligations they must, so far as legislation is concerned, when they deal with Provincial classes of subjects, be dealt with by cooperation between the Dominion and the Provinces. While the ship of state now sails on larger ventures and into foreign waters, she still retains the watertight

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[919] Attorney-General for Canada v Attorney-General for Ontario [1937] AC 326

[920] The Weekly Rest in Industrial Undertakings Act, S.C. 1935, 25 & 26 Geo. 5, c.14; The Minimum Wages Act, S.C. 1935, 25 & 26 Geo. 5, c.44; The Limitation of Hours of Work Act, S.C. 1935, 25 & 26 Geo. 5, c.63.

[921] ILO 1 (Hours of Work (Industry), 1919); ILO 14 (Weekly Rest (Industry), 1921; ILO 26 (Minimum Wage - Fixing Machinery, 1928).

compartments which are an essential part of her original structure.[922]

This bifurcation has been called Canada's "uncomfortable legacy" of this case.[923] It favours the internal balance in the constitutional division of power at the expense of a comprehensive approach to the nature of external affairs. The problem is that the watertight compartments are not so watertight today and this judgement, offering a finite rather than an organic approach to exclusivity in the Constitution,[924] creates a poor template to cope with change. It is statutory interpretation, not constitutional interpretation. It fixes section 132 in its 1867 context, when Canada had no treaty-making capacity of its own, the result now being that this section can never apply to any human rights treaty to which Canada is, or may become, a party. As a result, Canada is forced to negotiate its international human rights commitments on two fronts, the international and the domestic,[925] lest it be in breach of law at both levels.

The judgement is therefore a combination of a narrow legalism with respect to s.132 with an adherence to fundamental principles of federal constitutionalism respecting the division of powers. Today, the former is to be deplored as it does

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[922] At pp.353-4

[923] Rosemary Rayfuse, "Treaty Practice: The Canadian Perspective" in Philip Alston & Madelaine Chiam (eds) Treaty-Making and Australia: Globalisation versus Sovereignty? (1995, The Federation Press, Sydney), pp.253-65 at p.253.

[924] See H. Scott Fairley, "Canada, External Affairs and the Constitution: A Theory for Judicial Review", unpublished thesis, Harvard University, 1987, at p.57.

[925] See Rayfuse, ante, at p.258.

not allow the constitution to remain a document which is meant to work in current conditions. The latter, however, is a valid and even a commendable approach which respects the balance inherent in the very nature of federation. However, here it is sown with the seed of a fundamental problem. The Law Lords of the Privy Council were British jurists who trained and worked in a system of law operating in a unitary State where the Executive, which makes treaties, relies on the continuing confidence of the Parliament, which implements them. There is thus a necessary structural connexion between the two powers which, while separate, are in reality in a symbiotic relationship with each other. In a federation, this is not so: the federal executive and the provincial legislatures have a connexion only through the Constitution and only with respect to the subject matter of legislation - neither needs the confidence of the other in deciding whether to undertake an obligation at either international or domestic level. The Labour Conventions case appears to be a view of federalism based on a presumptive paradigm of a unitary State. The result for Canada is that in order to fulfil its international obligations with respect to domestic implementation, thirteen separate pieces of legislation may be necessary. There is nothing in the Canadian Constitution which encourages, let alone requires, that legislation to be uniform. The result is that while the "watertight compartments" of the Canadian Constitution may in principle keep the federal ship of state afloat, in reality they are about as useful as they were for the Titanic!

The Supreme Court has indicated that the time may be ripe for a reconsideration of the Labour Conventions case, but only in obiter dicta.[926] The issue was not addressed in the constitutional amendments in 1982. Labour Conventions thus remains good law in Canada - for the time being.

On the other hand, a revolution has occurred in Australian constitutional law as a result of Australia's international obligations. This can be seen by comparing the statements made in the second[927] and fifth[928] editions of Lane's Introduction to the Australian Constitution.

The subject matter of treaties to which Australia might become a party is unlimited,[929] but there are limitations on the Commonwealth with respect to the making of domestic laws with respect to its external affairs power, particularly if the subject matter of the treaty is within the residual powers of the states.

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[926] MacDonald v Vapour Canada Ltd (1976) 66 DLR (3d) 1; Schneider v The Queen (1982) 43 NR 91.

[927] "There is no external affair when the matter is simply Australia's own business ... I do not think that a Bill of Rights could be built on the external affairs power ... That kind of thing is the business of each country itself and by itself." P.H. Lane: An Introduction to the Australian Constitution, 2nd ed, (1977, Law Book Company, Sydney), p.102.

[928] "Since Koowarta's case and the Tasmanian Dam case the external affairs power has come into its own - or, to put it paradoxically, has come into internal affairs. And there are virtually no limits to the topics within this wide power if the Commonwealth wants to use it. ... The Commonwealth Government can now enter into a whole range of treaties ... [and] armed with these grenades, the central government can force its politics on the States, overrunning inconsistent State laws if the States refuse to capitulate." Op cit, 5th ed (1990, Law Book Company, Sydney), p.100.

[929] Burgess, ante, per Evatt and McTiernan JJ at p.681.

Amendment of the Constitution can only be done via the processes in s.128: back-door methods are invalid.[930] Also, both the express and implied constitutional limitations to Commonwealth power mentioned above are relevant.[931]

However, the Constitution can also be enabling with regard to the implementation of treaties. There are no specific limits placed on the external affairs power that are not limitations within the Constitution generally.[932] Most significantly, within the limits just mentioned, it does not matter that the subject matter of the legislation might otherwise be within the power of the states.[933] It can operate extra-territorially, even outside the area of the Commonwealth, its territories or of

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[930] Burgess, ante, per Latham CJ at 642.

[931] Burgess, ante, per Starke J at 658. In the same case Latham CJ, in obiter, gave the following example at p.642: "Section 116 of the Constitution provides that the Commonwealth shall not make any law for establishing any religion ... If the Commonwealth were to pass a law in pursuance of a treaty establishing a form of religion such a law would simply be invalid." Other examples would be treaty-based laws giving preference to one State over another in trade, commerce or revenue (s.99), laws abrogating the freedom of interstate trade and commerce (s.92), laws prohibiting the reasonable use of river water for irrigation (s.100), etc. Dixon J in A.R.U. v Victorian Railway Commissioners (1930) 44 CLR 319 stated that because s.106 stipulates that each state constitution shall continue after federation, there may be a difference between the power of the Commonwealth over the states and the power of the Commonwealth over individuals (at p.391). However, s.106 is itself expressly made subject to the constitution, and this, together with later interpretations of the external affairs power, seems to have put paid to this concern.

[932] Roche v Kronheimer (1921) CLR 329, per Higgins J at 338. This case held valid the Treaty of Peace Act 1919 even though it made laws with respect to matters within (rather than physically external to) Australia and affected the private rights of citizens and aliens.

[933] Commonwealth v Tasmania (1983) 158 CLR 1, which is discussed in detail below.

the states.[934] It has a scope at least equal to that of section 132 of the British North America Act[935] (now the Constitution Act), but has since been interpreted to apply way beyond that provision.

The precise scope of the external affairs power has been analysed in several leading cases. In R v Burgess; Ex parte Henry[936] the issue was whether the Commonwealth could make laws which required an aircraft pilot flying only within the state of New South Wales to obtain a licence pursuant to Air Navigation Regulations issued under Commonwealth legislation based on the Air Navigation Convention of 1919. The High Court held that the part of section 4 of the Act which provided that "the Governor-General may make regulations for the purpose of carrying out and giving effect to the Convention" was valid, but that the part of the same section which went on to provide that regulations could also be made "for the purpose of providing for the control of air navigation in the Commonwealth" was not. In the absence of an express power in the Constitution allowing the Commonwealth to control the entirety of civil aviation, laws based on a treaty dealing with some aspects of that subject could not be used to make laws on the entirety of that subject matter. But some laws could be enacted, even if the subject matter was otherwise normally within state rather than federal competence. Where

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[934] Jolley v Mainka (1933) 49 CLR 242, holding that the New Guinea Act 1920, which extended the provisions of the Bank Act to the Mandate of New Guinea was valid.

[935] Jolley v Mainka, ante, per Evatt J at 284.

[936] (1936) 55 CLR 618

the line is to be precisely drawn is not made clear. Latham CJ[937] and Evatt and McTiernan JJ[938] were of the view that the only relevant limits were those prohibitions specifically contained in the Constitution together with the implied prohibition that the Constitution could not be amended by indirect means. Starke J made no definitive pronouncement, holding that "it may be ... that the laws will be within power only if the matter is of sufficient international significance to make it a legitimate subject of international co-operation and agreement."[939] Dixon J referred to matters "indisputably international in character" as being a requirement for the legislation to be properly one with respect to external affairs.[940]

Despite the differences in opinion, what this case did was to clearly open the door to an interpretation of the external affairs power much wider than in the Labour Conventions case. Burgess was decided only a few months before that Privy Council decision. Had it been delayed, for whatever reason, and been decided in the light of Labour Conventions, the course of Australian constitutional law on this point may have been totally different. It is another example of the impact of an incident which in itself may be minor or trivial but which, in the developmental matrix overall, can produce profound effects.

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[937] At p.642

[938] At p.687

[939] At p.658

[940] At p.669

Although the Australian external affairs power is not limited to the external aspects of other specifically enumerated federal subjects,[941] and can apply to acts occurring within Australia as well as outside it,[942] if it is based on a treaty it is necessarily limited to what that treaty provides and cannot go unreasonably beyond it.[943] But does this require exact duplication of the treaty? Do its words need to be repeated or is the incorporation of its intention in the legislation enough?[944] In other words, once the issue of subject matter is settled, there is then the question of conformity of the law to the treaty. There was no uniformity on this point either, although subsequent decisions have seen a more flexible approach to this question. The Commonwealth amended its Air Navigation Regulations and as early as 1938 a case involving the same pilot, arrested this time for flying below regulated altitudes, held the regulations valid even though they applied to areas not mentioned in the Convention.[945] The approach was therefore quite different to the

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[941] Per Latham CJ at 639.

[942] Per Evatt and McTiernan JJ at 679.

[943] For example, the Convention limited the registration of aircraft to nationals of the relevant Party, while the Act provided for registrations of British subjects and others; the Convention provided exemptions for nationally-owned aircraft, while the Act provided exemptions for state owned aircraft; the Convention provided for medical examinations of pilots every six months, whereas the Act required only an initial examination.

[944] For example, Evatt and McTiernan JJ had doubted the validity of the Act changing the measurements in the Convention, which were expressed in metres, into feet and inches (at p.693). Contrast Starke J who stated that: "All means which are appropriate, and are adopted to the enforcement of the convention and are not prohibited, or are not repugnant to or inconsistent with it, are within power." (at p.659).

[945] R v Poole; Ex parte Henry (No. 2) (1938) 61 CLR 634. Rich J held that there need not be a "reproduction of the rules contained in the Convention" (at p.644) and Starke J held that it is up to the discretion of Parliament to determine the most appropriate and

Canadian Aeronautics Case which upheld the validity of Dominion aeronautics regulations, inter alia, under the POGG power because of the national interest and importance of the subject matter.[946] On that basis, POGG might have become an important mechanism for the introduction of human rights legislation based on treaties (as the need for national standards for human rights implementation can be easily argued). The Supreme Court of Canada has since resiled from this approach[947] but it has been resurrected in some cases.[948] It is unlikely to arise in this context in a significant way now, once again because of the Charter.

A further problem arises when it is unclear whether the treaty imposes an obligation to act or whether it is merely facultative. This aspect of human rights treaties and Australia's and Canada's precise obligations was discussed in Chapter 4. Can the Commonwealth validly enact only its strict obligations under a treaty? And, must the Commonwealth enact all of those obligations, or can it be selective? There have been three important cases in which the High Court has split 4-3 on

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effective means of implementing a treaty, although "within reason" (at p.648).

[946] Re The Regulation and Control of Aeronautics in Canada [1932] AC 54

[947] Reference Re Anti-Inflation Act (1976) 68 DLR (3d) 452, where five judges held that POGG could never be used to justify legislation merely because it was addressed to a problem of national concern. The legislation was however upheld here, but under the "emergency" branch of the POGG power.

[948] For example, R v Crown Zellerbach [1988] 1 SCR 401 where Le Dain J, writing for the majority held the federal Ocean Dumping Control Act valid - including within the boundaries of British Columbia - because "marine pollution, because of its predominantly extra-provincial as well as international character and implications, is clearly a matter of concern to Canada as a whole." (at p.436).

these issues. In Airlines of NSW Pty Ltd v New South Wales (No. 2)[949] the majority of the court[950] held that Air Navigation Regulations, this time under the Chicago Convention on Air Navigation, were valid as they were directed towards implementing the treaty, whereas the minority[951] held that they were not valid as they did not implement clear obligations placed on Australia by the treaty.

In Koowarta v Bjelke-Petersen[952] the principal issue was the validity of the Racial Discrimination Act 1975 which was based on the International Convention on the Elimination of All Forms of Racial Discrimination. The matter had come to a head when a group of Aborigines, the Winychanam people, sought to purchase the leasehold of some land in Queensland. The existing lessees were agreeable, but approval of the Queensland Minister of Lands was required under the Land Act 1962 (Qld). This approval was refused on the basis that it was Queensland Government policy not to approve transfers of large areas of land for development by Aborigines. This refusal was challenged under the Racial Discrimination Act and the Queensland government challenged the validity of that Act. The views of the court can be for convenience classified into the narrow view and the broad view of the s.51(xxix) power.

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[949] (1965) 133 CLR 54

[950] Barwick CJ, McTiernan, Menzies and Owen JJ.

[951] Kitto, Windeyer and Taylor JJ.

[952] (1982) 153 CLR 168

Under the narrow view, which found favour with the majority of the court,[953] it was considered that to allow the Commonwealth to enact all its international obligations without limitation would upset the federal balance established by the Constitution[954] and that "a law which gives effect within Australia to an international agreement will only be a valid law under s.51(xxix) if the agreement is with respect to a matter which itself can be described as an external affair."[955] The test for this is whether the matter involves Australia's relations with other countries or with persons or things outside Australia,[956] or is a matter of "international concern."[957] It is not enough that Australia has simply entered into a treaty. A law which dealt with racial discrimination did not fulfil this criterion according to three judges of the narrow view.[958] However, for one other judge of the narrow view, Stephen J, it did.[959] Thus, even though the juridical majority in this case expressed the narrow view of the external affairs power, the Act was nevertheless held to be valid. Stephen J came to his conclusion by relying upon the Convention itself as well as the UN Charter and the Universal Declaration of Human Rights.[960] Thus even though he took a narrow approach to the external

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[953] Gibbs CJ and Stephen, Aickin and Wilson JJ.

[954] See Gibbs CJ at p.198

[955] Per Gibbs CJ at p.200, emphasis added.

[956] Gibbs CJ at p.200

[957] Per Stephen J at p.217

[958] Gibbs CJ, Aickin and Wilson JJ.

[959] At p.218

[960] At pp.218-20

affairs power, a synergistic effect occurred when that power was combined with international human rights law, like opening the door of a musty room to the daylight.

The judges adhering to the broad approach[961] stressed the canon of constitutional construction that the Constitution should be interpreted liberally rather than narrowly or pedantically,[962] and that any disturbance to the federal balance was a necessary one precisely because the external affairs power was given to the Commonwealth rather than to the states, that the latter have residual rather than reserved powers, and that to do otherwise would be unrealistic.[963] In an interesting, and somewhat postmodern comment, Mason J regarded as a false assumption the implication that the categories of "internal" and "external" affairs are mutually exclusive ones. External affairs can operate under laws dealing exclusively with actions inside Australia.[964] He particularly uses the example of human rights treaties as falling into this category.[965] Thus, Commonwealth legislation can validly enact any obligation assumed by Australia under a treaty,[966] provided the legislation does not infringe the express or implied

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[961] Mason, Brennan and Murphy JJ.

[962] See Mason J at p.222

[963] See Mason J at pp.227-229

[964] At pp.226-7.

[965] At p.230

[966] Gibbs CJ at p.224; Brennan J at pp.259-60.

limitations set by the Constitution[967] and the treaty is genuine rather than some "colourable" attempt to convert a purely domestic matter into an external affair.[968] The latter qualification was not new,[969] but its application in any realistic sense is unlikely[970] and was described by Gibbs CJ as "at best ... a frail shield,"[971] although the High Court has recently alluded to "some real questions of sham or circuitous device to attract legislative power."[972] In the context of implementing human rights norms, this qualification is meaningless, except to the extent that it may be regarded as an application in this context of the well-established requirement that in determining the validity of Commonwealth legislation the court must look to the substance as well as the form.[973] The court's broad approach is realistic and purposive, recognising the adverse

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[967] Per Gibbs CJ at p.225-6. Thus, in Queensland Electricity Commission v Commonwealth (1985) 159 CLR 192 it was held that legislation based on the International Covenant on Civil and Political Rights, specifically to override laws in Queensland which were passed to break an electricity strike in that state and under which people could be forced to work, was invalid as it breached the constitutional limitation that the Commonwealth cannot single out any state for special treatment.

[968] Per Gibbs CJ at p.231; Brennan J at p. 260. See also Stephen J who stated that the treaty should have been entered into in good faith (at p.216).

[969] See Burgess, ante, per Latham CJ at 642, Starke J at p.658, Dixon J at p. 669, and Evatt and McTiernan JJ at p.687. See also Airlines of NSW (No. 2), ante, per Barwick CJ at p.85.

[970] Mason J in Koowarta refers to "a colourable treaty, if that can be imagined" at p.231. See also Zines: The High Court and the Constitution, ante, at pp.237-8 who writs: "It is difficult to understand how this could ever be proved."

[971] Koowarta, ante, at p.200

[972] Horta v Commonwealth (1994) 181 CLR 183 at p.195.

[973] R v Barger (1908) 6 CLR 41

consequences if domestic implementation of international obligations were left to the states.[974] The widest view of all was expressed by Murphy J who held that the domestic implementation of any treaty at all would attract the external affairs power.

Hanks has commented that, overall, this case offered a range of alternatives rather than clear guidance as to the extent of the power to implement treaties.[975] What should also be noted is the reluctance of the court, particularly on the part of the judges adhering to the narrow view, to break out of the constitutional paradigm around which the case revolves and attack the very nub of the issue: the appalling racism of the Queensland government. Being required to adopt this paradigm resulted in the issue being neutralised. But more than this, the narrow view, by refusing to adopt any approach connected with a synergy between international law and Australian law, both devalued and misinterpreted the former,[976] and impoverished the latter. It is a refusal to see the "external" as also "internal".

The third case involving the barest of judicial majorities was Commonwealth v

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[974] Mason J. at p.225

[975] P.J. Hanks: Australian Constitutional Law: Materials and Commentary, 4th ed, (1990, Butterworths, Melbourne), at p.780.

[976] For example, Gibbs CJ contrasted major issues based on race, such as genocide, with what he termed more "trivial" acts of racial discrimination. (at pp.205-6). Such a distinction is completely counter to the wording of Article 1 of the Racial Convention ("any ... restriction ... based on race...") and also with Article 5(d)(v) which guarantees the right to own property.

Tasmania[977] (the Dams case). Australia is a party to the UNESCO Convention for the Protection of the World Cultural and Natural Heritage, under Article 4 of which parties recognise the duty to identify, protect and conserve the natural heritage, and under Article 5(d) of which they "shall endeavour, in so far as possible ... to take appropriate legal ... measures." Article 34 of the Convention contains a federal clause which provides that where implementation provisions of the Convention come under the legal jurisdiction of the constituent states of a federation, the obligation of the federal body is to inform the states and recommend their adoption. In 1982, the Tasmanian Parliament passed legislation[978] to build a dam in a national park listed under the Convention's World Heritage List. The Commonwealth made the World Heritage (Western Tasmania Wilderness) Regulations under the National Parks and Wildlife Conservation Act 1975 prohibiting the construction of the dam. The Commonwealth sought a declaration from the High Court that the construction of the dam by Tasmania (which would otherwise have been lawful as within a state's powers) was unlawful. Tasmania sought declarations that the Commonwealth legislation was invalid.

The composition of the High Court had changed since Koowarta: Stephen J had become Governor-General and Aickin J had died. The point was thus worth re-

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[977] (1983) 158 CLR 1

[978] Gordon River Hydro-Electric Power Development Act 1982 (Tas)

litigating. Interestingly, Gibbs CJ and Wilson J, while remaining of the narrow view, abandoned their earlier arguments in favour of the approach of Stephen J (ie, that the subject matter of the legislation had to be something of international concern, even if dealing with something which is not necessarily physically external to Australia). They held, as did Dawson J,[979] that the protection of the environment and the cultural heritage, while important, was not of sufficient international concern to make it part of Australia's external affairs. Having decided that, in what must then be regarded as an obiter dictum, Gibbs CJ held that in addition the Convention imposed no obligations on Australia (particularly in the light of the federal clause) and that, even though the Commonwealth could be selective about the implementation of its international obligations, there must at least be an obligation, as opposed to a recommendation, to implement.[980] In particular, his honour together with Wilson J was concerned about the self-defining nature of the duties in the Convention (which are, in this respect, similar to many duties in the human rights treaties discussed in Chapter 4). The interpretative method used was in fact one more suited to domestic law than international law, despite the fact that both Gibbs CJ and Wilson J acknowledged (as did Mason and Brennan JJ) that recourse could be had to the travaux préparatoires of the treaty because of Article 32 of the Vienna Convention on the Law of Treaties.[981] But

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[979] Gibbs CJ at p.102; Wilson J at p.194; Dawson J at p 311.

[980] At p.106

[981] Gibbs CJ felt that in the course of the drafting of the treaty, stronger words like "undertake" had been replaced by words of lesser obligation; Mason and Brennan JJ felt that the plain meaning

rather than look upon this self-defining nature as evidence of a symbiotic relationship between those provisions and Australian law, the non-synergistic paradigm in which these judgements operate cannot bring the two legal systems closer together and the result is that they are seen as operating separately and ineffectively even though the majority of the justices specifically looked at the travaux.

Of the judges of the broad view[982] who were this time in the majority, Mason J particularly considered the argument made on behalf of Tasmania that to be valid, the law had to constitute an implementation of an obligation under the treaty (and its converse, that Australia would be in breach of its obligations if it failed to enact the law) calling it "too narrow a view."[983] In his opinion, it would be just as valid to enact laws implementing a benefit received by Australia under the treaty. What is important is that the law carries into effect the provisions of the treaty not just its obligations, but the law must "conform" to these: the treaty cannot be used as if it were a new and independent head of constitutional power allowing any legislation on the general subject matter of the treaty.[984] In the words of Deane J, there has to be "a reasonable proportionality between the designated purpose or

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of the words did impose obligations on Australia and that the travaux did not displace this; Wilson J felt that the words of the treaty did not impose obligations and that an examination of the travaux did not displace this.

[982] Mason, Brennan, Deane and Murphy JJ.

[983] At p.123

[984] At p.131

object and the means which the law embodies for achieving or procuring it"[985] and in the words of Brennan J the legislation has to be "reasonably conducive to the performance of the obligations imposed by the Convention."[986] For Mason J the legislation had to be "appropriate and adapted to the desired end",[987] and for Murphy J the legislation had to be "reasonably ... regarded as appropriate for implementation of provisions of the treaty."[988] In an important and inciteful passage, Deane J especially refers to the process of compromise by which international treaties are concluded (as explained in Chapters 3 and 4) and that they are therefore not as precise as common law contracts usually would be. He continued:

> That absence of precision does not, however, mean any absence of international obligation. In that regard, it would be contrary to both the theory and practice of international law to adopt the approach which was advocated by Tasmania and deny the existence of international obligations unless they be defined with the degree of precision necessary a legally enforceable agreement under the common law.[989]

Brennan J, who held that there had to be an obligation set up by the treaty, found that there was one in this case.[990] Indeed, the majority view was that Article 34 no longer had any application because the Commonwealth did have the power to

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[985] At p.260

[986] At p.235

[987] At p.138

[988] At p.172

[989] At pp.261-2

[990] At p.222

implement the Convention domestically. This approach has been called "clearly correct"[991] as a matter of international law and leads to a more successful implementation of Australia's international obligations. It was as a result of this aspect of the judgement that the Australian government modified its practice with respect to the use of federal clauses[992] (as there is no longer any real constitutional necessity for them) although it has retained its use of the "federal statement", which may in effect amount to the same thing as discussed in Chapter 4.

However, while Mason J found the legislation to be wholly valid, Brennan and Deane JJ found that parts of the Act were invalid because of the lack of a sufficiently reasonable or proportionate relationship between the provisions and the Convention.[993] Murphy J reiterated the wide view he expressed in Koowarta.[994] Thus, the "appropriateness" or "proportionality" of the application was crucial.

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[991] Andrew Byrnes & Hilary Charlesworth, "Federalism and the International Legal Order: Recent Developments in Australia" (1985) 79 A.J.I.L. 622 at 638. The learned authors refer to the travaux préparatoires of the Convention and point out that Article 34 was inserted to accommodate Austria where the Länder have exclusive legislative powers over matters such as conservation and land use planning.

[992] See Brian R. Opeskin, "The Role of Government in the Conduct of Australia's Foreign Affairs" (1994) 15 Australian Yearbook of International Law 129 at 144-5.

[993] For example, Deane J found the provisions of s.9 which included prohibitions on excavation, drilling, erection of buildings cutting down trees building roads and using explosives because there was no necessary appropriateness in prohibiting these for the purposes under the Convention: as read, they could be prohibited for any reason (at p.264).

[994] At pp.170-1

The verbal forms give no self-evident outcome much less express any clear test of proportionality. There is no elaboration like that of the Supreme Court of Canada in the Oakes case discussed above. Thus, the hidden perceptions are even more crucial here.

The overall result of the case was that while the Regulations and parts of the Act were invalid, the parts concerned with constructing a dam were valid. The broad juridical approach prevailed, subject to the reasonable relationship/proportionality test, and the weak proviso that the treaty be bona fide. Thus, while this represents an expanded view of the external affairs power, it is not an unlimited one and careful attention must be paid to the relevant treaty, even if its precise wording does not have to be subjected to a strict canons of domestic statutory interpretation.

This case finally cleared the way for the Commonwealth to implement its international obligations domestically, including its human rights obligations, and made it clear that any doctrine of reserved powers in the states is discredited. However, what the case modifies is the extent to which those international obligations may be domestically implemented. It also implicitly indicates that while international law working with Australian constitutional law gave the Commonwealth the right to prevent the building of the dam, it did not necessarily impose any duty to do so domestically. It overcomes some of the problems of transformation (which is discussed in more detail below) but does not substitute for

it an approach of incorporation. International norms do not in this sense cascade into the domestic system: they are modified by that system, no matter how synergistic the interaction may be.

In 1988 the issue of dams in Tasmania was revisited in Richardson v Forestry Commission.[995] After the Dams decision, the Commonwealth had been careful to amend its legislation so that it reasonably conformed to the treaty. However, in the Lemonthyme and Southern Forests (Commission of Inquiry) Act 1987 (Cth) it was made unlawful to do things such as excavating, cutting down trees and building roads in areas which a Commission of Inquiry was considering for addition to the World Heritage List, until that decision was made. The issue, as argued by Tasmania, was that there is no obligation under the Convention to protect property until it is listed, and this legislation prohibited action in the meantime. In a joint judgement, Mason CJ and Brennan J held that the identification of heritage areas was an obligation linked to, and not separate from, that of their protection.[996] It was reasonably appropriate and adapted to the object of the Convention [997] The identification of buffer zones was also appropriate.[998] Wilson J and Dawson J, who had both been of the narrow view in the Dams case, both accepted that the broad view was now the law in Australia, even though they did not personally

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[995] (1988) 164 CLR 261

[996] At p.290

[997] At p.291

[998] At p.295

agree with it.[999] They also found the legislation to be appropriate.[1000] Indeed, Dawson J went on to say that the treaty left it to the parties to devise appropriate measures and that this itself was the obligation under it. Consequently, they could not be disproportionate to the treaty.[1001] Deane J found that anything "reasonably incidental" to carrying out a treaty obligation would be valid.[1002] However, he held that the appropriate test for the external affairs power was, first, that there had to be an identified purpose or object which is itself a legitimate subject for external affairs (eg, the carrying into effect of a treaty) and secondly, that the purpose or object must explain the operation of the law to an extent that warrants the overall characterisation of the law as one with respect to external affairs. To do this, there must be reasonable proportionality between the purpose or object and the means which the law adopts to pursue it.[1003] Importantly, though, his honour held that it is not for the court to find that the provisions of the law are in fact the appropriate ones: it is sufficient if they are capable of being reasonably considered to be so.[1004] This leaves Parliament with a wide discretion in the sense that the court is demarcating for itself a "no-go" area. However, his honour found that

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[999] At p.297 and p.324 respectively.

[1000] At p.297 and p.327 respectively.

[1001] Ibid.

[1002] At p.309

[1003] At pp.311-12

[1004] At p.312

most of the provisions mentioned above were invalid on this test,[1005] as did Gaudron J,[1006] because they related to general environmental protection rather than specifically to the world heritage.

This decision was an endorsement of the broad approach in the Dams case, and leaves a wide discretion to the Commonwealth with respect to the domestic implementation of its international obligations. Indeed, the legislation does not necessarily have to be confined to obligations properly so called[1007] and also extends to obligations "reasonably apprehended" by the Commonwealth.[1008] It is now clear that the external affairs power gives the Commonwealth government the power to ratify any treaty on any subject matter,[1009] and can legislatively implement those treaties to the extent that it considers appropriate,[1010] subject to the express[1011] and implied[1012] prohibitions in the Constitution, the "genuine"

[1005] At p.317

[1006] At p.347

[1007] Dams Case per Mason J at 129-30, Murphy J at 171-2, Deane J at 258-9; Lemonthyme Forest Case per Mason CJ and Brennan J at 289, Gaudron J at 342.

[1008] Brennan J in Lemonthyme Forest, id.

[1009] This decision is itself not reviewable by a court: Koowarta v Bjelke-Petersen, ante, per Mason J at p.229; Minister for Arts, Heritage and Environment v Peko-Wallsend (1987) 75 ALR 218.

[1010] Queensland v Commonwealth (1989) 63 ALJR 473: the Commonwealth's nomination of the Daintree Rainforest in Queensland for World Heritage listing and the subsequent acceptance of this by the World Heritage Committee could not be subject to judicial review.

[1011] Such as sections 92 and 116

nature of the treaty, and proportionality between the treaty and the legislation.

The proportionality test has been described as importing "a certain ethical standard" into legislative action.[1013] The question, however, is upon what ethic is it based? Certainly, the thrust of the court's decisions has been that the Commonwealth cannot unreasonably trample on the legislative domain of the states, but this does not explain a coherent theory of the federal-state balance,[1014] nor, it might be added, of the impact of international human rights norms as a mediating factor in Australian constitutionalism. The notion is simply too vague and its application in Australia is ad hoc. When used in the context of the balance between states rights and federal rights, the touchstone is not the rights and interests of the citizen.[1015] The proportionality test in these cases has been used as part of the process of characterisation of the law as fitting within the parameters of s.51, rather than the different approach to identifying the content of an implied right as discussed above. Here, it cannot import values into the law. Thus, when legislation is based on the external affairs power and its validity is necessarily

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[1012] Such as separation of powers (Brandy v Bell, ante), the prohibition on the Commonwealth interfering in the internal administration of state matters (Melbourne Corporation v Commonwealth (the State Banking case) (1947) 74 CLR 31), the prohibition on the Commonwealth discriminating against a particular state (Queensland Electricity Commission v Commonwealth (1985) 159 CLR 192, and the recently discovered implied freedoms (Australian Capital Television Pty Ltd v Commonwealth (1992) 177 CLR 106, discussed above).

[1013] Brian Fitzgerald, "Proportionality and Australian Constitutionalism" (1993) 12 U. of Tasmania L. R. 263 at 277.

[1014] As Fitzgerald notes, ante, p.278.

[1015] Contrast Fitzgerald, ante, at p.280, with whom I must disagree on this point.

linked with the treaty on which it is bas ' imported into Australian law are the shortcomings of a treaty which may be ba. international political pragmatism rather than on Australia's federal wishes. The discretion left to the federal government in this regard by the cases[1016] cannot always overcome the fundamental shortcomings in the treaties described in Chapter 4. The situation may be different, however, when the court is dealing not with legislation but the common law (as discussed below).

In Polyukhovich v Commonwealth[1017] the issue was the constitutional validity of the War Crimes Amendment Act 1988 (Cth) which conferred upon Australian courts the jurisdiction to try Australian citizens and residents for war crimes committed in another country. The Act was not based on any treaty. The validity of this legislation was upheld by a 4-3 majority.[1018] Section 51(xxix) enabled the Commonwealth to regulate matters, things and relationships physically external to Australia[1019] and also persons external to Australia.[1020] The controversy was whether in these circumstances there had to be a connexion between the external matter and Australia, particularly in the light of the prefatory words to s.51 that

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[1016] See also the reference to a "margin of appreciation" in Cunliffe v Commonwealth (1994) 124 ALR 120, per Mason CJ at p.133.

[1017] (1991) 172 CLR 501

[1018] Mason CJ, Dawson, Toohey and McHugh JJ; Deane, Brennan and Gaudron JJ contra.

[1019] Mason CJ at 528-9; Brennan J at 549-50; Deane J at 599; Dawson J at 632; Gaudron J at 696; McHugh J at 712.

[1020] Mason CJ at 528-9; Brennan J at 552; Dawson J at 632.

the laws had to be for the "peace, order and good government of the Commonwealth." Four of the judges held that there was no need for such a connexion,[1021] either on the basis that Australia has extraterritorial competence in any event[1022] or because of the "peace, order and good government" preface to s.51.[1023] Of the other judges, Gaudron J held that once Parliament had selected an external matter or thing as the subject matter of the legislation, this provided sufficient connexion.[1024] Brennan J, however, felt that while the words "peace, order and good government" bear no territorial limitation there must be some nexus between Australia and the external affair.[1025] Consequently the legislation, which prohibited conduct outside Australia by people who were not Australian citizens, was invalid. The response of Deane J was that the reference in s.51(xxix) is to external affairs, not to "Australia's external affairs" and that the only limitations on the power were those express or implied in the Constitution. (POGG obviously did not fall into either category.) Toohey J saw that a connexion was established when there was a "national interest in some person, thing or matter that enables one to say that the subject of legislation concerns Australia."[1026]

[1021] Mason CJ at 529-30; Deane J at 599; McHugh J at 714; Dawson J at 634.

[1022] Mason CJ, ibid.

[1023] McHugh J, ibid, indicating a rare Australian example of a POGG approach to constitutionalism.

[1024] At pp.695-6.

[1025] At 550-1

[1026] At p.653.

Parliament would not legislate with respect to something in which it had no interest.[1027] Only Brennan J was concerned about the internal operation of the law. These approaches can most charitably be called disparate. Unlike Canada, the "peace, order and good government" criterion for validating, or invalidating[1028] laws, is not significant in Australia at federal level.[1029] It can be significant, however, at state level where it has been interpreted in a similar plenary fashion to the POGG powers under the British North America Act.[1030] This is discussed further below.

A significant consequence of these different approaches was the judicial approach to retrospective criminal laws, which are contrary to UDHR Article 11(2) and ICCPR Article 15. The majority in Polyukhovich thought that the law would be valid in this regard for the reasons given above. Only Deane and Gaudron JJ held that a retrospective criminal law could be invalid, on the basis that this was

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[1027] At p.654.

[1028] Union Steamship Co of Australia Pty Ltd v King (1988) 166 CLR 1 at 9-10

[1029] It may be a crucial point, however, if Australia enters into a treaty, enacts legislation based on it, and subsequently withdraws from the treaty (or where the other party withdraws from a bilateral treaty). In the absence of reliance on a POGG power, the treaty itself becomes crucial. See G.P.J. McGinley, "The Status of Treaties in Australian Municipal Law" (1990) 12 Adelaide L.R. 367 at p.381. Although this has not arisen for judicial consideration, and provided the treaty was initially bona fide, the validity of the legislation should be judged on the standing of the treaty at the time of the enactment of the legislation.

[1030] Union Steamship Co of Australia Pty Ltd v King, ibid. The cases referred to with approval are Hodge (1883) 9 App. Cas. at p.132, Riel (1885) 10 App. Cas. at p.678, Chenard & Co v Joachim Arissol [1949] AC 127.

inconsistent with the implications arising out of the separation of judicial power established in Chapter III of the Constitution. Such judicial power has to be exercised "in accordance with the essential attributes of the curial process", which include the determination of a contravention of the law at the time the contravention occurred. This is an "exclusively judicial function" which is usurped if the legislature passes retrospective laws.[1031] The reasoning of Deane J is based on the historical development of the Common Law and the doctrine of the separation of powers, not human rights. Gaudron J based her decision on this point on the notion of judicial power itself, holding that it is for a judge, and not Parliament, to determine guilt, and a law which was designed to apply to facts which have already occurred interfered with this process.[1032] No reference to human rights was made. For the majority, the law would have to be much more specific (along the lines of a "bill of attainder")[1033] for the separation of powers doctrine to arise here. In other words, everyone on the court ignored the human rights aspect of the issue. It was (still) a question of judicial and legislative powers, rather than an issue of rights.[1034]

This case does, however, make it clear that the external affairs power can also be

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[1031] At pp.607-10

[1032] At pp.703-8

[1033] A law specifically declaring that a particular person is guilty of an offence.

[1034] See, for example, Toohey J at p.685.

used to make laws based on customary international law,[1035] although evidentiary problems may loom large here.[1036] This can be important where there is no treaty, where the treaty is insufficient for the government's purposes, or (perhaps) where the treaty is void ab initio.[1037] This could, however, lead to problems where there is customary law on an issue (such as the human rights of children) and then a later treaty which may narrow the ambit of these rights (such as the Convention on the Rights of the Child). This issue has not specifically arisen, but

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[1035] Per Brennan J at 560. This issue had been considered before, but was largely obiter: see Burgess, ante, per Dixon J at 668; Koowarta, ante, per Stephen J at 220-21, Mason J at 234-6, and Murphy J at 238-42; Dams Case, ante, per Gibbs CJ at 98, Mason J at 131-2, Murphy J at 172, Deane J at 258-9 and Brennan J at 222.

[1036] See the review conducted by Brennan J in Polyukhovich at pp.556-60. His honour concluded that there was no opinio juris to establish a rule of customary law.

[1037] In Horta v Commonwealth (1994) 181 CLR 183 the plaintiffs argued that the Timor Gap Treaty between Australia and Indonesia was invalid under international law (because the Indonesians had no right to conclude boundary treaties with respect to areas they had illegally occupied) and that as a result the Commonwealth legislation giving effect to it was invalid. The High Court held unanimously that the legislation was a valid exercise of the external affairs power because it related to something physically external to Australia, thus finding it unnecessary to answer the question of the validity of legislation based on void treaties. Cheryl Saunders has argued on the basis of Horta that the validity of the treaty "is probably irrelevant" to the external affairs power: "The External Affairs Power in the Australian Constitution" (1994) 14 International Law News 36 at p.37. With respect, the High Court left this question open. In my opinion, in the context of implementing international human rights norms, there still needs to be something upon which to base the legislation. There cannot be an external affair arising out of the juridical void. Thus, a unilateral policy statement made by Australia in an international forum would not be sufficient. Conversely, if a treaty is void because it is contrary to jus cogens (Vienna Convention on the Law of Treaties Art. 53), such as a treaty to perform genocide, the overriding invalidity of the subject matter at international law would be determinative. There is thus still a limiting role of international law in this regard (see K. Walker, "Horta v The Commonwealth" (1994) 19 Melbourne U.L.R. 1114 at p.1124), but norms of customary international law can pick up the slack where necessary. In this sense, their very vagueness can be an advantage.

dicta by Mason J[1038] and Dawson J[1039] indicate that the treaty, and conformity with it, would take precedence.[1040] There may be some leeway in that the treaty may not cover all the aspects of the topic which customary law covers, whether by design or lack of consensus,[1041] but, as far as it does go, the treaty will apparently predominate. Thus, this aspect of the external affairs power may indeed hobble domestic application of international human rights norms.

In addition, there must still be sufficient conformity between the customary law and the Australian legislation. In Polyukhovich Brennan J thought that the War Crimes Amendment Act went beyond the definition of war crime in international law,[1042] whereas Toohey J thought that despite this, the Act as a whole was in conformity with international law.[1043]

There is also some authority that the external affairs power extends to the implementation of recommendations and resolutions that might not otherwise be

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[1038] Dams Case, ante.

[1039] Lemonthyme Forest Case, ante, at p.325

[1040] See also Zines: The High Court and the Constitution, ante, at p.253.

[1041] See Donald R. Rothwell, "The High Court and the External Affairs Power: A consideration of its Outer and Inner Limits" (1993) 15 Adelaide Law Review 209 at p.229.

[1042] At pp.588-9.

[1043] At pp.682-4.

customary international law.[1044] There is no reason not to, if benefits as well as obligations under a treaty can be the valid basis for legislation. It will certainly be so if the matter is one of international concern. The ultimate answer may thus be the perception of the importance of human rights and of their impact.[1045] The problem is that the Australian approaches to the power to make laws with respect to external affairs are precisely that: predominantly Australian as opposed to global. Only Murphy J adopted a sufficiently wide approach which can encapsulate global concerns which are not necessarily refracted through the Australian perspective, although Mason J in Dams argued that an agreement by nations to take common action in pursuit of common objectives would be an external affair.[1046] In Lemonthyme Forest the court recognised that treaties are by their nature imprecisely worded instruments, but that this alone was not fatal. But the cases, as expansive as they have become, nevertheless retain parochial blinkers which insist on characterising matters in terms of their refraction through Australian concerns, ignoring the fact that global concerns today are Australian concerns, and that a demarcation between the two in an anticipatory fashion is

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[1044] Evatt and McTiernan JJ in Burgess at p.687; Murphy and Deane JJ in Dams Case at 171-2; Brennan J in Polyukhovich at p. 591.

[1045] It has long been held that matters which are the subject of Australia's relations with other countries fall within the external affairs power - R. v Sharkey (1949) 79 CLR 121: s.24A(1)(c) of the Crimes Act 1919 (Cth) dealing with the offence of sedition with respect to the publication of material intended to "excite disaffection against the Commonwealth or Constitution of any of the King's Dominions" was supported by s.51(xxix).

[1046] Contrast Zines who, in The High Court and the Constitution, ante, argues that the necessity of commonality of objectives requires a degree of mutuality, implying that the focus is still primarily through that of Australian concerns (at p.259).

foolish and can be dangerous.

Conclusions on Constitutionalism

Under Article 2 of the ICCPR Australia and Canada have pledged to take the necessary steps in accordance with their constitutional processes to adopt the measures necessary to give effect to the rights in the Covenant for everyone. Constitutionalism is in itself no guarantee of what today we call human rights.[1047] Debates as to whether Canada should adopt the Australian approach to implementing its international obligations,[1048] or whether to do so is unnecessary,[1049] or conversely that Australia would be better off simply with a Bill of Rights, have so far lacked a proper comparative twist taking not just the constitutions (and the albeit important distinctions between reserved and residual powers, the use or not of a POGG power, the way paramountcy is handled, and the interpretation of "external") but the developmental matrix into account. Reliance on constitutional issues per se cannot explain or hope to overcome the central matter of uniformity (or lack of it) in the domestic implementation of

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[1047] Thus, for example, the European Court of Human Rights concluded that Ireland was in breach of human rights by criminalising homosexuality, even though the Supreme Court of Ireland had held that those laws were consistent with the Irish constitution: Norris v Ireland, 26 October 1988, Series A, No. 142.

[1048] See Torsten P. Strom & Peter Finkle, "Treaty Implementation: The Canadian Game Needs Australian Rules" (1992) 25 Ottawa Law Review 39.

[1049] See Wallace W. Struthers, ""Treaty Implementation ... Australian Rules": A Rejoinder" (1994) 26 Ottawa Law Review 305.

international human rights norms.

Despite the Charter, Canada has not legislated into domestic existence all its obligations, and those that it has are subject to the qualifications in sections 1 and 33, which were placed there as part of the compromises described above. There is now no question that Australia could legislate to domestically implement its human rights obligations, the cases now being both realistic and purposive on this point. The history of Bills of Rights in Australia shows, however, that the democratic "constitutional processes" may alone not be enough to achieve this. While there may be a growing significance of rights in Australian constitutionalism, it is at best the idea of human rights, rather than the specific international norms, to which attention is paid. The Australian cases do not grasp the human rights nettle: the possibilities for this are overlooked. The Canadian Charter thrusts that nettle into judicial hands, and however much human rights may there be underutilised or misconstrued, it has been placed there, with the result that other avenues (such as education) are opened up to encourage its further and better use.

There has been a movement away from the "facile promise of certainty"[1050]

[1050] Greg Craven, "The Crisis of Constitutional Literalism in Australia", Chapter 1 in H.P. Lee & George Winterton (eds): Australian Constitutional Perspectives (1992, Law Book Company, Sydney), p.9.

offered by the literal approach to constitutional interpretation.[1051] As yet this has not been replaced by a coherent approach to rights at all in Australia, or a coherent and consistent approach to international human rights in Canada. The cases are ad hoc solutions to specific questions and are not based on an underlying notion of fundamental, or human, rights. The strict judicial role persists, even in cases finding implied constitutional rights. The implications arise out of the structure, institutions and/or provisions of the Constitution as a document, and not out of the law generally. But at least in Canada the focus is now on rights. In Australia, while the cases now seem to be revolving more around rights and freedoms and less around Commonwealth/state powers, the extent to which this is so must be questioned. In Leeth, three judges found in favour of a doctrine of equality, and three against. The way in which these "freedoms" are generated does not allow for a general right to equality to be established. The Political Advertising case showed an actual indifference to existing inequalities of capacity to communicate, manifesting an approach which has justifiably been called "limited, negative, property-oriented and unimaginative."[1052] The cases do not articulate human rights, they interpret the consequences of legislative power. There is no ideology on which they are based. They need one. The High Court's approach to "proportionality" is insufficient for this task, despite assertions that it represents a

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[1051] Note that even the Engineers' Case itself was not totally literal in approach: "the ordinary principles of construction are applied so as to discover in the actual terms of the instrument their expressed or necessarily implied meaning." (1920) 28 CLR 129 at 155.

[1052] Tom Campbell, "Democracy, Human Rights and Positive Law" (1994) 16 Sydney Law Review 195 at 195.

postmodern approach to Australian constitutionalism, informing the government of humanness, realigning power and trumping Diceyan sovereignty.[1053] Diceyan notions of parliamentary sovereignty can be trumped in Australia, but this is largely because Dicey was writing about a legal system without a written constitution to which both federal and regional governments are subject.

Postmodernism rejects totalising theories and master narratives, regarding knowledge as an activity infused with social interaction and power; not just a set of propositions but a relationship to the cultural environment in which beliefs occur. Cultural changes have enabled the Australian High Court to look at rights and freedoms in a way that was rejected forty years ago in the Communist Party Case. But there is no consistent line taken by the Court. Only Deane J has consistently referred to the notion of the "people" as infusing the rights that can be implied in or from the Constitution (and since his elevation to the position of Governor-General he is no longer on the Court). If there is a trend towards the ancient Greek notion of the polis[1054] discussed above in Chapter 2, it remains delphic. The Political Advertising Case refused to interfere in an area quintessentially postmodern: the effect on democratic institutions of technological change. Postmodernism is morally ambiguous and the notion of proportionality resorted to by the Court cannot leap this divide.

[1053] Brian Fitzgerald, "Proportionality and Australian Constitutionalism" (1993) 12 U. Tasmania L.R. 263 at 320-21.

[1054] See M.J. Detmold, "The New Constitutional Law" (1994) 16 Sydney L.R. 228 at p.249.

Despite signs of significant change, what is happening so far is "tinkering at the edges" leading to a "haphazard and incomplete structure of human rights law in Australia."[1055] At least Canada has enormous potential for change in this regard and has started on the road towards it. Certainly, the High Court of Australia no longer feels itself bound to adhere to the intentions of the founding fathers. It has found some implied freedoms in the Constitution, although these may in fact be better termed inferred freedoms, being clearly not intended by the founding fathers. The issue is not whether the court ought to do this (since, as Chapter 3 showed, it is better to acknowledge judicial law making than to pretend that it does not exist) but how it should do so. Human rights could be the basis. They are more consistent and coherent than proportionality despite their myriad problems discussed in Chapter 3, and they are already legal obligations on Australia (and Canada). The consequential or reflexive nature of the implied rights and freedoms carries with it the danger of going into methodological free-fall.[1056] Those rights are also indeterminate: it is at best unclear, and probably untrue, to assert that Polyukhovich established an implied guarantee against retrospective criminal laws or that Leeth established an implied guarantee of equality, or that Theophanous and Stephens realigned the law of defamation. Indeed the question of implications only arises after it has been determined that a Commonwealth law is within power. Thus, while there may now be a right to political discussion, there is no right to

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[1055] Hilary Charlesworth, "The Australian Reluctance About Rights" (1993) 31 Osgoode Hall L.J. 195 at 196.

[1056] See Geoffrey Kennett, "Individual Rights, the High Court and the Constitution" (1994) 19 Melbourne U.L.R. 581 at 613.

freedom of expression, or to association, much less to economic rights in Australia. The constitutional matrix predominates. Thus it is by no means certain that the new approach to the Australian Constitution will enable a turn around of the interpretations of those limited express rights which do exist there, such as the overruling of Krygger and the finding of a general right to freedom of religion in s.116, unless there is resort to the underlying human rights base.

We do not have human rights in Australia as a result of the Constitution, we have some human rights. Those that we do have are enjoyed but are not necessarily protected by the Constitution. Neither the Constitution nor constitutionalism overcame the human rights abuses in the Queensland Electricity (Continuity of Supply) Act, the fact that Australian jails breach our international obligations under the ICCPR and the Convention Against Torture,[1057] or the story of the Social Justice Commissioner, Mick Dodson, an Aborigine who, at the age of 18, "belonged" to the Native Welfare Department, did not have the right to vote, was not considered worth counting in the census, faced limited job opportunities, and in some states could not drink alcohol, get married or travel long distances without permission, and could not swim in the same public swimming pools as whites.[1058] At best, a federal constitution which lacks a Bill of Rights or a court procedure for "reading in", allows a court to declare laws invalid, not fill in the

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[1057] Allegation by Human Rights Commissioner Brian Burdekin, The Australian, June 17, 1992, p.1.

[1058] The Australian, May 27, 1992, p.1.

human rights gaps which may be evident in those laws. The rule of law in Australia has been no champion of human rights, and sometimes it has not even been its friend. Despite the increasing recognition of rights, there are distinct systemic problems to the implementation of human rights in Australia through its present Constitution.

5.5 Legislation and Human Rights

(a) Anti-Discrimination Legislation

Anti-discrimination legislation in both Canada and Australia displays a remarkable similarity in both content and resolution procedures. However, a significant and (for this thesis) crucial difference between them are the bases for their legal validity. Because of the constitutional matrices discussed above, human rights norms are essential to the validity and content of federal anti-discrimination legislation in Australia because of the interpretation of the external affairs power, and have an indirect impact on similar state legislation because of the residuary nature of state constitutional powers together with the expansive interpretation and application of the s.109 inconsistency mechanism. In Canada, on the other hand, human rights norms are irrelevant in so far as legal validity is concerned at both federal and provincial levels (the s.91/92 dichotomy being the relevant issue here), and are of only indirect relevance as to content. They support, rather than act as the inspiration of, the Canadian legislation. Indeed, a swathe of legislation in the 1940's through to the early 1970's was enacted in Canada before the ICCPR was concluded and/or became binding on Canada, and some of it was enacted even before the UDHR was completed. International human rights norms are therefore irrelevant to the generation of that legislation (although they could be relevant to the current interpretation of it). In addition, most of the impetus for anti-

discrimination legislation has had to come from the provinces because of their constitutional powers, and the provinces (with a few limited exceptions) cannot become parties to international treaties nor generate international customary law. The situation in Canada is that there is no necessity to refer to human rights norms in anti-discrimination cases, and this is in fact rarely done except where Charter issues are involved - and then to the (limited) extent described earlier in this Chapter. However, what has since become important is the effect of the s 15 equality rights in the Charter upon anti-discrimination matters. This has had a standardising effect on Canadian anti-discrimination law. It is another example of the centrifugal and centripetal tendencies in Canadian constitutional law - but not necessarily of a greater use of international human rights norms. On the other hand, despite the crucial nature of human rights norms to the Australian legislation, there is surprisingly little direct reference to them there either.

With respect to any occurrence of synergy between the two sets of norms, for the reasons just described the possibility in Canada is minimal. What follows therefore discusses the Australian laws in proportionately more detail than the Canadian.

The first anti-discrimination statute in Canada was the Ontario Racial Discrimination Act[1059] in 1944, four years before the UDHR and twenty-two

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[1059] S.O. 1944, c.51

before the Racial Discrimination Convention. The Saskatchewan Bill of Rights Act[1060] followed in 1947.[1061] This Act, which bound the Crown, was an eclectic mix of civil and political rights as well as economic rights, but not social rights.[1062] The sanctions under it are also an eclectic mix.[1063] It illustrates a great similarity with the categories in the UDHR but without, on the one hand, the reluctance to include economic rights felt by Western countries during the Cold War, but also without the social rights which the UDHR would have suggested a year later. There had in fact been isolated anti-discrimination provisions in legislation earlier than this,[1064] but this was the first specialised legislation. It was followed four years later by the Ontario Fair Employment Practices Act[1065] which was introduced in part, according to the then Premier Mr Frost, because of

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[1060] S.S. 1947, c.35

[1061] There had in fact been an Alberta Bill of Rights Act in 1946, but it was struck down by the courts because of encroachment on the federal banking power. See Bora Laskin, "Canada's Bill of Rights: A Dilemma for the Courts? (1962) 11 International and Comparative Law Quarterly 519 at 521.

[1062] Included are the freedoms of conscience, religion, opinion, belief, expression, assembly, freedom from arbitrary arrest, the right to vote, the right to employment or to carry out any occupation or business without discrimination, the right to obtain land and interests in land, the right to join trade unions and the right to an education. Discrimination is prohibited on the grounds of race, creed, religion, colour and ethnic or national origin.

[1063] Fines ranging from $25 to $200, and injunctive relief.

[1064] For example, in 1931 the British Columbia Unemployment Relief Act (S.B.C. 1931, c.65, validated a federal-provincial relief work agreement which provided that employment on relief projects was not to be made because of political affiliations; in 1932 the Ontario Insurance Act (S.O. 1932, c.24) provided that an insurer who discriminated because of the race or religion of the insured was guilty of an offence. See generally Walter Tarnopolsky & William Pentney: Discrimination and the Law (1985, Richard De Boo Publishers, Don Mills), Chapter 2.

[1065] S.O. 1951, c.24

the UDHR.[1066] Another reason, however, was that the Ontario Racial Discrimination Act and the Saskatchewan Bill of Rights were quasi-criminal statutes setting up sanctions for illegal actions. Such an approach is not generally suitable in discrimination matters, (where amelioration of the problem is preferable to punishment, and where cases may fail because of the higher standard of proof required). Also, Canadian legislation dealing with employment practices,[1067] and later with accommodation,[1068] was largely copied from New York legislation which had been based on the success of this approach in labour relations bargaining.[1069] Nevertheless, when Ontario introduced its Human Rights Code[1070] in 1962 it recited the UDHR in its Preamble. There was thus an influence of the then existing human rights norms on Canadian legislation, but not a significant impact. It was not the engine driving the legislation, nor later

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[1066] Ont. Leg., Debates (1951), Vol.11, A-4, quoted in Walter Tarnopolsky, "The Impact of United Nations Achievements on Canadian Laws and Practices", in Alan Gotlieb (ed): Human Rights, Federalism and Minorities (1970, Canadian Institute of International Affairs, Toronto), at p.63.

[1067] Similar legislation was passed by Manitoba (S.M. 1953 (2nd Sess), c.18), Nova Scotia (S.N.S. 1955, c.5), New Brunswick (S.N.B. 1956, c.9), British Columbia (S.B.C. 1956, c.16) and Saskatchewan (S.S. 1956, c.69), as well as by the federal government (S.C. 1952-53, c.19).

[1068] Ontario (S.O. 1954, c.28), Saskatchewan (S.S. 195 , c.68), New Brunswick (S.N.B. 1959, c.6), Nova Scotia (S.N.S. 1959, c.4), Manitoba (S.M. 1960, c.14) and British Columbia (S.B.C. 1961, c.50).

[1069] N.Y. Public Law of 1945, c.118. See Tarnopolsky & Pentney, ante, at pp.2-3 - 2-4.

[1070] S.O. 1961-62, c.93

legislation.[1071] Nevertheless, similar legislation was passed during this period in every province and territory,[1072] except Newfoundland which did so later. The notion of protecting people from discrimination caught on, the Canadian culture of rights being sufficient to sustain it, as opposed to the much later introduction of similar legislation in Australia.

The issue of the power to make such laws in Canada revolves around sections 91 and 92 of the Constitution Act. The most basic division here is between the federal power to legislate on Criminal Law[1073] (relevant in the early days of this legislation which was quasi-criminal in nature) and the power of the provinces to legislate on "property and civil rights".[1074] The former has been widely defined.[1075] So has the latter, although the term "civil rights" does not equate to

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[1071] For example, the Nova Scotia Human Rights Act refers to the UDHR in its Preamble. In an interview by the author with the Commissioner and staff at the Human Rights Commission in Halifax, Nova Scotia, on May 12, 1989, the author was told that this reference is merely hortatory and has not been significant in the interpretation of the provisions of the Act. (Interview on tape).

[1072] Other than those already mentioned, they include - Alberta: Sex Disqualification Removal Act, R.S.A. 1965, c.310; Human Rights Act, S.A. 1966, c.39. British Columbia: Sex Disqualification Removal Act, R.S.B.C. 1960, c.352. Nova Scotia: Human Rights Act, S.N.S. 1963, c.5. Ontario: Age Discrimination Act, S.O. 1966, c.3. Prince Edward Island: Equal Pay Act, S.P.E.I. 1959, c.11. Quebec: Loi de la liberté des cultes, S.R.Q. 1964, c.301; Loi sur la discrimination dans l'emploi, S.R.Q. 1964, c.142; Loi de l'hotellerie, S.R.Q. 1964, c.205. North-West Territories: Fair Practices Ordinance, N.W.T.O. 1966, c.5. Yukon: Fair Practices Ordinance, Y.O. 1963 (2nd session), c.3.

[1073] Section 91(27)

[1074] Section 92(13)

[1075] Attorney-General for Ontario v Hamilton Street Railway [1903] AC 524: any act which is prohibited with penal consequences is a criminal act and is within the exclusive power of the federal Parliament. This will be so even if the matter is otherwise within a

what today we call civil liberties, as discussed above. Thus, both sets of legislatures in Canada have wide (and prima facie exclusive) powers with respect to anti-discrimination matters. But as already seen, it is not quite as straightforward as this. While the provincial power over property and civil rights would include employment and wage discrimination because they involve contractual rights (and it is no coincidence that the legislation on fair employment practices was generated by the provinces), and the s.92 powers also include matters of a merely local and private nature in the province[1076] and local works and undertakings[1077] (thus providing many areas where provincial anti-discrimination legislation could be made) there is hardly any head of federal power in s.91 which cannot affect these. Thus, employees of the Crown in right of Canada,[1078] employees working in connexion with any federal work, undertaking or business,[1079] employees of federal crown corporations,[1080] discrimination with respect to accommodation on federal Crown property,[1081] or occurring on the property of federal works or

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head of provincial power, unless the federal law is a colourable attempt to grasp power illegitimately: Attorney-General for Ontario v Reciprocal Insurers [1924] AC 328.

[1076] Section 92(16)

[1077] Section 92(10)

[1078] Re Applicability of the Minimum Wage Act of Saskatchewan to an Employee of a Revenue Post Office [1948] SCR 248

[1079] The Queen v Board of Transport Commissioners [1968] SCR 118

[1080] Canada Labour Relations Board v Canadian National Railway Co. [1975] 1 SCR 786

[1081] R v Red Line Ltd (1930)66 OLR 53

businesses,[1082] or with respect to goods and services which are an integral part of federal work,[1083] may be the basis for valid federal laws. This situation leads to a hotch-potch coverage with respect to anti-discrimination legislation.

Anti-discrimination legislation remains necessary in Canada, even after the Charter, because the two are conceptually different (the latter setting minimum standards of conduct, the former dealing with differential treatment within those standards) and also because of the slack left in the application of the Charter by the Dolphin Delivery case. However, the Canadian constitutional matrix with its separate heads of exclusive powers means that paramountcy problems between federal and provincial anti-discrimination statutes are unlikely to arise[1084] (a situation very different to Australia).

There is now a federal Canadian Human Rights Act[1085] the driving force of which was not so much Canada's international human rights obligations as the existence of similar provincial legislation which preceded it and the drafting over a two-year period by Professor Tarnopolsky who was engaged by the government to

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[1082] Madden v Nelson and Fort Sheppard Railway [1899] AC 626

[1083] Canadian Pacific Ltd v Fontaine [1991] 1 F.C. 571

[1084] See Hines v Registrar of Motor Vehicles (1990) 13 CHRR D/153 where an argument of the Nova Scotia Human Rights Commission that a Charter action challenging the reclassification of a driver's licence because of diabetes was improper because the claim should have been brought under the provincial Human Rights Act was rejected.

[1085] R.S.C. 1985, c.H-6

perform the task. It applies within the sphere of federal constitutional competence to the government and its agencies, as well as to banks, airlines and the Armed Forces. Some provinces enacted "mini" charters of rights which operate like a combined bill of rights and anti-discrimination legislation,[1086] thus forcing private actors to respect fundamental freedoms as well as not discriminate,[1087] although that of Saskatchewan does not override inconsistent statutes and those of Alberta and Quebec do but contain "notwithstanding" mechanisms. The Quebec Charter contains not even an hortatory reference to international human rights norms, but includes categories of rights which can be recognised as "mainstream" human rights norms,[1088] others which are recognisable but not often incorporated into Bills in Western democracies,[1089] and others which are not identifiable as international norms.[1090] All the others have anti-discrimination legislation[1091]

[1086] Saskatchewan: Human Rights Code R.S.S. 1979, c.S-24.1; Alberta: Bill of Rights S.A. 1972, c.1 (now Individual's Rights Protection Act A. Rev. S. 1980, c.1-2); Quebec: Charter of Human Rights and Freedoms R.S.Q. 1977, c.C-12.

[1087] See Ryan Rempel, "Fundamental Freedoms, Private Actors and the Saskatchewan Bill of Rights" (1991) 55 Saskatchewan Law Review 263.

[1088] For example, the rights to life, to vote, fair and prompt hearings, and the presumption of innocence; and the freedoms of conscience, religion, opinion, expression, peaceful assembly and association. Also included is a prohibition on being discriminated against in the exercise of human rights and freedoms (Art. 10).

[1089] For example, the right to enjoyment of property (Art. 6), the right to be provided free of charge with an interpreter in criminal cases (Art. 36) and the right of the child to the protection, security and attention of parents (Art. 39).

[1090] For example, the right to assistance when one's life is in peril (Art. 2), the right to safeguard one's dignity (Art. 4), the inviolability of a person's home (Art. 7), and the right to non-disclosure of confidential material (Art. 9).

with varying levels of override of other legislation.[1092] The Canadian constitutional matrix, creating separate exclusive powers, results in different applications ratione personae and ratione loci between the legislation, as these relate directly to constitutional powers, but the application ratione materiae is constitutionally indeterminate. There are, however, fairly consistent (in some cases to the point of being almost identical) applications in this regard. The separation between federal and provincial powers has encouraged much copying between the provinces and territories, and since the advent of the Charter further regularisation has occurred. Discrimination is expressly prohibited throughout Canada on the grounds of race,[1093] religion or creed, age,[1094] sex, marital status,[1095] and

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[1091] Ontario: Human Rights Code, R.S.O. 1990, c.H.19; New Brunswick. Human Rights Act, S.N.B. 1973, c.H-11; British Columbia Human Rights Act, S.B.C. 1984, c.22; Manitoba: Human Rights Code, S.M. 1987-88, c.45; Prince Edward Island: Human Rights Act, R.S.P.E.I. 1988, c.H-12; Newfoundland: Human Rights Code, R.S.N. 1990, c.H-14; Nova Scotia: Human Rights Act, R.S.N.S. 1989, c.214; Yukon: Human Rights Act, S.Y. 1987, c.3. Northwest Territories retains its Fair Practices Act R.S.N.W.T. 1988, c.F-2.

[1092] For example, s.4 of the Newfoundland Human Rights Code 1988 provides that laws giving preference for work to provincial residents are not affected by the Code. Ontario (s.46(2)) and Prince Edward Island (s.1(2)) specifically provide that their human rights Acts override other inconsistent legislation.

[1093] Which is nowhere defined and which, significantly, is considered on the basis of dictionary definitions rather than the Racial Discrimination Convention: see Dhaliwal v B.C. Timber Ltd. (1983) 4 CHRR D/1520. The legislation does, however, variously specifically include related concepts such as national origin, nationality, citizenship and ancestry.

[1094] In some jurisdictions there are qualifications to this ground. In Alberta and British Columbia, the group protected is people between the ages of 45 and 64, in Newfoundland 19 to 64, in New Brunswick 19 and over, in Ontario 18 and over except for discrimination in employment where the group is 18 to 65. The other jurisdictions have no such qualifications.

[1095] It is called "civil status" in the Quebec Charter. Some jurisdictions add "family status" (eg, Canada, Ontario, Manitoba).

disability.[1096] While pregnancy discrimination is expressly prohibited in only seven jurisdictions,[1097] it has been interpreted into all the legislation as a form of sex discrimination against women.[1098] Similarly, while sexual harassment is only expressly proscribed in a few jurisdictions,[1099] it also has been interpreted into the legislation as a form of sex discrimination.[1100] This also applies to cases of same-sex sexual harassment,[1101] an approach which is different to Australia because of the different constitutional matrix described below.

Less consistent is the express coverage with respect to discrimination on the basis of political opinion, belief or conviction,[1102] social conditions, social origin or source of income[1103] (the latter ground particularly illustrating a disconnection

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[1096] All jurisdictions cover physical disability, but only six cover mental disability. It has been interpreted to include discrimination on the basis of HIV positivity: S.T.E. v Bertelsen (1989) 10 CHRR D/6294.

[1097] Canada, Alberta, Quebec, Saskatchewan., Yukon, Manitoba, Ontario.

[1098] Brooks, Allen and Dixon v Canada Safeway Ltd. [1989] 1 SCR 1219

[1099] Canada, Quebec, Newfoundland, Ontario.

[1100] Bell and Korczak v Ladas and The Flaming Steer Steakhouse Tavern Inc. (1980) 1 CHRR D/155

[1101] Romman v Sea-West Holdings Ltd. (1984) 5 CHRR D/2312. Moreover, the Canadian Act in s.14 makes harassment on any proscribed ground unlawful: Gannon v Canadian Pacific Ltd (1993) 93 CLLC 17,016 (racial harassment of a black employee).

[1102] Newfoundland, British Columbia, Manitoba, Prince Edward Island, Quebec.

[1103] Quebec, Newfoundland, Manitoba, Ontario, Nova Scotia, Saskatchewan.

between the legislation and human rights norms), criminal conviction[1104] and sexual orientation,[1105] although the latter particularly has been expanded because of the application of s.15 of the Charter (as described below). Only Quebec expressly prohibits discrimination on the basis of language.[1106]

The areas or activities in which discrimination is prohibited include notices, signs, symbols, advertisements and messages,[1107] (an area which has enabled Canada to proscribe hate messages[1108] much earlier than Australia), the provision of

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[1104] Canada, British Columbia, Yukon.

[1105] Canada, Quebec, Yukon, Manitoba, Nova Scotia, Ontario, Saskatchewan.

[1106] Quebec Charter, s.10

[1107] A related problem here is the application of an exemption for freedom of speech (Saskatchewan Human Rights Commission v Waldo et al (1984) 5 CHRR D/2074: a publication belittling women was held to be discriminatory and the provision amounted to a valid limitation on the freedom of expression, but this was overturned by the Saskatchewan Court of Appeal on the basis of the specific wording of the relevant section (1989) 10 CHRR D/5636. The boundaries between federal and provincial jurisdiction where, for example, criminal sanctions or radio or television broadcasting is concerned, can also be important here. Note, however, that anti-discrimination legislation is usually a justifiable limit under s.1 of the Charter (see, for example, Canadian Human Rights Commission v Western Guard Party and Taylor [1990] 3 SCR 892). On the issue of language rights generally in Canada and freedom of expression see Edward Veitch, "Language, Culture and Freedom of Expression in Canada" (1990) 39 International and Comparative Law Quarterly 101.

[1108] For example, the Canadian Act, s.13. As explained above, racial hatred laws are also included in the federal Criminal Code. Provincial legislation, like the British Columbia Civil Rights Protection Act was based on responses to perceived regional needs rather than adherence to human rights, in the latter case the upsurge of activity by the Ku Klux Klan in 1979-80 as a result of which John McAlpine was commissioned by the B.C. government to write a report which recommended legislative action. The McAlpine report is based in part on the ICCPR and the Racial Discrimination Convention (pp.52-53) but also (and more heavily) upon other domestic sources such as the Saskatchewan Code (pp.60-65).

goods,[1109] services and facilities, accommodation, the rental and purchase of property, and employment.[1110] Exemptions do apply (such as that of bona fide occupational requirements in the case of employment), although like Australia, some of them reflect the public/private dichotomy which this legislation has not yet totally overcome.[1111]

Like Australia, anti-discrimination legislation in Canada is regarded as setting up its own resolution procedures which do not allow a separate common law action in a court,[1112] although some Canadian jurisdictions do specifically allow for this.[1113] Like Australia, all the Canadian legislation establishes human rights commissions to administer and enforce the Acts as well as to undertake research

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[1109] "Goods" is specifically protected only in Canada, Alberta, Quebec and the Yukon. Other jurisdictions cover this ground by reference to non-discrimination in contracts offered to the public (for example, Ontario, Manitoba, and Saskatchewan).

[1110] Depending on the circumstances, but particularly with respect to the federal government, a strict employment relationship must be shown for the legislation to operate in this area. See by analogy Chauhan and Ennila Rest Home v Ministry of Health (1985) 6 CHHR D/2786. In Australia, this aspect of ratione personae is less significant, with the employment provisions extending to contract workers and commission workers, and, in the case of Queensland, to "work" of a totally voluntary nature.

[1111] For example, most jurisdictions exempt domestic employment in a private home. The Canadian Act does not do this, but, as Tarnopolsky & Pentney point out (ante, at p.12-17), it is impossible to think of a situation where domestic employment would fall within federal jurisdiction. In comparison, in Australia race discrimination is universally prohibited because of the effect of the federal Racial Discrimination Act. So also is disability discrimination for similar reasons (although in this case the genuine occupational requirement exemption would cover most cases).

[1112] Board of Governors of Seneca College v Bhadauria (1981) 124 DLR (3d) 193

[1113] For example, Newfoundland Human Rights Code s.35.

and education functions. However, unlike Australia, most commissioners are part-time. Complaints of unlawful discrimination are handled on the basis of conciliation. In some jurisdictions,[1114] a conciliated settlement must be approved by the Commission, a situation which never occurs in Australia. If conciliation is unsuccessful, it may be followed by a more formal public hearing (usually before a "board of inquiry") with the strict rules of evidence not applying. A wide range of remedies (from ameliorative action to damages) may be ordered. Enforcement is usually by way of prosecution for violation of an order made under the relevant Act or by injunctive relief against continuing violations. The overall process is similar in Australia, except that for constitutional reasons explained below, the enforcement procedures are sometimes different. In particular, in those jurisdictions where the Commission itself must approve a settlement, the Commission can be a party in later enforcement proceedings - which also never occurs in Australia where complainants are thrown into the litigation pool to sink or swim as best they can. Some Canadian jurisdictions also limit the amount of damages that may be awarded,[1115] which occurs in some Australian jurisdictions[1116] but never under the federal legislation.

Such distinctions between Australia and Canada may be relatively minor, but in

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[1114] For example, the Canadian Act, s.48.

[1115] For example, the Canadian Act allows unlimited special damages, but general damages are limited to $5,000: s.53(3).

[1116] For example, New South Wales.

practical terms can be significant. Two other issues apart from constitutional matrices are of special significance in this regard: the approach to interpretation of this legislation, and the impact of the Charter on it.

Canada had a somewhat shaky start with respect to its early anti-discrimination legislation, particularly with respect to the criminal onus required by Acts dealing with employment and accommodation.[1117] Current legislation no longer requires intent to be shown, which has prompted the courts to hold that it is the effect of the action which must be considered. In this way, indirect discrimination has been interpreted into the legislation, even when it is not an express part of it.[1118] This has been done because the legislation is regarded as "not quite constitutional, but certainly more than ordinary"[1119] and as a result has primacy and cannot be impliedly (as opposed to expressly) repealed by later legislation.[1120] It has been

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[1117] For example, in R v McKay (1955) 113 CCC 56 a clear case of race discrimination under the Ontario Fair Accommodation Practices Act 1954, where a black man was refused service in a cafe in a situation designed to expose the owner's racism, was lost because the court found that the complainant had not shown beyond a reasonable doubt that the lack of service was due to his colour.

[1118] Ontario Human Rights Commission and O'Malley v Simpsons-Sears Ltd [1985] 2 SCR 536: a Seventh Day Adventist was unable to work on Friday evenings and Saturdays, the store's busiest times, and lost her full-time sales position and accompanying benefits. This was found to amount to unlawful discrimination. (And the store did not discharge its onus with respect to establishing bona fide occupational requirements.)

[1119] Ibid, at p.547 per McIntyre J.

[1120] Re Winnepeg School Division No.1 and Craton, et al (1985) 21 DLR (4th) 1: Ms Craton was compelled to retire at the age of 65 by the Manitoba Public Schools Act. This was contrary to the Manitoba Human Rights Act. The Public Schools Act had been re-enacted after the Human Rights Act (although it was argued that there was no significant difference between the original and the re-enacted sections). The Human Rights Act prevailed, and would do so even in

argued that this principle might apply beyond anti-discrimination legislation to "human rights" legislation generally.[1121] This approach has encouraged a wide interpretation of the proscribed grounds of discrimination. Thus, AIDS and HIV have been interpreted into provisions dealing with disability,[1122] as have obesity, height and an appearance marred by acne[1123] (none of which would be regarded as disabilities under Australian legislation), as well as perceived disabilities.[1124] It also means that systemic discrimination can be challenged, even by persons not directly and personally affected by it,[1125] but the courts sometimes stumble over other legislative requirements here.[1126] As well, a broad purposive approach to

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the case of a contract representing a collective workplace agreement.

[1121] Tarnopolsky & Pentney, ante, p.9-57.

[1122] Biggs & Cole v Hudson (1988) 9 CHRR D/5391

[1123] Unreported cases handled by the British Columbia Council of Human Rights: interview by the author with Mr Alan Andison, Manager, and staff in Victoria, British Columbia on May 26, 1989. (Interview on tape).

[1124] Brideau v Air Canada (1983) 4 CHRR D/1314

[1125] Action Travail des Femmes v Canadian National Railway Co [1987] 1 SCR 1114

[1126] For example, in Bhinder et al v Canadian National Railway Company (1985) 23 DLR (4th) 481 the Supreme Court, in a split decision, ruled that Bhinder, a Sikh, was not discriminated against by his employer when required to wear a hard hat (instead of his turban) because this was a bona fide occupational requirement. This was "upheld" by the Human Rights Committee in Singh Binder v Canada (Communication No. 208/1986, [1989-90] CHRY 306 at p.311). Contrast the Australian case of Flannery v O'Sullivan No.2 (1993) EOC 92-501, where it was held that genuine occupational requirements for police officers (in this case, to have a certain standard of eyesight) should not be confused with the way in which those requirements can be achieved.

interpretation cannot overcome problems of process generally,[1127] and sometimes politics get in the way.[1128] The quasi-constitutional nature of legislation does not prohibit its amendment or repeal.

A significant impact on Canadian anti-discrimination legislation has also been produced by the Charter. With respect to the administration and enforcement of these laws, the legal rights provisions in sections 7-14 may apply to investigation procedures[1129] and to general processes.[1130] However, whether this is

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[1127] See, for example, Achieving Equality: A Report on Human Rights Reform, Ontario Human Rights Code Review Task Force (1992, Ministry of Citizenship, Ontario) which lists problems of delay, physical and attitudinal problems, a lack of strategic and proactive challenges to systemic discrimination, and a lack of widespread and effective education on human rights (pp.20ff). This report builds on earlier reports on the functioning and effectiveness of the Ontario Commission: see Standing Committee on Government Agencies, Report on the Ontario Human Rights Commission (1990).

[1128] For example, in 1984 the former British Columbia Human Rights Code, which contained an open-ended list of grounds, was repealed and replaced after politicians considered that some of the cases being brought under it were a waste of resources. (Interview by the author with staff of the Council, referred to above).

[1129] In Alberta Human Rights Commission v Alberta Blue Cross Plan (1983) 4 CHRR D/1661 the Alberta Court of Appeal held that s.8 of the Charter applied to a request by the Commission for the production of documents during an investigation.

[1130] In Kodellas v Saskatchewan Human Rights Commission (1986) 8 CHRR D/3712 complaints of sexual harassment were filed against Kodellas in 1982 and 1983, but a Board of Inquiry was not appointed until 1985. The Saskatchewan Court of Queens Bench held that s.7 of the Charter (the right not to be deprived of life liberty and security) applied because the process was in the form of a public "trial" and the delay was prejudicial to Kodellas' case. It prohibited the Board from inquiring into the matter. This was partly overturned on appeal to the Court of Appeal ([1989] 5 WWR 1) on the basis that there should be no stay of proceedings against the vicariously liable corporate respondent, Tripolis Foods Ltd. However, the court was unanimous in the view that the unexplained delay, which was the commission's fault, was unreasonable and an infringement of Kodellas' right to fundamental justice in section 7. However, contrast Nisbett v Manitoba (Human Rights Commission) (1993) 101 DLR (4th) 744, where in a similar case of delay with respect to allegations of sexual harassment the Manitoba Court of Appeal refused

necessarily an advantage is open to debate. Human rights legislation is regarded as "special"[1131] and conciliation processes under it, while the rules of natural justice undoubtedly should apply, cannot always be analogised to court proceedings if the end result is to be equality rather than formal justice. The Supreme Court has said that the principles of fundamental justice are not immutable and may vary according to the context in which they are invoked.[1132] Regulatory regimes designed to further laws which promote community values as much as resolving person-to-person conflict need a flexible approach.[1133] The narrow use of the legal rights provisions of the Charter might not achieve this goal.

With respect to the substantive content of these laws, Charter sections 27 (the preservation and enhancement of Canada's multicultural heritage) and 28 (rights and freedoms are granted equally to men and women) may be important, but it is particularly the equality rights under section 15 which have been significant. That section, while it refers to equality "in particular" on the bases of "race, national or ethnic origin, colour, religion, sex, age or mental or physical disability," it is not

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to follow Kodellas on the basis that s.7 of the Charter had no application to proceedings of a non-penal nature under human rights legislation.

[1131] Craton, ante.

[1132] Per La Forest J in R v Lyons [1987] 2 SCR 309 at p.361. It has also held that in the context of orders to appear before the Restrictive Trade Practices Commission, there is no violation of s.7: Thomson Newspapers v Canada (Director of Investigations, Restrictive Trade Practices Commission) [1990] 1 SCR 425.

[1133] See Alison Harvison Young, "Keeping the Courts at Bay: The Canadian Human Rights Commission and its Counterparts in Britain and Northern Ireland: Some Comparative Lessons" (1993) 43 U. of Toronto L.J. 65 at pp.86-88.

limited to these.[1134] Thus, in Re Blainey and Ontario Hockey Association[1135] a young woman had been refused permission to play hockey on a boys' team and the Ontario Human Rights Code exempted sex-segregated sports facilities. This exemption was struck down as being contrary to the right of sex equality in section 15. The leading case on the section remains the first one to be decided under it, Andrews v Law Society of British Columbia,[1136] which I have already discussed above, where Mark Andrews met all the requirements for admission to the British Columbia bar except for Canadian citizenship. Specifically rejecting the approach adopted under the Bill of Rights in Bliss, the Supreme Court adopted a purposive approach, McIntyre J noting that the reference in s.15 to equality "without discrimination" meant that Parliament intended that the interpretation of s.15 should be undertaken in the light of other Canadian human rights legislation.[1137] Thus the section can apply to "analogous" grounds such as citizenship (it is not completely open-ended) and it addresses not only the intent, but also the effect, of laws. Thus a similarity test (everybody being treated the same) is not sufficient. Inequality is disadvantage, and this is to be ascertained in the social, legal and political context. The majority of the court found that the citizenship requirement breached section 15 (and was not saved by section 1 of the Charter).

[1134] Andrews v Law Society of British Columbia [1989] 1 SCR 143

[1135] (1986) 54 O.R. (2d) 513

[1136] Ante.

[1137] At p.175.

This broad and generous decision laid the groundwork for others holding, for example, that sexual orientation is an analogous ground[1138] and even opening up the possibility that economic rights might be protected and remedial action effectively ordered on the government by a court.[1139] Both federal and provincial legislation began to be amended and their scope of application expanded as a result, but the courts have been reluctant to take on a remedial role normally assigned to government.[1140] However, the decision in Andrews itself and the structure of the Charter present problems. The issue of reasonable limitations posed by section 1 applies, and has been held to justify non-equality.[1141] The scant reliance on international human rights norms in Andrews has already been

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[1138] Haig v Canada (1992) 94 DLR (4th) 1: the omission of sexual orientation from the Canadian Human Rights Act was a breach of s.15 of the Charter. It was held similarly in Newfoundland (Human Rights Commission) v Newfoundland (Minister of Employment and Labour Relations) (1995) 127 DLR (4th) 694 with respect to the omission of sexual orientation from the Newfoundland Human Rights Code.

[1139] Schachter v Canada (1988) 52 DLR (4th) 525: under the Unemployment Insurance Act adoptive parents, both male and female, could obtain maternity leave, whereas for natural parents, only the mother could obtain it. The Federal Court, Trial Division, held that this breached s.15 of the Charter. However, on appeal to the Supreme Court of Canada ((1992) 93 DLR (4th) 1) it was not argued that there had been a breach of s.15 (the government had amended the legislation in the meantime) but whether it was open to a court to read into the legislation a right for natural mothers. The answer to this was "no" as the mechanisms in s.52 of the Constitution Act s.24 of the Charter do not allow this when several remedial options might be open and the court would be required to choose one of them. This would be a substantial intrusion into budgetary decisions which it is not appropriate for a court to make.

[1140] Schachter, ante.

[1141] For example, in McKinney v University of Guelph [1990] 3 SCR 229 it was held that a mandatory retirement policy based on age was justifiable under s.1.

discussed above.[1142] The approach to equality in this case, rather, is taken from the U.S. "liberal" approach, and in particular the notion that equality attaches to "discrete and insular minorities" recognised as being disadvantaged.[1143] This approach has been followed in later cases.[1144] It means that, although the court looks at the disadvantaging effect of the law on minorities rather than at equal treatment under it (under the latter even Hitler's Nuremberg Laws could be justified), and thus focuses on disadvantage without necessarily requiring a comparator in relation to their treatment, (ie, it focus on disadvantage in the social, political and legal context, and not on the test of similarity and difference), a classification is still required and this is done without overt reliance on human rights. This can lead to problems for equality of minorities in particular contexts. Thus, while sexual orientation has been found to be an analogous ground in section 15,[1145] equality for same-sex couples has proved more difficult to achieve.[1146]

[1142] The only judge to refer to international law is McIntyre J (at p.177) and then it is to the European Convention on Human Rights rather than to any law binding on Canada, and then only to distinguish the equality provision in Article 14 of that treaty because of the internal qualifier of objective and reasonable justification read into it by the European Court of Human Rights (Belgian Linguistic Case (No.2) (1968) 1 EHRR 252 at p.284), thus distinguishing it from the Charter where such considerations take place in the context of section 1.

[1143] Wilson J at p.151-3 (writing for herself and Dickson CJ and L'Heureux-Dubé J); McIntyre J at p.183 (writing for himself and Lamer J).

[1144] For example, in R v Turpin [1989] 1 SCR 1296 s.15 was held not to apply to s.430 of the Alberta Criminal Code under which Alberta residents, but not residents of other provinces, could opt out of a jury trial. Criminals resident in other provinces were found not to be a prior-disadvantaged discrete and insular minority.

[1145] Haig, ante.

The approach allows judicial bias to intrude by encouraging a personal conceptualisation in terms of a different dichotomy, in-group and out-group. In these instances the effect of the case is to reconstruct the binary pairing it might otherwise have demolished and which is the paradigm on which anti-discrimination laws are designed. The problem is that same-sex couples are both similar and dissimilar to their heterosexual counterparts. The notions of "spouse" and "family" exist at different levels in both their homosexual and heterosexual manifestations. A classificatory scheme assumes a standard which simply does not exist. In these cases it is as though Canada did not have a Bill of Rights at all: they exhibit the similar problems with which Australian anti-discrimination laws are fraught.[1147]

[1146] For example, in Vogel v Manitoba [1992] 3 WWR 131 it was held that denial of "marital" benefits to a homosexual couple was not discrimination on the basis of sexual orientation but because the people concerned were not legally married to each other. See also Canada (Attorney-General) v Mossop [1993] 1 SCR 554 where on similar reasoning (but not in the context of a Charter challenge) denial of bereavement leave to a homosexual man on the death of his lover's father was held not to be discrimination on the basis of sexual orientation. In May 1995 the issue finally came before the Supreme Court of Canada. In Egan & Nesbit v Canada [1995] SCJ No.43 (May 25, 1995) the appellants had been in a relationship for 47 years. They were refused a spouse's allowance under the Old Age Security Act (RSC, 1985, c.O-9) because "spouse" was defined in the Act as a person of the opposite sex. Four judges of the court (Lamer CJ, Major, La Forest and Gonthier JJ) held that same-sex relationships were not included in discrimination on the basis of sexual orientation. The other five (Cory, Sopinka, Iaccobucci MacLachlan and L'Heureux-Dubé) held that they were so included, but Sopinka J thought that the legislation was justified under s.1 because of the necessity of incremental change to laws to make them conform to the Charter. Although the appellants lost, the advance in this case is that such laws are prima facie contrary to the Charter and will have to be justified by the governments making them.

[1147] For example, in Wilson & Anor v Qantas Airways (1985) EOC 92-141 a homosexual couple who were both Qantas flight attendants were held not to be discriminated against on the basis of marital status when they were refused inclusion on the married persons roster (which would allow them to fly - and have times off - together) because they were not "married" and the disadvantage they suffered was analogised to the case of "golfing buddies."

A significant contrast to Canada is the fact that anti-discrimination legislation in Australia is based on international human rights instruments: directly in the case of the Commonwealth Acts by using Schedules (because of the requirement of satisfying the external affairs power in s.51(xxix) of the Constitution) and indirectly in the case of the states and territories through the use of Preambles and otherwise.[1148] There is thus a greater recognition of human rights instruments in the Australian legislation than in the Canadian. This is significant because, despite the symbiotic relationship between international human rights norms and domestic law explained in Chapters 3 and 4, the former do not always represent the liberal laissez-faire ideology of the latter. The international norms can be used in the process of statutory interpretation of the legislation, as preambles can be used to resolve any ambiguities in the body of an Act (although they cannot be used to alter the otherwise plain meaning of the words used there),[1149] and Schedules are regarded as being part of an Act.[1150] Treaties, when they can be shown to have

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[1148] The states and territories, having residuary legislative powers, do not need to "justify" their legislation by reference to any head of power, but do refer to human rights treaties. See, for example, the Preamble to the Queensland Anti-Discrimination Act 1991 which refers with approval to Australia's ratification of, or adherence to, the Race Discrimination Convention, the Women's Convention, ILO 111, ILO 156, ICCPR, the Convention on the Rights of the Child, the Declaration on the Rights of Mentally Retarded Persons and the Declaration on the Rights of Disabled Persons. Other Acts have a specific "Objects" section in which the elimination of discrimination on various grounds and the promotion of equality are referred to. See South Australian Equal Opportunity Act 1984, s.3; ACT Discrimination Act 1991, s.3; Northern Territory Anti-Discrimination Act 1992, s.3.

[1149] Attorney-General v Prince Ernest Augustus of Hanover [1957] A.C. 436

[1150] Inland Revenue Commissioners v Gittus [1920] 1 K.B. 563 at 576. This is also provided for in every Acts Interpretation Act in Australia: Commonwealth, s.13; Queensland, s.14; New South Wales,

been the basis for an Act, can be used generally to resolve ambiguities in an Act,[1151] but not to alter the otherwise plain meaning there.[1152] The travaux préparatoires of a treaty may also be used in this way.[1153] But the relationship has not turned out to be of quite the same purposive approach adopted in Canada. For example, in Ontario Human Rights Commission and O'Malley v Simpsons-Sears Ltd[1154] it was held by the Canadian Supreme Court that, in interpreting the Ontario Human Rights Code and the Canadian Human Rights Act, the special status of human rights legislation requires courts to seek out the purpose of the legislation and give effect to it.[1155] The High Court of Australia has not gone quite so far. In referring to the New South Wales Anti-Discrimination Act it said:

> ... the purpose of the legislation should not be ignored in determining its meaning and ... unless the end which the provisions are designed to serve is kept in view, a construction which fails to serve those ends is likely to result. The provisions, mere means to an end, will have themselves become the end.[1156]

The Canadian approach puts the purpose foremost; the Australian approach uses

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s.35; ACT, s.12; Victoria, s.36; Tasmania, s.6; South Australia, s.19; Northern Territory, s.55; Western Australia, s.31.

[1151] Quazi v Quazi [1980] A.C. 744. The Acts Interpretation Acts of the Commonwealth and most of the states now allow extrinsic materials such as treaties to be taken into account: Commonwealth, s.15AB; New South Wales, s.34; Victoria, s.35; Western Australia, s.19; ACT, s.11B.

[1152] Ellerman Lines Ltd v Murray [1931] A.C. 126

[1153] Fothergill v Monarch Airlines Ltd [1981] A.C. 251, especially Lord Wilberforce at pp.270-8.

[1154] [1985] 2 SCR 536

[1155] At p.547

[1156] Australian Iron & Steel Pty Limited v Banovic & Anor (1989) EOC 92-271

the purpose to inform the text of the legislation. Thus the Canadian courts read indirect discrimination into the legislation; it is unlikely that Australian courts would have done the same.[1157] But the relationship in both cases is clearly symbiotic, although hedged by parliamentary decisions to limit domestic application. In some cases, it is also synergistic.

Because of the Australian constitutional matrix discussed above, there is no seamless web of human rights implementation in Australia, even where treaties are directly relied upon. The effect is more like a patchwork quilt. Anti-discrimination legislation now exists at federal,[1158] state[1159] and territory[1160] levels. The Commonwealth and local legislation can both theoretically apply, with the consequent inconsistency problems due to the operation of s.109 of the Constitution, as discussed above.

The High Court decisions with respect to the external affairs power discussed above indicate that there should now be little question of the validity of this

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[1157] Indirect discrimination is expressly written into the provisions of the Australian legislation.

[1158] Racial Discrimination Act 1975, Sex Discrimination Act 1984, Human Rights and equal Opportunity Commission Act 1986, Affirmative Action (Equal Employment Opportunity For Women) Act 1986, Disability Discrimination Act 1992.

[1159] Anti-Discrimination Act 1977 (NSW); Equal Opportunity Act 1984 (SA); Equal Opportunity Act 1984 (Vic); Equal Opportunity Act 1984 (WA); Anti-Discrimination Act 1991 (Qld); Sex Discrimination Act 1995 (Tas).

[1160] Discrimination Act 1991 (ACT); Anti-Discrimination Act 1992 (NT).

legislation. Reliance on human rights treaties has therefore had a significant impact on the introduction of human rights principles into Australian legislation. However, because there no longer has to be absolute conformity of the legislation with the treaty on which it is based, the former may fall short of, or exceed, the stipulations of the latter. This will now be examined to determine whether the symbiotic connexion (which is essential for the Commonwealth legislation) is used to its fullest extent and whether a synergistic effect can be perceived.

The Racial Discrimination Act (RDA) was originally the brainchild of Senator Lionel Murphy and was passed by the Australian Parliament in 1975 after some amendments based on opposition concern that a "star chamber" might be set up under the Act.[1161] It has as its Schedule the Convention on the Elimination of All Forms of Racial Discrimination.[1162] Indeed, the definition of racial discrimination in s.9(1) is taken directly from Articles 1 and 5 of the Convention. It also incorporates the affirmative action provision of Article 1(4) in section 8. This Act will therefore cover (more or less precisely depending on local situations) the ratione personae and the ratione materiae as in the Convention. In this regard, Bailey has called it a "mini Bill of Rights".[1163] Because of the limitations mentioned below, this is overstating the case. Indeed, the High Court in Mabo held

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[1161] See Peter Bailey: Human Rights: Australia in an International Context (1990, Butterworths, Sydney), pp.181-4.

[1162] Australia's ratification and reservations to this treaty are discussed above in Chapter 4.

[1163] Bailey, ante, p.188

that the reference in s.9 to the "doing of an act" did not apply to passing legislation that affects legal rights (even though that legislation would have to apply in the light of the equality provision in s.10).[1164] In this regard, the application is very different to the Canadian Charter cases discussed above, such as Operation Dismantle. In addition, the reproduction of the terms of the Convention also reproduces the strict public/private dichotomy which is a feature of it. It can compound this problem by a narrowness of interpretation, as seen in Gerhardy v Brown,[1165] although this approach seems to be improving.[1166] However, the Act goes beyond this to specifically include indirect racial discrimination.[1167] This is to take account of the discriminatory effects of imposed requirements or conditions which impact worse on people of some races when compared to others. It may attack systemic problems, such as job requirements written without regard to a multicultural perspective, but it is not limited to this. Indirect discrimination is a recent addition to this Act and is based on the fact that this form of discrimination has always been in the Sex Discrimination Act (SDA) and the Disability Discrimination Act (DDA). While the concept of indirect discrimination

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[1164] Mabo No.1 (1988) 166 CLR 186; Mabo No.2 (1992) 175 CLR 1

[1165] (1985) 159 CLR 70: the High Court found that certain Aboriginal land rights legislation infringed the RDA as a matter of direct discrimination because of its exclusion of other peoples from the land. However, the legislation was considered to be saved by the affirmative action principles of s.8. This is an approach to formal equality, ignoring substantive equality or effects and purposes, which is what Article 1 of the Race Convention (and s.9 of the RDA itself) advert to. This is again the classificatory approach. For a critical commentary, see W. Sadurski, "Equality Before the Law: A Conceptual Analysis" (1986) 60 Australian Law Journal 131.

[1166] See Street v Queensland Bar Association, discussed above.

[1167] Section 9(1A)

might be interpreted into Article 1 of the Convention, this is by no means clear.[1168] The inclusion of it can therefore be seen as an improvement on the basis provided by the Convention. However, it is no panacea. All indirect discrimination legislation in Australia revolves around the concept of reasonableness.[1169] This means that the resulting discrimination will not be unlawful if an imposed requirement or condition which impacts worse on people of some races than others is regarded as being reasonable. In Australia, the courts have made it clear that mere convenience is not enough[1170] and that "all the circumstances of the case must be taken into account."[1171] Nevertheless, if the issue becomes a contest, it will be a tribunal, almost always composed of Anglo-Australians, which will have to determine the matter. This determination may thus smack of paternalism, being based on what some critical race theorists have called "the hierarchy of credibility."[1172] Thus, in one of the few reported cases to discuss s.9(1A) of the RDA, the closing of a primary school in Alice Springs which had an almost totally Aboriginal student population was held not to amount

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[1168] However, see Warwick McKean: Equality and Discrimination Under International Law (1983, Clarendon Press, Oxford), pp285-8, and Theodore Meron, "The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination" (1985) 79 A.J.I.L. 283 at p.289 who argue that an international norm of non-discrimination is the negative expression of the principle of equality and therefore must include indirect discrimination.

[1169] For example, RDA s.9(1A)(a).

[1170] Styles v The Secretary of the Department of Foreign Affairs and Trade (1989) EOC 92-265

[1171] Waters v The Public Transport Corporation of Victoria (1991) 173 CLR 349, per Dawson and Toohey JJ at 383.

[1172] See Jeanne Gregory: Sex, Race and the Law: Legislating for Equality (1987, Sage Publications, London) at p.83.

to unlawful indirect racial discrimination in education because the closure was reasonable.[1173] It was the only school in the area to be closed. The circumstances adverted to were poor attendance records, cost savings in the closure and the Education Department's promise that a culturally appropriate style of education would be made available in other schools. The (white) Hearing Commissioner had to make a difficult decision based on the evidence before him and weighing up the factors to the best of his ability and experience. There is no guarantee that an Aborigine sitting as Hearing Commissioner on this case would have decided it differently. However, as a legal concept, "reasonableness" can tend to mask the value choices which are essential to arriving at a decision, and sorting the factors into a hierarchy of relevancy. This can sterilise relevant facts by abstracting them from the context in which their meaning for the complainant can be appreciated.[1174] Some critics of the US legal system argue that most judges and lawyers adopt a "perpetrator" rather than a "victim" perspective, that is, they look for abstract norms unsullied by history or social reality, thus ignoring the actual status of people of colour, and thereby serving to validate an unjust social system.[1175] As Sandra Berns has pointed out: "terms such as ... "equality"

[1173] Aboriginal Students' Support and Parents Awareness Committee, Traeger Park Primary School, Alice Springs v Minister for Education, Northern Territory (1992) EOC 92-415

[1174] See Richard Delgado, "Storytelling for Oppositionists and Others: A Plea for Narrative" (1989) 87 Michigan L.R. 2411, especially at 2428.

[1175] Allan D. Freeman, "Legitimising Racial Discrimination Through Anti-Discrimination Law: A Critical Review of Supreme Court Doctrine" (1978) 62 Minnesota L.R. 1049. See also Neil Gotanda, "A Critique of Our Constitution is Colourblind" (1991) 44 Stanford L.R. 1.

resonate with meaning only when and to the extent that they are situated within concrete narratives, narratives which lay bare the history, the structures and the values which sustain and support them."[1176] Critical race theorists are divided as to the usefulness of the law at all in combating racial discrimination. Derrick Bell maintains that the law is of little use in this regard.[1177] On the other hand, john powell argues that equality-based arguments can promote the cause of racial justice and equality and that the very act of making those arguments can prove to be transformative, whether or not they effect immediate results.[1178]

Thus, a combination of international and domestic law, whether synergetic or not, cannot overcome the problems systemic in the law itself. But improvements may nevertheless be effected. Vicarious liability for racial discrimination is expressly introduced in the RDA,[1179] which is not a specific feature of the Convention. Thus, a synergy between the international norm and the domestic system has produced something which is a little more than the mere sum of the individual parts even though we may still be a long way from the gates of the New Jerusalem.

[1176] Sandra Berns, "Tolerance and Substantive Equality in Rawls: Incompatible Ideals" (1990) 2 Law in Context 112 at 120.

[1177] Derrick A. Bell Jr., "Racial Realism" (1992) 24 Connecticut L.R. 363

[1178] john a. powell, "Racial Realism or Racial Despair?" (1992) 24 Connecticut L.R. 553

[1179] Section 18A

The application of the RDA is wide: it applies to individuals, companies, and the Crown in right of the Commonwealth, the states and the territories.[1180] It applies to equality before the law; access to places and facilities; land, housing and accommodation; the provision of goods and services; the right to join trade unions; employment; and advertisements.[1181] It has played a significant part in cases dealing with affirmative action[1182] and the equal application of laws.[1183]

Racial vilification was made unlawful by an amendment to the Act in 1995, but in a manner hedged with qualifications.[1184] New South Wales has amended its Act to introduce vilification provisions,[1185] South Australia is in the process of doing so,[1186] and Western Australia has had criminal provisions dealing with it since 1990.[1187]

[1180] Section 6

[1181] Sections 10-16.

[1182] Gerhardy v Brown, ante

[1183] Mabo v Queensland (No.1) (1988) 166 CLR 186

[1184] Sections 18B-18F. It only applies to public vilification which is "reasonably likely" to offend and does not apply to statements made for a "genuine purpose in the public interest." These provisions do not make the vilification an offence and so they fall short of the requirement in Article 4(a) of the Racial Discrimination Convention that Parties shall declare racial hatred "an offence punishable by law."

[1185] Anti-Discrimination Act 1977, ss.20B, 20C, 20D.

[1186] Racial Vilification Bill 1995

[1187] Criminal Code 1913 (WA) ss.76-80, as inserted by the Criminal Code Amendment (Racist Harassment and Incitement to Racial Hatred) Act 1990.

The remedies provided by this Act (and also by the SDA and the DDA) are conciliation followed by a public hearing and court proceedings if necessary.[1188] The aim of conciliation is to resolve an issue cheaply, quickly and confidentially, although this does not always occur.[1189] The overwhelming number of complaints are in fact settled at the conciliation stage,[1190] at least in the sense that the complainant accepts the settlement. Unlike Canada, no Australian federal or state legislation allows, much less requires, that the settlement be approved by the mediating body. Conciliation processes have been criticised in this context in that they presume an equality of status and bargaining power between complainant and respondent which often does not exist, and are modelled on employment negotiations between trade unions and employers, thereby being inappropriate for individual complainants.[1191] Also, this individualised approach offers little potential for systemic change, allowing the underlying social, economic and

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[1188] RDA Part III

[1189] For example, in Chief General Manager, Department of Health v Aramugam (1987) EOC 92-195, Dr Aramugam won the case at first instance (and was awarded $7000 compensation), but lost on appeal and was left with a legal bill of $100,000. Some jurisdictions such as Queensland have attempted to establish pro-bono agreements with law firms. The author's experience with these has been that in important and difficult cases (the very ones where lawyers are needed) the amount allocated in the agreement by the firm is usually expended by the end of a directions hearing. Some Canadian jurisdictions, such as British Columbia, have arrangements with community legal services to try to overcome this problem. (Interview by the author with Mr Alan Andison, Manager of the British Columbia Council of Human Rights, Victoria, British Columbia, May 26, 1989).

[1190] The 1993-94 Annual Report of the Human Rights and Equal Opportunity Commission (AGPS, Canberra 1994) indicates that in the year under review, of 641 cases where conciliation was attempted, 530 were conciliated (Table 3 at p.31).

[1191] See Margaret Thornton: The Liberal Promise: Anti-Discrimination Legislation in Australia (1990, Oxford U.P., Melbourne), Chapter 5 "Equivocations of Conciliation".

cultural factors impacting upon discrimination to be ignored, even though attention to these is in some cases a requirement of the international norms.[1192] Conciliators are given more powers than mediators,[1193] but the private process may be insufficient to deter the "recidivist" respondent and has a minimal educative effect. In addition, as conciliated settlements and determinations of the Human Rights Commission at a public hearing are not judgements of a court, they are not binding as to law or fact. Thus, if a respondent fails to abide by a settlement agreement or determination, a rehearing is possible in the Federal Court of Australia, but it would have to be a re-hearing de novo as to all issues of law and fact.[1194] This time-consuming, repetitive and costly process of enforcement was streamlined by the Commonwealth in 1992 when it introduced a process whereby settlement agreements and determinations could be registered in the Federal Court and would become binding as though orders of that court if not challenged by the respondent within 28 days.[1195] In 1995, the High Court struck

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[1192] For example, in L.K. v The Netherlands (Communication No. 4/1991) the Racial Discrimination Committee considered that the inadequate response by the police and in judicial proceedings to racial incidents in a neighbourhood which wanted to exclude foreigners did not comply with Article 6 of the Convention which applies to "effective protection and remedies ... against any acts of racial discrimination." It is unlikely that the processes under the RDA could provide redress in a similar circumstance in Australia, unless it could be shown that the police or the magistracy were treating the foreigners differently to others in the same or similar circumstances.

[1193] For example, they can compel attendance at, and co-operation in, conferences: RDA ss. 24B-24D.

[1194] Aldridge v Booth (1988) EOC 92-222

[1195] Sex Discrimination and Other Legislation Amendment Act 1992. This Act amended similar procedures under the SDA and the DDA at the same time.

down these amendments as being contrary to the separation of judicial powers required by Chapter III of the Constitution.[1196] The registration process, the court held, was not merely procedural but effectively turned the determination of a non-judicial body into a judicial decision. In the meantime, the Human Rights Commission reverted to its former enforcement procedures, and there are plans to establish a Human Rights Division of the Federal Court to hear these matters. Thus Australia's Constitution has once again tripped up the implementation of Australia's human rights obligations. It has not eliminated the implementation or enforcement of them, but it has made the process more cumbersome and less effective. The process is however sufficiently in conformity with the obligation under Article 2(1)(d) of the Convention to "prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination..." The symbiosis here allows for this, thus reducing the effectiveness of the prohibitions.

However, what can be reasonably said is that the Racial Discrimination Act, which would not have been constitutionally possible without the existence of the Convention, introduces into Australian law remedies for racial discrimination in circumstances where the Common Law or other legislation would have afforded none. Separately, Australian domestic law and international law would not have done this within Australia. Together, they achieve a considerable advance for

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[1196] Brandy v Human Rights and Equal Opportunity Commission & Ors (1995) EOC 92-662

human rights (although the situation is buy no means perfect) and act at least partly in a synergistic way to produce remedies a little beyond the mere sum of the two sets of norms. While it may have drawbacks with respect to systemic problems, it produces for individual complainants a range of resolutions (from apology to monetary damages) which are domestic remedies not specifically contemplated in the Convention but which are related to an international prohibition. Race discrimination is not made a criminal act by the RDA, but nor is it precisely a civil matter either, as most complaints are settled by conciliation. The conciliation model is implementation through law rather than by law.

The Sex Discrimination Act (SDA) was passed in 1984, largely on the initiative of Senator Susan Ryan (as minister assisting the Prime Minister on the status of women) and effective lobbying by women's groups, but in a watered-down version from its original Bill, removing affirmative action proposals to make it more politically palatable.[1197] It has as its Schedule the Convention on the Elimination of All Forms of Discrimination Against Women. The rationes materiae of the SDA are discrimination based on sex, marital status, pregnancy and (since 1992) family responsibilities.[1198] The latter was added to give effect to Australia's obligations under ILO Convention 156 (Workers with Family Responsibilities). Discrimination on the basis of being a woman or being pregnant is clearly covered in the

[1197] See Bailey, ante, pp.151-3.

[1198] Sections 5-7A

Convention. However, discrimination on the basis marital status not related to sex is not. Also, discrimination on the basis of being a male is not covered by the Convention. Men can bring complaints of sex discrimination under the SDA in limited circumstances[1199] (and in all appropriate circumstances under the state and territory legislation). Thus a synergy has occurred between Australian law and international law to allow remedies where previously they did not exist in either.

However, there is absent from the SDA general equality provisions like sections 9 and 10 of the RDA. It has been cogently argued that the Act therefore does not deliver the right to equality for women which imbues the Convention.[1200] Also, the ratione personae of the SDA is more limited than that of the RDA. While it will bind the Crown in right of the Commonwealth, it will not bind the Crown in right of a state or an instrumentality of a state unless the relevant sections specifically allow.[1201] A perusal of the Act reveals that the provisions of sections 14-20 (dealing with discrimination in employment), 25 (discrimination by clubs)

[1199] Under s.9, a man would be able to bring a complaint if the respondent were the Commonwealth, a trading or financial corporation, or a foreign corporation, or the discrimination involved interstate trade or commerce, interstate banking or insurance, or involves persons, things or matters outside Australia. See Tully v Ceridale Pty Ltd (1990) EOC 92-319: a man was able to bring a complaint against a nightclub charging higher entrance fees to men because the owner was a proprietary company which traded by selling drinks in a bar. These requirements of s.9 reflect the federal government's heads of power under s.51 of the Constitution and are used to extend the operation of the SDA beyond what it would be if relying on the external affairs power only.

[1200] See House of Representatives Standing Committee on Legal and Constitutional Affairs: Half Way to Equal: Report of the Inquiry into Equal Opportunity and Equal Status for Women in Australia (1992, AGPS, Canberra), especially at paragraphs 10.1.41-10.1.42.

[1201] Sections 12, 13

and 28A-28L (sexual harassment) do not bind the Crown in right of a state. This means that sex discrimination or sexual harassment occurring in the state public service (which is an major employer and service provider) or by state instrumentalities such as TAFE colleges and utility providers are not covered. Ostensibly, the reasons for this are the implied constitutional limitations discussed above, particularly the principle in the Melbourne Corporation Case that the Commonwealth cannot interfere in the internal workings of a state government. It may be questioned, in the light of the latest decisions under the external affairs power, whether this limitation would apply in these circumstances. In addition, it is not a limitation placed in the RDA which also relies on the external affairs power, (the race power alone being insufficient for the validity of that Act),[1202] which applies where the SDA baulks. Constitutionalism combined with a lack of political will have stymied the synergism which might have occurred here.

Discrimination under the SDA can be both direct and indirect. The remarks made above with respect to the latter also apply here. Vicarious liability applies as well.[1203]

The SDA, where it does apply, applies in employment, education, the provision of goods, services and facilities, accommodation, disposition of land, clubs, and the

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[1202] Koowarta v Bjelke-Petersen, ante.

[1203] Section 106

administration of Commonwealth programs.[1204] However, here the Act is hedged with numerous exemptions which do not appear in the RDA and are not required by the Women's Convention.[1205] Thus, the pubiic/private dichotomy is retained by exempting from the Act employment, accommodation or childcare services in a private residence.[1206] The Act does not apply to issues such as the ordination of priests[1207] or to work in or education by schools run by religious orders where the discrimination is done in order not to offend the religious susceptibilities of adherents to the religion.[1208] Insurance and superannuation funds are given exemptions based on statistical and actuarial factors as well as total exemptions for provisions existing before the Act was passed.[1209] Combat duties are exempted[1210] as are certain Acts such as the Social Security Act[1211] although the latter is subject to review by June 1996.[1212] These exemptions are not required by the Convention and some of them run counter to it. They implement Australia's reservations discussed in Chapter 4, but also go beyond them (there is

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[1204] SDA Part II

[1205] While Article 1 of the Racial Discrimination Convention confines racial discrimination to "any field of public life", the Women's Convention applies, under Article 1, to "any other field."

[1206] Sections 14(3), 23(3), 35

[1207] Section 37

[1208] Section 38

[1209] Sections 41-41B

[1210] Section 43

[1211] Section 40

[1212] Section 40A

no necessity as a matter of international law for the exemptions with respect to religious schools or insurance companies). They represent the influence of powerful interest groups such as the churches, financial bodies and the federal bureaucracy. The system once again allows domestic politics to trump international law. In particular, the exemption for other legislation in section 40, which provides that any act done in compliance with a list of legislation, illustrates the "ordinary law" approach to anti-discrimination legislation in Australia. The Supreme Court of Canada has held, in the absence of a provision like section 40, that a human rights statute is fundamental law to which exceptions can only be made by clear intention of the Parliament.[1213] The clear intention of the Australian Parliament is to retain the Diceyan paradigm rather than make human rights fundamental.

Like the RDA, the complaint-based approach, requiring that differential treatment based on sex be shown in specific areas, does little to remedy systemic problems.[1214] The paradigm of discrimination upon which the Act rests is one which looks to, and compares women with, men (usually of the white, able-bodied, heterosexual variety) to see if they are treated the same or differently. Thus in Proudfoot v ACT Board of Health[1215] a complaint by a man that health services for women were discriminatory was dismissed on the basis that these were an

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[1213] Craton v Winnipeg School Division No.1 (1983) 21 Man. R. (2d) 315

[1214] See Half Way To Equal, ante.

[1215] (1992) EOC 92-417

affirmative action measure (in other words, the Gerhardy v Brown approach to discrimination). Moreover, as Parashar points out,[1216] reliance by the Tribunal on the consequences of child rearing on women's health to justify its decision of a need for special measures has the consequence of reinforcing the social stereotype of women as the primary care givers. An anti-subordination model[1217] is not used. This formalistic approach is also evident in cases dealing with discrimination based on marital status.[1218] And despite the advantages in attacking systemic discrimination which proscribing indirect discrimination may allow, the approach here is also on the formal nature or statistical effects of the impugned policy or requirement, rather than on an inquiry into its historical origins and the social, economic and psychological effects of it.[1219]

[1216] A. Parashar, "The Anti-Discrimination Laws and the Illusory Promise of Sex Equality" (1994) 13 U. of Tasmania L.R. 83.

[1217] See Ruth Colker, "Anti-Subordination Above All: Sex, Race and Equal Protection" (1986) 61 N.Y.U.L.R. 1003.

[1218] Boehringer Ingelheim Pty Ltd v Reddrop (1984) EOC 92-108: a woman refused a job because her husband worked for a rival firm was held not to be discriminated against because of her marital status but because of the identity and profession of the person she was married to. Contrast Waterhouse v Bell (1991) EOC 92-376: a woman refused a horse trainer's licence because she was married to a man convicted of horse racing fraud was held to have been unlawfully discriminated against because of the assumption that she would be tainted by her husband's criminal character. (Note that this case did not overrule Boehringer but distinguished it). See also Wilson v Qantas Airways Ltd (1985) EOC 92-141: homosexual partners refused placement on the married employees' roster (so that they could be allocated the same flights) were held not to have been discriminated against on the basis of marital status, their position being analogised to "golfing buddies" who wanted to fly together.

[1219] See Rosemary Hunter: Indirect Discrimination in the Workplace, ante, p.9. See, for example, The Secretary of the Department of Foreign Affairs and Trade & Anor v Styles & Anor (1989) EOC 92-265 where the Federal Court of Australia held that the existence of and provisions in an Equal Opportunity Program in the workplace, and the objectives evident in it, were irrelevant to the issue of indirect discrimination (at pp.77643-45).

However, one significant way in which the Act extends the Convention is with respect to the provisions on sexual harassment.[1220] Sexual harassment is not expressly mentioned in the Convention. Because of effective lobbying it was included in the Act. When the constitutional validity of these sections was challenged (on the basis that as they went beyond the treaty they could not be sustained by the external affairs power) it was held that the sexual harassment of a woman was a form of sex discrimination and thus was supported by the treaty and the constitutional power.[1221] Here is an example of a significant synergy to produce a remedy where previously there was none expressly under international law or Australian law. The concept has been held to cover workplace environment sexual harassment as well as quid pro quo varieties.[1222] However, again it is not without limitations. An argument of constitutional validity based on the fact that a woman would not have been sexually harassed but for the fact of her gender leaves open the application of these provisions in cases where the harasser is a bisexual, and/or where (in those instances where the Act applies) the victim is a man. Also, the concept is qualified by a reasonableness criterion: the circumstances have to be such that a reasonable person would have anticipated that the victim would have been offended, humiliated or intimidated by the conduct.[1223] Using such a test is open to the criticism that perceptions as to the reasonableness of sexually-based

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[1220] Sections 28A-28L

[1221] Aldridge v Booth (1988) EOC 92-222

[1222] Horne v Press Clough Joint Venture (1994) EOC 92-556

[1223] Section 28A(1)

conduct differ, particularly on the basis of gender, and that this difference is masked by the apparent objectivity of a reasonableness test. This contrast is apparent in both the literature[1224] and the cases.[1225]

Enforcement procedures under the SDA are exactly the same as under the RDA. The comments made above in this respect also apply here. What can be added, however, is that recent empirical studies of conciliation in sex discrimination cases in Australia indicate that the largest single group of complainants were professional women - white, Anglo and middle-class. Only 10% were of non-English-speaking background and only three complainants in the whole study were Aboriginal women. The complaints were primarily made against the public administration sector, with none at all from the agricultural or mining sectors.[1226] This indicates that there are problems simply not being reached by this Act. In addition, the situation in the professions remains far from perfect.[1227]

[1224] Compare Nancy Ehrenreich, "Pluralist Myths and Powerless Men in Sexual Harassment Law" (1990) 99 Yale L.J. 1177 and Paul B. Johnson, "The Reasonable Woman in Sexual Harassment Law: Progress or Illusion?" (1993) Wake Forest Law Review 619.

[1225] Compare the decision of Einfeld J in Hall v Schieban (1988) EOC 92-227 (where it was held that sexual harassment during an interview was minimal and no damages would be awarded because the complainants were still hired) and the opinion of the Federal Court when the same case went to it for judicial review (1989) EOC 92-250 (where it was held that sexual harassment per se is unlawful).

[1226] See Rosemary Hunter & Alice Leonard: The Outcomes of Conciliation in Sex Discrimination Cases, Working Paper No. 8, Centre for Employment and Labour Relations Law, University of Melbourne, August, 1995.

[1227] In Gender Bias in the Law: Women Working in the Legal Profession in New South Wales, NSW Ministry for the Status and Advancement of Women (1995) it has been shown that in the legal profession in Australia, there are high concentrations of women

The Disability Discrimination Act (DDA), while it has no Schedules, is based on ILO 111, ICCPR and ICESCR,[1228] being the only Australian legislation specifically based on the latter in its entirety.[1229] It defines disability widely to include physical, psychological and psychiatric conditions as well as the presence in the body of organisms capable of causing illness or disease[1230] (which would include being HIV+). It includes discrimination based on present, past, imputed and presumed disabilities. It is therefore much more comprehensive with respect to disability than the international instruments on which it is based. The synergism is again hedged in by a jurisdictional application similar in its essentials to that described above with respect to s.9 of the SDA.[1231]

Indirect disability discrimination is also expressly included[1232] and so are the same consequences.

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lawyers in government work and academia, lower concentrations in private practice as solicitors (often with a disproportionate representation in "women's" areas like Family Law) even lower concentrations as barristers, and the lowest level of representation of all in the judiciary. Prospects of promotion in law firms were also shown to be substantially better for men than women, who suffered higher drop-out rates and faced problems when seeking re-entry into the profession after periods of child-rearing.

[1228] DDA Section 12(8)

[1229] The federal Industrial Relations Reform Act 1994 is also based in part on the ICESCR, but only Articles 3 and 7 of it.

[1230] Section 4(1)

[1231] Section 12

[1232] Section 6

The areas covered are also essentially the same as in the SDA[1233] and the Act also includes the (for Australia) totally new concept of disability harassment.[1234] This therefore goes far beyond what is expressed with respect to disabilities in the international norms. While it has not been challenged, it is submitted that it is within power in the light of the external affairs cases discussed above. There is a strong synergy in evidence here.

There are, however, several exemptions operating, but they are not as extensive as those under the SDA.[1235] Considering the impact of this legislation, for example with respect to the construction of public buildings[1236] and the provision of public transport,[1237] this is legislation based on human rights in which the Commonwealth feels reasonably secure. The impact of this Act and similar provisions in the states is going to cost. It is not only a significant step forward for human rights in Australia, it is also pro-active: there are provisions for Disability

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[1233] Sections 15-29

[1234] Sections 35-40

[1235] They relate to special measures (s.45), superannuation and insurance (s.46), compliance with prescribed laws, of which there are yet none (s.47), reasonable control of infectious diseases (s.48), charities (s.49), a three-year exemption for telecommunications carriers (s.50), pensions and allowances under various Acts (s.51), regulations under the Migration Act (s.52), combat and peacekeeping services (ss.53, 54).

[1236] Cocks v State of Queensland (1994) EOC 92-612 where the state of Queensland had to pay over $250,000 to install wheelchair access to the main entrance of the Brisbane Convention Centre when lack of it was held to be indirect discrimination.

[1237] Magro v State Transit Authority of New South Wales (1995) EOC 92-718: provision of wheelchair-accessible buses ordered.

Action Plans to be drawn up by service providers.[1238]

Remedies and enforcement are the same as under the RDA and the SDA. The same comments made there apply here.

The Human Rights and Equal Opportunity Commission Act is based on ILO 111, ICCPR, the Declaration on the Rights of the Child, the Declaration on the Rights of Mentally Retarded Persons and the Declaration on the Rights of Disabled Persons. It is therefore a potentially wide Act and its ratione materiae are in fact the grounds covered by all these instruments as they apply to Australia, as the definition of "discrimination" in section 3(1) of the Act is the same as the definition in Article 1 of ILO 111, and the definition of "human rights" in the same section is the rights and freedoms recognised in the other instruments, together with any others in instruments declared by the Attorney-General to be a "relevant international instrument" for these purposes. In this regard the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief[1239] and the Convention on the Rights of the Child

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[1238] Sections 59-65

[1239] GA Resol 36/55, UN Doc A/RES/36/55 (1981). This provides for the right to freedom of thought, conscience and religion, that no-one shall be subject to coercion which would impair her or his freedom to have a religion or belief, that family life may be organised in accordance with religion or belief, and that the freedom to manifest one's religion or belief be subject only to such limitations prescribed by law and necessary to protect public safety, order, health, morals or the fundamental rights and freedoms of others.

have been so declared.[1240] In addition, because the definition of discrimination, following ILO 111 Article 1(1)(b), includes any other distinction included by regulation to be discrimination, in addition to the grounds already listed (race, colour, sex, religion, political opinion, national extraction and social origin) were added age, medical record, criminal record, impairment, marital status, mental, intellectual or psychiatric disability, nationality, physical disability, sexual preference and trade union activity, including mere imputations of these and grounds which no longer exist (eg, being discriminated against on the basis of a disability one no longer has).[1241]

Thus, not only are the grounds wide: they expressly extend beyond the minima stipulated in the international instruments which form the Schedules to the Act. Moreover, this Act is not full of exemptions like the SDA and the DDA, the principal one being discrimination based on the inherent requirements of a job.[1242] However, a closer inspection of the Act reveals a different picture. First, unlike the SDA and the DDA, this Act does not make discrimination or a breach of human rights "unlawful". This means that any acts or practices done pursuant to legislation - state or federal - is effectively exempted.

[1240] Commonwealth of Australia Gazette, 13 January 1993 and 24 February 1993.

[1241] Human Rights and Equal Opportunity Commission Regulations, 1989, Reg. 4

[1242] Definition of "discrimination" in s.3(1)

Secondly, the application of the Act is constricted. Under s.11(1) the Human Rights and Equal Opportunity Commission is given the function of "inquir[ing] into any act or practice that may be inconsistent with or contrary to and human right, and ... to endeavour, by conciliation, to effect a settlement of the matters that gave rise to the inquiry." A wide mandate indeed - until one realises that the definition of "act" in s.3(1) limits it to acts done by or on behalf of the Commonwealth or under federal legislation, or within a Territory. The definition of "practice" in the same sub-section is similar. In other words, this provision will not apply to acts and practices of the state governments nor to those of private individuals or companies. Australia's reservations to the ICCPR are also specifically included and thus limit the definition of human rights.[1243]

In addition, s.31(b) confers upon the Commission the function of "inquir[ing] into any act or practice that may constitute discrimination and ... to endeavour, by conciliation, to effect a settlement of the matters that gave rise to the inquiry." For the purposes of this section, the terms "act" and "practice" are not limited to those of the Commonwealth and the territories, and can include those of the states and of individuals.[1244] However, the definition of discrimination in s.3(1) bases it on ILO 111. The result is that this wider breadth of application is limited to discrimination occurring in employment or occupation only.

[1243] Section 3(4)

[1244] Section 30

Moreover, this Act is unique in Australia with respect to its enforcement mechanisms. Complaints brought under it are attempted to be settled by conciliation. If this is unsuccessful, there is no provision, as there is in the other Acts, for a public hearing or, after that, for reference to the Federal Court. The Act merely provides that the Commission will report the fact to the Attorney-General.[1245] Indeed, even this sanction (if that is the proper word for it) has apparently never been used. When researching this thesis the author could find no instances of a reference to the Attorney-General having been made. This Act, which in terms of its ratione materiae is the widest in Australia, is so limited in its application and so weak in its potential for enforcement as to amount to legislative hypocrisy rather than a fulfilment of Australia's obligations of implementation under ILO 111 Articles 2 and 3, and ICCPR Article 2(3), even despite the open-ended symbiotic approach of those obligations.

A significant introduction in this Act was a specific power given to the Commission to intervene in court proceedings.[1246] However, this can only be done "with the leave of the court hearing the proceedings"; it is not an appearance as of right. Nor must the Human Rights Commission be notified by a court that it has a case with human rights ramifications before it.

[1245] Sections 11(1)(f)(ii), 31(b)(ii)

[1246] Sections 11(1)(o), 31(j). There are now corresponding provisions in the RDA s.20(1)(e), SDA s.48(1)(gb) and the DDA s.67(1)(1).

All the states and territories have similar legislation,[1247] and conversely to Canada, all of it came after the federal government had taken the lead based on its international human rights obligations, with one exception which was stated to have been designed to assist the Commonwealth in ratifying the Racial Discrimination Convention.[1248] While there are some differences, the overlap with the federal legislation is considerable. All jurisdictions prohibit discrimination on the bases of sex,[1249] marital status,[1250] race,[1251] and disability.[1252] All jurisdictions prohibit discrimination on the ground of pregnancy, either expressly[1253] or as a characteristic of being female.[1254] Parental status exists as a prohibited ground in Victoria,[1255] Queensland,[1256] the Australian Capital Territory,[1257]

[1247] NSW: Anti-Discrimination Act 1977; Qld: Anti-Discrimination Act 1991; Vic: Equal Opportunity Act 1984; S.A.: Equal Opportunity Act 1984; W.A.: Equal Opportunity Act 1984; ACT: Discrimination Act 1991; N.T.: Anti-Discrimination Act 1992; Tas: Sex Discrimination Act 1995.

[1248] The South Australian Prohibition of Discrimination Act 1966. The statement can be found in Yearbook on Human Rights for 1966 (U.N., 1969), at p.20.

[1249] NSW s.24; Vic s.17; Qld s.7(1)(a); SA s.29; WA s.8; ACT s.7(1)(a); NT s.19(1)(b); Tas s.16.

[1250] NSW s.39; Vic ss.4(1), 17; Qld s.7(1)(b); SA s.29; WA s.9; ACT s.7(1)(d); NT s.19(1)(c); Tas s.16.

[1251] NSW s.7; Vic s.17; Qld s.7(1)(g); SA s.51; WA s.36; ACT s.7(1)(g); NT s.19(1)(a).

[1252] NSW ss.49A, 49P; Vic s.17; Qld s.7(1)(h); SA s.66; WA s.66A; ACT s.7(1)(i); NT s.19(1)(j).

[1253] Qld s.7(1)(c); SA s.29; WA s.10; ACT s.8(1)(f); NT s.19(1)(f); Tas s.16.

[1254] Marshall v Marshall White & Co Pty Ltd (1990) EOC 92-304

[1255] Section 4(1)

[1256] Section 7(1)(d)

Tasmania[1258] and the Northern Territory.[1259] Western Australia and Tasmania go further by prohibiting discrimination on the basis of "family status"[1260] or "family responsibilities"[1261] which are defined similarly to "family responsibilities" in the SDA.

The instances where the enforceable federal legislation is exceeded are age discrimination, which is prohibited in all jurisdictions except Victoria and Tasmania,[1262] and discrimination on the basis of religion,[1263] political belief,[1264] trade union activity,[1265] and sexuality[1266] (which in three jurisdictions also extends to transsexuality).[1267] Two jurisdictions prohibit discrimination against breastfeeding mothers,[1268] one prohibits discrimination on

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[1257] Section 7(1)(e)

[1258] Section 16

[1259] Section 19(1)(g)

[1260] WA s.35A

[1261] Tas s.16

[1262] NSW Part 4E; Qld s.7(1)(f); SA s.85a; WA s.66V; ACT s.7; NT s.19(1)(d).

[1263] Vic ss.4, 17; Qld s.7(1)(i); WA s.53; ACT s.7(1)(h); NT s.19(1)(m).

[1264] Vic. ss.4, 17; Qld s.7(1)(j); WA s.53; ACT s.7(1)(h); NT s.19(1)(n).

[1265] Qld s.7(1)(k); ACT s.7(1)(ia); NT s.19(1)(k).

[1266] NSW s.49ZG; Qld s.7(1)(l).

[1267] SA s.29; ACT s.7(1)(c); NT ss.4(1), 19(1)(c).

[1268] Qld s.7(1)(e); NT s.19(1)(h).

the basis of criminal record,[1269] and one on the basis of profession, trade or calling.[1270]

All jurisdictions except the Northern Territory specifically cover indirect as well as direct discrimination[1271] and the areas where discrimination is unlawful are virtually identical to the federal legislation. Prohibitions on sexual harassment exist in all jurisdictions either expressly[1272] or as a form of sex discrimination.[1273] However, the coverage is not identical. The Northern Territory and Tasmania (like the SDA) prohibit it in all areas to which the Act otherwise applies.[1274] The other jurisdictions are more circumspect[1275] and Western Australia prohibits it only in employment.[1276] Queensland, on the other hand, makes sexual harassment unlawful anywhere, whether it occurs in an area otherwise covered by the Act or not.[1277]

[1269] NT s.19(1)(q)

[1270] ACT s.7(1)(ic)

[1271] NSW ss.7(2), 24(3), 39(3), 49A(3), 49P(2), 49ZG(2); Vic s.17(5); Qld s.11; SA ss.29, 51, 66, 85a; WA ss.8(2), 10(2), 35A(2), 36(2), 53(2), 66A(3), 66V(3); ACT s.8(1)(b).

[1272] Vic s.20; Qld ss.118-120; SA s.87; WA ss.24-26; ACT ss.58-64; NT s.22; Tas s.17.

[1273] As in New South Wales: O'Callaghan v Loder (1984) EOC 92-023.

[1274] NT s.22; Tas s.21.

[1275] Vic s.20; SA s.87; ACT ss.58-64.

[1276] Sections 24-26

[1277] Sections 118-120

All jurisdictions except the Northern Territory expressly provide for vicarious liability.[1278] However, they all also contain exemptions along the lines of the SDA, although these are by no means uniform. It is unnecessary to detail these, but their significance for present purposes is that they create gaps and anomalies in the Australian coverage of discrimination laws: gaps which resort to the First Option Protocol to the ICCPR might fill. In this case, the domestic anomalies might need rescuing by the international mechanisms.

Resolution methodology is also similar to that under the federal legislation: conciliation followed by a public hearing and the provision for judicial proceedings.[1279] However, the problem of the separation of powers doctrine does not apply in the state and territorial jurisdictions,[1280] and thus there is no constitutional problem with making tribunal decisions legally binding.

The New South Wales legislation also has racial vilification provisions[1281]

[1278] NSW s.53; Vic s.34; Qld s.133; SA s.91; WA s.161; ACT s.100: Tas s.73.

[1279] NSW Part 9; Vic Part VI; Qld Chapter 7; SA Part VIII; WA Parts VII, VIII; ACT Part VIII; NT Part 6; Tas Part 4.

[1280] Kotsis v Kotsis (1970) 122 CLR 69 at p.76; Somodaj v Australian Iron & Steel Ltd [1961] SR (NSW) 305 at p.307.

[1281] Anti-Discrimination Act 1977 s.20C: "It is unlawful for a person, by public act, to incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of ... race." See Wagga Wagga Action Group (on behalf of Atkinson) and Ors v Eldridge (1995) EOC 92-701: city councillor who on three public occasions referred to land title claims as being made by "radical half-castes" ordered to pay $3,000 compensation and apologise.

(which Western Australia has in its Criminal Code) as well as provisions on homosexual vilification[1282] (which no other state yet has).

The coverage is therefore uneven and the recourse to mechanisms to protect human rights can depend in Australia on where you live. Everywhere anti-discrimination legislation is based on the paradigm of differential treatment (and the drawbacks inherent in this) together with a classificatory legal formalism which requires that the discrimination occur on a prohibited ground, in a designated area, and that no overriding legislative exemptions apply.[1283] This is the antithesis of fundamentality. It also imports and magnifies problems inherent in the international norms which, as discussed in Chapters 3 and 4, are based largely on the classic liberal conception of the atomistic individual exercising a choice. Thus, while the tendency of the legislation is to look for differential treatment in same or similar circumstances, what is overlooked, as Hunter has aptly described it, is that "there are limits to women's ability to behave like men, and to Aborigines' ability to behave like whites" and that "a person's gender, race, impairment, religion and so on includes a whole matrix of shared social, cultural and inherited characteristics

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[1282] Anti-Discrimination Act ss.49ZS-49ZTA (inserted in 1993). The act proscribes inciting hatred towards, serious contempt for or severe ridicule of a person or group by a public act on the basis of homosexuality. This is subject to the normal conciliation procedures. However, "serious homosexual vilification" (involving threats of physical harm) attracts a fine or imprisonment.

[1283] Thus, for example, in Pearce v Glebe Administration Board & Anor (1985) EOC 92-131, the refusal of the owner of a parcel of vacant land to allow it to be used for a homosexual rally was held not to infringe the New South Wales Act because the use to which land is put by a private owner does not amount to a "service".

that cannot simply be made to disappear."[1284]

However, these mechanisms and institutions do in general comply with the "Paris Principles" adopted in 1991 at the first international meeting of national institutions convened by the UN Centre for Human Rights.[1285] In particular, the Principles dealing with the methods of operation, the quasi-jurisdictional competence, and the competence and responsibilities of national institutions correspond with the Australian scenario, except that with respect to the latter, Principle 3 (a)(ii) refers to making reports to the government on "any situation of violation of human rights which it [ie, the institution] decides to take up." This level of freedom is often circumscribed in Australia by reference to ministerial approval.[1286] Also, compliance with the Principles dealing with guarantees of independence and pluralism of the institutions is dubious. Principle 1 in this section of the Paris Principles requires co-operation with or the presence of representatives of non-governmental organisations, qualified experts, universities, Parliament and government departments. In fact in Australia such connections are established on an ad hoc basis and the trend is very much bureaucratic rather than consultative. For example, as the Human Rights and Equal Opportunity Commission Act 1986 was the successor to the Human Rights Commission Act 1981 and was introduced

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[1284] Rosemary Hunter: Indirect Discrimination in the Workplace, ante, at p.6.

[1285] A copy can be found in the Annex to UN Doc. A/48/340.

[1286] HREOCA ss.11, 31; Qld s.235; ACT s.111.

in the circumstances described above, one of its aims was to streamline the running of the Commission. The former Commission had consisted of eight part-time members (drawn from relevant sections of the community), a part-time President and a full-time Deputy President. The new structure retained a part-time President but did away with all other part-time positions, making the Commissioners responsible for race, sex and human rights full-time appointments. They are also independent appointments in the sense that they are the Commission, rather than being subject to directions from it. This streamlines the procedure but at the same time introduces a non-consultative, non-representative, bureaucratic approach.

Principle 2 in the same section requires adequate funding to ensure independence. This is a perennial problem in Australia. For example, the Annual Report 1993-4 of the federal Human Rights and Equal Opportunity Commission indicates that its budget for that financial year was a little under $20,000,000. Doing a rough calculation of this with respect to the population of Australia (approximately 17 million) this means that the federal Commission has $1.18 to spend per year on the human rights of each man, woman and child in the country. The situation in Canada appears to be worse,[1287] although some provincial agencies consider their funding to be adequate.[1288] The matter is therefore not explainable by

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[1287] The Canadian Human Rights Commission Annual Report 1992 indicates a similar amount expended annually (Financial Statement at p.102) but spread over a population much larger than Australia's.

[1288] In an interview with the author in Victoria, British Columbia, on May 26, 1989, Mr Alan Andison, the manager of the British Columbia Council of Human Rights and his staff stated that their funding (which worked out per capita to a sum similar to that

simple sums alone, but the figures do indicate that independence may be seriously compromised by even slight underfunding in relation to the agency's mandate. It is because of this that some agencies, such as the Queensland Anti-Discrimination Commission, have suspended their education programs and concentrate on complaint handling.[1289] This is both serious and significant as, in the words of Becet and Colard, "la connaissance des Droits de l'Homme est la condition première de leur respect."[1290]

(b) Other Legislation

As a result of the Toonen decision by the Human Rights Committee discussed in Chapter 4, the Commonwealth passed the Human Rights (Sexual Conduct) Act 1994.[1291] This Act therefore directly transforms one aspect of Article 17 of the ICCPR into Australian law. However, it does so only for limited purposes. While

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for Australia) was adequate for their work. (Tape of conversation on file).

[1289] Personal knowledge and experience of the author: the QADC suspended organised educational programs between 1994 and 1996 because of budget problems.

[1290] Becet & Colard, ante, at p.5

[1291] The operative provision of this Act is s.4 which states: "Sexual conduct involving only consenting adults acting in private is not to be subject, by or under any law of the Commonwealth, a State or a Territory, to any arbitrary interference with privacy within the meaning of Article 17 of the International Covenant on Civil and Political Rights." An adult is defined in the same section as a person 18 years of age or older.

the Act must now be regarded as a valid exercise of the external affairs power[1292] and may have ramifications in jurisdictions other than Tasmania,[1293] it singles out one aspect only of the Toonen decision, the privacy issue, and does not provide an "effective remedy" as required by ICCPR Article 2: the legislation does not invalidate Tasmania's laws (perhaps because of the Queensland Electricity Commission case) and a declaration will presumably have to be sought in the High Court that the offending Tasmanian law is overridden by the Act by virtue of s.109 of the Constitution. The result of this will not necessarily be a foregone conclusion because there is no explicit inconsistency of this Act (as opposed to the human rights on which it is based) with the Tasmanian law, and the retention in the Act of the requirement that the offending law amount to an "arbitrary interference with privacy" leaves it open to the court to find that the Tasmanian law is not arbitrary in domestic terms. Thus the Committee's views might not be incorporated into Australian law at all. One commentator has argued that the Commonwealth has "passed the buck" on the issue.[1294] Indeed, such specificity of response to particular cases reproduces in legislation the ad hoc approach that bedevils precedents drawn from judicial decisions in a system where the courts cannot give

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[1292] At least to the extent that it enacts the Human Rights Committee's interpretation of Article 17 in the light of homosexual practices. Its application to other areas, such as laws on prostitution, is less clear.

[1293] For example, it will affect Western Australian law where the age of consent for homosexual acts is 21.

[1294] Wayne Morgan, "Protecting Rights or Just Passing the Buck? The Human Rights (Sexual Conduct) Bill 1994" (1994) 1 Australian Journal of Human Rights 409

advisory opinions. It ends up being the worst of both worlds. The greatest value of the Toonen decision may be as a political argument rather than a constitutional one. Canadian legislation has also been amended because of decisions of the Human Rights Committee, such as the amendment to the Indian Act as a result of the Lovelace Case. However, the difference between the Canadian and Australian legislative reactions to international condemnation of human rights violations exhibits similar characteristics to those just described. In Canada (with no "external affairs" power for domestic implementation) the result is a qualification to legislation within an existing head of power. In Australia, this also can happen, but the Human Rights (Sexual Conduct) Act, despite its shortcomings, is legislation in an area new to the Commonwealth. When new law of this type is so generated, the focus is on the basis for it - in this instance, on human rights rather than on a traditional head of power. However, what has also happened in this instance is an illustration of the equal power of the government to narrow that focus for political reasons.

There is also other legislation based, directly or indirectly, on human rights obligations, illustrating the pervasive but nevertheless constricted influence of these on domestic law. The Commonwealth Affirmative Action (Equal Employment Opportunity for Women) Act 1986 is the enactment of Australia's obligations under Article 4 of the Women's Convention. However, while it applies to all Commonwealth authorities, universities and colleges of advanced education (and

while some of the states have introduced similar legislation covering state employees) it only applies to private businesses if they employ more than 100 people. The overwhelming majority of private enterprise in Australia is smaller than this. Thus, a large sector of the working population is not covered. The Act does not compel affirmative action so much as require those employers subject to the Act to consider it through the implementation of action plans and to report on progress to the Affirmative Action Agency set up by the Act. This Agency has no power of sanction over businesses not complying with the Act other than naming them in its Annual Report to Parliament. However, a sanction which has arisen in practice, if not in the terms of the legislation, is that those businesses so named are disqualified from tendering for government business.[1295] In Canada, most of the impetus for affirmative action programs has arisen out of the anti-discrimination legislation described above, all of which expressly provides that such programs will not amount to unlawful discrimination, together with the provisions in section 15(2) of the Charter. Coming from this base, affirmative action is thus more broadly applicable than in Australia, even though not overtly based on human rights obligations. Even prior to the Charter the Supreme Court of Canada held affirmative action to be lawful,[1296] along similar lines to the decision of the US Supreme Court in Bakke.[1297] There has of late been some resiling from this

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[1295] See generally O'Neill & Handley, ante, Chapter 20.

[1296] Athabaska Tribal Council v Amoco Petroleum (1981) 1 RCS 699

[1297] Regents of the University of California v Bakke 438 U.S. 265 (1978)

position. The Manitoba Court of Queens Bench quashed an order approving an affirmative action program for aboriginal peoples in obtaining licences for wild rice harvesting because it could not see a sufficient connexion between the cause of the economic disadvantage suffered by these peoples and the remedy proposed by the program.[1298] Specific legislation, such as the Ontario Employment Equity Act 1993, also exists, but again the basis is not overtly Canada's international obligations. Indeed, there is at the moment a proposal to repeal the latter Act.[1299]

The Commonwealth Privacy Act 1988 was designed in part to fulfil Australia's obligations under ICCPR Article 17 but also complies with the Organisation for Economic Co-Operation and Development Guidelines on the Protection of Privacy and Transborder Flows of Personal Data which form the basis of the "Information Privacy Principles" dealing with the collection, retention, dissemination of and access to personal information. However, it only applies to the Commonwealth government and its agencies, federal courts, banks and credit reporting agencies. Similarly, the Canadian Privacy Act[1300] only applies to the Departments and Ministries of State and government institutions listed in its Schedule. It provides access to information held by the government and limits those who may see it, on the basis of "fair information practices." Its impetus came primarily from freedom

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[1298] Apsit v Manitoba Human Rights Commission (1987) 9 CHRR D/4457

[1299] Bill 8, 44 Elizabeth II, 1995, for An Act to repeal job quotas and restore merit-based employment in Ontario.

[1300] S.C., 1980-81-82-83, c.111

of information concerns as the Access to Information Act and the Privacy Act were developed together. It has no real sanctions except for the censure which may be contained in the Privacy Commissioner's Annual Report to Parliament. The Commission has, however, been proactive, particularly with respect to privacy and AIDS.[1301]

Whereas Canada has similar provisions in its Criminal Code[1302] because of its broad constitutional power over criminal matters,[1303] the Australian Crimes (Torture) Act 1988 is based on the Convention Against Torture, which forms its Schedule. It makes torture an offence and expressly refers to the Convention as supplying the meaning of a term unless the contrary intention appears in the Act.[1304] However, it only applies to acts done overseas by public officials[1305] and prosecutions under the Act cannot take place without the written consent of the Attorney-General[1306] (so international or domestic politics may trump human rights norms).

[1301] See AIDS and the Privacy Act, Report of the Privacy Commissioner of Canada (1989, Minister of Supplies and Services, Canada).

[1302] R.S.C. 1985, c.C-46, as amended by R.S.C. 1985 (3rd Supp.), c.30, s.1.

[1303] See D. Matas, "Prosecution in Canada for Crimes Against Humanity" (1991) 11 New York Law School Journal for International and Comparative Law 347.

[1304] Section 3(2)

[1305] Section 6

[1306] Section 8(1)

The provisions with respect to refugees under the Australian Migration Act are designed to fulfil Australia's obligations under the Refugee Convention and Protocol. An amendment in 1992[1307] introduced a new s.26B under which the category of protection visas is expressly based on the fact that the applicant is a person "to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol." These decision are reviewable under Part 4A by the Refugee Review Tribunal. International law is thus directly incorporated into the statute, overcoming a previous problem as to whether the international definition applied in domestic tribunals in Australia.[1308] The Canadian Immigration Act 1976 similarly incorporates the Convention.[1309] But this direct incorporation is only partial incorporation of the Convention and does not overcome all problems at domestic level,[1310] one of the most basic of which

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[1307] Migration Reform Act 1992 (Cth)

[1308] Gunaleela v Minister for Immigration and Ethnic Affairs (1987) 74 ALR 263: failure to use the international definition may amount to an unreasonable exercise of power, but not to an error of law, for the purposes of judicial review of a decision under the Migration Act.

[1309] See the definition of "Convention refugee" in s.2(1).

[1310] See, for example, Savitri Taylor, "Informational Deficiencies Affecting Refugee Status Determinations: Sources and Solutions" (1994) 13 U. Tasmania L.R. 43, who argues that problems of fact-finding amount to a breach of the non-refoulement obligations under Art.33 of the Convention, especially as this imposes an obligation of result. See further Guy Goodwin-Gill: The Refugee in International Law (1983, Clarendon Press, Oxford), pp.142-48. In Canada, the issue of whether economic conditions satisfy the requirement of "persecution" has only been partly overcome - see Oyarzo v Minister of Employment and Immigration [1982] 2 F.C. 779: loss of employment constituted "persecution" for the purposes of the definition of "Convention refugee" because the loss was as a result of political activities. This case was cited with approval by the High Court of Australia in Chan Yee Kim v Minister for Immigration and Ethnic Affairs (1989) 169 CLR 379 at pp.429-30.

in Australia is refugee detention whereby refugees have been held for up to four years without trial waiting for a determination on their status to be made.[1311] The situation is similar, although not quite as bad, in Canada.[1312] We do not keep thieves or drug runners in jail for this long pending a decision. This question of access to legal rights, quite apart from the question of proper status in terms of the Refugee Convention, does not sit well with the general humanitarian approach of the Convention and its Protocols and illustrates the fragmented approach to human rights when lack of political will is combined with constitutional hurdles.

Amendments to the Australian Industrial Relations Act in 1994[1313] (and mirrored in Queensland[1314] and South Australia[1315]) are expressly based on ILO Conventions and Recommendations[1316] as well as the Women's Convention and Articles 3 and 7 of the ICESCR.[1317] These instruments provide a framework of

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[1311] This matter was addressed by the High Court in Lim's Case which is discussed in more detail in the next section. A complaint under the First Optional Protocol of the ICCPR has also been accepted as admissible before the Human Rights Committee: Lim Chinh Po v Australia, Communication No.560/1993, accepted as admissible April 4, 1995, CCPR/C/53/D/560/1993.

[1312] See David Matas: Closing the Doors: The Failure of Refugee Protection (1989, Summerhill Press, Toronto), especially Chapter 8.

[1313] Industrial Relations Reform Act 1993 (Cth)

[1314] Industrial Relations Reform Act 1994 (Qld)

[1315] Industrial and Employee Relations Act 1994 (SA)

[1316] Equal Remuneration Convention 1951; Discrimination (Employment and Occupation) Convention 1958; Minimum Wage Fixing Convention 1970; Family Responsibilities Convention 1981; Termination of Employment Convention 1982.

[1317] Industrial Relations Act s.3, Object 3(b)

prescribed minimum standards with respect to wages, dismissal and parental and carers' leave, stipulating that in these matters workers must not be discriminated against on the bases of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin.[1318] There is no definition of the terms in the legislation. They therefore fall to be determined in a manner consistent with the treaties on which they are based or in the way in which they are used in anti-discrimination legislation.[1319] The constitutional basis for these reforms is the external affairs power which, for the reasons discussed above, provides a wider basis for implementation of these rights than do the traditional heads of federal industrial power.[1320] In the light of the case law discussed above, the Recommendations (which include some matters of procedure not covered in the Conventions) are also validly implemented. As these amendments only apply to employment, there is no intention to "cover the field" with respect to anti-discrimination matters, so that s.109 problems will not arise in that sense. With respect to employment discrimination specifically, there should be no overriding of state anti-discrimination legislation nor implied repeal of the employment provisions in federal legislation, as it has been held that the remedies

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[1318] See Phillip Tahmindjis, "The EEO Practitioner and the New Industrial Laws" Australian Labour Law Reporter Vol. 4 (CCH Australia Ltd, Sydney), pp.80,097-109.

[1319] Street v Queensland Bar Associat[illegible] ante.

[1320] Constitution s.51(xx) (power with respect to foreign, trading and financial corporations) and s.51(xxxv) (power with respect to conciliation and arbitration of interstate industrial disputes).

offered by the two sets of legislation are substantially different.[1321] International human rights norms have thus been used to give a rights focus and framework to Australian industrial law and were specifically intended by the federal government to overcome the lack of such a rights basis in state industrial laws.[1322] The Labour Conventions Case made it clear that Canada could not follow this path. As a result, provincial and federal consultation was essential, with Labour Canada particularly pursuing a policy of "co-operative federalism."[1323] As a result, Canada ratified several ILO Conventions which thus had great influence on, but were not determinative of, Canadian legislation, as the "Labour Trilogy Cases" discussed above illustrate. Thus arose a mosaic of federal and provincial Labour Codes and employment standards legislation, with human rights based amendments,[1324] and the overlay of human rights codes,[1325] later specialist

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[1321] Toop v Commonwealth Bank of Australia (1995) EOC 92-700: anti-discrimination remedies held not to be an "adequate alternative remedy" provided for in the instruments and the legislation thus (not) overriding the power of the Industrial Court.

[1322] For example, the Victorian laws: see Katy Reade: The Use of the External Affairs Power in the Industrial Relations Reform Act 1993, Working Paper No. 5, Centre for Employment and Labour Relations Law, University of Melbourne, April, 1995.

[1323] See Kalmen Kaplansky, "The International Labour Organization", Chapter 7 in Robert O. Matthews & Cranford Pratt (eds): Human Rights in Canadian Foreign Policy (1988, McGill-Queen's U.P., Kingston), especially at pp.121ff.

[1324] For example, the Canadian Fair Wages and Hours of Labour Act 1966, the New Brunswick Female Employees Fair Remuneration Act 1961, the Quebec Act Respecting Discrimination in Employment 1964.

[1325] For example, the Ontario Human Rights Code of 1962 consolidated, amongst others, the Fair Employment Practices Act, the Female Employees Fair Remuneration Act; the Nova Scotia Human Rights Act of 1963 consolidated, amongst others, the Fair Employment Practices Act and the Equal Pay Act; and some provinces which did not already have equal pay legislation introduced the concept into their then new human rights codes, such as Newfoundland in 1969.

legislation,[1326] including affirmative action legislation,[1327] and interpretation in the light of the Bill of Rights[1328] and now the equality requirements of section 15 of the Charter.[1329]

Other legislation in Australia is also based on treaties of a human rights nature. Thus, for example, the Geneva Conventions Amendment Act 1991[1330] was based on the provisions of Protocol I (relating to the protection of victims of international armed conflicts) of the 1949 Geneva Conventions, and the International Labour Organisation (Compliance with Conventions) Act 1992 enables the domestic implementation of ILO Conventions 68 (Food and Catering (Ships Crew)), 108 (Seafarers' Identity I ›cuments), 147 (Merchant Shipping (Minimum Standards)), 73 (Medical Examination (Seafarers)), and 144 (Tripartite Consultation (International Labour Standards)). Because of the lack of a treaty-implementing

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[1326] For example, Employment Standards Act, R.S.O. 1980, c.137; Employment Standards Act, S.B.C. 1980, c.10; Employment Standards Act, R.S.A. 1980, c 10.1; An Act Respecting Labour Standards, S.Q. 1979, c.45; Labour Standards Code, S.N.S. 1972, c.10.

[1327] For example, the Ontario Pay Equity Act, S.O. 1987, c.34.

[1328] See generally above. Perhaps the most infamous example is Bliss v Attorney-General of Canada [1979] 1 SCR 183, where the Supreme Court held that unemployment benefits under the Unemployment Insurance Act which were denied to pregnant women did not contravene the equality provisions of the Bill of Rights because pregnancy, the result of voluntary sexual activity, meant that pregnant women were different to other claimants (in that during confinement and birth they would not be working in any event) and so lower maternity benefits compared to unemployment benefits did not amount to unequal treatment.

[1329] Brooks, Allen and Dixon v Canada Safeway Ltd [1989] 1 SCR 1219: limitations on the coverage of the respondent's accident and sickness policy during pregnancy held to amount to unequal treatment on the basis of sex.

[1330] No. 27 of 1991

power in the Canadian Constitution, such overt reliance does not occur unless the matter relates directly to a head of federal power (as in the Geneva Conventions Act[1331] which incorporates the four Geneva Conventions for the Protection of War Victims), although reference is sometimes made to international human rights instruments in the Preambles of Acts.[1332] Again, in Canada this issue is less prevalent as validity is a s.91/92 matter. Thus, Canada was able to introduce legislation for the prosecution of war crimes by an amendment to the (federal) Criminal Code. Australian legislation on this matter had to be justified under the external affairs power.[1333]

Other legislation exhibits features reflective of, but not based on, international human rights norms, such as that relating to judicial review[1334] and administrative appeals[1335] (which in Canada are now substantially a Charter issue together with the common law notion of natural justice and the specific process provisions of various pieces of legislation such as Motor Vehicle Acts), freedom of

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[1331] R.S.C. 1985, c.G-3

[1332] For example, the Preamble of the Emergencies Act 1988, S.C. 1988, c.29, refers to the ICCPR (and, significantly, replaces the draconian War Measures Act which allowed detention without trial and confiscation of property), and the Preamble of the Canadian Multiculturalism Act 1988, S.C. 1988, c.31, refers to the Racial Discrimination Convention and the ICCPR.

[1333] Polyukhovich, ante.

[1334] Administrative Decisions (Judicial Review) Act 1977 (Cth)

[1335] Administrative Appeals Tribunal Act 1975 (Cth)

information,[1336] the Ombudsman[1337] and native title.[1338] Similar legislation exists at state and territory level.[1339] It must be noted, however, that such legislation has not always accorded with Australia's human rights obligations.[1340] In Canada this issue is governed by a mixture of federal legislative powers, provincial legislative powers, the Bill of Rights, the Charter of Rights and Freedoms, the provisions of treaties with the tribes, and natural resources

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[1336] Freedom of Information Act 1982 (Cth); Canadian Access to Information Act 1982. There is also provincial legislation, for example the Nova Scotia Freedom of Information Act 1977, S.N.S. 1977, c.10, and the Quebec Access to Documents Act 1982, S.Q. 1982, c.30. For a general commentary, see Donald C. Rowat (ed): The Right to Know: Essays on Governmental Publicity and Public Access to Information, 2nd ed, (1981, Department of Political Science, Carleton University, Ottawa). On the Canadian Access to Information Act, see Donald C. Rowat (ed): The Making of the Federal Access Act: A Case Study of Policy-Making in Canada (1985, Department of Political Science, Carleton University, Ottawa), which in Chapter 1 ("The Role of Ideas" by Patrick Gibson) significantly does not accredit any influence to international human rights - the ideas debate revolved around the issues of paternal and popular concepts of government.

[1337] Ombudsman Act 1976 (Cth). There are provincial Ombudsmen in Canada (see, for example, S.A. 1967, c.59; S.N.B. 1967, c.18; S.Q. 1968, c.11; S.M. 1969 (2nd Sess.), c.26; S.N.S. 1970-71, c.3; S.S. 1972, c.87; S.B.C. 1977, c.58; R.S.N. 1970, c.285; S.O. 1975, c.42). There is no federal Ombudsman, the responsibilities being separately handled by the Privacy Commissioner, the Commissioner for Official Languages under the Official Languages Act 1988, the Correctional Investigator (for prisons) under the Inquiries Act 1973, etc.

[1338] Native Title Act 1993 (Cth). It should be noted, however, that the Australian Native Title Act was passed after the longest Senate debate in Australia's history: The Australian, December 22, 1993, p.1.

[1339] For example, the Mental Health Review Tribunal (NSW), the Guardianship Board (NSW), Health Rights Commission Act 1991 (Qld), Peaceful Assemblies Act 1992 (Qld), Invasion of Privacy Act 1971 (Qld), Judicial Review Act 1991 (Qld), Freedom of Information Act 1992 (Qld), Freedom of Information Act 1982 (Vic)

[1340] See Andrew Hiller: Public Order and the Law (1983, Law Book Company, Sydney); Hon Mr Justice R.M. Hope, "Civil Liberties in Australia: The Case of Peaceful Assemblies", Chapter 3 in Alice Ehr-Soon Tay (ed): Teaching Human Rights (1981, AGPS, Canberra). The latter details the legislation in each jurisdiction in Australia, showing that often the right to stage a protest march was subject to police permission - in the case of Queensland, without any appeal to a court (Traffic Act 1977 (Qld) s.57A).

agreements.[1341] The delivery and enjoyment of human rights in both Australia and Canada is thus uneven and therefore cannot be said to be fundamental in the legal context.

There are also now mechanisms of parliamentary scrutiny of legislation to monitor whether a trespass on personal rights and liberties has occurred or might occur. In Canada, this tends to be mainstreamed by the Justice Department. In Australia, the situation is much more ad hoc.[1342] In most instances this is done after Bills have been drafted, except in Queensland where the Office of Parliamentary Counsel is primarily responsible for drafting legislation and is made subject to "fundamental legislative principles" by which is meant the rights and liberties of individuals and the institution of Parliament.[1343] This is not the same thing as ascertaining compliance with Australia's international human rights obligations: the scrutiny is directed towards common law notions of procedural fairness and review rather than reliance on human rights instruments and acts as an ethical rather than a legal curb

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[1341] See Hogg, ante, Chapter 27, and Bradford W. Morse (ed): Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada (1985, Carleton U.P., Ottawa).

[1342] Commonwealth: Senate Standing Committee for the Scrutiny of Bills, Senate Standing Committee on Regulations and Ordinances; Territories: Subordinate Legislation and Tabled Papers Committee of the Northern Territory, Standing Committee for Scrutiny of Bills and Subordinate Legislation of the Australian Capital Territory; States: Regulation Review Committee of New South Wales, Scrutiny of Legislation Committee of Queensland, Legislative Review Committee of South Australia, Subordinate Legislation Committee of Tasmania, Scrutiny of Acts and Regulations Committee of Victoria, Joint Standing Committee on Delegated Legislation of Western Australia.

[1343] Legislative Standards Act 1992 (Qld), ss. 4-7.

to legislative excess.[1344] They are parliamentary checks and balances rather than the conferral of rights on the people. And they influence legislative (ie, documentary) policy rather than government policy.

Thus, legislative human rights coverage in Australia and Canada is both selective and random. While legislation can have different levels of effect,[1345] overall the legislative human rights picture is more like a mosaic rather than a coherent picture: the situation produces an identifiable but essentially blurred picture, and some parts of it simply fall into the cracks and joins. Express legislative transformation of international human rights norms does not incorporate the relevant instrument or customary rule into domestic law: it does so only in the context of the legislation and to the extent that the legislation provides. In the

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[1344] At federal level, see the Annual Reports of the Senate Standing Committee on Regulations and Ordinances. At state level see, for example, the Victorian Scrutiny of Acts and regulations Committee Discussion Paper No. 1 (May 1995) in which 44 Bills are examined with respect to their impact on s.85 of the Victorian Constitution, which provides for an entrenched right of judicial review by the Supreme Court of Victoria. The Second Annual Report of the same Committee (Government Printer, Melbourne, 1995) which reports on the scrutiny of 126 Bills in the 1994-95 period, admits that: "The rights and obligations of individuals or indeed the Government are not always easily defined. The Committee's work can only assist the Parliament as it deals with such matters." (Chairman's Introduction, p.vii). Of all the Bills, none was found to unduly trespass on rights and freedoms and only three were found to diminish rights and freedoms, being sent back to the Minister for further consideration or to Parliament for further debate (Appendix 1).

[1345] See John Griffiths, "Is Law Important?" (1979) 53 New York U.L.R. 339. Griffiths identifies four levels of effect: the direct effect (eg, anti-discrimination laws prompt people to stop discrimination); the indirect effect (eg, Acts like the SDA result in more pregnant women being employed); indirect effects independent of conforming behaviour (eg, laws as a symbol of the governments support of human rights); and unintended effects (eg, adverse reaction to affirmative action or racial vilification legislation).

absence of a base provided by international human rights, rights are turned into mere privileges. Any synergy that may occur between the two systems is operated upon by such factors as political will, the social culture with respect to rights, and the constitutional structure of the legal system, as well as the inherent problems of the international norms themselves.

Because these factors operate in free variation, de facto legal equality can have no fixed content: one must look to particular cases and particular instances. Legislation specifically designed to confront discrimination operates within the public rather than the private sphere and is directed primarily towards individual complaints with individual remedies. This produces a limited form of legal equality. As Thornton has aptly noted: "The atomism of direct discrimination doctrine ... effectively separates the act of racial discrimination from racism, the act of sex discrimination from sexism, the act of homosexual discrimination from homophobia and the act of disability discrimination from societal phobias concerning those who are other than able-bodied."[1346] Anti-discrimination legislation is based on a paradigm that in effect does little to challenge the system or the main players in it. Indirect discrimination helps overcome this problem, but, as discussed above, its success has been limited. In addition, any protection provided by "ordinary" anti-discrimination legislation (which is not part of the

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[1346] Thornton: The Liberal Promise, ante, p.8

Constitution) is potentially transient.[1347]

This makes it difficult to say in any general sense whether countries like Australia and Canada have fulfilled their obligations of implementation under human rights treaties, such as Article 2 of the ICCPR which obliges parties to "take the necessary steps in accordance with [their] constitutional processes ... to ensure that any person ... shall have an effective remedy ... [and] that the competent authorities shall enforce such remedies." With respect to rights of criminal process, the answer is probably yes; with respect to the right to marry, the answer is substantially yes with the significant qualification of same-sex marriages; with respect to women,[1348] blacks,[1349] gays[1350] and the disabled,[1351] the answer is less yes, depending on the particular instance; with respect to people who are HIV+ or have AIDS,[1352] the answer is still less yes; and with respect to

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[1347] For example, after the decision in X v Department of Defence (1995) EOC 92-715, where the Australian Human Rights Commission held that an HIV+ army officer had been unlawfully dismissed, the Defence Minister announced that he would legislate to overturn the decision: The Weekend Australian, July 8-9, 1995, p.3.

[1348] Half Way to Equal, ante.

[1349] Aboriginal and Torres Strait Islander Social Justice Commissioner: First Report (1993), Second Report (1994), (AGPS, Canberra)

[1350] See Phillip Tahmindjis, "The Adequacy of Protection for Gay Men and Lesbians", paper delivered to the Australian Rights Congress, Sydney, February 16, 1995.

[1351] Human Rights and Mental Illness, Report of the National Inquiry into the Human Rights of People with Mental Illness, 2 Vols., Human Rights and Equal Opportunity Commission, AGPS, Canberra, 1993.

[1352] Australian HIV/AIDS Legal Guide 2nd ed, John Godwin et al (eds), 1993, The Federation Press, Sydney. See also Phillip Tahmindjis, "The Legal Response to AIDS in Australia" (1983) 13 Community Health Studies Journal 410. The most comprehensive view is

transsexuals, the answer is probably the lowest of all. The impact of international human rights norms in Australian federalism has not been one with respect to changing the style of federalism so much as signifying a change to the content of the issues to which federalism addresses itself, as the Toonen case and its aftermath illustrate. Even this content remains centred around the "traditional" civil and political rights: Australia has a long way to go with respect to economic rights, although multiculturalism has had limited successes with social and cultural rights. In Canada, the style of federalism has been fundamentally affected by the Charter, but that impact is a limited and sometimes vicarious impact by international human rights norms, for the reasons explained above.

Legislative responses can represent, and often have represented, the minimalist approach to human rights. They can also represent an approach antithetical to human rights, as the decriminalisation of homosexuality by a homophobic Western Australian parliament indicates.[1353] The extent to which the judiciary has or can pick up the slack and tighten the whole system to one more like de facto legal equality is the issue to which this Chapter now turns.

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from the United States, see Randy Shilts: And the Band Played On: Politics, People and the AIDS Epidemic (1987, St. Martin's Press, New York).

[1353] Western Australia decriminalised homosexual acts in 1989. The Preamble to the Law Reform (Decriminalisation of Sodomy) Act reads in part: "Parliament does not believe that sexual acts between consenting adults in private ought to be regulated by the criminal law, ... [but nevertheless] disapproves of sexual relations between persons of the same sex ... [and] disapproves of the promotion or encouragement of homosexual behaviour ... [and] does not ... wish to create a change in community attitude to homosexual behaviour." This is the abnegation of rights rather than the creation of them.

5.6 The Common Law and International Human Rights

In Canada, the debate dealing with the adoption or transformation of international law by the courts, when human rights are the focus, has lost much of its urgency, again because of the impact of the Charter and its supreme nature in the Canadian legal hierarchy as part of a Constitution which overrides "any" laws inconsistent with it.[1354] This debate is now centred around the application of international human rights norms through, and especially to aid in the interpretation of, the Charter, as discussed above. The debate is not, however, entirely irrelevant. As discussed above, the Charter cannot apply to all circumstances. Even Charter cases will refer to "ancient" law applicable to Canada, such as Magna Carta and Habeas Corpus. Usually, however, this will be to describe the ancestry of the rights in the Charter rather than to apply those norms directly.[1355] It is true to say, however, that in Australia, which does have some constitutional[1356] and procedural[1357] protections but lacks a Bill of Rights, this issue remains crucial to, rather than being a supplementary matter in, the delivery of human rights in the domestic

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[1354] Constitution Act 1982, s.52

[1355] See, for example, La Forest J in R v Rahey [1987] 1 SCR 588 at p.634 who refers to Magna Carta and Habeas Corpus to describe the medieval origin of the rights in s.11(b) of the Charter.

[1356] As well as those mentioned above, the fact of having a written constitution can itself provide some limited protections against government intrusion because of the manner and form requirements established under it: Attorney-General for NSW v Trethowan & Ors [1932] AC 526. However, this is a flimsy protection.

[1357] For example, the rules of natural justice (Annetts v McCann (1990) 170 CLR 596) but these can be expressly overridden by parliament (Hammond v The Commonwealth (1983) 152 CLR 188).

scene.

When Australia was colonised by Europeans, they were regarded as importing with them English Common Law.[1358] This included the Magna Carta, the Petition of Right, the English Bill of Rights and the Habeas Corpus Acts discussed in Chapter 2. These also apply to the states since federation.[1359] They are sometimes referred to in cases,[1360] but not often, principally because of the drawbacks referred to in Chapter 2. Some protections are also afforded generally in the common law, such as in aspects of the law of torts (eg, nuisance, trespass, defamation, breach of confidence). Sometimes, an outcome of the human rights type is merely an apparent consequence of "value-free" common law argument, as for example the outcome of the Australian Spycatcher trial.[1361] Until now, the

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[1358] Mabo v Queensland (No. 2) (1992) 175 CLR 1 at p.80.

[1359] See for example Imperials Acts Application Act 1969 (NSW), Imperial Acts Application Act 1980 (Vic), Imperial Acts Application Act 1984 (Qld), Imperial Acts Application Act 1986 (ACT).

[1360] For example, R v Smith (1991) 25 NSWLR 1, Kirby P in dissent; Aboud v Attorney-General (1987) 10 NSWLR 671, McHugh JA at 691-2; Herron v McGregor (1986) 6 NSWLR 246; Jago v District Court (1988) 12 NSWLR 558 at 571-82, (1989) 168 CLR 23 at 33, 67. Significantly, in Halden v Marks (unreported decision of Steytler J in the Supreme Court of Western Australia, July 10, 1995) an injunction was sought against the hearing by a Royal Commission of events surrounding the presentation of a petition to the Legislative Assembly. One of the grounds was that this would breach the privilege of Parliament under Article 9 of the Bill of Rights 1689. Rights of individuals were thus irrelevant. In any event, the injunction was refused for lack of a sufficient basis made out by the plaintiff, not on rights grounds.

[1361] Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd (1988) 165 CLR 30: injunction to prevent publication of a book in breach of the British Official Secrets Act and equitable duties owed between the author and the British government refused on the basis of the unenforceability of British public law in Australia, analogising the notion of crimes being "cognisable and punishable [only] in the country where they are committed" (at p. 41). The right to free speech is upheld here not by notions of human rights (which are not

values reflected in the common law have not really represented fundamental human rights so much as parliamentary supremacy over the monarch and the right of courts to question parliament's legislation, but not always to strike it down.[1362] The view that courts can adjudicate but not legislate, and can find rather than create the law, no matter how inaccurate or even precious such a view may be, has meant that as a source of fundamental rights, the common law has in fact played a minimal role.[1363]

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mentioned in this case) but by a non-globalised view of legal principle. Another aspect of the decision is the "political" nature of the question posed and the undesirability of a court to adjudicate upon it (at p.47).

[1362] See Chapter 2, particularly the discussion of Doctor Bonham's Case (1609). More recently, see Liyanage v The Queen [1967] 1 A.C. 259 (Privy Council):legislation after a coup in Ceylon amounting in effect to a bill of attainder held to be an unjustifiable assumption of judicial power by the legislature (ie, parliamentary supremacy is checked by the separation of powers); contrast Building Construction Employees and Builders Labourers Federation v Minister for Industrial Relations (1986) 7 NSWLR 372 (NSW Court of Appeal): deregistration of a trade union by NSW legislation allowing this to be done by certificate of the Minister without the union being heard and with no recourse to the courts held to be valid because the separation of powers did not operate at state level. Thus the NSW Parliament could in effect exercise a judicial power (distinguishing Liyanage where the Ceylon Constitution had such a separation), because the NSW parliament was supreme, subject only to the Australian Constitution, the limits on extraterritorial legislation, and "peace, order and good government" requirements in s.5 of the NSW Constitution, and the manner and form requirements in it. Also, it was held that the doctrine of fundamental common law rights in Dr. Bonham's Case was dealt a fatal blow by the Bill of Rights 1689 and the Act of Settlement 1700. The judgements look at a considerable amount of "ancient" law dealing with the courts controlling parliament, going back to Day v Savadge 80 E.R. 235 (1614). However, the court could not say that the legislation was contrary to the "peace, order and good government" of New South Wales. Human rights are referred to nowhere in the judgement, including that of the judicial "champion" of human rights, Kirby J.

[1363] See BLF Case, ante. See also Malone v Metropolitan Police Commissioner [1979] Ch. 344: a right to privacy may exist as a result of the combination of certain principles of English law, but "no new right in the law ... can spring from the head of a judge" (per Megarry V-C at p.372). Contrast Victoria Park Racing and Recreational Grounds Club Co Ltd v Taylor (1937) 58 CLR 479: "However desirable some limitations upon invasions of privacy might be, ... [it has not been shown] that any general right of privacy exists."

Moreover, if the English common law was imported into Australia, so were its peculiarities and deficiencies. Thus, in Dugan v Mirror Newspapers[1364] a man convicted of murder was held not to be able to sue a newspaper for defamation because the common law doctrine of attainder had been received into the law of New South Wales and as a result he was "civilly dead." It did not matter that in the meantime the law had changed in England and that it no longer served its original purpose (as felons used to be executed) and a decision of the European Court of Human Rights which was directly on point[1365] was ignored by all the court except the sole dissentient, Murphy J.[1366] His honour also referred to the UDHR Articles 6, 7, 10 and 29(2), and the Articles 14 and 16 of the ICCPR. There has also been held to be no general right to privacy in the common law.[1367] Thus a strict reliance on the common law while ignoring human rights norms has resulted in the former not according with modern standards.

(per Rich J at p.496). See generally Nick O'Neill & Robin Handley: Retreat From Injustice: Human Rights in Australian Law (1994, Federation Press, Leichhardt), Chapter 5.

[1364] (1978) 142 CLR 583

[1365] Golder v U.K. Eur. Court H.R., Series A, Vol. 18 (1975): refusal to allow a prisoner to bring defamation proceedings against a guard who had wrongly accused him of being involved in an assault in prison was held, adopting the effectiveness principle, to be a breach of the right of access to a court necessarily implied in Article 6 of the European Convention.

[1366] Dugan, ante, at pp.607-8.

[1367] Victoria Park Racing and recreation Grounds Company Limited v Taylor and Others (1937) 58 CLR 479: the broadcasting of races from a tower positioned next to a racecourse did not infringe any legal right of the plaintiff.

5.6.1 Transformation vs Incorporation or Adoption

There is some confusion in the terminology used to describe the application of an international norm in a domestic legal system. The term on which there appears to be agreement is "transformation", in which the international norm is considered to be made domestically applicable only by a formal act such as the passing of legislation with respect to it. The term "adoption" refers to the view that international norms are part of domestic law and can be applied as such without a formal transforming act of the State. The term "incorporation" has been used to designate all forms . implementation of international norms in the domestic sphere.[1368] However, some writers seem to use the terms adoption and incorporation interchangeably.[1369] Some others refer only to incorporation,[1370] as do some judges.[1371] Others prefer the term "adoption".[1372] To the extent

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[1368] See Karl Joseph Partsch, "International Law and Domestic Law", in Encyclopedia of Public International Law, Vol. 10 (1987) at pp.238-57).

[1369] See, for example, D. O'Connell: International Law, 2nd ed (1970, Stevens, London), p.50; Ian Brownlie: The Principles of Public International Law, 4th ed (1990, Clarendon Press, Oxford), pp.43-44; Schabas: International Human Rights Law and the Canadian Charter, ante, p.18.

[1370] For example, Michael Akehurst: A Modern Introduction to International Law, 5th ed (1984, George Allen & Unwin, London), p.45.

[1371] See the well-known judgement of Lord Denning in Trendtex Trading Corp. v Central Bank of Nigeria [1977] Q.B. 529.

[1372] R. St J Macdonald, "The Relationship Between International Law and Domestic Law in Canada", Chapter 5 in R. St J Macdonald, Gerald Morris & Douglas M. Johnston (eds): Canadian Perspectives on International Law and Organization (1974, University of Toronto Press, Toronto); Maxwell Cohen & Anne Bayefsky, "The Canadian Charter of Rights and Freedoms and Public International Law" (1983) 61 Canadian Bar Review 265.

that the latter term has been used to imply that an international norm is regarded as being applicable domestically as law without changing its content or character - and in the context of the domestic use of international human rights norms I do not consider that this is an accurate description of what happens - I prefer to use the term "incorporation" to designate the less formal use of international human rights norms in the domestic legal system without a supe ening act such as the passing of legislation.

At the outset it should be noted that the judicial approach to international norms in Australian and Canadian courts has been schizophrenic: predominantly one of incorporation with respect to customary international law and quite strongly transformationist with respect to treaties, although the situation is starting to blur. This difference is linked to the policy issues in the creation of law between Executive and Parliament, and, in a federation, between federal and regional legislatures. Whether this remains a valid distinction in the human rights context is now questionable. It has also been suggested that the dichotomy between transformation and incorporation aligns itself with the distinction between the dualist and monist approaches to law.[1375] This nice demarcation is also no longer necessarily correct.

Transformation is based on the premise of the separateness of international law and

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[1375] Macdonald in Macdonald, Morris & Johnston, id, at pp.93ff.

domestic law despite, in the case of international human rights norms, the symbiosis between them. This leads to a tension which must be resolved. In Canada, the Charter has partly done this, as described above. In Australia, the High Court has declared that human rights norms are a special category of international law with respect to their impact on domestic law.[1374] The problem is that despite the similarities of subject matter between international human rights and domestic law, their creation processes are separate which encourages a deference to separate normative hierarchies, both between international law and domestic law and within domestic law between the powers of Parliament and the powers of the courts. This has led to an apparent difference in the approach to customary law and treaty law by the courts.

To understand this phenomenon of the apparent inconsistent treatment of international law by domestic courts it is necessary to consider the cases, particularly the earlier ones, in their historical context.

The statement by Lord Mansfield in 1764 (and followed by Blackstone)[1375] that international law is "part of the law of England"[1376] (and hence of Australia and

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[1374] Mabo v Queensland (No. 2) (1992) 175 CLR 1

[1375] Commentaries on the Laws of England (1765-69), Vol. 4, p.67.

[1376] Triquet v Bath (1764) 94 E.R. 936, a case involving diplomatic immunity. See also Buvot v Barbuit (1737) 25 E.R. 777.

Canada) is often quoted,[1377] but has been declared by at least one Australian judge in recent times to be "without foundation."[1378] Mansfield was referring to customary international law, as there were comparatively few treaties at the time, and to a recognition of settled basic concepts of international law (like the immunities of ambassadors, which Triquet v Bath involved) and the growth of what today is private international law (the recognition of foreign laws - around which many of the slavery cases discussed in Chapter 3 revolved).[1379] There has never in fact been a clear judicial pronouncement on the point, as the cases vacillate around the issues of clear and satisfactory evidence of the customary rule, as well as on the status of the rule, once accepted, in the Common Law. Crawford and Edeson have contended that the approach has been one of "qualifying rather than displacing the basic principle that international law is part of the law of England."[1380] Thus, Lawnton LJ in R v Secretary of State for the Home Department; Ex parte Thrakar stated: "when anyone in the United Kingdom seeks to enforce against the Crown what he [sic] alleges is a right arising under public international law, the courts have to decide what is the nature and extent of the

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[1377] See Macdonald, ante, at pp.94ff and references cited there, particularly in footnote 26.

[1378] Per Dixon J in Chow Hung Ching v R (1949) 77 CLR 449 at p.477.

[1379] See Arthur Nussbaum: A Concise History of the Law of Nations (1958, The Macmillan Company, New York), pp.136ff.

[1380] James Crawford & W.R. Edeson, "International Law and Australian Law", Chapter 4 in K.W. Ryan (ed): International Law in Australia, 2nd ed (1984, Law Book Company, North Ryde), at p.73.

right and whether there are any limitations imposed upon it by statute."[1381] This is consistent with the well-known dictum of Lord Atkin in Chung Chi Cheung v The King that courts recognise the existence of international norms and, once they have ascertained what they are, "they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals."[1382] This is neither strict transformation nor strict adoption of the international rule: it is incorporation of that rule into the domestic legal hierarchy which then shapes the rule to conform to its own ends. In the absence of such domestic limitations, international law has been used to help inform the public policy considerations of the law,[1383] but again not when there are such limitations, including policy considerations.[1384] Problems have thus arisen when

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[1381] [1974] 1 QB 684 at p.709: an argument was made (unsuccessfully) that a right to residence arose in people expelled from other countries (in this case Uganda) because of a duty on the U.K. to admit people with British nationality. This was overridden by clear statute: "the rules of international law only become part of our law in so far as they are accepted and adopted by us", per Lord Denning at p.701.

[1382] [1939] AC 160 at p.168, emphasis added.

[1383] Oppenheimer v Cattermole [1976] AC 249: House of Lords refused to recognise a 1941 Nazi denationalisation decree where it found "clearly established rules of international law" to the contrary of "so grave an infringement of human rights that the courts of this country ought not to recognise it as a law at all." (per Lord Cross at p.278). Note, however, that the effect of this was to consider that the people concerned were not stateless, an outcome of potentially the same effect as in Thrakar. It is use of human rights as to process rather than necessarily as to outcome.

[1384] For example, in Blathwayt v Lord Crawley [1976] AC 397, the issue was whether a provision in a will under which gifts would be forfeited if the beneficiaries adopted Catholicism was void as being contrary to public policy including the right to freedom of religion in the (unincorporated) European Convention. The answer was no because, in the words of Lord Wilberforce, "to do so would bring about a substantial reduction of another freedom, firmly rooted in our law, namely that of testamentary disposition." (at p.426).

a customary norm has been adopted domestically but later changes in international law, the preponderance of opinion formerly being that the earlier law prevails,[1385] but with a well-known dissent by Lord Denning.[1386] Other judges have overcome this problem by adoption of the rules of precedent.[1387] The preponderance of academic opinion is now that, with respect to customary international law, the incorporationist approach will allow the later changed rule to be applied.[1388] However, a clear parliamentary intention will nullify domestic implementation of the clearest international rule.[1389]

Moreover, if no clear statute or domestic precedent exists, the extent to which international human rights norms might fill the void is still limited. The classic expression of this[1390] is the case of Malone v Metropolitan Police

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[1385] Thai-Europe Tapioca Service v Government of Pakistan [1975] 1 WLR 1485

[1386] Trendtex Trading Corporation v Central Bank of Nigeria [1977] QB 529 at p.554: Denning accepted the (new) restricted doctrine of state immunity, also stating that "the doctrine of incorporation is correct".

[1387] For example, Shaw LJ in Trendtex, ante, considered that the former cases could be distinguished as being based on an international rule which no longer exists (at pp.578-9).

[1388] See, for example, Macdonald in Macdonald, Morris & Johnston, ante, at p.111; Schabas, ante, at p.19.

[1389] Mortensen v Peters (1906) 8 F (JC) 93: the Norwegian master of a fishing vessel was prosecuted for fishing contrary to statute which stipulated an outer maritime limit beyond the three-mile limit recognised by customary international law.

[1390] Involving, admittedly, the application of a treaty norm, but nevertheless instructive with respect to situations where there is a lacuna in the domestic law.

Commissioner.[1391] In that case an antique dealer was charged with handling stolen property. Part of the evidence had been obtained by telephone tapping. The issue arose whether this was contrary to Article 8 of the European Convention dealing with respect for private life and correspondence. In rejecting this argument Sir Robert Megary V.-C. agreed that legislation should be construed consistently with the Convention, particularly if that legislation was enacted to give effect to the Convention. But where no such legislation exists "it is indeed difficult for the courts to lay down new rules of common law or equity that will carry out the Crown's treaty obligations."[1392] Notably, it is not necessarily "impossible" for courts to do so. His honour held that the real issue here was not that the Convention forbad telephone tapping, but the extent to which this could be done.[1393] Such an issue, he felt, could only be answered by Parliament.[1394]

The apparent high point of transformation came in cases such as R v Keyn[1395] where even a clear rule of international law would not be implemented unless

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[1391] [1979] Ch. 344

[1392] At p.379.

[1393] See Klass v Germany 2 E.H.R.R. 241 (1978): the European Court of Human Rights held that legislation permitting secret surveillance was necessary in a democratic society to safeguard security or prevent crime, provided there exist adequate guarantees against abuse.

[1394] At p.380.

[1395] (1876) 2 Ex. D. 63: a collision occurring within three miles of the English coast held by majority not to be governed by English law despite the existence of the three-mile territorial sea in international law.

enacted by parliament (lest the ive function be usurped by the courts). However, as Macdonald has pointed out,[1396] what was in issue for the majority in that case was not the relationship between an international rule and domestic law, but what the international rule in fact required of a littoral State. The majority held that the rule was of a permissive nature - hence in the absence of a clear domestic rule extending criminal jurisdiction into the three-mile maritime zone there was nothing in the international rule alone which could support this. Recent English cases indicate that there has been some cautious nudging towards an incorporationist approach, but only when the international norm is "certain and is accepted generally by the body of civilised nations."[1397] The judicial focus has been widened, and in a way which might be accommodating to human rights norms, but in an hierarchical way.

The Australian and Canadian cases adopted a similarly equivocal approach: a rule of international law will be acted upon as part of domestic law,[1398] but only "so

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[1396] In Macdonald, Morris & Johnston, ante, at pp.95-96.

[1397] Per Lord Oliver, J.H. Rayner Ltd v Department of Trade (International Tin Council Case) [1990] 2 AC 418 at 513. Lord Denning's broad approach in Trendtex has not been followed (even though on the facts the decision would still be the same).

[1398] In Canada, see The Grace (1894) 4 Ex.C.R. 283: Canadian Fisheries Act interpreted in line with an international boundary agreement to give it application beyond the three-mile limit; Reference as to the powers of the City of Ottawa and the Village of Rockliffe to Levy Rates on Foreign Legations and High Commissioners' Residences [1943] SCR 208: diplomatic missions were held to be exempt from taxation because of the international doctrine of diplomatic immunity which was well-settled and not inconsistent with Canadian law; Reference re Exemption of US Forces From Canadian Criminal Law [1943] 4 DLR 11: immunity of foreign service personnel from local criminal law can apply because of international agreement, but not if this conflicts with fundamental constitutional principles.

far as it is not inconsistent with rules enacted by statutes or finally declared by the courts."[1399] While this is not a transformationist approach, it also does not allow unimpeded adoption by courts of international norms. This approach in fact allows, but does not compel, a domestic violation of international law.[1400] It will apply to statutes enacted by the federal as well as the state and territory governments in Australia,[1401] although the situation with respect to the Canadian provincial governments has not been directly answered.[1402]

[1399] Polites v Commonwealth (1945) 70 CLR 60, per Williams J at p.81: Polites, a Greek national living in Australia, was conscripted under the National Security Act 1939 (Cth) when international law forbad the conscription of aliens. The court followed the statute. See also Wright v Cantrell (1943) 44 SR(NSW) 45: any immunities for foreign military personnel which might apply under international law will be recognised by the courts but can be overridden by legislation. In Canada, see Capital Cities Communications Inc v Canadian Radio-Television Commission (1977) 81 DLR (3d) 609 (SCC): the CRTC was deleting commercial messages from television signals received from CCC in the United States and replacing them with public service announcements. CCC argued, inter alia, that this was contrary to the Inter-American Radio Communications Convention. Laskin CJ for the majority held that the treaty would have no domestic internal effect unless transformed by domestic legislation or unless domestic legislation was ambiguous and needed to be interpreted. However, Pigeon J for the minority held that as the CRTC was an agent for the government it was obliged to adhere to the treaty, which was government policy, even in the absence of transforming legislation.

[1400] Salemi v Minister for Immigration and Ethnic Affairs (No. 2) (1977) 14 ALR 1: definition of the term "amnesty" for illegal immigrants taken pursuant to the Ministers allowed discretion under the Migration Act rather than international law.

[1401] For the constitutional reasons discussed above.

[1402] Each Canadian province is sovereign with respect to its areas of legislative competence: Re Arrow River and Tributaries Slide and Boom Co [1932] 2 DLR 250: Ontario legislation imposing tolls on an international boundary river contrary to a treaty was held to be a valid exercise of provincial power under s.92 of the Constitution, but the legislation was interpreted so as to avoid a direct conflict with the terms of the treaty. In Alberta Union of Public Employees v The Crown in Right of Alberta (1980) 120 DLR (3d) 590 (affirmed (1981) 130 DLR (3d) 191) the Alberta Public Service Employee Relations Act banned strikes in the public service. This is prima facie contrary to Art.8 of ICESCR (unless done in the administration of a state - which Sinclair CJ found to be the case here) and to Art.3 of ILO 87 (which allows unions to organise their activities but does not specifically refer to the right to strike - a right which

More recent decisions appear to be more flexible on the matter, but are not determinative because of the obiter nature of the statements.[1403] International

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has been interpreted into the Article by the ILO Committee on Freedom of Association when asked by the unions for a view on this specific legislation (ILO, LXII, O.B. 10 (Series B, No.2 1979)). Sinclair CJ held that the recommendations of the Committee were not law binding on Canada, ILO 87 did not forbid strikes, and therefore the Albertan legislation was not contrary to an international rule binding on Canada. The specific issue of a province being able to pass legislation contrary to international law was thus unnecessary to answer, but it would appear that a province could do so. But this view has been questioned. Vanek in "Is International Law Part of the Law of Canada?" (1949-50) 8 University of Toronto L.J. 251 argued that since the British North America Act was ambiguous on the issue it had to be interpreted in conformity with international law and therefore neither the federal nor the provincial governments could violate international law. Judge La Forest in "May the Provinces Legislate in Violation of International Law?" (1961) 39 Canadian Bar Review 78 argued that the extraterritorial limits placed on colonial legislatures prohibited them from making laws beyond their boundaries which might conflict with the policy of the Imperial Parliament, and thus the provinces could not violate international law, while the federal government could. Donald Woloshyn in "To What Extent Can Canadian Courts be Expected to Enforce International Law in Civil Litigation?" (1985-6) 50 Saskatchewan L R. 1 argues the while the provinces may legislate contrary to treaty law, they cannot legislate contrary to customary law. In rebuttal, Alan Brudner in "The Domestic Enforcement of International Covenants on Human Rights: A Theoretical Framework" (1985) 35 University of Toronto L.J. 219 at 247 states that Vanek's argument that Britain must be considered not to have given the Canadian legislatures the power to violate international law, the obligations under which in those days were assumed by Britain for the whole empire, now runs contrary to the Statute of Westminster. He states that Judge La Forest's argument analogises the present relationship between the provincial and federal legislatures to that between the colonial legislatures and the Imperial Parliament, an analogy which is contrary to decisions which have since recognised the co-ordinate sovereignties of the federal and provincial legislatures: Attorney-General for Canada v Attorney-General for Ontario, ante. What must be said now is that since the patriation of the Constitution it can be argued that these arguments are now beside the point: a government can exercise its power within the limits given to it by the Constitution, regardless of what the situation might have been in the past. Macdonald (in Macdonald, Morris & Johnston, ante, at pp.88ff) argues that both the federal and provincial governments may legislate in violation of international law. But contrast the Foreign Legations Case [1943] SCR 208. In the context of the Charter, Schabas, ante, impliedly subscribes to the Macdonald view (at pp.28-31).

[1403] For example, the statements in Dams, ante, to the effect that customary international law might form the basis of Commonwealth legislation based on the external affairs power (in a case where the legislation was based on a treaty); Polyukhovich, ante, where customary law was relied upon to justify legislation to prosecute war criminals, but only after it was held valid under other constitutional powers. The situation in Canada appears to be similar:

courts will consider domestic law, but only as a "fact" in the case.[1404] Domestic courts do more than this with international law. The latter can be a "source" of domestic law[1405] but it is decidedly a subsidiary source of a persuasive nature only[1406] and is "a source of filling a lacuna in the common law of Australia or for guiding the court to a proper construction of the legislative provision in question."[1407] Nevertheless, this approach does mean that it is no longer only Parliament which can import international norms into domestic law: the courts may do it as well, but Parliament will have the final authoritative say. As a result, the ebb and flow of the common law may pull international human rights norms into the domestic legal system, but in the meandering way of the common law which develops through an accretion of single instance solutions to specific problems.

Thus, customary law may be a part of Australian and Canadian law, but if it is in direct conflict with a statute or some fundamental constitutional principle, the latter will prevail.[1408] If the statute or its application in a particular case is ambiguous,

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see the discussion in Bayefsky: International Human Rights Law ..., ante, at pp.7-10.

[1404] Eastern Carelia Case PCIJ Reports, Ser. B, No. 5 (1923); Serbian and Brazilian Loans Case PCIJ Reports, Ser. A, Nos. 20-21 (1929); Nottebohm Case ICJ Reports 1959, at pp.20-21.

[1405] Dixon J in Chow Hung Ching, ante, at p.477, and also in Cheung, ante, at pp.480-1.

[1406] See Geoffrey Sawer, "Australian Constitutional Law in relation to International Relations and International Law", Chapter 3 in Ryan (ed): International Law in Australia, ante, at p.50.

[1407] Per Kirby P in Cachia v Hanes (1991) 23 NSWLR 304

[1408] Horta v Commonwealth of Australia (1994) 123 ALR 1; Reference re Exemption of US Forces From Canadian Criminal Law [1943] 4 DLR 11.

an interpretation that is not in conflict with international law will be preferred.[1409] Where a customary rule has changed since last applied by a domestic court, the new customary rule may, all else being equal, be applied by the court.

The approach to treaties was more strongly transformationist. Unlike customary law, which emerges through the actions over time of several States, treaties can be concluded by as few as two States, can come into force immediately, and, in Canada and Australia, require no Parliamentary mandate. The transformationist stance was thus taken to restrict as far as possible the power of the Crown (and later of the Executive) to change the law by the use of the prerogative alone,[1410] although there may be exceptions to this, such as the domestic operation of peace treaties,[1411] and possibly where the treaty codifies customary international law

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[1409] Pierre-André Coté: The Interpretation of Legislation in Canada, 2nd ed (1991, Les Editions Yvon Blais, Québec), pp.308-9; A.I. MacAdam & T.M. Smith: Statutes, 2nd ed (1989, Butterworths, Sydney), pp.204-207.

[1410] See Crawford and Edeson, ante, at pp.85-6 and references cited there. See also The Parlement Belge (1879) 4 P.D. 129: provisions of a treaty not implemented by legislation did not operate to immunise a Belgian boat from prosecution in the English courts; Civilian War Claimants Association v R [1932] AC 14: unincorporated treaty does not affect or effect private rights to make a claim against the government for a share in war reparations which it has received in respect of damage suffered by the claimant; Attorney-General for Canada v Attorney-General for Ontario [1937] AC 326: domestic implementation of ILO Conventions ratified by Canada as part of the Treaty of Versailles could not be done by the federal government as the subject matter was "property and civil rights" which is an exclusively provincial head of power.

[1411] Chow Hung Ching v R (1948) 77 CLR 449 per Dixon J at p.478; Koowarta v Bjelke-Petersen, ante, per Mason J at p.648; Secretary of State of Canada v Alien Property Custodian for U.S. [1931] 1 DLR 890 per Duff J at p.902; but contrast Bitter v Secretary of state of Canada [1944] 3 DLR 482 per Thorson J who rejected the view in the

which, subject to the limitations just examined, could be applied by the courts.[1412] The policy basis for such an approach must now be questioned. It arose as a check on the Crown so that it could not by-pass parliament. International policy is now directed by the Executive. In both Canada and Australia the Executive retains power only as long as it retains the confidence of Parliament - usually, simply because it represents the majority party there and MP's are kept in line by the Party. In a parliamentary system based on parties and majoritarianism in a context of strict party discipline, a decision of the Executive is in effect a decision of the Parliament. In any event, why should the policy not be directed to upholding international legal obligations?

Nevertheless, the transformationist approach to the domestic implementation of treaties remains emphatically so in Australia[1413] and Canada.[1414] Interestingly,

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Alien Property Case. Contrast Kerwin CJ in Francis v The Queen [1956] 3 DLR 641 who held that the Jay Treaty 1794 did not, without implementing legislation, exempt a Canadian Indian from payment of customs duties at the border because it was not a peace treaty.

[1412] A. Drzemczewski, "The Applicability of Customary International Human Rights in the English Legal System" [1975] Human Rights Journal 71; P.J. Duffy, "English Law and the European Convention on Human Rights" (1980) 29 International and Comparative Law Quarterly 585.

[1413] Bradley v Commonwealth (1973) 128 CLR 557: UN Security Council resolutions which are binding under the UN Charter cannot justify actions otherwise unlawful under Australian law (in this case, cutting off mail and telephone services from the Rhodesian Information Office). See also Koowarta, ante, and R v Burgess; Ex parte Henry, ante. In Bluett v Fadden McLelland J said: "... a treaty does not of itself have legislative effect": (1956) 56 S.R. (NSW) 254 at p.261.

[1414] Re Arrow River and Tributaries Slide and Boom Co. [1932] 2 DLR 250: Ontario legislation clearly repugnant to a treaty prohibiting the charging of tolls on an international boundary river held to be a valid exercise of power under s.92 of the Constitution

an original draft of the Australian Constitution included a provision that all treaties made by the Commonwealth, as well as all legislation made by it, would be binding on all Australian courts.[1415] This was soon dropped for reasons related to the inability of the dominions to make treaties independently of Britain discussed above.[1416] Now, the interpretation of the external affairs power, as described

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(however, the legislation was interpreted to avoid a conflict with the treaty). This was followed in Francis v The Queen (1956) 3 DLR (2d) 641. Contrast Re Drummond Wren [1945] 4 DLR 674: Ontario High Court (Mackay J) struck down a covenant prohibiting the sale of land to "Jews or persons of objectionable nationality" in that it was contrary to public policy, as expressed, inter alia, in the UN Charter; and Re Noble and Wolf [1948] 4 DLR 123, affirmed in [1949] 4 DLR 375: the same court (Schroeder J) upheld a similar covenant on the basis that to do otherwise would interfere with freedom of contract, which also was public policy and, moreover, was policy which was paramount because the international instruments referred to in Re Drummond Wren had not been transformed into Canadian law and public policy was a matter for the legislature. The latter view sees no difference between direct reliance on an untransformed treaty and using that treaty as a basis to ascertain public policy. This may be a logical argument, but it is one which has not since been followed. However, as Brudner, ante, points out, it also relies on a view of public policy which is little different to political expediency (at p.241). It is really a matter of the context in which public policy is viewed. International law recognises a wider context and recognises the domestic relevance of that context. Nevertheless, an effect of international law was that after the decision in Re Noble and Wolf the Ontario legislature amended the Conveyancing and Law of Property Act declaring that henceforth such covenants would be void. Similar legislation was passed by Manitoba, New Brunswick, Nova Scotia and Prince Edward Island (See Tarnopolsky & Pentney: Discrimination and the Law, ante, at p.2-11). The doctrine, however, remains the same and the provisions of the Charter have not altered this except to the extent of interpretation described above: R v Vincent (1993) 12 O.R. (3d) 427: a native Indian charged with smuggling cigarettes could not rely on the Jay Treaty of 1794 as giving her the right to bring commercial goods into Canada free of duty. See also the Bhadauria case [1981] 2 SCR 181 discussed above which, while not a Charter case, overturned the approach in Noble and Wolf but not the doctrine with respect to the reception of international law.

[1415] Clause 7 adopted at the Adelaide session of the Constitutional Convention, 1897. This is discussed in G.P.J. McGinley, "The Status of Treaties in Australian Municipal Law: The Principle of Walker v Baird Reconsidered" (1990) 12 Adelaide L.R. 367 at pp.368-9.

[1416] McGinley, ibid, considers that the framers were worried that the inclusion of the provision might imply a claim to treaty-making power that would jeopardise the entire Bill. See also Stephen J in

above, enables this to occur to the extent that political will determines. In Canada, with the Labour Conventions Case still good law, for an international human rights norm to be transformed, either expressly or by necessary implication in legislation, the subject matter of the legislation must satisfy the requirements of sections 91 and 92 of the Canadian Constitution. Only Wilson J has said that the Charter achieves this transformation in a comprehensive fashion.[1417] International human rights norms under the Charter essentially remain "a relevant and persuasive source of interpretation"[1418] for it rather than being themselves transformed into Canadian law.

However, as seen above, if a treaty has been implemented domestically and its terms fall to be interpreted, they will be interpreted in accordance with international law rather than domestic principles of statutory interpretation.[1419] This promotes a synergy between the international and domestic systems and can

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Koowarta, ante, at p.643.

[1417] Singh v Minister of Employment and Immigration [1985] 1 SCR 177

[1418] Reference re Public Service Employee Relations Act [1987] 1 SCR 313, per Dickson CJ at p.350.

[1419] Dams Case; Polyukhovich, where this was crucial to the outcome of the case: Brennan J finding no rule of customary international law creating a legal obligation on States to prosecute war criminals, Toohey J finding that there was, and the other judges finding it unnecessary to decide this issue. See also Kirby P in SS Pharmaceutical Co Ltd v Qantas Airways [1991] 1 Lloyd's Rep. 288: parochial constructions of international instruments should be avoided when they are intended to operate in a transnational basis. (Here the treaties were with respect to liability for international air carriage. Given the symbiosis between human rights norms and domestic legal systems, this approach may hold good in broader terms, ie in setting the acceptable limits to the "margin of appreciation").

take domestic law a considerable distance from what Crawford describes as the "closed, introverted system"[1420] which steadfastly resisted consideration of international law.[1421] But it is nevertheless fraught with problems of interpretation with respect both to treaties and customary international law.[1422] This issue in the Dams case (whether an "obligation" arose out of the relevant treaty) has been discussed above. The problem is exacerbated when customary law is involved. In the Polyukhovich case the only two judges to discuss the issue of the existence of a rule of customary international law were Brennan and Toohey JJ. They came to diametrically opposed views, and delivered opposing final decisions in this case, on the basis of their examination of international law. They both considered that to locate a customary rule, both state practice and opinio juris had

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[1420] James Crawford, "General International Law and the Common Law: A Decade of Developments", American Society of International Law, Proceedings of the 76th Annual Meeting (1982), pp.232-244 at p.233.

[1421] Ellerman Lines Ltd v Murray [1931] AC 126; Barras v Aberdeen Steam Trawling Company Ltd [1933] AC 402: House of Lords held that it was more important to refer to previous decisions on the meaning of words used in a statute than to refer to the treaty on which the statute was implemented. See now James Buchanan & Co Ltd v Babco Forwarding & Shipping (UK) Ltd [1978] AC 141: "... Ellerman Lines Ltd v Murray is untypical and ... should no longer be followed ... the correct approach is to interpret the English text ... [in a way which is] appropriate for the interpretation of an international convention, unconstrained by technical rules of English law, or by English legal precedent" (per Lord Wilberforce at p.153). This approach has been affirmed by Lord Scarman in Fothergill v Monarch Airlines Ltd [1981] AC 251 at p.294, and Lord Diplock in Garland v British Rail [1982] 2 WLR 918 at p.935.

[1422] In Canada, see, for example, Re Newfoundland Continental Shelf [1984] 1 SCR 86 where the existence in international law of a right to the continental shelf at 1949 (the year Newfoundland joined the Canadian federation) had to be determined to decide whether Canada or Newfoundland had the right to explore and exploit the resources there. As this right was a later development in international law the court found in favour of Canada's right.

to be found.[1423] (Interestingly, they both took a traditional approach: the qualifications of the Nicaragua Case discussed in Chapter 3 do not appear to have been considered.) Toohey J found that at the relevant time (1942, when the alleged crimes took place) the notion of war crimes existed in international law (largely because of the 1907 Hague Convention)[1424] but evidence of the existence of crimes against humanity as an international norm he found "impossible ... to say definitively."[1425] However, to the extent that the impugned conduct was done in connexion with a war crime, it was forbidden in international law at the time.[1426] Brennan J, on the other hand, took a more technical approach. He found that crimes against humanity did not exist in international law before 1945[1427] and that in so far as war crimes were concerned, the War Crimes Act had not been drafted in sufficient conformity to the international rules (and was therefore constitutionally invalid).[1428] A similar difficulty in identifying customary rules under the Canadian war crimes legislation led to a different approach: a reliance on general principles of law recognised by the community of nations.[1429] Presumably a reference to Article 38(1)(c) of the ICJ Statute, although this is not

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[1423] (1991) 172 CLR 501, at p.560 and p.657 respectively.

[1424] At p.666

[1425] At p.674

[1426] At p.676

[1427] At p.587

[1428] At p.566

[1429] Finta (1989) 61 DLR (4th) 85

clear from the judgement, this approach has been diplomatically called "somewhat unusual."[1430] It represents perhaps a determination to apply rules which do not (or did not) exist in international law in the strict sense (as an international court applies principles of domestic law to fill a lacuna in international law).[1431] This highlights the important policy issue of the extent to which a domestic judge should give an expansive or a narrow interpretation to the international rule, whether as to its existence (as is often the case with customary law)[1432] and to its meaning and application (as is the case with a recognised rule of customary law and treaty provisions).[1433] The High Court has already made it clear that it is inclined to a more generous view of the rights and duties of States under international law, given the difference between the expression of rules in international law and domestic law.[1434] The approach of Brennan J in Polyukhovich illustrates that there must be limits to this, to avoid breaching another clear rule of international

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[1430] Henry Burmester, "Ascertaining International Human Rights Rules and Standards in Domestic Courts: War Crimes and Other Examples", in Philip Alston (ed): Towards an Australian Bill of Rights (1994, Centre for International and Public Law, ANU, Canberra), pp.311-28 at p.321.

[1431] See Bin Cheng, "On the Nature and Sources of International Law", in Cheng (ed): International Law: Teaching and Practice (1982, Stevens & Sons, London), pp.203-33 at pp.219-21.

[1432] In Polites, ante, the High Court looked at text books rather than State practice to confirm the existence of a rule forbidding conscription of aliens, which might have not existed in international customary law at all. In the Alberta Union Case, ante, the court simply got it wrong by insisting on "universal consent" to the rule.

[1433] In McCann v The Queen (1975) 68 DLR (3d) 661, the court referred to the UN Minimum Standards on the Treatment of Prisoners to determine the meaning of "cruel or unusual punishment" in the 1960 Bill of Rights, but only because the judge relied on the expert testimony of a psychiatrist who had referred to them. No inquiry as to their status was made.

[1434] For example, as discussed above in the Dams Case.

human rights law: creating an offence where none existed at the relevant time.[1435]

Transformation of international human rights norms and incorporation of them by the courts thus both involve an interpretation of the international norm and a contextualising of it in the domestic scene. There is nothing wrong with this: indeed, because of the symbiotic nature of the norms and the domestic systems mentioned in Chapter 4 this is exactly what was intended to occur. Moreover, because customary international human rights norms are overwhelmingly written (such as the UDHR and the several Declarations mentioned above) rather than being unwritten inter-State practice, there is even less reason for a strict demarcation between the transformation of treaties and the incorporation of customary rules. That demarcation is blurring. In the Canadian Charter context there has been an under-use of human rights, but when they are used there is little discrimination between binding treaty obligations, non-binding treaties and binding customary law. International human rights norms (as opposed to international norms generally) are in effect in a "special" category in this regard. These case have been discussed above. In the non-Charter context of Australia, there has recently been a rapid increase in the resort to international human rights norms, but the blurring of the demarcation between treaty and customary obligations shows signs of firming towards the transformationist rather the incorporationist

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[1435] Polyukhovich, at p.587. See, for example, UDHR Art.11(2), ICCPR Art.15.

approach for both forms of international obligation. I now turn to the Australian cases as an illustration of what can occur in the absence of a Bill of Rights.

5.6.2 Recent Australian Cases

Courts in Canada, when interpreting the Charter, have a disappointing track record with respect to the application of international human rights. Australian courts have in the last decade guardedly increased the degree to which they will take Australia's treaty obligations (and to a lesser extent, obligations under customary international law) into account when making decisions. There has been no enthusiastic embrace, but it does represent a shift from decisions on the limits to the exercise of power to issues of the substance of laws based on human rights.

The 1989 decision in Street has already been mentioned. But that case expanded the recognition of discrimination under s.117 of the Constitution in line with existing Australian anti-discrimination legislation rather than being a direct reliance on the international human rights obligations on which that legislation is based. This approach was reinforced in the same year when Brennan J, sitting alone to hear an application for an order waiving court fees in Re Limbo[1436] held that a declaration sought from the court on the basis of the United Nations Charter, the Universal Declaration of Human Rights, the International Covenant on Civil and

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[1436] (1990) 64 ALR 241

Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women, the Declaration on the Rights of the Child, the International Labour Organisation Convention No.111, the Nuremberg Principles and the Genocide Convention - and no Australian law - would amount to an abuse of the court's process unless the statement of claim revealed that breaches of the human rights standards expressed in the international instruments were relevant to the application of Australian domestic law.[1437] (The applicant in the case was alleging that Australian export controls unlawfully allowed military exports to countries which repressed their populations.) The judgement distinguished "lofty aspirations" from "rules of law"[1438] stating that the doctrine of separation of powers found in the constitution relegated only the latter to judicial scrutiny.

In Operation Dismantle, where the Canadian Supreme Court similarly did not interfere with government policy, a Charter-based claim was never regarded to be an abuse of process, even though Cabinet decisions were under consideration. On the basis of Re Limbo an Australian court can give a judgement on political power, but only with respect to whether that power has been exceeded: it cannot make a pronouncement on the manner of exercise of power or on the substance of the

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[1437] At p.242

[1438] Ibid.

decision even if they might be in breach on international human rights standards.

In 1991 the Federal Court of Australia avoided facing the problem that arises when an official exercise of government power is undertaken as a result of an error in construing Australia's international obligations. In Heshmati v Minister for Immigration, Local Government and Ethnic Affairs[1439] an issue arose as to whether an Iranian national had been incorrectly refused refugee status. An application for judicial review of the decision was made under s.6 of the Administrative Decisions (Judicial Review) Act on the basis that the decision was made on an "error of law". This meant, for the application to be successful, that the relevant refugee convention would have to be "law" for the purposes of this section The court left this particular question open, as it had done on at least one previous occasion,[1440] but cited, with apparent approval, the decision of the House of Lords in Brind v Secretary of State for Home Department[1441] where it was held that the exercise of an administrative discretion by the British government could not be presumed to have to comply with the requirements of the European Convention on Human Rights and Fundamental Freedoms, but an unincorporated treaty may be used to resolve an ambiguity in legislation, to consider the principles upon which a court should act when exercising a discretion (eg, to grant an

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[1439] (1991) 102 ALR 376

[1440] Gunaleela v Minister for Immigration and Ethnic Affairs (1987) 15 FCR 543

[1441] [1991] 1 AC 696

injunction), and to interpret the common law if it is uncertain.[1442]

In 1994 the High Court avoided a similar issue. In Horta and Others v Commonwealth of Australia[1443] three East Timor born Australians challenged the validity of the Petroleum (Australia-Indonesian Zone of Cooperation) Act 1990 (Cth) which had been based on a treaty between Australia and Indonesia to co operate over the exploitation of petroleum resources in the Timor Gap. The Timor Gap lies between Australia and the former Portuguese colony of East Timor which was invaded by Indonesia in 1975 and has remained under Indonesian control ever since. Australia recognised Indonesia's sovereignty in 1979. The plaintiffs sought declarations of the invalidity of the legislation on the basis that it was beyond the external affairs power because the Timor Gap Treaty was void under international law, being an agreement based on unlawful occupation of the territory. The argument was that the Commonwealth's executive power was constrained by the rules of international law. In a brief judgement the High Court held unanimously that as the subject matter of the legislation involved things physically external to Australia, it was valid as it satisfied the "narrow" view of the external affairs power. Thus, the validity or otherwise of the treaty in international law was irrelevant. The court rejected, without really giving reasons, the argument regarding the propriety of the executive decision as a non-justiciable matter. This

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[1442] Per Lord Ackner at p.761. This decision was followed in Derbyshire County Council v Times Newspapers Limited [1992] QB 770.

[1443] (1994) 123 ALR 1

judgement illustrates the continuing disjunction between domestic law and international law in Australia. This means that with respect to the application of international human rights norms, the importation into Australian law of concepts of individual rights and freedoms must be unequivocally clear. If the position is equivocal, or the law in question not Australian, courts will not apply international rules stipulating required minimum standards of treatment for individuals, even if these are otherwise binding on Australia under international law.

In 1992, however, this unpromising stance seemed to brighten as the High Court found, in quick succession, the right to freedom of expression implied within the Australian constitution in the cases discussed above, and then found a right to legal representation (more than the right merely to defend oneself) in the common law, and for good measure overturned a long-standing legal myth about the legal status of Aboriginal landholding in Australia at the time of white settlement. It was a sensational start to an apparently greater reliance on human rights.

A principal reason for this shift was Australia's accession to the First Optional Protocol of the ICCPR at the end of 1991, which has had an effect on the recognition by judges of international human rights norms. Chinkin has noted that, as the High Court has some flexibility with respect to being bound by its own previous decisions, an awareness that a matter may be taken to the Human Rights Committee allows at least argument to be made before the court on the basis of the

provisions of the ICCPR.[1444] Also, it would not be an exaggeration to assume that the possibility of judgements being subjected to international scrutiny in the context of human rights influences the perception of judges of the significance of these norms, even if they are not strictly binding in the domestic system. Human rights can thus be seen to have an influence in developing common law principles, where previously Australian judges largely ignored them.

Mabo v Queensland (No. 2)[1445] involved islands in the Torres Strait which were first brought under British sovereignty in the 1870's and were formally annexed to the colony of Queensland in 1879.[1446] Reserves for indigenous people were Crown land and government-managed in what could most flatteringly be called a paternalistic regime. A century later, the Queensland government began to overhaul its racist laws dealing with indigenous inhabitants. Under amendments to the Queensland Land Act the management of these reserves was to be vested in each community council under a "Deed of Grant in Trust." The people of the Torres Strait resisted this as it would mean that their rights were derived from Queensland law rather than their own indigenous laws and title would be vested in Councils rather than in the traditional owners. After a challenge to the sovereignty

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[1444] Christine Chinkin, "Using the Optional Protocol: The Practical Issues" (1993) 3 Aboriginal Law Bulletin 6 at p.7.

[1445] (1992) 175 CLR 1

[1446] Queensland Coast Islands Act 1879

of Queensland to the islands failed,[1447] the issue in Mabo was whether the instruments of the 1870's extinguished a pre-existing native title. In 1985 the Queensland government tried to pre-empt this issue by passing the Queensland Coast Islands Declaratory Act which declared retroactively that the 1879 legislation had not only acquired sovereignty over the islands but had at the same time extinguished any native title there. As discussed above, this Act was held by majority to be contrary to section 10 of the Racial Discrimination Act.[1448] Unlike the Commonwealth, there are no requirements on the states to compensate for acquisition of land, provided that it is otherwise done according to law. But that law now includes the Racial Discrimination Act operating on the state by virtue of section 109 of the Constitution. The issue thus became the existence and continuance of native title after British settlement.

The only Australian case which had squarely addressed this issue was Milirrpum v Nabalco Pty Ltd and Commonwealth,[1449] a decision of a single judge which held that as Australia was regarded as being terra nullius at the time of British occupation it was a "settled" colony in which British law applied and aboriginal laws or land rights would not be recognised. It would have been otherwise had

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[1447] Wacando v Commonwealth (1981) 148 CLR 1

[1448] Mabo and Another v The State of Queensland and Another (Mabo No.1) (1988) 166 CLR 186

[1449] (1971) 17 FLR 141

Australia been a conquered or ceded colony.[1450] The issue of Australia being settled rather than conquered was later upheld by the High Court.[1451] Unlike Canada, no treaties had ever been concluded with Australia's original inhabitants[1452] so there are no constitutional provisions in this regard. Canadian cases for over twenty years have recognised the survival of aboriginal rights after European settlement,[1453] emphasising historic occupation and possession which, together with the Indian Act, place an equitable obligation or fiduciary duty on the Crown enforceable in the courts.[1454] While these rights might be dependent upon Crown action,[1455] they are preserved by section 35 of the Canadian Constitution, exist at common law, are enforceable at common law,[1456] and hence do not need to rely on international human rights norms to support them.

[1450] This view follows the doctrine of Blackstone: Commentaries on the Law of England Vol. 1, p.105.

[1451] Coe v The Commonwealth (1979) 53 ALJR 408, where the High Court refused to entertain an application the effect of which would ultimately be to deny the authority of the Court to function. Contrast Henry Reynolds who argues that this view is historically incorrect. See The Law of the Land 2nd ed (1992, Penguin Books, Ringwood); "Terra Nullius? Never, Never", The Weekend Australian, July 3-4, 1993, p.23. For a critique of the cases see R.D. Lumb, "Aboriginal Land Rights: Judicial Approaches in Perspective" (1988) 62 Australian Law Journal 273.

[1452] In this regard, Australia was regarded as unique in not recognising native title: see Barbara Hocking: International Law and Aboriginal Human Rights (1988, Law Book Co., Sydney), p.5.

[1453] Calder v Attorney-General of British Columbia [1973] SCR 313

[1454] Guerin v The Queen (1984) 13 DLR (4th) 321

[1455] Attorney-General for Ontario v Bear Island Foundation et al (1984) 15 DLR (4th) 321

[1456] R v Sparrow [1990] 1 SCR 1075

The principal judgement in Mabo No.2 is that of Brennan J, with whom Mason CJ and McHugh J agreed. His honour said:

> The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. [Such would be] ... contrary both to international standards and to the fundamental values of our common law ...[1457]

Human rights are therefore a legitimate influence on the Common Law, but do not necessarily determine it regardless of how significant that influence may be. While recognising the influence of international law in the quote mentioned above, his honour nevertheless said: "In discharging its duty to declare the common law of Australia, this Court is not free to adopt rules that accord with contemporary notions of justice and human rights if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency."[1458] He refers particularly to the Advisory Opinion on Western Sahara[1459] and concludes: "If the international law notion that inhabited land may be classified as terra nullius no longer commands general support, the doctrines of the common law which depend on the notion that native peoples may be "so low in the scale of social organisation" that it is "idle to impute to such people some shadow of the

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[1457] (1992) 175 CLR 1 at p.42 (emphases added).

[1458] Id at p.29, emphasis added.

[1459] (1975) ICJ Reports 39

rights known to our law" can hardly be retained."[1460] Referring particularly to Australia's accession to the First Optional Protocol to the ICCPR which "brings to bear on the common law the powerful influence of the Covenant and the international standards it imports,"[1461] the retention of a fiction which is both unjust and discriminatory cannot be accepted as "the expectations of the international community accord in this respect with the contemporary values of the Australian people.[1462] Thus, while international human rights norms may be a "powerful influence", this influence is circumscribed by the extent to which they reflect existing Australian values and do not fracture the "skeleton of principle" upon which the common law rests. The international norms are nowhere used to direct, much less override, Australian values. A common law not in accordance with international values demands a "reconsideration": it is not made void. The decision in Milirrpum was expressly overruled by this case, but because the sovereignty of the Crown is recognised, pre-existing native title will not displace land which has since been alienated: it will only persist with respect to unalienated Crown land, the doctrines of Crown sovereignty and land tenure being part of the essential skeleton of principle of the common law.[1463] Acts of sovereignty amounting to dispossession need only be a fact, not due process.

[1460] At p.41. The quotes are from In re Southern Rhodesia [1919] AC 211 at pp.233-4.

[1461] At p.42

[1462] Ibid, emphasis added.

[1463] At pp.45ff.

The joint judgement of Deane and Gaudron JJ does not mention international law but relies on the simple fact that, as applied to Australia, terra nullius was a lie. It recommends not following the earlier decisions on terra nullius because it would be unjust to do so.[1464] Toohey J followed the approach to terra nullius in the Western Sahara Case because it is "an approach more in accord with reality"[1465] rather than because of the influence of international norms. Dawson J does not mention international law at all. The views with respect to the influence of international human rights are therefore minority views in this case. Although the terra nullius issue was decided by a 6-1 majority,[1466] that majority split 3-3 on the issue of whether compensation was payable. Interestingly, it was the three judges who did not particularly rely on international law who held that it was payable,[1467] the "internationalists" not being so influenced by human rights as to find that international norms would displace common law argument that the basis for compensation would have to be found, for example, in a breach of a fiduciary obligation. The result was that these latter three, together with the dissentient Dawson J, formed the majority on this question and no compensation was paid.

[1464] Their honours say at p.109: "The acts and events by which that dispossession in legal theory [ie, in the cases] was carried into practical effect constitute the darkest aspect of the history of this nation. The nation as a whole must remain diminished unless and until there is an acknowledgment of, and retreat from, those past injustices."

[1465] At p.181

[1466] Mason CJ, McHugh, Brennan, Deane, Gaudron and Toohey JJ, Dawson J dissenting.

[1467] Deane, Gaudron and Toohey JJ.

The influence of international human rights norms in the Mabo case has therefore had the stunning effect of helping to wipe away a perniciously racist legal fiction. That influence is, however, qualified because of the constraints the domestic system puts upon it, and so will not necessarily deliver to the dispossessed people either compensation or the return of lands which have been alienated in the meantime. Its principles only apply in cases where there has been no exercise of sovereignty. Thus, a relitigation of the Coe case[1468] was unsuccessful for similar reasons as previously.[1469] And in Walker v The State of New South Wales[1470] an argument about the application of Aboriginal customary law was rejected by the High Court on the basis that, even if such law had survived British settlement it had since been extinguished by the passing of criminal legislation. Indeed, as Simpson ably points out, the court (or at least the adherents to the Brennan judgement in it, for whom this should have been relevant) did not follow the logical next step in international law and, after finding that Australia was not terra nullius, hold that it was a conquered country, with all the legal consequences that would then flow,[1471] the other alternatives being cession (which is clearly inapplicable) and acquisition by adverse possession (which is unlikely to apply because the historical records do show that the Aborigines resisted the Europeans).

[1468] (1979) 53 ALJR 408, discussed ante.

[1469] Coe v Commonwealth (No. 2) (1993) 118 ALR 193

[1470] (1994) 182 CLR 45

[1471] Gerry Simpson, "Mabo, International Law, Terra Nullius and the Stories of Settlement: An Unresolved Jurisprudence" (1993) 19 Melbourne U.L.R. 195 at 197.

International law was thus used selectively, being relegated to one aspect of the case and was not allowed to permeate the whole decision. Native title in Australia pertains to unalienated Crown land. This outcome could have been different had Australia been held to be "conquered". The decision therefore represents a (probably sensible) political compromise in a legal system which lacks the equivalent of a section 1 of the Canadian Charter. But whereas Canadian courts, despite the problems with section 1 mentioned above, can be "up front" about this issue, in Australia the system encourages jurisprudential prevarication.

The case has been described by one authority as amounting to a "cautious correction" rather than a judicial revolution.[1472] Nevertheless, the decision in Mabo was greeted with acrimony by members of the mining and farming lobbies, journalists, politicians and retired judges.[1473] The Native Title Act 1993 (Cth) was passed to legislate into effect a mechanism for making claims to native title consistent with the High Court's judgement, but only after the longest debate in the history of the Australian Senate. It has been held by the High Court to be valid and to override inconsistent state legislation.[1474] But the newly-elected (Liberal) federal government is in the process of amending the Act.

[1472] Garth Nettheim, "Judicial Revolution or Cautious Correction? Mabo v Queensland" (1993) 16 UNSWLR 1.

[1473] See Loretta VanderLans, "The Myths of Mabo" (1992) 2 Aboriginal Law Bulletin 3.

[1474] Western Australia v Commonwealth (1995) 128 ALR 1

International human rights norms have lately become more significant domestically, but only to the extent that they are considered to reflect existing Australian legal values.

In Dietrich v The Queen[1475] a majority of the High Court found that a right to legal representation existed in the common law, and (apparently) based its findings, at least in part, on Australia's international human rights obligations in this respect.

The case involved a man convicted of importing a trafficable quantity of heroin into Australia. He had applied unsuccessfully for legal aid representation. The Legal Aid Commission of Victoria would only fund him for a plea of guilty. He pleaded not guilty to all charges. After a 40-day trial at which he was unrepresented by legal counsel, he was convicted.

In a joint judgement, Mason CJ and McHugh J held that the common law in Australia did not recognise a right for an accused person to legal representation at public expense.[1476] There was, however, a common law right to a fair trial.[1477] What precisely this right entailed was unclear, but their Honours noted that "various international instruments and express declarations of rights in other countries have attempted to define, albeit broadly, some of the attributes of a fair

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[1475] (1992) 67 ALR 1

[1476] At p.2

[1477] At p.3

trial."[1478] They specifically referred to Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 14 of the International Covenant on Civil and Political Rights, section 11 of the Canadian Charter of Rights and Freedoms and to the "due process" clauses of the United States Constitution. While these are recognised in the judgement, they are not used in any way as laws binding on Australia. They are rather used in an interstitial manner: to flesh out the framework of the common law. Thus the judgement is really an application of the traditional approach both to the effect of international law on the common law[1479] and a reiteration of the traditional view with respect to the direct application by Australian courts of treaty obligations: "Ratification of the ICCPR as an executive act has no direct legal effect upon domestic law; the rights and obligations contained in the ICCPR are not incorporated into Australian law unless and until specific legislation is passed implementing the provisions."[1480] Thus, while this approach appears similar to the use of international law in Canadian Charter cases it is not identical to that approach. Canada has passed legislation which at least to some extent implements human rights. The approach in Dietrich with "established" Common Law is more of an

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[1478] Ibid.

[1479] It does not alter, for example, the approach in Jago v Judges of the District Court of NSW (1988) 12 NSWLR 558, per Kirby P at 569, discussed below. Note that Dawson J, dissenting, doubted that international law could be used to resolve ambiguities in the common law as opposed to statutes: at p.31.

[1480] At p.6, referring with approval to Bradley v The Commonwealth (1973) 128 CLR 557 at 582; Simsek v MacPhee (1982) 148 CLR 636 at 641-4; Kioa v West (1985) 159 CLR 550 at 570-1.

"at arms length" attitude to international law. The judgement of Toohey J agrees with this approach[1481] and appears to reject an argument made on behalf of the applicant that Australia's international human rights obligations provide a morally binding obligation on the nation and its agencies to accord to people in Australia the rights enumerated in those instruments and that the common law should be developed in a way which accords with standards openly accepted by the legislative and executive branches of government.[1482] Similarly, the judgement of Gaudron J refers to international instruments, but does not directly use or apply them.[1483]

Their Honours thought that the appeal should be allowed because of the common law right to a fair trial which would be jeopardised where an accused person, charged with a serious offence, is legally unrepresented.[1484] Thus, reliance on concepts of international human rights was not direct, and cannot really be said to have been indirect: it was used little more than as a vague tangential reference. Nevertheless, even in this manner the court was able to overturn the earlier High Court decision in McInnis v R[1485] where a rape trial proceeded without legal representation for the accused on the basis that an adjournment would cause distress to the prosecutrix and inconvenience to the witnesses and jurors. The

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[1481] At pp.37-8.

[1482] At p.37

[1483] At p.44

[1484] Mason CJ and McHugh J at p.9; Toohey J at 38; Gaudron J at 46.

[1485] (1979) 143 CLR 575

majority of the High Court in that case held that there had been no miscarriage of justice as a result of the refusal to adjourn because, even though legal representation in serious criminal charges is important, the strength of the evidence against the accused meant that legal representation would have had no effect upon his conviction.[1486] The minority (Murphy J) argued that civilised justice, let alone a fair trial, implied the right to legal counsel.[1487] Charlesworth comments upon this case that the decision was based upon expediency and propriety, rather than upon the weighing of these factors against the importance of legal representation in serious criminal charges.[1488] Even the tangential notice paid in Dietrich to international human rights seems to have introduced at least the semblance of a "weighing" process to replace of a blinkered adherence to formalism.

The judgement of Brennan J in Dietrich goes further than the other judgements by making indirect use of international human rights principles. Conceding that rights such as those under consideration are not the same as rights expressed in a Bill of Rights (because in the Australian system they are either immunities resulting from a limitation on legislative power, or are amenable to abrogation by the

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[1486] Barwick CJ at 580; Mason J at 583; Wilson J at 594.

[1487] At pp.586ff. He specifically refers to Article 14 of the ICCPR.

[1488] Hilary Charlesworth, "Individual Rights and the Australian High Court" (1986) 4 Law in Context 52, at p.65.

legislature)[1489] it is nevertheless possible in a common law system for courts to mould the common law so that it corresponds with contemporary social values.[1490] In this process, while instruments like the International Covenant on Civil and Political Rights are not part of Australian municipal law, they are "a legitimate influence on the development of the common law."[1491] His Honour says:

> Where a common law rule requires some expansion or modification in order to operate more fairly or efficiently, this Court will modify the rule provided no injustice is done thereby. And, in those exceptional cases where a rule of the common law produces a manifest injustice, this Court will change the rule so as to avoid perpetuating the injustice.[1492]

Australia's international human rights obligations can therefore be used to help determine the content of justice in Australian law. Unlike the other judgements which use international law to fill gaps in the system or to resolve ambiguities, Brennan J would use international law in a more developmental fashion. However, his Honour considers that the principal issue in this case is the existence of any specific right to legal aid (rather than the more general right to a fair trial). Cast in that narrower perspective, he considers that it is beyond the judicial function to declare the existence of a right (or, more correctly, an entitlement) when the satisfaction of it (i.e., actually paying the cost of legal representation) is obviously

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[1489] At p.13

[1490] At p.14

[1491] At p.15

[1492] At p.14, footnotes omitted.

beyond the power of a court, concluding: "... to declare such an entitlement without power to compel its satisfaction amounts to an unwarranted intrusion into legislative and executive functions."[1493] Consequently, he dismissed the appeal, even though Article 14(3)(d) of the ICCPR clearly provides for a right to paid legal assistance and a reservation by Australia to this Article was expressly withdrawn in 1984. This approach is similar to that of the Supreme Court of Canada in Schachter v Canada[1494] where it considered it inappropriate to read into legislation a right of an extra category of person (in that case, natural fathers) to a benefit under legislation, as it would be an intrusion into budgetary decisions. (Contrast the decision of Wilson J in Singh v Minister for Employment and Immigration[1495] where she held that administrative or utilitarian concerns cannot vitiate individual rights, even if this poses a problem for the government).

Somewhat between these two approaches lies the judgement of Deane J, who uses the provisions of the International Covenant on Civil and Political Rights to help determine the notion of fairness in a criminal trial[1496] and, cast in this wider mould, allows the appeal. These international provisions are not decisive, but they can be used to justify the court's appreciation of current community values. (The other dissentient, Dawson J, thought that to use these instruments in this way

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[1493] At p.16

[1494] (1992) 93 DLR (4th) 1

[1495] [1985] 1 SCR 177 at pp.218-19

[1496] At p.24

would be doing more than removing ambiguity: it would be effecting a fundamental change and was therefore unacceptable.)[1497] Dietrich is thus full of ambiguities from the point of view of the domestic effect of international norms. The narrow approach of Brennan J did not prevent him from using international norms in a more developmental fashion than did the other judges. On the other hand, the wider approach of the majority allowed a use of Article 14 of the ICCPR and the Australian common law to produce an application of the two together. This might be redolent of the effectiveness approach adopted by the European Court of Human Rights in the Golder Case mentioned above with respect to a similar provision in the European Convention dealing with the right to representation in civil matters. However, in The State of New South Wales v Canellis and Others[1498] the High Court clearly rejected the application of the Dietrich case to situations other than criminal trials for serious criminal offences. Significantly, international law was nowhere mentioned by any of the judges who sat on that case.[1499]

There is no apparent clear path to the use of international norms, let alone to synergism between them and domestic law.

Also in 1992, the High Court delivered its judgement in Chu Kheng Lim v

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[1497] At p.31

[1498] (1994) 181 CLR 309

[1499] Mason CJ and Brennan, Dawson, Toohey and McHugh JJ.

Minister for Immigration, Local Government and Ethnic Affairs.[1500] The plaintiffs in this case were Cambodian nationals who had arrived in Australia by boat and who had been detained in Australia since 1989. The case involved amendments to the Migration Act 1958[1501] which allowed certain aliens to be held in custody while applications for refugee status were being determined and prohibited courts from ordering their release. Australia is a party to the Convention Relating to the Status of Refugees and Protocol as well as to the International Covenant on Civil and Political Rights. While the operation of the former can be dependent upon a determination of refugee status, the latter is not so limited. Article 9(4) of the ICCPR provides: "Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court in order that the court may decide without delay on the unlawfulness of his detention and order his release if the detention is not lawful." Nevertheless, the court found unanimously that the detention procedures were valid and by majority that the prohibition on judicial release was invalid.

The main judgement was delivered jointly by Brennan, Deane and Dawson JJ. The principal issue was whether these amendments were incidents of an executive power given under s.51(xix) of the Constitution with respect to naturalisation and aliens, and whether they offended the separation between the executive and the

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[1500] (1992) 67 ALR 125

[1501] Sections 54K-54R

judiciary set out in Chapter III of the Constitution. With respect to the detention provisions, their Honours held that these would be valid if:

> ... the detention which they require and authorise is limited to what is reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered. On the other hand, if the detention which those sections require and authorise is not so limited, the authority which they purportedly confer upon the Executive cannot properly be seen as an incident of the executive powers to exclude, admit and deport an alien. In that event, they will be of a punitive nature and contravene Ch III's insistence that the judicial power of the Commonwealth be vested exclusively in the courts which it designates.[1502]

Their Honours considered that this was a valid incident of executive powers because there was a requirement of expedition in the proceeding and because the person detained could secure their release immediately by agreeing to leave Australia.[1503] Such a statement is totally insensitive to the reality of the situation, and the fact that such a procedure might amount to an abnegation of Australia's international responsibilities towards refugees was treated as a total irrelevance, as were any other human rights that might have been infringed (such as the right to be presumed innocent until proven guilty). Their Honours said that: "We accept the proposition that the courts should, in a case of ambiguity, favour a construction of a Commonwealth statute which accords with the obligations of Australia under an international treaty. The provisions ... are, however, quite unambiguous."[1504]

[1502] At p.140

[1503] At p.140

[1504] At p.143

With respect to the issue of the restriction on court powers, their Honours displayed a keener interest. This provision was held to be invalid because it would operate regardless of the circumstances, even if a person were unlawfully held in custody.[1505] This breached the provisions of Chapter III of the Constitution which reserves to properly-established courts the power to make judicial decisions determining the lawfulness of actions.

Coming as soon as it did after the Dietrich case, Lim indicates the attenuated impact of international human rights norms in the Australian legal system. The case is more an exercise in constitutional characterisation than rights. The hierarchical approach lifts form over substance. Despite the several cases mentioned in this Chapter where courts wax lyrical about the human rights characteristics of the common law, this case illustrates that the hierarchy of the system relegates human rights obligations to a subsidiary, and in this case ineffectual, role. When push comes to shove, human rights are not allowed to have much of either.

Summing up the situation so far, it can be said that since Street's case issues of discrimination in all areas of the law can now be considered in the light of the definitions of discrimination which exist in State and federal anti-discrimination legislation; implications drawn from the Australian constitution can, particularly

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[1505] At p.141

since the ACTV case, be drawn from the structure of that document and not only from its text; a strict formalism is giving way (slowly) to a balancing of competing interests; it is now possible to argue that in order to ascertain the content of justice in Australian law, regard should be had to Australia's international human rights obligations (following Brennan J in Dietrich).

Balanced against this are the repeated statements that treaty provisions do not form a part of Australian law which can be directly applied by a court until transformed into the Australian legal system. An error of law for the purposes of judicial review means an error as to Australian (rather than international) law. Implications drawn from the structure of the Australian constitution are necessarily limited to and by that structure: there is no "living tree" doctrine in this aspect of Australian constitutional law as there is in Canada.[1506] The use of human rights to develop the common law is done by way of interstitial patching rather than through a recognition of human rights being a part of the structure of the common law.

The cases in Australia have dealt more with the limitations to rights rather than with rights themselves. As a result, Australian courts have been generally able to avoid the difficult job of analysing the meaning of rights that may exist, expressly or by implication, in our legal system. Despite recent cases, human rights in the Australian legal system do not act as fundamental overriding principles. Unless

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[1506] Hunter v Southam [1984] 2 SCR 145 at 155

specifically designated as such by legislation or the tradition of the common law, they are consequential or residual rather than fundamental. This means that they are more like entitlements than rights, and our Constitution as it presently stands apparently cannot be used to remedy this situation. As a result, it not only remains unclear to what extent there exist implied human rights in the Australian legal system; it is still unclear precisely what those rights are.

The influence of human rights norms is, however, spreading to other areas. I now deal with three principal examples of this: Administrative Law, Family Law and the influence of human rights on some state courts. This is not being overly selective or narrow - it is illustrative of the (as yet) fairly narrow application of human rights norms in the absence of a constitutional Bill of Rights. It is an example of a development which is both important and significant but which remains less than incremental (which implies a seepage into the domestic system generally) as it is irregular and random.

5.6.3 Administrative Law

This is another area which in Canada is now strongly influenced by the Charter.[1507] The influence of international human rights norms on Australian Administrative Law had been prompted by the Preamble to the Human Rights

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[1507] See J.M. Evans, "The Principles of Fundamental Justice: The Constitution and the Common Law" (1991) 29 Osgoode Hall L. J. 51.

Commission Act 1981 which declared that it was desirable that the conduct of people administering Commonwealth laws should conform with the ICCPR and the Declarations forming the Schedules of the Act (a declaration missing from the current Human Rights and Equal Opportunity Commission Act 1986 which does not contain a Preamble). Courts began to hold that the instruments in the Act's Schedules should be taken into account, if not actually used to determine the decisions made.[1508] In 1985 the matter went to the High Court in Kioa and Others v Minister for Immigration and Ethnic Affairs[1509] but the court did not take advantage of the window of opportunity opened by the case. It involved two citizens from Tonga who had overstayed a visitors visa in Australia and the decision which had been made to deport them. While in Australia they had a daughter who, by virtue of her Australian birth, was an Australian citizen. Deporting the parents meant effectively deporting an Australian citizen (the daughter) as well. The High Court held that the Preamble did not have the effect of importing the terms of the international instruments into Australian law[1510] and that in any event it entitled, rather than required, the decision maker to take them into account.[1511] In addition, the court could find nothing in those terms which Australia had breached: that the family was entitled to the protection of the

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[1508] See Sezdirmezoglu v Minister for Immigration (1983) 51 ALR 577 per Smithers J.

[1509] (1985) 62 ALR 321

[1510] Per Gibbs CJ at p.336

[1511] Per Brennan J at p.381.

State and that this protection extended to children was not affected by the deportation.[1512]

This approach altered significantly, but not radically, in 1995 in Minister for Immigration and Ethnic Affairs v Ah Hin Teoh.[1513] The facts of this case were that the Malaysian respondent, Mr Teoh, came to Australia in 1988 on a temporary entry permit. Within a few months he married Jean Lim, an Australian citizen. She already had four children at the time of this marriage. She had three more with Mr Teoh. At the time relevant to these proceedings, she had six children, all under ten years of age, living with her. She was also addicted to heroin. Mr Teoh applied for residential status in Australia. In 1990, while this application was pending, he was convicted of nine counts of importation and possession of heroin and sentenced to six years' imprisonment. As a result, his application for residential status was refused on the basis that Immigration Department policy required that applicants be of good character. Having a criminal record affected that character, and in 1992 a deportation order was made against him.

Mr Teoh applied for judicial review of these decisions. Being unsuccessful at first instance, he appealed to the Full Court of the Federal Court and was successful, inter alia on the ground that Australia's ratification of the UN Convention on the

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[1512] Per Gibbs CJ at p.336, Wilson J at p.362, Brennan J at p.381.

[1513] (1995) 128 ALR 353

Rights of the Child had created a "legitimate expectation" that the Commonwealth's actions would be carried out in accordance with the principles of that Convention and that insufficient consideration had been given in this case to the impact of Mr Teoh's deportation on the children.[1514] Article 3(1) of the Convention (which came into force for Australia on January 16, 1991, and therefore after the Kioa decision which had to rely on the weaker provisions of the Declaration on the Rights of the child)[1515] provides: "In all actions concerning children ... the best interests of the child shall be a primary consideration." The matter was therefore remitted to the Minister for reconsideration, and the Minister appealed against this decision. The High Court, by a clear majority of 4-1, dismissed the appeal.

Unincorporated treaties traditionally gave a person no "legitimate expectation" that executive discretion would be exercised in accordance with Australia's international obligations.[1516] The High Court reiterated that the provisions of any treaty to which Australia is a party do not form part of domestic Australian law unless transformed into it by statute, fundamentally because treaty-making is an Executive

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[1514] (1994) 121 ALR 436

[1515] Principle 1 of the Declaration provides that the best interests of the child shall be paramount in the enactment of laws with respect to the protection of children.

[1516] Simsek v McPhee (1982) 56 ALJR 277: the Minister for Immigration was not bound by the Geneva Convention on Refugees when deciding whether to deport an alien claiming to be a refugee. See similarly Gunaleela v Minister for Immigration and Ethnic Affairs (1987) 15 FCR 543: the Minister may take the Convention into account but is not bound to do so. (Note that the legislation was later changed and the Minister is now directed to take it into account).

power over which the Parliament has no direct control, whereas law-making is a Parliamentary power. This case does not change that basic proposition and in fact clearly concedes the established view that legislation may expressly override the provisions of a treaty. However, the case does extend the horizons of the ambit of influence treaties may have domestically in Australian courts beyond the already recognised application of treaties to the interpretation of ambiguous legislation[1517] (ie, the interpretative presumption that Parliament does not normally intend to breach international law.) The joint judgement of Mason CJ and Deane J states that "there are strong reasons for rejecting a narrow conception of ambiguity. If the language of the legislation is susceptible of a construction which is consistent with the terms of the international instrument ... then that construction should prevail."[1518] This view takes the use of treaties in the interpretation of statutes one step beyond where it was. While there must still be an ambiguity in the statute, courts are now required to favour the construction which conforms to Australia's treaty obligations, rather than, as formerly, merely being entitled to do so. This will certainly apply where the relevant legislation is enacted after, or in contemplation of, the treaty[1519] because of the presumption that Parliament does not intend to violate international law. However, in this case the treaty was ratified after the legislation was enacted, but before the decision under that legislation was

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[1517] D & R Henderson (Mfg) Pty Ltd v Collector of Customs (NSW) (1974) 48 ALJR 132; Yager v The Queen (1977) 139 CLR 28.

[1518] At p.362 (emphasis added)

[1519] Ibid.

made, so it could be taken into account. However, there are limitations. The treaty's provisions are used as an aid to the interpretation of legislation; they are not as such imported into Australian law. Neither the Preamble of, the Schedules to, nor declarations made under s.47 of, the Human Rights and Equal Opportunity Commission Act could achieve transformation. The instruments are therefore not a direct source of individual rights or of corresponding obligations. What they do is guide the source of those rights to conform to international standards which Australia has recognised. But just how these international standards are to be interpreted is not indicated in Teoh. In international law, treaties are interpreted in accordance with the Vienna Convention on the Law of Treaties 1969 and the court had already indicated in earlier cases such as the Dams case that it would follow this Convention. But it is nowhere mentioned in this decision, even though three of the terms in Article 3 ("actions concerning children", "best interests of the child" and "a primary consideration") were crucial to the outcome of this case. In addition, Mason CJ and Deane J emphasised that "due circumspection" and "a cautious approach"[1520] should be adopted lest a court trespass upon Parliamentary law-making powers.

Moreover, there was no ambiguity in the Migration Act as such. Teoh revolved around the application of the principles of natural justice to the decisions made under that Act and so the statement with respect to the effect of international law

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[1520] At pp.362-3

on legislation generally must be regarded as obiter. However, from this obiter Mason CJ and Deane J held that "the foregoing discussion of the status of the Convention in Australian law reveals no intrinsic reason for excluding its provisions from consideration by the decision-maker."[1521] Significantly, the joint judgement stated that "ratification by Australia of an international convention is not to be dismissed as a merely platitudinous or ineffectual act", but rather that it indicates that the government and its agencies "will act in accordance with the Convention."[1522] Thus, in terms of the principles of natural justice, a "legitimate expectation" (significantly distinguished by their honours from a rule or principle of law)[1523] was raised that a decision-maker would act in conformity with such international obligations. To this extent it did not matter that the treaty had not been formally transformed into Australian law nor that it post-dated the legislation (the decision-maker was an agent of the government which entered into the obligation). In this context this means that, since the deportation order against Mr Teoh would be an action concerning his children, the decision-maker should treat the children's best interests as a primary consideration. It was in this regard that the case goes a step beyond Kioa.

However, because a legitimate expectation is not a rule of law, it cannot require the decision-maker to act in a particular way. The Full Court of the Federal Court

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[1521] At p.363

[1522] At p.365

[1523] Ibid.

had suggested that inquiries with respect to the children's best interests should have been undertaken by the decision-maker. The majority of the High Court held instead that notice of the decision should have been given so that an adequate opportunity to present a case against it, in the light of the best interests of the children, could have been argued. The matter thus interpreted is one limited to procedural fairness rather than of substantive domestic rights emerging from treaty obligations. It was because this process had not been followed, and that the criminal conviction appeared to have been the primary consideration taken, that the appeal was dismissed.

What the High Court has done, against the sole dissent of McHugh J (who held that unincorporated treaty obligations cannot give rise to domestic implications without legislative intervention),[1524] is clearly to reject the view that treaties create rights only the international level and as a result cannot give rise to legitimate domestic expectations without direct legislative intervention. Indeed, the presumption is created that, within the limitations expressed above, the provisions of treaties should be taken into account even if they have not been incorporated into domestic Australian law. This will be so regardless of when the relevant legislation was enacted, whether before or after the entry into force for Australia of the treaty. Thus changed values and policies can impact on "old" legislation. Gaudron J thought that the Convention nevertheless reflected values underpinning a

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[1524] At p.384

common law right to citizenship and would give rise to a legitimate expectation in this way (provided that it did reflect the local values).[1525]

This case helps to focus the role of the courts in reviewing the exercise of a discretion along human rights lines. However, there remain other limitations to this qualified expansion of the effect of international human rights obligations in Australian law. The extent to which this expanded approach can apply remains unclear when the respondent is not a Commonwealth agency. And in practical terms, what may now happen to Mr Teoh and the children as a result of this decision? The only clear outcome is that the Department has to take into primary consideration the effect on the children Mr Teoh's deportation may have. But the Department is not directed to take any particular action. After such consideration it may still be decided that the children's best interests can be accommodated without Mr Teoh's presence in Australia.

The Teoh case has created procedural principles, not rights. The extent to which this case allows international human rights norms to inject substance into Australian law rather than merely affect procedures under it, is constricted.[1526] Moreover the symbiosis between the international norms and domestic laws allows a domestic decision-maker the first option of deciding threshold questions. Thus, in

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[1525] At pp.375-6

[1526] See also Reference re Canada Assistance Plan (B.C.) [1991] 2 SCR 525 at 557-8; (1991) 83 DLR (4th) 297 at 319.

Irving v Minister for Immigration Local Government and Ethnic Affairs[1527] a decision to refuse a visitors visa to a person who wanted to promote two of his books which argued that the Holocaust in wartime Germany was a hoax was upheld. While French J in the Federal Court referred to the freedoms of speech and opinion in the ICCPR, he noted[1528] that these are subject to the limitations of public order[1529] and the prohibition on national religious or racial hatred.[1530] It was apparently not argued before his honour that Australia in fact made a reservation to the latter. The decision on these threshold issues was initially the Minister's and the court saw no reason to overturn it.

Moreover, the Commonwealth government has proceeded to eliminate even the modest advance in Teoh. In a joint press release on May 10, 1995, the Minister for Foreign Affairs and the Attorney-General made much of the fact that the Teoh decision made it clear that any legitimate expectation arising from a treaty can be displaced by statutory or executive indications to the contrary and continued:

> We now make such a clear and express statement. We state, on behalf of the Government, that entering into an international treaty is not reason for raising any expectation that government decision-makers will act in accordance with the treaty if the relevant provisions of that treaty have not been enacted into domestic Australian law. It is not legitimate, for the purpose of applying Australian law, to expect that the provisions of a treaty not incorporated by legislation should be applied by decision-makers. Any

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[1527] (1993) 115 ALR 125

[1528] At p.140

[1529] Article 19(3)

[1530] Article 20(2)

> expectation that may arise does not provide a ground for review of a decision. This is both for existing treaties and for future treaties that Australia may join. ... The making of such a treaty obligation effectively part of Australian law is something for the legislature, and not something which should be achievable by executive action alone.[1531]

A Bill is currently before Parliament to implement these sentiments by legislation.[1532] This position, which seeks to re-dichotomise domestic Australian law and international law in the face of an emerging reverse trend still leaves several questions unanswered. It applies to administrative decisions and their review. It does not, however, touch upon other matters which may come before a court.[1533] It also does not appear to affect the influence of customary international law. It continues to draw upon the increasingly artificial distinction between legislative and executive powers. Most importantly, it throws serious doubt over Australia's commitment to its human rights obligations in the treaties it has ratified. In general, it creates confusion at both the international and domestic level.

It has already been mentioned above that a similar government reaction of

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[1531] Press Release, 10 May 1995 (M44), pp.2-3.

[1532] Administrative Decisions (Effect of International Instruments) Bill 1995 (No. 15, 1995).

[1533] Thus, it has been held to be inapplicable to cases of the exercise of a duty rather than of an administrative discretion: Re Shields; Ex parte Official Receiver in Bankruptcy, decision of Beazley J in the Federal Court of Australia, December 7, 1995 (unreported). In that case a bankrupt's family lived 30km from the nearest town and his 14 year old son has a learning disability and needs constant educational help. The family's only means of transport was a station wagon of which the Receiver took possession to pay creditors. It was held that the Convention on the Rights of the Child did not apply to the exercise of the receiver's duties under the Bankruptcy Act which stipulated the dealing with divisible property.

changing legislation occurred after the decision of the Human Rights and Equal Opportunity commission in X v Department of Defence[1534] where it was held that discharging an HIV+ soldier was contrary to the Disability Discrimination Act. On the other hand, after the Mabo decision the Native Title Act was introduced (although this is now the subject of reconsideration by a new federal government), and after the Toonen decision by the Human Rights Committee the Privacy (Sexual Conduct) Act was introduced. There is no consistent line. The reaction is dependent upon political will more than on an adherence to human rights. The confusion remains and is exacerbated.

5.6.4 Family Law

The Family Court of Australia has had in the past a pathetic track record when it comes to human rights, although this has been more by omission than intention. For example, In the marriage of C and D[1535] involved the validity of a marriage of a man who had been born a true hermaphrodite but who had undergone surgery to remove an ovary and breasts. Relying, probably incorrectly,[1536] on cases dealing with the marriage of people who had undergone sex-change surgery[1537] (rather than realignment surgery) the court found that the marriage was void on the

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[1534] (1995) EOC 92-715

[1535] (1979) FLC 90-636

[1536] Rebecca J. Bailey, (1979) 53 Australian Law Journal 660

[1537] Corbett v Corbett [1971] P. 83

basis that it was not a union between a man and a woman. The problem, however, was that the sex-change cases implied that the union was one between two men. The respondent in this case was legally held to be neither male nor female. The result is that in Australia he can never legally marry anyone at all, a situation which is in breach of the intention of UDHR Article 16 and ICCPR Article 23, neither of which were argued in this case.

However, the Family Court of Australia has also now turned its attention in recent years to human rights considerations. The first case to do this in a significant way was In Re Jane.[1538] This case involved "Jane", who was seventeen years of age but who had a mental age of two. Her parents wanted to have her sterilised because medical evidence indicated that once she started to menstruate she would not be able to cope with menstruation, pregnancy or childbirth. The Human Rights and Equal Opportunity Commission, as intervener, argued that the application of s.60D[1539] of the Family Law Act, which required the court to treat the welfare of the child as the paramount consideration, involved a consideration of Article 7 of the ICCPR (dealing with inhuman and degrading treatment and medical experimentation), the declaration on the Rights of the Child (dealing with the right of the child to develop and to special treatment if required), the Declaration on the Rights of Mentally Retarded Persons (dealing with the right to legal protection and

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[1538] (1989) FLC 92-007

[1539] Now s.64(1)(a). amendment Act No.37 of 1991, s.20.

to training and guidance to enable the maximum possible development of the person) and the Declaration on the Rights of Disabled Persons (dealing with matters similar to the former declaration but also adding protection from discriminatory treatment). The Convention on the Rights of the Child had not been concluded in 1988. Nicholson CJ, sitting alone, held that the decision on sterilisation was one for the court rather than the parents to make. This was done as a matter of the court's jurisdiction rather than on the basis of the child's rights. With respect to the sterilisation itself, he allowed it to be performed.

The Commission had argued that while the Schedules to the Human Rights and Equal Opportunity Commission Act do not incorporate the international instruments into Australian law, they can be used as evidence of customary international law which can be applied by an Australian court. Nicholson CJ rejected this assertion, appearing to be uneasy with such general principles but relying on the Common Law which in this area exhibits equal generality: there is a common law right to bodily inviolability unless the interference is therapeutic.[1540] He held that since the federal government had the obvious opportunity to transform the instruments cited by the Commission into Australian law through the Act, but had not done so, it could not be argued that those instruments could be relied upon as a basis for Australian law other than in cases of ambiguity and as a guide when exercising

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[1540] At p.77,248

judicial discretion.[1541] It was only to this extent that they might be used when interpreting the application of s.60D of the Family Law Act. This approach produces a neutralising effect on the application of human rights to this issue, as exemplified by the fact that when using the instruments to test his exercise of discretion, Nicholson CJ found no bar to Jane's sterilisation. The problem with this approach is that it allows the notion of a therapeutic sterilisation to be focused away from the child and to be effectively based on the convenience of the adults responsible for her care. Both Jane and the law were sterilised.

However, by 1990 Nicholson CJ appeared to change his mind. In Re Marion[1542] was a case also involving the proposed hysterectomy of a thirteen year old girl with physical and intellectual disabilities worse than were Jane's. The issue whether the court's consent to the sterilisation was necessary was re-litigated in this Full Court decision as the earlier cases were all of single judges and there was no clear precedent.[1543] After a comprehensive analysis of Australian and overseas case law, and expressly by way of obiter dictum only,[1544] his honour held that the instruments in the Schedules to the Human Rights and Equal Opportunity Commission Act lent support to his conclusion that the court's consent

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[1541] At p.77,249

[1542] (1991) FLC 92-193

[1543] Court's consent held to be necessary in In Re Jane, ante and In Re Elizabeth (1989) FLC 92-023; court's consent held not to be necessary in In Re a Teenager (1989) FLC 92-006 and In Re S (1990) FLC 92-124.

[1544] At p.78,301

was necessary. This was so because they had been made a part of an Act; the situation might be different had a treaty been ratified but not introduced in any way into Australian law.[1545] While conceding the classic view of the necessity for transformation, his honour stated:

> Contrary to what I said in In re Jane, however, I now think it strongly arguable that the existence of the human rights set out in the relevant instrument, [ie, the Human Rights and Equal Opportunity Commission Act] defined as they are by reference to them (ie because s.3 defines "human rights" in the Act as meaning the rights set out in the ICCPR and the Declarations], have been recognised by the Parliament as a source of Australian domestic law by reason of this legislation.[1546]

This change of heart he attributes to the greater advocacy on the point in this case.[1547] This is still a strongly transformationist view, his honour stating: "It seems to me that the Act and its Schedules constitute a specific recognition by the Parliament of the existence of the human rights conferred by the various instruments within Australia"[1548] and that the principles in the instruments are "readily consistent with the English and Australian common law."[1549] It therefore does not represent a radical opening up of family Law and children's rights to international human rights norms. Indeed, by the time this case was decided the Convention on the Rights of the Child had been signed but not ratified by Australia. Nicholson CJ mentions it nowhere in his judgement, although Strauss

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[1545] Ibid.

[1546] At p.78,303

[1547] At p.78,301

[1548] At p.78,301, emphasis added.

[1549] At p.78,304

J does, in order to state that it is unnecessary to apply it.[1550] Strauss and McCall JJ, who formed the majority in this case, held that the court's consent to the sterilisation was not required.[1551]

On appeal to the High Court[1552] this aspect of the decision was overturned, the court holding that judicial consent was required for a sterilisation. Incredibly, and despite the fact that the Human Rights Commission was again permitted to intervene in the proceedings, none of the judges mentions human rights issues in any of their judgements, with the sole exception of Brennan J when considering the right to integrity of the person, and then merely to note that Australian law already satisfies the international standard.[1553] He does not mention human rights at all when hypothesising (and rejecting) a power for non-therapeutic sterilisations.[1554] This is an arid approach to children's rights, and contrasts with Canadian cases like Re Eve[1555] where, on the basis of sections 7 and 15 of the Charter (although no express reference to international human rights was made) it was not only held that the court's consent had to be obtained for a sterilisation but it was emphasised that

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[1550] At p.78,312

[1551] At p.78,312 and pp.78,322-3 respectively.

[1552] Secretary, Department of Health and Community Services v JWB and SMB (1992) FLC 92-293

[1553] At p.79,189 he says: "... municipal law satisfies the requirement of the first paragraph of the 1971 United Nations Declaration on the Rights of Mentally Retarded Persons...".

[1554] at p.79,194

[1555] (1986) 31 DLR (4th) 1

it was for the interests of the person with the disability, rather than the benefit or convenience of those who cared for them, that the consent would be granted or withheld. Although La Forest J regarded this as a case of non-therapeutic sterilisation[1556] (and so it might be distinguished from the Australian cases) his honour made it clear, as the Australian cases do not, that a careful distinction between therapeutic and non-therapeutic sterilisations be made which will "not allow for subterfuge."[1557] The Charter-rights focus mandates a careful factual examination because the presumption is that a person should generally not be sterilised. The lack of such a focus in Australia means that there is no such presumptive hurdle to aid the person with the disability.

The Family Court does from time to time take non-incorporated international norms into account.[1558] Sometimes, international human rights norms are not referred to at all, even in cases where they could be.[1559] When taken into account, the approach to human rights is cautious to the point of being

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[1556] At p.9

[1557] At p.34

[1558] For example, in Van Rensburg and Paquay (1993) FLC 92-391 it had regard to the policy of the Hague Convention on the Abduction of Children to inform Australian law, even though the Convention was not strictly relevant to the case as one of the countries concerned, South Africa, is not a party to it. See similarly Barrios and Sanchez (1989) FLC 92-054.

[1559] See, for example, Sajdak and Sajdak (1993) FLC 92-348 where it was held that a woman who could not speak English and was unrepresented had been denied a fair trial, but human rights were nowhere referred to.

conservative.[1560] In re Marion illustrates the merely tenuous toehold human rights norms are allowed in this area of Australian law. As Otlowski and Tsamenyi point out, while Australian Family Law does generally conform to the principles of the Convention on the Rights of the Child, re-alignment of parts not in conformity will have to be achieved through legislation.[1561] There is thus still a distinct disjunction between Australian domestic law and its international human rights obligations, despite the obvious consistencies between the two. The latest cases have not altered this approach[1562] and resort to international law is still irregular[1563] with little of the developmental approach seen in Canada because of the Charter.[1564] The use of human rights for value guidance is rare.

[1560] For example, in Murray v Director, Family Services, ACT (1993) FLC 92-416 one of the issues was the failure of the trial judge to take into account the (unincorporated) Convention on the Rights of the Child in a case involving the Hague Convention on the Civil Aspects of International Child Abduction, which is incorporated through s.111B of the Family Law Act together with the Child Abduction Regulations to which it is a Schedule. Relying with approval on the decision of Gummow J in Magno, ante, that a ratified but unincorporated Convention can be relied upon to resolve ambiguities in legislation or to help in the exercise of a discretion, the court held that the Hague Convention had a higher status in Australian law than the Convention on the Rights of the Child, even perhaps those parts of it which might not be expressly incorporated (at pp.80,257-8).

[1561] Margaret Otlowski & B. Martin Tsamenyi: An Australian Family Law Perspective on the Convention on the Rights of the Child (1992, Unitas Law Press, Hobart), Conclusion at p.101.

[1562] McCall (1995) FLC 92-551

[1563] The Queen v L (1992) 174 CLR 379: the High Court held that rape in marriage laws were valid, inter alia, because if the common law had ever said that by marriage a wife gave irrevocable consent to intercourse with her husband, that is not the case now. No instances of human rights were referred to in the case.

[1564] For example, in R v Salituro [1991] 3 SCR 654 the issue of compellability of spouses to be witnesses in criminal cases was examined in the light of the values the Charter provided for the development of the common law.

5.6.5 State Courts

The Supreme Court of New South Wales has referred to human rights norms in a number of cases, but its use of them is also equivocal. In Jago v District Court of New South Wales[1565] a company director was charged with fraudulently converting the company's cheques. The alleged offences happened between 1976 and 1979. He was charged in 1981, committed for trial in 1982, a bill of indictment found in 1986 and the case listed for trial in 1987. He sought a permanent stay of proceedings on the basis of delay. This was refused by majority in the New South Wales Court of Appeal, a decision which was affirmed by the High Court[1566] which held that there was no right to the speedy trial of a criminal charge unless this meant that the trial was no longer fair. Kirby P in the Court of Appeal specifically referred to Article 14(3)(d) of the ICCPR (the right to be tried without undue delay), preferring, in cases where the common law is uncertain, to rely on "modern statements of human rights" rather than "ancient" authorities such as Magna Carta and the Habeas Corpus Act.[1567] The use is therefore subsidiary only. In addition, his honour did not adopt an "effectiveness" approach to the international norm, pointing out that "there is nothing in the Covenant, unless it be by inference, to provide a "right" to be discharged upon

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[1565] (1988) 12 NSWLR 558

[1566] (1989) 168 CLR 23

[1567] At p.569

denial of a speedy trial."[1568] He considered that the crux of this part of the case was whether the delay had been "undue", concluding that it was not, as no witnesses had died, the preponderance of the evidence would be documentary, and the matter was a serious one. In any event, he thought that the remedy for undue delay already existed in New South Wales law: the right to apply for a permanent stay.[1569] This circular argument merely pays lip service to international norms and looks to form rather than substance. Kirby P has later become regarded as somewhat a judicial champion of the use of human rights by Australian courts. This was a shaky start to that reputation. In the same case Samuels JA also mentions the ICCPR and concedes that unincorporated treaties may be "of assistance" in cases of ambiguity, but states that "in most cases I would regard the normative traditions of the common law as a surer foundation for development."[1570] The dissentient, McHugh JA, did not refer to international norms at all, yet found on the basis of common law that the stay ought to be granted. There is thus no prima facie right to a speedy trial in Australia, despite the references to international law in this regard. This contrasts with the right to be tried "within a reasonable time" which exists in s.11(b) of the Canadian Charter. Although the approach there depends on the balancing of factors such as length of and reasons for the delay, together with any prejudice to the accused,[1571] so that

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[1568] At p.570

[1569] Ibid

[1570] At p.582

[1571] See Hogg, ante, Chapter 49.

delay alone, even if lengthy, is itself not necessarily grounds for a stay,[1572] there is an express prima facie right. In Australia, a blinkered approach to international norms has deprived Australians of the substance rather than the mere form of a fundamental right. Considering the symbiotic relationship between the international and domestic norms, such a narrow approach is inappropriate, but attributable to the asymmetrical nature of the two systems.

Kirby P and Samuels JA also referred to the ICCPR in Gradidge v Grace Bros Pty Ltd,[1573] a case involving the direction of a trial judge to the sign interpreter for the deaf appellant to stop translating legal argument between counsel. They held that this direction was an error of law. Article 14 of the ICCPR, which Kirby P without explanation declared to be customary international law,[1574] was referred to in order to support, but not determine, the common law conclusion arrived at, Kirby P stating that "it is desirable that the common law should, so far as possible, be in harmony with such provisions.[1575] This is hardly robust support for the application of international norms.

[1572] Compare R v Conway [1989] 1 SCR 1659 (a 5-year delay held to be reasonable) and R v Rahey [1987] 1 SCR 588 (an 11-month delay held to be unreasonable).

[1573] (1988) 93 FLR 414

[1574] At p.422

[1575] Ibid, emphases added. The statement by Samuels JA is at p.426.

In 1991, Kirby J said in Adamopoulos v Olympic Airways S.A.:[1576] "Judges, declaring the common law, would be entitled to take into account the virtually universal acceptance in international statements of human rights of a right to have access to an interpreter in court proceedings where the applicant's felt need for assistance justified it." But this does not go so far as to create a right to an interpreter as a supreme principle of court procedure, as does section 14 of the Canadian Charter, on the basis of which decisions can be overturned.[1577]

In Daemar v Industrial Commission of New South Wales[1578] the issue was whether s.60(2) of the Bankruptcy Act 1966 (Cth) applied to prevent an action by an undischarged bankrupt against the justices of the Industrial Commission whom he claimed had sullied his reputation in the business community through critical comments of him in another matter heard by them. After referring to the "important civil right of access to the courts" and Articles 14 and 17 of the ICCPR,[1579] Kirby P held that the Act prevailed. In S & M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd[1580] an issue was whether a judge who had appeared many times as counsel for the oil company should disqualify himself as a judge. After referring to Article 14(1) of the ICCPR (everyone has the right to a

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[1576] (1991) 25 NSWLR 75 at p.78

[1577] See, for example, Tran v The Queen (1994) 117 DLR (4th) 7

[1578] (1988) 79 ALR591

[1579] At p.599

[1580] (1988) 12 NSWLR 358

hearing by an independent and impartial tribunal) Kirby P held that the trial judge had correctly refused to disqualify himself. (The other two judges held the same, but did not refer to human rights). In Eastgate v Rozzoli[1581] the issue was whether the claimant (a former psychiatric patient) could restrain the presentation to the Governor for assent the Mental Health Bill 1990, on the basis of its constitutional invalidity (under New South Wales law) because it would deprive her of protection from arbitrary arrest and detention contrary to Articles 6-9 of the UDHR. Holding that recourse to international norms "only arises if a lacuna exists in the common law or an ambiguity in statute law"[1582] Kirby P then proceeded to follow the approach in the BLF Case that the words "peace, order and good government" in the New South Wales Constitution are words conferring plenary legislative power and not words of limitation. The relief sought was refused. These decisions do not apply international human rights norms in any significant way, even in the case where there are ambiguities. It is merely paying lipservice to the notion of human rights.

Other cases have upheld "fundamental" rights, in the designation of which human rights norms can play a part. In Yuill v Corporate Affairs Commission of New South Wales[1583] it was held that a requirement to produce company documents under s.295 of the Companies (New South Wales) Code did not abolish the right of

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[1581] (1990) 20 NSWLR 188

[1582] At p.203

[1583] (1990) 20 NSWLR 386

privilege with respect to documents between a company director and his personal solicitor. Kirby P makes it clear that Parliament could have done this as it "has the last say"[1584] but should not be taken to do so in matters which the court considers are of fundamental importance and where the statute can be so interpreted. This is in fact a "technique of statutory construction"[1585] not an application of human rights. A similar decision was reached in Director of Public Prosecutions for the Commonwealth v Saxon[1586] where it was said that: "Our law can override such fundamental principles. But it must do so clearly. Where it does not, our courts will continue to impute to Parliament an intention to respect such fundamental rights because they are enshrined in our common law for centuries."[1587] But those fundamental rights are those "which are guaranteed by the common law, including as that law is illuminated by international principles of human rights."[1588] Thus, international human rights norms might form the basis for a change in direction of the common law principles and their application. This can also be so for criminal matters,[1589] but here the ultimate control is at the

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[1584] At p.403

[1585] Ibid.

[1586] (1990) 20 NSWLR 263: s.43(3) of the Proceeds of Crime Act 1987 (Cth) allowing exceptions to restraining orders on property suspected of being the proceeds of a crime should be construed in the light of the fundamental right of a defendant to use property for a legal defence.

[1587] At p.274, emphasis added.

[1588] Ibid.

[1589] R v Astill (1992) 63 Aust. Crim. R. 148: Article 14 of the ICCPR and Article 6 of the European Convention used with respect to the admission or exclusion of evidence; Smith v The Queen (1991) 25 NSWLR 1: $60,000 fine for contempt against a prisoner earning $12 per

reasonable discretion of the judge.[1590]

In Young v Registrar, Court of Appeal [No. 3][1591] the issue was the jailing for contempt of a father in proceedings with respect to custody of a child. There was no question that the applicant had committed a contempt of the Supreme Court, but the problem was that he was committed by the Full Court of that court and therefore had no avenue of appeal other than to the High Court of Australia. After a ten minute hearing, leave to so appeal was refused by the High Court. It was argued that this was contrary to ICCPR Article 14(5) ("Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.") The Registrar's counter argument was that the applicant had not been convicted of a "crime" but for a civil contempt and that in any event a review had occurred at the (10-minute) leave application before the High Court. Kirby P reiterated that the Convention is not part of the law of

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week held by Kirby P in minority to be excessive as against the spirit of Art. 7 of the ICCPR, as well as s.12 of the Canadian Charter, several other national and international instruments, and the English Bill of Rights 1689. (The majority held that as it was arrived at by application of a statutory formula, and the prisoner had committed contempt of court it was lawful and not excessive); Ganin v NSW Crime Commission (1993) 32 NSWLR 423: Art.14(3)(g) of the ICCPR used to discuss the proper scope of the privilege against self-incrimination.

[1590] R. v Greer (1992) 62 Aust. Crim. R. 442: The right in Art.14 of the ICCPR to be allowed adequate time and facilities to prepare a defence does not allow the accused to determine when he or she is ready to face trial - that decision is for the judge; R v Sandford (1994) 33 NSWLR 172: the right to legal assistance of one's own choosing in ICCPR Art.14(3)(d) does not entitle an accused to obtain an adjournment of a trial simply because the preferred counsel is unavailable.

[1591] (1993) 32 NSWLR 262

Australia and cannot override clear principles of the common law or unambiguous statutory provisions.[1592] However, it can be used as a guide in other cases. This was such a case. Indeed, the President seemed to imply that most cases coming before a court would be so.[1593] He then rejected the Registrar's arguments,[1594] adopting an effectiveness approach to Article 14 and finding that it applied to more than "criminal" proceedings narrowly construed and that the leave application before the High Court did not amount to a review. This approach is in fact in line with a General Comment on Article 14 by the Human Rights Committee made four years before Young's case, but not mentioned in it.[1595] This illustrates the possibility that, while reference is made to human rights norms, the research into them by judges and their associates is still not sufficiently human rights oriented. The result in this case was that Young was remitted to the Court of Appeal for re-sentencing in a manner which would allow a proper appeal. Young's petitions for a release and discharge of the sentence were dismissed because the provisions of the New South Wales Supreme Court Act 1970 and of the Commonwealth Judiciary Act 1903 prevailed over any international law to the contrary.[1596]

[1592] At p.276

[1593] Ibid.

[1594] Referring to Koowarta, ante, and the findings of the Human Rights Committee: pp.276-80.

[1595] General Comment 13 (21), UN Doc. CCPR/C/21/Rev. 1 (1989), p.12, paragraphs 2, 17.

[1596] At p.280

In Ballina Shire Council v Ringland[1597] the issue was whether the Council could sue for defamation or injurious falsehood with respect to a press release issued by the respondent (the president of the "Clean Seas Coalition") dealing with sewage outfall in the shire. All three judges (not just Kirby P) referred to international human rights. For Gleeson CJ Article 19 of the ICCPR (the right to hold opinions and freedom of expression) was considered, but the decision of the House of Lords in Derbyshire County Council v Times Newspapers[1598] was followed (holding that a local authority cannot sue for defamation, on the basis of the common law being consistent with the European Convention on Human rights in this regard). Also on a common law basis, Gleeson CJ held that the Council could, on the other hand, sue for an injurious falsehood. Mahoney JA (dissenting) referred to the UDHR, the ICCPR and also the ICESCR.[1599] However, he considered that New South Wales law was quite clear on the matter and held that the Council could sue for defamation and that any change to this on free speech principles would amount to a policy change which a court alone could not make.[1600] He also held that the Council could sue for injurious falsehood. Kirby P also referred to the ICCPR, the UDHR and the European Convention and, like Mahoney JA, noted that in international law the right of free speech is not absolute.[1601] However, holding

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[1597] (1994) 33 NSWLR 680

[1598] [1993] AC 534

[1599] At p.720. The latter reference is presumably a mistake and his honour meant Art. 19 of the ICCPR.

[1600] At p.732

[1601] At pp.698-9

that "it is permissible for us to clarify the common law ... by reference to these instruments"[1602] he found nothing in them that allows an organ of government to protect its reputation while "there is no ambiguity or uncertainty whatever about Mr Ringland's right of free expression."[1603] Unlike Gleeson CJ, he found that an action for injurious falsehood was similarly unavailable to the council. References to human rights do not ensure consistency.

A similar argument that human rights norms are unavailable to corporations has been upheld by the High Court.[1604] These diverse findings indicate that Mr Ringland's right was as much dependent on the Council's perceived inability to sue as on human rights norms. The decision is an amalgam, but not a synergy, of international and domestic law. However, resort to international human rights is (slowly) increasing and (slowly) improving. The latest case on freedom of speech balanced against the right to privacy is John Fairfax Publications Pty Ltd v Doe.[1605] This case involved the publication by a newspaper of the transcripts of intercepted telephone conversations indicating criminal activity by the respondent which had been lawfully obtained by the Australian Federal Police. To publish them was contrary to the Telecommunications (Interception) Act 1979. The

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[1602] At p.709

[1603] At p.710

[1604] Environment Protection Authority v Caltex Refining Co Pty Ltd (1993) 178 CLR 477: a company has no protection under the freedom against self-incrimination.

[1605] (1995) 130 ALR 488

respondent obtained an injunction against the appellant to prevent further publication. The appellant claimed the right to freedom of speech. The court held that the Act was a valid exercise of Commonwealth power under s.51(v) of the Constitution (powers with respect to telephonic services). In this regard, the case is another exercise in characterisation. However, Gleeson CJ and Kirby P held that the prohibition on publication related to confidentiality and privacy. The matter was not a political one (which would attract the dicta in the ACTV Case) and, as the ICCPR provides for the right to privacy in Article 17, that ought to prevail.[1606] Their honours specifically refused to embark on an exercise of balancing the policy considerations in the case - in the absence of a provision like section 1 of the Canadian Charter they are not obliged to. Nevertheless, this case illustrates some incremental creep of international human rights norms into the Australian legal system, as does the trend now in Australia, although this is by no means analogous to a lemming rush[1607] and the approach is frequently reminiscent of pre-Charter Canadian cases which get it "right" almost by accident[1608] or simply ignore human rights.[1609]

[1606] Per Kirby P at p.503.

[1607] For example, in A.L.R.M. v State of South Australia & Anor (1995) EOC 92-759 the Supreme Court of South Australia rejected a challenge by a group of Aborigines to the holding of a Royal Commission based on the alleged intrusion into secret "women's business" that would occur, (and inter alia infringing freedom of religion), as the inquiry would not impair any rights held by the complainants. The notion of a general freedom of religion was ignored in favour of a narrow legalistic approach redolent of the cases interpreteing s.116 of the Australian Constitution discussed above. International human rights are mentioned nowhere in the judgements.

[1608] For example, Roncarelli v Duplessis [1959] SCR 121

[1609] Attorney-General of Quebec v Dupond [1978] 2 SCR 770

Unincorporated treaties can thus be used to interpret ambiguous legislation, to fill in gaps in legislation, to develop the common law, to aid in the exercise of judicial discretion, and to review the exercise of an executive discretion. But despite the special attention given to international human rights norms as opposed to international law generally,[1610] there remains a retention of transformationist stance by the courts[1611] and a persisting (if diminishing) reluctance to use them at all in cases when they might be used.[1612] Incorporation of a treaty into a schedule of an Act does not automatically incorporate the treaty as a whole into Australian law so that it alone can be the basis of justiciable rights,[1613] unless the legislation specifically does so. It will, however, be used to interpret the legislation in cases of ambiguity.

There has thus been some shift away from the formalistic, quasi-historical approach - which was relied upon to "prove" that the courts were applying "law"

[1610] EPA v Caltex, ante, at p.499; Mabo No.2, ante, at p.42; Young, ante, at p.276.

[1611] EPA v Caltex, ibid; Mabo No.2, ibid; Young, id at p.273; Dietrich, ante, at p.321.

[1612] For example, in Ngoc Tri Chau v Director of Public Prosecutions (Cth) (1995) 132 ALR 430, the NSW Court of Appeal (including Kirby P) unanimously upheld the validity of s.8A of the NSW Bail Act 1978 which contains a presumption against entitlement to bail for certain drug offences without referring to human rights norms at all, inter alia on the basis that any constitutional guarantee to fair process in criminal trials found in Dietrich did not impact upon custody matters (and therefore adopting a very narrow view of criminal "process") and that in any event rights can be overridden by statute.

[1613] Magno, ante, per Gummow J at 303-4; Dietrich, ante, per Mason CJ and McHugh J at 305, Toohey J at 359-60, Brennan J at 321, and Dawson J at 348.

rather than "values" - to a more rights-focused approach. In some cases this has been central, in others not. But there are multiple sources in Australia from which this is derived: express constitutional rights, implied constitutional rights, constructive constitutional rights, human-rights based legislation, and the human rights influence on the common law. Ultimately, however, human rights norms still occupy a subordinate position in Australian law. The summation by Gummow J in Magno remains apt: international obligations must be transformed into domestic law before a domestic court can enforce them; if this has not happened, an untransformed obligation which is binding on Australia internationally can be used by the courts to resolve an ambiguity (or fill a gap)[1614] in the domestic law; regard may be had to international obligations in the exercise of a discretion, but not so as to displace clear domestic law.[1615]

Clear domestic law thus overrides international human rights obligations. Although this can also occur in Canada, Canadian governments are obliged to state openly an abrogation of the Charter under section 33, and also bear the onus of proving reasonable justification in other cases under section 1. Neither pertains in Australia. Thus, in Ansett Transport Industries (Operations) Pty Ltd and Others v Australian Federation of Air Pilots[1616] Brooking J held that a trade union paying

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[1614] Per Nicholson CJ and Fogarty J in Murray v Director, Family Services, ACT (1993) FLC 92-416 at p.80,257.

[1615] Magno, ante, at pp.534-5.

[1616] [1991] 1 V.R. 37

its striking members strike pay amounted to the tort of inducing a breach of contract. Therefore, despite the real improvements in recent years, it would be an exaggeration to claim that the Australian legal system delivers Australia's international human rights obligations to the intended recipients, although this will ultimately depend upon how those obligations are interpreted.[1617]

[1617] For example, in Re Alberta Union of Provincial Employees et al and the Crown in Right of Alberta (1980) 120 DLR (3d) 590 (affirmed (1981) 130 DLR (3d) 191, it was held that international human rights law provides no right to strike for public servants.

5.7 Conclusion to this Chapter: Other Matters Impacting on Human Rights Delivery

The growing recognition of the importance and relevance of international human rights norms to domestic law is an increasing trend in the 1990's. The Vienna Declaration of the World Conference of Human Rights in 1993 illustrates this,[1618] and Australia has proposed the preparation of National Action Plans with respect to human rights.[1619] Judges in Commonwealth countries are also increasingly sensitised to this issue. At a series of colloquia for judges organised by the Commonwealth Secretariat in Bangalore, India, in 1988, Harare, Zimbabwe, in 1989, Banjul, The Gambia, in 1990, Abuja, Nigeria, in 1991, and Balliol College, Oxford, in 1992, the relationship between international law and domestic law has been examined in detail. An Australian judge who is now one of the leading proponents of the use of human rights in domestic law, the Honourable Michael Kirby CMG, President of the New South Wales Court of Appeal, (and elevated to the High Court in February, 1996) has recounted how the effect of these colloquia on him was analogous to the conversion of St Paul seeing the light

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[1618] Paragraph I.27 states: "Every State should provide an effective framework of remedies to redress human rights grievances and violations" and paragraph II.83 states: "The World Conference on Human Rights urges Governments to incorporate standards as contained in international human rights instruments in domestic legislation and to strengthen national structures, institutions and organs of society which play a role in promoting and safeguarding human rights."

[1619] It presented such a plan to the 50th session of the UN Commission on Human Rights in February, 1994 (National Action Plan, Australia (1994, AGPS, Canberra).

on the road to Damascus.[1620] Each of these meetings produced Statements, Principles or Declarations[1621] which reaffirmed the inherent nature of fundamental human rights and freedoms, that these provide important guidance for a judge particularly where domestic law is uncertain or incomplete, but emphasised that local laws, traditions, circumstances and needs must be taken fully into account. If the domestic law is clear but inconsistent with international law, the former prevails, the job of the judge here being to draw that inconsistency to the attention of the government. While this breaks down the insularity of domestic legal systems, and is thus important, it is nevertheless an hierarchical view which places domestic law in a superior position to international norms in domestic fora. These statements on human rights are essentially a statement of judicial technique rather than a legal revolution, as judges have always had at least an interstitial role in the development of the law along the lines of "rights". It has, however, enormous potential, particularly if viewed, mutatis mutandis, in a way similar to the use in international law of general principles in Article 38(1)(c) of the Statute of the International Court of Justice. It exists as a potential source, but a subsidiary one. The issue becomes what sort of "source" of domestic law it is and how the interplay between international and domestic norms, and the very placement of

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[1620] Justice Michael Kirby, "The Australian Use of International Human Rights Norms: From Bangalore to Balliol - A View from the Antipodes" (1993) 16 UNSWLJ 363 at pp.363-4.

[1621] See [1989] Australian International Law News 227ff; (1989) 63 ALJ 497ff; (1993) 67 ALJ 63ff; Commonwealth Secretariat and Interights: Developing Human Rights Jurisprudence: Conclusions of Judicial Colloquia on the Domestic Application of International Human Rights Norms 1988-91 (1991, London). Interestingly, Canada does not appear to have been represented at these meetings.

international norms in the elements of a domestic system, affect this. If the courts adopt a subsumptive approach with respect to human rights (ie, subsuming the traditional "legal" approaches and concerns into the general principle of human rights which becomes the purpose to be achieved by the process) they could actually promote rights within the domestic system. This in itself is not new: our courts adopt such an approach with respect to the notion of the welfare of the child in matters of Family Law. However, it is precisely here that both courts[1622] and governments[1623] baulk.

There are differences in the content of human rights norms in that some are well understood and relatively easy to apply in countries like Canada and Australia (eg, slavery, genocide, summary execution) and others are vaguer (eg, freedom of expression). Also, the civil and political rights "fit" more easily into Australian and Canadian legal and political systems than do the economic, social and cultural rights. This difference can be crucial not just in the incorporation of the international norm, but in the use of it (for example, if the basis for constitutional power is dependent on the meaning of the norm, as in the external affairs power in Australia and the categories in sections 91 and 92 of the Canadian Constitution).

[1622] See, for example, the judgement of Brennan J in Dietrich, ante, where he declined to decide whether an accused was entitled to legal representation paid for by the State.

[1623] For example, the reaction of the Australian government to the decision in Teoh, ante, which held that public servants were obliged to consider the best interests of the child in administrative decisions because of the effect of the Children's Convention.

What sort of rights do we have? More negative than positive. More domestic than international. We are parties to the Racial Discrimination Convention, but still have race discrimination;[1624] we are parties to the Women's Convention, but sex discrimination still exists;[1625] we are parties to the Children's Convention, but Australia has negated part of its domestic effect by executive direction. These problems persist in Canada, even with a Charter. But in Australia there remain distinct limitations to many areas of rights themselves, including privacy, expression, opinion, assembly, and equality rights generally,[1626] despite the provisions of the UDHR and the ICCPR. Economic rights, under the ICESCR, are protected even less by the legal system. Despite improvements, the impact of international human rights norms on domestic legal systems remains an issue which is not merely important, it is crucial. It is crucial domestically if people are to be able to enjoy their recognised rights; it is crucial internationally, if a country like Australia is not to be regarded as an international hypocrite.

This thesis deals essentially with a comparison of two juridical models of rights and freedoms. What must be conceded is that the law itself, and the use of a

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[1624] See Aboriginal and Torres Strait Islander Social Justice Commissioner's Reports: First report (AGPS, 1993), Second Report (AGPS, 1994), Third Report (AGPS, 1995). See also the 1993 Amnesty International report "Australia: A Criminal Justice System Weighted Against Aboriginal People" (London, 1993).

[1625] Equality Before the Law, Discussion Paper No.54, Australian Law Reform Commission, July, 1993 (AGPS, Canberra).

[1626] See Beth Gaze & Melinda Jones: Law, Liberty and Australian Democracy (1990, Law Book Co., Sydney).

juridical model, offers problems as well as potential solutions. Juridical models categorise. The readily apparent categorisations in anti-discrimination legislation, with precisely specified spheres of operation relating to ratio loci, ratio materiae and ratio personae, are duplicated in a less apparent fashion in other areas within the juridical model. Thus, the institutions, practices and ideologies of constitutionalism - and the very subscription to the "rule of law" - create not only possibilities but also limitations on the practical delivery of human rights. We must not demand of law more than it can realistically deliver. Real solutions often lie elsewhere,[1627] and as the historical conditions for the existence of a norm change (such as the approaches to the express rights in the Australian Constitution) norms need to be tolerated, abolished or their effect ameliorated. Human rights notions are now part of the justification for such change.

Law deals with relationships of power. The application of human rights in domestic law heralds, but does not always fully achieve, a power shift. The success in achieving a human rights goal will depend not only on the law, but, as Chapter 2 shows it always has, on the myriad economic, political and ideological considerations acting in free variation with each other and the legal system. While

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[1627] See, for example, Ian Duncanson & Valerie Kerruish, "The Reclamation of Civil Liberty" (1986) 6 Windsor Yearbook of Access to Justice 3, who argue that the juridical model of civil liberty cannot fully constitute and protect a participatory mode of citizenship (ie, active participation in the political process) and that instead of notions of abstract entitlements we should look at the convergence of historical, economic and political conditions within which juridical forms emerged. At a more basic level, it must also be conceded that Amnesty International may be more effective in releasing a prisoner of conscience than is the rule of law.

the domestic implementation of human rights has special problems (and it is these which are the main concern here) it must also be recognised that the domestic application of human rights is beset with the problems which hinder the exercise of rights generally. Access to justice can be a problem, and no amount of legislative transformation or judicial incorporation of human rights will necessarily overcome this practical problem, unless the human right relates to that very issue. These are the silencing mechanisms with the legal system.

Thus, issues of locus standi can be important. In Australia, the difficulty here is that the complainant has to show an injury to a legal right or interest, or special damage.[1628] Such an approach is more attuned to the vindication of private rights than to the enforcement of public law duties,[1629] although the Attorneys-General, the states and the Commonwealth itself are regarded as having standing, even though their respective rights might not be directly involved.[1630] However,

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[1628] Liston v Davies (1937) 57 CLR 424, especially Dixon J at pp.441-2.

[1629] See Sir Anthony Mason, "The Importance of Judicial Review of Administrative Action as a Safeguard of Individual Rights" (1994) 1 Australian Journal of Human Rights 3 at p.7.

[1630] Attorney-General (NSW) v Brewery Employees Union of NSW (1908) 6 CLR 469: in a dispute over the registration of a trade mark, breweries had an interest above that of the community generally as did the NSW Attorney-General to the extent to argue that the registration under a Commonwealth law was unconstitutional; Attorney-General (Victoria); Ex Rel. Dale v Commonwealth (1945) 71 CLR 237: the Victorian Attorney-General had standing to challenge appropriations made under the Pharmaceutical Benefits Act 1944 (Cth) to pay for free medicines on the basis that they were unconstitutional; Victoria v Commonwealth (1975) 134 CLR 338: a state has standing to challenge the validity of a Commonwealth appropriation. Note that an Attorney-General has the power to give fiat to a private plaintiff to bring an action ex relatione, as in Dale above. (Dale was the President of the Medical Society of

without a private right or special interest arising, an individual is regarded as having no standing to bring a case merely because they concerned with the breach of a public duty. It is not enough that an Act creates a situation of general community interest with procedures for monitoring or a limitation on government.[1631] However, in Robinson v The Western Australian Museum the High Court held that it would be enough to establish that special interest if the plaintiff could show that he or she was deprived of some benefit that would otherwise accrue, even if that benefit (or detriment) might potentially attach or apply to others.[1632]

However, it is not enough that a private individual is concerned that Australia is in breach of its international obligations. Without at least some special interest of his or her own, the breach of international law is itself not sufficient to confer

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Victoria: the impugned legislation also imposed duties on doctors with respect to the prescription of medicines.)

[1631] Australian Conservation Foundation Inc v The Commonwealth (1980) 146 CLR 493: the Foundation had no standing to injunct the Commonwealth from approving the building of a resort in a conservation area which it claimed was contrary to the provisions of the Environment Protection (Impact of Proposals) Act 1974 (Cth) because that Act did not create private rights but only established a mechanism for the approval of land use applications subject to certain criteria (Murphy J dissented on the basis of US cases); Onus v Alcoa of Australia Ltd (1981) 149 CLR 27: an Aboriginal tribe had standing to prevent the construction of an aluminium smelter on land which it had traditionally occupied and which it claimed contained relics, thus amounting a breach of the Archaeological and Aboriginal Relics Preservation Act 1971 (Vic) because this tribe had a special interest in the matter (but Aborigines generally had no standing as they were not given rights or interests under the Act).

[1632] (1977) 138 CLR 283, especially Mason J at pp.327-8 and Murphy J at pp.344-5: the finder of an historic shipwreck had standing to challenge the validity of Western Australian laws which deprived him of claiming a right to the wreck.

standing.[1633] This will be so even if there is some personal connexion with the matter if the international norm has not been transformed into Australian law in a way which gives rights to the complainants.[1634] Kirby P held in Eastgate v Rozzoli that a plaintiff would have to show actual or apprehended damage to his or her interests, although these had to be of a proprietary, business, or economic nature and perhaps of a social, political, cultural, spiritual or historical nature.[1635] But there must be some personal connexion: it is not enough simply being a citizen concerned with the actions of government which might impact on one's rights.[1636]

[1633] Ingram v The Commonwealth of Australia and Another (1980) 54 ALJR 395: the plaintiff held to have no standing to seek a declaration against the defendants that they were in breach of international law by supporting the SALT II Treaty because he had no special interest in the matter other than that shared by the public at large; Tasmania Wilderness Society Inc v Fraser (1982) 153 CLR 270 at p.274: the Wilderness Society had no standing to bring an injunction against the Prime Minister and others with respect to heritage listing under Commonwealth legislation for a breach of international law when the legislation did not transform that international law into the domestic system; Re Limbo (1990) 92 ALR 81 at pp.84-5: an action with respect to a challenge to the export of military equipment under the UN Charter, UDHR, ICCPR, ICESCR, Race Convention, Women's Convention, Declaration on the Rights of the Child, ILO 111, the Nuremberg Principles and thew Genocide Convention did not give standing to the applicants in the absence of transforming Australian law. Followed in Young v Registrar, Court of Appeal [No. 3], ante, at p.273.

[1634] Coe (on behalf of the Wiiradjuri tribe) v The Commonwealth (1993) 118 ALR 193: a claim that the Wiiradjuri tribe was entitled to reparations for genocide was struck out as it did not show legal principles on which the matter could be judged.

[1635] (1990) 20 NSWLR 188 at p.200.

[1636] Id., at p.201: a citizen of New South Wales had no standing to seek an injunction against the Speaker of the House from presenting a Mental Health Bill to the Governor for assent on the basis that its contents contravened her rights under the UDHR.

References to international human rights norms are therefore not strong enough to influence the choice of political values implicit in these cases. Even the recognition of implied rights in the Australian Constitution has not swayed the High Court to adopt an approach which sees the importance of enforcing a constitutional right as being more important than the existence or non-existence of a private legal right.[1637] What is potentially a substantive matter is treated as a formally procedural one. The narrow formalistic approach seen in the cases interpreting the express rights of the Constitution has not been swept away, by international norms, or otherwise.[1638] This approach effectively gives primacy to political processes over the judicial.[1639] An Australian Law Reform Commission Report on this issue[1640] was met with no action by the government.

In Canada,[1641] the issue of standing has been freed up by the Charter to the extent that section 24 provides that anyone whose rights and freedoms have been

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[1637] For example, in Davis v Commonwealth, ante, on the prohibitions during the bicentennial celebrations to use certain words on products, consideration of this issue of standing was avoided by the High Court.

[1638] While some jurisdictions have formally introduced the phenomenon of the class action (eg, Federal Court of Australia Amendment Act 1991), these assume standing in the first place.

[1639] See Henry Burmester, "Locus Standi in Constitutional Cases", Chapter 6 in H.P. Lee and George Winterton (eds): Australian Constitutional Perspectives (1992, Law Book Co., Sydney) at p.178, who argues that this is as it should be.

[1640] Law Reform Commission: Standing in Public Interest Litigation, Report No. 27 (19 5, AGPS, Canberra)

[1641] See generally, Thomas A. Cromwell: Locus Standi: A Commentary on the Law of Standing in Canada (1986, Carswell, Toronto).

infringed has a remedy and section 52 of the Constitution provides that this is part of the supreme law of Canada.[1642] A "public interest" litigant could take advantage of these provisions.[1643] The criterion for standing in Canada is "genuine interest" which is aimed at screening out the "mere busybody."[1644] The applicant must be able to show the court either a direct interest in the outcome of the proceedings, or at least an ability to make a useful contribution to them.[1645] This has lead one commentator to note that this "effectively permits the courts to select the public policy questions on which they feel judicial pronouncement is needed."[1646]

A related issue is the right of intervention. An intervener must also be found to have a sufficient interest in the proceedings.[1647] In Australia, because it is

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[1642] See Big M Drug Mart, ante.

[1643] Although a pre-Charter decision, a leading case is Minister of Justice v Borowski [1981] 2 SCR 575: Mr Borowski was allowed to challenge the provisions of the Criminal Code allowing abortions in certain circumstances even though he was not personally affect by them. See also Operation Dismantle, discussed above.

[1644] Per Le Dain J in Minister of Finance v Finlay [1986] 2 SCR 607 at p.633.

[1645] Morgentaler v New Brunswick (Attorney-General) (1994) 116 DLR (4th) 750

[1646] Graham Garton, "Civil Litigation Under the Charter", Chapter 4 in Neil Finkelstein & Brian Rogers (eds): Charter Issues in Civil Cases (1988, Carswell, Toronto), at p.76.

[1647] Corporate Affairs Commission v Bradley: Commonwealth of Australia (Intervener) (1974) 1 NSWLR 391: the Commonwealth was at first instance given leave to intervene in a case involving the registration of the name "Rhodesia Information Centre" on the basis that its interest was the public impression that might be created by the registration that the australian government tolerated the existence of an illegal regime. On appeal, this part of the decision was overturned, Hutley JA saying: "The courts do not exist to enable

unclear whether a court has a general discretion to permit an intervention,[1648] the right is usually conferred by statute.[1649] A discretion, when exercised, is narrowly circumscribed, Dixon J stating that "it would be wise to exercise it by allowing only those to be heard who wish to maintain some particular right, power or immunity in which they are concerned, and not merely to intervene to contend for what they consider to be a desirable state of the general law."[1650] This view was specifically approved of by Kitto J in R v The Commonwealth Court of Conciliation and Arbitration; Ex parte Ellis[1651] and is apparently followed by the High Court to this day.[1652] Again, human rights norms are insufficient to effect

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the Australian or any Government to satisfy foreign states of the sincerity of a Government's attitude; they exist to adjudicate upon rights, and for a court to permit a Government to appear for the express purpose of achieving a particular result in litigation between two private litigants in which it concedes it has no rights of its own is, in my opinion, a wrong exercise of discretion, if such discretion exists." (at pp.404-5). The approach in Canada was more generous, the Supreme Court allowing intervention by interest groups in Bill of Rights litigation: Attorney-General of Canada v Lavell (1973) 38 DLR (3d) 481; Morgentaler v The Queen [1976] 1 SCR 616.

[1648] Bradley, ibid.

[1649] For example, s.78A of the Judiciary Act 1903 gives to the Attorneys-General of the Commonwealth, the states and the Northern Territory the right to intervene in proceedings arising under the Constitution or involving its interpretation. Section 11(1)(o) of the Human Rights and Equal Opportunity Commission Act, s.48(1)(gb) of the Sex Discrimination Act, s.20(1)(e) of the Race Discrimination Act and s.67(1)(l) of the Disability Discrimination Act give the Human Rights Commission the power to seek leave to intervene in cases involving matters relevant to those Acts. The Human Rights Commission has thus intervened in many of the cases mentioned above, such as Re Jane and Re Marion in the Family Court.

[1650] Australian Railways Union v Victorian Railways Commissioners (1930) 44 CLR 319 at p.331.

[1651] (1954) 90 CLR 55 at pp.68-9.

[1652] For example, in Brandy v Bell, ante, involving a challenge to the enforcement procedures of the Human Rights Commission, argument to grant leave to the Public Advocacy Centre (representing several special interest groups including the Women's Electoral Lobby, the Australian Federation of AIDS organisations and the Federation of

a change in this approach. In Canada, the impact of the Charter has had a limited[1653] but steadily increasing acceptance and significance.[1654] Because Charter cases are more rights-focused, and because the Supreme Court of Canada relies more heavily on written submissions than does the High Court of Australia (which deals with cases principally on the basis of oral pleadings), interveners in Canada are regarded as being more relevant to the issues before the court.

The cost of mounting a legal case (including the emotional cost), and the restrictions on the availability of legal aid are also an important factor[1655] which can directly affect the operation of rules by excluding that operation from some people, or deterring them from resorting to legal rights.[1656] In addition, because applicants must satisfy not only a means test but also have their cases assessed on

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Ethnic Communities) was listened to by the High Court, which then retired for some minutes and returned, refusing leave without giving reasons.

[1653] See Jillian Welch, "No Room at the Top: Interest Group Interveners and Charter Litigation in the Supreme Court of Canada" (1985) 43 U. of Toronto Faculty of Law Review 204.

[1654] Sharon Lavine, "Advocating Values: Public Interest Intervention in Charter Litigation" (1992-3) 2 National Journal of Constitutional Law 27.

[1655] See Legal Aid for the Australian Community: Legal Aid Policy, Programs and Strategies, A Report by the National Legal Aid Advisory Committee, July, 1990 (AGPS, Canberra); Profiles of Applicants for Legal Aid in 1990, Vol. 1, Office of Legal Aid and Family Services, Attorney-General's Department (1991, AGPS, Canberra); Dieter Hoehne: Legal Aid in Canada (1989, Edwin Mellen Press, Lewiston).

[1656] The economic effect of the Aramugam case in Australia has been discussed above. In Canada, in common with many losers of court cases, Operation Dismantle was ordered to pay the winner's costs (ie, those of the government of Canada) as well as its own: see Michael Mandel: The Charter of Rights and the Legalisation of Politics in Canada (1989, Wall & Thompson, Toronto), at p.1.

the likelihood of success, this process in itself may be adversely affected by assumptions with respect to such things as race and gender.[1657]

Issues of justiciability can be another problem. A court will generally not review the traditional functions of the Executive, such as the appointment of judges,[1658] although it might do so where procedural fairness is required and has been denied.[1659] Brennan J has been particularly careful to distinguish matters which are properly "legal" from those which are "political" and not the proper function of the court to decide.[1660] This will include allegations by private citizens that their country has breached its international obligations where no right of the citizen's is directly involved.[1661] This approach, which reflects an artificial distinction between the legal and the political, particularly in the area of human rights (as

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[1657] See Mary Jane Mossman, "Gender Equality and Legal Aid Services: A Research Agenda for Institutional Change" (1993) 15 Sydney L.R. 30; Equality Before the Law, Law Reform Commission Discussion Paper No. 54 (1993, AGPS, Canberra), Chapter 5.

[1658] Attorney-General (NSW) v Quin (1990) 170 CLR 1

[1659] FAI Insurances Limited v Winneke (1982) 151 CLR 342: judicial review of the refusal of the Governor in Council to renew an insurer's licence; Attorney-General (Canada) v Inuit Tapirisat of Canada (1980) 115 DLR (3d) 1 at p.11: statutory powers of the Governor in Council are reviewable, but only if those powers are exceeded, which will not be so if the power is legislative in nature.

[1660] For example, in Re Limbo, ante, he stated that "It is essential to understand that courts perform one function and the political branches of government perform another ... [the pleas of the plaintiffs] are political pleas." (at pp.242-3; see also his judgement in Gerhardy v Brown (1985) 159 CLR 70 at pp.138-9: a decision to enter into a treaty is not justiciable; and his view in Dietrich, ante, that the issue whether the accused was entitled to legal representation paid for at public expense was one a court could not decide.

[1661] Tasmanian Wilderness Society v Fraser, ante, per Mason J at p.51: "a breach ... of [Australia's] international obligations is not a matter justiciable at the suit of a private person."

discussed in the development of the notion in the chapters above) allows the courts, in effect, a discretionary power to exclude human rights norms.

The justiciability issue can particularly arise where national security is at stake. While a mere claim to an immunity from disclosure of documents on this basis is not conclusive, the High Court of Australia has held that the balance of public interest will usually be against disclosure in "cases of defence secrets, matters of diplomacy or affairs of government at the highest level."[1662] The existence of Charter rights in Canada has changed this approach to allow the courts to consider the matter in a rights framework which makes justiciability an irrelevant issue, but the rights themselves might flicker and die in the blast of foreign affairs,[1663] as there has to be a causal link between the government's decision and an adverse effect on the right allegedly impugned[1664] which is more than merely

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[1662] Sankey v Whitlam (1978) 142 CLR 1, per Stephen J at pp.58-9.

[1663] Operation Dismantle v The Queen [1985] 1 SCR 441: an allegation that a decision by the Canadian government to permit the US government to test cruise missiles in Canada violated rights under s.7 of the Charter (life, liberty and security of the person) because it increased the vulnerability of Canada as a nuclear target, was held not to be non-justiciable because it raised a political question, as cabinet decisions, whether taken pursuant to statute or the royal prerogative, fall "within the authority of Parliament" under s.32(1)(a) of the Charter and are therefore reviewable. Nevertheless there was no violation of the plaintiffs' rights as s.7 has no application to actions of the government in its foreign relations which are not directed to any member of the community (analogising it to a declaration of war which might similarly increase the risk to the personal safety of the community). Such special danger might occur to a section of the population if live warheads were used in the tests.

[1664] Per Dickson J at pp.454, 459.

incidental.[1665]

Another issue is legal personality. Our law deals with people (usually as individuals) in certain categories: individual, guardian, parent, child, tenant, licensee, employer, employee, vendor, purchaser, trustee, beneficiary, etc. It is ill-equipped to deal with group rights attaching to the neighbourhood, the community, or the family. (Family Law deals with the rights and duties of individuals because of their membership of a family unit, not with the unit as such.) This is also linked to the problem of standing, so that the extension of rights to other recipients or objects (eg, the unborn, animals, the environment) is hedged not only by the scope of the content at international level but also by the structures and processes at the domestic level.[1666]

Another feature is that in an adversarial system, while an issue might be raised proprio motu, courts generally rely on the skill and honesty of the advocates to bring to their attention any relevant matters, including any relevant international law. Cases may therefore be decided per incuriam where international norms are simply not drawn to the courts' attention, as discussed above. In addition, because

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[1665] Per Wilson J at p.490.

[1666] See Joel Feinberg, "The Rights of Animals and Unborn Generations" in William T. Blackstone (ed): Philosophy and Environmental Crisis (1974, University of Georgia Press, Athens), pp.43-68; Tom Regan: A Case for Animal Rights (1983, University of California Press, Berkeley); Christopher D. Stone, "Should Trees Have Standing? - Towards Legal Rights for Natural Objects" (1972) 45 Southern California L.R. 450.

international law is not as such applied by the courts but has to be incorporated or transformed into the domestic legal system, international norms are not "facts" in a case which can be proven by calling expert witnesses, for example. They are by the stage of transformation or incorporation a part of the domestic law, but, as discussed above, judicial knowledge of them is weak and faulty.[1667]

All of these factors will directly affect the rule of law. Added to this, in terms of the present thesis, is the fact that international human rights norms sit in an awkward relationship to domestic law, particularly in Australia. The increased, and ever increasing, reliance on human rights by the courts in Australia is an attempt to produce just and realistic results, in a modern context, through an apparently coherent set of structured principles, particularly when the domestic law is deficient in this regard. The approach is becoming increasingly purposive. But as Chapters 3 and 4 showed, the international norms also bring with them their own inherent and acquired deficiencies and incoherencies. Thus, the reliance on international law in and of itself does not overcome some of the problems pointed out by Critical Legal Studies scholars, such as the contradiction between the commitment to mechanically applied rules on the one hand and situation-sensitive, ad hoc standards on the other.[1668] However, what it does do is attempt to find the latter within the former through reference to human rights norms. This,

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[1667] See in particular the discussion in Bayefsky: International Human Rights Law ... , ante, at pp.137-43.

[1668] See Mark Kelman: A Guide to Critical Legal Studies (1987, Harvard U.P., Cambridge), p.3.

however, does not overcome the indeterminacy criticism of CLS,[1669] but the application can, and has been, contextual rather than uniform, as the cases of the use of human rights in Family Law illustrate.

The rights favoured and used most often are the negative rather than the positive ones. And the public/private distinction still persists. A person who is locked up may have their legal rights infringed unless the incarceration is done by due process of law. The same person who cannot leave a room because she cannot afford to pay for childcare is nevertheless regarded as being legally free because the coercion to stay is not one which the law recognises. Because of the nature of constitutions, legislation and case law, international human rights norms used in any of these are an exercise in problem solving rather than a critique of the law. Thus, for example, the Australian Sex Discrimination Act, reliant on the Women's Convention for both its validity and much of its content and meaning, seeks to remove and redress instances of sex-based discrimination but, unlike feminist jurisprudence for example, is not, and cannot be, a critique of the liberal presuppositions which underpin many of the sexist problems with law - indeed, many of those presuppositions are inherent in the Convention itself (as discussed in Chapter 4). Human rights norms might, however, provide a theoretical basis for a rights approach in Australian law in the absence of a Charter, even though the open-ended nature of the norms means that a value choice is still essential in the

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[1669] See Kelman, ante, at p.13.

process of application. But it is a valid avenue away from the "strict and complete legalism" espoused by the Engineers Case. Street's Case showed this being done indirectly (by reference to anti-discrimination legislation). The courts are now (sometimes) courageous enough to do it directly.

Legal argument itself has inherent limitations in this regard. The nature of legal argument is that its starting point is existing applicable rules. To do otherwise is regarded as inappropriate "judicial legislation." As CLS (and the Realists) have shown us, judges do in fact "legislate" a lot, if not all, of the time. But overt admissions of radicalism do not abound in the law. Even the most "radical" of Australian judges, Murphy J, started with rules. His difference was which rules he chose. In the absence of legislation, human rights as a gloss on the Common Law is thus the acceptable face of their legal application, regardless of what the treaties may say about duties of implementation. Used in this way, human rights at least enable judges to look sideways, and occasionally forwards, rather than forever backwards. However, the "game" of law is one which operates within the existing framework of both rules and structures. The use of human rights to "develop" the common law may be a different thing to the extension of the common law into new areas, as the metes and bounds have already been set by the framework unless they are used to set a new paradigm of fact, as in the Mabo Case which changed history more than law.

To analogise with the uses of Equity in international law,[1670] the use of human rights norms in domestic law is sometimes infra legem (ie, recognised as being part of domestic law or an accurate reflection of domestic policy), sometimes praeter legem (ie, used to fill in the gaps of the domestic system or to interpret it when ambiguous), but never contra legem (ie, to overturn clear domestic law).

It is only to this extent that human rights can be said to be a "source" of domestic law, helping to supply the material content and shifting the historical paradigms, but not allowed to alter domestic legal structures. Human rights can inform legal values, but do not broaden law from something which was principally rule-oriented. While it is now acknowledged that the law is more than just rules but also consists of principles recognised by the prevailing political morality which guide the application of the rules, where these principles conflict their respective weights must be acknowledged.[1671] And these must "fit" into the existing legal structures and rules. In Australia, this structure promotes an exercise in legal hierarchy. In Canada, the Charter has produced in the structure an orientation to defining the meaning of rights. But in either case the judge is constrained by the interpretative community in which he or she belongs.[1672] This may explain the

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[1670] See Bin Cheng: General Principles of Law as applied by International Courts and Tribunals (1988 reprint, Stevens, London).

[1671] See Brian Fitzgerald, "International Human Rights and the High Court of Australia" (1994) 1 James Cook U.L.R. 78 at pp.95ff.

[1672] See Stanley Fish: Is There a Text in the Class (1980, Harvard U.P., Cambridge) and Doing What Comes Naturally (1989, Oxford U.P., Oxford.

gradualism of the Kirby approach. Our courts are in a liberal interpretative mode in a postmodern world. Together they partially neutralise the potential of human rights, as the continuing problems with systemic discrimination illustrate, and make irrelevant debates on the nature of human rights as "rights as relationships"[1673] as opposed to Dworkin's idea of "rights as trumps." Because of the nature of human rights and the structures in which they operate, human rights norms can be enforced without necessarily being domestically implemented, and domestically implemented without necessarily being truly enforced.

Recognition of human rights may widen the judicial perception with respect to the mischief in government powers that might need to be contained as it re-prioritises the status of the individual over the workings of government. It puts a new gloss on the function of a Constitution and the "natural" meaning of its terms. It is an "acceptable" way of giving an historical text a contemporary meaning. But if they operate, to use Dworkin's approach, not like rules but principles or policies informing the rules,[1674] then the problems identified by Stanley Fish also go with them: judges do not really interpret an independent text but react to it in context.[1675] The judicial pattern remains doctrinal. Human rights allow judges to

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[1673] See Jennifer Nedelsky, "Law, Boundaries and the Bounded Self"

[1674] R.M. Dworkin: Taking Rights Seriously (1978, Duckworth, London)

[1675] Stanley Fish: Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies (1989, Clarendon Press, Oxford)

bring values into the law without appearing to deviate from the legal into the political or the moral. However, this is important as it can both validate and explain change without appearing to threaten the system. But that very cosiness militates against change which thus has to come from its traditional "political" source: Parliament (although this does not have to be so, as the development of the law of negligence indicates). There are no specific ideologies emerging yet: the difference between the judgements of Dawson J and the rest of the High Court in Australia are not so much because the former is a tough conservative and the others are benevolent liberals (eg, see the apparent inconsistencies in the approach of Brennan J). Nor is there a consistency in the resort to human rights between the "Charter enthusiasts" and the "Charter resisters" in Canada described above. Common law development is opportunistic. And while courts can assess the content of international human rights norms independently of the Executive, they cannot apply those norms contrary to the clearly expressed law of the forum. Thus, the cases recognise and operate under an hierarchical process which is domestically determined. Hierarchical questions at international law, such as the effect of jus cogens on treaty obligations,[1676] tend to be ignored in the domestic forum. Thus, to guarantee rights in such a domestic system, legislation is essential. But legislation needs to be interpreted in order to be applied. The problem thus becomes a circular one. It is therefore not an idle quip to remark, as has the Critical Legal Studies scholar Mark Tushnet in the context of the US Constitution,

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[1676] See Sir Ian Sinclair: The Vienna Convention on the Law of Treaties 2nd ed (1984, Manchester U.P., Manchester), Ch.7.

that the result is "a government of men, not law"[1677] rather than the other way around.

Chapter 4 showed that there are distinct problems with the application and enforcement of human rights for individuals within the international system. Chapter 5 has shown that the application of those international norms in the domestic system at least nudges the law towards a notion of human needs being fundamental. Sometimes, and rarely, is there a synergy between international human rights norms and domestic laws. Examples of this are the laws on sexual harassment, the domestic application of some human rights to companies both as complainants and (through vicarious liablity) as respondents, laws with respect to indirect discrimination, and the wide range of remedies available domestically. More often, however, the reaction is reflexive: synergetic rather than synergistic. Thus, the result is uneven. In some areas, such as with respect to sexual harassment or age discrimination, we go beyond what is strictly required by international law or which the domestic system on its own might otherwise have been capable of producing. Yet with others, such as race discrimination and sex discrimination per se, we lag behind.

We have not yet reached the stage with respect to the domestic use of human rights

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[1677] Mark Tushnet, "Constitutionalism and Critical Legal Studies", Chapter 8 in Alan S. Rosenbaum (ed): Constitutionalism: The Philosophical Dimension (1988, Greenwood Press, New York).

that we say "why not" instead of "why"; we are somewhere between the two, although the effect of section 1 of the Charter (where the question is ought the government abrogate a right, rather than does it have the power to do so) has meant that Canada is further down this particular track than is Australia. However, in both countries there is little rigour with respect to that domestic application at all levels of government and the legal system. What we are left with is something less than a wholesale adoption of international human rights, and also something quite different to a Lockean notion of inalienable natural rights as exhibited in other countries, such as in the US Declaration of Independence or the French Declaration of the Rights of Man and the Citizen.

CHAPTER 6

CONCLUSION

> "Cheshire Puss," she began rather timidly, ... "Would you tell me, please, which way I ought to go from here?" "That depends a good deal on where you want to get to," said the Cat. "I don't much care where - ..." said Alice. "Then it doesn't matter which way you go," said the Cat. "... - so long as I get somewhere," Alice added as an explanation. "Oh, you're sure to do that," said the Cat, "if you only walk long enough."[1]

This famous dialogue has been used to illustrate the fact that science cannot tell us where to go, but it might tell us the best way to get there.[2] Applied to human rights in domestic legal systems, the converse is so: human rights indicate a general direction in which to go towards a concept of human dignity, but not necessarily any way at all to get there. This is supplied by the domestic system.

Human rights treaties now clearly indicate, either in preambles or through their travaux préparatoires, that the basic rights in the Universal Declaration of Human Rights are regarded as being axiomatic. This however does not overcome the fundamental ambiguity in the notion and norms of human rights. This means that

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[1] The Annotated Alice: Alice's Adventures in Wonderland and Through the Looking Glass by Lewis Carroll, with an Introduction and Notes by Martin Gardner (1960, Bramhall House, New York), p.88.

[2] For example, James Kemeny: A Philosopher Looks at Science (1959), discussed in Gardner, id, at p.89.

human rights are not the end of the story at either the international or the domestic level - they are the beginning of a process. Chapter 5 showed that at the domestic level in Canada and Australia human rights are not treated uniformly. At worst they are ignored; at least they can be influential (both with respect to constitutionalism and statutes, or in the interpretation and development of the Common Law); and at best they can act in a synergistic fashion with the domestic system. Chapter 2 showed that changing legal and social paradigms helped to eradicate the notion of the divine right of kings as the basis for law and rights. This, however, came to be replaced in the English (and hence by inheritance in the Canadian and Australian) scene by a de facto notion of the "divine" (at least in the sense of sovereign) right of Parliament. Human rights shift this focus once again, this time to a concept of human dignity in the light of which the State must at least justify its actions, rather than the assumption being that it cannot be called to account for them. This thesis has considered the factors which affect this process, and how successful it has been, in Canada and Australia.

Even at the level of merely descriptive comparison, the differences between Australia and Canada discussed in Chapters 2-5 disclose some interesting and significant facts. Although both Canada and Australia inherited the same English (unmetaphysical)[3] legal background, slavery existed de jure in Canada but was

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[3] The "unmetaphysical British" is the decription used by Alan Ryan, "The British, the Americans and Rights", Chapter 7 in Lacey & Haakonssen: A Culture of Rights, ante.

abolished relatively early; slavery never existed de jure in Australia but did exist de facto and continued to exist even after British abolition of it. With respect to human rights in the formative period of the UN, Australia was proactive and enthusiastic while Canada was lukewarm and sceptical. With respect to the Universal Declaration of Human Rights, Australia was in favour of it but did not appear to consider the domestic legal consequences of such support; Canada was initially opposed (and in fact voted against the Declaration) largely because of domestic legal considerations, but eventually voted in favour for political (Cold War) considerations. With respect to the formulation of the human rights treaties, Australia supported (at least at international level) economic and social rights, while Canada opposed them. Australia and Canada display a great similarity in the range of human rights treaties to which they are parties, but great dissimilarity with respect to the scope of domestic implementation of them. Canada has made few reservations to the treaties, largely because of the effect of the Labour Conventions Case, and has resorted to federal-provincial co-operation; Australia has made many reservations to them despite the Dams Case, and there is little federal-state co-operation in this regard. As a result, when the Canadian federal government acts on human rights the provinces are largely behind it; when the Australian federal government acts, human rights become a "weasel word" indicating federal oppression of the states. The comparative pattern has therefore been one of a converse and almost paradoxical nature.

The historical and political development of Canada and Australia indicates that in both countries the approach to rights has been evolutionary rather than revolutionary. In Canada, the approach has been political but conducted in the context of constitutionalism and (at least superficially) of ideological neutrality; in Australia, the approach has been one of suspicion of anything smacking remotely of an ideology, and a distrust of authority (including legal authority). In Canada, Parliaments took the lead on human rights; in Australia Parliaments abdicated this responsibility and left human rights primarily to semi-autonomous Commissions and, by default, the courts. Where Canada has thus produced actual rights, the Australian approach has produced autonomy rather than equality and a reliance on residual rather than actual rights.

As Canada and Australia are both federations, the ramifications of the Constitution are crucial. In Canada, federal Parliament has reserved and residual powers, and the provinces have reserved powers; in Australia the federal Parliament has express (but not exclusive) powers and the states have residual (but not reserved) powers. Thus in Canada, exclusivity is the rule and concurrency is the exception; in Australia, the converse is the case. Nevertheless, it is "easier" for the Australian Parliament to introduce human rights legislation than it is for the Canadian because of the content of the express powers. In Canada there is a bifurcation between the treaty-making and treaty-implementing powers; in Australia, these powers are linked. But this means that in Australia international human rights norms are

crucial to the validity of federal anti-discrimination and similar legislation; in Canada, they are not crucial as to validity. In Australia, a strong regional focus at the time of federation has changed to one of centralism (largely because of the Engineers case); in Canada, a strong initial centralism at the time of federation has developed into a pendulum effect (largely because of the existence of exclusive provincial reserved powers). Thus Canada had early adoption of human rights-type legislation (but it came initially from the provinces); Australia had late adoption of such legislation but it was principally the federal government which led the way. Again, like the conversation between Alice and the Cheshire Cat, a similar destination was arrived at but by converse pathways. But unlike the Cat's advice, it does matter which way you go because while the paths lead in a similar direction, the process affects the outcome so that the destinations do not end up being exactly the same, and differ in some significant respects.

In Canada, without a specific power until recently to amend the Constitution, a constitutionally entrenched Bill of Rights has been introduced; in Australia, with an amending power since federation, there is no Bill of Rights (constitutionally entrenched or otherwise) despite several attempts to introduce one. In Canada, there is thus a principal reliance on express rights; in Australia the principal reliance is on implied and constructive rights. Nevertheless, there is an underuse of international human rights norms in the Canadian legal system (especially considering the existence of the Charter), and when they are used the approach is

indiscriminate with respect to binding and non-binding treaties, and between treaties and customary law; in Australia there is an increasing reliance on human rights by courts in the absence of a Charter, but that use tends to be strictly transformationist. In Canada, the Charter imports human rights notions into the very structure of the Constitution so that human rights are potentially a part of that structure; in Australia, human rights implications are drawn from the constitutional structure (and are limited by and to it) so that human rights are interstitial to the constitutional structure.

At a more analytical level, the following propositions can be drawn from the discussion in Chapters 2-5 generally, and from the just-mentioned descriptive comparators particularly:

1. Rights and rights discourse, when examined diachronically, synchronically and comparatively, does not exhibit a consistent, linear, "upward" development, but is paradoxical, non-linear, and as much consequential and opportunistic as purposive.

2. The developmental matrix (comprising the intellectual paradigms used within the economic, social and political structures of a community) directly affects the expression, content and effectiveness of notions of the human rights-type, particularly with respect to concepts relating to what is

"natural", "inherent", "inalienable" and "universal". As a result, human dignity as expressed as rights to freedom and equality has never been an immutable concept and is not so now: it is constructed out of the developmental matrix which is constantly changing.

3. The major English "human rights" instruments - Magna Carta, the Petition of Right, Habeas Corpus, the Bill of Rights 1688 - were of a predominantly consequential, tangential and residual influence on individual rights when formulated, and their influence now is primarily the result of later inference rather than of initial intention or implication.

4. The belief that there is an English (and hence Canadian and Australian) Common Law tradition favouring individual (much less collective) rights is exaggerated. This is shown particularly in the eighteenth century cases dealing with slavery, but persists today. In the absence of a Bill of Rights (and sometimes even with one), "rights" are often an articulation of the silences of the law.

5. International human rights are a predominantly (but not exclusively) Western development. Because of this they should "fit" within Australian and Canadian rights discourse.

6. Human rights can therefore be used at least as values in Canadian and Australian legal systems, and, moreover, they are needed there.

7. However, there is no stable, unified, basis for rights attaching to human beings, but, then again, there never has been: the impression in the past may have been different because of the connexion between the rights of humans and notions of Natural Law.

8. International human rights are compromised and ambiguous norms, particularly since they arise out of a relatively static State-oriented system. Early versions, such as the prohibition on slavery, were exceptions to the system and based more on economic and political self-interest than on a commitment to the rights of humans. Thus there developed an ad hoc and patchwork system of rights protection. Human rights within the international legal system were then, and remain today, of a non-synallagmatic type.

9. An emerging conception of collective responsibility for the rights of human beings was crystallised in modern times by the atrocities of World War II and came to fulfilment in the UN Charter. However, human rights in that instrument are totally undefined.

10. The seminal modern human rights instrument, which has since been treated as an articulation of axiomatic norms, is the Universal Declaration of Human Rights. This instrument was politically compromised, has little philosophical underpinning and is comprised of open-ended norms. It displays some elements of Enlightenment, Romantic, Utilitarian, positivist, teleological and pragmatist approaches, but is not a "Natural Law" document like its historical predecessors. It is global and transideological, but displays some Western bias.

11. Within the Universal Declaration, domestic legal systems were always intended to be a major avenue of implementation. Moreover, the document acknowledges a symbiotic relationship with those systems. Thus, the standard-setting function of the instrument is achieved in collaboration with those systems. The universality of its norms are therefore of a transnational, rather than an international, character, which is further highlighted by the references to the involvement of individuals, communities and organisations, as well as to States, in the process of implementation.

12. The norms established by the Universal Declaration are therefore indeterminate and contextual, but universalisable. This is not a fatal drawback as postmodern approaches to law indicate that all law is in effect like this. Thus, the lack of an express solid philosophical underpinning is

also not fatal, and the open-ended nature of the norms is in reality not unusual. However, equally with all law, the assumptions underlying its concepts may mask oppression.

13. The greatest power of the Universal Declaration may therefore be in its ability to be used to generate norms. It is sufficiently coherent to be useful, despite inherent problems. It is, and human rights are, thus useable in domestic legal systems. And despite its indeterminacy, a synergy is possible when its norms are implanted into a domestic system.

14. The human rights treaties which follow from the Universal Declaration adopt its characteristics: they are ostensibly philosophically neutral and are not Natural Law-type instruments, but rather establish and rely on a symbiotic relationship with the domestic systems within which they are meant to operate.

15. The symbiosis with domestic systems is of three types:

Explicit symbiosis (eg, the use within the international norms of qualifying phrases such as "according to law" or "prescribed by law");

Implied symbiosis (eg, the reference in the international norms to

undefined terms which must rely for their meaning on domestic law or social structures, such as "family" and "marriage");

Functional symbiosis (eg, the reference in the international norms to qualifying or prohibitory terms such as "arbitrary", which relate to the way the domestic system works).

16. The effects of symbiosis are:

(a) In the absence of strong measures of implementation and enforcement at international level, symbiosis becomes determinative of both the domestic implementation of the international norm and also of its meaning;

(b) Implementation and meaning of the international norms are therefore contextual, but are subject to international supervision which is weak due to the fact that the international and domestic legal systems are asymmetrical with respect to each other;

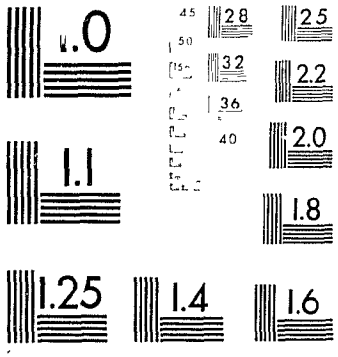
(c) Because of contextualism, the use (in the case of Australia) or non-use (in the case of Canada) of reservations to human rights treaties is important, but is not crucial to the level of domestic implementation of the international norms;

(d) Similarly, the dichotomy between "hard" and "soft" international legal obligations remains significant, but with respect to international human rights norms is essentially beside the point. This is so with respect to both derogable and non-derogable norms;

(e) The international law of human rights is therefore nothing like Natural Law in that it is neither superior to nor anterior to domestic legal norms, even though it may be used as a check upon those norms;

(f) Furthermore, the values underlying the domestic legal system can be crucial. Thus, even though problems of "cultural relativism" with respect to human rights (ie, the ostensible Western bias) do not significantly affect Canada or Australia, the domestic "culture" can significantly affect human rights implementation and thus the domestic legal meaning of equality;

(g) Symbiosis will not, and cannot, screen out the problems, particularly the systemic problems, which may exist in either system. The effect of symbiosis can therefore be both positive and negative.



17. Human rights are therefore constructed by the law as well as of the law

18. In the light of symbiosis, monist, dualist and relativist theories about the relationship between international and domestic law are inadequate with respect to human rights. A contextual approach is necessary.

19. Similarly, the transformationist and incorporationist approaches to the application of international law by domestic courts do not clearly apply to the treatment of international human rights, which ought to be treated in a sui generis fashion.

20. In the Canadian context, the Bill of Rights was an ineffective implementation of human rights because of constitutional limitations (it affects federal laws only and is not part of the Constitution) and a passive approach to its interpretation which was more concerned with rules than policy, thus producing formal rather than substantive equality. The Charter is more effective as it is part of the Constitution and can be used to strike down inconsistent laws. However, its principal motivation was political, and while human rights were influential they were not determinative as to its content or to its validity. It is not an incorporation of Canada's international human rights obligations into Canadian law. Human rights inform rather than justify it. Its rights are not universal (because of s.32 and the Supreme

Court decision in the Dolphin Delivery Case) nor inalienable (because of s.33). Its significant impact is that it places the onus on the government to justify its actions (because of s.1). The developmental matrix explains this situation better than theories of monism and dualism.

21. With respect to the treatment of international human rights by the courts, the Canadian context shows that the two-stage approach in Charter cases induces a tendency to treat Charter rights as absolutes and then consider reasonable justifications for their limitation. This means that international human rights norms are downplayed because they are not determinative of the meaning of the domestic norms. This in turn induces a transformationist approach to the international norms. The purposive approach to interpretation also induces indeterminacy. There is also no correlation with the resort to human rights between the Charter "enthusiasts" and the Charter "resistors". The use of international human rights norms is inconsistent, sometimes dubious and occasionally wrong.

22. The Canadian context produces inconsistent results and human rights are given no special treatment in it. Human rights tend to be used more in a safety-net fashion as an indicator of prescribed minimum standards, rather than to inform policy issues. However, the courts do have to consider the rights directly; they are not merely residual or consequential in nature, and

human rights, when used, are not only used in cases of ambiguity.

23. In the Australian context, successive failures to introduce a Bill of Rights occurred, even with a clear amending mechanism in the Constitution, indicating that this factor, while important, is relatively minor. The lack of a "culture of rights" in Australia has led to a social reaction against, and the political failure of, a general rights program. The constitutional matrix is one which maintains parliamentary sovereignty. The division of legislative power is significantly different to Canada where Criminal Law (a significant component of human rights norms) is a federal matter. In Australia this is a state matter. However, the wide interpretation of the external affairs power (with respect to both subject matter and treaty-implementing power) and the states having residuary but not reserved powers, has meant that the federal Parliament has a powerful human rights implementing authority. It is therefore not just the subject matter of a head of power that is significant, nor the federal-provincial division of these powers, but these together with the type of division which forms the matrix affecting human rights delivery. The Australian matrix makes international human rights crucial to the validity of federal legislation in a way that does not occur in Canada because of its matrix. However, the Australian approach is patchwork and the very antithesis of fundamentality because of a lack of commitment to rights.

24. With respect to the treatment of international human rights by the courts, the Australian context shows that such express powers relating to rights in the Constitution have been interpreted narrowly and are limitations on government rather than the rights of people. The finding by the High Court of implied rights in the Constitution is a breakthrough, but these are consequential upon and directly relate to limitations of legislative power rather than necessitating an ascertainment of the scope of a right. There is very little direct reference to international human rights norms. What there is has been used inconsistently and selectively to bolster already-held domestic values. This is tinkering at the edges of rights.

25. The Australian matrix allows international human rights norms to be used infra legem (ie, as illustrative of existing domestic law) and praeter legem (ie, to develop the law or clarify ambiguities in it), but not contra legem (ie, it is never used when domestic law is clearly contradictory to it). The latter is the situation where human rights are needed the most. And it is precisely here that the system baulks.

Overall, the effect between international human rights norms and domestic law is more synergetic than synergistic. Both Canada and Australia have a human rights mosaic: a broadly discernible pattern made up of bits and pieces stuck together,

which loses its coherence the closer we examine it. However, a synergy can, and does, occur - but not often. The principal examples of this discussed above (particularly in Chapter 5) where the result has been more than the sum of the component international and domestic parts, are:

- Laws with respect to sexual harassment.
- Laws with respect to indirect discrimination.
- The expansion of the reach of domestic legislation through the "analogous grounds" approach or on the basis of perceived grounds of discrimination.
- The application of some human rights to non-humans, such as corporations.
- The application of the domestic concepts of vicarious liability and remedies for delicts based on human rights.

For synergy to occur is not just a matter of the content of either the international or domestic rule, or of the process of implementation of one in the other. Because both of these are linked, synergy occurs when the systemic problems in either system do not intrude. In the absence of an overt human rights ideology, this is a random phenomenon. It occurs more consequentially than by design.

This is significant if human rights are to help effect any real change, particularly in the Australian and Canadian situations where the issues are less about malicious and intentional gross violations of rights and are more the result of subordination by systems and institutions, or a lack of a response to the perspective of minorities

or the oppressed.

The Australian and Canadian legal systems do not have a coherent approach to the reception of international human rights. At the legislative level this may be explained by the constitutional matrix: in Australia, with respect to federal legislation, the difference between norms being located in a ratified treaty, an unratified treaty, customary law or the recommendation of an international organisation can be crucial to domestic validity; in Canada, this is not so important. At the level of curial application, it cannot be so easily explained other than at the level of a broader matrix including education (or ignorance). Application there takes little heed of the authority or validity at international law of the norm. The Canadian Charter makes no difference to this. Thus, reliance on human rights norms may lead to a more focused approach, but not necessarily to a more systematic approach. The problem then becomes one of minimum international standards functioning as maximum domestic standards.

Dianne Otto has written that "legal discourse has the power to universalise certain knowledges and experiences and to disqualify others."[4] All law, international and domestic, plays a part in constructing social reality which may be Eurocentric, gendered, heterosexist, etc. There is thus a constitutive power of law which, while

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[4] Dianne Otto, "Challenging the 'New World Order': International Law, Global Democracy and the Possibilities for Women" (1993) 3 Transnational Law and Contemporary Problems 371 at p.406.

it does not equate law and politics, means at least that law is also political.[5] Law thus operates in a paradoxical fashion, marginalising certain individuals or groups (and their discourses) but at the same time carrying with it the potential to contest those exclusions.

Nevertheless, human rights perform not only a symbolic function, but have a talismanic quality. They can be used as a strategy to at least allow the possibility that those traditionally at the margins of the law can participate in a rights discourse. As Martha Minow has said: "Rights are not "trumps" but the language we use to try to persuade others to let us win this round."[6] This strategic quality further underlines the lack of an immutable fixed content of human rights. Postmodern approaches show that this is so with law generally. However, thirty years ago Lord Reid described as a "perennial fallacy" the notion that rules or principles need to be expressed exactly in order to work: "The idea of negligence is ... insusceptible of exact definition, but what a reasonable man would regard as ... negligent in particular circumstances [is] ... capable of serving as [a] test in law."[7] Although feminists and critical race theorists would challenge the unacknowledged assumptions operating here, what is clear is that human rights norms are not per se incapable of performing a function in domestic law because

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[5] Otto, ibid.

[6] Martha Minow, "Interpreting Rights: An Essay for Robert Cover" (1987) 96 Yale Law Journal 1860 at p.1876.

[7] Ridge v Baldwin [1963] AC 40 at p.65.

of vagueness. Indeed, the increasing influence of human rights at the level of government administration is seen by the increasing numbers of people hired specifically to monitor the human rights ramifications of policy.[8]

Nevertheless, there is a juridical disjunction between international law and domestic law. The legal systems of Canada and Australia remain obdurately resistant to incursions from international human rights. The courts in both countries, both with or without a Bill of Rights, retain an outmoded and transformationist approach. Incorporation has been the approach with respect to customary law. But, as explained in Chapter 5, this approach can, and ought to, apply to the domestic reception of human rights treaties. This is because of the symbiotic relationship between international human rights norms and domestic legal systems, and because the notion that Parliament's legislative authority will be infringed by the incorporation of treaties is a myth when parliamentary government is responsible rather than representative and when legislation is co-ordinated strictly by the executive of the parliamentary party in power.

It is certainly unlikely, and probably impossible, that cases like Christie v The

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[8] Interview by author with personnel in the Canadian federal government Departments of Justice and External Affairs, May, 1987 (interviews on tape). See also a similar observation in Murray Wilcox: An Australian Charter of Rights? (1993, Law Book Co, Sydney), p.184. A similar situation, in the author's experience, exists with respect to the Australian federal bureaucracy.

York Corporation[9] would ever be decided the same way in either Canada or Australia. But a commitment is needed. In Tarumi v Bankstown City Council[10] Cripps J in the New South Wales Land and Environment Court had to decide a development application for a Muslim school which had been opposed by residents in the area. The Human Rights and Equal Opportunity Commission was granted leave to intervene in the case. His honour granted the application, but in the course of his decision had this to say:

> I was invited to suggest some judicial guidelines concerning the Human Rights and Equal Opportunity Commission Act 1986 and the Racial Discrimination Act 1975 in its general application to planning laws in New South Wales. I declined to respond to the invitation. To embark upon such an exercise would be, at best, to impose an onerous burden not only on the Court but to other parties to the litigation and, at worst, may well divert the Court from its true function in these proceedings which is to determine whether development consent should be granted or withheld.[11]

It is an appalling indictment on any legal system that a judge would not consider that human rights was not a part of the true function of a court. This case represents well the approach which views human rights as a mere appendage to the "real" law.

But a greater reliance on human rights will not necessarily deliver us to the gates of the New Jerusalem. Indeed, the law itself may not be capable of succeeding in

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[9] [1940] SCR 139: A black man was refused service in a Montreal tavern because of his race. The Supreme Court of Canada held that freedom of commerce meant that merchants could carry on a business in any way they thought best for that business.

[10] (1987) EOC 92-214

[11] Id., p.77006, emphasis added.

the task of delivering human dignity. Apart from the difficulties mentioned in the previous chapters - not the least of which include its hierarchical approach, its reliance on form rather than substance, its systemic problems which might never be able to underwrite equality for all people, and the compartmentalised mechanisms through which threats to human dignity are conceptualised as only coming from the State when today they can come from any of us[12] - human rights, with all its incoherence, is the element that can aid us to heed Koskenniemi's challenge:

> Once the idea of objective principles and natural social laws is discarded, then normative problem-solution cannot proceed by simply interpreting what is already there. It will have to involve an attempt to imagine new and alternative ways to cope with social conflict.[13]

Canadian and Australian law lacks a sufficient human rights ideology, although Canada is further down this path than Australia. This would at least make possible greater opportunities for synergy between the international and domestic legal systems in so far as human rights are concerned. Synergy has been shown to be possible, and sometimes to occur, in both the Australian and the Canadian systems. Despite the differences between, none is necessarily determinative, although each is influential. This is not just a gestalt approach (which would see the whole as irreducible to the sum of its parts) but a recognition and identification of those parts, and appreciating how they may produce effects which are more than the

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[12] See, for example, Hon Michael Kirby, "Medical Technology and the New Frontiers of Family Law" (1987) 1 Australian Journal of Family Law 196.

[13] Martti Koskenniemi: From Apology to Utopia: The Structure of International Legal Argument (1989, Finnish Lawyers' Publishing Company, Helsinki), p.498.

mere sum of the combination. Education is an essential first step to such an appreciation and to increased possibilities for synergy. But in neither Canada nor Australia is Human Rights (as opposed to various forms of constitutional studies) a compulsory part of any educational program, including legal education. Human rights must be an essential component to start a process whereby we can produce a bench, a bar, a legal academy, and a populace, which can combine passion with reason and reasonableness, and have both a grasp of history and a vision for the future, so that in our legal systems we can induce synergy with international human rights norms. Given the drawbacks, the synergistic equation 1 + 1 = 3 may prove to be unattainable. But 1 + 1 = 2½ may be more feasible.

The rest is up to us.

SELECT BIBLIOGRAPHY

I. PRIMARY SOURCES

A) INTERNATIONAL

1) TREATIES, RESOLUTIONS AND DECLARATIONS

Convention on the Elimination of All Forms of Discrimination Against Women (1979) UNTS Vol.1249, p.13

Convention on the Nationality of Married Women (1957) UNTS Vol.309, p.65

Convention on the Political Rights of Women (1952) UNTS Vol.193, p.135

Convention on the Prevention and Punishment of the Crime of Genocide (1948) UNTS, Vol.78, p.277

Convention on the Reduction of Statelessness (1961) UNTS Vol.989, p.175

Convention on the Rights of the Child (1989) Official Records of the General Assembly A/RES/44/25

Convention relating to the Status of Refugees (1951) UNTS, Vol.189, p 137

Convention Relating to the Status of Stateless Persons (1954) UNTS 360, p.130

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment UN Resol. 36/46 (10 December, 1984), General Assembly Official Records A/RES/39/46, Supplement No.51 (A/39/51), p.197

European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) UNTS Vol.213, p.221

ILO Convention No.111 (Concerning Discrimination in Respect of Employment and Occupation) (1958) UNTS Vol.362, p.31

ILO Convention No. 156 (Concerning Workers with Family Responsibilities) (1981) Cmnd. 8773

ILO Convention No. 158 (Concerning Termination of Employment at the Initiation of the Employer) (1982) Cmnd. 9078

International Covenant on Civil and Political Rights (1966) UNTS Vol.999, p.171

International Covenant on Economic, Social and Cultural Rights (1966) UNTS Vol.993, p.3

International Convention on the Suppression and Punishment of the Crime of Apartheid (1973) UNTS 1015, p.243

International Convention on the Elimination of All Forms of Racial Discrimination (1965) UNTS Vol.660, p.195

Protocol Relating to the Status of Refugees (1967) UNTS Vol.606, p.267

Slavery Convention (1926) as amended by 1953 Protocol UNTS Vol.212, p.17

Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery (1956) UNTS Vol.266

Universal Declaration of Human Rights in 1948 3 UNGAOR 962 (1948). Res. 217 III (C): UN Doc E/1371 Supp. 20 (A/2119). p.36

Vienna Convention on the Law of Treaties 1969, A/CONF.39/27 (1969)

Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (G.A. Resol. 36/55, November 25, 1981), UN Doc. A/RES/36/55 (1981)

Declaration on the Elimination of Violence Against Women (G.A. Resol. 48/104, December 20, 1993).

Declaration on the Rights of the Child (1959), GA Resol. 1386 (XIV) (November 20, 1959)

Declaration on the Rights of Mentally Retarded Persons (1971), GA Resol. 2856 (XXVI) (December 20, 1971)

Declaration on the Rights of Disabled Persons (1975), GA Resol. 3447 (December 9, 1975)

"Paris Principles" adopted at the first international meeting of National Human Rights Institutions: UN Doc A/48/340, Annex (1991)

2) CASES AND DECISIONS

Administrative Decision No.V. (1924) R.I.A.A. 119

Advisory Opinion on The Legal Consequences of the Continued Presence of South Africa in Namibia, I.C.J. Reps, 1971, 16

Advisory Opinion on the Minority Schools in Albania P.C.I.J. Rep. Ser. A/B (1935) 64

A.D. v Canada (Communication No. 78/1980), A/39/40/1984

A.R.S. v Canada, Communication No.91/1981

Ballantyne, Davidson and McIntyre v Canada Communications Nos. 359/89 and 385/89 (1993) 14 Human Rights Law Journal 171

Decisions of the Human Rights Committee under the Optional Protocol, Vol. 2, UN Doc. CCPR/C/OP/2, pp.112-16

Belilos v Switzerland Eur. Ct. H.R., Series A, Vol.132 (judgement of April 20, 1988).

Bhinder v Canada, Communication no. 208/1986 [1989-90] CHRY 306

Case Concerning Military and Paramilitary Activities in and Against Nicaragua ICJ Reports 1986, p.14.

C.F et al v Canada Communication No. 113/1981: Selected Decisions of the Human Rights Committee under the Optional Protocol (Seventeenth to Thirty-second Sessions), Vol.2, UN Doc. CCPR/C/OP/2, pp.13-17.

Chitat Ng v Canada Communication No.469/1991

Handyside v United Kingdom (1978-9) 1 EHRR 737

J.B. et al v Canada (Alberta Union Case) Communication No. 118/1982, Selected Decisions of the Human Rights Committee under the Optional Protocol, Vol. 2, UN Doc. CCPR/C/OP/2, pp.34-39

J.K. v Canada GAOR 40th Session, UN Doc. A/40/40, p.215

Tahir Hussain Khan v Canada Communication No. 15/1994, UN Doc.

CAT/C/13/D/15/1994

Kindler v Canada Communication No. 470/1991

Lovelace v Canada Communications No. 24/1977, Selected decisions of the Human Rights Committee under the Optional Protocol, Vol.1 (1985, New York), CCPR/C/OP/1, p.38

Lubicon Lake Band v Canada (Communication No. 167/1984, decision of 26 March, 1990, reproduced in (1990) 11 Human Rights Law Journal 305)

MacIsaac v Canada Communication No. 55/1979, Selected Decisions of the Human Rights Committee under the Optional Protocol, Vol. 2, UN Doc. CCPR/C/OP/2, p.87

Maroufidou v Sweden [1981-2] 2 YHRC 385

Mikmaq Tribal Society v Canada Communication No. 205/1986

Pinkey v Canada, Report of the Human Rights Committee, GAOR 37th Session, UN Doc. A/37/40, p.101;

South-West Africa Case (Ethiopia v South Africa; Liberia v South Africa) ICJ Reports 1962, Preliminary Objections, p.356

South West Africa Case(Second Phase), I.C.J. Reps, 1966, 34

Sunday Times v United Kingdom 2 EHRR 245

Taylor & Western Guard Party v Canada A/38/40, 231 (1983)

Toonen v Australia, Communication No.488/1992, UN Doc. (CCPR/C/50/D'488/1992)

US Diplomatic and Consular Staff in Tehran Case (US v Iran), ICJ Reports 1980, p.3

Van Duzen v Canada Communication No. 50/1979, Selected decisions under the Optional Protocol (Second to Sixteenth Sessions (1985, United Nations, New York), UN Doc. CCPR/C/OP/1, pp.118-21

B) DOMESTIC

1) AUSTRALIAN LEGISLATION

Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975 (Cth)

Administrative Decisions (Effect of International Instruments) Bill 1995 (No. 15, 1995) (Cth)

Affirmative Action (Equal Employment Opportunity For Women) Act 1986 (Cth)

Anti-Discrimination Act 1991 (Qld)

Anti-Discrimination Act 1977 (NSW);

Anti-Discrimination Act 1992 (NT)

Australian Bill of Rights Bill 1985 (Cth)

Bill of Rights Bill 1993 (Qld)

Commonwealth of Australia Constitution Act (63 & 64 Vict. c.12)

Communist Party Dissolution Act 1950 (Cth)

Constitutional Alteration (Aboriginals) Act 1967 (Cth)

Constitution Alteration (Fair Elections) Bill 1988 (Cth)

Constitution Alteration (Local Government) Bill 1988 (Cth)

Constitution Alteration (Rights and Freedoms) Bill 1988 (Cth)

Crimes (Torture) Act 1988 (Cth)

Disability Discrimination Act 1992 (Cth)

Discrimination Act 1991 (ACT)

Electricity (Continuity of Supply) Act 1985(Qld)

Equal Opportunity Act 1984 (SA)

Equal Opportunity Act 1984 (Vic)

Equal Opportunity Act 1984 (WA)

Human Rights and Equal Opportunity Commission Act 1986 (Cth)

Human Rights (Sexual Conduct) Bill, 1994 (Cth)

Industrial Relations Reform Act 1993 (Cth)

Industrial Relations Reform Act 1994 (Qld)

International Labour Organisation (Compliance with Conventions) Act 1992 (Cth)

Legislative Standards Act 1992 (Qld)

Migration Act 1958 (Cth)

Native Title Act 1993 (Cth)

Polynesian Labourers Act 1868 (Qld)

Pacific Islanders Protection Act 1872 (35 & 36 Vic. c.19, as amended by 38 & 39 Vic. c.51, 46 & 47 Vic. c.39, 56 & 57 Vic. c.54 and 61 & 62 Vic. c.22)

Pacific Island Labourers Acts, 1880-86 (44 Vic. No. 17, 47 Vic. No. 12, 49 Vic. No. 17 and 50 Vic. No. 6.)

Pacific Island Labourers Act 1906, No. 22 of 1906

Pitjantjatjara Land Rights Act 1981 (S.A.)

Political Broadcasts and Political Disclosures Act 1991

Privacy Act 1988 (Cth)

Racial Discrimination Act 1975 (Cth)

Sex Discrimination Act 1984 (Cth)

Sex Discrimination Act 1975 (S.A.)

Sex Discrimination Act 1995 (Tas)

War Crimes Act (Cth)

2) CANADIAN LEGISLATION

Act Respecting Communistic Propaganda S.Q. 1937

Alberta Bill of Rights R.S.A. 1980, c.A-8.

An Act Respecting the Constitution Act 1982 S.Q. 1982, c.21

British Columbia Human Rights Act S.B.C. 1984, c.22

Canada Act 1982

Canadian Bill of Rights 1960 S.C. 1960, c.44

Canadian Human Rights Act R.S.C. 1985, c.H-6

Constitution Act 1982

Constitution Act 1867

Fair Practices Act R.S.N.W.T. 1988, c.F-2

Indian Act R.S.C. 1970, ch. I-6

Manitoba Human Rights Code S.M. 1987-88, c.45

New Brunswick Human Rights Act S.N.B. 1973, c.H-11

Newfoundland Human Rights Code R.S.N. 1990, c.H-14

Nova Scotia Human Rights Act, R.S.N.S. 1989, c.214

Official Languages Act 1969

Ontario Human Rights Code R.S.O. 1990, c.H.19

Prince Edward Island Human Rights Act R.S.P.E.I. 1988, c.H-12

Quebec Charter of Rights and Freedoms R.S.Q. 1977, c.C-12

Racial Discrimination Act R.S.O. 1944, c.51

Saskatchewan Bill of Rights Act S.S. 1947, c.35

Saskatchewan Human Rights Code R.S.S. 1979, c.S-24.1

War Measures Act R.S.C. 1970, ch. W-2

Yukon Human Rights Act, S.Y. 1987, c.3

3) OTHER LEGISLATION

a) United Kingdom

Act of Settlement 1701, 12 & 13 Wm.3, c.2

Bill of Rights Act 1689 An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown, 1 William & Mary c.2 [as amended by 1825 (6 Geo. 4, c.50); 1867 (30 & 31 Vict. c.59); 1888 (51 Vict. c.3); 1910 (10 Edw. 7 & 1 Geo. 5 c.29); 1948 (11 & 12 Geo. 6 c.62); and 1950 (14 Geo. 6 c.6)]

British North America Act 1867 30 & 31 Victoria, c.3 (UK)

Habeas Corpus Act 1640 16 Car. I, c.10 (UK)

Habeas Corpus Act 1679 31 Charles II, c.2

Habeas Corpus Act 1803 43 Geo. 3, c.140

Habeas Corpus Act 1816 56 Geo. 3, c.100

Magna Carta 1215

Petition of Right 3 Charles I, c.1, s.5 (1628) (UK)

Slave Trade Act 51 Geo. 3, c.23

Toleration Act 1689 1 Will. & Mary, c.18

b) United States

Declaration of Independence 1776

Constitution of the United States 1787

c) France

Declaration of the Rights of Man and the Citizen 1789

4) AUSTRALIAN CASES

Aboriginal Students' Support and Parents Awareness Committee, Traeger Park Primary School, Alice Springs v Minister for Education, Northern Territory (1992) EOC 92-415

Aboud v Attorney-General (1987) 10 NSWLR 671

Adamopoulos v Olympic Airways S.A. (1991) 25 NSWLR 75

Adelaide Company of Jehovah's Witnesses Incorporated v The Commonwealth (1943) 67 CLR 116

Air Caledonie International v The Commonwealth (1988) 165 CLR 462

Airlines of NSW Pty Ltd v New South Wales (No. 2) (1965) 133 CLR 54

Aldridge v Booth (1988) EOC 92-222

A.L.R.M. v State of South Australia & Anor (1995) EOC 92-759

Amalgamated Society of Engineers v Adelaide Steamship Co. Ltd. (the Engineers' case) (1920) 28 CLR 129

AMP Society v Goulden & Ors (1986) 160 CLR 330

Ansett Transport Industries (Operations) Pty Ltd v Commonwealth (1977) 139 CLR 54

Ansett Transport Industries (Operations) Pty Ltd v Wardley (1980) 142 CLR 237

Ansett Transport Industries (Operations) Pty Ltd v Australian Federation of Air Pilots [1991] 1 V.R. 637

Attorney-General (NSW) v Quin (1990) 170 CLR 1

Attorney-General Ex Rel McKinlay v Commonwealth (1975) 135 CLR 1

Attorney-General for Victoria Ex Rel Black v Commonwealth (1981) 146 CLR 559

Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd (1988) 165 CLR 30

Australian Capital Television Pty Ltd v The Commonwealth (1992) 66 ALR 695

Australian Communist Party v Commonwealth (1951) 83 CLR 1

Australian Conservation Foundation Inc v The Commonwealth (1980) 146 CLR 493

Australian Iron & Steel Pty Ltd v Banovic & Anor (1989) EOC 92-271

Ballina Shire Council v Ringland (1994) 33 NSWLR 680

Bank of NSW v Commonwealth (Bank Nationalisation Case) (1948) 76 CLR 1

Bluett v Fadden (1956) 56 S.R. (NSW) 254

Boehringer Ingelheim Pty Ltd v Reddrop (1984) EOC 92-108

Bradley v Commonwealth (1973) 128 CLR 557

Brandy v Human Rights and Equal Opportunity Commission (1995) 69 ALJR 191

Building Construction Employees and Builders Labourers Federation v Minister for Industrial Relations (1986) 7 NSWLR 372

Burns v Ransley (1949) 79 CLR 101

Cachia v Hanes (1991) 23 NSWLR 304

Chief General Manager, Department of Health v Aramugam (1987) EOC 92-195

Chow Hung Ching v R (1949) 77 CLR 449

Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs (1992) 67 ALR 125

Church of the New Faith v Commissioner of Payroll Tax (Victoria) (1983) 154 CLR 121

Clunies-Ross v Commonwealth (1984) 155 CLR 193

Coe v The Commonwealth (1979) 53 ALJR 408

Coe (on behalf of the Wiiradjuri tribe) v The Commonwealth (No. 2) (1993) 118 ALR 193

Cole v Whitfield (1988) 62 ALJR 303

Commonwealth v Tasmania and Ors (1983) 46 ALR 625

Cocks v State of Queensland (1994) EOC 92-612

Cunliffe v The Commonwealth (1994) 68 ALJR 791

Dao & Anor v Australian Postal Commission (1987) 162 CLR 317

Davis and Others v The Commonwealth of Australia (1988) 166 CLR 79

Dietrich v R. (1992) 177 CLR 292

Dugan v Mirror Newspapers (1978) 142 C.L.R. 583

Eastgate v Rozzoli (1990) 20 NSWLR 188

Environment Protection Authority v Caltex Refining Co Pty Ltd (1993) 178 CLR 477

Gerhardy v Brown (1985) 159 CLR 70

Grace Bible Church v Reedman (1984) 36 SASR 376

Gradidge v Grace Bros Pty Ltd (1988) 93 FLR 414

Hall v Schieban (1988) EOC 92-227;(1989) EOC 92-250

Heshmati v Minister for Immigration, Local Government and Ethnic Affairs (1991) 102 ALR 376

Horne v Press Clough Joint Venture (1994) EOC 92-556

Horta v Commonwealth (1994) 181 CLR 183

Ingram v The Commonwealth of Australia and Another (1980) 54 ALJR 395

In the marriage of C and D (1979) FLC 90-636

In the marriage of Firth and Firth (1988) FLC 91-971

In Re Elizabeth (1989) FLC 92-023

In Re Jane (1989) FLC 92-007

In Re Marion (1991) FLC 92-193

In Re a Teenager (1989) FLC 92-006

In Re S (1990) FLC 92-124.

Jago v District Court (1988) 12 NSWLR 558, (1989) 168 CLR 23

John Fairfa. Publications Pty Ltd v Doe (1995) 130 ALR 488

Kioa and Others v Minister for Immigration and Ethnic Affairs (1985) 62 ALR 321

Koowarta v Bjelke-Petersen and Others (1982) 153 CLR 168

Langer v Commonwealth of Australia & Ors (1996) 134 ALR 400

Leeth v The Commonwealth (1992) 66 ALJR 529

Mabo and Another v The State of Queensland and Another (Mabo No.1) (1988) 166 CLR 186

Mabo v The State of Queensland (No.2) (1992) 107 ALR 1

Magro v State Transit Authority of New South Wales (1995) EOC 92-718

Marshall v Marshall White & Co Pty Ltd (1990) EOC 92-304

McGinty & Ors v State of Western Australia (1996) 134 ALR 289

McInnis v R (1979) 143 CLR 575

Melbourne Corporation v Commonwealth (1947) 74 CLR 31

Milirrpum v Nabalco Pty Ltd and Commonwealth (1971) 17 FLR 141

Minister for the Army v Dalziel (194 68 CLR 261

Minister for Foreign Affairs and Trade & Others v Magno & Another (1993) 112 ALR 529

Minister for Immigration and Ethnic Affairs v Ah Hin Teoh (1994) 121 ALR 436; (1995) 128 ALR 353

Nationwide News Pty Ltd v Wills (1992) 66 ALJR 658

Ngoc Tri Chau v Director of Public Prosecutions (Cth) (1995) 132 ALR 430

O'Callaghan v Loder (1984) EOC 92-023

Polites v Commonwealth (1945) 70 CLR 60

Polyukhovich v Commonwealth (1991) 172 CLR 501

Proudfoot v ACT Board of Health (1992) EOC 92-417

Queensland v Commonwealth (1989) 63 ALJR 473

Queensland Electricity Commission v Commonwealth (1985) 159 CLR 192

R. v Burgess; Ex parte Henry (1936) 55 CLR 618

R. v Carter; ex parte Kisch (1934) 52 C.L.R. 221

R v Fletcher; ex parte Kisch (1935) 52 C.L.R. 248

R v Poole; Ex parte Henry (No. 2) (1938) 61 CLR 634

Re Limbo (1990) 64 ALR 241

Re Loubie [1986] 1 Qd R 272

Richardson v Forestry Commission (1988) 164 CLR 261

Sajdak and Sajdak (1993) FLC 92-348

Salemi v Minister for Immigration and Ethnic Affairs (No. 2) (1977) 14 ALR 1

Sankey v Whitlam (1978) 142 CLR 1

Secretary, Department of Health and Community Services v JWB and SMB (1992) FLC 92-293

Secretary, Department of Foreign Affairs and Trade & Anor v Styles & Anor (1989) EOC 92-265

S & M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd (1988) 12 NSWLR 358

Stephens v West Australian Newspapers Ltd (1994) 68 ALJR 765

Street v Queensland Bar Association (1989) 168 CLR 461

Tarumi v Bankstown City Council (1987) EOC 92-214

Tasmania Wilderness Society Inc v Fraser (1982) 153 CLR 270

Theophanous v Herald & Weekly Times Ltd (1994) 68 ALJR 713
The State of Western Australia v The Commonwealth (1995) 128 ALR 1

Tully v Ceridale Pty Ltd (1990) EOC 92-319

Union Steamship Co of Australia Pty Ltd v King (1988) 166 CLR 1

Victoria Park Racing and Recreational Grounds Club Co Pty Ltd v Taylor (1937) 58 C.L.R. 479.

Viskauskas & Anor v Niland (1983) 57 ALJR 414

Walker v The State of New South Wales (1994) 182 CLR 45

Waters v The Public Transport Corporation of Victoria (1991) 173 CLR 349

Waterhouse v Bell (1991) EOC 92-376

Wilson v Qantas Airways Ltd (1985) EOC 92-141

X v Department of Defence (1995) EOC 92-715

Young v Registrar, Court of Appeal [No. 3] (1993) 32 NSWLR 262

5) CANADIAN CASES

Andrews v Law Society of British Columbia [1989] 1 SCR 143

Attorney-General of British Columbia v Craig (1984) 8 DLR (4th) 156

Attorney-General (Canada) v Inuit Tapirisat of Canada (1980) 115 DLR (3d) 1

Attorney-General of Canada v Jeanette Lavell, Richard Isaac et. al. v Yvonne Bedard [1974] S.C.R. 1349

Attorney-General for Canada v Canard [1976] 1 SCR 170

Attorney-General for Canada v Dupond (1978) 84 DLR (3d) 420

Attorney-General of Canada v Lavell (1974) 34 DLR (3d) 418

Bhinder et al v Canadian National Railway co (1985) 23 DLR (4th) 481

Bliss v Attorney-General of canada [1979] 1 SCR 183

British Columbia Government Employees' Union v British Columbia [1988] 2 SCR 214

Capital Cities Communications Inc v C.R.T.C. (1977) 81 DLR (3d) 609 (SCC)

Christie v The York Corporation [1940] SCR 139

Edmonton Journal v Attorney-General for Alberta (1989) 64 DLR (4th) 577

Edwards v Attorney-General of Canada [1930] AC 124

Edwards books and Art Ltd v The Queen (1986) 35 DLR (4th) 1

Ford v Attorney-General of Quebec [1988] 2 SCR 712

Haig v Canada (1992) 94 DLR (4th) 1

Hunter v Southam Inc. [1984] 2 SCR 145

In the Matter of Legislative Jurisdiction over Hours of Labour [1925] SCR 505

Irwin Toy Ltd v Quebec (Attorney-General) (1989) 1 SCR 927

Law Society of Upper Canada v Skapinker (1984) 9 DLR (4th) 161

Levesque v Attorney-General of Canada (1986) 25 DLR (4th) 184

MacBain v Lederman [1985] 1 FC 856

McCann v The Queen (1975) 68 DLR (3d) 661

Morgentaler v The Queen (1988) 44 DLR (4th) 385

Ontario Human Rights Commission and O'Malley v Simpsons-Sears Ltd [1985] 2 SCR 536

Operation Dismantle v The Queen [1985] 1 SCR 441

Public Service Alliance of Canada v The Queen in Right of Canada (1984) 11 DLR (4th) 337; [1987] 1 SCR 460

Reference re Amendment of the Constitution of Canada (Nos. 1, 2 & 3) (1981) 125 DLR 1 (SCC)

R v Big M Drug Mart [1985] 1 SCR 295

R v Burnshine [1975] 1 SCR 693 per Laskin J;

R v Drybones (1970) 9 DLR (3d) 473

R v Finta (1989) 61 DLR (4th) 85

R v Keegstra (1990) 2 SCR 727

R v Konechny [1984] 2 WWR 481

R v Kopyto (1987) 39 CCC (3d) 1

R v Mills [1986] 1 SCR 963

R v Oakes (1986) 26 DLR (4th) 200

R v Rahey [1987] 1 SCR 588

R v Salituro [1991] 3 SCR 654

R v Therens [1985] 1 SCR 613

R v Videoflicks Ltd (1984) 14 DLR (4th) 10

Re Alberta Union of Provincial Employees and The Crown in Right of Alberta (1981) 120 DLR (3d) 590

Re Arrow River and Tributaries Slide and Boom Co [1932] 2 DLR 250

Re Attorney-General of Quebec and Attorney-General of Canada (1982) 140 DLR (3d) 385

Re Blainey and Ontario Hockey Association (1986) 2 DLR (4th) 728

Re Drummond Wren [1945] 4 DLR 674

Re Luscher and Deputy Minister, Revenue Canada (1985) 17 DLR (4th) 503

Re Mitchell and the Queen (1983) 150 DLR (3d) 449

Re Noble and Wolf [1948] 4 DLR 123

Re Objection by Quebec to Resolution to Amend the Constitution [1982] 2 SCR 793

Re Powers to Levy Rates on Foreign Legations [1943] SCR 208

Re the Regulation and Control of Aeronautics in Canada [1932] AC 54

Re Retail, Wholesale & Department Store Union, Locals 544, 496, 635 and 955, and the Government of Saskatchewan (1985) 19 DLR (4th) 609; [1987] 1 SCR 424

Re Service Employees' International Union, Local 204 and Broadway Manor Nursing Home (1983) 4 DLR (4th) 231; [1987] 1 SCR 313

Re Winnipeg School Division No.1 and Craton, et al (1985) 21 DLR (4th) 1

Reference as to the Meaning of the Word "Persons" in Section 24 of the British North America Act 1867 [1928] SCR 276

Reference re Alberta Legislation [1938] SCR 100

Reference re French Language Rights of Accused in Saskatchewan Criminal Proceedings [1987] 5 WWR 577

Reference re Public Service Employee Relations Act (Alberta) [1987] 1 SCR 313

Reference re the Regulation and Control of Radio Communication [1932] AC 304

Reference re s.94(2) of the Motor Vehicle Act (BC) (1985) 24 DLR (4th) 536

References re the Weekly Rest in Industrial Undertakings Act, the Minimum Wages Act and the Limitation of Hours of Work Act (1936) 3 DLR 673

Retail, Wholesale and Department Store Union v Dolphin Delivery Ltd [1986] 2 SCR 573

Robertson and Rosetanni v The Queen (1964) 41 DLR (2d) 485

Roncarelli v Duplessis [1959] SCR 121

Saumur v City of Quebec [1953] 2 SCR 299

Schachter v Canada (1992) 93 DLR (4th) 1

Singh v Minister of Employment and Immigration [1985] 1 SCR 177

Slaight Communications v Davidson [1989] 1 SCR 1038

Smith v R. [1987] 1 S.C.R. 1045

Smythe v The Queen [1971] SCR 680

Switzman v Elbing & Attorney-General of Quebec [1957] SCR 286

Union Colliery v Bryden [1899] AC 580

Whitfield v Canadian Marconi Co (1968) 68 DLR (2d) 251

6) ENGLISH CASES

Attorney-General for Canada v Attorney-General for Ontario [1937] A.C. 236

Bonham's Case 8 Co. Rep. 117b-118b (1610)

Chung Chi Cheung v The King [1939] AC 160

Civilian War Claimants Association v R [1932] AC 14

Darcy v Allin (1598) 74 E.R. 1131

Darnel's Case 3 S.T. 1 (1627)

Day v Savadge 80 E.R. 235 (1614)

Derbyshire County Council v Times Newspapers Limited [1992] QB 770

Doctor Bonham's Case (1609)

Entick v Carrington 19 State Trials 1030 (1765)

Grace's (Slave) Case [1827] 2 Hag. Adm. 94

In re Southern Rhodesia [1919] AC 211

Le Louis (1817) 2 Dods 210

Liyanage v The Queen [1967] 1 A.C. 259

MacCormick v Lord Advocate 1953 Sessions Cases 396

Malone v Metropolitan Police Commissioner [1979] Ch 344

Oppenheimer v Cattermole (Inspector of Taxes) [1976] A.C. 249

Prohibitions del Roy 12 Co. Rep. 63 (1607)

R. v Dudley and Stephens (1884) 14 Q.B.D. 273; [1881-5] All E.R. 61

R v Keyn (1976) 2 Ex. D. 63

R v Secretary of State for the Home Department; Ex parte Brind [1991] 2 WLR 588; (HL) [1991] 1 AC 696

R v Secretary of State for the Home Department; Ex parte The Parlement Belge (1879 4 P.D. 129

The State (Ryan and others) v Lennon and others [1935] Ir. R. 170

Thrakar [1974] 1 QB 684

Ship Money Case (1637) 3 State Tr. 836

Somerset v. Stewart 98 E.R. 499

Thai-Europe Tapioca Service v Government of Pakistan [1975] 1 WLR 1485

Trendtex Trading Corporation v Central Bank of Nigeria [1977] QB 529

Triquet v Bath 96 E.R. 936

The Zong (Gregson v. Gilbert (1783) 3 Doug KB 232)

II. SECONDARY SOURCES

A) BOOKS

Allott, Philip : Eunomia: New Order for a New World (1990, Oxford U.P., Oxford)

Alston, Philip (ed): Towards an Australian Bill of Rights (1994, Centre for International and Public Law/Human Rights and Equal Opportunity Commission, Canberra)

Alston, Phillip (ed): The United Nations and Human Rights: A Critical Appraisal (1992, Clarendon Press, Oxford)

Alston, Phillip & Madelaine Chiam (eds): Treaty-Making and Australia: Globalisation vs Sovereignty? (1995, Federation Press, Sydney)

Altman, Andrew: Critical Legal Studies: A Liberal Critique (1990, Princeton U.P., Princeton)

An-Na'im, Abdullahi Ahmed (ed): Human Rights in Cross-Cultural Perspectives: A Quest for Consensus (1992, U. of Pennsylvania Press, Philadelphia)

Anderson, Walter Truett (ed): The Truth About the Truth (1995, G.P. Putnam's Sons, New York)

Aristotle Politics (trans. T.A.Sinclair, 1926, Penguin Books, London)

Bailey, Peter: Human Rights: Australia in an International Context (1990, Butterworths, Sydney)

Baker, Herschel : The Image of Man: A Study of the Idea of Human Dignity in Classical Antiquity, the Middle Ages and the Renaissance (1947, reprinted in 1961, Harper & Row, New York)

Bayefsky, Anne: Canada's Constitution Act 1982 and Amendments: A Documentary History (1989, McGraw-Hill Ryerson, Toronto)

Bayefsky, Anne: International Human Rights Law: Use in Canadian Charter of Rights and freedoms Litigation (1992, Butterworths, Toronto)

Beatty, David (ed): Human Rights and Judicial Review: A Comparative Perspective (1994, Martinus Nijhoff, Dordrecht)

Beaudoin, G A. & Ratushny (eds): The Canadian Charter of Rights and Freedoms 2nd ed (1989, Wilson & Lafleur, Montreal)

Becet, Jean-Marie & Colard, Daniel: Les droits de l'Homme (1982, Economica, Paris)

Benn, S.I. & G.F. Gaus (eds): Public and Private in Social Life (1983, Croom Helm, London)

Bernhardt, R. (ed): Encyclopedia of Public International Law (published under the auspices of the Max Planck Institute), Vol. 7 (1984, North-Holland Publishing, Amsterdam)

Bossuyt, Marc J.: Guide to the Travaux Préparatoires of the International Covenant on Civil and Political Rights (1987, Martinus Nijhoff, Dordrecht)

Bowen, Catherine Drinker The Lion and the Throne: The Life and Times of Sir Edward Coke (1956, Little, Brown & Co., Boston)

Bowring, John (ed) : Anarchical Fallacies, Jeremy Bentham, Works (1962, rep by Russell & Russell, New York)

Boyle,J: Critical Legal Studies (1992, Dartmouth Publishing, Aldershot)

Boyne, R. & Rattansi, A. (eds): Postmodernism and Society (1990, Macmillan, London)

Brodsky, Gaven & Day, Shelagh: Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back (1989, Canadian Advisory Council on the Status of Women, Ottawa)

Bronowski, J.: The Ascent of Man (1973, BBC, London)

Bronowski, J. & Mazlish, Bruce : The Western Intellectual Tradition: From Leonardo to Hegel (1960, Harper & Brothers, New York)

Brown, Henry Phelps : Egalitarianism and the Generation of Inequality (1988, Clarendon Press, Oxford)

Buergenthal, Thomas : International Human Rights Law (1988, West Publishing, St Paul)

Burgers, J.Herman & Danelius, Hans: The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel,

Inhuman or Degrading Treatment or Punishment (1988, Martinus Nijhoff Publishers, Dordrecht)

Burgess, Michael (ed): Canadian Federalism: Past, Present and Future (1990, Leicester U.P., Leicester)

Butler, W.E.: International Law in Comparative Perspective (1980, Sijthoff & Noordhoff, Netherlands)

Butler, W.E.: (ed): International Law and the International System (1987, Martinus Nijhoff Publishers, Dordrecht)

Byrnes, Andrew & Chan, Johannes (eds): Public Law and Human Rights (1993, Butterworths, Hong Kong)

Cairns, Alan C.: Charter versus Federalism: The Dilemmas of Constitutional Reform (1992, McGill-Queen's University Press, Montreal)

Campbell, John Lord : The Lives of the Chief Justices of England (London, 1849)

Campbell, E. & Whitmore, H.: Freedom in Australia (1973, Sydney University Press, Sydney)

Campbell, Tom & Goldberg, David & McLean, Sheila & Mullen, Tom (eds): Human Rights: From Rhetoric to Reality (1986, Basil Blackwell, New York)

Carty, Anthony: The Decay of International Law? A Reappraisal of the Limits of Legal Imagination in International Affairs (1986, Manchester U.P., Manchester)

Cassese, Antonio : International Law in a Divided World (1986, Clarendon Press, Oxford)

Cassin, Rene: Amicorum Discipulorumque Liber I: Problemes de protection internationale des droits de l'homme (1969, Editions A. Pedone, Paris)

Cathcart, Michael (abridged) Manning Clarke's History of Australia, (1993, Melbourne U.P., Melbourne)

Cheng, Bin (ed): International Law: Teaching and Practice (1982, Stevens & Sons, London)

Chrimes, S.B.: An Introduction to the Administrative History of Medieval England (1952, Basil Blackwell, Oxford)

Chrimes, S.B.: English Constitutional Ideas in the Fifteenth Century

Clarkson, Thomas: History of the Abolition of the Slave Trade by the British Parliament, 2 vols., (1808, London)

Claude, Richard P. (ed): Comparative Human Rights (1976, Johns Hopkins U.P, Baltimore)

Claude, R.P. & Weston, B.H. (eds): Human Rights in the World Community (1989, U. Pennsylvania Press, Philadelphia)

Conklin, William E.: Images of a Constitution (1989, U. of Toronto Press, Toronto)

Conley, Marshall & Daniel Cullen: The Effects of International Human Rights Law on the Canadian Legal and Political System (1989, Acadia U. Institute, Wolfville)

Cooper-Stephenson, Ken: Charter damages Claims (1990, Carswell, Toronto)

Coper, Michael: Encounters With the Australian Constitution (1987, CCH Australia, Sydney)

Cook, Thomas I. : History of Political Philosophy from Plato to Burke (1937, Prentice-Hall, New York)

Cooray, L.J.M. (ed): Human Rights in Australia (1985, A.C.F.R. Community Education Project, Sydney)

Cornell,Drucilla & Rosenfeld, Michel & Carlson, David Grey (eds): Deconstruction and the Possibility of Justice (1992, Routledge, New York)

Cot, Jean-Pierre & Pellet, Alain: La Charte des Nations Unies - Commentaire Article par Article (1985, Economica, Paris)

Cotterrell, Roger : The Politics of Jurisprudence: A Critical Introduction to Legal Philosophy (1989, Butterworths, London)

Cover, Robert: Justice Accused: Antislavery and the Judicial Process, 1975, Yale U.P., New Haven

Cranston, Maurice: What Are Human Rights? (2nd ed., 1973, Bodley Head, London)

Crawley, C.W. (ed): The New Cambridge Modern History Vol. IX, (1975, Cambridge U.P., Cambridge).

Crossley,C. & Small, I. (eds): The French Revolution and British Culture (1989, Oxford U.P., Oxford)

Daes, Erica-Irene: Freedom of the Individual under Law - A Study on the Individual's Duties to the Community and the Limitations on Human Rights and Freedoms under Article 29 of the Universal Declaration of Human Rights (1990, United nations Publications, New York); UN Publication No. E.89.XIV.5

Dahl, Robert A.: Democracy and its Critics (1991, Yale U.P., New Haven)

D'Amato, Anthony: The Concept of Custom in International Law (1971)

D'Amato, Anthony: International Law: Process and Prospect (1977, Transnational Publishers, New York).

Davidson, Alastair & Spegele, Roger D.: Rights, Justice and Democracy in Australia (1991, Longman Cheshire, Melbourne)

Davies, Margaret Asking the Law Question (1994, Law Book Co., Sydney)

Davies, R.G. & Denton, J.H. (eds): The English Parliament in the Middle Ages (1981, Manchester U.P., Manchester)

Davis, David Brion: The Problem of Slavery in the Age of Revolution 1770-1823 (1975, Cornell U.P., Ithaca)

Davis, David Brion: The Problem of Slavery in Western Culture (1966, Cornell U.P., Ithaca)

del Russo, Alessandra Luini: International Protection of Human Rights (1971, Lerner Law Book Co., Washington)

d'Entreves, A.P. : Natural Law: An Introduction to Legal Philosophy 2nd rev. ed. (1970, Hutchinson & Co., London)

Detrick, Sharon (ed): The United Nations Convention on the Rights of the Child: A Guide to the "Travaux Preparatoires" (1992, Martinus Nijhoff Publishers, Dordrecht)

Dicey, A.V. : Introduction to the Study of the Law of the Constitution (10th ed.,

1959, Macmillan, London, reprinted from Dicey's 7th ed. of 1908)

Doeker, G: The Treaty-Making Power of the Commonwealth of Australia (1966, Nijhoff, The Hague)

Donnelly, Jack: Universal Human Rights in Theory and Practice (1989, Cornell U.P., Ithaca)

Douzinas, Costas, Warrington, Ronnie & McVeigh, Shaun: Postmodern Jurisprudence: The Law of Text in the Texts of Law (1991, Routledge, London)

Dowrick, F.E.: Human Rights: Problems, Perspectives and Texts (1979, Saxon House, Farnborough)

Dworkin, Ronald: Law's Empire (1986, Harvard U.P., Cambridge)

Dworkin, R: Taking Rights Seriously (1977, Duckworth, London)

Eide, Asbjorn, Gudmundur Alfredsson, Goran Melander, Lars Adam Rehof and Allan Rosas, with the collaboration of Theresa Swinehart (eds) :The Universal Declaration of Human Rights: A Commentary (1992 Scandinavian University Press, Oslo)

Eide, Asbjorn & Shou, August (eds): International Protection of Human Rights: Proceedings of the Seventh Nobel Symposium, Oslo, 1977 (1968, Interscience Publishers, Uppsala)

Eterovich, Francis H. : Approaches to Natural Law From Plato to Kant (1972, Exposition Press, New York)

Ezejiofor, Gaius: Protection of Human Rights Under the Law (1964, Butterworths, London).

Falk, Richard: Human Rights and State Sovereignty (1981, Holmes & Meier Publishers, New York), p.34.

Finkelstein, Neil R. & Brian MacLeod Rogers (eds): Charter Issues in Civil Cases (1988, Carswell, Toronto)

Finnis, John: Natural Law and Natural Rights (1980, Oxford U.P., Oxford)

Fish, Stanley: Is There a Text in the Class (1980, Harvard U.P., Cambridge)

Fish, Stanley: Doing What Comes Naturally: Change, Rhetoric and the Practice of

Theory in Literary and Legal Studies (1989, Oxford U.P., Oxford)

Freeden, Michael: Rights (1991, U. of Minnesota Press, Minneapolis)

Friedmann, W : Legal Theory 5th ed. (1967, Columbia U.P., New York)

Friedrich, Carl J. (ed): Nomos IV: Liberty,(1962, Atherton Press, New York)

Gaete, Rolando: Human Rights and the Limits of Critical Reason (1993, Dartmouth, Aldershot)

Galligan, Bryan: Politics of the High Court: A Study of the Judicial Branch of Government in Australia (1987, Queensland U.P., St. Lucia)

Galligan, Brian (ed): Australian Federalism (1989, Longman Cheshire, Melbourne)

Gaus, Gerald. F.: The Modern Liberal Theory of Man (1983, Croom Helm, London)

Gaze, Beth & Jones, Melinda: Law, Liberty and Australian Democracy (1990, Law Book Co., Sydney)

Gewirth, Alan: Human Rights: Essays on Justification and Applications (1982, U. Chicago Press, Chicago)

Ghosh, Ramesh Chandra: Treaties and Federal Constitutions: Their Mutual Impact (1961, The World Press Private Ltd, Calcutta)

Gibson, Dale: The Law of the Charter: General Principles (1986, Carswell, Scarborough)

Gilbert, Christopher: Australian and Canadian Federalism 1867-1984 (1986, Melbourne U.P., Melbourne)

Goodrich,L.M., Hambro, E. & Simons, A.P.: Charter of the United Nations - Commentary and Documents 3rd rev. ed. (1969, Columbia U.P., New York)

Gotlieb, A.E.: Canadian Treaty Making (1963, Butterworths, Toronto)

Glendon, Mary Anne: Rights Talk: The Impoverishment of Political Discourse (1991, The Free Press, New York)

Gough, J.W.: Fundamental Law in English Constitutional History (1971, Clarendon Press, Oxford)

Gough, J.W.: Fundamental Law in English Constitutional History (1977 reprint with corrections of the 1955 edition, Clarendon Press, Oxford)

Gough, J.W.: John Locke's Political Philosophy (1973, Clarendon Press, Oxford)

Gough, J.W.: The Social Contract: A Critical study of Its Development (1957, Clarendon Press, Oxford)

Graycar, R. & Morgan, J.: The Hidden Gender of Law (1990, Federation Press, Sydney).

Gregory, Jeanne: Sex, Race and the Law: Legislating for Equality (1987, Sage Publications, London)

Greig, D.W.: International Law 2nd ed (1976, Butterworths, London)

Haines, Charles Grove : The Revival of Natural Law Concepts (1930, Harvard U.P., Cambridge)

Hale, J.R.: Renaissance Europe (1971, Collins, London)

Hanks, P.J.: Australian Constitutional Law: Materials and Commentary 4th ed (1990, Butterworths, Sydney)

Harper, Norman & Sissons, David: Australia and the United Nations (1959, Manhattan Publishing Co., New York)

Harpham, Edward J. (ed): John Locke's Two Treatises of Government: New Interpretations (1992, University Press of Kansas, Kansas City)

Harrison, Ross: Bentham (1983, Routledge & Kegan Paul, London)

Hegel, G.W.F. : Philosophy of Right (trans. T.M. Knox) (1967, Clarendon Press, Oxford)

Henkin, Alice : Human Dignity: The Internationalization of Human Rights (1979, Oceana, Dobbs Ferry, New York)

Henkin, Louis : The Rights of Man Today (1979, Stevens and Sons, London)

Henkin, Louis: The International Bill of Rights: The Covenant on Civil and Political Rights (1981, Columbia U.P., New York)

Hannum, Hurst (ed): Guide to International Human Rights Practice (1984,

University of Pennsylvania Press, Philadelphia)

Higgins, Rosalyn: The Development of International Law through the Political Organs of the United Nations (1963)

Hobbes, Thomas Leviathan-"The Matter, Form and Power of a Commonwealth, Ecclesiastical and Civil" Everyman ed. (1914, 1962 reprint, J.M. Dent & Sons, London)

Hocking, Barbara: International Law and Aboriginal Human Rights (1988, Law Book Co., Sydney)

Hodgins, Bruce W. et al (eds): Federalism in Canada and Australia: Historical Perspectives, 1920-1988 (1989, The Frost Centre for Canadian Heritage & Development Studies, Trent University, Peterborough, Canada)

Hogg, Peter: Constitutional Law of Canada, 3rd ed (1992, Carswell, Scarborough)

Holmes, John W.: The Shaping of Peace: Canada and the Search for World Order 1943-57 (1979, U. of Toronto Press, Toronto)

Holt, J.C.: Magna Carta and Medieval Government (1985, The Hambledon Press, London)

Hughes, Robert: The Fatal Shore: A History of the Transportation of Convicts to Australia, 1787-1868 (1987, Collins Harvill, London)

Humphrey, John: No Distant Millenium: The International Law of Human Rights (1989, UNESCO, Paris),

Humphrey, John : Human Rights and the U.N.: A Great Adventure (1984, Transnational Publishers, New York)

Hunter, Rosemary: Indirect Discrimination in the Workplace (1992, Federation Press, Sydney)

Iwe, Nwachukwuike S.S.: The History and Contents of Human Rights: A Study of the History and Interpretation of Human Rights (1986, Peter Lang, New York)

Jacomy-Millette, A.: Treaty Law in Canada (1975, U. of Ottawa Press, Ottawa)

Janis, Mark W. The Influence of Religion on the Development of International Law (1991, Martinus Nijhoff, Dordrecht)

Jellinek, Georg: The Declaration of the Rights of Man and of Citizens - A Contribution to Modern Constitutional History (translated from the German by Max Farrand, 1901, H. Holt, New York; reprinted 1979, Hyperion Press, Westport)

Johnson, Paul: The Birth of the Modern: World Society 1815-1830 (1991, Harper Collins, New York)

Johnson, Barbara (ed): Freedom and Interpretation: The Oxford Amnesty Lectures 1992 (1993, Basic Books, New York)

Johnston, Richard E.: The Effect of Judicial Review on Federal-State Relations in Australia, Canada and the United States (1969, Louisiana State U.P., Baton Rouge)

Joyce, J.A.: The New Politics of Human Rights (1978, Macmillan, London)

Kairys, David (ed): The Politics of Law: A Progressive Critique (1982, Pantheon, New York)

Kamenka, Eugene & Alice Ehr-Soon Tay: Human Rights (1978, Edward Arnold, London)

Kanger. H : Human Rights in the U.N. Declaration (1984, Academia Upsaliensis, Uppsala)

Kaplan, Morton A. & Katzenbach, Nicholas de B.: The Political Foundations of International Law (1961)

Kelly, J.M. : A Short History of Western Legal Theory (1992, Clarendon Press. Oxford)

Kelman, Mark: A Guide to Critical Legal Studies (1987, Harvard U.P., Cambridge)

Kennedy, David: International Legal Structures (1987, Nomos Verlagsgesellschaft, Baden)

Kerruish, Valerie: Jurisprudence As Ideology (1991, Routledge, London)

Koskenniemi, Martii: From Apology to Utopia: The Structure of International Legal Argument (1989, Finnish Lawyers' Publishing Co., Helsinki)

Kowalski-Wallace, Elizabeth: Their Fathers' Daughters: Hannah More, Maria Edgeworth and Patriarchal Complicity (1991, Oxford U.P., Oxford)

Lacey, Michael J. & Haakonssen, Knud: A Culture of Rights: The Bill of Rights in Philosophy, Politics and Law 1791 and 1991 (1991, Cambridge U.P., Cambridge)

La Nauze, J.A.: The Making of the Australian Constitution (1972, Melbourne U.P., Melbourne)

Lane, P.H.: An Introduction to the Australian Constitution, 2nd ed, (1977, Law Book Company, Sydney)

Lane, P.H.: A Manual of Australian Constitutional Law 4th ed (1987, Law Book Company, Sydney)

Lauterpacht, Hersch : An International Bill of the Rights of Man (1945, Columbia U.P., New York)

Lauterpacht, Hersch: International Law and Human Rights (1950, Stevens & Sons, London)

Lauterpacht, Hersch : John Locke's Political Philosophy (1973, Clarendon Press, Oxford)

Lee, H.P. & Winterton, George (eds): Australian Constitutional Perspectives (1992, Law Book Company, Sydney)

Lewis, Gordon K.: Slavery, Imperialism and Freedom: Studies in English Radical Thought (1978, Monthly Review Press, New York)

Luard, Evan: A History of the United Nations, 2 vols., (Vol.1: 1982, St. Martin's Press, New York), (Vol.2: 1989, Macmillan, London).

Lumb, R.D.: The Constitution of the Commonwealth of Australia Annotated (1986, Butterworths, Sydney)

Macdonald, R. St.J. & Johnston, Douglas (eds): The Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory (1983, Martinus Nijhoff, The Hague)

Macdonald, R. St J., Johnston, D.M. & Morris, G.L.: The International Law and Policy of Human Welfare (1978, Sijhoff & Noordhoff, Netherlands)

Macdonald, R. St J., & Humphrey, John P.: The Practice of Freedom: Canadian Essays on Human Rights and Fundamental Freedoms (1979, Butterworths, Toronto)

Macdonald, R. St J, Morris, Gerald, & Johnston, Douglas (eds): Canadian Perspectives on International Law and Organisation (1974, U. of Toronto Press, Toronto)

Machan, Tibor : Human Rights and Human Liberties (1975,Nelson Hall, Chicago)

MacKinnon,Catherine: Feminism Unmodified: Discourses on Life and Law (1987)

Mahoney, Kathleen & Mahoney, Paul (eds): Human Rights in the Twenty-First Century: A Global Challenge (1993, Martinus Nijhoff Publishers, Dordrecht)

Mandel, Michael: The Charter of Rights and the Legalisation of Politics in Canada (1980, Wall & Thompson, Toronto)

Matas, David: Closing the Doors: The Failure of Refugee Protection (1989, Summerhill Press, Toronto)

McCoubrey, H.: The Development of Naturalist Legal Theory (1987, Croom Helm, London)

McDougal, Myres S., Lasswell, Harold D. & Chen, Lung-chu: Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity (1980, Yale U.P. New Haven)

Macfarlane, L.J.: The Theory and Practice of Human Rights (1985, Maurice Temple Smith, London)

McGoldrick, Dominic: The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights (1991, Clarendon Press, Oxford),

McIlwain, Charles Howard: The High Court of Parliament and its Supremacy: An Historical Essay on the Boundaries Between Legislation and Adjudication in England (1910, Yale U.P., New Haven)

McKean, Warwick: Equality and Discrimination under International Law (1985, Clarendon Press, Oxford)

McKechnie, William Sharp : Magna Carta: A Commentary on the Great Charter of King John (1914, Maclehose & Sons, Glasgow)

McNaught, Kenneth: The Penguin History of Canada (1988, Penguin Books, London)

McRae, H., Nettheim,G. & Beacroft, L.: Aboriginal Legal Issues: Commentary and Materials (1991, Law Book Company, Sydney)

McWhinney, Edward: Canada and the Constitution 1979-1982: Patriation and the Charter of Rights (1982, University of Toronto Press, Toronto)

Mazlish, Bruce : James and J.S. Mill: Father and Son in the Nineteenth Century (1975, Basic Books, New York)

Melden, A.I.: (ed): Human Rights (1970, Wadsworth, Belmont)

Meron, Theodore: Human Rights and Humanitarian Norms as Customary Law (1991, Clarendon Press, Oxford)

Meron, Theodore (ed): Human Rights in International Law: Legal and Policy Issues (1984, Clarendon Press, Oxford)

Meron, Theodore: Human Rights Law-Making in the United Nations: A Critique of Instruments and Process (1986, Clarendon Press, Oxford)

Merrills, J.G.: The Development of International Law by the European Court of Human Rights (1988, Manchester University Press, Manchester)

Meyers, Diana, T.: Inalienable Rights: A Defense (1985, Columbia U.P., New York)

Mill J.S.; The Subjection of Women (Everyman's Library Edition, 1970),

Miller, Anthony J.: "Functionalism and Foreign Policy: An Analysis of Canadian Voting Behaviour in the General Assembly of the U.N., 1946-66", Ph.D. thesis, McGill University, 1970.

Milne, David: The New Canadian Constitution (1982, James Lorimer & Co, Toronto)

Milner, Andrew : Cultural Materialism (1993, Melbourne U.P., Melbourne)

Naffine, Ngaire: Law and the Sexes: Explorations in Feminist Jurisprudence (1990, Allen & Unwin, Sydney)

Nettheim, Garth: Victims of the Law: Aboriginal Queenslanders Today (1981, George Allen & Unwin, Sydney)

Nickel, James W.: Making Sense of Human Rights: Philosophical Reflections on

the Universal Declaration of Human Rights (1987, U. of California Press, Berkley)

Nino, Carlos (ed): Rights (1992, Dartmouth, Aldershot)

Norgaard, Carl Aage: The Position of the Individual in International Law (1962, Munksgaard, Copenhagen)

Nowak, Manfred: United Nations Covenant on Civil and Political Rights: CCPR Commentary (1993, N.P. Engel, Strasbourg)

Nowak, M. Steirer,D. & Tretter, H (eds): Progress in the Spirit of Human Rights: Festschrift fur Felix Ermacora (1988, N.P. Engel Verlag, Strasbourg)

Nozik, Robert: Anarchy, State and Utopia (1974, Basic Books, New York)

Nussbaum, Arthur : A Concise History of the Law of Nations (1958, Macmillan, New York)

O'Connell, D.P. : International Law, 2nd ed (1970, Stevens, London)

O'Hagen, Timothy : The End of Law? (1984, Basil Blackwell, Oxford)

O'Neill, Nick & Handley, Robin: Retreat from Injustice: Human Rights in Australian Law (1994, The Federation Press, Sydney)

Ommundsen, Wenche : Metafictions? Reflexivity in Contemporary Texts (1993, Melbourne U.P., Melbourne)

Oppenheim: International Law: A Treatise 8th ed by H. Lauterpacht (1955, Longman, London)

Oraa, Jaime: Human Rights in States of Emergency in International Law (1992, Clarendon Press, Oxford).

Otlowski, Margaret & Tsamenyi, B.Martin: An Australian Family Law Perspective on the Convention on the Rights of the Child (1992, Unitas Law Press, Hobart)

Palmer, George: Kidnapping in the South Seas (1871, Edmonston and Douglas), published in facsimile edition by Penguin Books, 1973.

Palumbo, Michael : Human Rights: Meaning and History (1982, Robert E. Krieger Publishing Co., Florida)

Patterson, Orlando: Freedom in the Making of Western Culture (Vol.I) (1991,

Basic Books, New York)

Pennock, J. Roland & Chapman, John W.: (eds): Human Rights: Nomos XXIII (1981, NYU Press, New York)

Perrot, Michelle (ed.) : A History of Private Life: Volume IV From the Fires of Revolution to the Great War, translated by Arthur Goldhammer (1990, Harvard U.P., Cambridge)

Pollack, Ervin H. (ed): Human Rights (1971, Jay Stewart Publications, Buffalo).

Pollis, Adamantia & Schwab, Peter (eds): Human Rights: Cultural and Ideological Perspectives (1979, Praeger Publishers, New York)

Quick, J. & Garran, R.R.: The Annotated Constitution of the Australian Commonwealth (1901, Angus & Robertson, Sydney; reprinted 1976, Legal Books, Sydney)

Ramcharan, B. (ed): Human Rights Thirty Years After the Universal Declaration (1979, Martinus Nijhoff, The Hague)

Ramcharan, B.: International Law and Fact Finding in the Field of Human Rights (1982, Martinus Nijhoff, The Hague)

Ramcharan, B.: Keeping the Faith with the United Nations (1987, Martinus & Nijhoff, Dordrecht)

Ramcharan, B (ed): The Concept and Present Status of the International Protection of Human Rights: Forty Years After the Universal Declaration (1989, Martinus Nijhoff, Dordrecht)

Raphael, D.D. Political Theory and the Rights of Man (1967, London, Macmillan)

Reid, Escott: On Duty: A Canadian at the Making of the United Nations, 1945-1946 (1983, McClelland & Stewart, Ottawa)

Resch, John Phillips & Huckaby, John K. (eds): Man and Society: Freedom and Liberty (1972, Columbus, Charles E. Merrill Publishing Co.)

Robert, O. & Pratt, Cranford (eds): Human Rights in Canadian Foreign Policy (1988, McGill-Queen's U.P., Montreal)

Robertson, A.H.: Human Rights in the World: An Introduction to the Study of the International Protection of Human Rights 2nd ed., (1982, St. Martin's Press, New

York)

Robertson, A.H. & Merrills, J.G. Human Rights in the World (1992, Manchester U.P., Manchester)

Robinson, Jacob: Human Rights and Fundamental Freedoms in the Charter of the United Nations (1946, Institute of Jewish Affairs, New York)

Robinson, Nehemiah.: The Universal Declaration of Human Rights: Its Origin, Significance, Application and Interpretation (1958, Institute of Jewish Affairs, New York)

Rommen, Heinrich A.: The Natural Law: A Study in Legal and Social History and Philosophy,(1947, B Herder Book Co.,
London, translated by T.R. Hanley)

Rosas, Allan & Helgesen, Jan (eds): Human Rights in a Changing East-West Perspective (1990, Pinter Publishers, London)

Rosenbaum, Alan S. (ed.): The Philosophy of Human Rights: International Perspectives (1980, Greenwood Press, Westport)

Ryan, K.W. (ed): International Law in Australia, 2nd ed (1984, The Law Book Company, Sydney)

Sagan, Carl & Druyan, Ann : Shadows of Forgotten Ancestors: A Search for Who We Are (1992, Random House, New York)

Sawer, Geoffrey: Australian Federal Politics and Law 1929-1949 (1963, Melbourne U.P., Melbourne)

Sawyer, Roger: Slavery in the Twentieth Century (1986, Routledge & Kegan Paul, London)

Schabas, William A.: International Human Rights Law and the Canadian Charter: A Manual for the Practitioner (1991, Carswell, Toronto)

Schachter, Oscar: International Law in Theory and Practice (1991, Martinus Nijhoff Publishers, Dordrecht)

Schmitt,Charles, Skinner,Quentin & Kessler,Eckhard (eds) Cambridge History of Renaissance Philosophy, (1988, Cambridge U.P., Cambridge)

Schreuer, Christoph: Decisions of International Institutions Before Domestic Courts

(1981, Oceana, London)

Schwelb, Egon: Human rights and the International Community: The Roots and Growth of the Universal Declaration of Human Rights, 1948-1963 (1964, Quadrangle Books, Chicago)

Scutt, Jocelyn A.: Women and the Law (1990, Law Book Company, Melbourne)

Sieghart, Paul : The Lawful Rights of Mankind: An Introduction to the International Legal Code of Human Rights (1985, Oxford U.P., Oxford)

Sieghart, Paul: The International Law of Human Rights (1983, Clarendon Press, Oxford), p.19.

Sigmund, Paul E.: Natural Law in Political Thought (1971, Winthrop Publishers, Cambridge, Massachusetts)

Shotwell, James T. : The Long Way to Freedom (1960, Bobbs-Merrill, New York)

Smart, Barry: Postmodernity (1993, Routledge, London)

Soward, F.H. & McInnis, Edgar: Canada and the United Nations (1956, Manhattan Publishing Co., New York)

Spender, Dale: Feminist Theorists: Three Centuries of Women's Intellectual Traditions (1983, The Women's Press, London)

Strauss, Leo : Natural Right and History, 1953, U. Chicago Press, Chicago)

Stromholm, Stig : A Short History of Legal Thinking in the West (1985, Norstedts Forlag, Stockholm)

Sunstein, Emily W.: A Different Face: The Life of Mary Wollstonecraft (1975, Harper & Row, New York).

Tarnopolosky, Walter: The Canadian Bill of Rights, 2nd rev ed (1975, McClelland & Stewart, Toronto)

Tarnopolsky, Walter, & William Pentney: Discrimination and the Law (1985, De Boo, Don Mills)

Tay,Alice Erh-Soon : Human Rights For Australia, Human Rights Commission Monograph Series No.1 (1986, Australian Government Publishing Service,

Canberra)

Thompson, Faith: Magna Carta (Minneapolis, 1948)

Thompson, Faith: The First Century of the Magna Carta: Why It Persisted As a Document (1925, 1967 reprint, Russell & Russell, New York)

Thornton, Margaret: The Liberal Promise: Anti-Discrimination Legislation in Australia (1990, Oxford U.P., Melbourne)

Tomalin, Claire: The Life and Death of Mary Wollstonecraft (1974, Harcourt Brace Jovanovich, New York)

Trakman, Leon: Reasoning With the Charter (1991, Butterworths, Toronto)

UNESCO: Human Rights - Comments and Interpretations (1949, reprinted 1973, Greenwood Press, Westport)

UNESCO: Birthright of Man: A Selection of Texts Prepared under the Direction of Jeanne Hersch (1969, New York)

Unger, Roberto: Knowledge and Politics (1975, The Free Press, New York)

van Dijk, P. & van Hoof, G.J.H.: Theory and Practice of the European Convention on Human Rights (1984, Klewer Publishers, Deventer)

Vasak, K & Alston, P (eds): The International Dimensions of Human Rights, 1, (1982, UNESCO, Paris)

Verdoodt. A.: Naissance et signification de la declaration Universelle des droit de l'homme (n.d., Editions Nauwelaerts, Louvain-Paris)

Verzijl, J.H.W.: International Law in Historical Perspective (A.W. Sijthoff, Leiden).

Waldron, Jeremy (ed): Nonsense Upon Stilts - Bentham, Burke and Marx on the Rights of Man (1987, Menthuen, London)

Waller, Harold & Sabetti, Filippo & Elazar, Daniel J. (eds): Canadian Federalism: From Crisis to Constitution (1984, University Press of America, Lanham)

Walters, F.P.: History of the League of Nations (1952, London)

Wawn, William T.: The South Sea Islanders and the Queensland Labour Trade - A

Record of Voyages and Experiences in the Western Pacific, From 1875 to 1891 (1893, Swan Sonnenschein & Co., London).

Weiler, Joseph M. & Elliot, Robin M. (eds): Litigating the Values of a Nation: The Canadian Charter of Rights and Freedoms (1986, Carswell, Toronto)

Weinreb, Lloyd L.: Natural Law and Justice (1987, Harvard U.P., Cambridge)

White, Alan, R.: Rights (1984, Clarendon Press, Oxford)

Wilcox, Hon Justice Murray: An Australian Charter of Rights? (1993, Law Book Co., Sydney)

Winks, Robin W.: The Blacks in Canada: A History (1971, Yale U.P., New Haven)

Zines, Leslie: The High Court and the Constitution 2nd ed (1987, Butterworths, Sydney)

Zines, Leslie: (ed): Commentaries on the Australian Constitution: A Tribute to Geoffrey Sawer (1977, Butterworths, Sydney)

B) ARTICLES

ABA, "Declaration on Human Rights: Canadian, American Bars Ask Delay of Action" (1948) 34 American Bar Association Journal 881

Adair, E.R. "The Petition of Right" (1920-21) 5 History 99
Ago, Robert "Pluralism and the Origins of the International Community" (1978) 3 Indian Yearbook of International Law 3

Airo-Farulla,Geoff: "Dirty Deeds Done Dirt Cheap: Deconstruction, Derrida, Discrimination and Difference/ance in (the High) Court" (1991) 9 Law in Context 102

Alston, Philip: "Out of the Abyss: The Challenges Confronting the New UN Committee on Economic, Social and Cultural Rights" (1987) 9 Human Rights Quarterly 332.

Alston,Philip: "Conjuring Up New Human Rights: A Proposal for Quality Control" (1984) American Journal of International Law 607

Alston,Philip: "Making Space for New Human Rights: The Case of the Right to Development" (1988) 1 Harvard Human Rights Yearbook 3

Alston, Philip & Quinn,Gerard: "The Nature and Scope of States' Parties Obligations under the International Covenant on Economic, Social and Cultural Rights" (1987) 9 Human Rights Quarterly 156

Alston, Philip & Simma,Bruno "Second Session of the UN Committee on Economic, Social and Cultural Rights" (1988) 82 AJIL 603

Arnold, Morris S. "Statutes as Judgements: The Natural Law Theory of Parliamentary Activity in Medieval England", (1977) 126 University of Pennsylvania L.R. 329

Bakan, Joel C., "Constitutional Arguments: Interpretation and legitimacy in Canadian Constitutional Thought" (1989) 27 Osgoode hall L.J. 123

Balkin, J: "Deconstructive Legal Practice" [1987] Yale L.J. 743

Balkin, J: "What is a Postmodern Constitution?" (1992) 90 Michigan L.R. 1966

Balton, David, A.: "The Convention on the Rights of the Child: Prospects for International Enforcement" (1990) 12 Human Rights Quarterly 120

Bayefsky, Anne: "The Principle of Equality or Non-Discrimination in International Law" (1990) 11 Human Rights Law Journal 1.

Bayefsky, Anne: "The Human Rights Committee and the Case of Sandra Lovelace" (1982) 20 Canadian Yearbook of International Law 244

Beatty, David, "Constitutional Conceits: The Coercive Authority of the Courts" (1987) U. of Toronto L.J. 183

Bell Jr., Derrick, A.: "Racial Realism" (1992) 24 Connecticut L.R. 363

Bellamy, Richard "A Liberal Dose of French Nonsense", The Times Higher Education Supplement, October 12, 1990, p. 15

Berns, Sandra:"Tolerance and Substantive Equality in Rawls: Incompatible Ideals" (1990) 2 Law in Context 112

Bleicher, Samual, A.: "The Legal Significance of Re-Citation of General Assembly Resolutions" (1969) 63 AJIL 444

Brudner, Alan:"The Domestic Enforcement of International Covenants on Human Rights: A Theoretical framework" (1985) 35 University of Toronto L.J. 219

Burrowes, M.R.: "Implementing the UN Racial Convention - Some Procedural Aspects" (1981) 7 Australian Yearbook of International Law 236

Byrnes, Andrew & Charlesworth, Hilary: "Federalism and the International Legal Order: Recent Developments in Australia" (1985) 79 A.J.I.L. 622

Campbell, Tom: "Democracy, Human Rights and Positive Law" (1994) 16 Sydney Law Review 195

Cass, Deborah: "Through the Looking Glass: The High Court and the Right to Speech" (1993) 4 Public Law Review 229

Charlesworth, Hilary: "Individual Rights and the Australian High Court" (1986) 4 Law in Context 52

Charlesworth, Hilary "Customary International Law and the Nicaragua Case" 11 Australian Yearbook of International Law 1.

Charlesworth, Hilary: "The Australian Reluctance About Rights" (1993) 31 Osgoode Hall L.J. 195

Charlesworth, Hilary: "Australia's Accession to the First Optional Protocol to the International Covenant on Civil and Political Rights" (1991) 18 Melbourne University L.R. 428

Charlesworth, Hilary, Chinkin, Christine & Wright, Shelley "Feminist Approaches to International Law" (1991) 85 American Journal of International law 613.

Charlesworth, Hilary & Chinkin, Christine: "The Gender of Jus Cogens" (1993) 15 Human Rights Quarterly 63

Chinkin, Christine: "Using the Optional Protocol: The Practical Issues" (1993) 3 Aboriginal Law Bulletin 6

Claydon, John: "International Human Rights Law and the Interpretation of the Canadian Charter of Rights and Freedoms" (1982) 4 Supreme Court Law Review 287

Cohen, Maxwell "Some Considerations of the Origins of Habeas Corpus" (1938) XVI Canadian Bar Review 92

Cohen, Maxwell "Habeas Corpus Cum Causa - The Emergence of the Modern Writ - I" (1940) 18 Canadian Bar Review 10

Cohen, Maxwell & Anne Bayefsky, "The Canadian Charter of Rights and freedoms and Public International Law" (1983) 61 Canadian Bar Review 265

Cohn, Cindy A.: "The Early Harvest: Domestic Legal Changes Related to the Human Rights Committee and the Covenant on Civil and Political Rights" (1991) 13 Human Rights Quarterly 295

Colker, Ruth, "Anti-Subordination Above All: Sex, Race and Equal Protection" (1986) 61 N.Y.U.L.R. 1003

D'Amato, Anthony "International Human Rights at the Close of the Twentieth Century", (1988) 22 The International Lawyer 167

D'Amato, Anthony "Trashing Customary International Law" (1987) 81 A.J.I.L. 101

Das, Kamleshwar, "Some Observations Relating to the International Bill of Human Rights" (1984) 19 Indian Yearbook of International Law 1

de Arechaga, Jimenez: "The Background to Article 17 of the Universal Declaration" (1967) 8 Journal of the International Commission of Jurists 34

Delgado, Richard: "Storytelling for Oppositionists and Others: A Plea for Narrative" (1989) 87 Michigan L.R. 2411

Delgado, Richard: "The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?" (1987) 22 Harvard Civil Rights-Civil Liberties L.R. 301

De Sousa, Santos, "Law: A Map of Misreading. Toward a Postmodern Conception of Law" (1987) 14 Journal of Law and Society 279

Detmold, M.J., "The New Constitutional Law" (1994) Sydney Law Review 228

Devlin, Richard, "Ventriloquism and the Verbal Icon: A Comment Upon Professor Hogg's 'The Charter and American Theories of Interpretation'" (1988) 26 Osgoode Hall L.J. 1

de Zayas, A., Moller, J. & Opsahl,T. "Application of the International Covenant on Civil and Political Rights under the Optional Protocol by the Human Rights Committee" (1985) 28 German Yearbook of I.L. 9

de Zayas, Alfred, M.: "The Follow-Up Procedure of the UN Human Rights Committee" (1991) 47 The Review (International Commission of Jurists) 28

Donnelly, Jack: "Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights" (1982) 76 American Political Science Review

Drzemczewski, A: "The Applicability of Customary International Human Rights in the English Legal System" [1975] Human Rights Journal 71

Duffy, P.J.: "English Law and the European Convention on Human Rights" (1980) 29 International and Comparative Law Quarterly 585

Duncanson, Ian & Kerruish, Valerie: "The Reclamation of Civil Liberty" (1986) 6 Windsor Yearbook of Access to Justice 3

Eagleton, Clyde "The Share of Canada in the Making of the United Nations" U. of Toronto L.J., VII (1948), 351

Ehrenreich, Nancy: "Pluralist Myths and Powerless Men in Sexual Harassment Law" (1990) 99 Yale L.J. 1177

Evatt, Elizabeth: "International Machinery on Human Rights" (1988) 4 QITLJ 55

Fiddes, Edward: "Lord Mansfield and the Sommersett Case", (1934) 200 L.Q.R.

499

Fischer, Dana, D.: "Reporting under the Covenant on Civil and Political Rights: The First Five Years of the Human Rights Committee" (1982) 76 AJIL 142

Fish, S., "Wrong Again" (1983) 62 Texas L.R. 299

Fitzgerald, Brian: "Proportionality and Australian Constitutionalism" (1993) 12 U. of Tasmania L.J. 263

Fitzgerald, Brian: "International Human Rights and the High Court of Australia" (1994) 1 James Cook U.L.R. 78

Fitzmaurice, G., "The general Principles of International Law Considered from the Standpoint of the Rule of Law" 92 Hague receuil 5 (1957-II)

Fryer, Eugene D.: "Contemplating Sinha's Anthropocentric Theory of International Law as a Basis for Human Rights" (1980) Case Western Reserve J. I. L. 575

Garibaldi, Oscar, M. "General Limitations on Human Rights: The Principle of Legality" (1976) 17 Harvard International Law Journal 503

Gerber, David: "Rights" (1976) 62 Archiv fur Rechts- und Sozialphilosophie 329-48.

Glenn, H. Patrick, "The Common Law in Canada" (1995) 74 Canadian Bar Review 261

Gold, Marc, "Of Rights and roles: The Supreme Court and the Charter" (1989) 23 U.B.C.L.R. 507

Gordon, Robert W.: "Critical Legal Histories" (1984) 36 Stanford L.R. 59 at 114.

Gotanda, Neil: "A Critique of Our Constitution is Colourblind" (1991) 44 Stanford L.R. 1

Gunning, Isabelle R "Modernizing Customary International Law: The Challenge of Human Rights" (1991) 31 Virginia Journal of International Law 211

Hannaford, John, "Truth, Tradition and Confrontation: A Theory of International Human Rights" (1993) 31 Canadian Yearbook of International Law 151

Hartman, Joan, F. "Derogation From Human Rights Treaties in Public Emergencies" (1981) Harvard International L.J. 1.

Hassan, Parvez: "The Word "Arbitrary" as Used in the Universal Declaration of Human Rights: "Illegal" or "Unjust"? (1969) 10 Harvard International Law Journal 225

Hassan, Parvez: "The International Covenants on Human Rights: An Approach to Interpretation" (1969) 19 Buffalo L.R. 35

Hasluck, Paul "Australia and the Formation of the United Nations, Some Personal Reminiscences" Journal and Proceedings of the Royal Australian Historical Society 40: 133-178, 1954

Henkin, Louis: "Rights: Here and There" (1981) Columbia L.R. 1582 at 1592.

Henkin, Louis : "Judaism and Human Rights" Judaism: A Quarterly Journal of Jewish Life and Thought Vol.25 no.4, 1976, 437

Hobbins, A.J.: "Rene Cassin and the Daughter of Time: The First Draft of the Universal Declaration of Human Rights" (1989) Fontanus II, 7-26

Humphrey, John P. "On the Foundations of International Law" (1945) 39 A.J.I.L. 231

Humphrey, John "The Dean Who Never Was" (1989) 34 McGill L.J. 191

Humphrey, John P.: "The Implementation of International Human Rights Law" (1978) N.Y. Law School L.R. 31

Humphrey, John: "The Revolution in the International Law of Human Rights" (1974-5) 4 Human Rights 205

Humphrey, John: "The International Bill of Rights: Scope and Implementation" (1976) 17 William and Mary L.R. 527

Humphrey, John: "The Right to Petition the United Nations" (1971) 4 Rev. des Droits de l'Homme 463

Hutchinson, Allan & Monahan, Patrck: "The 'Rights' Stuff: Roberto Unger and Beyond" (1984) 62 Texas L.R. 1477

Hutchinson, Allan & Monahan, Patrck:"Law, Politics and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought" (1984) 36 Stanford L.R. 199

Hutchinson, A. & A. Petter, "Private Rights/Public Wrongs" (1988) 38 U. of

Toronto L.J. 278

Hunt, A, "The Big Fear: Law Confronts Postmodernism" (1990) 35 McGill L.J. 507.

Kamenka, Eugene & Tay,Alice Erh-Soon: "Philosophy and Human Rights: A Survey and Select Annotated Bibliography of Recent English-Language Literature" (1984) 70 Archiv fur Rechts- und Sozialphilosophie 291.

Kennedy, Duncan "The Structure of Blackstone's Commentaries" (1979) 28 Buffalo L.R. 205

Kennett, Geoffrey: "Individual Rights, the High Court and the Constitution" (1994) 19 Melbourne U.L.R. 581

Kirby, Justice M.D.: "H.V. Evatt, The Anti-Communist Referendum and Liberty in Australia" (1991) 7 Australian Bar Review 93

Kirby, Justice Michael "The Australian Use of International Human Rights Norms: From Bangalore to Balliol - A View from the Antipodes" (1993) 16 UNSWLJ 363

La Forest, Justice G.: "May the Provinces Legislate in Violation of International Law?" (1961) 39 Canadian Bar Review 78

LaRue, L.H.: "Hohfeldian Rights and Fundamental Rights" (1985) 35 U. of Toronto L.J. 86

Laskin, Bora: "Canada's Bill of Rights: A Dilemma for the Courts?" (1962) 11 International & Comparative Law Quarterly 519

Laskin, Bora: "An Inquiry Into the Diefenbaker Bill of Rights" (1959) 37 Canadian Bar Review 77

Lauren, Paul, "Human Rights in History: Diplomacy and Racial Equality at the Paris Peace Conference" (1978) 2 Diplomatic History 257

Lee, H.P.: "Reforming the Australian Constitution: The Frozen Continent Refuses to Thaw" [1988] Public Law 535

MacKinnon, Catherine: "Towards Feminist Jurisprudence" (1982) 34 Stanford L.R. 703

McCarry, Greg: "Landmines Among the Landmarks: Constitutional Aspects of Anti-Discrimination Laws" (1989) 63 Australian Law Journal 327

McGinley, G.P.J.: "The Status of Treaties in Australian Municipal Law: The Principle of Walker v Baird Reconsidered" (1990) 12 Adelaide L.R. 367

McRae, D.M.: "The Legal Effect of Interpretive Declarations" (1978) 49 B.Y.I.L. 155.

McWhinney, Edward: "The Supreme Court and the Bill of Rights - The Lessons of Comparative Jurisprudence" (1959) 37 Canadian Bar Review 16

McWhinney, Edward, "The Canadian Charter of Rights and freedoms: The Lessons of Comparative Jurisprudence" (1983) 61 Canadian Bar Review 55

Macdonald, R.St.J., "Leadership in Law: John P. Humphrey and the Development of the International Law of Human Rights" (1991) 29 Canadian Yearbook of International Law 3

MacKay,R.A. "Coke - Parliamentary Sovereignty or the Supremacy of the Law?" (1923-4) 22 Michigan L.R. 215

Mahalic, Drew & Mahalic, Joan Gambee "The Limitation Provisions of the International Convention on the Elimination of All Forms of Racial Discrimination" (1987) Human Rights Quarterly 74.

Mahoney, Kathleen, E.: "International Strategies to Implement Equality Rights for Women: Overcoming Gender Bias in the Courts" (1993) 1 Australian Feminist Law Journal 115

Mason, Sir Anthony: "A Bill of Rights for Australia?" (1989) 5 Australian Bar Review 79

Meron, Theodore: "The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination" (1985) 79 A.J.I.L. 283

Minnow, Martha, "Interpreting Rights: An Essay for Robert Cover" (1987) 96 Yale L.J. 1860

Moffatt, R.C.L.: "Philosophical Foundations of the Australian Constitutional Tradition" (1965) 5 Sydney Law Review 59

Morabito, Vince & Strain, Henriette: "The Section 109 "Cover the Field" Test of Inconsistency: an Undesirable Legal Fiction" (1993) 12 U. of Tasmania L.R. 182

Morgan, Wayne: "Protecting Rights or Just Passing the Buck? The Human Rights (Sexual Conduct) Bill 1994" (1994) 1 Australian Journal of Human Rights 409

Morgan, Wayne, "Queer Law" (1995) ? Australasian Gay and Lesbian Law Journal 1

Morsink, Johannes: "The Philosophy of the Universal Declaration" (1984) 6 Human Rights Quarterly

Mossman, Mary Jane: "Gender Equality and Legal Aid Services: A Research Agenda for Institutional Change" (1993) 15 Sydney L.R. 30

Munger, Frank & Seron, Carroll "Critical Legal Studies Versus Critical Legal Theory: A Comment on Method" (1984) 6 Law and Policy 257

Nettheim, Garth: "Judicial Revolution or Cautious Correction? Mabo v Queenslaud" (1993) 16 UNSWLR 1

O'Manique, John: "Universal and Inalienable Rights: A Search for Foundations" (1990) 12 Human Rights Quarterly 465

O'Neill, N.K.F., "The Australian Bill of Rights Bill of 1985 and the Supremacy of Parliament" (1986) 60 A.L.J. 139

Opeskin, Brian: "The Role of Government in the Conduct of Australia's Foreign Affairs" (1994) 15 Australian Yearbook of International Law 129

Otto, Dianne: "Challenging the 'New World Order': International Law, Global Democracy and the Possibilities for Women" (1993) 3 Transnational Law and Contemporary Problems 371

Parashar, A., "The Anti-Discrimination Laws and the Illusory Promise of Sex Equality" (1994) 13 U. of Tasmania L.R. 83

Peck, Sidney R., "An Analytical Framework for the Application of the Canadian Charter of Rights and freedoms" (1987) 25 Osgoode Hall L.J. 1

Plucknett, Theodore F.T., "Bonham's Case and Judicial Review" XL Harv. L.R. 30

Powell, John, A.: "Racial Realism or Racial Despair?" (1992) 24 Connecticut L.R. 553

Purvis, Nigel: "Critical Legal Studies in Public International Law" (1991) 32 Harvard International L.J. 81

Raphael, D.D: "The Liberal Western Tradition of Human Rights" (1966) 18 Inter.

Soc. Sci. J. 22

Rothwell, Donald, R.: "The High Court and the External Affairs Power: A consideration of its Outer and Inner Limits" (1993) 15 Adelaide Law Review 209

Sadurski, W: "Equality Before the Law: A Conceptual Analysis" (1986) 60 Australian Law Journal 131

Sadurski, W: "Gerhardy v Brown v The Concept of Discrimination: Reflections on the Landmark Case that Wasn't" (1986) 11 Sydney Law Review 5

Saunders, Cheryl: "The External Affairs Power in the Australian Constitution" (1994) 14 International Law News 36

Sawyer, G.: "The External Affairs Power" (1984) Federal Law Review 199

Sawyer, G.: "Execution of Treaties by Legislation in the Commonwealth of Australia" (1956) II University of Queensland L.J. 297

Schwelb, Egon: "Civil and Political Rights: the International Measures of Implementation" (1968) 62 American Journal of I.L. 827

Schwelb, Egon "The United Nations and Human Rights" (1965) 11 Howard L.J. 356

Schwelb, Egon: "The Influence of the Universal Declaration of Human Rights on International and National Law", Proceedings of the American Society of International Law (1959), 217

Scott, Craig: "International Review and Interpretative Authority", paper presented to the conference Australia and Human Rights: Where to From Here?, Centre for International and Public Law, Australian National University, Canberra, 15-17 July, 1992

Simpson, Gerry: "Mabo, International Law, Terra Nullius and the Stories of Settlement: An Unresolved Jurisprudence" (1993) 19 Melbourne U.L.R. 195

Sinha, Surya Prakesh, "The Axiology of the International Bill of Human Rights" (1989) 1 Pace Yearbook of International Law 21

Sinha, Surya Prakesh, "The Anthropocentric Theory of International Law as a Basis for Human Rights" (1978) 10 Case Western Reserve J. Int. Law 469

Sinha, S. Prakesh, "Human Rights Philosophically" (1978) 18 Indian J. of

International Law 139

Sinha, S. Prakesh: "Human Rights: A Non-Western Viewpoint" (1981) 67 Archiv fur Rechts- und Sozialphilosophie 76

Sinha, S. Prakesh, "Freeing Human Rights From Natural Rights" (1984) 70 Archiv fur Rechts- und Sozialphilosophie 342

Strom, Torsten H. & Peter Finkle, "Treaty Implementation: The Canadian Game Needs Australian Rules" (1992) 25 Ottawa L.R. 39

Struthers, Wallace W., "Treaty Implementation .. A Rejoinder" (1994) 26 Ottawa L.R. 305

Tahmindjis, Phillip: "Australia, the Cocos Islands and Self-Determination" (1985) 1 QIT Law Journal 177

Tahmindjis, Phillip: "The EEO Practitioner and the New Industrial Laws" (1994) Australian Labour Law Reporter Vol. 4, pp.80,097-109

Tahmindjis, Phillip: "The Legal Response to AIDS in Australia" (1989) 13 Community Health Studies Journal 410

Tarnopolsky, Walter: "Human Rights, International Law and the International Bill of Rights" (1985-6) 50 Saskatchewan Law Review 21

Tarnopolsky, Walter:"The Supreme Court and the Canadian Bill of Rights" (1975) 53 Canadian Bar Review 649

Tarnopolsky, Walter S: "The Canadian Experience with the International Covenant on Civil and Political Rights seen from the Perspective of a Former Member of the Human Rights Committee" (1986/7) 20 Akron L.R. 611

Tarnopolsky, Walter, "A Comparison between the Canadian Charter of Rights and Freedoms and the International Covenant on Civil and Political Rights" (1982-83) Queen's Law Journal 211

Trindade, A.A.: "Exhaustion of Local Remedies under the UN Covenant on Civil and Political Rights and its Optional Protocol" (1979) 28 International and comparative Law Quarterly 734

Turp, Daniel: "L'examen des rapports periodiques du Canada en application du Pacte international relatif aux droits economiques, sociaux et culturels" (1991) 29 Canadian Yearbook of International Law 330

Tushnet, Mark "Critical Legal Studies: An Introduction to its Origins and Underpinnings" (1986) 36 Journal of Legal Education 505

Vanek: "Is International Law Part of the Law of Canada?" (1949-50) 8 University of Toronto L.J. 251

Walker, K: "Horta v The Commonwealth" (1994) 19 Melbourne U.L.R. 1114

Walker, Sally: "The Impact of the High Court's Free Speech Cases on Defamation Law" (1995) 17 Sydney Law Review 43

Weil, Prosper: "Towards Relative Normativity in International Law?" (1983) 77 AJIL 413

Wilson, H.H., "Some Principal Aspects of British Efforts to Crush the African Slave Trade 1807-1929" (1950) 44 AJIL 505.

Young, Alison Harvison, "Keeping the Courts at Bay: The Canadian Human Rights Commission and its Counterparts in Britain and Northern Ireland: Some Comparative Lessons" (1993) 43 U. of Toronto L.J. 65

C) MISCELLANEOUS

A/C.3/SR.88-178 - General Assembly Third Committee discussions on the Universal Declaration

"An Analysis of the Procedures of the United Nations Regarding Individual Petitions with respect to Human Rights", Report (1974-5) 4 Human Rights 217-58

Annotations on the Text of the Draft International Covenants on Human Rights, UN Doc. A/2929 (1955)

Australia and International Treaty Making: Information Kit, October, 1994 (Commonwealth Government)

Birthright of Man: A Selection of Texts Prepared under the direction of Jeanne Hersch (1969, UNESCO, New York)

Commonwealth Secretariat and Interights: Developing Human Rights Jurisprudence: Conclusions of Judicial Colloquia on the Domestic Application of International Human Rights Norms 1988-91 (1991, London)

Daes, Erica-Irene A.: Status of the Individual and Contemporary International Law: Promotion, Protection and Restoration of Human Rights at National, Regional and International Levels, Human Rights Study Series No. 4, E.91.XIV.3, (1992, United Nations, New York)

Guidelines Adopted by the Committee on the Elimination of Racial Discrimination, CERD/C/R 12 (1970).

Human Rights in Australia: Comments on the Australian Government's Official Report to the Human Rights Committee: International League for Human Rights, New York, April, 1988.

Human Rights: Status of International Instruments (1987, UN, New York), (ST/HR/5),

Joint Standing Committee on Foreign Affairs, Defence and Trade A Review of Australia's Efforts to Promote and Protect Human Rights (1994, AGPS, Canberra).

Lauterpacht, Hersch "Human Rights, the Charter of the United Nations and the International Bill of the Rights of Man-Preliminary Report" submitted to ECOSOC by the Commission on Human Rights: UN Doc. E/CN.4/89 (12 May, 1948).

Manual for Human Rights Reporting (UN Centre for Human Rights, 1991)

Multilateral Treaties in the Area of Human Rights to which Canada is a Party (as at March 31, 1993) (Human Rights Directorate, Multiculturalism & Citizenship Canada, 1970)

Paris Principles (1991) UN Doc. A/48/340

Selected Decisions of the Human Rights Committee under the Optional Protocol Vol. 2, UN Doc. CCPR/C/OP/2

van Asbeck, Baron F.M. (ed) : The Universal Declaration of Human Rights and its Predecessors (1679-1948), (1949, E.J. Brill, Leiden)

Reports under the ICCPR

International Covenant on Civil and Political Rights: First Report of Canada on Implementation of the Provisions of the Covenant, (Ministry of Supply and Services), March 1979, pp.25-6

Human Rights Directorate, Multiculturalism and Citizenship Canada, International Covenant on Civil and Political Rights: Second and Third Reports of Canada, (1990, Ottawa).

Australia's Second Report under Article 40 of the International Covenant on Civil and Political Rights (February, 1987), CCPR/C/42/Add.2

Reports under the Racial Discrimination Convention

Canada: First Report CERD/C/R.25/Add.5
Second Report CERD/C/R.53/Add.6
Seventh Report CERD/C/107/Add.8
Eighth Report CERD/C/132/Add.3
Ninth Report CERD/C/159/Add.3

Australia: First Report A/32/18
Second Report A/34/18
Ninth Report A/49/18

Reports under the ICESCR

Canada's First Report on the Implementation of Articles 6-9 in 1981 (UN Doc. E/1978/8/Add.32)

Canada's Second Report on Articles 6-9 (Department of the Secretary of State for Canada, December, 1987)

Canada's Second Report on Articles 10-15 (Human Rights Directorate, Multiculturalism and Citizenship Canada, Ottawa, 1992)

Reports under the Women's Convention

First Report of Canada under the Convention on the Elimination of All Forms of Discrimination Against Women, Department of the Secretary of State, Ottawa, May, 1983, p.15

Second Report of Canada: Convention on the Elimination of All Forms of Discrimination Against Women, Department of the Secretary of State of Canada, Ottawa, January, 1988.

Convention on the Elimination of All Forms of Discrimination Against Women: Third Report of Canada covering the period January 1, 1987 to December 31, 1990, Multiculturalism and Citizenship Canada, Ottawa, 1992.

Convention on the Elimination of All Forms of Discrimination Against Women: Report of Australia, Department of Prime Minister and Cabinet, Office of the Status of Women, Canberra, June, 1986; CEDAW/C/5/Add.40 and Amend.1

Women in Australia: Australia's Second progress Report on Implementing the United Nations Convention on the Elimination of All Forms of Discrimination Against Women, Commonwealth of Australia, June 1992.

Reports under the Convention Against Torture

Canada: Initial Report, 1989, CAT/C/5/Add.5

Australia: Initial Report, 1991, CAT/C/9/Add.8

Reports under the Children's Convention

Australia: Initial Report, 1995 (AGPS)

Canada: Initial Report CRC/C/11/Add.3

General Comments of the Human Rights Committee

Human Rights Committee: General Comment No. 3(13) adopted at the 311th meeting, July 28, 1981. UN Doc. CCPR/C/21/Rev.1

Human Rights Committee: General Comment No. 4(13), adopted by the Committee at its 311th meeting, July 28, 1981, UN Doc. CCPR/C/21/Rev.

Human Rights Committee: General Comment No.6(16), July 27, 1982, 9 E.H.R.R. 169 at 174.

Human Rights Committee: General Comment No. 7(16), July 27, 1982, 9 E.H.R.R. 169 at 176.

Human Rights Committee: General Comment No. 9(16), July 27, 1982: 9 E.H.R.R. 169 at 178.

Human Rights Committee: General Comment 10(19), Report of the Human Rights Committee, GAOR, 38th Session, Supplement No. 40, UN Doc. A/38/40, p.109.

Human Rights Committee: General Comment No. 11(19), July 29, 1983, 9 E.H.R.R 169 at 180.

Human Rights Committee: General Comment 13 (21), UN Doc. CCPR/C/21/Rev. 1 (1989), p.12, paragraphs 2, 17

Human Rights Committee: General Comment No.15, UN Doc. A/41/40, Annex VI.

Human Rights Committee: General Comment 16(32), adopted on March 23, 1988: UN Doc. CCPR/C/21/Rev.1

Human Rights Committee: General Comment 17(35), adopted at the 891st meeting, April 5, 1989: UN Doc. CCPR/C/21/Rev. 1.

Human Rights Committee: General Comment 18(37), CCPR/C/21/Rev.1

Human Rights Committee: General Comment 19(39), adopted at its 1002nd

meeting, July 24, 1990: UN Doc. CCPR/C/21/Rev. 1/Add 1-4.

Human Rights Committee: General Comment No. 22(48), adopted by the Committee at its 1247th meeting (48th session), July 20, 1993; UN Doc. CCPR/C/21/Rev.1/Add.42 (September 7, 1993).

Human Rights Committee: General Comment No. 24(52), CCPR/C/21/Rev.1/Add.6

General Comments of the Committee on Economic, Social and Cultural Rights

General Comment No. 1 (1989) Report on the Third Session (6-24 Februa.y, 1989), ECOSOC, Official Records, 1989, Supp. No.4, Annex III, UN Doc E/1989/22.

General Comment No. 2 (1990): Report of the Fourth Session (15 January - 2 February 1990), ECOSOC Official Records, 1990, Supplement No. 3, Annex III, UN Doc. E/1990/23.

General Comment No. 3 (1990): Report of the Fifth Session (26 November - 14 December 1990), ECOSOC Official records, 1991, Supplement No. 3, UN Doc. E/1991/23 (paragraph 9).

General Recommendations of CEDAW

General Recommendation No. 21, E/CN.6/1991/CRP.1, Annex 1

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