

CCPI Coalition Authorities

Volume 3

International Instruments		Cited
25.	Government of Canada, Permanent Mission of Canada to the United Nations, Response of the Government of Canada to the Views of the Human Rights Committee Concerning Communication No. 2348/2014 (Feb 1, 2019)	para 34
26.	International Covenant on Civil and Political Rights UN General Assembly resolution 2200A (XXI) (16 December 1966)	
27.	Optional Protocol to the International Covenant on Civil and Political Rights UN General Assembly resolution 2200A (XXI) (16 December 1966)	Preamble. article 1
28.	International Covenant on Economic, Social and Cultural Rights , 19 December 1966, 993 UNTS 3 (entered into force 3 January 1976)	article 2(2) article 12
29.	UN Human Rights Committee, General Comment 36: article 6, right to life (3 September 2019) CCPR/C/GC/36	para 26
30.	United Nations, Vienna Convention on the Law of Treaties , 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331	Preamble Article 26 Article 31
31.	UN Human Rights Committee, General Comment No. 33, Obligations of States parties under the Optional Protocol to the International Covenant on Civil and Political Rights , 25 June 2009, CCPR/C/GC/33	para 13
Secondary Sources		
32.	Jennifer A. Klinck, "Modernizing judicial review of the exercise of prerogative powers in Canada" (2016) 54:4 <i>Alta. L. Rev.</i> 997	
33.	Bruce Porter & Martha Jackman, " Introduction: Advancing Social Rights in Canada " in Martha Jackman & Bruce Porter, eds, <i>Advancing Social Rights in Canada</i> (Toronto: Irwin Law, 2014)	
34.	Martha Jackman, " One Step Forward and Two Steps Back: Poverty, the Charter and the Legacy of Gosselin " (2019) 39 NJCL 85	
35.	Paul Taylor, A commentary on the International Covenant on Civil and Political Rights: The UN Human Rights Committee's Monitoring of ICCPR Rights (Cambridge: Cambridge University Press, 2020)	

36.	Craig Scott, " Canada's International Human Rights Obligations and Disadvantaged Members of Society: Finally into the Spotlight? " (1999) 10:4 Forum Constitutional Forum 97	
37.	Sarah Joseph, " Extending the Right to Life Under the International Covenant on Civil and Political Rights: General Comment 36 " (2019) 19 Human Rights Law Review" 347	
38.	Bruce Porter, " Inclusive Interpretations: Social and Economic Rights and the Canadian Charter " in Helena Alviar García, Karl Klare & Lucy A Williams, eds, <i>Social and Economic Rights in Theory and Practice: Critical Enquiries</i> (New York: Routledge, 2014) 215	
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40.	John H Currie, <i>Public International Law</i> , 2 nd ed (Toronto: Irwin Law, 2008) Chapter 4: Law of Treaties	at 154 .
41.	Mark W. Janis, " Nature of Jus Cogens " (1988) 3 Conn J Int'l L 359	at 362-63
42.	Robert Kolb, <i>Good Faith in International Law</i> (Oxford: Hart Publishing, 2017) Chapter 4	
43.	Martin Scheinin, " The Work of the Human Rights Committee " in Raija Hanski & Martin Scheinin, <i>Leading Cases of the Human Rights Committee</i> , 2nd ed (Turku: Abo Akademi University, 2007)	at 23
44.	Sarah Joseph & Melissa Castan, <i>The International Covenant on Civil and Political Rights: Cases, Materials and Commentary</i> , 3rd ed (Oxford: Oxford, 2013)	para 1.61
45.	Donald Galloway, " Immigration, Xenophobia and Equality Rights " (2019) 42:1 Dalhousie Law Journal 17	
46.	Y.Y. Brandon Chen, " The Future of Precarious Status Migrants' Right to Health Care in Canada " (2017) Alta L Rev 649	
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Government of Canada, Permanent Mission of Canada to the United Nations,
*Response of the Government of Canada to the Views of the Human Rights
Committee Concerning Communication No. 2348/2014* (Feb 1, 2019)



Government of Canada
Permanent Mission of Canada
to the United Nations and the
Conference on Disarmament

Gouvernement du Canada
Mission permanente du Canada
auprès des Nations Unies et de
la Conférence du désarmement

Note No.: GENEV-5356

Reference:

HRCttee 2348/2014 Ms. Nell Toussaint
Response to the Committee's Views

The Permanent Mission of Canada to the Office of the United Nations at Geneva presents its compliments to the Office of the High Commissioner for Human Rights and has the honour to submit Canada's response to the Committee's views in the above-noted communication.

The submission consists of one PDF document.

The Permanent Mission of Canada to the Office of the United Nations at Geneva avails itself of this opportunity to renew to the Office of the High Commissioner for Human Rights the assurances of its highest consideration.



**RESPONSE OF THE GOVERNMENT OF CANADA TO THE VIEWS
OF THE HUMAN RIGHTS COMMITTEE CONCERNING
COMMUNICATION NO. 2348/2014
SUBMITTED BY MS. NELL TOUSSAINT**

I. INTRODUCTION

1. On 6 August 2018, the Secretary-General of the United Nations (High Commissioner for Human Rights) transmitted to Canada the Human Rights Committee's views concerning communication No. 2348/2014, submitted to the Committee on behalf of Ms. Nell Toussaint (the author).
2. The Committee expressed the view that, by denying the author state-funded health care coverage under the Interim Federal Health Program (IFHP) between 2009 and 2013, Canada had violated the author's right to life under article 6 of the *International Covenant on Civil and Political Rights* (the "*Covenant*"), as well as her right to equality under article 26.
3. In accordance with its *Rules of Procedure*, the Committee requested that Canada provide, within 180 days, information about the measures taken to give effect to its views.
4. In this Response, Canada will explain on what basis it is unable to agree with the Committee's view that Canada violated the author's rights under articles 6 and 26 of the *Covenant*. Canada will also provide its views on the remedies suggested by the Committee.

II. OBSERVATIONS ON THE VIEWS OF THE COMMITTEE

5. Canada takes very seriously its international human rights treaty obligations, including those under the *Covenant*, and fully supports the Committee's important mandate to consider individual communications.
6. Canada does its utmost to cooperate with the Committee's processes and gives serious, good faith consideration to its views. However, Canada does not always agree with the Committee, either in its interpretation of the scope of States parties' obligations under the *Covenant*, or with the Committee's application of *Covenant* obligations to the facts in specific complaints against Canada.
7. Following careful consideration of the Committee's views in the context of the *Covenant* and other human rights treaties to which Canada is a party, Canada regrets that it cannot agree with the Committee's reasoning in this case.

Apparent misunderstanding of domestic court findings

8. In forming the view that Canada violated the author's right to life and right to equality, the Committee appears to rely heavily on domestic Federal Court and Federal Court of Appeal decisions. The Committee portrays these decisions as having found that the author's life and health were placed at significant risk by the denial of publicly-funded health care coverage under the IFHP (at paras. 11.2, 11.4 and 11.8 of the views).
9. However, as stressed in Canada's Second Supplementary Submission on the Admissibility and the Merits of the Communication, dated 5 December 2016, the Federal Court of Appeal in fact disagreed with the Federal Court that the author's ineligibility for IFHP coverage was the operative cause of any risk to her life and security of the person. The Federal Court of Appeal overturned the Federal Court's finding in this regard.
10. As per the Federal Court of Appeal:

“The appellant has attempted to obtain coverage under the Ontario Health Insurance Plan. Ontario refused coverage because, as a person in Canada contrary to Canadian immigration law, the appellant is not a “resident” of Ontario under R.R.O. 1990, Regulation 552, section 1.4, enacted under the *Health Insurance Act*, R.S.O. 1990, c. H.6. She did not judicially review Ontario's refusal, nor did she argue that Ontario's eligibility requirements violate her rights under sections 7 and 15 of the *Charter* against provincial legislation that limits her access to health care.

Further, and most fundamentally, the appellant by her own conduct – not the federal government by its Order in Council – has endangered her life and health. The appellant entered Canada as a visitor. She remained in Canada for many years, illegally. Had she acted legally and obtained legal immigration status in Canada, she would have been entitled to coverage under the Ontario Health Insurance Plan [...]

In my view, the appellant has not met her burden of showing that the Order in Council is the operative cause of the injury to her rights to life and security of the person under section 7 of the *Charter*.”¹

11. The Supreme Court of Canada, Canada's highest court, denied the author's application for leave to appeal the Federal Court of Appeal's decision.
12. In its 5 December 2016 submission, in light of the appellate court's findings, Canada asked that the Committee reject the author's request that the Committee defer to the “factual

¹ [Toussaint v. Canada \(Attorney General\)](#), [2013] 1 F.C.R. 374, 2011 FCA 213, at paras. 70-73 (emphasis added).

findings” of the Federal Court as to the causal connection between the author’s exclusion from the IFHP and the risk to her life and long-term health.

13. Canada’s 5 December 2016 submission is not mentioned in the Committee’s views. It is unfortunate that the views do not indicate whether the Committee considered this important submission in its deliberations.
14. Canada disagrees with the Committee’s view of causality of any risk to the author’s health and life, for the reasons identified by the Federal Court of Appeal and set out by Canada in its submissions on the admissibility and merits of the communication.

Response to the Committee’s view that Canada violated article 6 of the Covenant

15. The Committee expressed the view that “in light of serious implications of the denial of health care coverage to the author from July 2009 to April 2013”, Canada had violated the author’s rights under article 6. In reaching its conclusion, the Committee opined that “States parties have the obligation to provide access to existing health services that are reasonably available and accessible, when lack of access to health care would expose a person to a reasonably foreseeable risk that can result in loss of life.”²
16. With respect, Canada cannot accept the broad scope that the Committee has given to article 6 in these views. Article 6 guarantees the inherent right to life, and stipulates that no one shall be arbitrarily deprived of life. Canada accepts that protecting the right to life may entail some limited positive obligations. However, it cannot extend so far as to impose a positive obligation on States to provide state-funded medical insurance to foreign nationals without legal status present in the territory of the State. The Committee’s views are not supported by established rules of treaty interpretation – namely, they are not supported by the ordinary meaning of the terms of article 6 read in their context and in light of the *Covenant’s* object and purpose, by the negotiating history and the larger context in which the *Covenant* was adopted, nor by the practice of States parties to the *Covenant*.
17. Economic and social rights, including the right to the highest attainable standard of health, are protected by the *International Covenant on Economic, Social and Cultural Rights* (ICESCR). While Canada recognizes the interdependence and interrelatedness of rights, the Committee’s approach in its views essentially conflates the right to health under the right to life, resulting in an apparent conclusion that a certain level of health care, or of health insurance, may be “necessary” to protect the right to life.
18. The *Covenant* and the ICESCR were developed in parallel to address different categories of rights separately. Negotiating States, including Canada, clearly did not intend for economic and social rights, such as the right to the highest attainable standard of health, to be encompassed under the right to life.

² Committee views, at para. 11.3.

19. As Canada recently stated in its comments on Draft General Comment No. 36 on the right to life,³ Canada disagrees with the Committee's assertion, at paragraph 11.3 of the views, that the right to life includes a right to enjoy a life with dignity to the extent that it may encompass socio-economic entitlements. Canada notes that a number of other States parties similarly raised concerns with the Committee's expansive interpretation and with this potential blending of economic and social rights with the right to life.⁴
20. While rights under the *Covenant* must immediately be realized, social and economic rights, such as the right to the highest attainable standard of health, must be progressively realized, to the maximum of available resources.⁵ The Committee in its views imports a standard of progressive realization by suggesting that States parties have an obligation under Article 6 of the *Covenant* to provide access to health care services that are "reasonably available and accessible" in the State in question.⁶ This approach both distorts States parties' obligations under the *Covenant* and further indicates that the Committee's views conflate the right to life with an economic and social right.
21. Moreover, the Committee's views fail to distinguish between providing access to health care, and providing state-funded health care coverage. To this extent, Canada recalls its submission on the admissibility and merits of the communication, in which it set out the various health care services that the author was in fact able to access.
22. The facts of the case establish that, while the author did experience some delay in obtaining some medical care or medications, she was in every important instance able to receive it, despite not having state-funded medical insurance or the ability to pay for the care herself.
23. Most importantly, hospitals in Canada are prohibited from denying emergency medical treatment to anyone, if doing so would endanger their life, regardless of their immigration status. Canada believes that this availability of life-saving emergency medical treatment contributes to the fulfillment of Canada's obligations related to the protection of life under article 6(1) of the *Covenant*.
24. Persons without legal status in Canada are also able to access non-emergency health services at their own expense, or on a *pro bono* basis. Indeed, the author was able to receive emergency medical services, and she was also able to access many non-emergency services and medications on a *pro bono* basis. While the author was denied publicly-funded health insurance under the IFHP, a serious risk to the author's life was in no way a reasonably foreseeable or preventable outcome.

³ Comments by the Government of Canada to the Human Rights Committee on Draft General Comment No. 36 on Article 6, online at: <https://www.ohchr.org/EN/HRBodies/CCPR/Pages/GC36-Article6Righttolife.aspx>.

⁴ See, for example, the submissions of Australia, the United Kingdom and the United States on Draft General Comment No. 36.

⁵ ICESCR, Article 2.1.

⁶ Committee views, at para. 11.3.

Response to the Committee's view that Canada violated article 26 of the Covenant

25. The Committee expressed the view that States “cannot make a distinction, for the purposes of respecting and protecting the right to life, between regular and irregular migrants.”⁷ In the Committee’s view, distinctions in the IFHP coverage between persons having legal status in Canada and “those who have not been fully admitted to Canada” were not based on reasonable and objective criteria in the particular circumstances of the author’s case, and therefore constituted discrimination under article 26.⁸
26. As explained above, Canada cannot accept the Committee’s view that the author’s right to life is engaged in this communication. Canada believes the communication is in essence a claim to access to a certain level of publicly-funded health care.
27. Canada’s position is that legality of residence in a country does not come within the scope of “other status” under article 26. Unlike many of the other grounds listed in article 26, legality of status is not a characteristic inherent to the person. It is a characteristic that can change with time and it is one that States may have a legitimate interest in expecting the person to change. Indeed, as soon as the author applied for and obtained permanent resident status in Canada, she became eligible for health insurance under the provincial health insurance plan.
28. Moreover, Canada disagrees with the Committee’s view that the differential treatment in this case is not based on reasonable and objective criteria. It is important to underline again that in Canada, all migrants can access basic services, including emergency health care, regardless of migration status. More specifically, Canadian hospitals are prohibited from denying emergency medical care to anyone whose life is at risk. Persons without legal status in Canada are also able to access non-emergency health services at their own expense. Canada does not accept that failing to provide persons without legal status in Canada with state-funded health insurance is discriminatory within the meaning of Article 26 of the Covenant.
29. The distinction in treatment reasonably and objectively recognizes public health insurance as a reciprocal scheme, in which beneficiaries make contributions to the insurance scheme from which they then seek a benefit on a prepaid basis, and on uniform terms and conditions.⁹ The distinction further advances a legitimate aim of encouraging persons not lawfully present in Canada to take steps to regularize their status. This is consistent with

⁷ Committee views, at para. 11.7.

⁸ Committee views, at para. 11.8.

⁹ Health Canada, “Canada Health Act – Frequently Asked Questions,” online: <http://hc-sc.gc.ca/hcs-sss/medi-assur/faq-eng.php> (The *Canada Health Act* affords provinces and territories discretion in determining how to finance health insurance plans. Financing can be through the payment of premiums, payroll taxes, sales taxes, other provincial or territorial revenues, or by a combination of methods. Provinces/territories that levy premiums also offer financial assistance based on income so that low-income residents can have their payment reduced or be entirely exempted from the cost).

the well-recognized principle that States may control immigration and decide who they will admit to their territory.¹⁰

30. Just as it cannot be considered discriminatory not to provide visitors to Canada with state-funded health insurance, nor can it be considered discriminatory to deny state-funded health insurance to persons who choose to overstay their visitor visas and remain in Canada without legal status.

Response to the Committee's views on remedies

31. In its views, the Committee stated that Canada has an obligation to provide the author with adequate compensation for the harm that she suffered, and to take steps to prevent similar violations in the future, including reviewing its national legislation to ensure that irregular migrants have access to essential health care to prevent a reasonably foreseeable risk that can result in loss of life.
32. With respect, Canada believes that the proposed compensation to the author is unwarranted. Canada sympathizes with the author for the serious health-related challenges that she has experienced. Canada recognizes the stress that can be caused by having to access medical care without health insurance. At the same time, Canada reiterates that the evidence demonstrates that, while the author did experience some delay in obtaining some medical care and medications, she was in every important instance able to receive it, despite not having state-funded medical insurance or the ability to pay for the care herself. Further, and as clearly found by the Federal Court of Appeal, the denial of IFHP coverage could not be said to be the operative cause of the risk to the author's life, even should such a risk have been established.
33. In relation to proposed systemic changes, Canada reiterates its position that the provision of life-saving emergency medical services to irregular migrants at Canadian hospitals is sufficient to meet Canada's obligations under the *Covenant*. In addition, since 2012, the IFHP has included a discretionary power for the Minister of Immigration, Refugees and Citizenship to grant persons without residency status in Canada, including undocumented migrants, with IFHP benefits in exceptional and compelling circumstances. Between 2012 and November 2018, the Minister received 7 requests for IFPH coverage from undocumented migrants. Five of these requests were approved, and one is currently under consideration.

III. CONCLUSION

34. For the reasons stated, Canada regrets that it is unable to agree with the views of the Committee in respect of the facts and law in the communication and as such will not be taking any further measures to give effect to those views. As requested by the Committee,

¹⁰ HRC General Comment No. 15: The position of aliens under the Covenant (1986).

the Government of Canada has published the views on a government website,¹¹ and intends to publish them on an additional website shortly.

Ottawa, Canada
January 29, 2019

¹¹ See: <https://www.canada.ca/en/canadian-heritage/services/human-rights-complaints/international.html>.

27.

[International Covenant on Civil and Political Rights](#) UN General Assembly resolution 2200A (XXI) (16 December 1966)

International Covenant on Civil and Political Rights

Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 49

Preamble

The States Parties to the present Covenant,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, 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,

Recognizing that these rights derive from the inherent dignity of the human person,

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights,

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,

Agree upon the following articles:

PART I

Article 1

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

PART II

Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, 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.

2. Where not already provided for by existing legislative or other measures, 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 laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

Article 4

1 . In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.

3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

Article 5

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

2. There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

PART III

Article 6

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.

3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

Article 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Article 8

1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.

2. No one shall be held in servitude.

3.

(a) No one shall be required to perform forced or compulsory labour;

(b) Paragraph 3 (a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court;

(c) For the purpose of this paragraph the term "forced or compulsory labour" shall not include:

(i) Any work or service, not referred to in subparagraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention;

(ii) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors;

(iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community;

(iv) Any work or service which forms part of normal civil obligations.

Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Article 10

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

2.

(a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;

(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.

3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

Article 11

No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation. Article 12

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

4. No one shall be arbitrarily deprived of the right to enter his own country.

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 and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation. 5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Article 15

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

Article 16

Everyone shall have the right to recognition everywhere as a person before the law.

Article 17

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.

Article 18

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. 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.

4. 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.

Article 19

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 20

1. Any propaganda for war shall be prohibited by law.

2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Article 21

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those 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 health or morals or the protection of the rights and freedoms of others.

Article 22

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

2. No restrictions may be placed on the exercise of this right other than those which are prescribed by 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 health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

Article 23

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

2. The right of men and women of marriageable age to marry and to found a family shall be recognized.

3. No marriage shall be entered into without the free and full consent of the intending spouses.

4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

Article 24

1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

2. Every child shall be registered immediately after birth and shall have a name.

3. Every child has the right to acquire a nationality.

Article 25

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

(c) To have access, on general terms of equality, to public service in his country.

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all

persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 27

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

PART IV

Article 28

1. There shall be established a Human Rights Committee (hereafter referred to in the present Covenant as the Committee). It shall consist of eighteen members and shall carry out the functions hereinafter provided.

2. The Committee shall be composed of nationals of the States Parties to the present Covenant who shall be persons of high moral character and recognized competence in the field of human rights, consideration being given to the usefulness of the participation of some persons having legal experience.

3. The members of the Committee shall be elected and shall serve in their personal capacity.

Article 29

1. The members of the Committee shall be elected by secret ballot from a list of persons possessing the qualifications prescribed in article 28 and nominated for the purpose by the States Parties to the present Covenant.

2. Each State Party to the present Covenant may nominate not more than two persons. These persons shall be nationals of the nominating State.

3. A person shall be eligible for renomination.

Article 30

1. The initial election shall be held no later than six months after the date of the entry into force of the present Covenant.

2. At least four months before the date of each election to the Committee, other than an election to fill a vacancy declared in accordance with article 34, the Secretary-General of the United Nations shall address a written invitation to the States Parties to the present Covenant to submit their nominations for membership of the Committee within three months.

3. The Secretary-General of the United Nations shall prepare a list in alphabetical order of all the persons thus nominated, with an indication of the States Parties which have nominated them, and shall submit it to the States Parties to the present Covenant no later than one month before the date of each election.

4. Elections of the members of the Committee shall be held at a meeting of the States Parties to the present Covenant convened by the Secretary General of the United Nations at the Headquarters of the United Nations. At that meeting, for which two thirds of the States Parties to the present Covenant shall constitute a quorum, the persons elected to the Committee shall be those nominees who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

Article 31

1. The Committee may not include more than one national of the same State.

2. In the election of the Committee, consideration shall be given to equitable geographical distribution of membership and to the representation of the different forms of civilization and of the principal legal systems.

Article 32

1. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. However, the terms of nine of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these nine members shall be chosen by lot by the Chairman of the meeting referred to in article 30, paragraph 4. 2. Elections at the expiry of office shall be held in accordance with the preceding articles of this part of the present Covenant.

Article 33

1. If, in the unanimous opinion of the other members, a member of the Committee has ceased to carry out his functions for any cause other than absence of a temporary character, the Chairman of the Committee shall notify the Secretary-General of the United Nations, who shall then declare the seat of that member to be vacant.

2. In the event of the death or the resignation of a member of the Committee, the Chairman shall immediately notify the Secretary-General of the United Nations, who shall declare the seat vacant from the date of death or the date on which the resignation takes effect.

Article 34

1. When a vacancy is declared in accordance with article 33 and if the term of office of the member to be replaced does not expire within six months of the declaration of the vacancy, the Secretary-General of the United Nations shall notify each of the States Parties to the present Covenant, which may within two months submit nominations in accordance with article 29 for the purpose of filling the vacancy.

2. The Secretary-General of the United Nations shall prepare a list in alphabetical order of the persons thus nominated and shall submit it to the States Parties to the present Covenant. The

election to fill the vacancy shall then take place in accordance with the relevant provisions of this part of the present Covenant.

3. A member of the Committee elected to fill a vacancy declared in accordance with article 33 shall hold office for the remainder of the term of the member who vacated the seat on the Committee under the provisions of that article.

Article 35

The members of the Committee shall, with the approval of the General Assembly of the United Nations, receive emoluments from United Nations resources on such terms and conditions as the General Assembly may decide, having regard to the importance of the Committee's responsibilities.

Article 36

The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Covenant.

Article 37

1. The Secretary-General of the United Nations shall convene the initial meeting of the Committee at the Headquarters of the United Nations.

2. After its initial meeting, the Committee shall meet at such times as shall be provided in its rules of procedure.

3. The Committee shall normally meet at the Headquarters of the United Nations or at the United Nations Office at Geneva.

Article 38

Every member of the Committee shall, before taking up his duties, make a solemn declaration in open committee that he will perform his functions impartially and conscientiously.

Article 39

1. The Committee shall elect its officers for a term of two years. They may be re-elected.
2. The Committee shall establish its own rules of procedure, but these rules shall provide, inter alia, that:
 - (a) Twelve members shall constitute a quorum;
 - (b) Decisions of the Committee shall be made by a majority vote of the members present.

Article 40

1. The States Parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights: (a) Within one year of the entry into force of the present Covenant for the States Parties concerned;
 - (b) Thereafter whenever the Committee so requests.
2. All reports shall be submitted to the Secretary-General of the United Nations, who shall transmit them to the Committee for consideration. Reports shall indicate the factors and difficulties, if any, affecting the implementation of the present Covenant.
3. The Secretary-General of the United Nations may, after consultation with the Committee, transmit to the specialized agencies concerned copies of such parts of the reports as may fall within their field of competence.

4. The Committee shall study the reports submitted by the States Parties to the present Covenant. It shall transmit its reports, and such general comments as it may consider appropriate, to the States Parties. The Committee may also transmit to the Economic and Social Council these comments along with the copies of the reports it has received from States Parties to the present Covenant.

5. The States Parties to the present Covenant may submit to the Committee observations on any comments that may be made in accordance with paragraph 4 of this article.

Article 41

1. A State Party to the present Covenant may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant. Communications under this article may be received and considered only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration. Communications received under this article shall be dealt with in accordance with the following procedure:

(a) If a State Party to the present Covenant considers that another State Party is not giving effect to the provisions of the present Covenant, it may, by written communication, bring the matter to the attention of that State Party. Within three months after the receipt of the communication the receiving State shall afford the State which sent the communication an explanation, or any other statement in writing clarifying the matter which should include, to the extent possible and pertinent, reference to domestic procedures and remedies taken, pending, or available in the matter;

(b) If the matter is not adjusted to the satisfaction of both States Parties concerned within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee, by notice given to the Committee and to the other State;

(c) The Committee shall deal with a matter referred to it only after it has ascertained that all available domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged;

(d) The Committee shall hold closed meetings when examining communications under this article;

(e) Subject to the provisions of subparagraph (c), the Committee shall make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of respect for human rights and fundamental freedoms as recognized in the present Covenant;

(f) In any matter referred to it, the Committee may call upon the States Parties concerned, referred to in subparagraph (b), to supply any relevant information;

(g) The States Parties concerned, referred to in subparagraph (b), shall have the right to be represented when the matter is being considered in the Committee and to make submissions orally and/or in writing;

(h) The Committee shall, within twelve months after the date of receipt of notice under subparagraph (b), submit a report:

(i) If a solution within the terms of subparagraph (e) is reached, the Committee shall confine its report to a brief statement of the facts and of the solution reached;

(ii) If a solution within the terms of subparagraph (e) is not reached, the Committee shall confine its report to a brief statement of the facts; the written submissions and record of the oral submissions made by the States Parties concerned shall be attached to the report. In every matter, the report shall be communicated to the States Parties concerned.

2. The provisions of this article shall come into force when ten States Parties to the present Covenant have made declarations under paragraph 1 of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by any State Party shall be received after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party concerned has made a new declaration.

1.

(a) If a matter referred to the Committee in accordance with article 41 is not resolved to the satisfaction of the States Parties concerned, the Committee may, with the prior consent of the States Parties concerned, appoint an ad hoc Conciliation Commission (hereinafter referred to as the Commission). The good offices of the Commission shall be made available to the States Parties concerned with a view to an amicable solution of the matter on the basis of respect for the present Covenant;

(b) The Commission shall consist of five persons acceptable to the States Parties concerned. If the States Parties concerned fail to reach agreement within three months on all or part of the composition of the Commission, the members of the Commission concerning whom no agreement has been reached shall be elected by secret ballot by a two-thirds majority vote of the Committee from among its members.

2. The members of the Commission shall serve in their personal capacity. They shall not be nationals of the States Parties concerned, or of a State not Party to the present Covenant, or of a State Party which has not made a declaration under article 41.

3. The Commission shall elect its own Chairman and adopt its own rules of procedure.

4. The meetings of the Commission shall normally be held at the Headquarters of the United Nations or at the United Nations Office at Geneva. However, they may be held at such other convenient places as the Commission may determine in consultation with the Secretary-General of the United Nations and the States Parties concerned.

5. The secretariat provided in accordance with article 36 shall also service the commissions appointed under this article.

6. The information received and collated by the Committee shall be made available to the Commission and the Commission may call upon the States Parties concerned to supply any other relevant information.

7. When the Commission has fully considered the matter, but in any event not later than twelve months after having been seized of the matter, it shall submit to the Chairman of the Committee a report for communication to the States Parties concerned:

(a) If the Commission is unable to complete its consideration of the matter within twelve months, it shall confine its report to a brief statement of the status of its consideration of the matter;

(b) If an amicable solution to the matter on the basis of respect for human rights as recognized in the present Covenant is reached, the Commission shall confine its report to a brief statement of the facts and of the solution reached;

(c) If a solution within the terms of subparagraph (b) is not reached, the Commission's report shall embody its findings on all questions of fact relevant to the issues between the States Parties concerned, and its views on the possibilities of an amicable solution of the matter. This report shall also contain the written submissions and a record of the oral submissions made by the States Parties concerned;

(d) If the Commission's report is submitted under subparagraph (c), the States Parties concerned shall, within three months of the receipt of the report, notify the Chairman of the Committee whether or not they accept the contents of the report of the Commission.

8. The provisions of this article are without prejudice to the responsibilities of the Committee under article 41.

9. The States Parties concerned shall share equally all the expenses of the members of the Commission in accordance with estimates to be provided by the Secretary-General of the United Nations.

10. The Secretary-General of the United Nations shall be empowered to pay the expenses of the members of the Commission, if necessary, before reimbursement by the States Parties concerned, in accordance with paragraph 9 of this article.

Article 43

The members of the Committee, and of the ad hoc conciliation commissions which may be appointed under article 42, shall be entitled to the facilities, privileges and immunities of experts on mission for the United Nations as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.

Article 44

The provisions for the implementation of the present Covenant shall apply without prejudice to the procedures prescribed in the field of human rights by or under the constituent instruments and the conventions of the United Nations and of the specialized agencies and shall not prevent the States Parties to the present Covenant from having recourse to other procedures for settling a dispute in accordance with general or special international agreements in force between them.

Article 45

The Committee shall submit to the General Assembly of the United Nations, through the Economic and Social Council, an annual report on its activities.

PART V

Article 46

Nothing in the present Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations and of the constitutions of the specialized agencies which define the respective responsibilities of the various organs of the United Nations and of the specialized agencies in regard to the matters dealt with in the present Covenant.

Article 47

Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.

PART VI

Article 48

1. The present Covenant is open for signature by any State Member of the United Nations or member of any of its specialized agencies, by any State Party to the Statute of the International Court of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a Party to the present Covenant.

2. The present Covenant is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. The present Covenant shall be open to accession by any State referred to in paragraph 1 of this article.

4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

5. The Secretary-General of the United Nations shall inform all States which have signed this Covenant or acceded to it of the deposit of each instrument of ratification or accession.

Article 49

1. The present Covenant shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the thirty-fifth instrument of ratification or instrument of accession.

2. For each State ratifying the present Covenant or acceding to it after the deposit of the thirty-fifth instrument of ratification or instrument of accession, the present Covenant shall enter into force three months after the date of the deposit of its own instrument of ratification or instrument of accession.

Article 50

The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.

Article 51

1. Any State Party to the present Covenant may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General of the United Nations shall thereupon communicate any proposed amendments to the States Parties to the present Covenant with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that at least one third of the States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.

2. Amendments shall come into force when they have been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of the States Parties to the present Covenant in accordance with their respective constitutional processes. 3. When amendments come into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of the present Covenant and any earlier amendment which they have accepted.

Article 52

1. Irrespective of the notifications made under article 48, paragraph 5, the Secretary-General of the United Nations shall inform all States referred to in paragraph 1 of the same article of the following particulars:

(a) Signatures, ratifications and accessions under article 48;

(b) The date of the entry into force of the present Covenant under article 49 and the date of the entry into force of any amendments under article 51.

Article 53

1. The present Covenant, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of the present Covenant to all States referred to in article 48.

Optional Protocol to the International Covenant on Civil and Political Rights

Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966

entry into force 23 March 1976, in accordance with Article 9

The States Parties to the present Protocol,

Considering that in order further to achieve the purposes of the International Covenant on Civil and Political Rights (hereinafter referred to as the Covenant) and the implementation of its provisions it would be appropriate to enable the Human Rights Committee set up in part IV of the Covenant (hereinafter referred to as the Committee) to receive and consider, as provided in the present Protocol, communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant. Have agreed as follows:

Article 1

A State Party to the Covenant that becomes a Party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant. No communication shall be received by the Committee if it concerns a State Party to the Covenant which is not a Party to the present Protocol.

Article 2

Subject to the provisions of article 1, individuals who claim that any of their rights enumerated in the Covenant have been violated and who have exhausted all available domestic remedies may submit a written communication to the Committee for consideration.

Article 3

The Committee shall consider inadmissible any communication under the present Protocol which is anonymous, or which it considers to be an abuse of the right of submission of such communications or to be incompatible with the provisions of the Covenant.

Article 4

1. Subject to the provisions of article 3, the Committee shall bring any communications submitted to it under the present Protocol to the attention of the State Party to the present Protocol alleged to be violating any provision of the Covenant.
2. Within six months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.

Article 5

1. The Committee shall consider communications received under the present Protocol in the light of all written information made available to it by the individual and by the State Party concerned.
2. The Committee shall not consider any communication from an individual unless it has ascertained that:

(a) The same matter is not being examined under another procedure of international investigation or settlement;

(b) The individual has exhausted all available domestic remedies. This shall not be the rule where the application of the remedies is unreasonably prolonged.

3. The Committee shall hold closed meetings when examining communications under the present Protocol. 4. The Committee shall forward its views to the State Party concerned and to the individual.

Article 6

The Committee shall include in its annual report under article 45 of the Covenant a summary of its activities under the present Protocol.

Article 7

Pending the achievement of the objectives of resolution 1514(XV) adopted by the General Assembly of the United Nations on 14 December 1960 concerning the Declaration on the Granting of Independence to Colonial Countries and Peoples, the provisions of the present Protocol shall in no way limit the right of petition granted to these peoples by the Charter of the United Nations and other international conventions and instruments under the United Nations and its specialized agencies.

Article 8

1. The present Protocol is open for signature by any State which has signed the Covenant.
2. The present Protocol is subject to ratification by any State which has ratified or acceded to the Covenant. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.
3. The present Protocol shall be open to accession by any State which has ratified or acceded to the Covenant.
4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.
5. The Secretary-General of the United Nations shall inform all States which have signed the present Protocol or acceded to it of the deposit of each instrument of ratification or accession.

Article 9

1. Subject to the entry into force of the Covenant, the present Protocol shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the tenth instrument of ratification or instrument of accession.
2. For each State ratifying the present Protocol or acceding to it after the deposit of the tenth instrument of ratification or instrument of accession, the present Protocol shall enter into force three months after the date of the deposit of its own instrument of ratification or instrument of accession.

Article 10

The provisions of the present Protocol shall extend to all parts of federal States without any limitations or exceptions.

Article 11

1. Any State Party to the present Protocol may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate any proposed amendments to the States Parties to the present Protocol with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposal. In the event that at least one third of the States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.

2. Amendments shall come into force when they have been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of the States Parties to the present Protocol in accordance with their respective constitutional processes.

3. When amendments come into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of the present Protocol and any earlier amendment which they have accepted.

Article 12

1. Any State Party may denounce the present Protocol at any time by written notification addressed to the Secretary-General of the United Nations. Denunciation shall take effect three months after the date of receipt of the notification by the Secretary-General.

2. Denunciation shall be without prejudice to the continued application of the provisions of the present Protocol to any communication submitted under article 2 before the effective date of denunciation.

Article 13

Irrespective of the notifications made under article 8, paragraph 5, of the present Protocol, the Secretary-General of the United Nations shall inform all States referred to in article 48, paragraph I, of the Covenant of the following particulars:

(a) Signatures, ratifications and accessions under article 8;

(b) The date of the entry into force of the present Protocol under article 9 and the date of the entry into force of any amendments under article 11;

(c) Denunciations under article 12.

Article 14

1. The present Protocol, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of the present Protocol to all States referred to in article 48 of the Covenant.

28.

[*International Covenant on Economic, Social and Cultural Rights*](#), UN General Assembly resolution 2200A (XXI) (16 December 1966)

International Covenant on Economic, Social and Cultural Rights

**Adopted and opened for signature, ratification and accession by General Assembly
resolution 2200A (XXI)
of 16 December 1966**

entry into force 3 January 1976, in accordance with article 27

Preamble

The States Parties to the present Covenant,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, 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,

Recognizing that these rights derive from the inherent dignity of the human person,

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights,

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,

Agree upon the following articles:

PART I

Article 1

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

PART II

Article 2

1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.

Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.

Article 4

The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only 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.

Article 5

1. Nothing in the present Covenant 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 or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant.

2. No restriction upon or derogation from any of the fundamental human rights recognized or existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

PART III

Article 6

1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.

Article 7

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

(a) Remuneration which provides all workers, as a minimum, with:

(i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;

(ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;

(b) Safe and healthy working conditions; (c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;

(d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays

Article 8

1. The States Parties to the present Covenant undertake to ensure:

(a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;

(c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.

2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State. 3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.

Article 9

The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.

Article 10

The States Parties to the present Covenant recognize that:

1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.

2. Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.

3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.

Article 11

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:

(a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;

(b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

Article 12

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

(a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;

(b) The improvement of all aspects of environmental and industrial hygiene;

(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;

(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

Article 13

1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:

(a) Primary education shall be compulsory and available free to all;

(b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;

(c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;

(d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;

(e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.

3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph I of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

Article 14

Each State Party to the present Covenant which, at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all.

Article 15

1. The States Parties to the present Covenant recognize the right of everyone:

(a) To take part in cultural life;

(b) To enjoy the benefits of scientific progress and its applications;

(c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture. 3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.

4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.

PART IV

Article 16

1. The States Parties to the present Covenant undertake to submit in conformity with this part of the Covenant reports on the measures which they have adopted and the progress made in achieving the observance of the rights recognized herein.

2.

(a) All reports shall be submitted to the Secretary-General of the United Nations, who shall transmit copies to the Economic and Social Council for consideration in accordance with the provisions of the present Covenant;

(b) The Secretary-General of the United Nations shall also transmit to the specialized agencies copies of the reports, or any relevant parts therefrom, from States Parties to the present Covenant which are also members of these specialized agencies in so far as these reports, or parts therefrom, relate to any matters which fall within the responsibilities of the said agencies in accordance with their constitutional instruments.

Article 17

1. The States Parties to the present Covenant shall furnish their reports in stages, in accordance with a programme to be established by the Economic and Social Council within one year of the entry into force of the present Covenant after consultation with the States Parties and the specialized agencies concerned.

2. Reports may indicate factors and difficulties affecting the degree of fulfilment of obligations under the present Covenant.

3. Where relevant information has previously been furnished to the United Nations or to any specialized agency by any State Party to the present Covenant, it will not be necessary to reproduce that information, but a precise reference to the information so furnished will suffice.

Article 18

Pursuant to its responsibilities under the Charter of the United Nations in the field of human rights and fundamental freedoms, the Economic and Social Council may make arrangements with the specialized agencies in respect of their reporting to it on the progress made in achieving the observance of the provisions of the present Covenant falling within the scope of their activities. These reports may include particulars of decisions and recommendations on such implementation adopted by their competent organs.

Article 19

The Economic and Social Council may transmit to the Commission on Human Rights for study and general recommendation or, as appropriate, for information the reports concerning human rights submitted by States in accordance with articles 16 and 17, and those concerning human rights submitted by the specialized agencies in accordance with article 18.

Article 20

The States Parties to the present Covenant and the specialized agencies concerned may submit comments to the Economic and Social Council on any general recommendation under article 19 or reference to such general recommendation in any report of the Commission on Human Rights or any documentation referred to therein.

Article 21

The Economic and Social Council may submit from time to time to the General Assembly reports with recommendations of a general nature and a summary of the information received from the States Parties to the present Covenant and the specialized agencies on the measures taken and the progress made in achieving general observance of the rights recognized in the present Covenant.

Article 22

The Economic and Social Council may bring to the attention of other organs of the United Nations, their subsidiary organs and specialized agencies concerned with furnishing technical assistance any matters arising out of the reports referred to in this part of the present Covenant which may assist such bodies in deciding, each within its field of competence, on the advisability of international measures likely to contribute to the effective progressive implementation of the present Covenant.

Article 23

The States Parties to the present Covenant agree that international action for the achievement of the rights recognized in the present Covenant includes such methods as the conclusion of conventions, the adoption of recommendations, the furnishing of technical assistance and the holding of regional meetings and technical meetings for the purpose of consultation and study organized in conjunction with the Governments concerned.

Article 24

Nothing in the present Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations and of the constitutions of the specialized agencies which define the respective responsibilities of the various organs of the United Nations and of the specialized agencies in regard to the matters dealt with in the present Covenant.

Article 25

Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.

PART V**Article 26**

1. The present Covenant is open for signature by any State Member of the United Nations or member of any of its specialized agencies, by any State Party to the Statute of the International Court of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a party to the present Covenant.
2. The present Covenant is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.
3. The present Covenant shall be open to accession by any State referred to in paragraph 1 of this article.
4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.
5. The Secretary-General of the United Nations shall inform all States which have signed the present Covenant or acceded to it of the deposit of each instrument of ratification or accession.

Article 27

1. The present Covenant shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the thirty-fifth instrument of ratification or instrument of accession.

2. For each State ratifying the present Covenant or acceding to it after the deposit of the thirty-fifth instrument of ratification or instrument of accession, the present Covenant shall enter into force three months after the date of the deposit of its own instrument of ratification or instrument of accession.

Article 28

The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.

Article 29

1. Any State Party to the present Covenant may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate any proposed amendments to the States Parties to the present Covenant with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that at least one third of the States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.

2. Amendments shall come into force when they have been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of the States Parties to the present Covenant in accordance with their respective constitutional processes.

3. When amendments come into force they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of the present Covenant and any earlier amendment which they have accepted.

Article 30

Irrespective of the notifications made under article 26, paragraph 5, the Secretary-General of the United Nations shall inform all States referred to in paragraph I of the same article of the following particulars:

(a) Signatures, ratifications and accessions under article 26;

(b) The date of the entry into force of the present Covenant under article 27 and the date of the entry into force of any amendments under article 29.

Article 31

1. The present Covenant, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of the present Covenant to all States referred to in article 26.



International Covenant on Civil and Political Rights

3 September 2019

Original: English

Human Rights Committee

General comment No. 36

Article 6: right to life*,**

I. General remarks

1. This general comment replaces general comments No. 6, adopted by the Committee at its sixteenth session (1982), and No. 14, adopted by the Committee at its twenty-third session (1984).

2. Article 6 of the International Covenant on Civil and Political Rights recognizes and protects the right to life of all human beings. The right to life is the supreme right from which no derogation is permitted, even in situations of armed conflict and other public emergencies that threaten the life of the nation. The right to life has crucial importance both for individuals and for society as a whole. It is most precious for its own sake as a right that inheres in every human being, but it also constitutes a fundamental right, the effective protection of which is the prerequisite for the enjoyment of all other human rights and the content of which can be informed by other human rights.

3. The right to life is a right that should not be interpreted narrowly. It concerns the entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death, as well as to enjoy a life with dignity. Article 6 of the Covenant guarantees this right for all human beings, without distinction of any kind, including for persons suspected or convicted of even the most serious crimes.

4. Paragraph 1 of article 6 of the Covenant provides that no one shall be arbitrarily deprived of life and that this right shall be protected by law. It lays the foundation for the obligation of States parties to respect and ensure the right to life, to give effect to it through legislative and other measures, and to provide effective remedies and reparation to all victims of violations of the right to life.

5. Paragraphs 2, 4, 5 and 6 of article 6 of the Covenant set out specific safeguards to ensure that in States parties that have not yet abolished the death penalty, death sentences are not applied except for the most serious crimes, and then only in the most exceptional cases and under the strictest limits (see part IV below). The prohibition on arbitrary deprivation of life contained in article 6 (1) further limits the ability of States parties to apply the death penalty. The provisions in paragraph 3 regulate specifically the relationship between article 6 of the Covenant and the Convention on the Prevention and Punishment of the Crime of Genocide.

6. Deprivation of life involves intentional or otherwise foreseeable and preventable life-terminating harm or injury, caused by an act or omission. It goes beyond injury to bodily or mental integrity or a threat thereto.

7. States parties must respect the right to life. This entails the duty to refrain from engaging in conduct resulting in arbitrary deprivation of life. States parties must also ensure the right to life and exercise due diligence to protect the lives of individuals against deprivations caused by persons or entities whose conduct is not attributable to the State. The obligation of States parties to respect and ensure the right to life extends to reasonably foreseeable threats and life-threatening situations that can result in loss of life. States parties may be in violation of article 6 even if such threats and situations do not result in loss of life.

8. Although States parties may adopt measures designed to regulate voluntary termination of pregnancy, those measures must not result in violation of the right to life of a pregnant woman or girl, or her other rights under the Covenant. Thus, restrictions on the ability of women or girls to seek abortion must not, inter alia, jeopardize their lives, subject them to physical or mental pain or suffering that violates article 7 of the Covenant, discriminate against them or arbitrarily interfere with their privacy. States parties must provide safe, legal and effective access to abortion where the life and health of the pregnant woman or girl is at risk, or where carrying a pregnancy to term would cause the pregnant woman or girl substantial pain or suffering, most notably where the pregnancy is the result of rape or incest or where the pregnancy is not viable. In addition, States parties may not regulate pregnancy or abortion in all other cases in a manner that runs contrary to their duty to ensure that women and girls do not have to resort to unsafe abortions, and they should revise their abortion laws accordingly. For example, they should not take measures such as criminalizing pregnancy of unmarried women or applying criminal sanctions to women and girls who undergo abortion or to medical service providers who assist them in doing so, since taking such measures compels women and girls to resort to unsafe abortion. States parties should remove existing barriers to effective access by women and girls to safe and legal abortion, including barriers caused as a result of the exercise of conscientious objection by individual medical providers, and should not introduce new barriers. States parties

should also effectively protect the lives of women and girls against the mental and physical health risks associated with unsafe abortions. In particular, they should ensure access for women and men, and especially girls and boys, to quality and evidence-based information and education on sexual and reproductive health and to a wide range of affordable contraceptive methods, and prevent the stigmatization of women and girls who seek abortion. States parties should ensure the availability of, and effective access to, quality prenatal and post-abortion health care for women and girls, in all circumstances and on a confidential basis.

9. While acknowledging the central importance to human dignity of personal autonomy, States should take adequate measures, without violating their other Covenant obligations, to prevent suicides, especially among individuals in particularly vulnerable situations, including individuals deprived of their liberty. States parties that allow medical professionals to provide medical treatment or the medical means to facilitate the termination of life of afflicted adults, such as the terminally ill, who experience severe physical or mental pain and suffering and wish to die with dignity, must ensure the existence of robust legal and institutional safeguards to verify that medical professionals are complying with the free, informed, explicit and unambiguous decision of their patients, with a view to protecting patients from pressure and abuse.

II. Prohibition against arbitrary deprivation of life

10. Although it inheres in every human being, the right to life is not absolute. While the Covenant does not enumerate the permissible grounds for deprivation of life, by requiring that deprivations of life must not be arbitrary, article 6 (1) implicitly recognizes that some deprivations of life may be non-arbitrary. For example, the use of lethal force in self-defence, under the conditions specified in paragraph 12 below, would not constitute an arbitrary deprivation of life. Even those exceptional measures leading to deprivations of life that are not arbitrary per se must be applied in a manner that is not arbitrary in fact. Such exceptional measures should be established by law and accompanied by effective institutional safeguards designed to prevent arbitrary deprivations of life. Furthermore, States that have not abolished the death penalty and that are not parties to the Second Optional Protocol to the Covenant, aiming at the abolition of the death penalty, or other treaties providing for the abolition of the death penalty can apply the death penalty only in a non-arbitrary manner, for the most serious crimes and subject to a number of strict conditions elaborated in part IV below.

11. The second sentence of article 6 (1) requires that the right to life be protected by law, while the third sentence requires that no one be arbitrarily deprived of life. The two requirements partly overlap in that a deprivation of life that lacks a legal basis or is otherwise inconsistent with life-protecting laws and procedures is, as a rule, arbitrary in nature. For example, a death sentence issued following legal proceedings conducted in violation of domestic laws of criminal procedure or evidence will generally be both unlawful and arbitrary.

12. Deprivation of life is, as a rule, arbitrary if it is inconsistent with international law or domestic law. A deprivation of life may, nevertheless, be authorized by domestic law and still be arbitrary. The notion of “arbitrariness” is not to be fully equated with “against the law”, but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality. In order not to be qualified as arbitrary under article 6, the application of potentially lethal force by a private person acting in self-defence, or by another person coming to his or her defence, must be strictly necessary in view of the threat posed by the attacker; it must represent a method of last resort after other alternatives have been exhausted or deemed inadequate; the amount of force applied cannot exceed the amount strictly needed for responding to the threat; the force applied must be carefully directed, only against the attacker; and the threat responded to must involve imminent death or serious injury. The use of potentially lethal force for law enforcement purposes is an extreme measure that should be resorted to only when strictly necessary in order to protect life or prevent serious injury from an imminent threat. It cannot be used, for example, in order to prevent the escape from custody of a suspected criminal or a convict who does not pose a serious and imminent threat to the lives or bodily integrity of others. The intentional taking of life by any means is permissible only if it is strictly necessary in order to protect life from an imminent threat.

13. States parties are expected to take all necessary measures to prevent arbitrary deprivation of life by their law enforcement officials, including soldiers charged with law enforcement missions. These measures include putting in place appropriate legislation controlling the use of lethal force by law enforcement officials, procedures designed to ensure that law enforcement actions are adequately planned in a manner consistent with the need to minimize the risk they pose to human life, mandatory reporting, review and investigation of lethal incidents and other life-threatening incidents, and supplying forces responsible for crowd control with effective, less-lethal means and adequate protective equipment in order to obviate their need to resort to lethal force (see also para. 14 below). In particular, all operations of law enforcement officials should comply with relevant international standards, including the Code of Conduct for Law Enforcement Officials and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, and law enforcement officials should undergo appropriate training designed to inculcate these standards so as to ensure, in all circumstances, the fullest respect for the right to life.

14. While preferable to more lethal weapons, States parties should ensure that less-lethal weapons are subject to strict independent testing and evaluate and monitor the impact on the right to life of weapons such as electro-muscular disruption devices (Tasers), rubber or foam bullets, and other attenuating energy projectiles, which are designed for use or are actually used by law enforcement officials, including soldiers charged with law enforcement missions. The use of such weapons must be restricted to law enforcement officials who have undergone appropriate training, and must be strictly regulated in accordance with applicable international standards, including the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials. Furthermore, less-lethal weapons must be employed only subject to strict requirements of necessity and proportionality, in situations in which other less harmful measures have proven to be or clearly are ineffective to address

the threat. States parties should not resort to less-lethal weapons in situations of crowd control that can be addressed through less harmful means, especially situations involving the exercise of the right to peaceful assembly.

15. When private individuals or entities are empowered or authorized by a State party to employ force with potentially lethal consequences, the State party is under an obligation to ensure that such employment of force actually complies with article 6 and the State party remains responsible for any failure to comply. Among other things, a State party must rigorously limit the powers afforded to private actors and ensure that strict and effective measures of monitoring and control, as well as adequate training, are in place in order to guarantee, *inter alia*, that the powers granted are not misused and do not lead to arbitrary deprivation of life. For example, a State party must take adequate measures to ensure that persons who were involved or are currently involved in serious human rights violations or abuses are excluded from private security entities empowered or authorized to employ force. It must also ensure that victims of arbitrary deprivation of life by private individuals or entities empowered or authorized by the State party are granted an effective remedy.

16. Paragraphs 2, 4 and 5 of article 6 implicitly recognize that countries that have not abolished the death penalty and have not ratified the Second Optional Protocol to the Covenant, aiming at the abolition of the death penalty, are not legally barred under the Covenant from applying the death penalty with regard to the most serious crimes, subject to a number of strict conditions. Other procedures regulating activity that may result in deprivation of life, such as protocols for administering new drugs, must be established by law, accompanied by effective institutional safeguards designed to prevent arbitrary deprivation of life, and must be compatible with other provisions of the Covenant.

17. The deprivation of life of individuals through acts or omissions that violate provisions of the Covenant other than article 6 is, as a rule, arbitrary in nature. This includes, for example, the use of force resulting in the death of demonstrators exercising their right to freedom of assembly and the passing of a death sentence following a trial that failed to meet the due process requirements of article 14 of the Covenant.

III. Duty to protect life

18. The second sentence of article 6 (1) provides that the right to life “shall be protected by law”. This implies that States parties must establish a legal framework to ensure the full enjoyment of the right to life by all individuals as may be necessary to give effect to the right to life. The duty to protect the right to life by law also includes an obligation for States parties to adopt any appropriate laws or other measures in order to protect life from all reasonably foreseeable threats, including from threats emanating from private persons and entities.

19. The duty to protect by law the right to life requires that any substantive ground for deprivation of life must be prescribed by law and must be defined with sufficient precision to avoid overly broad or arbitrary interpretation or application. Since deprivation of life by the authorities of the State is a matter of the utmost gravity, the law must strictly control and limit the circumstances in which a person may be deprived of his or her life by those authorities, and States parties must ensure full compliance with all of the relevant legal provisions. The duty to protect by law the right to life also requires States parties to organize all State organs and governance structures through which public authority is exercised in a manner consistent with the need to respect and ensure the right to life, including establishing by law adequate institutions and procedures for preventing deprivation of life, investigating and prosecuting potential cases of unlawful deprivation of life, meting out punishment and providing full reparation.

20. States parties must enact a protective legal framework that includes effective criminal prohibitions on all manifestations of violence or incitement to violence that are likely to result in deprivation of life, such as intentional and negligent homicide, unnecessary or disproportionate use of firearms, infanticide, “honour” killings, lynching, violent hate crimes, blood feuds, ritual killings, death threats and terrorist attacks. The criminal sanctions attached to these crimes must be commensurate with their gravity, while remaining compatible with all the provisions of the Covenant.

21. The duty to take positive measures to protect the right to life derives from the general duty to ensure the rights recognized in the Covenant, which is articulated in article 2 (1) when read in conjunction with article 6, as well as from the specific duty to protect the right to life by law, which is articulated in the second sentence of article 6. States parties are thus under a due diligence obligation to take reasonable, positive measures that do not impose disproportionate burdens on them in response to reasonably foreseeable threats to life originating from private persons and entities whose conduct is not attributable to the State. Hence, States parties are obliged to take adequate preventive measures in order to protect individuals against reasonably foreseen threats of being murdered or killed by criminals and organized crime or militia groups, including armed or terrorist groups (see also para. 23 below). States parties should also disband irregular armed groups, such as private armies and vigilante groups, that are responsible for deprivations of life and reduce the proliferation of potentially lethal weapons to unauthorized individuals. States parties must further take adequate measures of protection, including continuous supervision, in order to prevent, investigate, punish and remedy arbitrary deprivation of life by private entities, such as private transportation companies, private hospitals and private security firms.

22. States parties must take appropriate measures to protect individuals against deprivation of life by other States, international organizations and foreign corporations operating within their territory or in other areas subject to their jurisdiction. They must also take appropriate legislative and other measures to ensure that all activities taking place in whole or in part within their territory and in other places subject to their jurisdiction, but having a direct and reasonably foreseeable impact on the right to life of individuals outside their territory, including activities undertaken by corporate entities based in their territory or subject to their jurisdiction, are consistent with article 6, taking due account of related international standards of corporate responsibility and of the right of victims to obtain an effective remedy.

23. The duty to protect the right to life requires States parties to take special measures of protection towards persons in vulnerable situations whose lives have been placed at particular risk because of specific threats or pre-existing patterns of violence. Such persons include human rights defenders (see also para. 53 below), officials fighting corruption and organized crime, humanitarian workers, journalists, prominent public figures, witnesses to crime and victims of domestic and gender-based violence and human trafficking. They may also include children, especially children in street situations, unaccompanied migrant children and children in situations of armed conflict, members of ethnic and religious minorities, indigenous peoples, lesbian, gay, bisexual, transgender and intersex persons, persons with albinism, alleged witches, displaced persons, asylum seekers, refugees and stateless persons. States parties must respond urgently and effectively in order to protect individuals who find themselves under a specific threat, by adopting special measures such as the assignment of around-the-clock police protection, the issuance of protection and restraining orders against potential aggressors and, in exceptional cases, and only with the free and informed consent of the threatened individual, protective custody.

24. Persons with disabilities, including psychosocial or intellectual disabilities, are also entitled to specific measures of protection so as to ensure their effective enjoyment of the right to life on an equal basis with others. Such measures of protection must include the provision of reasonable accommodation when necessary to ensure the right to life, such as ensuring access of persons with disabilities to essential facilities and services, and specific measures designed to prevent unwarranted use of force by law enforcement agents against persons with disabilities.

25. States parties also have a heightened duty of care to take any necessary measures to protect the lives of individuals deprived of their liberty by the State, since by arresting, detaining, imprisoning or otherwise depriving individuals of their liberty, States parties assume the responsibility to care for their lives and bodily integrity, and they may not rely on lack of financial resources or other logistical problems to reduce this responsibility. The same heightened duty of care attaches to individuals held in private incarceration facilities operating pursuant to an authorization by the State. The duty to protect the life of all detained individuals includes providing them with the necessary medical care and appropriate regular monitoring of their health, shielding them from inter-prisoner violence, preventing suicides and providing reasonable accommodation for persons with disabilities. A heightened duty to protect the right to life also applies to individuals quartered in liberty-restricting State-run facilities, such as mental health facilities, military camps, refugee camps and camps for internally displaced persons, juvenile institutions and orphanages.

26. The duty to protect life also implies that States parties should take appropriate measures to address the general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity. These general conditions may include high levels of criminal and gun violence, pervasive traffic and industrial accidents, degradation of the environment (see also para. 62 below), deprivation of indigenous peoples' land, territories and resources, the prevalence of life-threatening diseases, such as AIDS, tuberculosis and malaria, extensive substance abuse, widespread hunger and malnutrition and extreme poverty and homelessness. The measures called for to address adequate conditions for protecting the right to life include, where necessary, measures designed to ensure access without delay by individuals to essential goods and services such as food, water, shelter, health care, electricity and sanitation, and other measures designed to promote and facilitate adequate general conditions, such as the bolstering of effective emergency health services, emergency response operations (including firefighters, ambulance services and police forces) and social housing programmes. States parties should also develop strategic plans for advancing the enjoyment of the right to life, which may comprise measures to fight the stigmatization associated with disabilities and diseases, including sexually transmitted diseases, which hamper access to medical care; detailed plans to promote education for non-violence; and campaigns for raising awareness of gender-based violence and harmful practices, and for improving access to medical examinations and treatments designed to reduce maternal and infant mortality. Furthermore, States parties should also develop, when necessary, contingency plans and disaster management plans designed to increase preparedness and address natural and man-made disasters that may adversely affect enjoyment of the right to life, such as hurricanes, tsunamis, earthquakes, radioactive accidents and massive cyberattacks resulting in disruption of essential services.

27. An important element of the protection afforded to the right to life by the Covenant is the obligation on the States parties, where they know or should have known of potentially unlawful deprivations of life, to investigate and, where appropriate, prosecute the perpetrators of such incidents, including incidents involving allegations of excessive use of force with lethal consequences (see also para. 64 below). The duty to investigate also arises in circumstances in which a serious risk of deprivation of life was caused by the use of potentially lethal force, even if the risk did not materialize (see also para. 7 above). This obligation is implicit in the obligation to protect and is reinforced by the general duty to ensure the rights recognized in the Covenant, which is articulated in article 2 (1), when read in conjunction with article 6 (1), and the duty to provide an effective remedy to victims of human rights violations and their relatives, which is articulated in article 2 (3) of the Covenant, when read in conjunction with article 6 (1). Investigations and prosecutions of potentially unlawful deprivations of life should be undertaken in accordance with relevant international standards, including the Minnesota Protocol on the Investigation of Potentially Unlawful Death, and must be aimed at ensuring that those responsible are brought to justice, at promoting accountability and preventing impunity, at avoiding denial of justice and at drawing necessary lessons for revising practices and policies with a view to avoiding repeated violations. Investigations should explore, inter alia, the legal responsibility of superior officials with regard to violations of the right to life committed by their subordinates. Given the importance of the right to life, States parties must generally refrain from addressing violations of article 6 merely through administrative or disciplinary measures, and a criminal investigation is normally required, which should lead, if enough incriminating evidence is gathered, to a criminal prosecution. Immunities and amnesties provided to perpetrators of intentional killings and to their superiors, and comparable measures leading to de facto or de jure impunity, are, as a rule, incompatible with the duty to respect and ensure the right to life, and to provide victims with an effective remedy.

28. Investigations into allegations of violations of article 6 must always be independent, impartial, prompt, thorough, effective, credible and transparent (see also para. 64 below). In the event that a violation is found, full reparation must be provided, including, in view of the particular circumstances of the case, adequate measures of compensation, rehabilitation and satisfaction. States parties are also under an obligation to take steps to prevent the occurrence of similar violations in the future. Where relevant, the investigation should include an autopsy of the victim's body, whenever possible, in the presence of a representative of the victim's relatives. States parties need to take, among other things, appropriate measures to establish the truth relating to the events leading to the deprivation of life, including the reasons and legal basis for targeting certain individuals and the procedures employed by State forces before, during and after the time at which the deprivation occurred, and identify the bodies of the individuals who have lost their lives. States parties should also disclose relevant details about the investigation to the victim's next of kin, allow the next of kin to present new evidence, afford the next of kin legal standing in the investigation, and make public information about the investigative steps taken and the findings, conclusions and recommendations emanating from the investigation, subject to absolutely necessary redactions justified by a compelling need to protect the public interest or the privacy and other legal rights of directly affected individuals. States parties must also take the necessary steps to protect witnesses, victims and their relatives and persons conducting the investigation from threats, attacks and any act of retaliation. An investigation into violations of the right to life should commence when appropriate ex officio. States should support and cooperate in good faith with international mechanisms of investigation and prosecutions addressing possible violations of article 6.

29. Loss of life occurring in custody, in unnatural circumstances, creates a presumption of arbitrary deprivation of life by State authorities, which can only be rebutted on the basis of a proper investigation that establishes the State's compliance with its obligations under article 6. States parties also have a particular duty to investigate allegations of violations of article 6 whenever State authorities have used or appear to have used firearms or other potentially lethal force outside the immediate context of an armed conflict, for example, when live fire has been used against demonstrators, or when civilians have been found dead in circumstances fitting a pattern of alleged violations of the right to life by State authorities.

30. The duty to respect and ensure the right to life requires States parties to refrain from deporting, extraditing or otherwise transferring individuals to countries in which there are substantial grounds for believing that a real risk exists that their right to life under article 6 of the Covenant would be violated. Such a risk must be personal in nature and cannot derive merely from the general conditions in the receiving State, except in the most extreme cases. For example, as explained in paragraph 34 below, it would be contrary to article 6 to extradite an individual from a country that had abolished the death penalty to a country in which he or she might face the death penalty. Similarly, it would be inconsistent with article 6 to deport an individual to a country in which a fatwa had been issued against him or her by local religious authorities, without verifying that the fatwa was not likely to be followed; or to deport an individual to an extremely violent country in which he or she had never lived, had no social or family contacts and could not speak the local language. In cases involving allegations of risk to the life of the removed individual emanating from the authorities of the receiving State, the situation of the removed individual and the conditions in the receiving States need to be assessed, inter alia, based on the intent of the authorities of the receiving State, the pattern of conduct they have shown in similar cases, and the availability of credible and effective assurances about their intentions. When the alleged risk to life emanates from non-State actors or foreign States operating in the territory of the receiving State, credible and effective assurances for protection by the authorities of the receiving State may be sought and internal flight options could be explored. When relying upon assurances from the receiving State of treatment upon removal, the removing State should put in place adequate mechanisms for ensuring compliance with the issued assurances from the moment of removal onwards.

31. The obligation not to extradite, deport or otherwise transfer, pursuant to article 6 of the Covenant, may be broader than the scope of the principle of non-refoulement under international refugee law, since it may also require the protection of aliens not entitled to refugee status. States parties must, however, allow all asylum seekers claiming a real risk of a violation of their right to life in the State of origin access to refugee or other individualized or group status determination procedures that could offer them protection against refoulement.

IV. Imposition of the death penalty

32. Paragraphs 2, 4, 5 and 6 of article 6 regulate the imposition of the death penalty by those countries that have not yet abolished it.

33. Paragraph 2 of article 6 strictly limits the application of the death penalty, firstly, to States parties that have not abolished the death penalty, and secondly, to the most serious crimes. Given the anomalous nature of regulating the application of the death penalty in an instrument enshrining the right to life, the contents of paragraph 2 have to be narrowly construed.

34. States parties to the Covenant that have abolished the death penalty, through amending their domestic laws, becoming parties to the Second Optional Protocol to the Covenant, aiming at the abolition of the death penalty, or adopting another international instrument obligating them to abolish the death penalty, are barred from reintroducing it. Like the Covenant, the Second Optional Protocol does not contain termination provisions and States parties cannot denounce it. Abolition of the death penalty is therefore legally irrevocable. Furthermore, States parties may not transform into a capital offence any offence that, upon ratification of the Covenant or at any time thereafter, did not entail the death penalty. Nor can they remove legal conditions from an existing offence with the result of permitting the imposition of the death penalty in circumstances in which it was not possible to impose it before. States parties that have abolished the death penalty cannot deport, extradite or otherwise transfer persons to a country in which they are facing criminal charges that carry the death penalty, unless credible and effective assurances against the imposition of the death penalty have been obtained. In the same vein, the obligation not to reintroduce the death penalty for any specific crime requires States parties not to deport, extradite or otherwise transfer an individual to a country in which he or she is expected to stand trial for a capital offence, if the same

offence does not carry the death penalty in the removing State, unless credible and effective assurances against exposing the individual to the death penalty have been obtained.

35. The term “the most serious crimes” must be read restrictively and appertain only to crimes of extreme gravity involving intentional killing. Crimes not resulting directly and intentionally in death, such as attempted murder, corruption and other economic and political crimes, armed robbery, piracy, abduction, drug and sexual offences, although serious in nature, can never serve as the basis, within the framework of article 6, for the imposition of the death penalty. In the same vein, a limited degree of involvement or of complicity in the commission of even the most serious crimes, such as providing the physical means for the commission of murder, cannot justify the imposition of the death penalty. States parties are under an obligation to review their criminal laws so as to ensure that the death penalty is not imposed for crimes that do not qualify as the most serious crimes. They should also revoke death sentences issued for crimes not qualifying as the most serious crimes and pursue the necessary legal procedures to resentence those convicted for such crimes.

36. Under no circumstances can the death penalty ever be applied as a sanction against conduct the very criminalization of which violates the Covenant, including adultery, homosexuality, apostasy, establishing political opposition groups or offending a head of State. States parties that retain the death penalty for such offences commit a violation of their obligations under article 6, read alone and in conjunction with article 2 (2) of the Covenant, as well as of other provisions of the Covenant.

37. In all cases involving the application of the death penalty, the personal circumstances of the offender and the particular circumstances of the offence, including its specific attenuating elements, must be considered by the sentencing court. Hence, mandatory death sentences that leave domestic courts with no discretion as to whether to designate the offence as a crime warranting the death penalty, and whether to issue the death sentence in the particular circumstances of the offender, are arbitrary in nature. The availability of a right to seek pardon or commutation on the basis of the special circumstances of the case or the accused is not an adequate substitute for the need for judicial discretion in the application of the death penalty.

38. Article 6 (2) also requires States parties to ensure that any death sentence would be “in accordance with the law in force at the time of the commission of the crime”. This application of the principle of legality complements and reaffirms the application of the principle of *nulla poena sine lege* found in article 15 (1) of the Covenant. As a result, the death penalty can never be imposed if it was not provided by law for the offence at the time of its commission. Nor can the imposition of the death penalty be based on vaguely defined criminal provisions, whose application to the convicted individual depend on subjective or discretionary considerations, the application of which is not reasonably foreseeable. On the other hand, the abolition of the death penalty should apply retroactively to individuals charged or convicted of a capital offence in accordance with the retroactive leniency (*lex mitior*) principle, which finds partial expression in the third sentence of article 15 (1), requiring States parties to grant offenders the benefit of lighter penalties adopted after the commission of the offence. The retroactive application of the abolition of the death penalty to all individuals charged or convicted of a capital crime also derives from the fact that the need for applying the death penalty cannot be justified once it has been abolished.

39. Article 6 (3) reminds all States parties that are also parties to the Convention on the Prevention and Punishment of the Crime of Genocide of their obligations to prevent and punish the crime of genocide, which include the obligation to prevent and punish all deprivations of life, which constitute part of a crime of genocide. Under no circumstances can the death penalty be imposed as part of a policy of genocide against members of a national, ethnic, racial or religious group.

40. States parties that have not abolished the death penalty must respect article 7 of the Covenant, which prohibits certain methods of execution. Failure to respect article 7 would inevitably render the execution arbitrary in nature and thus also in violation of article 6. The Committee has already opined that stoning, injection of untested lethal drugs, gas chambers, burning and burying alive and public executions are contrary to article 7. For similar reasons, other painful and humiliating methods of execution are also unlawful under the Covenant. Failure to provide individuals on death row with timely notification about the date of their execution constitutes, as a rule, a form of ill-treatment, which renders the subsequent execution contrary to article 7 of the Covenant. Extreme delays in the implementation of a death penalty sentence that exceed any reasonable period of time necessary to exhaust all legal remedies may also entail the violation of article 7 of the Covenant, especially when the long time on death row exposes sentenced persons to harsh or stressful conditions, including solitary confinement, and when sentenced persons are particularly vulnerable due to factors such as age, health or mental state.

41. Violation of the fair trial guarantees provided for in article 14 of the Covenant in proceedings resulting in the imposition of the death penalty would render the sentence arbitrary in nature, and in violation of article 6 of the Covenant. Such violations might involve the use of forced confessions; the inability of the accused to question relevant witnesses; lack of effective representation involving confidential attorney-client meetings during all stages of the criminal proceedings, including criminal interrogation, preliminary hearings, trial and appeal; failure to respect the presumption of innocence, which may manifest itself in the accused being placed in a cage or being handcuffed during the trial; lack of an effective right of appeal; lack of adequate time and facilities for the preparation of the defence, including the inability to access legal documents essential for conducting the legal defence or appeal, such as official prosecutorial applications to the court, the court’s judgment or the trial transcript; lack of suitable interpretation; failure to provide accessible documents and procedural accommodation for persons with disabilities; excessive and unjustified delays in the trial or the appeal process; and general lack of fairness of the criminal process, or lack of independence or impartiality of the trial or appeal court.

42. Other serious procedural flaws not explicitly covered by article 14 of the Covenant may nonetheless render the imposition of the death penalty contrary to article 6. For example, a failure to promptly inform detained foreign nationals of their right to consular notification pursuant to the Vienna Convention on Consular Relations, resulting in the imposition of

the death penalty, and failure to afford individuals about to be deported to a country in which their lives are claimed to be at real risk the opportunity to avail themselves of available appeal procedures would violate article 6 (1) of the Covenant.

43. The execution of sentenced persons whose guilt has not been established beyond reasonable doubt also constitutes an arbitrary deprivation of life. States parties must therefore take all feasible measures in order to avoid wrongful convictions in death penalty cases, to review procedural barriers to reconsideration of convictions and to re-examine past convictions on the basis of new evidence, including new DNA evidence. States parties should also consider the implications for the evaluation of evidence presented in capital cases of new reliable studies, including studies suggesting the prevalence of false confessions and the unreliability of eyewitness testimony.

44. The death penalty must not be imposed in a discriminatory manner contrary to the requirements of articles 2 (1) and 26 of the Covenant. Data suggesting that members of religious, racial or ethnic minorities, indigent persons or foreign nationals are disproportionately likely to face the death penalty may indicate an unequal application of the death penalty, which raises concerns under article 2 (1) read in conjunction with article 6, as well as under article 26.

45. According to the last sentence of article 6 (2), the death penalty can only be carried out pursuant to a judgment of a competent court. Such a court must be established by law within the judiciary, be independent of the executive and legislative branches and be impartial. It should be established before the commission of the offence. As a rule, civilians must not be tried for capital crimes before military tribunals and military personnel can be tried for offences carrying the death penalty only before a tribunal affording all fair trial guarantees. Furthermore, the Committee does not consider courts of customary justice to constitute judicial institutions offering sufficient fair trial guarantees to enable them to try capital crimes. The issuance of a death penalty without any trial, for example in the form of a religious edict or military order that the State plans to carry out or allows to be carried out, violates both articles 6 and 14 of the Covenant.

46. Any penalty of death can be carried out only pursuant to a final judgment, after an opportunity to resort to all judicial appeal procedures has been provided to the sentenced person, and after petitions to all other available non-judicial avenues have been resolved, including supervisory review by prosecutors or courts, and consideration of requests for official or private pardon. Furthermore, death sentences must not be carried out as long as international interim measures requiring a stay of execution are in place. Such interim measures are designed to allow review of the sentence before international courts, human rights courts and commissions, and international monitoring bodies, such as the United Nations treaty bodies. Failure to implement such interim measures is incompatible with the obligation to respect in good faith the procedures established under the specific treaties governing the work of the relevant international bodies.

47. States parties are required pursuant to article 6 (4) to allow individuals sentenced to death to seek pardon or commutation, to ensure that amnesties, pardons and commutation can be granted to them in appropriate circumstances, and to ensure that sentences are not carried out before requests for pardon or commutation have been meaningfully considered and conclusively decided upon according to applicable procedures. No category of sentenced persons can be a priori excluded from such measures of relief, nor should the conditions for attainment of relief be ineffective, unnecessarily burdensome, discriminatory in nature or applied in an arbitrary manner. Article 6 (4) does not prescribe a particular procedure for the exercise of the right to seek pardon or commutation and States parties consequently retain discretion in spelling out the relevant procedures. Still, such procedures should be specified in domestic legislation, and they should not afford the families of victims of crime a preponderant role in determining whether the death sentence should be carried out. Furthermore, pardon or commutation procedures must offer certain essential guarantees, including certainty about the processes followed and the substantive criteria applied and the rights for individuals sentenced to death to initiate pardon or commutation procedures and to make representations about their personal or other relevant circumstances, to be informed in advance when the request will be considered, and to be informed promptly about the outcome of the procedure.

48. Article 6 (5) prohibits the imposition of the death penalty for crimes committed by persons below the age of 18 at the time of the offence. This necessarily implies that such persons can never face the death penalty for that offence, regardless of their age at the time of sentencing or at the time foreseen for carrying out the sentence. If there is no reliable and conclusive proof that the person was not below the age of 18 at the time the crime was committed, he or she will have the right to the benefit of the doubt and the death penalty cannot be imposed. Article 6 (5) also prohibits States parties from carrying out the death penalty on pregnant women.

49. States parties must refrain from imposing the death penalty on individuals who face special barriers in defending themselves on an equal basis with others, such as persons whose serious psychosocial or intellectual disabilities impede their effective defence, and on persons who have limited moral culpability. They should also refrain from executing persons who have a diminished ability to understand the reasons for their sentence, and persons whose execution would be exceptionally cruel or would lead to exceptionally harsh results for them and their families, such as persons of advanced age, parents of very young or dependent children, and individuals who have suffered serious human rights violations in the past.

50. Article 6 (6) reaffirms the position that States parties that are not yet totally abolitionist should be on an irrevocable path towards complete eradication of the death penalty, de facto and de jure, in the foreseeable future. The death penalty cannot be reconciled with full respect for the right to life, and abolition of the death penalty is both desirable and necessary for the enhancement of human dignity and progressive development of human rights. It is contrary to the object and purpose of article 6 for States parties to take steps to increase de facto the rate of use of and the extent to which they resort to the death penalty, or to reduce the number of pardons and commutations they grant.

51. Although the allusion to the conditions for application of the death penalty in article 6 (2) suggests that when drafting the Covenant, the States parties did not universally regard the death penalty as a cruel, inhuman or degrading punishment per se, subsequent agreements by the States parties or subsequent practice establishing such agreements may ultimately lead to the

conclusion that the death penalty is contrary to article 7 of the Covenant under all circumstances. The increasing number of States parties to the Second Optional Protocol to the Covenant, aiming at the abolition of the death penalty, other international instruments prohibiting the imposition or carrying out of the death penalty, and the growing number of non-abolitionist States that have nonetheless introduced a de facto moratorium on the exercise of the death penalty, suggest that considerable progress may have been made towards establishing an agreement among the States parties to consider the death penalty as a cruel, inhuman or degrading form of punishment. Such a legal development is consistent with the pro-abolitionist spirit of the Covenant, which manifests itself, inter alia, in the texts of article 6 (6) and the Second Optional Protocol.

V. Relationship of article 6 with other articles of the Covenant and other legal regimes

52. The standards and guarantees of article 6 both overlap and interact with other provisions of the Covenant. Some forms of conduct simultaneously violate both article 6 and another article. For example, applying the death penalty in response to a crime that does not constitute a most serious crime (see also para. 35 above) would violate both article 6 (2) and, in light of the extreme nature of the punishment, article 7. At other times, the contents of article 6 (1) are informed by the contents of other articles. For example, application of the death penalty may amount to an arbitrary deprivation of life under article 6 by virtue of the fact that it represents a punishment for exercising freedom of expression, in violation of article 19.

53. Article 6 also reinforces the obligations of States parties under the Covenant and the Optional Protocol to protect individuals against reprisals for promoting and striving to protect and realize human rights, including through cooperation or communication with the Committee. States parties must take the necessary measures to respond to death threats and to provide adequate protection to human rights defenders, including the creation and maintenance of a safe and enabling environment for defending human rights.

54. Torture and ill-treatment, which may seriously affect the physical and mental health of the mistreated individual, could also generate the risk of deprivation of life. Furthermore, criminal convictions resulting in the death penalty that are based on information procured by torture or cruel, inhuman or degrading treatment of interrogated persons would violate articles 7 and 14 (3) (g) of the Covenant, as well as article 6 (see also para. 41 above).

55. Returning individuals to countries where there are substantial grounds for believing that they face a real risk to their lives violates articles 6 and 7 of the Covenant (see also para. 31 above). In addition, making an individual who has been sentenced to death believe that the sentence has been commuted only to inform him or her later that it has not, and placing an individual on death row pursuant to a death sentence that is void ab initio, would run contrary to both articles 6 and 7.

56. The arbitrary deprivation of life of an individual may cause his or her relatives mental suffering, which could amount to a violation of their own rights under article 7 of the Covenant. Furthermore, even when the deprivation of life is not arbitrary, failure to provide relatives with information on the circumstances of the death of an individual may violate their rights under article 7, as could failure to inform them of the location of the body, and, where the death penalty is applied, of the date on which the State party plans to carry out the death penalty. Relatives of individuals deprived of their life by the State must be able to receive the remains, if they so wish.

57. The right to life guaranteed by article 6 of the Covenant, including the right to protection of life under article 6 (1), may overlap with the right to security of person guaranteed by article 9 (1). Extreme forms of arbitrary detention that are themselves life-threatening, in particular enforced disappearances, violate the right to personal liberty and personal security and are incompatible with the right to life (see also para. 58 below). Failure to respect the procedural guarantees found in article 9 (3) and (4), designed inter alia to prevent disappearances, could also result in a violation of article 6.

58. Enforced disappearance constitutes a unique and integrated series of acts and omissions representing a grave threat to life. The deprivation of liberty, followed by a refusal to acknowledge that deprivation of liberty or by concealment of the fate of the disappeared person, in effect removes that person from the protection of the law and places his or her life at serious and constant risk, for which the State is accountable. It thus results in a violation of the right to life as well as other rights recognized in the Covenant, in particular, article 7 (prohibition of torture or cruel, inhuman or degrading treatment or punishment), article 9 (liberty and security of person) and article 16 (right to recognition as a person before the law). States parties must take adequate measures to prevent the enforced disappearance of individuals, and conduct an effective and speedy inquiry to establish the fate and whereabouts of persons who may have been subject to enforced disappearance. States parties should also ensure that the enforced disappearance of persons is punished with appropriate criminal sanctions, and introduce prompt and effective procedures for cases of disappearance to be investigated thoroughly by independent and impartial bodies that operate, as a rule, within the ordinary criminal justice system. They should bring to justice the perpetrators of such acts and omissions and ensure that victims of enforced disappearance and their relatives are informed about the outcome of the investigation and are provided with full reparation. Under no circumstances should families of victims of enforced disappearance be obliged to declare them dead in order to be eligible for reparation. States parties should also provide families of victims of disappeared persons with the means to regularize their legal status in relation to the disappeared persons after an appropriate period of time.

59. A particular connection exists between article 6 and article 20, which prohibits any propaganda for war and certain forms of advocacy constituting incitement to discrimination, hostility or violence. Failure to comply with these obligations under article 20 may also constitute a failure to take the necessary measures to protect the right to life under article 6.

60. Article 24 (1) of the Covenant entitles every child to such measures of protection as are required by his or her status as a minor, on the part of his or her family, society and the State. This article requires adoption of special measures designed to protect the life of every child, in addition to the general measures required by article 6 for protecting the lives of all individuals. When taking special measures of protection, States parties should be guided by the best interests of the child, and by the need to ensure all children's survival, development and well-being.

61. The right to life must be respected and ensured without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or any other status, including caste, ethnicity, membership of an indigenous group, sexual orientation or gender identity, disability, socioeconomic status, albinism and age. Legal protections for the right to life must apply equally to all individuals and provide them with effective guarantees against all forms of discrimination, including multiple and intersectional forms of discrimination. Any deprivation of life based on discrimination in law or in fact is ipso facto arbitrary in nature. Femicide, which constitutes an extreme form of gender-based violence that is directed against girls and women, is a particularly grave form of assault on the right to life.

62. Environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life. The obligations of States parties under international environmental law should thus inform the content of article 6 of the Covenant, and the obligation of States parties to respect and ensure the right to life should also inform their relevant obligations under international environmental law. Implementation of the obligation to respect and ensure the right to life, and in particular life with dignity, depends, inter alia, on measures taken by States parties to preserve the environment and protect it against harm, pollution and climate change caused by public and private actors. States parties should therefore ensure sustainable use of natural resources, develop and implement substantive environmental standards, conduct environmental impact assessments and consult with relevant States about activities likely to have a significant impact on the environment, provide notification to other States concerned about natural disasters and emergencies and cooperate with them, provide appropriate access to information on environmental hazards and pay due regard to the precautionary approach.

63. In light of article 2 (1) of the Covenant, a State party has an obligation to respect and ensure the rights under article 6 of all persons who are within its territory and all persons subject to its jurisdiction, that is, all persons over whose enjoyment of the right to life it exercises power or effective control. This includes persons located outside any territory effectively controlled by the State whose right to life is nonetheless affected by its military or other activities in a direct and reasonably foreseeable manner (see para. 22 above). States also have obligations under international law not to aid or assist activities undertaken by other States and non-State actors that violate the right to life. Furthermore, States parties must respect and protect the lives of individuals located in places that are under their effective control, such as occupied territories, and in territories over which they have assumed an international obligation to apply the Covenant. States parties are also required to respect and protect the lives of all individuals located on marine vessels and aircraft registered by them or flying their flag, and of those individuals who find themselves in a situation of distress at sea, in accordance with their international obligations on rescue at sea. Given that the deprivation of liberty brings a person within a State's effective control, States parties must respect and protect the right to life of all individuals arrested or detained by them, even if held outside their territory.

64. Like the rest of the Covenant, article 6 continues to apply also in situations of armed conflict to which the rules of international humanitarian law are applicable, including to the conduct of hostilities. While rules of international humanitarian law may be relevant for the interpretation and application of article 6 when the situation calls for their application, both spheres of law are complementary, not mutually exclusive. Use of lethal force consistent with international humanitarian law and other applicable international law norms is, in general, not arbitrary. By contrast, practices inconsistent with international humanitarian law, entailing a risk to the lives of civilians and other persons protected by international humanitarian law, including the targeting of civilians, civilian objects and objects indispensable to the survival of the civilian population, indiscriminate attacks, failure to apply the principles of precaution and proportionality, and the use of human shields would also violate article 6 of the Covenant. States parties should, in general, disclose the criteria for attacking with lethal force individuals or objects whose targeting is expected to result in deprivation of life, including the legal basis for specific attacks, the process of identification of military targets and combatants or persons taking a direct part in hostilities, the circumstances in which relevant means and methods of warfare have been used, and whether less harmful alternatives were considered. They must also investigate alleged or suspected violations of article 6 in situations of armed conflict in accordance with the relevant international standards (see paras. 27–28 above).

65. States parties engaged in the deployment, use, sale or purchase of existing weapons and in the study, development, acquisition or adoption of weapons, and means or methods of warfare, must always consider their impact on the right to life. For example, the development of autonomous weapon systems lacking in human compassion and judgment raises difficult legal and ethical questions concerning the right to life, including questions relating to legal responsibility for their use. The Committee is therefore of the view that such weapon systems should not be developed and put into operation, either in times of war or in times of peace, unless it has been established that their use conforms with article 6 and other relevant norms of international law.

66. The threat or use of weapons of mass destruction, in particular nuclear weapons, which are indiscriminate in effect and are of a nature to cause destruction of human life on a catastrophic scale, is incompatible with respect for the right to life and may amount to a crime under international law. States parties must take all necessary measures to stop the proliferation of weapons of mass destruction, including measures to prevent their acquisition by non-State actors, to refrain from developing, producing, testing, acquiring, stockpiling, selling, transferring and using them, to destroy existing stockpiles, and to take adequate measures of protection against accidental use, all in accordance with their international obligations. They must also respect their international obligations to pursue in good faith negotiations in order to achieve the aim of nuclear disarmament under strict and effective international control, and to afford adequate reparation to victims whose right

to life has been or is being adversely affected by the testing or use of weapons of mass destruction, in accordance with principles of international responsibility.

67. Article 6 is included in the list of non-derogable rights in article 4 (2) of the Covenant. Hence, the guarantees against arbitrary deprivation of life contained in article 6 continue to apply in all circumstances, including in situations of armed conflict and other public emergencies. The existence and nature of a public emergency that threatens the life of the nation may, however, be relevant to a determination of whether a particular act or omission leading to deprivation of life is arbitrary and to a determination of the scope of the positive measures that States parties must take. Although some Covenant rights other than the right to life may be subject to derogation, derogable rights that support the application of article 6 must not be diminished by measures of derogation. Such rights include procedural guarantees, such as the right to fair trial in death penalty cases, and accessible and effective measures to vindicate rights, such as the duty to take appropriate measures to investigate, prosecute, punish and remedy violations of the right to life.

68. Reservations with respect to the peremptory and non-derogable obligations set out in article 6 are incompatible with the object and purpose of the Covenant. In particular, no reservation is permitted to the prohibition against arbitrary deprivation of life of persons and to the strict limits provided in article 6 with respect to the application of the death penalty.

69. Wars and other acts of mass violence continue to be a scourge of humanity resulting in the loss of many thousands of lives every year. Efforts to avert the risks of war and any other armed conflict, and to strengthen international peace and security, are among the most important safeguards of the right to life.

70. States parties engaged in acts of aggression as defined in international law, resulting in deprivation of life, violate ipso facto article 6 of the Covenant. At the same time, all States are reminded of their responsibility as members of the international community to protect lives and to oppose widespread or systematic attacks on the right to life, including acts of aggression, international terrorism, genocide, crimes against humanity and war crimes, while respecting all of their obligations under international law. States parties that fail to take all reasonable measures to settle their international disputes by peaceful means might fall short of complying with their positive obligation to ensure the right to life.

Notes

30.	United Nations, <i>Vienna Convention on the Law of Treaties</i> , 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331.
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Vienna Convention on the Law of Treaties
1969

Done at Vienna on 23 May 1969. Entered into force on 27 January 1980.
United Nations, *Treaty Series*, vol. 1155, p. 331



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2005

Vienna Convention on the Law of Treaties
Done at Vienna on 23 May 1969

The States Parties to the present Convention,

Considering the fundamental role of treaties in the history of international relations,

Recognizing the ever-increasing importance of treaties as a source of international law and as a means of developing peaceful cooperation among nations, whatever their constitutional and social systems,

Noting that the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized,

Affirming that disputes concerning treaties, like other international disputes, should be settled by peaceful means and in conformity with the principles of justice and international law,

Recalling the determination of the peoples of the United Nations to establish conditions under which justice and respect for the obligations arising from treaties can be maintained,

Having in mind the principles of international law embodied in the Charter of the United Nations, such as the principles of the equal rights and self-determination of peoples, of the sovereign equality and independence of all States, of non-interference in the domestic affairs of States, of the prohibition of the threat or use of force and of universal respect for, and observance of, human rights and fundamental freedoms for all,

Believing that the codification and progressive development of the law of treaties achieved in the present Convention will promote the purposes of the United Nations set forth in the Charter, namely, the maintenance of international peace and security, the development of friendly relations and the achievement of cooperation among nations,

Affirming that the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention,

Have agreed as follows:

PART I.
INTRODUCTION

Article 1
Scope of the present Convention

The present Convention applies to treaties between States.

Article 2
Use of terms

1. For the purposes of the present Convention:

- (a) “treaty” means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;
- (b) “ratification”, “acceptance”, “approval” and “accession” mean in each case the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty;
- (c) “full powers” means a document emanating from the competent authority of a State designating a person or persons to represent the State for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the State to be bound by a treaty, or for accomplishing any other act with respect to a treaty;
- (d) “reservation” means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State;
- (e) “negotiating State” means a State which took part in the drawing up and adoption of the text of the treaty;
- (f) “contracting State” means a State which has consented to be bound by the treaty, whether or not the treaty has entered into force;
- (g) “party” means a State which has consented to be bound by the treaty and for which the treaty is in force;
- (h) “third State” means a State not a party to the treaty;
- (i) “international organization” means an intergovernmental organization.

2. The provisions of paragraph 1 regarding the use of terms in the present Convention are without prejudice to the use of those terms or to the meanings which may be given to them in the internal law of any State.

Article 3
*International agreements not within the scope
of the present Convention*

The fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law or between such other subjects of international law, or to international agreements not in written form, shall not affect:

- (a) the legal force of such agreements;
- (b) the application to them of any of the rules set forth in the present Convention to which they would be subject under international law independently of the Convention;
- (c) the application of the Convention to the relations of States as between themselves under international agreements to which other subjects of international law are also parties.

Article 4
Non-retroactivity of the present Convention

Without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention, the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States.

Article 5
Treaties constituting international organizations and treaties adopted within an international organization

The present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization.

PART II.
CONCLUSION AND ENTRY INTO FORCE OF TREATIES
SECTION I. CONCLUSION OF TREATIES

Article 6
Capacity of States to conclude treaties

Every State possesses capacity to conclude treaties.

Article 7
Full powers

1. A person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty if:

- (a) he produces appropriate full powers; or
- (b) it appears from the practice of the States concerned or from other circumstances that their intention was to consider that person as representing the State for such purposes and to dispense with full powers.

2. In virtue of their functions and without having to produce full powers, the following are considered as representing their State:

- (a) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty;
- (b) heads of diplomatic missions, for the purpose of adopting the text of a treaty between the accrediting State and the State to which they are accredited;
- (c) representatives accredited by States to an international conference or to an international organization or one of its organs, for the purpose of adopting the text of a treaty in that conference, organization or organ.

Article 8
Subsequent confirmation of an act performed
without authorization

An act relating to the conclusion of a treaty performed by a person who cannot be considered under article 7 as authorized to represent a State for that purpose is without legal effect unless afterwards confirmed by that State.

Article 9
Adoption of the text

1. The adoption of the text of a treaty takes place by the consent of all the States participating in its drawing up except as provided in paragraph 2.

2. The adoption of the text of a treaty at an international conference takes place by the vote of two thirds of the States present and voting, unless by the same majority they shall decide to apply a different rule.

Article 10
Authentication of the text

The text of a treaty is established as authentic and definitive:

- (a) by such procedure as may be provided for in the text or agreed upon by the States participating in its drawing up; or
- (b) failing such procedure, by the signature, signature ad referendum or initialling by the representatives of those States of the text of the treaty or of the Final Act of a conference incorporating the text.

Article 11
Means of expressing consent to be bound by a treaty

The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.

Article 12
Consent to be bound by a treaty expressed by signature

1. The consent of a State to be bound by a treaty is expressed by the signature of its representative when:

- (a) the treaty provides that signature shall have that effect;
- (b) it is otherwise established that the negotiating States were agreed that signature should have that effect; or
- (c) the intention of the State to give that effect to the signature appears from the full powers of its representative or was expressed during the negotiation.

2. For the purposes of paragraph 1:

- (a) the initialling of a text constitutes a signature of the treaty when it is established that the negotiating States so agreed;
- (b) the signature ad referendum of a treaty by a representative, if confirmed by his State, constitutes a full signature of the treaty.

Article 13
Consent to be bound by a treaty expressed by an exchange of instruments constituting a treaty

The consent of States to be bound by a treaty constituted by instruments exchanged between them is expressed by that exchange when:

- (a) the instruments provide that their exchange shall have that effect; or
- (b) it is otherwise established that those States were agreed that the exchange of instruments should have that effect.

Article 14
Consent to be bound by a treaty expressed by ratification, acceptance or approval

1. The consent of a State to be bound by a treaty is expressed by ratification when:

- (a) the treaty provides for such consent to be expressed by means of ratification;
- (b) it is otherwise established that the negotiating States were agreed that ratification should be required;
- (c) the representative of the State has signed the treaty subject to ratification; or
- (d) the intention of the State to sign the treaty subject to ratification appears from the full powers of its representative or was expressed during the negotiation.

2. The consent of a State to be bound by a treaty is expressed by acceptance or approval under conditions similar to those which apply to ratification.

Article 15
Consent to be bound by a treaty expressed by accession

The consent of a State to be bound by a treaty is expressed by accession when:

- (a) the treaty provides that such consent may be expressed by that State by means of accession;
- (b) it is otherwise established that the negotiating States were agreed that such consent may be expressed by that State by means of accession; or
- (c) all the parties have subsequently agreed that such consent may be expressed by that State by means of accession.

Article 16
Exchange or deposit of instruments of ratification, acceptance, approval or accession

Unless the treaty otherwise provides, instruments of ratification, acceptance, approval or accession establish the consent of a State to be bound by a treaty upon:

- (a) their exchange between the contracting States;
- (b) their deposit with the depositary; or
- (c) their notification to the contracting States or to the depositary, if so agreed.

Article 17
Consent to be bound by part of a treaty and choice of differing provisions

1. Without prejudice to articles 19 to 23, the consent of a State to be bound by part of a treaty is effective only if the treaty so permits or the other contracting States so agree.

2. The consent of a State to be bound by a treaty which permits a choice between differing provisions is effective only if it is made clear to which of the provisions the consent relates.

Article 18

*Obligation not to defeat the object and purpose
of a treaty prior to its entry into force*

A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

- (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or
- (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

SECTION 2. RESERVATIONS

Article 19

Formulation of reservations

A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

- (a) the reservation is prohibited by the treaty;
- (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
- (c) in cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

Article 20

Acceptance of and objection to reservations

1. A reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting States unless the treaty so provides.

2. When it appears from the limited number of the negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.

3. When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

4. In cases not falling under the preceding paragraphs and unless the treaty otherwise provides:

(a) acceptance by another contracting State of a reservation constitutes the reserving State a party to the treaty in relation to that other State if or when the treaty is in force for those States;

(b) an objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting State;

(c) an act expressing a State's consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation.

5. For the purposes of paragraphs 2 and 4 and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

Article 21

Legal effects of reservations and of objections to reservations

1. A reservation established with regard to another party in accordance with articles 19, 20 and 23:

(a) modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and

(b) modifies those provisions to the same extent for that other party in its relations with the reserving State.

2. The reservation does not modify the provisions of the treaty for the other parties to the treaty inter se.

3. When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation.

Article 22

Withdrawal of reservations and of objections to reservations

1. Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State which has accepted the reservation is not required for its withdrawal.

2. Unless the treaty otherwise provides, an objection to a reservation may be withdrawn at any time.

3. Unless the treaty otherwise provides, or it is otherwise agreed:

(a) the withdrawal of a reservation becomes operative in relation to another contracting State only when notice of it has been received by that State;

(b) the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the State which formulated the reservation.

Article 23

Procedure regarding reservations

1. A reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and communicated to the contracting States and other States entitled to become parties to the treaty.

2. If formulated when signing the treaty subject to ratification, acceptance or approval, a reservation must be formally confirmed by the reserving State when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

3. An express acceptance of, or an objection to, a reservation made previously to confirmation of the reservation does not itself require confirmation.

4. The withdrawal of a reservation or of an objection to a reservation must be formulated in writing.

SECTION 3. ENTRY INTO FORCE AND PROVISIONAL,
APPLICATION OF TREATIES

Article 24

Entry into force

1. A treaty enters into force in such manner and upon such date as it may provide or as the negotiating States may agree.

2. Failing any such provision or agreement, a treaty enters into force as soon as consent to be bound by the treaty has been established for all the negotiating States.

3. When the consent of a State to be bound by a treaty is established on a date after the treaty has come into force, the treaty enters into force for that State on that date, unless the treaty otherwise provides.

4. The provisions of a treaty regulating the authentication of its text, the establishment of the consent of States to be bound by the treaty, the manner or date of its entry into force, reservations, the functions of the depositary and other matters arising necessarily before the entry into force of the treaty apply from the time of the adoption of its text.

Article 25
Provisional application

1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:

- (a) the treaty itself so provides; or
- (b) the negotiating States have in some other manner so agreed.

2. Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

PART III.
OBSERVANCE, APPLICATION AND
INTERPRETATION OF TREATIES
SECTION 1. OBSERVANCE OF TREATIES

Article 26
“Pacta sunt servanda”

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

Article 27
Internal law and observance of treaties

A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.

SECTION 2. APPLICATION OF TREATIES

Article 28
Non-retroactivity of treaties

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

Article 29
Territorial scope of treaties

Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.

Article 30
Application of successive treaties relating to
the same subject matter

1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States Parties to successive treaties relating to the same subject matter shall be determined in accordance with the following paragraphs.

2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.

3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

4. When the parties to the later treaty do not include all the parties to the earlier one:

- (a) as between States Parties to both treaties the same rule applies as in paragraph 3;
- (b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.

5. Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty.

SECTION 3. INTERPRETATION OF TREATIES

Article 31
General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

- (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
- (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

- (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
- (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
- (c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32
Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.

Article 33
Interpretation of treaties authenticated in two or more languages

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.

3. The terms of the treaty are presumed to have the same meaning in each authentic text.

4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

SECTION 4. TREATIES AND THIRD STATES

Article 34
General rule regarding third States

A treaty does not create either obligations or rights for a third State without its consent.

Article 35
Treaties providing for obligations for third States

An obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing.

Article 36
Treaties providing for rights for third States

1. A right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.

2. A State exercising a right in accordance with paragraph 1 shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty.

Article 37
Revocation or modification of obligations or
rights of third States

1. When an obligation has arisen for a third State in conformity with article 35, the obligation may be revoked or modified only with the consent of the parties to the treaty and of the third State, unless it is established that they had otherwise agreed.

2. When a right has arisen for a third State in conformity with article 36, the right may not be revoked or modified by the parties if it is established that the right was intended not to be revocable or subject to modification without the consent of the third State.

Article 38
Rules in a treaty becoming binding on third States
through international custom

Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such.

PART IV.
AMENDMENT AND
MODIFICATION OF TREATIES

Article 39
General rule regarding the amendment of treaties

A treaty may be amended by agreement between the parties. The rules laid down in Part II apply to such an agreement except insofar as the treaty may otherwise provide.

Article 40
Amendment of multilateral treaties

1. Unless the treaty otherwise provides, the amendment of multilateral treaties shall be governed by the following paragraphs.

2. Any proposal to amend a multilateral treaty as between all the parties must be notified to all the contracting States, each one of which shall have the right to take part in:

- (a) the decision as to the action to be taken in regard to such proposal;
- (b) the negotiation and conclusion of any agreement for the amendment of the treaty.

3. Every State entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended.

4. The amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement; article 30, paragraph 4 (b), applies in relation to such State.

5. Any State which becomes a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State:

- (a) be considered as a party to the treaty as amended; and
- (b) be considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement.

Article 41
*Agreements to modify multilateral treaties between
certain of the parties only*

1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:

- (a) the possibility of such a modification is provided for by the treaty; or
- (b) the modification in question is not prohibited by the treaty and:
 - (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
 - (ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.

2. Unless in a case falling under paragraph 1 (a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.

PART V.
INVALIDITY, TERMINATION AND SUSPENSION OF THE OPERATION OF TREATIES
SECTION 1. GENERAL PROVISIONS

Article 42
Validity and continuance in force of treaties

1. The validity of a treaty or of the consent of a State to be bound by a treaty may be impeached only through the application of the present Convention.

2. The termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or of the present Convention. The same rule applies to suspension of the operation of a treaty.

Article 43
Obligations imposed by international law independently of a treaty

The invalidity, termination or denunciation of a treaty, the withdrawal of a party from it, or the suspension of its operation, as a result of the application of the present Convention or of the provisions of the treaty, shall not in any way impair the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of the treaty.

Article 44
Separability of treaty provisions

1. A right of a party, provided for in a treaty or arising under article 56, to denounce, withdraw from or suspend the operation of the treaty may be exercised only with respect to the whole treaty unless the treaty otherwise provides or the parties otherwise agree.

2. A ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty recognized in the present Convention may be invoked only with respect to the whole treaty except as provided in the following paragraphs or in article 60.

3. If the ground relates solely to particular clauses, it may be invoked only with respect to those clauses where:

- (a) the said clauses are separable from the remainder of the treaty with regard to their application;
- (b) it appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other party or parties to be bound by the treaty as a whole; and
- (c) continued performance of the remainder of the treaty would not be unjust.

4. In cases falling under articles 49 and 50, the State entitled to invoke the fraud or corruption may do so with respect either to the whole treaty or, subject to paragraph 3, to the particular clauses alone.

5. In cases falling under articles 51, 52 and 53, no separation of the provisions of the treaty is permitted.

Article 45

*Loss of a right to invoke a ground for invalidating, terminating,
withdrawing from or suspending the operation of a treaty*

A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 46 to 50 or articles 60 and 62 if, after becoming aware of the facts:

(a) it shall have expressly agreed that the treaty is valid or remains in force or continues in operation, as the case may be; or

(b) it must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be.

SECTION 2. INVALIDITY OF TREATIES

Article 46

*Provisions of internal law regarding competence
to conclude treaties*

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

2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

Article 47

*Specific restrictions on authority to express
the consent of a State*

If the authority of a representative to express the consent of a State to be bound by a particular treaty has been made subject to a specific restriction, his omission to observe that restriction may not be invoked as invalidating the consent expressed by him unless the restriction was notified to the other negotiating States prior to his expressing such consent.

Article 48

Error

1. A State may invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error relates to a fact or situation which was assumed by that State to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty.

2.Paragraph 1 shall not apply if the State in question contributed by its own conduct to the error or if the circumstances were such as to put that State on notice of a possible error.

3.An error relating only to the wording of the text of a treaty does not affect its validity; article 79 then applies.

Article 49

Fraud

If a State has been induced to conclude a treaty by the fraudulent conduct of another negotiating State, the State may invoke the fraud as invalidating its consent to be bound by the treaty.

Article 50

Corruption of a representative of a State

If the expression of a State's consent to be bound by a treaty has been procured through the corruption of its representative directly or indirectly by another negotiating State, the State may invoke such corruption as invalidating its consent to be bound by the treaty.

Article 51

Coercion of a representative of a State

The expression of a State's consent to be bound by a treaty which has been procured by the coercion of its representative through acts or threats directed against him shall be without any legal effect.

Article 52

Coercion of a State by the threat or use of force

A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.

Article 53

Treaties conflicting with a peremptory norm of general international law ("jus cogens")

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

SECTION 3. TERMINATION AND SUSPENSION
OF THE OPERATION OF TREATIES

Article 54

*Termination of or withdrawal from a treaty under
its provisions or by consent of the parties*

The termination of a treaty or the withdrawal of a party may take place:

- (a) in conformity with the provisions of the treaty; or
- (b) at any time by consent of all the parties after consultation with the other contracting States.

Article 55

*Reduction of the parties to a multilateral treaty below the
number necessary for its entry into force*

Unless the treaty otherwise provides, a multilateral treaty does not terminate by reason only of the fact that the number of the parties falls below the number necessary for its entry into force.

Article 56

*Denunciation of or withdrawal from a treaty containing no
provision regarding termination, denunciation or withdrawal*

1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:

- (a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or
- (b) a right of denunciation or withdrawal may be implied by the nature of the treaty.

2. A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1.

Article 57

*Suspension of the operation of a treaty under its
provisions or by consent of the parties*

The operation of a treaty in regard to all the parties or to a particular party may be suspended:

- (a) in conformity with the provisions of the treaty; or
- (b) at any time by consent of all the parties after consultation with the other contracting States.

Article 58
Suspension of the operation of a multilateral treaty by
agreement between certain of the parties only

1. Two or more parties to a multilateral treaty may conclude an agreement to suspend the operation of provisions of the treaty, temporarily and as between themselves alone, if:

- (a) the possibility of such a suspension is provided for by the treaty; or
- (b) the suspension in question is not prohibited by the treaty and:
 - (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
 - (ii) is not incompatible with the object and purpose of the treaty.

2. Unless in a case falling under paragraph 1 (a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of those provisions of the treaty the operation of which they intend to suspend.

Article 59
Termination or suspension of the operation of a treaty
implied by conclusion of a later treaty

1. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject matter and:

- (a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or
- (b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.

2. The earlier treaty shall be considered as only suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties.

Article 60
Termination or suspension of the operation of a treaty
as a consequence of its breach

1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.

2. A material breach of a multilateral treaty by one of the parties entitles:

- (a) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either:

- (i) in the relations between themselves and the defaulting State; or
- (ii) as between all the parties;

(b) a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;

(c) any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.

3. A material breach of a treaty, for the purposes of this article, consists in:

- (a) a repudiation of the treaty not sanctioned by the present Convention; or
- (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.

4. The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach.

5. Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.

Article 61

Supervening impossibility of performance

1. A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.

2. Impossibility of performance may not be invoked by a party as a ground for terminating, withdrawing from or suspending the operation of a treaty if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

Article 62

Fundamental change of circumstances

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

- (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

(b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:

(a) if the treaty establishes a boundary; or

(b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.

Article 63

Severance of diplomatic or consular relations

The severance of diplomatic or consular relations between parties to a treaty does not affect the legal relations established between them by the treaty except insofar as the existence of diplomatic or consular relations is indispensable for the application of the treaty.

Article 64

Emergence of a new peremptory norm of general international law ("jus cogens")

If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.

SECTION 4. PROCEDURE

Article 65

Procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty

1. A party which, under the provisions of the present Convention, invokes either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation, must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefor.

2. If, after the expiry of a period which, except in cases of special urgency, shall not be less than three months after the receipt of the notification, no party has raised any objection, the party making the notification may carry out in the manner provided in article 67 the measure which it has proposed.

3.If, however, objection has been raised by any other party, the parties shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations.

4.Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes.

5.Without prejudice to article 45, the fact that a State has not previously made the notification prescribed in paragraph 1 shall not prevent it from making such notification in answer to another party claiming performance of the treaty or alleging its violation.

Article 66

Procedures for judicial settlement, arbitration and conciliation

If, under paragraph 3 of article 65, no solution has been reached within a period of 12 months following the date on which the objection was raised, the following procedures shall be followed:

(a) any one of the parties to a dispute concerning the application or the interpretation of article 53 or 64 may, by a written application, submit it to the International Court of Justice for a decision unless the parties by common consent agree to submit the dispute to arbitration;

(b) any one of the parties to a dispute concerning the application or the interpretation of any of the other articles in part V of the present Convention may set in motion the procedure specified in the Annex to the Convention by submitting a request to that effect to the Secretary-General of the United Nations.

Article 67

Instruments for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty

1.The notification provided for under article 65, paragraph 1, must be made in writing.

2.Any act of declaring invalid, terminating, withdrawing from or suspending the operation of a treaty pursuant to the provisions of the treaty or of paragraphs 2 or 3 of article 65 shall be carried out through an instrument communicated to the other parties. If the instrument is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers.

Article 68

Revocation of notifications and instruments provided for in articles 65 and 67

A notification or instrument provided for in article 65 or 67 may be revoked at any time before it takes effect.

SECTION 5. CONSEQUENCES OF THE INVALIDITY, TERMINATION
OR SUSPENSION OF THE OPERATION OF A TREATY

Article 69
Consequences of the invalidity of a treaty

1. A treaty the invalidity of which is established under the present Convention is void. The provisions of a void treaty have no legal force.

2. If acts have nevertheless been performed in reliance on such a treaty:

(a) each party may require any other party to establish as far as possible in their mutual relations the position that would have existed if the acts had not been performed;

(b) acts performed in good faith before the invalidity was invoked are not rendered unlawful by reason only of the invalidity of the treaty.

3. In cases falling under article 49, 50, 51 or 52, paragraph 2 does not apply with respect to the party to which the fraud, the act of corruption or the coercion is imputable.

4. In the case of the invalidity of a particular State's consent to be bound by a multilateral treaty, the foregoing rules apply in the relations between that State and the parties to the treaty.

Article 70
Consequences of the termination of a treaty

1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention:

(a) releases the parties from any obligation further to perform the treaty;

(b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.

2. If a State denounces or withdraws from a multilateral treaty, paragraph 1 applies in the relations between that State and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect.

Article 71
*Consequences of the invalidity of a treaty which conflicts
with a peremptory norm of general international law*

1. In the case of a treaty which is void under article 53 the parties shall:

(a) eliminate as far as possible the consequences of any act performed in reliance on any provision which conflicts with the peremptory norm of general international law; and

(b) bring their mutual relations into conformity with the peremptory norm of general international law.

2. In the case of a treaty which becomes void and terminates under article 64, the termination of the treaty:

(a) releases the parties from any obligation further to perform the treaty;

(b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination, provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law.

Article 72

Consequences of the suspension of the operation of a treaty

1. Unless the treaty otherwise provides or the parties otherwise agree, the suspension of the operation of a treaty under its provisions or in accordance with the present Convention:

(a) releases the parties between which the operation of the treaty is suspended from the obligation to perform the treaty in their mutual relations during the period of the suspension;

(b) does not otherwise affect the legal relations between the parties established by the treaty.

2. During the period of the suspension the parties shall refrain from acts tending to obstruct the resumption of the operation of the treaty.

PART VI.

MISCELLANEOUS PROVISIONS

Article 73

Cases of State succession, State responsibility and outbreak of hostilities

The provisions of the present Convention shall not prejudice any question that may arise in regard to a treaty from a succession of States or from the international responsibility of a State or from the outbreak of hostilities between States.

Article 74

Diplomatic and consular relations and the conclusion of treaties

The severance or absence of diplomatic or consular relations between two or more States does not prevent the conclusion of treaties between those States. The conclusion of a treaty does not in itself affect the situation in regard to diplomatic or consular relations.

Article 75
Case of an aggressor State

The provisions of the present Convention are without prejudice to any obligation in relation to a treaty which may arise for an aggressor State in consequence of measures taken in conformity with the Charter of the United Nations with reference to that State's aggression.

PART VII.
DEPOSITARIES, NOTIFICATIONS,
CORRECTIONS AND REGISTRATION

Article 76
Depositaries of treaties

1. The designation of the depositary of a treaty may be made by the negotiating States, either in the treaty itself or in some other manner. The depositary may be one or more States, an international organization or the chief administrative officer of the organization.

2. The functions of the depositary of a treaty are international in character and the depositary is under an obligation to act impartially in their performance. In particular, the fact that a treaty has not entered into force between certain of the parties or that a difference has appeared between a State and a depositary with regard to the performance of the latter's functions shall not affect that obligation.

Article 77
Functions of depositaries

1. The functions of a depositary, unless otherwise provided in the treaty or agreed by the contracting States, comprise in particular:

- (a) keeping custody of the original text of the treaty and of any full powers delivered to the depositary;
- (b) preparing certified copies of the original text and preparing any further text of the treaty in such additional languages as may be required by the treaty and transmitting them to the parties and to the States entitled to become parties to the treaty;
- (c) receiving any signatures to the treaty and receiving and keeping custody of any instruments, notifications and communications relating to it;
- (d) examining whether the signature or any instrument, notification or communication relating to the treaty is in due and proper form and, if need be, bringing the matter to the attention of the State in question;
- (e) informing the parties and the States entitled to become parties to the treaty of acts, notifications and communications relating to the treaty;

- (f) informing the States entitled to become parties to the treaty when the number of signatures or of instruments of ratification, acceptance, approval or accession required for the entry into force of the treaty has been received or deposited;
- (g) registering the treaty with the Secretariat of the United Nations;
- (h) performing the functions specified in other provisions of the present Convention.

2. In the event of any difference appearing between a State and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of the signatory States and the contracting States or, where appropriate, of the competent organ of the international organization concerned.

Article 78
Notifications and communications

Except as the treaty or the present Convention otherwise provide, any notification or communication to be made by any State under the present Convention shall:

- (a) if there is no depositary, be transmitted direct to the States for which it is intended, or if there is a depositary, to the latter;
- (b) be considered as having been made by the State in question only upon its receipt by the State to which it was transmitted or, as the case may be, upon its receipt by the depositary;
- (c) if transmitted to a depositary, be considered as received by the State for which it was intended only when the latter State has been informed by the depositary in accordance with article 77, paragraph 1 (e).

Article 79
Correction of errors in texts or in certified copies
of treaties

1. Where, after the authentication of the text of a treaty, the signatory States and the contracting States are agreed that it contains an error, the error shall, unless they decide upon some other means of correction, be corrected:

- (a) by having the appropriate correction made in the text and causing the correction to be initialled by duly authorized representatives;
- (b) by executing or exchanging an instrument or instruments setting out the correction which it has been agreed to make; or
- (c) by executing a corrected text of the whole treaty by the same procedure as in the case of the original text.

2. Where the treaty is one for which there is a depositary, the latter shall notify the signatory States and the contracting States of the error and of the proposal to correct it and shall specify an appropriate time-limit within which objection to the proposed correction may be raised. If, on the expiry of the time-limit:

(a) no objection has been raised, the depositary shall make and initial the correction in the text and shall execute a procès-verbal of the rectification of the text and communicate a copy of it to the parties and to the States entitled to become parties to the treaty;

(b) an objection has been raised, the depositary shall communicate the objection to the signatory States and to the contracting States.

3. The rules in paragraphs 1 and 2 apply also where the text has been authenticated in two or more languages and it appears that there is a lack of concordance which the signatory States and the contracting States agree should be corrected.

4. The corrected text replaces the defective text ab initio, unless the signatory States and the contracting States otherwise decide.

5. The correction of the text of a treaty that has been registered shall be notified to the Secretariat of the United Nations.

6. Where an error is discovered in a certified copy of a treaty, the depositary shall execute a procès-verbal specifying the rectification and communicate a copy of it to the signatory States and to the contracting States.

Article 80

Registration and publication of treaties

1. Treaties shall, after their entry into force, be transmitted to the Secretariat of the United Nations for registration or filing and recording, as the case may be, and for publication.

2. The designation of a depositary shall constitute authorization for it to perform the acts specified in the preceding paragraph.

PART VIII.

FINAL PROVISIONS

Article 81

Signature

The present Convention shall be open for signature by all States Members of the United Nations or of any of the specialized agencies or of the International Atomic Energy Agency or parties to the Statute of the International Court of Justice, and by any other State invited by the General Assembly of the United Nations to become a party to the Convention, as follows: until 30 November 1969, at the

Federal Ministry for Foreign Affairs of the Republic of Austria, and subsequently, until 30 April 1970, at United Nations Headquarters, New York.

Article 82
Ratification

The present Convention is subject to ratification. The instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 83
Accession

The present Convention shall remain open for accession by any State belonging to any of the categories mentioned in article 81. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 84
Entry into force

1. The present Convention shall enter into force on the thirtieth day following the date of deposit of the thirty-fifth instrument of ratification or accession.

2. For each State ratifying or acceding to the Convention after the deposit of the thirty-fifth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification or accession.

Article 85
Authentic texts

The original of the present Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, being duly authorized thereto by their respective Governments, have signed the present Convention.

DONE at Vienna this twenty-third day of May, one thousand nine hundred and sixty-nine.

ANNEX

1. A list of conciliators consisting of qualified jurists shall be drawn up and maintained by the Secretary-General of the United Nations. To this end, every State which is a Member of the United Nations or a party to the present Convention shall be invited to nominate two conciliators, and the names of the persons so nominated shall constitute the list. The term of a conciliator, including that of any conciliator nominated to fill a casual vacancy, shall be five years and may be renewed. A conciliator whose term expires shall continue to fulfil any function for which he shall have been chosen under the following paragraph.

2. When a request has been made to the Secretary-General under article 66, the Secretary-General shall bring the dispute before a conciliation commission constituted as follows:

The State or States constituting one of the parties to the dispute shall appoint:

(a) one conciliator of the nationality of that State or of one of those States, who may or may not be chosen from the list referred to in paragraph 1; and

(b) one conciliator not of the nationality of that State or of any of those States, who shall be chosen from the list.

The State or States constituting the other party to the dispute shall appoint two conciliators in the same way. The four conciliators chosen by the parties shall be appointed within sixty days following the date on which the Secretary-General receives the request.

The four conciliators shall, within sixty days following the date of the last of their own appointments, appoint a fifth conciliator chosen from the list, who shall be chairman.

If the appointment of the chairman or of any of the other conciliators has not been made within the period prescribed above for such appointment, it shall be made by the Secretary-General within sixty days following the expiry of that period. The appointment of the chairman may be made by the Secretary-General either from the list or from the membership of the International Law Commission. Any of the periods within which appointments must be made may be extended by agreement between the parties to the dispute.

Any vacancy shall be filled in the manner prescribed for the initial appointment.

3. The Conciliation Commission shall decide its own procedure. The Commission, with the consent of the parties to the dispute, may invite any party to the treaty to submit to it its views orally or in writing. Decisions and recommendations of the Commission shall be made by a majority vote of the five members.

4. The Commission may draw the attention of the parties to the dispute to any measures which might facilitate an amicable settlement.

5. The Commission shall hear the parties, examine the claims and objections, and make proposals to the parties with a view to reaching an amicable settlement of the dispute.

6. The Commission shall report within twelve months of its constitution. Its report shall be deposited with the Secretary-General and transmitted to the parties to the dispute. The report of the Commission, including any conclusions stated therein regarding the facts or questions of law, shall not be binding upon the parties and it shall have no other character than that of recommendations submitted for the consideration of the parties in order to facilitate an amicable settlement of the dispute.

7. The Secretary-General shall provide the Commission with such assistance and facilities as it may require. The expenses of the Commission shall be borne by the United Nations.

31	UN Human Rights Committee, <i>General Comment No. 33, Obligations of States parties under the Optional Protocol to the International Covenant on Civil and Political Rights</i> , 25 June 2009, CCPR/C/GC/33.
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**International covenant
on civil and
political rights**

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HUMAN RIGHTS COMMITTEE
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General Comment No 33

**The Obligations of States Parties under the Optional Protocol to the International
Covenant on Civil and Political Rights**

1. The Optional Protocol to the International Covenant on Civil and Political Rights was adopted and opened for signature, ratification or accession by the same act of the United Nations General Assembly, resolution 2200 A (XXI) of 16 December 1966, that adopted the Covenant itself. Both the Covenant and the Optional Protocol entered into force on 23 March 1976.
2. Although the Optional Protocol is organically related to the Covenant, it is not automatically in force for all States parties to the Covenant. Article 8 of the Optional Protocol provides that States parties to the Covenant may become parties to the Optional Protocol only by a separate expression of consent to be bound. A majority of States parties to the Covenant has also become party to the Optional Protocol.
3. The preamble to the Optional Protocol states that its purpose is “further to achieve the purposes” of the Covenant by enabling the Human Rights Committee, established in part IV of the Covenant, “to receive and consider, as provided in the present Protocol, communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant.” The Optional Protocol sets out a procedure, and imposes obligations on States parties to the Optional Protocol arising out of that procedure, in addition to their obligations under the Covenant.
4. Article 1 of the Optional Protocol provides that a State party to it recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State party of any of the rights set forth in the Covenant. It follows that States parties are obliged not to hinder access to the Committee and to prevent any retaliatory measures against any person who has addressed a communication to the Committee.

5. Article 2 of the Optional Protocol requires that individuals who submit communications to the Committee must have exhausted all available domestic remedies. In its response to a communication, a State party, where it considers that this condition has not been met, should specify the available and effective remedies that the author of the communication has failed to exhaust.

6. Although not a term found in the Optional Protocol or Covenant, the Human Rights Committee uses the description “author” to refer to an individual who has submitted a communication to the Committee under the Optional Protocol. The Committee uses the term “communication” contained in article 1 of the Optional Protocol instead of such terms as “complaint” or “petition”, although the latter term is reflected in the current administrative structure of the Office of the High Commissioner for Human Rights, where communications under the Optional Protocol are initially handled by a section known as the Petitions Team.

7. Terminology similarly reflects the nature of the role of the Human Rights Committee in receiving and considering a communication. Subject to the communication being found admissible, after considering the communication in the light of all written information made available to it by the individual author and by the State party concerned, “the Committee shall forward its views to the State party concerned and to the individual.”¹

8. The first obligation of a State Party, against which a claim has been made by an individual under the Optional Protocol, is to respond to it within the time limit of six months set out in article 4 (2). Within that time limit, “the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by the State.” The Committee’s Rules of Procedure amplify these provisions, including the possibility in exceptional cases of treating separately questions of the admissibility and merits of the communication.²

9. In responding to a communication that appears to relate to a matter arising before the entry into force of the Optional Protocol for the State party (the *ratione temporis* rule), the State party should invoke that circumstance explicitly, including any comment on the possible “continuing effect” of a past violation.

10. In the experience of the Committee, States do not always respect their obligation. In failing to respond to a communication, or responding incompletely, a State which is the object of a communication puts itself at a disadvantage, because the Committee is then compelled to consider the communication in the absence of full information relating to the communication. In such circumstances, the Committee may conclude that the allegations contained in the communication are true, if they appear from all the circumstances to be substantiated.

11. While the function of the Human Rights Committee in considering individual communications is not, as such, that of a judicial body, the views issued by the Committee under the Optional Protocol exhibit some important characteristics of a judicial decision. They are arrived at in a judicial spirit, including the impartiality and independence of Committee members, the considered interpretation of the language of the Covenant, and the determinative character of the decisions.

¹ Optional Protocol, article 5(4).

² Rules of Procedure of the Human Rights Committee, Rule 97(2). UN Doc. CCPR/C/3/Rev.8, 22 September 2005.

12. The term used in article 5, paragraph 4 of the Optional Protocol to describe the decisions of the Committee is “views”.³ These decisions state the Committee’s findings on the violations alleged by the author of a communication and, where a violation has been found, state a remedy for that violation.

13. The views of the Committee under the Optional Protocol represent an authoritative determination by the organ established under the Covenant itself charged with the interpretation of that instrument. These views derive their character, and the importance which attaches to them, from the integral role of the Committee under both the Covenant and the Optional Protocol.

14. Under article 2, paragraph 3 of the Covenant, each State party undertakes “to ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by a person acting in an official capacity.” This is the basis of the wording consistently used by the Committee in issuing its views in cases where a violation has been found:

“In accordance with article 2, paragraph 3(a) of the Covenant, the State party is required to provide the author with an effective remedy. By becoming a party to the Optional Protocol the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established. In this respect, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee’s views.”

15. The character of the views of the Committee is further determined by the obligation of States parties to act in good faith, both in their participation in the procedures under the Optional Protocol and in relation to the Covenant itself. A duty to cooperate with the Committee arises from an application of the principle of good faith to the observance of all treaty obligations.⁴

16. The Committee decided, in 1997, under its rules of procedure, to appoint a member of the Committee as Special Rapporteur for the Follow-Up of Views.⁵ That member, through written representations, and frequently also through personal meetings with diplomatic representatives of the State party concerned, urges compliance with the Committee’s views and discusses factors that may be impeding their implementation. In a number of cases this procedure has led to acceptance and implementation of the Committee’s views where previously the transmission of those views had met with no response.

³ In French the term is “constatations” and in Spanish “observaciones”.

⁴ Vienna Convention on the Law of Treaties, 1969, article 26.

⁵ Rules of Procedure of the Human Rights Committee, Rule 101.

17. It is to be noted that failure by a State party to implement the views of the Committee in a given case becomes a matter of public record through the publication of the Committee's decisions *inter alia* in its annual reports to the General Assembly of the United Nations.

18. Some States parties, to which the views of the Committee have been transmitted in relation to communications concerning them, have failed to accept the Committee's views, in whole or in part, or have attempted to re-open the case. In a number of those cases these responses have been made where the State party took no part in the procedures, having not carried out its obligation to respond to communications under article 4, paragraph 2 of the Optional Protocol. In other cases, rejection of the Committee's views, in whole or in part, has come after the State party has participated in the procedure and where its arguments have been fully considered by the Committee. In all such cases, the Committee regards dialogue between the Committee and the State party as ongoing with a view to implementation. The Special Rapporteur for the Follow-up of Views conducts this dialogue, and regularly reports on progress to the Committee.

19. Measures may be requested by an author, or decided by the Committee on its own initiative, when an action taken or threatened by the State party would appear likely to cause irreparable harm to the author or the victim unless withdrawn or suspended pending full consideration of the communication by the Committee. Examples include the imposition of the death penalty and violation of the duty of non-refoulement. In order to be in a position to meet these needs under the Optional Protocol, the Committee established, under its rules of procedure, a procedure to request interim or provisional measures of protection in appropriate cases.⁶ Failure to implement such interim or provisional measures is incompatible with the obligation to respect in good faith the procedure of individual communication established under the Optional Protocol.

20. Most States do not have specific enabling legislation to receive the views of the Committee into their domestic legal order. The domestic law of some States parties does, however, provide for the payment of compensation to the victims of violations of human rights as found by international organs. In any case, States parties must use whatever means lie within their power in order to give effect to the views issued by the Committee.

⁶ Rules of Procedure of the Human Rights Committee, UN Doc. CCPR/C/3/Rev.8, 22 September 2005, Rule 92 (previously Rule 86):

“The Committee may, prior to forwarding its Views on the communication to the State party concerned, inform the State of its Views as to whether interim measures may be desirable to avoid irreparable damage to the victim of the alleged violation. In doing so, the Committee shall inform the State party concerned that such expression of its Views on interim measures does not imply a determination on the merits of the communication.”

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MODERNIZING JUDICIAL REVIEW OF THE EXERCISE OF PREROGATIVE POWERS IN CANADA

JENNIFER A. KLINCK*

Despite judicial pronouncements that the source of government power, whether statutory or prerogative, should not affect judicial review, Canadian courts respond much more tentatively when asked to review exercises of prerogative powers than exercises of statutory powers. Courts (1) define prerogative powers in a way that makes it difficult to precisely articulate their existence and scope; (2) frequently avoid judicially reviewing exercises of prerogative powers by applying peculiar justiciability tests; and (3) when they do engage in judicial review, generally limit themselves to a conservative form of procedural review. This article proposes that courts reform judicial review of the exercise of prerogative powers by (1) adopting a principled approach to defining prerogative powers that starts with distinguishing the Crown's prerogative powers from its natural person powers; (2) abandoning peculiar interest-based and subject matter justiciability tests in favour of a test that turns on the nature of the question, and maintaining a subject matter justiciability test only for exercises of prerogative powers that are integral to the democratic process; and (3) applying standard principles of administrative law to judicial review of the existence, scope, and exercise of prerogative powers.

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I. INTRODUCTION

Under the standard account of judicial review in Canadian administrative law, the role of courts is to mediate the “tension between the rule of law and the foundational democratic principle” that arises when Parliament and legislatures endow administrative bodies with statutory powers.¹ Courts manage this tension by ensuring that public authorities do not exceed their statutory powers, while also showing “deference to administrative decisions within the area of decision-making authority conferred” by statute.² However, Canadian courts and commentators have yet to articulate an approach to judicial review animated by a commitment to democracy and the rule of law which is suited to reviewing executive actions under the Crown’s non-statutory prerogative powers.

A. OVERVIEW OF THE PREROGATIVE POWERS

The Crown’s prerogative powers are defined at common law.³ As such, they can be limited or displaced by statute, absent exceptional constitutional entrenchment.⁴ Although “legislation has severely curtailed the scope of the Crown prerogative” in Canada,⁵ it remains important in a number of areas. The prerogative vests the executive with substantial discretionary authority to conduct a range of activities from “mundane administrative” affairs to “key matters of state.”⁶ For example, the executive still relies on the prerogative to confer or revoke honours,⁷ passports,⁸ and pardons,⁹ to exercise prosecutorial discretion,¹⁰ to appoint

¹ *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 27 [*Dunsmuir*].

² *Alberta (Information and Privacy Commissioner) v Alberta Teachers’ Association*, 2011 SCC 61, [2011] 3 SCR 654 at para 1 [ATA]. See also *Dunsmuir*, *ibid* at paras 27–28.

³ *Black v Canada (Prime Minister)* (2001), 54 OR (3d) 215 at para 26 (CA) [*Black*].

⁴ Pursuant to section 41(a) of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, an amendment to the Constitution of Canada in relation to “the office of the Queen, the Governor General and the Lieutenant Governor of a province” can only be made with the unanimous consent of the Senate, the House of Commons, and the legislative assembly of each province. If certain prerogative powers are intrinsic or essential to the office of the Queen, the Governor General, or the Lieutenant Governor of a province (one possible example might be the power to assent to bills), those powers may be constitutionally entrenched and only subject to amendment by way of the unanimous formula for constitutional amendment (see *Reference re Supreme Court Act, ss 5 and 6*, 2014 SCC 21, [2014] 1 SCR 433).

⁵ *Black*, *supra* note 3 at para 27.

⁶ Philippe Lagassé, “Parliamentary and Judicial Ambivalence Toward Executive Prerogative Powers in Canada” (2012) 55:2 *Can Public Administration* 157 at 162.

⁷ See e.g. *Black*, *supra* note 3.

⁸ *Kamel v Canada (Attorney General)*, 2009 FCA 21, [2009] 4 FCR 449 at paras 21–23, leave to appeal to SCC refused, 33088 (20 August 2009) [*Kamel*].

⁹ *Hinse v Canada (Attorney General)*, 2015 SCC 35, [2015] 2 SCR 621 at paras 27–31 [*Hinse*]; *Criminal Code*, RSC 1985, c C-46, s 749.

¹⁰ *Krieger v Law Society of Alberta*, 2002 SCC 65, [2002] 3 SCR 372 at paras 24, 31 [*Krieger*].

ministers¹¹ and dissolve Parliament,¹² to declare war and deploy troops,¹³ to engage in diplomacy,¹⁴ and to conclude international treaties¹⁵ and treaties with First Nations.¹⁶

Prerogative powers may be exercised directly by the Governor General, the Prime Minister, and other ministers of the Crown.¹⁷ Moreover, public bodies may be established and delegated powers pursuant to the exercise of prerogative powers.¹⁸ Similar principles apply in the provinces, where the Lieutenant-Governors have all the prerogative powers necessary to fulfill provincial purposes.¹⁹

While uncontentious examples of prerogative powers can be identified, as will be seen, adequately defining them as a class is controversial and uncertain. The prerogative powers have never been comprehensively catalogued, nor has a definition that would enable all assertions of the existence and scope of a prerogative power to be decided without controversy ever been articulated.²⁰

B. DEMOCRATIC LEGITIMACY AND RULE OF LAW DEFICIENCIES

Despite their continuing importance, significant criticisms have been levelled against the prerogative powers. They have been described as anachronistic;²¹ as obscure, uncertain and vague,²² and as suffering from “a democratic deficit.”²³ In 1994, British politician Jack Straw even affirmed that “[t]he royal prerogative has no place in a modern western democracy.”²⁴ Indeed, the idea that the government may act without statutory authorization, invoking ill-defined common law powers, sits uncomfortably with contemporary conceptions of democratic legitimacy and the rule of law.

Non-statutory sources of government authority do not have the same democratic pedigree as statutory sources, even though ministerial accountability to Parliament and provincial

¹¹ *Guergis v Novak*, 2013 ONCA 449, 116 OR (3d) 280 [*Guergis*].

¹² *Conacher v Canada (Prime Minister)*, 2010 FCA 131, [2011] 4 FCR 22, leave to appeal to SCC refused, 33848 (20 January 2011) [*Conacher*].

¹³ *Blanco v Canada*, 2003 FCT 263, 231 FTR 3 [*Blanco*]; *Turp v Chrétien*, 2003 FCT 301, 111 CRR (2d) 184 [*Turp* 2003].

¹⁴ *Copello v Canada (Minister of Foreign Affairs)*, 2003 FCA 295, 308 NR 175 at paras 21–22.

¹⁵ *Turp v Canada (Justice)*, 2012 FC 893, [2014] 1 FCR 439 [*Turp* 2012].

¹⁶ *Cook v The Minister of Aboriginal Relations and Reconciliation*, 2007 BCSC 1722, [2008] 7 WWR 672 [*Cook*].

¹⁷ *Black*, *supra* note 3 at para 32.

¹⁸ See *McDonald v Anishinabek Police Service* (2006), 83 OR (3d) 132 (Sup Ct J (Div Ct)) [*Anishinabek*].

¹⁹ See *Liquidators of the Maritime Bank of Canada v Receiver-General of New Brunswick*, [1892] AC 437 (PC).

²⁰ Paul Lordon, *Crown Law* (Markham: Butterworths, 1991) at 62; AW Bradley, KD Ewing & CJS Knight, *Constitutional and Administrative Law*, 16th ed (Harlow: Pearson, 2015) at 253; *R v Secretary of State for the Home Department, Ex parte Northumbria Police Authority*, [1989] 1 QB 26 at 56 (CA) [*Northumbria Police*].

²¹ UK, HC, *Official Report*, vol 223, col 489 (21 April 1993) (John Garrett), cited in Sebastian Payne, “The Royal Prerogative” in Maurice Sunkin & Sebastian Payne, eds, *The Nature of the Crown: A Legal and Political Analysis* (Oxford: Oxford University Press, 1999) at 77.

²² UK, HC, “Taming the Prerogative: Strengthening Ministerial Accountability to Parliament,” Cm 422 in *Sessional Papers* (2003–04) 1 at 5 [*Taming the Prerogative*]; Margit Cohn, “Judicial Review of Non-Statutory Executive Powers after *Bancoult*: A Unified Anxious Model” [2009] Public L 260 at 265.

²³ Cohn, *ibid*.

²⁴ Jack Straw, “Abolish the Royal Prerogative” in Anthony Barnett, ed, *Power and the Throne: The Monarchy Debate* (London: Vintage, 1994) 125 at 125.

legislatures provides a degree of democratic oversight over the exercise of prerogative powers.²⁵ Prior statutory authorization for government action entails Parliamentary debate and scrutiny of the nature and scope of government power. Moreover, the existence of publicly available written instruments defining the scope of government powers enhances transparency.²⁶

To the extent that prerogative powers are uncertain and vaguely defined, they are also difficult to square with the rule of law. The principle of legality inherent in the rule of law requires “that the executive must be able to demonstrate a lawful authority for its actions, whether under statute, common law or prerogative.”²⁷ The rule of law further requires that these sources of authority prescribe the limits of lawful government action, which are enforced by the courts through judicial review.²⁸ If the prerogative powers remain nebulous, they cannot provide the defined legal authority, with boundaries able to be monitored by courts, that the rule of law demands.

Notwithstanding these democratic legitimacy and rule of law deficiencies, governments defend the prerogative powers on the grounds that they are “a well-established part of the constitution,” offer “much-needed flexibility to govern” and allow ministers “to react quickly in possibly complex and dangerous circumstances.”²⁹ The democratic principle and the rule of law require a healthy skepticism towards such claims. Legislation, too, can confer upon government actors broad discretionary powers allowing them to address important and complex problems; at the same time, an explicit statutory foundation enhances democratic accountability and provides a concrete basis for determining the limits of government authority. Still, it is true that statutes may not adequately foresee all the powers governments need to act in the public interest, and it may not always be practicable to obtain statutory authorization in advance of necessary government action.

C. REFORMS TO JUDICIAL REVIEW OF THE EXERCISE OF PREROGATIVE POWERS ANIMATED BY THE DEMOCRATIC PRINCIPLE AND THE RULE OF LAW

One way to mitigate the democratic legitimacy and rule of law deficiencies associated with prerogative powers is to codify them. In the United Kingdom, the question of whether some or all of the prerogative powers should be codified has been the subject of lively debate and legislative proposals, as well as government and parliamentary reports.³⁰ In Canada, however, systematic codification and modernization of the prerogative have not figured prominently on the political agenda. Additionally, since prerogative powers have been a long-standing feature of the British conception of the State, they are interwoven into existing legislation, institutions, and governance practices. Consequently, systematic codification

²⁵ Peter W Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2007) (loose-leaf 2016 supplement), ch 9 at 13–15.

²⁶ Cohn, *supra* note 22 at 265.

²⁷ Anthony Lester & Matthew Weait, “The Use of Ministerial Powers Without Parliamentary Authority: The Ram Doctrine” [2003] Public L 415 at 419.

²⁸ *Dunsmuir*, *supra* note 1 at para 28.

²⁹ See e.g. UK, Ministry of Justice, *The Governance of Britain: Review of the Executive Royal Prerogative Powers: Final Report* (London: Ministry of Justice, 2009) at para 8.

³⁰ See *ibid* at paras 6–16.

could require intensive reviews in order to avoid creating unanticipated lacunae, the cost of which may be difficult to justify since the established system works relatively well, and can be modified with targeted legislation or policies to enhance accountability in areas of particular concern.³¹

Nevertheless, it is possible for courts to moderate some of these democratic and rule of law deficiencies by adopting incremental reforms to judicial review of the exercise of prerogative powers (while remaining sensitive to claims that some measure of non-statutory executive action is necessary).³²

At present, however, Canadian courts respond much more tentatively when asked to review exercises of prerogative powers than exercises of statutory powers. Canadian courts (1) define prerogative powers in a way that makes it difficult to precisely articulate their existence and scope; (2) frequently avoid judicially reviewing exercises of prerogative powers by applying peculiar justiciability tests; and (3) when they do engage in judicial review, generally limit themselves to a conservative form of procedural review. Courts adopt this tentative approach despite judicial pronouncements that the source of government power, whether statutory or prerogative, should not affect judicial review.³³

I will argue that the principles governing judicial review of the exercise of prerogative powers need to be clarified and brought into line with the principles that apply to judicial review of statutory powers. Where possible, principles that mitigate the prerogative powers' democratic legitimacy and rule of law deficiencies should be preferred. To this end, I will propose the following three reforms:

- First, courts should abandon the misconception that the distinction between the Crown's unique powers and its natural person powers is of no practical significance. This distinction is needed to determine the *existence* and *scope* of the Crown's non-statutory powers.
- Second, courts should discard flawed justiciability tests, which are disproportionately applied to prerogative powers.
- Third, when reviewing the exercise of prerogative powers, courts should use the same principles that apply to judicial review of statutory powers. To the extent that this approach will require courts to more explicitly define the nature and purpose of particular prerogative powers, courts should engage in this project.

³¹ For a discussion of this issue in the British context, see *ibid* at paras 109–12. In Canada, national defence provides a good example of a situation where prerogative powers operate together with primary and secondary legislation (in particular the *National Defence Act*, RSC 1985, c N-5 and its associated regulations) to provide authority for the existence, organization, and activities of the armed forces. As an example of a targeted measure to increase accountability, the federal government has adopted a “Policy on Tabling of Treaties in Parliament,” which provides that international instruments are to be tabled in the House of Commons, accompanied by a brief Explanatory Memorandum, following their signature or adoption by other procedure and prior to Canada formally notifying that it is bound by the instrument (Global Affairs Canada, “Policy on Tabling of Treaties in Parliament,” (Ottawa: GAC, 6 April 2006) at para 4).

³² Cohn, *supra* note 22 at 265–66.

³³ *Hupacasath First Nation v Canada (Minister of Foreign Affairs)*, 2015 FCA 4, 379 DLR (4th) 737 at para 63 [*Hupacasath*]; *Black*, *supra* note 3 at para 47.

II. DEFINING THE PREROGATIVE

A. THE PREROGATIVE ACCORDING TO DICEY AND BLACKSTONE

The royal prerogative is “a notoriously difficult concept to define adequately.”³⁴ Two classic competing definitions are those offered by A.V. Dicey and Sir William Blackstone. Dicey defined the prerogative as “the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown.”³⁵ On this view, “[e]very act which the executive government can lawfully do without the authority of an Act of Parliament is done in virtue of this prerogative.”³⁶ For Blackstone, the monarch’s “special pre-eminence ... in right of his regal dignity” is essential to the prerogative.³⁷ As such, the designation of royal prerogative “can only be applied to those rights and capacities which the king enjoys alone, in contradistinction to others, and not to those which he enjoys in common with any of his subjects.”³⁸

Canadian jurisprudence has generally preferred Dicey’s definition over Blackstone’s. The Supreme Court of Canada³⁹ and other Canadian appellate courts⁴⁰ have endorsed Dicey’s definition, while the British Columbia Court of Appeal has expressly rejected Blackstone’s.⁴¹ Pursuant to these authorities, all non-statutory Crown powers are prerogative powers.⁴² If Dicey has prevailed in Canadian courts, this is due to a perception that there are no practical consequences to retaining Blackstone’s distinction. Contrary to this view, it will be shown that Blackstone’s distinction must be retained, because it is essential for determining the *existence* and *scope* of the Crown’s non-statutory powers.

B. PREFERRING DICEY OVER BLACKSTONE: A DISTINCTION WITHOUT A DIFFERENCE?

A primary justification for adopting Dicey’s definition is that “there is no practical significance to the distinction between prerogative powers and natural person powers since, in either case, the power is reviewable by the court.”⁴³ If the source of the Crown’s powers determined the availability of judicial review, distinguishing sources of power would be important. Sir William Wade defended Blackstone’s definition on the grounds that “[i]t may

³⁴ *Taming the Prerogative*, *supra* note 22 at para 3, cited in Bradley, Ewing & Knight, *supra* note 20 at 250.

³⁵ AV Dicey, *The Law of the Constitution*, ed by JWF Allison (Oxford: Oxford University Press, 2013) at 188.

³⁶ *Ibid* at 189.

³⁷ Sir William Blackstone, *Commentaries on the Laws of England in Four Books*, 11th ed (London: A Strahan & W Woodfall, 1791) Book 1 at 239.

³⁸ *Ibid*.

³⁹ See *Canada (Prime Minister) v Khadr*, 2010 SCC 3, [2010] 1 SCR 44 at para 34 [*Khadr*]; *Ross River Dena Council Band v Canada*, 2002 SCC 54, [2002] 2 SCR 816 at para 54. Earlier, in *Quebec (AG) v Labrecque*, [1980] 2 SCR 1057 at 1082 [*Labrecque*], the Court endorsed Blackstone’s definition.

⁴⁰ See e.g. *Askin v Law Society of British Columbia*, 2013 BCCA 233, 363 DLR (4th) 706 at para 34, leave to appeal to SCC refused, 35463 (7 November 2013) [*Askin*]; *Black*, *supra* note 3 at para 25.

⁴¹ *Delivery Drugs Ltd v Ballem*, 2007 BCCA 550, 286 DLR (4th) 630 at paras 50–53, leave to appeal to SCC refused, 32428 (3 April 2008).

⁴² *Ibid* at para 53.

⁴³ *Anishinabek*, *supra* note 18 at para 67, citing *Council of Civil Service Unions v Minister for the Civil Service*, [1985] 1 AC 374 at 409–10 (HL) [*CCSU*]. See also Peter W Hogg & Patrick J Monahan, *Liability of the Crown*, 3rd ed (Toronto: Carswell, 2000) at 16.

well be easier to extend [judicial] control to the few genuine prerogative powers ... if the court is not by the same token committed to extend it to all sorts of pretended prerogatives.”⁴⁴ In an apparent contradiction, Wade suggested elsewhere that the true prerogatives would remain unreviewable, even as courts extended judicial review to those powers the Crown “shares with everyone else.”⁴⁵ While pointing in opposite directions, both defences of Blackstone rely on the expectation that the availability of judicial review would depend upon the source of power. Once the possibility of judicial review is extended to all exercises of non-statutory powers, such arguments lose their force. Wade himself subsequently admitted that the House of Lords’ holding that the source of power is irrelevant to the availability of judicial review “may, indeed, be regarded as ruling out the distinction which Blackstone made.”⁴⁶

At one time, it was also suggested that Blackstone’s distinction might affect the availability of public law claims, “since a wide definition of the prerogative may bring into the public law forum matters that would otherwise be private law issues.”⁴⁷ This, however, has not turned out to be the case. Whether public or private law claims are available does not turn on the distinction between the Crown’s prerogative powers and its natural person powers, but on a contextual inquiry into the public or private nature of a particular government action.⁴⁸

C. THE DIFFERENCE THAT BLACKSTONE’S DISTINCTION MAKES

Distinguishing the Crown’s unique powers from those it shares with natural persons is therefore irrelevant to the availability of judicial review or public law claims. These considerations, however, are inadequate to support the conclusion that nothing practical now turns on the distinction, so that Dicey’s definition may safely be adopted. Rather, adopting a definition of prerogative powers that includes all non-statutory powers of the Crown generates significant practical problems for determining their *existence* and *scope*. Dicey’s definition “does not take us very far”⁴⁹ in determining whether an asserted prerogative power exists, because it “does not provide criteria by which one could identify something as falling within the class of prerogatives.”⁵⁰ Worse, taking Dicey’s definition too seriously risks eroding courts’ ability to identify the limits of non-statutory powers and generating unnecessary confusion when prerogative powers are codified.

1. DELINEATING THE BOUNDARIES OF PREROGATIVE POWERS

If courts understand “the Crown’s non-statutory powers” as a comprehensive definition of the prerogative, they may find it difficult or impossible to inquire into the existence of

⁴⁴ Sir William Wade, *Constitutional Fundamentals*, revised ed (London: Stevens & Sons, 1989) at 62.
⁴⁵ HWR Wade, “Procedure and Prerogative in Public Law” (1985) 101 Law Q Rev 180 at 198.
⁴⁶ Sir William Wade, “The Crown, Ministers and Officials: Legal Status and Liability” in Sunkin & Payne, *supra* note 21 at 31.
⁴⁷ London, *supra* note 20 at 63.
⁴⁸ *Air Canada v Toronto Port Authority*, 2011 FCA 347, [2013] 3 FCR 605 at paras 56–60.
⁴⁹ *Burmah Oil Co Ltd v Lord Advocate*, [1965] AC 75 (HL (Scot)) at 99, Reid L [*Burmah Oil*].
⁵⁰ Payne, *supra* note 21 at 94.

asserted prerogative powers. Absent some other criteria for identifying prerogative powers, courts may conclude (or at least imply) that every government action not authorized by statute is — for that reason — authorized by the prerogative.

The Ontario Court of Appeal appeared to reason in this way in *Black*.⁵¹ In that case, Black “sued the Prime Minister for abuse of power, misfeasance in public office and negligence,” alleging that the Prime Minister had unlawfully and wrongfully intervened with the Queen to oppose his appointment as a peer in the United Kingdom.⁵² Black claimed that the Prime Minister’s communication with the Queen fell outside the scope of the prerogative because it was a “personal intervention” motivated by a “personal vendetta.”⁵³ Citing Dicey’s definition of the prerogative,⁵⁴ the Court responded that “the Prime Minister’s authority is always derived from either a federal statute or the prerogative; it is never personal in nature.... Here, *Prime Minister Chrétien did not act under a statute; he therefore acted under the authority of the Crown prerogative.*”⁵⁵ The implication of this statement is that if the Prime Minister acted in fact, and did not act under a statute, he must have acted under the prerogative. Such reasoning would preclude the possibility of finding that the Prime Minister had acted outside the scope of his legal authority.

The reasoning suggested by the Court’s statement in *Black* must be rejected as incompatible with the constitutional guarantee of judicial review, “particularly with regard to the definition and enforcement of jurisdictional limits.”⁵⁶ It offends the unwritten constitutional principle of the rule of law, by virtue of which “all exercises of public authority must find their source in law” and “[a]ll decision-making powers have legal limits, derived from the enabling statute itself, the common or civil law or the Constitution.”⁵⁷

In fairness, the Court of Appeal’s recourse to Dicey’s definition was not the sole basis for its conclusion that the Prime Minister had acted under the prerogative. The Court also concluded that the prerogative power relating to honours included the power of giving advice on and advising against a foreign country’s conferral of honours on a Canadian citizen because, if it did not, Canada’s three policy statements on the issue would be meaningless.⁵⁸

Nevertheless, Dicey’s definition was not helpful to the Court’s analysis, but was rather a source of confusion in defining the scope of the prerogative powers. By itself, Dicey’s definition does not enable courts to perform their judicial review function of defining and enforcing the limits of executive power, because it does not provide courts with any device for identifying or delineating the scope of prerogative powers.

⁵¹ *Supra* note 3.

⁵² *Ibid* at para 1.

⁵³ *Ibid* at para 39.

⁵⁴ *Ibid* at paras 25, 39.

⁵⁵ *Ibid* at para 39 [citation omitted] [emphasis added]. As Lorne Sossin points out, this conclusion seems open to challenge (Lorne Sossin, “The Rule of Law and the Justiciability of Prerogative Powers: A Comment on *Black v Chrétien*” (2002) 47:2 McGill LJ 435 at 442–43 [Sossin, “Rule of Law”]).

⁵⁶ *Dunsmuir*, *supra* note 1 at para 31.

⁵⁷ *Ibid* at para 28.

⁵⁸ *Black*, *supra* note 3 at para 37.

2. CONFUSING CODIFICATION

Defining the prerogative as “the Crown’s non-statutory powers” may also cause unnecessary confusion when a prerogative power is codified. Courts occasionally say that despite a traditional prerogative power having been given a statutory basis, the power retains its prerogative nature. For example, section 579 of the *Criminal Code*⁵⁹ now provides statutory authority for the Attorney General’s power to stay a criminal proceeding, which is of the same nature as the Crown’s traditional prerogative power (also exercised by the Attorney General) to stay a criminal proceeding by filing a *nolle prosequi*.⁶⁰ Despite this statutory basis, the power to stay a criminal proceeding continues to be referred to as a prerogative power,⁶¹ and courts interpret section 579 with reference to the prerogative power to file a *nolle prosequi*.⁶² This judicial treatment reflects the uncontroversial conclusion that Parliament, in enacting section 579, intended to preserve the character and scope of the prerogative power to file a *nolle prosequi*.⁶³ However, the idea that a prerogative power that is given a statutory basis should retain its prerogative nature is incomprehensible if Dicey’s definition of the prerogative is taken to be exhaustive, that is, if the only defining feature of a prerogative power is that it is a power whose source is not statutory.

3. BLACKSTONE’S DISTINCTION: SELECTING CRITERIA FOR THE EXISTENCE OF AN ALLEGED POWER

Considering these difficulties, courts must go beyond Dicey for an adequate definition of the prerogative. What is required are criteria for courts to apply when answering the questions “does the Crown have the power it asserts?” and “what is the scope of the Crown’s asserted power?” Although Blackstone’s definition does not furnish such criteria, his distinction between the Crown’s unique powers and its natural person powers determines which criteria apply. Thus, Blackstone’s distinction is crucial as the starting point of the inquiry.

Where the Crown’s natural person powers are at issue, the existence and scope of the asserted power is determined through a process of analogy to a natural person. The Crown has the “general capacity” of a physical person “in accordance with the rule of ordinary law.”⁶⁴ Thus, if the action is something that a natural person could do, then it will fall within the scope of the Crown’s natural person powers.⁶⁵ Examples include the powers to contract, and to acquire and dispose of property.⁶⁶

⁵⁹ *Supra* note 9.

⁶⁰ *R v Mann*, 2014 BCCA 231, 310 CCC (3d) 143 at paras 34–39 [*Mann*], leave to appeal to SCC refused, 36066 (18 December 2014).

⁶¹ See e.g. *Dubé c R*, 2009 QCCS 6749, 2009 QCCS 6749 (CanLII) at para 7 [*Dubé*].

⁶² *Mann*, *supra* note 60 at paras 34–39; *Dubé*, *ibid* at paras 7–8.

⁶³ See e.g. *Hinse*, *supra* note 9, where the Supreme Court of Canada reiterated that the statutory provisions codifying the prerogative of mercy “merely set out various ways to exercise this prerogative but do not limit its scope” (*ibid* at para 30, citing *Therrien (Re)*, 2001 SCC 35, [2001] 2 SCR 3 at para 113).

⁶⁴ *Labrecque*, *supra* note 39 at 1082.

⁶⁵ George Winterton, *Parliament, the Executive and the Governor-General* (Melbourne: Melbourne University Press, 1983) at 121–22.

⁶⁶ *Labrecque*, *supra* note 39 at 1082; *Cook*, *supra* note 16 at para 52.

Where the Crown asserts powers that are unique to it, “the proper approach is a historical one.”⁶⁷ The court must look to historical precedent to determine the existence and extent of the asserted power. This historical approach implements the principle that courts should not extend the Crown’s exceptional common law powers,⁶⁸ as “it is 350 years and a civil war too late for the Queen’s courts to broaden the prerogative.”⁶⁹ That being said, a historical approach can involve considerable uncertainty where a prerogative power is not established in contemporary case law or government practice. The failure of old cases or textbooks to mention a prerogative power may reflect its non-existence or, alternatively, the fact that its existence was seen as too evident to merit mention.⁷⁰ The historical position may be not only difficult to discover, but also ambiguous. England’s seventeenth century power struggle between the King and Parliament, culminating in the imposition of formal legal constraints on the King’s prerogative through the *Bill of Rights, 1689*,⁷¹ may be seen as a cut-off excluding earlier historical precedents for broad royal prerogatives.⁷² Nevertheless, the scope of the Crown’s prerogative powers was never fixed, but fluctuated over time⁷³ and was contested based on competing political theories.⁷⁴ Therefore, while history provides criteria for identifying the Crown’s unique powers, it may not provide clear answers in particular cases. Considering the rule of law and democratic legitimacy deficiencies associated with prerogative powers, where there are competing historical authorities, the executive should be expected to demonstrate that obtaining statutory authorization would not be practicable before the existence of a disputed prerogative power is recognized. Similar demonstration should also be expected where the executive advances a novel interpretation of an established prerogative power. As I will argue below, courts should show deference to the executive’s determinations in this regard, since standard administrative law principles would typically require courts to review executive determinations of the existence and scope of a prerogative power on a reasonableness standard, as they do for executive interpretations of their enabling legislation.

4. BLACKSTONE’S DISTINCTION: INHERENT CONSTRAINTS ON NATURAL PERSON POWERS

Mark Elliott and BV Harris characterize the distinction between the Crown’s prerogative and natural person powers as a distinction between the prerogative as opposed to “*de facto*”⁷⁵ or “third source” powers.⁷⁶ They present prerogative powers as grounded in positive legal authority and *de facto* or third source powers as a residual liberty, pursuant to which “the government is free to do anything that does not interfere with the judicially-enforceable rights of others and is not otherwise legally prohibited.”⁷⁷

⁶⁷ *Burmah Oil*, *supra* note 49 at 101, Reid L. See also Payne, *supra* note 21 at 94–95.

⁶⁸ *Labrecque*, *supra* note 39 at 1083.

⁶⁹ *British Broadcasting Corp v Johns*, [1965] 1 Ch 32 at 79 (CA), Diplock LJ.

⁷⁰ See *Northumbria Police*, *supra* note 20 at 58, Nourse LJ.

⁷¹ (UK), 1 Will & Mar, c 2.

⁷² Bradley, Ewing & Knight, *supra* note 20 at 251–52.

⁷³ *Burmah Oil*, *supra* note 49 at 100, Reid L.

⁷⁴ Payne, *supra* note 21 at 101.

⁷⁵ Mark Elliott, *The Constitutional Foundations of Judicial Review* (London: Hart, 2001) at 166–67 [emphasis in original].

⁷⁶ BV Harris, “The ‘Third Source’ of Authority for Government Action” (1992) 108:4 Law Q Rev 626 at 626; BV Harris, “The ‘Third Source’ of Authority for Government Action Revisited” (2007) 123:2 Law Q Rev 225 at 225–27 [Harris, “Revisited”].

⁷⁷ Harris, “Revisited,” *ibid* at 235.

Their characterization illuminates a further way, beyond the method of identification, in which Blackstone's distinction is required to establish the scope of the Crown's non-statutory powers. Whereas the Crown's prerogative powers may extend to "authori[zing] the government to override competing common law legal rights,"⁷⁸ the legal rights of others and the general law form a hard boundary constraining the scope of the Crown's natural person powers.⁷⁹ However, if courts ignore the distinction between these two categories of non-statutory Crown powers, they can be expected to lose sight of this basic difference between the scope of each.

The British Columbia Court of Appeal's treatment of the Crown's authority to establish a non-statutory program to reimburse the cost of certain prescription drugs through *ex gratia* payments in *Pharmaceutical Manufacturers Assn of Canada v British Columbia (Attorney General)* provides an example.⁸⁰ The Court accepted Dicey's definition of the prerogative. It then held that the Crown, like any natural person, was free "to establish programs for public benefit and to define or restrict the distribution of such benefits."⁸¹ The Court added, however, that the Crown's capacity to do so was "subject to *the same proviso that limits the exercise of the royal prerogative in its narrow or historical sense*: the Crown may not interfere with the 'rights, duties or liberties' of its subjects without legal authority."⁸² This *obiter* statement strongly implies that the Crown's inability to interfere with the rights, duties, or liberties of its subjects is the same, whether it is acting under the royal prerogative or under its natural person powers. As phrased, it obfuscates the essential distinction that, whereas the royal prerogative can itself provide the requisite legal authority for such an interference, the Crown's natural person powers cannot. This conflation is less dangerous than one suggesting that the Crown has a residual liberty that, like the prerogative powers, allows the Crown to interfere with its subjects' rights. However, it still distorts the law. On this view, for example, Canadian courts could not recognize the Crown's prerogative power to destroy a subject's property to prevent it from falling into the hands of the enemy in war, subject to payment of compensation, as the House of Lords did in *Burmah Oil*.⁸³

D. ADVANTAGES OF NATURAL PERSON POWERS OVER RESIDUAL LIBERTY

Notwithstanding the value of Elliott and Harris' distinction between the Crown's positive legal authority under the prerogative and the Crown's residual liberty for drawing attention to the latter's inherent constraints, a natural person powers conception of the Crown's non-prerogative common law powers should be preferred over a residual liberty conception.

First, Elliott and Harris' formulation conflicts with the Supreme Court of Canada's affirmation that "all exercises of public authority must find their source in law."⁸⁴ Contrary to this principle, they argue that the Crown's residual liberty allows the government to act

⁷⁸ *Ibid* at 228.

⁷⁹ *Ibid* at 227–28.

⁸⁰ (1997), 149 DLR (4th) 613 (BCCA) at para 27, leave to appeal to SCC refused, 26260 (12 February 1998).

⁸¹ *Ibid*.

⁸² *Ibid* at para 28 [emphasis added].

⁸³ *Supra* note 49.

⁸⁴ *Dunsmuir*, *supra* note 1 at para 28.

“without—and without any need of—legal authori[zation].”⁸⁵ In contrast, no such inconsistency arises if the Crown is understood to have a discrete head of natural person powers. It may be for this reason that Canadian courts have relied on the concept of the Crown’s natural person powers, as opposed to its residual liberty.⁸⁶ Moreover, understanding the Crown’s natural person powers as a discrete source of positive legal authority is consistent with the use of express statutory authorization to confer natural person powers on other public authorities, such as municipalities.⁸⁷

Second, the residual liberty conception is misleadingly narrow. It fails to capture the full range of capacities and rights that the Crown shares with natural persons, but which cannot be described as liberties. For example, the Crown’s capacity to sue is one of its natural person powers.⁸⁸ It is, however, difficult to conceive of the Crown’s right to be recognized by, and have a legal dispute resolved by, the courts as a residual liberty.

Third, the language of residual liberty is undesirably broad. By virtue of its public status, the Crown has the ability to take actions that natural persons cannot take. These include actions the Crown could take without interfering with its subjects’ rights or otherwise acting unlawfully. Such actions would fall within a residual liberty of the Crown, but not within a natural person power. Thus, for example, a residual liberty would be broad enough to capture the Crown’s ability to enter into treaties, while a natural person power would not be. Yet, the Crown’s ability to perform this distinctly public act has not been grounded in broad residual liberty, but in an established historical prerogative power.

Moreover, the Crown’s coercive authority may colour its recourse to the general law, such that the analogy with a natural person is no longer tenable. For example, a natural person has no powers to grant regulatory approvals, such as issuing development permits, which could be exploited to bolster its contractual bargaining position and thereby obtain an involuntary benefit from another contracting party. On this basis, the Alberta Court of Appeal found that a municipality with statutory natural person powers had exceeded the scope of those powers when it made the issuance of development permits and subdivision approvals conditional upon developers entering into agreements requiring them to pay fees with respect to off-site facilities and services. According to the Court, “natural person powers do not extend to imposing fees or charges, or coercing developers into agreements to ‘voluntarily’ pay for *infrastructure deficits*.”⁸⁹ Similarly, if the Crown uses its common law natural person powers to extend its coercive authority, it should be found to have acted outside the scope of its authority.

Under a natural person powers conception, the Crown’s authority to take actions which it is uniquely competent to take, by virtue of its public status, must be grounded in statute or a prerogative power supported by historical precedent. Under a residual liberties conception, not limited by the analogy to a natural person, the boundaries of uniquely public actions are

⁸⁵ Elliott, *supra* note 75 at 191. See also Harris, “Revisited,” *supra* note 76 at 225.

⁸⁶ See e.g. *Labrecque*, *supra* note 39 at 1082; *Andrews v Canada (Attorney General)*, 2009 NLCA 70, 314 DLR (4th) 577 at para 38.

⁸⁷ See e.g. *Municipal Government Act*, RSA 2000, c M-26, s 6.

⁸⁸ *Ontario (AG) v Fatehi*, [1984] 2 SCR 536.

⁸⁹ *Prairie Communities Development Corp v Okotoks (Town)*, 2011 ABCA 315, [2012] 3 WWR 221 at para 51 [emphasis in original].

left to the creativity of public officials. Of course, it may not always be easy to draw a sharp distinction between cases where an analogy with a natural person can be sustained and those where it cannot. The availability of public law review for exercises of natural person powers that have a sufficiently public character provides the intermediate response of enhanced judicial scrutiny where the analogy is strained, but not so untenable as to make the action fall outside the scope of the natural person power.

Fourth, a discrete natural person power, together with implied statutory powers and prerogative powers, can provide the government with sufficient authority and flexibility. In carrying out ordinary government business, the Crown's natural person powers authorize a full range of "managerial acts of a kind that any natural person could do, such as making contracts, acquiring or disposing of property, hiring and firing staff and the like."⁹⁰ When pursuing a statutory mandate, the government's implied powers include "all powers which are practically necessary for the accomplishment of the object intended to be secured by the statutory regime."⁹¹ A broad residual liberty would therefore only be necessary to enable the government to act in a uniquely public manner, and outside the sphere of an existing statutory mandate or historically established prerogative power (for example, treaty-making). Yet, the uniquely public nature of such acts, together with their lack of connection to an existing statutory mandate or prerogative power, suggests that they would likely involve setting novel public policy. Absent an emergency, democratic considerations favour requiring the government to seek statutory authorization (even if framed in very broad terms) to engage in these uniquely public activities that chart a new public policy course, as such authorization enhances opportunities for parliamentary debate and scrutiny. Nor is a broad residual liberty even required in emergencies. Federal, provincial, and territorial statutes already authorize public authorities to take exceptional temporary measures to respond to a wide range of emergencies.⁹² Even if such legislation were not in place, historical precedent very likely supports a prerogative power to take urgent action to protect national security and public order where there is insufficient time to obtain statutory authorization.⁹³

In sum, Blackstone's distinction between the Crown's prerogative powers and its natural person powers is essential for determining the existence and scope of the Crown's non-statutory powers. The Crown's prerogative powers are grounded in historical precedent. Its natural person powers should be determined by an analogy with a natural person, and the

⁹⁰ *R (New London College Ltd) v Home Secretary (SC(E))*, [2013] UKSC 51, [2013] 1 WLR 2358 at para 28.

⁹¹ *ATCO Gas & Pipelines Ltd v Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 SCR 140 at para 51.

⁹² See *Emergencies Act*, RSC 1985, c 22 (4th Supp); *Emergency Management and Civil Protection Act*, RSO 1990, c E.9; *Civil Protection Act*, CQLR c S-2.3; *Emergency Management Act*, SNS 1990, c 8; *Emergency Measures Act*, RSNB 2011, c 147; *Emergency Measures Act*, RSPEI 1988, c E-6.1; *Emergency Services Act*, SNL 2008, c E-9.1; *Emergency Program Act*, RSBC 1996, c 111; *Emergency Management Act*, RSA 2000, c E-6.8; *The Emergency Planning Act*, SS 1989-90, c E-8.1; *Emergency Measures Act*, CCSM c E80; *Civil Emergency Measures Act*, RSNWT 1988, c C-9; *Emergency Measures Act*, SNU 2007, c 10; *Civil Emergency Measures Act*, RSY 2002, c 34.

⁹³ The issue has been considered in UK jurisprudence. In *Burmah Oil*, *supra* note 49, Lord Pearce referred to the "Crown's prerogative ... to protect its realm and citizens in times of war and peril," but also indicated that the domestic emergency prerogative is more restricted than the war emergency prerogative recognized in that case (*ibid* at 143-44). A prerogative power to preserve the peace of the realm was recognized in *Northumbria Police*, *supra* note 20. While uncontroversial in its application to emergencies (this was not contested), the case has properly been criticized for failing to restrict the prerogative to emergencies, and extending it where statutory authority existed (AW Bradley, "Police Powers and the Prerogative" [1988] Public L 298).

Crown should not be viewed as having broad residual liberties. The discussion that follows will focus on the Crown's prerogative powers, not its natural person powers. However, to the extent that the exercise of the Crown's natural person powers is subject to public law review, similar principles should ordinarily apply.

III. JUSTICIABILITY

A. THE BASIC PRINCIPLE: SOURCE OF POWER IS IMMATERIAL

Since *Black*, Canadian courts have generally accepted the basic principle that the justiciability of a government action does not depend on the source of power.⁹⁴ In *Hupacasath*, the Federal Court of Appeal presented this principle as clear and settled: "Whether the question before the Court is justiciable bears no relation to the source of the government power.... For some time now, it has been accepted that for the purposes of judicial review there is no principled distinction between legislative sources of power and prerogative sources of power."⁹⁵

Considering the concerns that prerogative powers are less consistent with democratic legitimacy and the rule of law than statutory powers, a rule that justiciability does not depend on the source of power is justified. Absent such a rule, government has an incentive to act under the prerogative, rather than under statute, because it can avoid judicial scrutiny by so doing. However, despite broad statements of principle that the source of power does not determine justiciability, Canadian courts have tended to apply peculiar justiciability tests to exercises of prerogative powers.

B. INTEREST-BASED TESTS

A first category of justiciability tests applied to exercises of prerogative powers is those tests that turn on the nature of the effect of the government action on a person's interests. Among these, a frequently cited test is the requirement that the government action affects a person's rights or legitimate expectations (RLE test).⁹⁶ Canadian jurisprudence almost

⁹⁴ *Black*, *supra* note 3 at para 47; *Black v Advisory Council for the Order of Canada*, 2012 FC 1234, 420 FTR 79 at para 48 [*Black FC*]; *Ontario First Nations (2008) Limited Partnership v Aboriginal Affairs (Ontario)*, 2013 ONSC 7141, 118 OR (3d) 356 at para 37 [*OFNLP*]; *Galati v Johnston*, 2015 FC 91, 474 FTR 136 at para 7 [*Galati*]. While doubts were expressed in *Cook*, *supra* note 16 at paras 46, 50, the Supreme Court of British Columbia has since confirmed, in *Cape Mudge Indian Band v British Columbia (Ministry of Aboriginal Relations and Reconciliation)*, 2016 BCSC 556, 2016 BCSC 556 (CanLII), that *Cook* should not be read as holding that ministerial conduct is not judicially reviewable merely because it flows from a prerogative power, rather than a statutory power (*ibid* at paras 16–21). The Supreme Court of Canada stated in *Hinse*, *supra* note 9, that "it must be borne in mind that the exercise of the royal prerogative, like the exercise of any other statutory power, can be reviewed by the courts" (*ibid* at para 43). Although dealing with codified prerogative powers ("any other statutory power"), this statement tends to confirm that source of power is irrelevant to justiciability (*ibid* [emphasis added]).

⁹⁵ *Supra* note 33 at para 63 [citation omitted].

⁹⁶ See *Drabinsky v Advisory Council of the Order of Canada*, 2014 FC 21, 445 FTR 240 at para 18 [*Drabinsky*]; *Black FC*, *supra* note 94; *Anishinabek*, *supra* note 18 at para 64; *OFNLP*, *supra* note 94 at para 48; *Chiasson v Canada*, 2003 FCA 155, 226 DLR (4th) 351 at para 9.

exclusively refers to this test in the context of non-statutory powers.⁹⁷ Applying this test, the Court in *Black* held that the honours prerogative was not justiciable because “[n]o Canadian citizen has a right to an honour” and “no Canadian citizen can have a legitimate expectation of receiving an honour.”⁹⁸ However, the RLE test is deficient in several respects. Given the frequency with which the RLE test is invoked, the discussion that follows focuses on the difficulties with that test. As will be seen, however, courts have also articulated interest-based tests in more flexible terms, asking whether “important individual interests are at stake” or whether there are “real adverse consequences for the person affected.”⁹⁹ Yet, even these more flexible tests suffer from many of the same deficiencies as the RLE test, if to a lesser degree.

1. INCOMPATIBILITY WITH PROCEDURAL FAIRNESS AND STANDING TESTS

To begin, the RLE test for justiciability cannot be reconciled with principles governing the duty of fairness. The RLE test imposes a more demanding standard for the impact of a decision on a person than the test for the existence of a duty of fairness. A duty of fairness attaches to any administrative decision “which affects the rights, privileges or interests of an individual.”¹⁰⁰ Thus, while effects on a person’s privileges or interests are sufficient to trigger a duty of fairness, they are insufficient to render an exercise of prerogative powers justiciable under the RLE test. However, since justiciability is a condition of the procedural fairness inquiry, the interest required to establish justiciability cannot be more demanding than the interest required to give rise to a duty of fairness. If the RLE test were accepted as a general test of justiciability, courts would never reach the procedural fairness inquiry where only a person’s interests or privileges were affected. For example, exercises of prerogative powers that harm a person’s reputation, an interest typically sufficient to trigger a duty of fairness, but do not affect that person’s rights or legitimate expectations, would not be justiciable.¹⁰¹ Similarly, the symbolic privileges attached to an appointment to the Order of Canada would be insufficient to render the grant or revocation of such an honour justiciable.¹⁰²

The RLE test of justiciability also conflicts with the law of public interest standing. In *Finlay v. Canada (Minister of Finance)*, a recipient of provincial assistance for persons in need sought to challenge the legality of federal contribution payments to the province as inconsistent with federal cost-sharing legislation.¹⁰³ The Supreme Court of Canada held that Finlay could not establish private interest standing to challenge the federal payments because persons in need only had rights under provincial, not federal, legislation. The federal cost-sharing payments, therefore, did not affect his rights directly.¹⁰⁴ The Court nevertheless

⁹⁷ One reported case suggests that this test applies to the exercise of statutory powers, but justiciability did not turn on the choice of test (*Ontario (Revenue) v Carter*, 2010 ONCA 566, 5 CPC (7th) 445 at paras 26–27).

⁹⁸ *Supra* note 3 at paras 60–61.

⁹⁹ *Ibid* at para 60.

¹⁰⁰ *Cardinal v Director of Kent Institution*, [1985] 2 SCR 643 at 653 [*Cardinal*], cited in *Canada (Attorney General) v Mavi*, 2011 SCC 30, [2011] 2 SCR 504 at para 38 [*Mavi*].

¹⁰¹ *Canada (Attorney General) v Canada (Commission of Inquiry on the Blood System)*, [1997] 3 SCR 440 at para 55.

¹⁰² *Black FC*, *supra* note 94 at para 22.

¹⁰³ [1986] 2 SCR 607 at 610 [*Finlay*].

¹⁰⁴ *Ibid* at 621–22.

exercised its discretion to grant Finlay public interest standing to challenge administrative action for exceeding the limits of statutory authority.¹⁰⁵ The circumstances in *Finlay* would not satisfy the RLE test. The federal payments did not affect Finlay's rights. The doctrine of legitimate expectations did not apply because there was no government representation about the process or outcome of an administrative decision, and because the doctrine only gives rise to procedural rights, which were not at issue.¹⁰⁶ At the same time, justiciability was a condition for the Court's recognition of public interest standing.¹⁰⁷ If an administrative action had to affect a person's rights or legitimate expectations to be justiciable, the Court could not have granted Finlay public interest standing.

2. INABILITY TO DRAW THE REQUIRED DISTINCTIONS

Furthermore, the RLE test cannot explain judicial treatment of the justiciability of different prerogative powers. In *Black*, immediately after confirming that "the basic question in this case" was whether the RLE test was satisfied, the Court gave examples "[t]o put this question in context" that cannot be explained by that test.¹⁰⁸

By way of example, the Court in *Black* indicated that "executive decisions to sign a treaty or to declare war" were "matters of 'high policy'" where "public policy and public interest considerations far outweigh the rights of individuals or their legitimate expectations."¹⁰⁹ By stating that individuals' rights and legitimate expectations were outweighed in, rather than absent from, such high policy contexts, the Court implicitly acknowledged that the RLE test would be satisfied. Far from illuminating the RLE test, the Court actually formulated a distinct test: that "high policy" decisions are not justiciable absent a claim under the *Canadian Charter of Rights and Freedoms*.¹¹⁰ The "high policy" test, discussed below, is very different from the RLE test, as *Aleksic v. Canada (Attorney General)* illustrates.¹¹¹ In that case, the plaintiffs sought to sue the Government of Canada for the injuries and deaths of their relatives, the destruction of their property, and the interruption of their business, all of which they claimed resulted from Canada's participation in the North Atlantic Treaty Organization's missile and aerial bombardment of the Federal Republic of Yugoslavia in 1999. The decision to participate in the bombing was held to be a non-justiciable "high policy" decision.¹¹² The idea that the plaintiffs in *Aleksic* had failed to claim that their rights had been affected is untenable, unless the concept of rights is so internally qualified by policy considerations as to be unworkable as a distinct notion.

As another example to put the RLE test in context, the Court in *Black* suggested that judicial review ought to be available for certain exercises of the prerogative of mercy.¹¹³ The Court specifically referred to the Crown's common law prerogative of mercy, preserved by

¹⁰⁵ *Ibid* at 630–31, 634.

¹⁰⁶ *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 26 [*Baker*].

¹⁰⁷ *Finlay*, *supra* note 103 at 632.

¹⁰⁸ *Supra* note 3 at para 52.

¹⁰⁹ *Ibid*.

¹¹⁰ *Ibid*; *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

¹¹¹ (2002), 215 DLR (4th) 720 (Ont Sup Ct J (Div Ct)) [*Aleksic*].

¹¹² *Ibid* at paras 30–31, 36.

¹¹³ *Supra* note 3 at paras 53–55.

section 749 of the *Criminal Code*, as opposed to codified mercy powers.¹¹⁴ However, there is no right to a pardon: “[T]he mercy procedure is not the subject of legal rights, as it is initiated only after a convicted person has exhausted his or her rights.”¹¹⁵ Absent specific government representations, it would not affect a person’s legitimate expectations either. Indeed, the language of “rights” or “legitimate expectations” cannot explain why exercises of the prerogative of mercy should be justiciable, but exercises of the honours prerogative should not be. Rather, the distinction reflects a value judgment about the importance of the decision to the individual.¹¹⁶ It is for this reason that the Court in *Black* had to explain this distinction by reference to yet another interest-based justiciability test: “The refusal to grant an honour is far removed from the refusal to grant ... a pardon, where important individual interests are at stake. Unlike the refusal of a peerage, the refusal of ... a pardon has real adverse consequences for the person affected.”¹¹⁷

Under this test, justiciability turns on whether the decision affects important individual interests or has real adverse consequences for the person affected. While this test is less formalistic and demanding than the RLE test, it is similarly incompatible with the principles governing the existence of a duty of fairness (as it requires more than a simple effect on a person’s interests or privileges) and the availability of public interest standing.

3. TENDENCY TOWARDS CONSERVATIVE PROCEDURAL REVIEW

Finally, although Canadian courts have used the “legitimate expectations” portion of the test to expand the range of justiciable exercises of prerogative powers, accessing justiciability through this narrow route has led to conservative and purely procedural review. In *Drabinsky*, the Federal Court found that a policy outlining the procedure for terminating appointments to the Order of Canada created a legitimate expectation that the prescribed procedure would be followed, making this revocation of an honour justiciable.¹¹⁸ Nevertheless, because only legitimate expectations were affected, “the sole basis on which the ... decision [could] be reviewed [was] procedural” and not substantive, because “the doctrine of legitimate expectations relates to procedural fairness, not substantive rights.”¹¹⁹ Moreover, the procedural review would consider only the narrow “question [of] whether the process ... met the affected person’s legitimate expectations.”¹²⁰

¹¹⁴ In *Hinse*, *supra* note 9, the Supreme Court of Canada considered a claim in civil liability against the federal Crown based on the Minister of Justice’s conduct in the exercise of codified mercy powers. Although the Court rejected the claim on the grounds that neither a breach of the applicable standard of conduct nor causation had been established, the decision confirms that such conduct is justiciable.

¹¹⁵ *Hinse*, *ibid* at para 65, citing *Thatcher v Canada (Attorney General) (TD)*, [1997] 1 FCR 289 at para 9 (FCTD); see also Diplock LJ in *de Freitas v Benny*, [1976] AC 239 at 247 (PC).

¹¹⁶ In *Smith v Canada (Attorney General) (FC)*, 2009 FC 228, [2010] 1 FCR 3 [*Smith*], the Federal Court alluded to this value judgment: “Perhaps in keeping with Canadian sensibilities, Justice Laskin held that the potential grant of a British honour did not engage an important individual interest or give rise to real adverse consequences for Mr. Black” (*ibid* at para 27).

¹¹⁷ *Supra* note 3 at para 60.

¹¹⁸ *Supra* note 96 at para 23, *aff’d* 2015 FCA 5, 446 NR 375 (refusing to opine on justiciability, but also not questioning the Federal Court’s analysis). See also *Black FC*, *supra* note 94 at paras 52–66, *aff’d* 2013 FCA 267, 454 NR 202 [*Black FCA*] (refusing to opine on “the issues of justiciability and legitimate expectation” (*Black FCA*, *ibid* at para 7)).

¹¹⁹ *Drabinsky*, *ibid* at para 19 (*obiter* because only procedural objections had been raised).

¹²⁰ *Ibid*.

However, even though legitimate expectations cannot create substantive rights to a particular outcome,¹²¹ it does not follow that the sole basis of review should be procedural. Government representations can influence the considerations that the decision-maker must take into account. Thus, a decision may amount to an abuse of discretion if it demonstrated a “singular lack of recognition of the serious consequences [that a] sudden reversal of position inflicted on” the person subject to it.¹²² Also, restricting procedural review to conformity with represented procedures conflicts with the principles governing procedural fairness in the exercise of statutory powers. As discussed below, those principles provide that the content of the duty of fairness is “eminently variable” and must be “decided in the specific context of each case,” taking into account an open list of factors, of which legitimate expectations is only one.¹²³ Contrary to this flexible and contextual approach, *Drabinsky* endorses a rigid and conservative procedural fairness inquiry where the Court makes no independent assessment of the requirements of fairness, but simply requires the decision-maker to comply with its representations as to procedure.¹²⁴

C. SUBJECT MATTER TESTS

Another category of tests for justiciability of the exercise of prerogative powers is those that exclude from judicial review certain government decisions or actions based on their subject matter.¹²⁵ Subject matter justiciability tests are sometimes articulated broadly to mean that the justiciability of any claim pertaining to the exercise of a prerogative power depends upon the subject matter of the prerogative power itself. On this formulation, each prerogative power can be categorized as either justiciable or non-justiciable. Consistent with this formulation, the Court in *Black* held that the honours prerogative was not justiciable¹²⁶ and endorsed the following statement from Lord Roskill in *CCSU*:

Prerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers as well as others are not, I think, susceptible to judicial review because their nature and subject matter are such as not to be amenable to the judicial process.¹²⁷

Under a slightly narrower formulation, justiciability depends on the subject matter of the type of decision. For example, decisions to deploy troops¹²⁸ or to participate in a bombing campaign¹²⁹ have been held to be non-justiciable. Such determinations are more limited than Lord Roskill’s view that the prerogative power over defence of the realm is not justiciable.

¹²¹ *Moreau-Bérubé v New Brunswick (Judicial Council)*, 2002 SCC 11, [2002] 1 SCR 249 at para 78.

¹²² *Mount Sinai Hospital Center v Quebec (Minister of Health and Social Services)*, 2001 SCC 41, [2001] 2 SCR 281 at para 63, Binnie J [*Mount Sinai*].

¹²³ *Baker*, *supra* note 106 at para 21.

¹²⁴ It does so even though the earlier decision of the Federal Court of Appeal in *Black FCA*, *supra* note 118, which refused to opine on the issues of justiciability and legitimate expectations, relied on the *Baker* factors to conclude that a decision to revoke an honour complied with the requirements of procedural fairness (*ibid* at para 7).

¹²⁵ *Black*, *supra* note 3 at para 47.

¹²⁶ *Ibid* at para 63.

¹²⁷ *Supra* note 43 at 418, cited in *ibid* at para 58.

¹²⁸ *Blanco*, *supra* note 13 at para 21; *Turp* 2003, *supra* note 13 at paras 19–21.

¹²⁹ *Aleksic*, *supra* note 111 at paras 30–31.

A significantly narrower formulation provides that justiciability depends upon the subject matter of a particular exercise of a prerogative power. The interest-based tests examined above are amenable to this narrower approach. On such tests, where a particular exercise of the prerogative affects a person's rights, legitimate expectations, or important individual interests, or otherwise has real adverse consequences on a person, it is justiciable. However, exercises of the same prerogative power or decisions of the same type may not be justiciable in other cases. Thus, the Federal Court in *Drabinsky* could find exercises of the honours prerogative justiciable based on the specific policy in place on the facts, even though the grant or revocation of honours might not be justiciable in other circumstances.

Each of these formulations of the subject matter test carves out a sphere of government action that is immune from judicial review. Applying these tests, once the subject matter of government action is held to be non-justiciable, courts have found that they are not competent to evaluate any challenges to those actions (except, as will be seen, for *Charter* claims). Thus, in *Turp 2003*, the applicants argued that Canadian constitutional law requires the executive to obtain parliamentary authorization prior to deploying troops.¹³⁰ The Court declined to decide this question on the basis that deploying troops is a non-justiciable "high policy" decision.¹³¹ In *Black*, the Court held that the honours prerogative was not justiciable and therefore, "even if [the Prime Minister's] motives [when exercising the prerogative] were questionable, they [could not] be challenged by judicial review."¹³²

1. CONTRASTED WITH JUSTICIABILITY OF THE QUESTION TESTS

In contrast with subject matter justiciability tests, the Supreme Court of Canada has endorsed a test for justiciability that turns on the nature of the question. According to the Supreme Court of Canada in *Reference Re Canada Assistance Plan (B.C.)*, in determining justiciability,

the Court's primary concern is to retain its proper role within the constitutional framework of our democratic form of government.... In considering its appropriate role the Court must determine whether the *question* is purely political in nature and should, therefore, be determined in another forum or whether it has a sufficient legal component to warrant the intervention of the judicial branch.¹³³

In *Operation Dismantle v. R.*, the appellants sought to challenge a Cabinet decision, made under the prerogative, to permit cruise missile testing by the United States in Canadian territory.¹³⁴ They claimed that this decision violated their section 7 *Charter* right not to be deprived of life, liberty or security of the person except in accordance with the principles of fundamental justice.¹³⁵ Writing for the Court on the issue of justiciability, Justice Wilson focused squarely on the nature of the question being asked:

It might be timely at this point to remind ourselves of the question the Court is being asked to decide.... if the Court were simply being asked to express its opinion on the wisdom of the executive's exercise of its

¹³⁰ *Supra* note 13.

¹³¹ *Ibid* at paras 8–9, 19–21.

¹³² *Supra* note 3 at para 65.

¹³³ [1991] 2 SCR 525 at 545 [citations omitted] [emphasis added].

¹³⁴ [1985] 1 SCR 441 [*Operation Dismantle*].

¹³⁵ *Supra* note 110.

defence powers in this case, the Court would have to decline. It cannot substitute its opinion for that of the executive to whom the decision-making power is given by the Constitution.... The question before us is not whether the government's defence policy is sound but whether or not it violates the appellants' rights under s. 7 of the *Charter of Rights and Freedoms*. This is a totally different question. I do not think there can be any doubt that this is a question for the courts.¹³⁶

Since *Operation Dismantle*, claims that an exercise of the prerogative violated the *Charter* have been considered justiciable.¹³⁷ However, *Operation Dismantle* has often been interpreted as merely establishing a narrow *Charter* claims exception to non-justiciability. Some decisions suggest that exercises of prerogative powers are only reviewable on *Charter* grounds,¹³⁸ although this proposition has more recently been rejected.¹³⁹ Other decisions, which remain unassailed, interpret *Operation Dismantle* as providing a *Charter* claims exception from the "high policy" subject matter justiciability test. On this test, "apart from *Charter* claims, [executive decisions on matters of 'high policy'] are not judicially reviewable."¹⁴⁰ However, this interpretation of *Operation Dismantle* is untenable. The case should rather be understood as establishing the general principle that justiciability turns on the nature of the question the court is asked to decide, not the subject matter of the government decision or action under review.

Once it is accepted that courts are competent to evaluate *Charter* claims in highly political spheres of government activity, the subject matter approach is already partly abandoned. There is no principled justification for insisting that courts are incompetent to decide any other questions about highly political government actions. In particular, there is no justification for why courts can answer questions about *Charter* compliance, but not about compliance with other conditions for the legality of government action.

Indeed, in *Finlay*, the Supreme Court of Canada relied on *Operation Dismantle* to conclude that the limits of statutory authority were also justiciable questions. The Supreme Court cited *Operation Dismantle* for the proposition that "where there is an *issue* which is appropriate for judicial determination the courts should not decline to determine it on the ground that because of its policy context or implications it is better left for review and determination by the legislative or executive branches of government."¹⁴¹ This principle was not restricted to *Charter* issues, but was deemed "equally applicable to a non-constitutional issue of the limits of statutory authority."¹⁴²

Returning to *Turp* 2003 and *Black*, the Court in each case failed to answer *questions* that should properly have been held to be justiciable, because it applied a subject matter justiciability test instead of asking whether the particular questions asked were justiciable. In *Turp* 2003, the Court declined to decide whether Canadian constitutional law requires

¹³⁶ *Operation Dismantle*, *supra* note 134 at 471–72.

¹³⁷ See *Khadr*, *supra* note 39 at para 36.

¹³⁸ *Turp* 2012, *supra* note 15 at para 18; *Blanco*, *supra* note 13 at para 15.

¹³⁹ *Hupacasath*, *supra* note 33 at paras 59–61.

¹⁴⁰ *Black*, *supra* note 3 at para 52, cited in *Aleksic*, *supra* note 111 at paras 29–30 and *Turp* 2003, *supra* note 13 at paras 19–21.

¹⁴¹ *Finlay*, *supra* note 103 at 632 [emphasis added].

¹⁴² *Ibid.*

Parliament to authorize a troop deployment.¹⁴³ This is a question that courts can competently and appropriately answer, even though the decision to deploy troops is highly political. The Court would not have overstepped its constitutional role by stating that, as a matter of law, no requirement of parliamentary authorization exists. Similarly, if Parliament passed legislation requiring parliamentary authorization for certain military actions, courts could properly decide claims that the legislation had been contravened (unless, correctly construed, the legislation contemplated exclusively non-judicial accountability for non-compliance).¹⁴⁴ In *Black*, the Court found that the Prime Minister's exercise of the honours prerogative was not judicially reviewable "even if his motives were questionable."¹⁴⁵ Specifically, the Court would not consider Black's claim that the Prime Minister's action was a "personal intervention" motivated by a "personal vendetta."¹⁴⁶ However, while courts may be ill-suited to decide who is most worthy of an honour, they are competent to rule on whether a public official has acted in bad faith or for an improper purpose.¹⁴⁷ As Wade points out, "whether a minister has acted on improper grounds is an issue with which the courts are very familiar" and one which gives rise to "no problem of justiciability."¹⁴⁸ Indeed, in *Hinse*, the Supreme Court of Canada confirmed that civil liability claims against the Crown based on the Minister of Justice's exercise of codified mercy powers were justiciable,¹⁴⁹ even though such mercy decisions were "true policy decision[s]" under the applicable legislation.¹⁵⁰ In deciding the issue of fault, the proper question for the Supreme Court was whether the Minister had acted irrationally or in bad faith (which includes serious recklessness) in exercising the Crown's mercy powers.¹⁵¹

What separates *Operation Dismantle* and *Finlay* from *Turp 2003* and *Black* is the Court's ability to uphold the rule of law.¹⁵² The rule of law "provides a shield for individuals from arbitrary state action."¹⁵³ An aspect of the rule of law, the principle of legality, requires "that there must be practical and effective ways to challenge the legality of state action."¹⁵⁴ By focusing their justiciability analysis on the nature of the question, the Supreme Court in *Operation Dismantle* and *Finlay* concluded that they could answer questions about the conditions of legality of government action: compliance with the *Charter* and the limits of statutory authority. In contrast, by focusing their justiciability inquiry on the nature of the government decision or action, the Courts in *Turp 2003* and *Black* declined to answer questions about other uncontroversial conditions for the legality of government action: the absence of a constitutional prohibition or bad faith.

¹⁴³ *Turp 2003*, *supra* note 13 at para 12.

¹⁴⁴ See e.g. *Friends of the Earth v Canada (Minister of the Environment)*, 2009 FCA 297, 313 DLR (4th) 767, leave to appeal to SCC refused, 33469 (25 March 2010).

¹⁴⁵ *Supra* note 3 at para 65.

¹⁴⁶ *Ibid* at para 39.

¹⁴⁷ Sossin, *supra* note 55 at 454–55.

¹⁴⁸ *Supra* note 45 at 197.

¹⁴⁹ *Supra* note 9 at para 43.

¹⁵⁰ *Ibid* at para 4.

¹⁵¹ *Ibid* at paras 4, 36, 53.

¹⁵² Sossin, *supra* note 55 at 454–55.

¹⁵³ *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 70 [*Secession Reference*].

¹⁵⁴ *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 SCR 524 at para 31.

Subject matter justiciability tests, therefore, tend to prevent courts from fulfilling their rule of law function of supervising the legality of government action. In light of this tendency, the general application of such justiciability tests in prerogative powers cases should be abandoned. The Federal Court of Appeal's 2015 decision in *Hupacasath* signals a move in this direction. In that case, a First Nation claimed that a foreign investment agreement might affect its Aboriginal rights, and that it therefore had a right to be consulted before the executive brought the agreement into force.¹⁵⁵ Considering "[w]hether the question before the Court [was] justiciable,"¹⁵⁶ the Court held that, although the "factors underlying a decision to sign a treaty are beyond the courts' ken or capability to assess,"¹⁵⁷ the question of whether the First Nation had "enforceable legal rights to be consulted" was justiciable.¹⁵⁸

2. A NARROW SPHERE FOR THE CONTINUED APPLICATION OF A SUBJECT MATTER TEST

If any spheres of government activity are to be immune from judicial scrutiny, a strong constitutional counterweight to the rule of law principle must be provided. Specifically, the unwritten constitutional principle of democracy may justify the non-justiciability of the exercise of prerogative powers that are integral to the democratic process.¹⁵⁹ For example, in *Galati*, the Federal Court held that the Governor General's exercise of the prerogative to grant royal assent to a bill is a legislative act that is not justiciable, even on constitutional grounds.¹⁶⁰ Similarly, in *Guergis*, the Ontario Court of Appeal held that the Prime Minister's exercise of the prerogative power to appoint or dismiss Cabinet ministers is not justiciable, identifying no exceptions (only tort claims had been raised).¹⁶¹ Although not invoked in these cases, the democratic principle should be understood to require accountability for executive actions integral to the democratic process to be purely political, even when *Charter* rights are at stake. For example, if a Cabinet minister was dismissed for professing strong religious beliefs that conflicted with the government's policies, it would seem inappropriate for a court to conclude that her dismissal was an unconstitutional interference with her section 2(a) *Charter* right to freedom of religion.¹⁶²

Judicial supervision of exercises of prerogative powers that are integral to the democratic process is generally inappropriate because such actions more significantly affect the public interest than the interests of particular individuals, and are uniquely visible and subject to parliamentary and public scrutiny, such that democratic accountability provides an adequate alternative remedy to judicial control.¹⁶³ The Supreme Court of Canada reasoned along these

¹⁵⁵ *Hupacasath*, *supra* note 33 at paras 1, 33.

¹⁵⁶ *Ibid* at para 63 [emphasis added].

¹⁵⁷ *Ibid* at para 68.

¹⁵⁸ *Ibid* at para 69.

¹⁵⁹ *Secession Reference*, *supra* note 153 at paras 61–69.

¹⁶⁰ *Supra* note 94 at para 32.

¹⁶¹ *Supra* note 11 at paras 6, 86, 96.

¹⁶² *Supra* note 110.

¹⁶³ Based on this argument, I would reject the proposition that, absent a provision for the exercise of the office by deputy, "an incapacity to execute [ministerial offices] with propriety and effect, would form a legal ground of objection" to the appointment of a Cabinet minister (Joseph Chitty Jr, *A Treatise on the Law of the Prerogatives of the Crown; and the Relative Duties and Rights of the Subject* (London: Butterworth and Son, 1820) at 84, cited in *obiter* in *Askin*, *supra* note 40 at para 38). Instead of entrusting the courts with such capacity determinations, parliamentary and public scrutiny should be viewed as adequate safeguards against ministerial incapacity. If they are not, a democracy is already eroded beyond what the courts could be expected to repair.

lines in *Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*.¹⁶⁴ The Supreme Court held that the Auditor General's statutory entitlement to access documents held by Cabinet and a Crown corporation was not justiciable. The existence of adequate alternative remedies was deemed relevant to courts' assessment of "the appropriateness of [their] intervention."¹⁶⁵ The Supreme Court concluded that "a political remedy" was "an adequate alternative remedy" because "[t]he Auditor General [was] acting on Parliament's behalf carrying out a *quintessentially Parliamentary function*, namely, oversight of executive spending pursuant to Parliamentary appropriations."¹⁶⁶

In *Auditor General*, the Supreme Court stressed that it was not dealing with a *Charter* case.¹⁶⁷ Indeed, political accountability is not generally an adequate alternative remedy for *Charter* violations because the very purpose of the *Charter* is to protect individual rights from the political will of the majority.¹⁶⁸ Nevertheless, the Supreme Court reiterated Justice Wilson's statement in *Operation Dismantle* that "[i]n the realm of *Charter* adjudication, s. 1 is 'the uniquely Canadian mechanism through which the courts are to determine the justiciability of particular issues that come before it.'"¹⁶⁹ Section 1 is the *Charter's* rights limitation clause. Under section 1, a rights interference will be justified if the government action pursues an important objective and does not disproportionately interfere with the *Charter* right.¹⁷⁰ The courts have not explained how this framework applies to a justiciability assessment.

Here, section 1 may allow non-justiciability itself to be justified. The non-justiciability of exercises of prerogative powers that are integral to the democratic process is necessary to preserve that process' integrity, as this prevents judicial interference in its inner workings. While courts can properly review the legality of the outcome of the democratic process, including the constitutionality of legislation and the legality of government actions taken in pursuit of public policies, courts should not interfere with that process and meddle in the very formulation of a majority will. Indeed, justifications of this kind support the constitutional protection of parliamentary privilege.¹⁷¹ At the same time, it is difficult to imagine these exercises of prerogative powers seriously interfering with an individual's *Charter* rights.

Nevertheless, invoking section 1 to determine the justiciability of *Charter* claims is not without difficulty. Lorne Sossin has argued that section 1 of the *Charter* is a flawed mechanism for a justiciability inquiry because "a court could only reach the section 1 inquiry if it has already deemed the subject matter suitable for adjudication."¹⁷² Such a sequential reasoning process may not be essential, however: a court might find that, in light of the strong section 1 justification available, and the absence of an alleged serious rights violation

¹⁶⁴ [1989] 2 SCR 49 [*Auditor General*].

¹⁶⁵ *Ibid* at 92.

¹⁶⁶ *Ibid* at 103 [emphasis added].

¹⁶⁷ *Ibid* at 110.

¹⁶⁸ *Secession Reference*, *supra* note 153 at para 74.

¹⁶⁹ *Auditor General*, *supra* note 160 at 91, citing *Operation Dismantle*, *supra* note 134 at 491.

¹⁷⁰ *Doré v Barreau du Québec*, 2012 SCC 12, [2012] 1 SCR 395 at para 7 [*Doré*]; *R v Oakes*, [1986] 1 SCR 103 at 139.

¹⁷¹ *Canada (House of Commons) v Vaid*, 2005 SCC 30, [2005] 1 SCR 667 at paras 41–46 [*Vaid*]; *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 SCR 319 at 374–375, 385–390 [*New Brunswick Broadcasting*].

¹⁷² Lorne M Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada*, 2nd ed (Toronto: Carswell, 2012) at 213.

that could outweigh that justification, it should decline to decide whether a *Charter* right has been infringed at all. It might also be objected that, since the *Charter* does not apply to the courts,¹⁷³ section 1 cannot operate to determine whether or not the courts should adjudicate certain matters. However, if section 1 were relied upon to determine the justiciability of *Charter* claims, the *Charter* would only be applying to the courts in an incidental way, since such determinations would always occur where the true subject of the proposed litigation is a *Charter* challenge to government action.

If section 1 does not provide a sound constitutional basis for the non-justiciability of exercises of prerogative powers that are integral to the democratic process, the unwritten constitutional principle of democracy, itself, may offer a more straightforward and cogent basis. Unwritten constitutional principles “assist in the interpretation of the text [of the Constitution] and the delineation of spheres of jurisdiction, the scope of rights and obligations, and the role of our political institutions;”¹⁷⁴ they are also “invested with a powerful normative force, and are binding upon both courts and governments.”¹⁷⁵ Where a particular prerogative power is integral to the democratic process, judicial review would strike at the core of the democratic principle by interfering with the formulation of the democratic will. In this way, insofar as certain prerogative powers, like inherent parliamentary privileges, are “necessary to modern Canadian democracy”¹⁷⁶ they may be understood as having constitutional status and thus not subject to judicial challenge on *Charter* or other constitutional grounds.¹⁷⁷

The idea that exercises of prerogative powers that are integral to the democratic process should generally be immune from judicial review is grounded in the nature of those actions and their unique suitability to political accountability. In this narrow context, then, justiciability would turn on the subject matter of government action, rather than the question before the court. Even in this narrow context, however, judicial review cannot be categorically excluded. In *Conacher*, the Federal Court of Appeal found that a statute providing for fixed election dates, when properly construed, neither restricted the Governor General’s prerogative power to dissolve Parliament and set an election date, nor the Prime Minister’s related advisory authority.¹⁷⁸ However, had the legislation unequivocally restricted the Governor General’s discretion, compliance with such legislation should have been justiciable.¹⁷⁹ In such a case, considering Parliament’s unambiguously expressed intent to impose judicially enforceable constraints on the exercise of a prerogative power integral to the democratic process, the democratic principle itself could no longer support non-justiciability. Similarly, it should always be open to a party seeking to challenge the exercise of a prerogative power that is integral to the democratic process to demonstrate that political accountability is not an adequate alternative remedy in a particular case. One such instance is where the exercise of the prerogative not only forms part of the democratic process, but also generates a substantive outcome outside the democratic process that directly prejudices

¹⁷³ *RWDSU v Dolphin Delivery Ltd*, [1986] 2 SCR 573 at 600–601 [*Dolphin Delivery*].

¹⁷⁴ *Secession Reference*, *supra* note 153 at para 52.

¹⁷⁵ *Ibid* at para 54.

¹⁷⁶ *New Brunswick Broadcasting*, *supra* note 171 at 387.

¹⁷⁷ *Vaid*, *supra* note 171 at para 30; *New Brunswick Broadcasting*, *supra* note 171 at 373, 390, 393.

¹⁷⁸ *Supra* note 12 at paras 5–9.

¹⁷⁹ Assuming it did not contravene section 50 of the *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5 (but this was a question that *Conacher*, *ibid*, did not decide).

minorities or individuals.¹⁸⁰ For example, if a federal Cabinet minister were required by statute to personally provide a service to the public, but was unable to do so in both official languages, a challenge to the appointment should be considered justiciable.¹⁸¹

IV. STANDARD ADMINISTRATIVE LAW PRINCIPLES

In the previous section, I argued that courts should abandon peculiar justiciability tests that have been applied to challenges to exercises of prerogative powers. Partly due to their excessive reliance on such justiciability tests, courts also often fail to apply standard administrative law principles of judicial review to exercises of prerogative powers. As with the application of peculiar justiciability tests, the failure to apply standard administrative law principles to judicial review of exercises of prerogative powers conflicts with the principle that the source of power should not affect judicial review.

It may be objected, however, that principles governing judicial review of statutory powers are ill-adapted to judicial review of non-statutory prerogative powers. Commenting on the House of Lords' holding that prerogative legislation is "subject to review on ordinary principles of legality, rationality and procedural impropriety in the same way as any other executive action,"¹⁸² Richard Moules notes: "Usually in judicial review the court ascertains the proper purposes for which a decision maker may act and the relevant considerations he must bear in mind by construing the relevant statute. However, in the case of non-statutory powers such as prerogative powers there is no governing statute to construe."¹⁸³ Such concerns are equally relevant in Canada. In this section, I will show how they can be addressed so that standard administrative law judicial review principles can be applied to exercises of prerogative powers. I will further demonstrate that these standard principles allow courts to supervise the legality of exercises of prerogative powers, while also permitting judicial restraint consistent with the appropriate constitutional role of the courts.

In the analysis that follows, I seek to provide a succinct and accurate summary of the administrative law principles that govern judicial review of the exercise of statutory powers, in order to show how these principles can apply to the exercise of prerogative powers. However, as several commentators have lamented, there is considerable doctrinal uncertainty in Canadian administrative law.¹⁸⁴ It is not the aim of this article to canvass or resolve all of these issues. Rather, I argue that although the principles of Canadian administrative law will require further clarification and refinement, that project should recognize that the same principles can be applied to exercises of statutory and prerogative powers.

¹⁸⁰ *Reference Re Manitoba Language Rights*, [1985] 1 SCR 721 at 744; *Blaikie v Quebec (AG)*, [1979] 2 SCR 1016.

¹⁸¹ See *Charter*, *supra* note 110, s 20; *Official Languages Act*, RSC 1985, c 31 (4th Supp), s 22.

¹⁸² *R (Bancoult) v Foreign Secretary (No 2) (HL(E))*, [2008] UKHL 61, [2009] 1 AC 453 at para 35.

¹⁸³ Richard Moules, "Judicial Review of Prerogative Orders in Council" (2009) 68:1 Cambridge LJ 14 at 17.

¹⁸⁴ See e.g. The Hon Justice David Stratas, "The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency" (17 February 2016) [unpublished], online: <ssrn.com/abstract=2733751>; David Mullan, "Unresolved Issues on Standard of Review in Canadian Judicial Review of Administrative Action — The Top Fifteen!" (2013) 42:1 & 2 Adv Q 1; Paul Daly, "The Scope and Meaning of Reasonableness Review" (2015) 52:4 Alta L Rev 799.

A. ADMINISTRATIVE LAW JUDICIAL REVIEW PRINCIPLES

In Canada, there are two basic forms of judicial review of administrative action.¹⁸⁵ First, under procedural fairness review, courts examine “the manner in which the decision is made”¹⁸⁶ for compliance with “prescribed rules of procedure” and “general principles involving the right to answer and defence.”¹⁸⁷ Second, through substantive review, courts scrutinize the substance of government actions or decisions to ensure that they do not exceed the government actor’s legal authority, applying either a reasonableness or a correctness standard of review.¹⁸⁸ The suitability of standard administrative law principles of procedural and substantive review to exercises of prerogative powers will be analyzed in turn.

B. PROCEDURAL FAIRNESS

1. STANDARD PRINCIPLES

When asked to review a government decision for compliance with the duty of fairness, a court will first determine whether the duty was engaged at all. As discussed above, “[t]he fact that a decision is administrative and affects ‘the rights, privileges or interests of an individual’ is sufficient to trigger the application of the duty of fairness.”¹⁸⁹ Thus, a minimum impact on a person’s interests is required for a duty of fairness to exist.

The traditional rule also requires the decision to be administrative. In *Canada (A.G.) v. Inuit Tapirisat*, the Supreme Court of Canada held that no duty of fairness applies to legislative decisions, that is, polycentric decisions affecting various constituencies and engaging a range of “political, economic and social concerns.”¹⁹⁰ Thus, fixing rates for a public utility gave rise to no duty of fairness.¹⁹¹ Although *Inuit Tapirisat* has never been overturned, recent *obiter* statements in Supreme Court of Canada jurisprudence suggest that it may need to be qualified. In particular, courts may enforce procedures tailored to the legislative decision-making context, such as notice and voting requirements for municipal legislation.¹⁹² Even the fixing of public utility rates might, today, attract some form of participatory rights.¹⁹³

If a duty of fairness exists, the court will conduct a flexible and contextual inquiry to determine its precise content.¹⁹⁴ The content of the duty of fairness may include rights to notice, to make written or oral submissions, to be represented by counsel, and to receive reasons for the decision. Procedural fairness also includes the right to an impartial decision-maker, with the standard of impartiality varying with the administrative context.¹⁹⁵ In *Baker*,

¹⁸⁵ *Catalyst Paper Corp v North Cowichan (District)*, 2012 SCC 2, [2012] 1 SCR 5 at para 12 [*Catalyst*].

¹⁸⁶ *Sketchley v Canada (Attorney General) (FCA)*, 2005 FCA 404, [2006] 3 FCR 392 at para 54.

¹⁸⁷ *Dunsmuir*, *supra* note 1 at para 77.

¹⁸⁸ *Ibid* at paras 47, 50–62.

¹⁸⁹ *Baker*, *supra* note 106 at para 20, citing *Cardinal*, *supra* note 100 at 653.

¹⁹⁰ [1980] 2 SCR 735 at 755 [*Inuit Tapirisat*].

¹⁹¹ *Ibid* at 754.

¹⁹² *Catalyst*, *supra* note 185 at para 12.

¹⁹³ *Canadian National Railway Co v Canada (Attorney General)*, 2014 SCC 40, [2014] 2 SCR 135 at para 39.

¹⁹⁴ *Mavi*, *supra* note 100 at paras 41–42.

¹⁹⁵ *Newfoundland Telephone Co v Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 SCR 623 at 636–39 [*Newfoundland Telephone*].

the Supreme Court of Canada established a non-exhaustive list of five factors for determining the content of the duty of fairness.¹⁹⁶ The first factor is the nature of the decision: the more closely it “resemble[s] judicial decision making, the more likely it is that procedural protections closer to the trial model will be required.”¹⁹⁷ The second is the nature of the statutory scheme and the role of the decision within it (for example, decisions that are final attract greater procedural protections).¹⁹⁸ The third particularly significant factor is “the importance of the decision to the ... individuals affected,” with greater procedural protections applying to more important decisions.¹⁹⁹ The fourth factor is legitimate expectations. A legitimate expectation that a specific procedure will be followed creates a right to that procedure, while a legitimate expectation about the outcome of a decision gives rise to enhanced procedural protections prior to a contrary decision being made.²⁰⁰ Fifth, courts will consider and respect “the choices of procedure made by the agency itself.”²⁰¹

The above principles govern the duty of fairness at common law. Nevertheless, absent a violation of the *Charter* or a quasi-constitutional instrument like the *Canadian Bill of Rights*,²⁰² legislation can displace this duty expressly or by necessary implication.²⁰³

2. APPLICABILITY TO PREROGATIVE POWERS

As discussed above, standard procedural fairness review principles are often not applied to exercises of prerogative powers. Justiciability tests that require a greater effect on a person’s interests than that required to trigger a duty of fairness exclude from judicial review decisions that would otherwise attract a duty of fairness. Moreover, the emphasis on legitimate expectations as the gateway for justiciability has resulted in this single factor, as it relates to representations about specific procedures, dominating the inquiry into the content of the duty of fairness. However, standard procedural fairness principles are suited to judicial review of exercises of prerogative powers.

Once interest-based justiciability tests are abandoned, standard procedural fairness principles provide that the existence of a duty of fairness depends on an effect on a person’s rights, privileges, or interests. This test avoids the difficulties of drawing categorical distinctions between such highly discretionary decisions as the conferral of honours and the granting of pardons using the language of rights. The language of rights is unhelpful because there is a sense in which no person has the right to have a highly discretionary power exercised in one way or another. Under standard procedural fairness principles, a duty of fairness will exist in both such individualized decision-making contexts. Distinctions between the two can then be drawn through the contextual inquiry into the content of the duty.

¹⁹⁶ *Supra* note 106 at para 28.

¹⁹⁷ *Ibid* at para 23.

¹⁹⁸ *Ibid* at para 24.

¹⁹⁹ *Ibid* at para 25.

²⁰⁰ *Ibid* at para 26.

²⁰¹ *Ibid* at para 27.

²⁰² SC 1960, c 44, ss 1(a), 2(e).

²⁰³ *Ocean Port Hotel Ltd v British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52, [2001] 2 SCR 781 at para 22.

The standard principles of procedural fairness review flexibly accommodate a wide range of decision-making contexts. They apply to the “spectrum of administrative bodies whose functions vary from being almost purely adjudicative to being political or policy-making in nature.”²⁰⁴ In *Baker*, these principles were applied to a minister’s broad statutory discretion to exempt a person from statutory immigration conditions on humanitarian and compassionate grounds.²⁰⁵ This discretion codified an aspect of the prerogative to determine who may enter and remain in Canada.²⁰⁶ A person requesting humanitarian and compassionate relief does “not ... attempt to assert a right, but, rather, attempts to obtain a discretionary privilege.”²⁰⁷ It follows that standard procedural fairness review should be available for similarly broad discretionary powers under prerogative powers that have not been codified.

Furthermore, although the *Baker* factors refer to the statutory scheme, “[t]he simple overarching requirement is fairness, and this ‘central’ notion of the ‘just exercise of power’ should not be diluted or obscured by jurisprudential lists developed to be helpful but *not* exhaustive.”²⁰⁸ Thus, the specific wording of the factors need not be a straitjacket confining the procedural fairness inquiry, but can be adapted to the prerogative powers context. Based on how those factors were applied in *Baker*, the necessary adaptation would be minor. In that case, the humanitarian and compassionate relief decision was found to be (1) “very different from a judicial decision, since it involve[d] the exercise of considerable discretion and require[d] the consideration of multiple factors”; (2) “an exception to the general principles” under the statutory scheme; (3) particularly important to the claimant; (4) not the subject of any legitimate expectations; and (5) governed by procedures that the Minister had “considerable flexibility” under the statute to establish.²⁰⁹ The first two factors weighed against extensive procedural protections, the third weighed in favour, the fourth was neutral, and the fifth supported deference to the Minister’s selected procedures.²¹⁰ Very similar considerations would likely apply to the exercise of certain prerogative powers, and the analogy with the Crown’s residual uncodified mercy powers is particularly apt.²¹¹ Only the second and the fifth factors refer to the statutory scheme. However, even without a statute, the substance of the second factor can be considered, that is, whether the decision involves an exceptional discretionary privilege or a widely available administrative practice. Based on this factor, decisions to grant an honour or a pardon could be distinguished from decisions to issue a passport. Similarly, the fifth factor would simply require deference to the procedures selected by the government for exercising the prerogative.

Perhaps the best reason for applying standard procedural fairness principles to exercises of prerogative powers is the emphasis those principles place on the importance of the decision to the individual affected. This factor is lost if courts restrict their fairness assessment to requiring the government to comply with those procedures that a person could

²⁰⁴ *Newfoundland Telephone*, *supra* note 195 at 637.

²⁰⁵ *Supra* note 106 at paras 1, 29, 31.

²⁰⁶ *Tuel v Canada (Minister of Citizenship and Immigration)*, 2011 FC 223, 2011 FC 223 (CanLII) at para 1 [*Tuel*]; *Grillas v Canada (Minister of Manpower and Immigration)*, [1972] SCR 577 at 581.

²⁰⁷ *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at para 57 [*Khosa*], citing *Prata v Canada (Minister of Manpower and Immigration)*, [1976] 1 SCR 376 at 380.

²⁰⁸ *Mavi*, *supra* note 100 at para 42 [emphasis in original].

²⁰⁹ *Baker*, *supra* note 106 at para 31.

²¹⁰ *Ibid.*

²¹¹ *Criminal Code*, *supra* note 9, s 749.

legitimately expect. Moreover, the importance of the decision provides a compelling justification for varying levels of judicial intervention. For example, it supports the distinction the Court in *Black* wished to draw, but failed to adequately justify, between the conferral of honours and pardons. In *Smith*, the Federal Court stressed the importance of the decision to the individual when it imposed substantial procedural requirements on the Government of Canada's decision to withdraw clemency support for a Canadian citizen on death row in the US.²¹² The Court explained that:

In the realm of diplomatic assistance to citizens in legal trouble in foreign jurisdictions everything pales in significance to the cause of one's imminent execution and the corresponding interest in avoiding it. One would expect, therefore, that any decision by the Canadian government to withdraw clemency support for a person in such a predicament would also attract the most rigorous and anxious scrutiny by the decision maker and, where that is not evident, by the supervising court.²¹³

In concluding that *Smith* was entitled to "full consultation," "fair and objective consideration" of his circumstances, and reasons for the Government's reversal of position, the Court focused on his legitimate expectations rather than on a full assessment of the *Baker* factors.²¹⁴ However, it would be artificial to conclude that the importance of the decision to *Smith* had not influenced the Court's imposition of significant procedural protections.

Finally, standard procedural fairness review principles will not lead to excessive judicial interference in exercises of prerogative powers. Legislative decisions either do not give rise to duties of fairness, following *Inuit Tapirisat*, or only give rise to procedural requirements adapted to their policy context. In many instances, exercises of prerogative powers over foreign affairs (for example, treaty-making) and defence (for example, deciding to participate in a military campaign) would fall under the *Inuit Tapirisat* exclusion. Moreover, unlike a municipality's democratic processes, there are arguably no formal participatory procedures adapted to these policy contexts. Although the standard principles apply a low threshold for the existence of a duty of fairness, the factors relevant to determining the content of the duty allow for minimal procedural guarantees. For example, absent legitimate expectations, it is unlikely that the conferral of honours would attract procedural duties beyond the existence of a rational and impartial process for candidates to be identified and considered. Furthermore, the fifth *Baker* factor requires deference to the government's procedures for exercising prerogative powers. In addition to these various devices of judicial restraint, absent constitutional or quasi-constitutional constraints, it is also always open to the legislature to immunize certain exercises of prerogative powers from procedural fairness review, and face the political consequences of such legislation.

²¹² *Supra* note 116 at paras 31, 38.

²¹³ *Ibid* at para 39.

²¹⁴ *Ibid* at para 42.

C. SUBSTANTIVE REVIEW

1. STANDARD PRINCIPLES

Apart from procedural illegality, principles of substantive review of administrative action provide that a government actor will exceed its jurisdiction by deciding a matter unreasonably or, in those cases where it is required to decide correctly, by deciding incorrectly.²¹⁵ Canadian courts have rejected approaches to substantive review that require a court to “identify a categorical or nominate error, such as bad faith, error on collateral or preliminary matters, ulterior or improper purpose, no evidence, or the consideration of an irrelevant factor.”²¹⁶ Instead, courts apply the standard of review analysis to determine whether a particular administrative decision is reviewable on a correctness or a reasonableness standard. An administrative decision that does not stand up to judicial scrutiny on the applicable standard of review will be unlawful. In this way, the standard of review analysis provides “an overarching or unifying theory for review of the substantive decisions of all manner of statutory and prerogative decision makers.”²¹⁷

a. Selecting the Standard of Review

To determine the applicable standard of review, courts first “ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question.”²¹⁸ The recognized categories can be summarized as follows:

The standard of correctness governs: (1) a constitutional issue; (2) a question of “general law ‘that is both of central importance to the legal system as a whole and outside the adjudicator’s specialized area of expertise’”...; (3) the drawing of jurisdictional lines between two or more competing specialized tribunals; and (4) a “true question of jurisdiction or *vires*” ... reasonableness is normally the governing standard where the question: (1) relates to the interpretation of the tribunal’s enabling (or “home”) statute or “statutes closely connected to its function, with which it will have particular familiarity”...; (2) raises issues of fact, discretion or policy; or (3) involves inextricably intertwined legal and factual issues.²¹⁹

Where this initial “inquiry proves unfruitful,”²²⁰ courts determine the standard of review based on the following factors: “(1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal.”²²¹

²¹⁵ *UES, Local 298 v Bibeault*, [1988] 2 SCR 1048 at 1086 [*Bibeault*] (following *Dunsmuir*, *supra* note 1, the Court’s reference to patent unreasonableness can be updated to refer to reasonableness); *Catalyst*, *supra* note 185 at para 12.

²¹⁶ *Dr Q v College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 SCR 226 at para 22 [*Dr Q*]. See also *Bibeault*, *ibid* at 1088.

²¹⁷ *Dr Q*, *ibid* at para 25, citing David J Mullan, *Administrative Law* (Toronto: Irwin Law, 2001) at 108. These comments referred to the predecessor of the current standard of review analysis, the “pragmatic and functional approach,” but they are equally applicable to both.

²¹⁸ *Dunsmuir*, *supra* note 1 at para 62.

²¹⁹ *Smith v Alliance Pipeline Ltd*, 2011 SCC 7, [2011] 1 SCR 160 at para 26 [citations omitted] [*Alliance*].

²²⁰ *Dunsmuir*, *supra* note 1 at para 62.

²²¹ *Ibid* at para 64.

b. Applying the Standard of Review

A court applying the correctness standard engages in its own assessment of the matter under review, and does “not show deference to the decision [maker].”²²² If the court does not agree with the administrative decision, it “will substitute its own view and provide the correct answer.”²²³

In contrast, when applying the reasonableness standard, “courts cannot substitute their own appreciation of the appropriate solution, but must rather determine if the outcome falls within ‘a range of possible, acceptable outcomes which are defensible in respect of the facts and law.’”²²⁴ Thus, “[r]easonableness is a deferential standard animated by the principle that ... certain questions that come before administrative tribunals do not lend themselves to one specific, particular result.”²²⁵

The reasonableness standard applies to a wide range of administrative decisions, from an adjudicator’s interpretation of his constituent statute,²²⁶ to a minister’s discretionary decision not to relieve a person from a finding of inadmissibility to Canada based on an evaluation of the “national interest,”²²⁷ to a municipal council’s exercise of “a broad and virtually unfettered legislative discretion to establish property tax rates.”²²⁸ As such, what reasonableness requires “must be assessed in the context of the particular type of decision making involved.”²²⁹ Thus, “[r]easonableness is a single standard that takes its colour from the context.”²³⁰ In some circumstances, there will be a wide range of reasonable decisions available to the decision-maker; in others, the range of reasonable decisions will be significantly constrained. Indeed, in the realm of statutory interpretation there will be cases “[w]here the ordinary tools of statutory interpretation lead to a single reasonable interpretation.”²³¹

Moreover, because fully articulated reasons for administrative actions or decisions will not always be available, courts can “consider the reasons that could be offered for the decision when conducting a reasonableness review.”²³² Courts therefore determine the reasonableness of a government decision through an “organic” evaluation of the reasons, together with the outcome, seeking to supplement reasons that appear incomplete before seeking to subvert them.²³³

²²² *Ibid* at para 50.

²²³ *Ibid*.

²²⁴ *Khosa*, *supra* note 207 at para 59, citing *Dunsmuir*, *ibid* at para 47.

²²⁵ *Dunsmuir*, *ibid*.

²²⁶ *Ibid*.

²²⁷ *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 SCR 559 at paras 42, 49–50 [*Agraira*].

²²⁸ *Catalyst*, *supra* note 185 at para 26.

²²⁹ *Ibid* at para 18.

²³⁰ *Khosa*, *supra* note 207 at para 59.

²³¹ *McLean v British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 SCR 895 at para 38 [*McLean*].

²³² *ATA*, *supra* note 2 at 247.

²³³ *Newfoundland and Labrador Nurses’ Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 at para 14.

2. APPLICABILITY TO PREROGATIVE POWERS

Applying current substantive review principles, the vast majority of exercises of prerogative powers will be reviewable on a reasonableness standard, since they will raise issues of fact, discretion or policy. The central inquiry is, therefore, whether judicial deference under a reasonableness standard provides an adequate mechanism for reviewing exercises of prerogative powers.

a. Judicial Indications of a Need for Deference

The difficulties associated with peculiar justiciability tests are fully discussed above. Beyond these, tenuous judicial qualifications of justiciability show that courts require the resources of deference to deal with prerogative cases. In attempting to manage peculiar justiciability tests, courts have asserted that prerogative powers lie on a “spectrum of judicial reviewability”²³⁴ or a “justiciability continuum.”²³⁵ However, the concept of a justiciability spectrum or continuum is not coherent. If a matter is justiciable, the court will consider it; if not, the court will not consider it. Justiciability is an all or nothing proposition. In contrast, the variable judicial restraint that courts have sought to invoke is the essence of deference under a contextual reasonableness standard.

b. Judicial Review of Discretionary Statutory Powers and Codified Prerogative Powers

Canadian courts routinely apply reasonableness review to discretionary powers with a statutory source, including pure statutory creations and codifications of prerogative powers. Reasonableness review has been applied to polycentric policy decisions and to individualized decisions to grant exceptional discretionary privileges. For example, Canadian courts have applied the reasonableness standard to:

- (1) The Canadian Radio-television and Telecommunications Commission’s (CRTC) broad statutory discretion to determine just and reasonable rates for telecommunications services;²³⁶
- (2) a municipality’s “broad and virtually unfettered legislative discretion to establish property tax rates;”²³⁷
- (3) codifications of the prerogative power to grant an inadmissible person a discretionary privilege to remain in Canada, based on “humanitarian and compassionate considerations”²³⁸ or an assessment of the “national interest;”²³⁹ and

²³⁴ *Black*, *supra* note 3 at para 52.

²³⁵ *Smith*, *supra* note 116 at paras 29–30.

²³⁶ *Bell Canada v Bell Aliant Regional Communications*, 2009 SCC 40, [2009] 2 SCR 764 [*Bell*].

²³⁷ *Catalyst*, *supra* note 185 at para 26.

²³⁸ *Tuel*, *supra* note 206 at para 16, citing *Khosa*, *supra* note 207 at para 4.

²³⁹ *Agraira*, *supra* note 227 at para 50.

- (4) the Minister of Justice’s “highly discretionary” powers, “derive[d] from the Royal Prerogative of Mercy,” to grant the “extraordinary remedy” of a fresh hearing of a criminal matter²⁴⁰ if he “is satisfied that there is a reasonable basis to conclude that a miscarriage of justice likely occurred,”²⁴¹ “tak[ing] into account all matters that the Minister considers relevant.”²⁴²

The application of reasonableness review to highly discretionary statutory powers arguably supports its application to similarly discretionary non-statutory prerogative powers. However, the challenges identified by Moules are potentially most acute in the context of substantive review. Absent a statutory framework, a court may struggle to articulate an objective legal basis for why the exercise of a discretionary power was unreasonable. In this context, a court may be concerned that reasonableness review will necessarily amount to improperly questioning the wisdom of policy determinations.²⁴³ Indeed, “[t]he statute and regulations define the scope of the discretion and the principles governing the exercise of the discretion, and they make it possible to determine whether it has in fact been exercised reasonably.”²⁴⁴

Thus, in exercising its rate-setting discretion, the CRTC was required to consider policy objectives articulated in its enabling legislation.²⁴⁵ The Court could then assess the reasonableness of the CRTC’s discretionary decision against those policy objectives.²⁴⁶ Even the mere articulation of the discretion in the statute can provide objective constraints on its scope. A discretion to grant an extraordinary remedy for a “miscarriage of justice,” based on “humanitarian and compassionate considerations,” or based on an assessment of the “national interest,” however broad, is still confined by the types of considerations that can reasonably be captured by each of those expressions.

However, the Supreme Court of Canada’s application of reasonableness review to a municipal property tax bylaw, in *Catalyst*, indicates that reasonableness review is possible even where statutory discretion is “broad and virtually unfettered.”²⁴⁷ Municipal councillors had “extensive latitude in what factors they [were free to] consider,” from “objective factors directly relating to consumption of services” to “broader social, economic and political factors that [were] relevant to the electorate.”²⁴⁸ They were also “not required to give formal reasons or lay out a rational basis for bylaws.”²⁴⁹ Nevertheless, the Supreme Court made it clear that “[t]he fact that wide deference is owed to municipal councils does not mean that they have *carte blanche*.”²⁵⁰ The bylaw would not survive reasonableness review if it was “manifestly unjust,” “disclosed bad faith,” “involved such oppressive or gratuitous interference with the rights of those subject to [it]” as to exceed any reasonable

²⁴⁰ *Ross v Canada (Minister of Justice)*, 2014 FC 338, 453 FTR 56 at para 32. See also *Hinse*, *supra* note 9 at paras 28, 30–34, 43.

²⁴¹ *Criminal Code*, *supra* note 9, s 696.3(3)(a).

²⁴² *Ibid*, s 696.4.

²⁴³ *Fontaine v Canada (Attorney General)*, 2017 FC 431, 2017 FC 431 (CanLII) at paras 39–41, 47.

²⁴⁴ *Montréal (City) v Montreal Port Authority*, 2010 SCC 14, [2010] 1 SCR 427 at para 33.

²⁴⁵ *Bell*, *supra* note 236 at paras 28, 36.

²⁴⁶ *Ibid* at paras 74–76.

²⁴⁷ *Supra* note 185 at para 26.

²⁴⁸ *Ibid* at para 30.

²⁴⁹ *Ibid* at para 33.

²⁵⁰ *Ibid* at para 24.

justification,²⁵¹ or had been adopted for “improper motives.”²⁵² Reasonableness review, in this sense, does not depend on constraints imposed by the statutory scheme, and should therefore be equally available for exercises of non-statutory prerogative powers.

c. Defects in the Nature of Bad Faith:
Substantive or Jurisdictional Review?

Catalyst confirms that courts are competent to review government actions for bad faith, improper purpose, manifest injustice, or oppressive or gratuitous infliction of prejudice in excess of any reasonable justification, even in the absence of statutory constraints on government discretion. Indeed, bad faith, improper purpose, and flagrant impropriety are accepted grounds for judicial review of the exercise of prosecutorial discretion, which derives from the prerogative.²⁵³ These grounds are available whether the specific aspect of prosecutorial discretion is codified (for example, the discretion to stay a criminal proceeding)²⁵⁴ or remains entirely non-statutory (for example, the discretion to decide whether to bring the prosecution of a charge laid by police).²⁵⁵

More broadly, judicial review for defects in the nature of bad faith is justified on the basis that those minimal constraints on executive discretion are inherent in the public nature of prerogative powers. The essentially public character of the prerogative is a principle of long standing. In 1883, Chief Justice Ritchie wrote in *R. v. McLeod* that the “prerogatives of the Crown must not be treated as personal to the sovereign; they are great constitutional rights, conferred on the sovereign, upon principles of public policy, for the benefit of the people, and not, as it is said, ‘for the private gratification of the sovereign.’”²⁵⁶ These propositions follow John Locke’s understanding of the prerogative as the “power to act according to discretion, for the public good, without the prescription of the law, and sometimes even against it.”²⁵⁷

Catalyst’s more novel suggestion is that review on these limited grounds is simply the application of a contextual reasonableness standard in circumstances where the only judicially cognizable constraint on government power is that it is public in nature. However, applying reasonableness review in this sense to exercises of prerogative powers is controversial. The Supreme Court of Canada expressly rejected judicial scrutiny of the exercise of prosecutorial discretion for its reasonableness in *Nixon*. According to the Supreme Court, reasonableness review would amount to “second-guessing the decision,” which would undermine the independence and impartiality of the Attorney General.²⁵⁸ Sharply distinguishing substantive administrative review from review for defects in the nature of bad faith, the Supreme Court held that “the court does not assess the reasonableness or correctness of the decision itself; it only looks behind the decision for ‘proof of the

²⁵¹ *Ibid* at para 21, citing *Kruse v Johnson*, [1898] 2 QB 91 at 99.

²⁵² *Catalyst*, *ibid* at para 28.

²⁵³ *Krieger*, *supra* note 10 at paras 24, 49, 51; *R v Nixon*, 2011 SCC 34, [2011] 2 SCR 566 at para 59 [*Nixon*].

²⁵⁴ *Criminal Code*, *supra* note 9, s 579.

²⁵⁵ *Krieger*, *supra* note 10 at para 46.

²⁵⁶ (1883), 8 SCR 1 at 26, cited in *London*, *supra* note 20 at 61.

²⁵⁷ John Locke, *Two Treatises of Government* (Dublin: Sarah Cotter and J Sheppard, 1766) at 271, relied upon by Lord Denning in *Laker Airways Ltd v Department of Trade*, [1977] 1 QB 643 at 705 (CA).

²⁵⁸ *Nixon*, *supra* note 253 at para 52.

requisite prosecutorial misconduct, improper motive or bad faith in the approach, circumstances or ultimate decision.”²⁵⁹

Under *Catalyst*, judicial review for defects in the nature of bad faith is simply an application of the minimum content of the reasonableness standard, whereas under *Nixon*, it is categorically distinct from reasonableness review. A possible rationale for *Nixon*’s categorical distinction may lie in the traditional rule that courts are entitled to determine the scope of a prerogative power, but not to review its exercise.²⁶⁰ In this way, the traditional rule categorically distinguished jurisdictional review from substantive review of the exercise of prerogative powers. Viewed through this prism, *Nixon*’s categorical distinction may rest upon an understanding of defects in the nature of bad faith as jurisdictional rather than substantive. Such defects would be jurisdictional because actions taken in bad faith by public officials are always outside the scope of their authority.

This explanation of *Nixon*, however, is at odds with contemporary administrative law principles. Jurisdictional review cannot be contrasted with substantive review because it is precisely by acting in a manner that does not withstand scrutiny on the applicable standard of substantive review that a government actor exceeds its jurisdiction. In this sense, unreasonableness is, itself, a jurisdictional defect.²⁶¹ Moreover, nominate grounds of review have been rejected in favour of an overarching framework for substantive review of decisions based on the standard of review analysis.²⁶² Traditionally, administrative law categorically distinguished discretionary decisions from questions of law, such that “decisions classified as discretionary [could] only be reviewed on limited grounds such as ... bad faith ... improper purpose, and ... irrelevant considerations.”²⁶³ However, recognizing that “a rigid dichotomy of ‘discretionary’ or ‘non-discretionary’ decisions”²⁶⁴ could not be sustained, the Supreme Court of Canada held in *Baker* that discretionary decisions should be approached under the same substantive review framework as questions of law.²⁶⁵ To maintain defects in the nature of bad faith as a form of review categorically distinct from reasonableness review in the context of prerogative powers would be to maintain a distinction the Supreme Court has already found untenable in the context of statutory discretionary powers. It would also perpetuate divergent approaches to judicial review of the exercise of statutory as opposed to prerogative powers, despite the jurisprudential consensus that there is no principled basis for such a distinction.

More fundamentally, this rationale for *Nixon* creates an unnecessary rule of law problem. The Supreme Court of Canada’s decision in *Dunsmuir* established that “[i]t is ... inconsistent with the rule of law to retain an irrational decision.”²⁶⁶ The Court replaced the prior two standards of patent unreasonableness and reasonableness *simpliciter* with a single

²⁵⁹ *Ibid.*

²⁶⁰ *Black, supra* note 3 at paras 26, 29, 45.

²⁶¹ A jurisdictional defect in this sense must be distinguished from the category of “true questions of jurisdiction or *vires*” to which the correctness standard of review in principle applies, but the very existence of which is doubtful since the Supreme Court of Canada’s decision in *ATA, supra* note 2 at paras 30–44.

²⁶² *Dr Q, supra* note 216 at para 22; *Bibeault, supra* note 215 at 1088.

²⁶³ *Baker, supra* note 106 at para 53.

²⁶⁴ *Ibid* at para 54.

²⁶⁵ *Ibid* at paras 54–56.

²⁶⁶ *Supra* note 1 at para 42.

reasonableness standard, holding that “it would be unpalatable to require parties to accept an irrational decision simply because ... the irrationality of the decision is not clear enough.”²⁶⁷ Thus, government action must be reasonable if it is to be lawful. *Nixon* suggests that courts must allow an unreasonable government action to stand, thereby offending the rule of law. In contrast, *Catalyst* gives rise to no such difficulty. It does not permit an unreasonable decision to stand, but rather explains what reasonableness means where the constraints on discretionary power do not derive from the words of the statute, but from the public nature of the power.

Furthermore, the Supreme Court of Canada’s recent decision in *Hinse* points towards a better explanation of *Nixon*. Specifically, judicial review of the exercise of prosecutorial discretion may simply be a special case requiring an exceptional level of deference from the courts. According to the Supreme Court, the constitutionally entrenched independence of the prosecutor’s office justifies an exceptionally high fault threshold in an action for malicious prosecution.²⁶⁸ It is “fundamental to the integrity and efficiency of the criminal justice system” that prosecutors “be able to act independently of any political pressure from the government” and “be beyond the reach of judicial review, except in cases of abuse of process.”²⁶⁹ In contrast, in making a mercy decision (as with the exercise of most prerogative powers), “the Minister must weigh social, political and economic factors in making his or her decision.”²⁷⁰ Therefore, “an action for malicious prosecution must be based on malice or on an improper purpose,”²⁷¹ whereas an action against the Crown based on the Minister of Justice’s exercise of codified mercy powers can be based on mere bad faith, including serious recklessness.²⁷² Viewed in light of *Hinse*, *Nixon* should be read as holding that the constitutionally entrenched independence of the prosecutor’s office displaces the ordinary principles of judicial review. Prosecutorial independence thus provides its own exceptional rule of law justification for courts to allow an irrational decision to stand, and to require more before they interfere. For this reason, *Nixon* should not preclude judicial review of other prerogative powers on a reasonableness standard, applying the principles in *Catalyst*, absent a similar constitutional justification.

d. *Charter* and Reasonableness Review

Recent jurisprudential developments on *Charter* review of administrative action also support the application of standard substantive review principles to exercises of prerogative powers. Since *Operation Dismantle*, courts have consistently held that exercises of prerogative powers are judicially reviewable on *Charter* grounds. However, in *Doré*, the Supreme Court of Canada eschewed a sharp distinction between *Charter* and administrative law review, holding that courts should assess *Charter* challenges to administrative decisions under the framework of substantive administrative law review.²⁷³ Specifically, courts should apply a reasonableness standard to “determine whether an administrative decision-maker has

²⁶⁷ *Ibid* [emphasis in original].

²⁶⁸ *Hinse*, *supra* note 9 at paras 40–41.

²⁶⁹ *Ibid* at para 40.

²⁷⁰ *Ibid* at para 42.

²⁷¹ *Ibid* at para 40.

²⁷² *Ibid* at paras 48–53.

²⁷³ *Supra* note 170.

taken sufficient account of *Charter* values in making a discretionary decision.”²⁷⁴ The Supreme Court further held that “administrative decisions are *always* required to consider fundamental values” and, as such, “administrative bodies are ... required ... to consider *Charter* values within their scope of expertise.”²⁷⁵

After *Doré*, the established rule allowing *Charter* review of exercises of prerogative powers entails reasonableness review when *Charter* claims are raised. An administrative decision that “does not take *Charter* rights into account or that restricts them disproportionately [is] an unreasonable decision.”²⁷⁶ Indeed, in *El Shurafa v. Canada (Attorney General)*, the Federal Court followed *Doré* in a case involving the prerogative power over passports.²⁷⁷ Under the rubric of reasonableness review, the Court held that an exercise of the prerogative power to issue a geographically limited passport constituted a justified interference with the applicant’s *Charter* mobility rights.²⁷⁸

More significantly, *Doré*’s affirmation that administrative decision-makers must always consider *Charter* values implies that reasonableness review informed by *Charter* values cannot be restricted to cases where it is specifically alleged that an exercise of a prerogative power infringed a *Charter* right. Like the requirement of good faith, *Charter* values are therefore a constraint on the exercise of discretionary power, even in the absence of a statutory framework. As such, *Doré* extends the established rule of judicial review of prerogative powers on *Charter* grounds to a general rule of reasonableness review guided by *Charter* values.

e. Judicial Restraint in *Charter* Cases

Doré confirmed that section 1 of the *Charter* entails deference in the course of *Charter* review of discretionary administrative decisions.²⁷⁹ Beyond deference to the substantive decision, seminal decisions on *Charter* review of exercises of prerogative powers invoke other devices of judicial restraint that can similarly mitigate concerns about excessive judicial intervention through substantive review on a reasonableness standard.

In *Operation Dismantle*, the claim was ultimately held to be non-justiciable because the alleged harm from Canada permitting the US to carry out cruise missile testing was “too uncertain, speculative and hypothetical to sustain a cause of action.”²⁸⁰ In *Khadr*, the Supreme Court concluded that Canada’s interrogation of a youth detained at Guantanamo Bay, in circumstances where he had no access to counsel, where he had been subjected to scheduled sleep deprivation, and where his statements would be used against him in US criminal proceedings, violated his section 7 *Charter* rights.²⁸¹ However, in order to give due weight to the executive’s constitutional responsibility for complex foreign affairs decisions, the Supreme Court held that “the proper remedy [was] to grant Mr. Khadr a declaration that

²⁷⁴ *Ibid* at para 43.

²⁷⁵ *Ibid* at para 35 [emphasis in original].

²⁷⁶ *Kamel v Canada (AG)*, 2013 FCA 103, 448 NR 217 at para 35.

²⁷⁷ 2014 FC 789, 461 FTR 208 [*El Shurafa*].

²⁷⁸ *Ibid* at para 46.

²⁷⁹ *Supra* note 170 at para 56.

²⁸⁰ *Supra* note 134 at 447.

²⁸¹ *Supra* note 39 at paras 24–26.

his *Charter* rights [had] been infringed, while leaving the government a measure of discretion in deciding how best to respond.”²⁸²

These *Charter* cases show that, even if standard administrative law principles are applied to exercises of prerogative powers, courts have mechanisms beyond deference allowing them to limit their intervention. These include grounds of non-justiciability not peculiar to the prerogative powers context and the broad discretion inherent to prerogative remedies²⁸³ and declarations.²⁸⁴

f. Reasonableness Review: A Continuum of Constraints on the Exercise of Prerogative Powers

Applying a contextual reasonableness standard to exercises of prerogative powers recognizes that the limits on discretionary authority lie along a continuum. Various contextual factors will determine the contours of discretionary powers in particular cases. The contextual reasonableness standard allows courts to calibrate judicial review to the variable constraints on administrative discretion.

Following *Baker*, “discretion must be exercised in accordance with ... the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the *Charter*.”²⁸⁵ Some of these constraints on discretionary powers have already been discussed, including requirements of non-arbitrariness, good faith, and respect for *Charter* values. Exercising discretion in accordance with *Charter* values requires not only proportionate justifications for interferences with *Charter* rights, as *Doré*

²⁸² *Ibid* at para 2.

²⁸³ *ATA*, *supra* note 2 at para 22.

²⁸⁴ *Solosky v R*, [1980] 1 SCR 821 at 830. However, in some jurisdictions, statutes governing judicial review procedure may complicate the granting of declarations in applications for judicial review of the exercise of prerogative powers. These statutes were designed to simplify proceedings challenging the legality of government action, by establishing a unified procedure for the prerogative remedies of mandamus, certiorari, and prohibition (previously available on application) and the remedies of a declaration and an injunction (previously available in an action) (see *Judicial Review Act*, RSPEI 1988, c J-3, s 2(1)(a)). For example, section 2(1) of Ontario’s *Judicial Review Procedure Act*, RSO 1990, c J.1 [*JRPA*], provides:

On an application by way of originating notice, which may be styled “Notice of Application for Judicial Review”, the court may, despite any right of appeal, by order grant any relief that the applicant would be entitled to in any one or more of the following:

1. Proceedings by way of application for an order in the nature of mandamus, prohibition or certiorari.
2. Proceedings by way of an action for a declaration or for an injunction, or both, in relation to the exercise, refusal to exercise or proposed or purported exercise of a statutory power.

Such legislation is procedural only, and does not change the substantive law (*Cook*, *supra* note 16 at para 50). As such, remedies in the nature of mandamus, certiorari, and prohibition can evolve with the common law, such that they are now available with respect to exercises of prerogative powers. However, the drafting of provisions like section 2(1) in Ontario’s *JRPA* (*ibid*; see also *Judicial Review Procedure Act*, RSBC 1996, c 241, s 2), suggests that declarations and injunctions are only available on an application for judicial review in relation to the exercise, refusal to exercise, or proposed or purported exercise of a statutory power, making it necessary to bring an action to claim these remedies in relation to exercises of prerogative powers. Due to the similarity of mandamus and prohibition to injunctions, the primary difficulty is with respect to declarations. Considering courts’ broad jurisdiction to grant declarations, the flexibility of this remedy, and the purpose of judicial review procedure legislation to simplify proceedings, courts should seek to avoid the above interpretation where the statutory language allows. Where it does not, they should avail themselves of other procedural devices (for example, the power to convert an application into an action with respect to an issue to be tried in Ontario (*Rules of Civil Procedure*, RRO 1990, Reg 194, s 38.10(3))) in order to grant the most appropriate remedy with the least procedural encumbrance.

²⁸⁵ *Supra* note 106 at para 56.

directs, but also regard for the more open-textured values that the *Charter* expresses, such as “equality, autonomy, liberty, privacy and human dignity.”²⁸⁶ Additionally, Canada’s international obligations, especially international human rights norms, can be used to identify the fundamental values of Canadian society, which constrain the exercise of discretion.²⁸⁷

Government representations about how discretion will be exercised are also relevant. Actions that renege on such representations will be an abuse of discretion, and therefore unreasonable, when they demonstrate a “singular lack of recognition of the serious consequences the [government’s] sudden reversal of position inflicted on [a person].”²⁸⁸

Furthermore, exercises of prerogative powers may be constrained by a formal written instrument. For example, Orders-in-Council prescribe the relevant considerations for the issuance and revocation of passports,²⁸⁹ and for the designation of certain harbour waters as controlled access zones for national defence purposes.²⁹⁰ Substantive review of delegated authority under such instruments is analogous to substantive review of statutory powers. Thus, in *El Shurafa*, the Federal Court’s reasonableness review of Passport Canada’s exercise of passport issuance powers under the Canadian Passport Order was indistinguishable from reasonableness review of the exercise of a statutory power.²⁹¹

The contextual factors that constrain discretion in particular cases cannot be enumerated exhaustively. However, jurisprudence identifying factors that constrain discretionary statutory powers can also guide reasonableness review of exercises of prerogative powers.

g. Applying Reasonableness Review to Determinations
About the Existence and Scope of Prerogative Powers

So far, I have argued that courts should apply the contextual reasonableness standard to exercises of prerogative powers. Contemporary administrative law principles also suggest that courts must not have a monopoly on defining the scope of prerogative powers. Although these powers are defined by the common law, the government actors who exercise them have considerable expertise relative to the courts as to how the scope of those powers ought to be understood in light of changing social, economic, and political realities.

An administrative actor’s interpretation of its constituent statute is reviewable on a reasonableness standard,²⁹² unless the interpretive question falls under one of the exceptional categories warranting correctness review outlined above.²⁹³ Moreover, the possibility of treating such questions as jurisdictional, and thus reviewable for correctness, has been all but ruled out.²⁹⁴ Consistent with these principles, courts review administrative interpretations of

²⁸⁶ *R v Mabior*, 2012 SCC 47, [2012] 2 SCR 584 at para 43.

²⁸⁷ *Baker*, *supra* note 106 at paras 69–71.

²⁸⁸ *Mount Sinai*, *supra* note 122 at para 63, Binnie J.

²⁸⁹ *Canadian Passport Order*, SI/81-86, (1981) C Gaz II, 1852, online: <laws-lois.justice.gc.ca/eng/regulations/SI-81-86/>.

²⁹⁰ *Controlled Access Zone Order (Halifax, Esquimalt and Nanoose Harbours)*, SI/2003-2, online: <laws.justice.gc.ca/eng/regulations/SI-2003-2/>.

²⁹¹ *El Shurafa*, *supra* note 277 at paras 28, 39–46.

²⁹² *ATA*, *supra* note 2 at para 41.

²⁹³ *Ibid* at para 30; *McLean*, *supra* note 231 at para 25.

²⁹⁴ *McLean*, *ibid*, citing *ATA*, *ibid* at para 34.

the scope of codified prerogative powers on a reasonableness standard.²⁹⁵ In *Agraira*, the Supreme Court of Canada reviewed a minister's interpretation of the term "national interest" as a ground for granting exceptional relief from immigration legislation on the reasonableness standard, even though the Minister had not expressly interpreted that term.²⁹⁶ The Supreme Court determined the implied interpretation based on the Minister's ultimate decision and the administrative guidelines in place. The Supreme Court then considered the reasons that could have been offered in support of the Minister's implied interpretation, allowing it to conclude that the interpretation was reasonable.²⁹⁷ If reasonableness review applies to administrative interpretations of the scope of codified prerogative powers, it should equally apply to administrative interpretations of the existence and scope of prerogative powers defined at common law. Where administrative actors do not expressly interpret the scope of the prerogative powers under which they purport to act, courts can seek out their implicit interpretations, as they do with statutory powers.

It may be objected that determining the existence and scope of prerogative powers is a matter uniquely suited to the courts, because it involves developing the common law. Such an objection, however, is untenable, since courts already apply reasonableness review to certain administrative interpretations of equitable and common law rules.²⁹⁸

Nevertheless, just as reasonableness review of statutory interpretation differs significantly from reasonableness review of the exercise of discretion, so too will it differ considerably between interpretations of the existence or scope, as compared to the exercise, of prerogative powers. The range of reasonable statutory interpretations is often limited because administrative statutory interpretations must conform "with the plain words of the provision, its legislative history, its evident purpose, and its statutory context."²⁹⁹ Similarly, prerogative powers must be grounded in demonstrable historical precedents, which will constrain their number and scope. As argued above, rule of law and democratic legitimacy deficiencies associated with prerogative powers support requiring the executive to demonstrate that obtaining statutory authorization would not be practicable before courts recognize the existence of a disputed prerogative power, or a novel interpretation of an established prerogative power. The application of a reasonableness standard simply means that courts will show deference to the executive's assessment of the feasibility of relying on statutory authority.

Additionally, the range of reasonable interpretations of the existence and scope of prerogative powers will be constrained by *Charter* values, because both administrative decision-makers³⁰⁰ and courts are required to "apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution."³⁰¹

²⁹⁵ *Agraira*, *supra* note 227.

²⁹⁶ *Ibid* at paras 55–56.

²⁹⁷ *Ibid* at paras 55–88.

²⁹⁸ See *Nor-Man Regional Health Authority Inc v Manitoba Association of Health Care Professionals*, 2011 SCC 59, [2011] 3 SCR 616.

²⁹⁹ *Alliance*, *supra* note 219 at para 46.

³⁰⁰ *Doré*, *supra* note 170 at para 35.

³⁰¹ *Dolphin Delivery*, *supra* note 173 at 603.

Therefore, administrative decisions about the existence and scope of prerogative powers should be reviewed for reasonableness, unless they fall under an exceptional category warranting correctness review (a possible example would be cases involving the division of powers, such as claims by provincial governments to be exercising the prerogative to enter treaties).³⁰² Furthermore, those exceptional categories must not be interpreted as a license for wide-ranging correctness review.³⁰³ Accordingly, *El Shurafa*'s holding that interpreting the scope of prerogative powers is "a constitutional question" warranting correctness review, "because it is about the separation of powers between the executive and legislative branches of government,"³⁰⁴ should be rejected. Judicial review is always about the separation of powers — perhaps even more so when courts are ensuring that the executive respects the limits of its statutory authority. The Federal Court's reasoning would therefore justify correctness review in all cases, an approach dramatically out of step with contemporary administrative law principles.

The general application of a reasonableness standard to judicial review of the existence, scope, and exercise of prerogative powers is consistent with the Supreme Court of Canada's rejection of the traditional rigid dichotomies between discretionary and non-discretionary decisions,³⁰⁵ as well as between legal and policy questions.³⁰⁶ Moreover, reasonableness review of the existence and scope of prerogative powers fosters an institutional dialogue in which courts can mitigate the rule of law deficiencies of those powers by more precisely articulating their scope and purpose, while showing deference to executive evaluations of the non-statutory powers required to further the public interest.

V. CONCLUSION

I have proposed that Canadian courts reform judicial review of the exercise of prerogative powers in three ways. First, courts should adopt a principled approach to defining prerogative powers that starts with distinguishing the Crown's prerogative powers from its natural person powers. Second, courts should abandon peculiar interest-based and subject matter justiciability tests in favour of a test that turns on the nature of the question. They should maintain a subject matter justiciability test only for exercises of prerogative powers that are integral to the democratic process. Third, courts should apply standard principles of administrative law to judicial review of the existence, scope, and exercise of prerogative powers. Implementing these reforms will allow the principle that the source of power is immaterial for the purposes of judicial review to become more than empty judicial rhetoric. It will also enable judicial review of the exercise of prerogative powers to express the judicial commitment to democracy and the rule of law.

³⁰² The federal-provincial distribution of prerogative powers over foreign affairs is disputed (Gibrán van Ert, "The Legal Character of Provincial Agreements with Foreign Governments" (2001) 42:4 C de D 1093 at 1116; Armand de Mestral, "The Provinces and International Relations in Canada" in Jean-François Gaudreault-DesBiens & Fabien Gélinas, eds, *The States and Moods of Federalism: Governance, Identity and Methodology* (Cowansville, QC: Yvon Blais, 2005) at 313).

³⁰³ *McLean*, *supra* note 231 at paras 25–26.

³⁰⁴ *Supra* note 277 at para 25.

³⁰⁵ *Baker*, *supra* note 106 at para 54.

³⁰⁶ *Catalyst*, *supra* note 185 at para 14.

33.	Bruce Porter & Martha Jackman, " Introduction: Advancing Social Rights in Canada " in Martha Jackman & Bruce Porter, eds, <i>Advancing Social Rights in Canada</i> (Toronto: Irwin Law, 2014).
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Introduction: Advancing Social Rights in Canada*

Bruce Porter and Martha Jackman**

A. The Human Rights Crisis in Canada

A book which purports to discuss advancing social rights in Canada in 2014 may be viewed by some as an exercise in denial. Thirty years into Canada's post-*Charter* democracy, growing economic inequality and violations of social rights, disproportionately experienced by Aboriginal people, sole support mothers and their children, people with disabilities, racialized groups and newcomers, represent egregious human rights failures that call into question our collective commitment to what have long been understood as definitional values. As former NDP leader Jack Layton observed:

Canadians, overwhelmingly, believe in justice and equality. These are values we trust, and we want to bring them to life in our communities. Our vision of the just society forms the core of our sense of identity *as Canadians*. But rejecting poverty in our national heart hasn't stopped poverty from festering. Our society enters this new millennium with open wounds and a poverty rate that stands among the worst in the developed world.¹

In recent years, civil society and Aboriginal organizations in Canada have consistently identified poverty, food insecurity, inadequate housing and lack of access to health care, education and decent work as fundamental

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¹ Jack Layton, "Foreword to the First Edition" in Dennis Raphael, *Poverty in Canada*, 2nd ed. (Toronto: Canadian Scholars' Press Inc., 2011) xii.

violations of human rights.² UN human rights bodies have also expressed “grave concern” about the extent and systemic impact of homelessness, hunger and poverty in Canada, and have called for immediate and concerted federal and provincial/territorial government action to address these issues.³ It is not, as the Canadian government likes to suggest, that the UN mistakenly believes that hunger and homelessness are more extreme in Canada than in struggling economies in Africa or Asia.⁴ Rather these harms are seen as a human rights crisis in Canada because they are completely unnecessary in a country experiencing unprecedented affluence and economic prosperity; the result of governmental choice and symptomatic of a serious retrogression from the respect for social rights norms that the UN had come to expect of post-war Canada.⁵

At one time ranked by the international community as a leading voice for human rights and a model for emerging constitutional democracies, Canada is now more often viewed as shamelessly pursuing environmentally unsustainable development within and beyond its own borders in ways that

² See for example: Ligue des droits et libertés, *Rapport sur l'état des droits humains au Québec et au Canada* (2013) online : LDL <http://liguedesdroits.ca>; Bruce Porter & Leilani Farha, “Reaffirming Canada’s Commitments to Human Rights” in *Poverty and Parliament* (Spring 2009) online: Social Rights in Canada CURA www.socialrightscura.ca; Leilani Farha, Alex Neve, Bruce Porter, “The Universal Periodic Review of Canada: February 2009 – An overview of a select number of Canadian NGO concerns and recommendations” (January 2009) online: Social Rights in Canada CURA www.socialrightscura.ca; Assembly of First Nations, *Submission to the United Nations Human Rights Council Universal Periodic Review of Canada’s Human Rights Obligations* (October 2012) online: Universal Periodic Review www.upr-info.org; Senate, Subcommittee on Cities of the Standing Senate Committee on Social Affairs, Science and Technology, *In from the Margins: A Call to Action on Poverty, Housing and Homelessness* (December 2009) (Chair: Honourable Art Eggleton, PC) (“[w]hether the subject was poverty, housing or homelessness, many witnesses described the problems in terms of rights denied” at 15); Canadian Human Rights Act Review Panel, *Promoting Equality: A New Vision* (Ottawa: Department of Justice, 2000) (Chair: Hon. G.V. LaForest) (“[d]uring our consultations we heard more about poverty than any other single issue” at 106).

³ Bruce Porter & Martha Jackman, “International Human Rights and Strategies to Address Homelessness and Poverty in Canada: Making the Connection,” Ottawa Faculty of Law Working Paper No. 2013-09 47-54, online: CURA <http://socialrightscura.ca>; See also Bruce Porter’s discussion in Chapter 1.

⁴ House of Commons Debates, 41st Parl, 1st Sess, No 127 (18 May 2012) at 1155 (Deepak Obhrai).

⁵ United Nations Human Rights Council, *Report of the Special Rapporteur on the right to food, Olivier De Schutter, Addendum, Mission to Canada*, UNHRCOR, 22nd Sess, A/HRC/22/50/Add.1 (2012) online: OHCHR www.ohchr.org [*Report of the Special Rapporteur on the right to food*].

primarily benefit the most affluent, exploit vulnerable groups, damage ecologies, disinherit Indigenous communities and exacerbate global and domestic inequality.⁶ In response to increasing criticism of Canada's human rights and environmental record at home and abroad, the Canadian government has staged a dramatic retreat from Canada's earlier engagement with international human rights norms and accountability mechanisms.⁷ Instead of being an active proponent of advances in international human rights at the UN, as it has in earlier years, Canada has resisted recent progressive reforms in the field of social rights. In particular, Canada has failed to support the development of, and then refused to ratify, new complaints procedures which would empower those whose social rights have been violated in Canada to seek international adjudication.⁸ As the current Canadian government would have it, serious human rights violations only occur in other countries, and Canada needs no lessons from the UN in this sphere.⁹

When UN human rights bodies have pointed to the estimated 150,000 – 300,000 people who are homeless across Canada¹⁰ and the close to a million

⁶ “International human rights: Canada’s role dwindling”, *The Toronto Star* (4 April 2011); Less Whittington, “Canadian mining firms worst for environment, rights: Report”, *The Toronto Star* (19 October 2010); House of Commons, Standing Committee on Foreign Affairs and International Trade, *Mining in Developing Countries and Corporate Responsibility* (2005) (Chair: Bernard Patry) online: Parliament of Canada www.parl.gc.ca; Alain Deneault and William Sacher, *Imperial Canada Inc: Legal Haven of Choice for the World’s Mining Industries* (Vancouver: Talonbooks, 2012).

⁷ Alex Neve, Béatrice Vaugrante, “Op-Ed: Time for a human-rights reboot”, *Ottawa Citizen* (29 December 2013); John E. Trent, “The United Nations and Canada: What Canada has done and should be doing at the UN” (2013), online: Academic Council on the United Nations System <http://acuns.org>.

⁸ Canada has refused to ratify any of the three complaints procedures that include social rights: *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, GA Res 63/117, UNGAOR, 63d Sess, Supp No 49, UN Doc A/RES/63/117 (2008) [OP-ICESCR]; *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, GA Res 61/106, UNGAOR, 61st Sess, UN Doc A/RES/61/106, (2006); and *Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure*, UNHRCOR, 17th Sess, UN Doc A/HRC/RES/17/18 (2011). On Canada’s role in opposing development of a complaints procedure for social rights, see Bruce Porter, “The Reasonableness of Article 8(4) – Adjudicating Claims From The Margins” (2009) 27:1 *Nordic Journal of Human Rights* 39 at 44-47.

⁹ Laura Payton, “UN official sparks debate over Canadian food security”, *CBC News* (16 May 2012).

¹⁰ United Nations Human Rights Council, *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living*,

adults and children relying on food banks to provide necessary supplements to inadequate diets¹¹ – phenomena which would have been unimaginable when Canada ratified the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*¹² along with the *International Covenant on Civil and Political Rights (ICCPR)*¹³ in 1976¹⁴ – the federal government has insisted that such concerns are both misplaced and politically biased.¹⁵ When the UN Special Rapporteur on the Right to Food conducted a mission to Canada in 2013, voicing distress about the extent of hunger in so affluent a country, and questioning the absence of a national food security strategy or legal protection for the right to food, Canada's response was to launch a personal and very undiplomatic attack. Leading members of the government characterized the Special Rapporteur as a meddling academic who was wasting UN funds by investigating Canada when he could have been somewhere with real hunger and food issues.¹⁶ When the UN Committee on the Rights of the Child commented negatively on Canada's human rights performance with respect to growing poverty among Aboriginal, immigrant and disabled children, the Canadian government dismissed these concerns as politically motivated. The justification in that case: one of the Committee experts was of Syrian origin, a

and on the Right to Non-discrimination in this Context, Miloon Kothari - Addendum - Mission to Canada (October 2007), UNHRCOR, 10th Sess, UN Doc A/HRC/10/7/Add.3, (2009) at para 54, online: OHCHR www2.ohchr.org. Current estimates suggest there are 150,000 individuals using shelters in Canada annually and that there are three times as many "hidden homeless" as the number living in shelters or unsheltered. Stephen Gaetz, Jesse Donaldson, Tim Richter & Tanya Gulliver, *The State of Homelessness in Canada 2013* (Toronto: Canadian Homelessness Research Network, 2013) at 21-24.

¹¹ *Report to the Special Rapporteur on the right to food*, above note 5 at para 7.

¹² *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3, Can TS 1976 No 46 (entered into force 3 January 1976, accession by Canada 19 May 1976) [ICESCR].

¹³ *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, Can TS 1976 No 47 (entered into force 23 March 1976, accession by Canada 19 May 1976) [ICCPR].

¹⁴ Bruce Porter, "ReWriting the Charter at 20 or Reading it Right: The Challenge of Poverty and Homelessness in Canada" in Wesley Cragg & Christine Koggel, eds, *Contemporary Moral Issues*, 5th ed (Toronto: McGraw-Hill Ryerson, 2005) 373.

¹⁵ Government of Canada, *Interactive Dialogue with the Special Rapporteur on the Right to Adequate Housing, UN Human Rights Council OR, 10th Sess, Response to the Addendum Report on Canada* (9 March 2009) online: Social Rights in Canada CURA <http://socialrightscura.ca>;

¹⁶ Open letter from human rights organizations and allied individuals to Prime Minister Stephen Harper concerning the Government of Canada's treatment of the United Nations human rights Special Rapporteur on the right to food (30 May 2012) online: Social Rights Advocacy Centre www.socialrights.ca.

country with its own record of serious human rights violations.¹⁷ This approach, accurately described by the Special Rapporteur as a new Canadian self-righteousness,¹⁸ is deeply disturbing, not least because it undermines Canada's adherence to human rights and sustainable development as important and viable objects of international co-operation and respect.

B. Looking Back: The Historic Social Rights Paradigm in Canada

Those seeking to advance social rights in Canada today must not only remind people of what has been lost, but also sustain a human rights paradigm that is larger than one particular government or decade of Canadian political history. The problems associated with growing economic inequality in an era of neoliberalism are not unique to Canada. However the unwillingness of Canadian governments and courts to address the resulting violations of social rights is surprising, at least to international observers, in light of Canada's post-war image and self-identity. Unlike its neighbor to the south, by ratifying the *ICESCR* in 1976, Canada formally acknowledged that adequate food, housing, health care, education, social security, and just and favourable conditions of work were not simply laudable goals of social policy. These were recognized as fundamental human rights, requiring progressive implementation to the maximum of available resources by all appropriate means, and demanding access to justice and effective remedies for rights claimants when governments fail to meet their obligations.¹⁹

While social rights in the 1970s were not always implemented in legislation or programs, what is striking in retrospect is the degree to which they were referred to as core "Canadian values." In a period when Canada defined itself largely in relation to the U.S., Canada's ratification of the *ICESCR* and its recognition of the positive role governments must play in protecting rights was seen as part of Canada's national identity. Former Prime Minister Pierre Trudeau had, for instance, written of the importance of economic and social rights as a young academic,²⁰ and his campaign for the "just society" capitalized on widespread public acceptance of social justice as a central component of Canadians' self-identity. As Trudeau reaffirmed as Prime Minister in June of 1968 "[M]ost people take it for granted that every Canadian is assured a reasonable standard of living. Unfortunately, that is not

¹⁷ *House of Commons Debates*, 41st Parl, 1st Sess, No 178 (27 September 2012) at 1500 (Bob Dechert).

¹⁸ Sarah Schmidt, "UN envoy blasts Canada for 'self-righteous' attitude over hunger, poverty", *Postmedia News* (15 May 2012).

¹⁹ *ICESCR*, above note 12.

²⁰ Pierre Trudeau, "Economic Rights" (1961) 8 McGill LJ 122 at 125.

the case ... The Just Society will be one in which all of our people will have the means and the motivation to participate.”²¹

Parallel to, and nurtured by, Canada’s engagement with international human rights, the 1970s saw the emergence of vibrant domestic human rights movements.²² Though influenced by the American civil rights campaign, they were grounded in a different rights paradigm than the one that predominated in the U.S. Both in Quebec and the rest of Canada, domestic human rights protections were linked to a commitment to internationalism and to a more comprehensive conception of human rights. Cold war dichotomies, including the rigid distinction drawn between social and economic *versus* civil and political rights, were less firmly entrenched in 1970s Canada than in the U.S.²³ Social rights were particularly important in Quebec. With the adoption of its new *Charter of Human Rights and Freedoms*²⁴ in 1976, Quebec provided explicit legal recognition for social rights, including to free public education, an “acceptable standard of living” and a healthful environment in which biodiversity is preserved. The Quebec *Charter* was, as Pierre Bosset and Lucie Lamarche point out, strongly influenced by the international human rights context: “Le Québec, qui connaît sa révolution tranquille et développe l’État social, tient alors à s’inscrire dans la mouvance d’un droit international qui, officiellement, reconnaît ces droits...”²⁵

New social movements across Canada increasingly articulated struggles for justice and equality as human rights struggles. In 1981, people with disabilities mobilized around the International Year of Persons with Disabilities and the celebrated “Obstacles” Report²⁶, issued by an All Party House of Commons Committee – an early expression of the “social model of

²¹ Cited in Ron Graham, ed, *The Essential Trudeau* (Toronto: McLelland & Stewart, 1998) at 16-20.

²² Dominique Clément, Will Silver & Daniel Trottier, “The Evolution of Human Rights in Canada” (2012), online: Canadian Human Rights Commission www.chrc-ccdp.ca.

²³ *Ibid*, at 5 & 17; Chaviva Hosek, “Women and Constitutional Process” in Keith Banting and Richard Simeon eds., *And No One Cheered: Federalism, Democracy & the Constitution Act* (Toronto: Methuen Publications, 1983) 280 [Hosek, “Women and Constitutional Process”]; Cynthia Soohoo, Catherine Albisa, and Martha F Davis, *Bringing Human Rights Home: A History of Human Rights in the United States* (Westport: Praeger, 2008).

²⁴ *Charter of Human Rights and Freedoms*, RSQ, c C12.

²⁵ Pierre Bosset & Lucie Lamarche, “Introduction: Donner droit de cité aux droits économiques, sociaux et culturels” in Pierre Bosset & Lucie Lamarche, eds, *Droit de cité pour les droits économiques, sociaux et culturels : La Charte québécoise en chantier* (Cowansville: Éditions Yvon Blais, 2011) 1 at 3.

²⁶ House of Commons, Special Parliamentary Committee on the Disabled and the Handicapped, *Obstacles*, 32nd Parliament, 1st Session (February 1981).

disability” that was adopted more than two decades later in the UN *Convention on the Rights of Persons with Disabilities*.²⁷ Emerging rights-based approaches to social justice fed directly into debates about the wording and content of rights in the proposed new *Canadian Charter of Rights and Freedoms*.²⁸ Disability rights organizations demanded that mental and physical disabilities be added to the list of prohibited grounds of discrimination in section 15 of the new *Charter*.²⁹ Aboriginal organizations demanded that the constitutional debates not ignore the desperate conditions on reserves and demanded positive recognition of treaty rights, the right to self-determination and control over resources and development.³⁰ For their part, women’s organizations orchestrated an historic cross-country campaign for changes to the heading and wording of section 15,³¹ in order to put an end to the formal, negative rights equality paradigm that had been adopted by the courts under the *Canadian Bill of Rights*.³² Demanding the inclusion of a right to the “equal protection and equal benefit of the law” in section 15, they sought to ensure that the *Charter* would directly engage with government obligations to institute programs and benefits to address historic patterns of exclusion and disadvantage.³³

²⁷ *Convention on the Rights of Persons with Disabilities*, GA Res. 61/106,

UNGAOR, 61st Sess, Supp. No. 49, UN Doc A/61/611, (2007).

²⁸ Gwen Brodsky & Shelagh Day, *Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back*, (Ottawa: Canadian Advisory Council on the Status of Women, 1989) at 15-17.

²⁹ Yvonne Peters, “From Charity to Equality: Canadians with Disabilities Take Their Rightful Place in Canada's Constitution” in Deborah Stienstra & Aileen Wight-Felske, eds, *Making Equality: History of Advocacy and Persons with Disabilities in Canada* (Concord, Ontario: Captus Press, 2003) 119.

³⁰ Dominique Clément, Will Silver & Daniel Trottier, *The Evolution of Human Rights in Canada*, (Ottawa: Minister of Public Works and Government Services, 2012) at 31 [*The Evolution of Human Rights in Canada*]; Douglas E. Saunders, “The Indian Lobby” in Keith Banting & Richard Simeon, eds., *And No One Cheered: Federalism, Democracy and the Constitution Act* (Toronto: Methuen Publications, 1983) 301.

³¹ Penny Kome, *The Taking of Twenty-Eight: Women Challenge the Constitution* (Toronto: Women’s Educational Press, 1983) 34-36. Hosek, “Women and Constitutional Process”, above note 23.

³² *Canadian Bill of Rights*, SC 1960, c 44.

³³ Mary Eberts, “The Equality Provision of the Canadian Charter of Rights and Freedoms and Government Institutions” in Claire Beckton & A. Wayne MacKay, Research Coordinators, *The Courts and the Charter* (Ottawa: Minister of Supply and Services Canada, 1985) 133; Francine Fournier, “Égalité et droits à l’égalité” in Lynn Smith et al., eds., *Righting the Balance: Canada’s New Equality Rights* (Saskatoon: Canadian Human Rights Reporter Inc., 1986) 25; Bruce Porter, “Expectations of Equality” (2006) 33 Sup Ct L Rev (2d) 23 [Porter, “Expectations of Equality”].

Social movements adopting new rights-based approaches were ultimately successful in transforming the architecture of equality under the new *Charter*. Then Justice Minister Jean Chrétien succumbed to the pressure from women's groups and endorsed the proposed changes to section 15, as he put it, "to stress the positive nature of this important part of the *Charter*."³⁴ Moreover, Canada became the first democracy to include disability as a constitutionally prohibited ground of discrimination. This advance was critical from a social rights perspective because a negative rights framework is so clearly inadequate in relation to disability discrimination, which frequently results from failures of law and policy to address unique circumstances, needs and capabilities, and which often requires positive measures to ensure real, instead of merely formal, equality.³⁵ Yvonne Peters, one of the contributors to this book and a key advocate for disability rights at the time, has observed that the constitutional recognition of disability was:

[A] watershed event that occurred at a time when people with disabilities were just beginning to construct a new vision and analysis of the disability experience... The disability rights movement rejected the medical model of disability, and argued that it was social barriers and prejudices that created disabilities. This shift to a rights-based analysis therefore represents a profound and decisive turning point in the history of people with disabilities.³⁶

Substantive equality, as articulated by women's organizations, the disability rights movement and other equality seeking groups in Canada, was and remains a social rights paradigm. It emphasizes positive rights, social inclusion, a hybrid of group/individual rights, and the necessity of structural change and historical transformation to achieve the realization of rights over time. The equality/social rights paradigm is remedial in its focus – defined by

³⁴ Statement by the Honourable Jean Chrétien, Minister of Justice, to the Special Joint Committee on the Constitution, January 12, 1981 (Government of Manitoba Archives).

³⁵ Yvonne Peters, *Twenty Years of Litigating for Disability Equality Rights: Has it Made a Difference?* (Winnipeg: Council of Canadians with Disability, 2004); Dianne Pothier, "Legal Development in the Supreme Court of Canada Regarding Disability" in Dianne Pothier & Richard Devlin, eds., *Critical Disability Theory: Essays in Philosophy, Politics, Policy and Law* (Vancouver: UBC Press, 2006) 304. See the discussion by Shelagh Day, Gwen Brodsky & Yvonne Peters in Chapter 7.

³⁶ Yvonne Peters, "From Charity to Equality: Canadians with Disabilities Take Their Rightful Place in Canada's Constitution" in Deborah Stienstra & Aileen Wight-Felske, eds, *Making Equality: History of Advocacy and Persons with Disabilities in Canada* (Concord, Ontario: Captus Press, 2003) at 122.

the broad purposes of human rights, rather than by restorative or compensatory justice in relation to a single individual.³⁷ From the outset, it was nurtured by jurisprudence developed under provincial and federal human rights legislation and by the work of newly created national and provincial human rights institutions across the country.³⁸ In landmark cases, such as *Action Travail des femmes v CNR*,³⁹ equality advocates insisted upon, and Canadian courts and tribunals recognized, the necessity of placing obligations on both governments and private actors to address systemic inequality through positive action, including social programs, measures to address the needs of people with disabilities, and “employment equity” to combat systemic inequality in the workplace. Building on this social rights paradigm, the *Charter* was expected to ensure that access to housing, health care, nutrition, jobs, child care and social assistance for those in need would be accorded as much importance as negative guarantees of freedom from unreasonable government interference.⁴⁰

Equality seeking groups mobilized and won support for an approach to constitutional rights centered on a commitment to substantive equality as a framework for proactively addressing what were seen as the critical sources of inequality and exclusion in Canadian society: poverty, lack of access to appropriate housing, employment, education and social programs. Barbara Cameron, another contributor to this book, accurately predicted in 1984 that the neoliberal version of equality of opportunity would only mean that “equalization is downwards.”⁴¹ She emphasized that ensuring the “just and favourable conditions of work”, to which Canada was committed under the *ICESCR*, required active government engagement in labour markets, through employment equity, affirmative action and other positive measures.⁴² Appearing before the Subcommittee on Equality Rights of the Standing Committee on Justice and Legal Affairs in 1985, two other contributors to this book, Gwen Brodsky and Shelagh Day, argued that the new constitutional right to equality demanded positive measures to protect social rights. Gwen

³⁷ Colleen Sheppard, “Recognition of the Disadvantaging of Women: The Promise of *Andrews v. Law Society of British Columbia*” (1989) 35 McGill LJ 207; *Andrews v Law Society of British Columbia*, [1989] 1 SCR. 171; Mary Eberts, “Section 15 Remedies for Systemic Inequality: You Can’t Get There From Here” in Sheila McIntyre & Sanda Rogers, *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Toronto: LexisNexis, 2006) 389.

³⁸ *The Evolution of Human Rights in Canada*, above note 30.

³⁹ *CN v Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 1114.

⁴⁰ Porter, “Expectations of Equality”, above note 33.

⁴¹ Barbara Cameron, “Labour Market Discrimination and Affirmative Action” in Jill McCalla Vickers, ed., *Taking Sex into Account: The Policy Consequences of Sexist Research* (Ottawa: Carleton University Press, 1984) 135.

⁴² *Ibid.*

Brodsky stated on behalf of the National Association of Women and the Law that: “Unless the Government implements positive programs to remove barriers to equality it will be signaling tolerance of discrimination and indifference to the expectations of Canadian women.”⁴³ Speaking for the Women’s Legal Education and Action Fund (LEAF), Shelagh Day affirmed that the right to equality embodies “a fresh beginning” and a rejection of “[n]arrow interpretations or technical pathways that lead us away from what is really happening to the lives of Canadians and to the lives of Canadian women . . .”⁴⁴

Social rights were not seen as relying solely on *Charter* rights, however. They were supported by legislative and programmatic commitments in the areas of health care, education, housing, social security, and financial assistance for those in need, particularly through the mechanism of joint federal-provincial/territorial cost sharing agreements such as the *Canada Health Act (CHA)*⁴⁵ and the *Canada Assistance Plan Act (CAP)*.⁴⁶ The *CAP*, for example, created an entitlement to an adequate level of financial assistance for anyone in need, regardless of cause, in exchange for shared federal funding of provincial social assistance costs. The *CAP* requirement to provide an adequate level of social assistance was subject to judicial review for reasonable compliance, and to systemic (though not individual) remedy by courts.⁴⁷ Similarly, the *CHA* implemented five legally binding principles: public administration, comprehensiveness, universality, portability and accessibility. These *CHA* conditions were understood and embraced as social rights principles, designed to guarantee access to health care based on need, rather than ability to pay, as a fundamental human right.⁴⁸ The commitment

⁴³ House of Commons, Sub-committee on Equality Rights of the Standing Committee on Justice and Legal Affairs, *Minutes of Proceedings*, 33rd Parl. 1st Sess, Vol 3 (17 April 1985) at 3:9, cited in Porter, “Expectations of Equality”, note 33 above at 30-31.

⁴⁴ *Ibid.*

⁴⁵ *Canada Health Act*, RSC 1985, c C-6.

⁴⁶ *Canada Assistance Plan*, SC 1966-67, c 45.

⁴⁷ In *Finlay v Canada (Minister of Finance)*, [1986] 2 SCR 607, the Supreme Court determined that an affected individual had public interest standing to challenge provincial non-compliance with the adequacy requirements of *CAP*. Subsequently, in *Finlay v Canada (Minister of Finance)*, [1993] 1 SCR 1080, the Court that found that *CAP* “requires assistance to be provided in an amount that is compatible, or consistent, with an individual’s basic requirements” but provides for some flexibility and for the recovery of overpayments.

⁴⁸ Marie-Claude Prémont, *The Canada Health Act and the Future of Health Care Systems in Canada Discussion Paper No. 4* (Saskatoon: Commission on the Future of Health Care in Canada, 2002); Martha Jackman, “Law as a Tool for Addressing Social Determinants of Health” in Nola Ries, Tracey Bailey & Timothy

to implementing social rights through programmatic entitlements such as these was given concrete expression in section 36 of the *Constitution Act, 1982*, which entrenches an explicit undertaking by governments in Canada to “promote the well-being of Canadians and to provide essential public services of reasonable quality to all Canadians.”⁴⁹ In its submissions to U.N. treaty monitoring bodies, the Canadian government has described the constitutional commitment in section 36 as a core element in the implementation of Canada’s social rights obligations under international human rights law.

⁵⁰

Canada of the 1970s and 1980s was not a Camelot for social rights. While food banks and homelessness did not exist to the extent and in the same way as they do now, there were nevertheless serious violations of social rights during this period, particularly among Aboriginal communities, racialized groups, women and LGBT communities. Still, what is striking, looking back, is the extent to which social rights values were accepted as definitional during that period. Commitments to social rights, under both international and domestic law, created the foundation for a distinctive social rights paradigm to take root and flourish in post-*Charter* Canada. Today, commitments to a distinctive idea of substantive equality, linked to social rights and international human rights law, is still strong, or stronger at the community level, where disability rights, anti-poverty, food security, women’s and other groups in in all parts of the country continue to embrace both social rights and the international nature of the human rights project.⁵¹ Beyond that, however, there is far less evidence of any meaningful commitment to the distinctive Canadian social rights paradigm that was widely affirmed in the period leading up to, and immediately following the adoption of the *Charter*. As

Caulfield, eds., *Public Health Law and Policy in Canada*, 3rd ed. (Markham: LexisNexis Canada, 2013) 91.

⁴⁹ *Constitution Act, 1982*, s 36, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11; See generally Martha Jackman and Bruce Porter, “Rights-based Strategies to Address Homelessness and Poverty in Canada: The Constitutional Framework” (June 2012) online: SSRN <http://ssrn.com>.

⁵⁰ Canadian Heritage, *Core Document forming part of the Reports of States Parties: Canada* (October 1997), online: Canadian Heritage www.pch.gc.ca. The document was submitted by Canada pursuant to HRI/CORE/1 sent to States parties by note verbale of the Secretary General, G/SO 221 (1) of 26 April 1991.

⁵¹ *Empty Words And Double Standards: Canada’s Failure To Respect And Uphold International Human Rights. Joint Submission to the United Nations Human Rights Council in relation to the May 2013 Universal Periodic Review of Canada* (Ottawa, October, 2012) online: Social Rights in Canada CURA <http://socialrightscura.ca>; Bruce Porter, “Claiming Adjudicative Space: Social Rights, Equality and Citizenship” in Margot Young et al, eds, *Poverty: Rights, Social Citizenship, and Legal Activism* (Vancouver: UBC Press, 2007) 77.

Layton accurately described, widespread poverty, homelessness and hunger amidst affluence has created an open wound in the Canadian body politic.⁵²

C. The *Charter* Critics and the Justiciability of Social Rights

There was some indication in early *Charter* jurisprudence that a distinctive Canadian human rights paradigm inclusive of social rights might take root in the courts. In his 1986 decision in *R v Oakes*, Chief Justice Dickson spoke eloquently of the values and principles which must guide *Charter* interpretation, including “respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.”⁵³ In 1989, in *Irwin Toy Ltd. v Quebec (Attorney General)*⁵⁴ the Supreme Court rejected a corporate challenge to a ban on children’s advertising, emphasizing that the protection of vulnerable groups is a core value which must guide the interpretation of *Charter* rights, as well as the assessment of reasonable limits under section 1. The Court concluded in *Irwin Toy* that corporate-commercial economic rights were not included in section 7.⁵⁵ However Chief Justice Dickson was careful to distinguish these private property-related rights from the social and economic rights “included in various international covenants, as rights to social security, equal pay for equal work, adequate food, clothing and shelter ...”⁵⁶ This latter category of rights, the court cautioned, should not be excluded from the scope of section 7 at such an early stage of the *Charter*’s development.⁵⁷

In retrospect we can also see the serious challenges facing the emergent social rights paradigm in Canada. While attracting a very high level of public support in all parts of the country, the enactment of the *Charter* was met with significant ambivalence and scepticism within some political, academic and judicial circles. Many remained loyal to the Westminster tradition of parliamentary supremacy and were concerned about expanding the role of the courts.⁵⁸ When it came time to reconcile the two traditions of parliamentary sovereignty and constitutional supremacy, the traditional distinctions between civil and political rights on the one hand, and social rights on the other, provided a convenient, though misguided, way of limiting

⁵² Above note 1.

⁵³ *R v Oakes*, [1986] 1 SCR 103 at 136.

⁵⁴ [1989] 1 SCR 927 [*Irwin Toy*].

⁵⁵ *Ibid* at 1003.

⁵⁶ *Ibid*.

⁵⁷ *Ibid*.

⁵⁸ See for example Ronald I. Cheffins and Patricia A. Johnson, *The Revised Canadian Constitution: Politics as Law* (McGraw-Hill: Ryerson Ltd, 1986).

constitutional supremacy. Traditional civil and political rights, conceived as negative rights, were ascribed to the courts while social rights, conceived as positive rights, were deemed to fall within the exclusive purview of legislatures, engaging matters beyond the institutional legitimacy and competence of the courts.⁵⁹ Quoting from Oliver Wendell Holmes, for example, constitutional scholar Peter Hogg characterized social rights as “issues upon which elections are won and lost”⁶⁰ – an oft-repeated statement in Canadian social rights jurisprudence.

The problematic and now widely discredited distinction between justiciable civil and political rights and non-justiciable social rights has a number of adverse consequences for *Charter* interpretation, however. When they are conceived solely as negative rights, broadly framed guarantees, such as rights to life and security of the person, are whittled down to freedom from government interference and stripped of their social rights content. The effect is to disenfranchise disadvantaged groups from the protection of section 7 since, as the Supreme Court noted in *Irwin Toy*: “Vulnerable groups will claim the need for protection by the government whereas other groups and individuals will assert that the government should not intrude.”⁶¹ Moreover, a negative rights framework reduces section 15 – the very *Charter* section that was drafted to ensure substantive rather than formal equality for disadvantaged groups – to a guarantee of freedom simply from direct discrimination.⁶² Finally, the remedial promise of section 24 is rendered

⁵⁹ See generally David Robitaille, *Normativité, interprétation et justifications des droits économiques et sociaux: Les cas Québécois et Sud-africain* (Brussels: Éditions Bruylant, 2011); Martha Jackman, “The Protection of Welfare Rights under the Charter” (1988) 20 *Ottawa L Rev* 257 at 330-337.

⁶⁰ As Hogg expressed it: “It has been suggested that “security of the person” includes the economic capacity to satisfy basic human needs ... The trouble with this argument is that it ... involves a massive expansion of judicial review, since it would bring under judicial scrutiny all of the elements of the modern welfare state, including ... of course, the level of public expenditures on social programmes. As Oliver Wendell Holmes would have pointed out, these are the issues upon which elections are won and lost; the judges need a clear mandate to enter that arena and s. 7 does not provide that clear mandate.” Peter Hogg, *Constitutional Law of Canada*, 4th ed. (Scarborough, ON: Carswell, 1997) at 1073.

⁶¹ *Irwin Toy*, above note 54 at 993; see generally Cara Wilkie & Meryl Zisman Gary, “Positive and Negative Rights under the Charter: Closing the Divide to Advance Equality” (2011) 30 *Windsor Rev Legal Soc Issues* 37; Davide Wiseman, “Taking Competence Seriously” in Margot Young et al, eds, *Poverty: Rights, Social Citizenship and Legal Activism* (Vancouver: UBC Press, 2007) 263; David Wiseman, “The *Charter* and Poverty: Beyond Injusticiability” (2001) 1 *UTLJ* 425.

⁶² Margot Young, “Blissed Out: Section 15 at Twenty” in Sheila McIntyre and Sanda Rodgers, eds., *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Markham, Ontario: LexisNexis, 2006) 45; Fay Faraday,

illusory in relation to social rights, if claims requiring positive action are deemed to be non-justiciable. The bifurcation of positive and negative rights as a simplistic solution to the separation of powers has thus seriously undermined the inclusive paradigm of social rights for which women, people with disabilities and other stakeholders fought. This approach has also been profoundly out of step with the growing international recognition of the interconnectedness and interdependence of all human rights.⁶³ When characterized as non-justiciable, and as matters to be relegated to legislatures and “resolved” by elections, social rights lose their legitimacy as rights claims and become no more than competing policy positions advocated by “interest groups” lacking in political power. The result, intentional or not, has too often been to banish those living in poverty and homelessness from access to justice and the equal protection and benefit of the *Charter*.

Unfortunately, the argument that courts should not engage with issues of social policy in response to *Charter* claims was made not only by the conservative right. It also found support in a parallel critique of rights-discourse put forward by prominent voices within the social democratic left.⁶⁴ Among the leftist *Charter* critics, the concern was about vesting privileged and unelected judges with the power to review social policy and programs adopted by democratically elected and accountable legislatures. Like their conservative counterparts, these critics accepted that the dominant legal paradigm under the *Charter* would be individualistic and negative-rights oriented. On that basis they insisted that the pursuit of social justice through the courts would prove illusory and would distract social justice movements from more fruitful political avenues for seeking progressive change. Rather than insisting that the judicial system be reformed or transformed to realize

Margaret Denike & M. Kate Stephenson, eds., *Making Equality Rights Real: Securing Substantive Equality Under the Charter* (Toronto: Irwin Law Inc., 2006); Sharon Donna McIvor, “Aboriginal Women Unmasked: Using Equality Litigation to Advance Women’s Rights” (2004) 16 CJWL 106 at 111; Gwen Brodsky & Shelagh Day, “Beyond the Social and Economic Rights Debate: Substantive Equality Speaks to Poverty (2002) 14 CJWL 185.

⁶³ On interdependence of social rights and women’s equality rights, see for example Leilani Farha, “Committee on the Elimination of Discrimination Against Women: Women Claiming Economic, Social and Cultural Rights – the CEDAW Potential” in Malcolm Langford, ed, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (New York: Cambridge University Press, 2008); Leilani Farha, Shelagh Day & Marianne Mollman, “The Montreal Principles: Needed Clarity on Women’s Right to Equal Enjoyment of Economic, Social and Cultural Rights” (2004) 22:3 Nordic Journal of Human Rights 345.

⁶⁴ See for example Harry J Glasbeek & Michael Mandel, “The Legalization of Politics in Advanced Capitalism: The Canadian Charter of Rights and Freedoms” (1984) 2 Socialist Studies 84; Andrew Petter, “The Politics of the Charter” (1986) 8 Sup Ct L Rev 473; Allan C Hutchinson & Andrew Petter, “Private Rights/Public Wrongs: The Liberal Lie of the Charter” (1988) 38 UTLJ 278.

the expectations inherent in the social rights paradigm put forward by women's and other equality seeking groups, *Charter* critics tended to accepted the *status quo*, pointing to negative legal outcomes in social rights cases as proof that rights-based approaches were misguided.

While the Canadian courts have been accused by some of undue *Charter* activism, nothing could be further from the truth insofar as the socio-economic rights claims of the poor and other disadvantaged groups are concerned. In response to the challenge of reconciling constitutional supremacy with parliamentary democracy, judicial culture in Canada has made a virtue out of deference to legislatures and Parliament on matters of social policy. There has been a widespread failure to acknowledge that, in many cases, such deference can amount to an abdication of judicial responsibility to ensure that the Charter provides adequate safeguards for the rights and interests of the most marginalized groups in Canadian society. Those attempting to litigate social rights claims have been subject to criticism for risking negative jurisprudence, or for misleading rights claimants into thinking that rights could actually be realized through the courts. Thus Louise Arbour has noted that “the first two decades of Charter litigation testify to a certain timidity – both on the part of litigants and the courts – to tackle head on the claims emerging from the right to be free from want.”⁶⁵ But, the less Canadian courts have been asked, or have been willing, to determine social rights claims, the more the negative rights paradigm appears to have settled-in, almost by default.⁶⁶

What is remarkable about the first thirty years of Charter jurisprudence in relation to social rights claims is not any observable trend of having been successful or unsuccessful – there are examples of both.⁶⁷ Rather, it is the relative absence of cases addressing what were seen at the outset of the Charter as the critical human rights issues of poverty and systemic inequality. Social rights have, with limited exceptions, remained largely unclaimed. Those few cases with significant social rights potential

⁶⁵ Louise Arbour, “‘Freedom from Want’ – From Charity to Entitlement”, LaFontaine-Baldwin Lecture, Quebec City (2005) 7; Margot Young, “Why Rights Now? Law and Desperation” in Margot Young et al, eds, *Poverty: Rights, Social Citizenship and Legal Activism* (Vancouver: UBC Press, 2007) 317; Barbara Billingsley & Peter Carver, “Sections 7 and 15(1) of the Charter and Access to the Public Purse: Evolution in the Law?” (2007) 36 SCLR (2d) 223.

⁶⁶ Martha Jackman, “Charter Remedies for Socio-economic Rights Violations: Sleeping Under a Box?” in Robert J Sharpe & Kent Roach, eds, *Taking Remedies Seriously* (Montreal: Canadian Institute for the Administration of Justice, 2010) 279.

⁶⁷ Martha Jackman & Bruce Porter, “Socio-Economic Rights Under the Canadian Charter” in Malcolm Langford, ed, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (New York: Cambridge University Press, 2008) 209.

that have been brought before the courts have, as often as not, been unheard: victims of motions to strike or of lower court losses, with leave to appeal usually denied by appellate and the Supreme Court.⁶⁸ As a consequence, more than three decades after the enactment of the Charter, the critical question of the extent to which Charter rights to life, security of the person and equality include social rights guaranteed under international human rights law, remains unanswered by the Canadian courts.

In *Gosselin v Quebec (Attorney General)*⁶⁹ the only Supreme Court case to directly address the issue of whether social rights guaranteed under international human rights law ought to be included in the interpretation of section 7, since the question was left open in *Irwin Toy*, the scope of the Charter's protection for social rights was again left unresolved. However, Canadian lower courts appear to be taking the Supreme Court's silence and continued denials of leave to appeal in poverty-related cases as a license to treat the matter as closed, preventing poor people from even getting a hearing into denials of civil legal aid, access to housing, or other critical social rights challenges.⁷⁰ Perhaps the over-riding lesson of the last decade, then, is less about the track record of social rights claims under the Charter, and more about the failure of political solutions that social rights claimants were advised by the Charter critics to rely upon. There has been little diversion of attention or resources to legal cases addressing social rights claims in Canada. The failure of Canadian democracy to address poverty and homelessness and the denial of meaningful access to democratic procedures for those affected by social rights violations is a much bigger story than that.

D. Social Rights beyond the Courts

The federalist dimensions of the social rights paradigm of 1980s Canada also proved to be fragile. The worldwide pressure for structural adjustment in the early 1990s resulted in the

⁶⁸ Sanda Rodgers, "Getting Heard: Leave to Appeal, Interveners and Procedural Barriers to Social Justice in the Supreme Court of Canada" (2010) 50 SCLR (2d) 1 at 40; see also Martha Jackman & Bruce's review in Chapter 2.

⁶⁹ 2002 SCC 84.

⁷⁰ See for example *Tanudjaja v Attorney General (Canada) (Application)*, 2013 ONSC 5410; *Canadian Bar Assn. v British Columbia*, 2008 BCCA 92; Martha Jackman, "Constitutional Castaways: Poverty and the McLachlin Court" (2010) 50 Sup Ct L Rev 297.

Canadian government relinquishing social rights standards embedded in cost-sharing agreements with the provinces.⁷¹ In particular, the *Canada Assistance Plan*⁷² was abandoned in 1995, and with it any political commitment to implementing and protecting the right to adequate social assistance through such conditional shared-cost programs.⁷³ Non-binding principles, sometimes not even put in writing, have come to replace social entitlements embedded in legislation. Provinces have further downloaded key programs in housing, social assistance and health care to municipalities and local service providers. The “reinventing government” movement has brought about widespread privatization of publicly delivered services and the replacement of social rights-based standards with market criteria to assess public services.⁷⁴

Over the past decade, the capacity of civil society organizations to pursue social rights claims, either in court or through social mobilization, has also been seriously eroded. Since the 1970s, the human rights movement in Canada has depended heavily on government recognition of, and financial support for, the independent role of civil society organizations as a means of giving voice to concerns of groups that would otherwise lack the resources or ability to participate in democratic processes. Unlike their counterparts in other countries, where charitable or development funding is more available, human rights groups in Canada have relied primarily on public rather than private funding. This was seen as the hallmark of a social democracy, mitigating the need to cater to charity and charitable models of addressing social rights violations linked to poverty and inequality.⁷⁵ With the election in 2004 of a federal party whose leader had been steadfastly hostile to human rights “interest groups”, the fragility of this commitment became clear.

⁷¹ International Monetary Fund, *Canada: Article IV Consultation Discussions Statement by the Fund Mission to the Minister of Finance* (Ottawa, December 7, 1995) online: The Halifax Initiative www.halifaxinitiative.org.

⁷² *Canada Assistance Plan*, above note 46.

⁷³ Martha Jackman, “Women and the Canada Health and Social Transfer: Ensuring Gender Equality in Federal Welfare Reform” (1995) 8 Can J Women & L 371; Shelagh Day & Gwen Brodsky, *Women and the Equality Deficit: The Impact of Restructuring Canada’s Social Programs* (Ottawa: Status of Women Canada, 1998).

⁷⁴ Barbara Cameron, “Accounting for Rights and Money in the Canadian Social Union” in Margot Young et al, eds, *Poverty: Rights, Social Citizenship and Legal Activism* (Vancouver: UBC Press, 2007) 162; Lucie Lamarche, “The ‘Made in Québec’ Act to Combat Poverty and Social Exclusion: The Complex Relationship Between Poverty and Human Rights” in Margot Young et al, eds, *Poverty: Rights, Social Citizenship and Legal Activism* (Vancouver: UBC Press, 2007) 139; and see Barbara Cameron’s discussion in Chapter 4 of this book.

⁷⁵ Voices-voix, *Submission to the United Nations Human Rights Council. Universal Periodic Review of Canada’s Human Rights Obligations* (October 2012), online: OHCHR <http://lib.ohchr.org> [Voices-voix, *Canada’s Human Rights Obligations*].

The systematic exclusion of human rights and equality seeking groups from the federal programs that remain in existence and the outright cancellation of funding for the Court Challenges Program of Canada, Status of Women Canada's Policy Research Program, the Law Commission of Canada, the National Council on Welfare, Aboriginal health programs and many other organizations and institutions promoting human rights accountability, have had profound effects on the capacity of civil society organizations to advocate for social rights in Canada.⁷⁶ Moreover, in response to the increased reliance of human rights and environmental organizations on charitable donations, the federal Minister of Finance has allocated 8 million dollars of special funding to the Canada Revenue Agency to conduct audits of organizations suspected of expending more than ten per cent of their resources on any form of advocacy, including public education, research, meetings or other activities that might promote change to or retention of existing programs, policies or laws. This has had a significant chilling effect across the country, creating a fear that charitable status could be lost by speaking out about violations of human rights where remedies require changes to policy or legislation.⁷⁷

E. Ongoing Engagement with Social Rights

A major strength of the social rights paradigm in Canada is its grounding in evolving international human rights procedures, frameworks and norms. Notwithstanding a hostile domestic climate, Canadian NGOs have continued to engage with all aspects of UN human rights review, adjudication and norm-setting procedures. These have included periodic reviews of Canada undertaken by various UN treaty monitoring bodies; the Universal Periodic Review before the UN Human Rights Council; missions by Special Rapporteurs to Canada; petitions under optional complaints procedures; and investigations into rights violations in Canada conducted by international and regional bodies.⁷⁸ Beyond engaging in these existing mechanisms related to Canada's compliance with international and regional human rights instruments, social rights advocates in Canada have also participated in new

⁷⁶ Maria Gergin, *Silencing Dissent: The Conservative Record* (Ottawa: Canadian Centre for Policy Alternatives, 2011) online: Canadian Centre for Policy Alternatives www.policyalternatives.ca; Kathleen Rodgers & Melanie Knight, " 'You Just Felt the Collective Wind Knocked Out of Us': The Deinstitutionalization of Feminism and the Survival of Women's Organizing in Canada" (2011) 34 *Women's Studies International Forum* 570.

⁷⁷ Voices-voix, *Canada's Human Rights Obligations*, above note 75.

⁷⁸ Civil society and Indigenous initiatives in Canada in relation to these procedures are outlined at CURA, "International and Regional Accountability Initiatives" (2013) online: Social Rights in Canada CURA <http://socialrightscura.ca>.

international developments in the field of social rights. The dynamic evolution of social rights practices, in other countries and at the international level, has provided a framework for advancing social rights at home, despite the comparative inertia of Canadian courts and legislators.

For example, disability rights groups in Canada were actively involved in the negotiation of the text of the new *Convention on the Rights of Persons with Disabilities (CRPD)* and its *Optional Protocol*.⁷⁹ The CRPD provides for self-standing rights to housing, education, health care, work, social security, an adequate standard of living, social protection and the right to live independently in the community and acts as a key reference point for domestic advocacy groups, such as the Council of Canadians with Disabilities, working to advance the rights of people with disabilities in Canada.⁸⁰ Aboriginal representatives from Canada also participated actively in the drafting of the *UN Declaration of the Rights of Indigenous People*, which addresses many social rights issues in the context of Indigenous and treaty rights, colonization and dispossession of Indigenous lands and resources.⁸¹ While Canada was one of the few states refusing to support the UNDRIP when it was adopted by the UN Human Rights Council and the UN General Assembly, the Declaration has been central to social rights advocacy undertaken by Indigenous organizations in Canada. The federal government eventually reversed its position and agreed to endorse the UNDRIP.⁸²

Advocates from Canada were also actively engaged in the ongoing debate over the justiciability of economic, social and cultural rights, including at the Open Ended Working Group mandated by the UN Human Rights Council to consider an *Optional Protocol* to the *ICESCR*⁸³ to establish a complaints procedure for victims of violations of economic and social rights. The adoption on December 10, 2008, and entry into force on May 5, 2013 of

⁷⁹ Council of Canadians with Disabilities, “Canada and the CRPD Archives” (2013) online: Council of Canadians with Disabilities www.ccdonline.ca.

⁸⁰ Council of Canadians with Disabilities, online: Council of Canadians with Disabilities www.ccdonline.ca.

⁸¹ Jackie Hartley, Paul Joffe, and Jennifer Preston, eds, *Realizing the UN Declaration on the Rights of Indigenous Peoples: Triumph, Hope, and Action* (Saskatoon: Purich Publishing, 2010).

⁸² Foreign Affairs, Trade and Development Canada, News Release, No 361, “Canada Endorses the United Nations Declarations on the Rights of Indigenous Peoples” (12 November 2010) online: Foreign Affairs, Trade and Development Canada www.international.gc.ca.

⁸³ Activities in support of the development of the OP-ICESCR are outlined at CURA, “Promoting a Complaints Adjudication Procedure for Social Rights at the International Level: The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights” (2013) online: Social Rights in Canada CURA <http://socialrightscura.ca>.

the OP-ICESCR marked the international community's formal acceptance of the fact that access to adjudication and remedy for rights violations is as fundamental for social rights as it is for civil and political rights claimants. The government of Canada has continued to oppose recognition of the justiciability of social rights and, as noted above, has refused to support, sign or ratify the *OP-ICESCR*⁸⁴. Whatever position governments may take regarding the justiciability of social rights, either internationally or before Canadian courts, however, social rights advocates now operate within this new internationally recognized social rights paradigm. That paradigm now informs not only legal but also political social rights advocacy in Canada.

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While it is undeniable that resources and capacity have been seriously reduced by the Harper government's attacks on human rights and programs that support them, at the same time many new spaces are opening up, and many new actors are becoming involved in social rights advocacy at the domestic level. Current developments in the field of law and in social policy suggest that social rights practice will be more diversified in the future than may have been imagined in the past. On the social policy side, the new federalism and the contracted-out state make it difficult to envisage any comprehensive protection of social rights that does not include multiple actors and a number of different policy areas. In the future, social rights strategies may need to encompass a variety of formal and informal instruments and processes. As the Special Rapporteur on the Right to Food made clear in his recommendations to Canada following his 2013 mission, a food security strategy, for example, will need to engage with a range of policies, programs and instruments, including income security, minimum wage, indigenous rights to land and resources, social security, affordable housing programs, support for alternative food production, land-holding regulation, and new supply management and distribution systems.⁸⁶

As for the legal context for advancing social rights in Canada, the Supreme Court has increasingly moved to diversify the space for rights claims to be heard and enforced. The Court has recognized that a broad array of administrative decision-makers and tribunals must actively engage with

⁸⁴ Above note 8.

⁸⁵ The claim in *Tanudjaja v Attorney General (Canada) (Application)*, above note 70, is an example of legal advocacy informed by the international human rights paradigm. An example of a political initiative informed by recent developments internationally is Bill C-400, *An Act to ensure secure, adequate, accessible and affordable housing for Canadians*, 1st Sess, 42nd Parl, 2012 (first Reading 16 February 2012). See generally Bruce Porter's discussion in Chapter 1 in this book.

⁸⁶ *Report of the Special Rapporteur on the right to food*, above note 5.

human rights norms.⁸⁷ This means that rights must be protected at the level where decisions affecting rights are made: both where they are put at risk and where decision-making can play a constructive role in realizing rights. In two of its most important *Charter* cases in the social rights area: *Eldridge v British Columbia (Attorney General)*⁸⁸ and *Canada (Attorney General) v PHS Community Services Society (Insite)*⁸⁹, the Supreme Court has drawn attention to the fact that substantive rights, such as access to health care for vulnerable groups, may often depend more on the quality of delegated decision-making than on the precise wording or explicit provisions of any applicable legislation. By articulating a standard of reasonable decision-making, consistent with the *Charter* and international human rights, the Court has opened up an expanded field of government decision-making to review for compliance with domestic and international social rights norms.⁹⁰ The scope of protection for social rights in Canadian law is unlikely to be resolved by a single administrative or *Charter* decision answering for all time the question, left open in the *Irwin Toy* case, of the status of social and economic rights under the *Charter*. Rather, the answer will evolve as a number of administrative and judicial bodies confront the questions that have been put before them as a result of the Supreme Court's opening-up of new spaces in which social rights-related claims can be advanced.

F. Moving Forward: New Avenues for Social Rights Practice

What is required, then, to advance social rights in Canada? On the one hand, it will be important to maintain a commitment to international human rights and to equality-seeking social movements – the twin foundations of social rights in Canada. As described above, the human rights paradigm that has emerged internationally has strong resonance with the ideal of substantive equality as it has been articulated and pursued by women's, disability and other equality seeking groups in Canada over the past four decades. The critical links between domestic and international human rights has been under assault from recent governments in Canada, but they continue to be solid at the civil society level. On the other hand, it will be necessary to diversify social rights practice: to take advantage of the variety of *fora* that are now available for advancing social rights claims in Canada; to address the

⁸⁷ See Lorne Sossin and Andrea Hill's discussion of the dissemination of rights adjudication to a wide range of administrative tribunals in Chapter 11 of this book.

⁸⁸ [1997] 3 SCR 624.

⁸⁹ 2011 SCC 44 [*Insite*]; Matthew Rottier Voll, "PHS Community Services Society v Canada (Attorney General): Positive Health Rights, Health Care Policy, and Section 7 of the *Charter*" (2011) 31 Windsor Rev Legal Soc Issues 41. These cases are discussed by Martha Jackman & Bruce Porter in Chapter 2 and by Margot Young in Chapter 14 of this book.

⁹⁰ See the analysis by Lorne Sossin and Andrea Hill in Chapter 11 of this book.

challenges of the contracted-out state and downloading of social service delivery; and to engage more constructively with new models of federalism. It will also be important to ensure that the new social rights paradigm is inclusive of experiences of Aboriginal communities, people with disabilities, racialized groups, migrants and others who have been marginalized, not only from mainstream politics but, all too often, from the human rights movement itself.

This book emerged from a Social Sciences and Humanities Research Council of Canada (SSHRC) Community-University Research Alliance (CURA) project entitled: “Reconceiving Human Rights for the New Social Rights Paradigm.” The SSHRC’s CURA program and the CURA research project we co-directed provided unique opportunities to link innovative academic research in domestic and international social rights law and policy to community based social rights initiatives in a wide range of fields of human rights practice. The CURA grant enabled us to bring a number of Quebec and Canadian academics and activists together for a symposium on emerging approaches to social rights practice, leading to the publication of this edited collection, which includes contributions by many of the CURA researchers and collaborators. The book provides examples of just some of the wide range of new spaces, approaches, and opportunities for advancing social rights in Canada. It is hoped, however, that the underlying methodology and commitment evidenced by the authors in the book, including both academics and community-based social rights advocates, will act as a catalyst for ongoing work and networking in this critical area of research.

In the first chapter Bruce Porter explores how proposals for rights-based housing and anti-poverty strategies in Canada have opened an important new space for advancing social rights. He considers how the new paradigm of social rights, as claimable rights under international law, can provide a framework for such domestic strategies. Porter proposes a more robust integration of rights and social policy, to engage directly with Canada’s international human rights law obligation to progressively realize social rights to the maximum of available resources. He suggests how the standard of “reasonableness” that has been adopted under the new *OP-ICESCR*⁹¹ offers a normative framework for housing and anti-poverty strategies in Canada. And he explains how such strategies must entail coherent and coordinated initiatives engaging multiple levels of government, Aboriginal peoples, and other stakeholders; incorporating goals and timelines; and providing effective claiming, adjudication and monitoring procedures.

In the second chapter Martha Jackman and Bruce Porter consider the implications of evolving domestic constitutional and human rights jurisprudence for the protection of social rights to housing, food and an adequate standard of living, in order to assess whether a rights-based

⁹¹ *OP-ICESCR*, above note 8.

framework for housing and anti-poverty strategies can also be found in the Canadian *Charter*. Examining recent Supreme Court case law on the right to life and security of the person under section 7 and the Court's professed return to a substantive approach to equality under section 15, the authors contend that there is ample room for the courts to address Canadian governments' failure to combat widespread homelessness, hunger and poverty, as violations of the *Charter*. They further argue that the reasonableness of government action and inaction in relation to poverty and homelessness can be effectively assessed under section 1 of the *Charter*. Beyond judicial recognition of social rights claims, however, the authors suggest that rights-based federal, provincial/territorial and municipal anti-poverty and housing strategies are urgently required.

In the third chapter, Vincent Greason provides a critical assessment of existing anti-poverty strategies both in Quebec and in other Canadian provinces. Greason finds that anti-poverty strategies have been shaped by the context in which they were created: one of neoliberal consolidation, reduced taxation, and offloading of state responsibilities to non-state entities. He identifies five common themes in provincial anti-poverty initiatives: i) the repackaging of poverty as a social rather than material deprivation; ii) a focus on poverty measurement rather than poverty elimination; iii) emphasis on individual responsibility; iv) integrating philanthropic organizations as key actors, and; v) reframing social services to address a range of social needs rather than addressing economic deprivation. Greason notes that two themes have been markedly absent from anti-poverty strategies: attention to growing income disparities and the incorporation of a human rights framework for fighting poverty. Greason calls for a reorientation of anti-poverty strategies in Quebec and Canada, around a framework of social rights and redistributive justice.

In the fourth chapter, Barbara Cameron provides an updated analysis of the federal spending power as an instrument for advancing social rights in Canada. She argues that there are three distinct accountability relationships implicated in federal transfers to fund provincial social programs: the social rights relationship (legislature to citizen); the federal relationship (federal to provincial executive); and the responsible government relationship (executive to legislature). By distinguishing these three sets of accountability relationships, Cameron is able to identify three corresponding accountability regimes that have governed federal social transfers in Canada: the administrative accountability regime, seen in the *Canada Assistance Plan*;⁹² the political accountability regime, evident in the *Canada Health Act*;⁹³ and the public reporting accountability regime, associated with the Social Union Framework agreements. Cameron finds that none of these is entirely satisfactory and she proposes an alternative accountability regime that would

⁹² *Canada Assistance Plan*, above note 46.

⁹³ *Canada Health Act*, above note 45.

affirm the expansion of the social citizenship rights of members of Canadian society as the primary purpose of federal social transfers.

In the fifth chapter, Marie-Ève Sylvestre and Céline Bellot develop a critical understanding of homelessness as a human rights issue by documenting and assessing discriminatory and punitive responses to homelessness in Canada. The authors argue that an analysis of the discriminatory discourses that prevail in relation to homeless people strongly supports the recognition of homelessness as an analogous ground of discrimination, as well as supporting housing rights claims under sections 7 and 15 of the *Charter*. The authors contend that the courts must consider the complexity of embedded social structures and interactions at play in this area, understanding homelessness as a social construct and characteristic that is difficult for affected individuals to change. Recognizing the discriminatory underpinnings of, and responses to, homelessness should also lead, in Sylvestre's and Bellot's view, to a reorientation of social programs to address the structural causes of homelessness and the reversal of cuts to income support, housing and employment programs that have been part of the punitive responses to homelessness in Canada in recent years.

In the sixth chapter Kerri Froc explores the interdependence of equality and social rights, analyzing how Canadian courts have dealt with discrimination linked to socioeconomic status and women's right to just conditions of work in section 15 *Charter* cases. She finds that in cases involving women at work, the test for analogous grounds, initially sensitive to social and historical context and power relations, has been increasingly applied as a hard status/conduct binary. The formerly contextualized concept of "discrete and insular minorities" has, in Froc's view, been fused with a static notion of immutability, undermining women's legitimate claims to equality and denying discrimination in cases of mutable, gendered conduct that is fundamentally linked to women's socio-economic inequality. Froc argues that recognizing the gendered nature of women's work would shift the focus of discrimination analysis from considerations of immutability to how systems of economic and gender subordination operate in fact to construct women's work.

In Chapter Seven, Shelagh Day, Gwen Brodsky and Yvonne Peters, analyze the current legal landscape for litigating the substantive equality rights of people with disabilities. While the Supreme Court's decisions in *British Columbia (Public Service Employee Relations Comm.) v BCGEU (Meiorin)*⁹⁴ and *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights) (Grismer)*⁹⁵ were cause for optimism that the courts would take adverse effects discrimination seriously, and apply the duty to accommodate so as to engage with systemic obstacles to

⁹⁴ [1993] 3 SCR 3.

⁹⁵ [1999] 3 SCR 868.

equality, the authors describe how subsequent human rights case law has regressed toward a minimalist version of accommodation. The authors note, however, that in the recent *Moore v British Columbia (Education)*⁹⁶ decision, the Supreme Court rejected the formalistic use of a comparator group and rejected a narrow conception of services available to the public. They explain that this positive development comes at a time when Canada's ratification of the UN *Convention of Rights of People with Disabilities*⁹⁷ should also provide domestic tribunals and courts with motivation for fusing social rights with substantive equality analysis and recommitting to the promise of social transformation and inclusion of persons with disabilities that is at the core of the section 15 equality guarantee.

In chapter eight, Vince Calderhead and Claire McNeil reflect on their experience representing low income consumers of electricity in Nova Scotia, in the *Boulter v Nova Scotia Power Incorporated (Boulter)*⁹⁸ case, challenging a legislative provision prohibiting utilities monopolies from adjusting rates based on ability to pay. The authors point explain that, while most social rights equality litigation has addressed unequal access to government services or benefits, the *Boulter* case raised the important issue of inequalities in accessing essential services provided by private actors; the regulatory responsibilities of governments to ensure access by all who are in need; and the expense rather than the income side of household finances. The authors point out that what the courts found particularly challenging in *Boulter* was the idea of applying constitutional equality rights to market pricing. While the litigation was ultimately unsuccessful, the issues raised in the case were critical for those living in poverty and the authors suggest that the basis for the *Boulter* decision may ultimately be revisited in light of more recent Supreme Court jurisprudence rejecting formal comparator group analysis.

In Chapter nine, Constance MacIntosh assesses the viability of new approaches to litigating Aboriginal claims to the right to water in Canada, focusing on whether fiduciary law creates an actionable right to safe drinking water for Aboriginal peoples living on reserves. Reviewing the shocking state of water safety on reserves, the author points out that the Crown has not only offloaded to First Nations governments the responsibility to meet water quality standards which the Crown had previously failed to meet, it has also failed to provide First Nations with the facilities or resources that would enable them to meet these basic standards. Such policies do not, MacIntosh argues, comply with standards of reasonableness and due diligence under fiduciary law. While the author notes that Canada has resisted recognizing the right to water under international human rights law, that right is now firmly established internationally as a component of treaties ratified by

⁹⁶ 2012 SCC 61.

⁹⁷ *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, UNGAOR, 61st Sess, Supp No 49, UN Doc (2007).

⁹⁸ 2009 NSCA 17.

Canada, and provides reinforcement for a rigorous standard of review of whether the Crown has met its fiduciary duties towards First Nations.

In Chapter Ten, Alana Klein considers new avenues for advancing the right to health in Canada, focusing on the challenging issue of human rights scrutiny of health resources distribution. Reviewing the current state of *Charter* jurisprudence on the issue of health care equity, Klein observes a judicial reticence to engage with critical issues of resource distribution and considers what benefits judicial review of health care decisions may offer. Since Canadian provinces have come to rely on participation and accountability to drive more responsive resource allocation, Klein suggests that promoting participatory and accountable governance at the provincial and local levels may be an avenue for activism in support of the right to health in Canada. The existence of accountability and participation requirements at the local level might then serve to enhance judicial confidence in addressing human rights claims, and enable health policy decision-making to be more responsive to rights-based claims and adjudication. Klein suggests that international actors may also play an important role in monitoring the outcome of participatory governance in Canadian health care.

In Chapter Eleven, Lorne Sossin and Andrea Hill consider the possibilities for advancing social rights in the crucial area of administrative decision-making. As the focus of social rights compliance has turned toward government plans and policies, the authors contend that the role of agencies, boards, and commissions charged with implementing those plans and policies must be better recognized as a critical area of social rights compliance and implementation. In particular, they argue that such bodies should create a meaningful and accessible system of establishing and protecting social rights, by firmly rooting adjudication in constitutional and international human rights commitments; in the practical realities of the administrative justice system; and in the lived experiences of the parties who come before them. While the Supreme Court's recent decision to adopt a new robust standard of administrative law reasonableness, in *Doré v Barreau du Québec*,⁹⁹ offers significant potential for protection of social rights in day to day administrative decision-making, the authors raise the concern that, without adequate resources, administrative tribunals will not be able to fulfill the critical role that has now been assigned to them.

In Chapter twelve, Sylvie Paquerot examines the practical application of the principle of the interdependence of environmental and human rights in the work of the *Ligue des droits et libertés du Québec (Ligue)*. She explains that the *Ligue* first focused on the connection between procedural rights and environmental protection: advocating against Strategic Lawsuits Against Public Participation (SLAPPs), used by corporations in an attempt to silence environmental challenges. Later the *Ligue* advocated more substantively for rights to water, health and self-determination, in its opposition to fracking for

⁹⁹ 2012 SCC 2012.

shale gas in Quebec. The author suggests that situating environmental issues within a human rights framework allowed the *Ligue* to reinforce principles of environmental responsibility, both politically and judicially. She advocates further alliances between human rights and environmental groups, proposing a transformation of sector-specific advocacy into a more comprehensive and inclusive affirmation of the right to public participation in social and environmental decisions, mobilizing around the right to ‘say no’ to development that would undermine social and environmental rights.

In Chapter Thirteen, Graham Mayeda engages with another critical question for social rights advocacy: the relationship between courts and social protest movements. Mayeda analyses how courts in Canada have traditionally considered the right to protest in terms of competing rights or claims to public space, pitting protestors’ right to freedom of expression against the rights of residents to walk their dogs or use parks for recreational purposes, and linking the rights of dog-walkers, rather than the rights of protestors, to the public interest. In opposition to the competing rights paradigm, Mayeda outlines a social rights approach that would promote legal rules that facilitate rather than silence protest. Drawing on the transformative dimension of social rights emphasized in South African commentary and jurisprudence, Mayeda proposes that a social rights approach recognize and support the transformative role of public protest and social conflict in a democratic state. He further urges the courts to recognize deliberative democracy as a core public interest and acknowledge and facilitate claims made by the public against the ‘justice’ of the existing social order.

In the final chapter, Margot Young reflects on judicial responses to neoliberalism and widening socio-economic inequality in Canada in the adjudication of recent claims under sections 7 and 15 of the *Charter*. Focusing on the *Victoria (City) v Adams*¹⁰⁰ and *Insite*¹⁰¹ cases, she argues that rights claims must be contextualized in the spatial aspect of struggles for equality and justice. The author suggests that in both of these cases, consideration of the social context of poverty and homelessness is critical, but that context also has a geographical and spatial dimension. She points out that rights claims advanced in these cases demanded a re-shaping of city space around the realization of a social right. Young finds that the legal victories in *Adams* and *Insite* are localized, however, leaving the systemic barriers to realizing social rights largely intact. Effective challenges to neoliberal inequality within urban landscapes will, according to Young, require a broader re-ordering and re-allocation, and thus a re-production, of spaces and civic geography.

G. Conclusion

¹⁰⁰ 2009 BCCA 563.

¹⁰¹ *Insite*, above note 89.

The contributors to this book hope to advance social rights in Canada by outlining opportunities and challenges in a wide range of fields. Provincial and national housing and anti-poverty strategies may be transformed by a revitalized social rights paradigm. So too may new and existing accountability regimes within Canadian federalism. Substantive equality can be reconceived and updated by addressing discriminatory and punitive responses to homelessness; by relinquishing the judicial obsession with immutability as a marker of disadvantage; by reconceptualizing reasonable accommodation of disability; and by engaging with governments' obligations to regulate private actors. Relationships between Aboriginal communities and the Crown may be recontoured through recognition and enforcement of Aboriginal and treaty related social rights claims. Health care adjudication and administrative decision-making can become new spaces for the pursuit of social rights claims. Incorporating environmental rights, social protest, and the struggles of marginalized communities in Canadian inner-cities may give rise to a more inclusive, comprehensive and creative human rights practice. All of these advances would engage social rights claimants in a revitalized, more inclusive human rights movement in Canada.

The central role of social rights as a response and corrective to inequality and exclusion within Canada's constitutional democracy may be profoundly threatened – but not lost. The social rights paradigm that emerged in Canada in the pre-*Charter* period continues to be embraced by an increasingly wide range of constituencies. The reasons are clear. Social rights are interdependent with, and indivisible from, civil and political rights. They speak in a more direct way to aspects of material well-being that are necessary conditions for full and effective participation in social, economic and political life. Social rights are founded upon a more holistic understanding of both government and citizenship. They do not simply restrain governments. They reflect and reinforce the indispensable role of governments in ensuring the wellbeing of individuals, households and communities. They engage with the need for ongoing social transformation and structural change that flows from providing fair hearings to previously silenced voices and unheard claims. Social rights remain fundamental to recognizing the unique circumstances and needs of equality seeking and marginalized groups and to giving real effect to equality.

As Justice Cory observed in his concurring judgment for the majority of the Supreme Court in *Vriend v Alberta*, the notion of equality and the “just society” as core values require more than rhetorical affirmation if they are to continue to define our collective identity:

The rights enshrined in s. 15(1) of the *Charter* are fundamental to Canada. They reflect the fondest dreams, the highest hopes and finest aspirations of Canadian society.... It is easy to praise these concepts as providing the foundation for a just society which permits every individual to live in dignity and in harmony

with all. The difficulty lies in giving real effect to equality. Difficult as the goal of equality may be it is worth the arduous struggle to attain.¹⁰²

The gap between our national self-image and the reality of rights violations perpetrated by Canadian governments at home and abroad can no longer be filled with reassuring affirmations of shared values of equality and the just society. If we are to engage in the “arduous struggle” that is at the heart of the social rights/equality paradigm, poverty, homelessness, hunger and Aboriginal dispossession in the midst of affluence and unsustainable development must be understood first and foremost as human rights violations demanding urgent and concerted attention. Canada is at a crossroads. Social justice, equality and inclusiveness require a broad re-engagement with the international human rights project and a recommitment to the transformational goals that were embraced by equality seeking groups and others in the early years of Canada’s constitutional democracy.

Social rights practice in Canada need not start from scratch. It is not a matter of renegotiating the content of constitutional rights in Canada but rather of retrieving and building on the existing domestic and international human rights foundation. Key questions about the scope and meaning of relevant *Charter* provisions remain open. Evolving international human rights norms continue to be accepted by courts, at least in theory, as relevant and persuasive in interpreting and applying domestic law. Canada remains a state party to UN treaties guaranteeing social rights. There is a lot to work with. However, the time has come for us to choose the kind of country we want to live in. The contributors to this book have sketched the beginnings of a blueprint for reconceiving and retrieving social rights in a range of spheres of human rights practice, both political and legal. Meaningful advances in social rights in Canada will, however, depend on a broader commitment to renew and update the struggle to realize social rights and equality, among legislators and policy makers, administrative decision-makers and tribunals, Canadian courts at all levels, and within civil society itself. This book can only offer direction: the choice to commit to social rights is one we must all make.

¹⁰² *Vriend v Alberta*, [1998] 1 SCR 4 at para 68.

34.	Martha Jackman, " One Step Forward and Two Steps Back: Poverty, the Charter and the Legacy of Gosselin " (2019) 39 NJCL 85.
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One Step Forward and Two Steps Back: Poverty, the Charter and the Legacy of Gosselin

Martha Jackman*

In 2002, the Supreme Court of Canada dismissed Louise Gosselin's Charter challenge to a Québec welfare regulation that reduced benefits for those under-30 by two-thirds, forcing them to choose between hunger and homelessness. The article examines the legacy of Gosselin for the rights and constitutional inclusion of people living in poverty. It first considers the important jurisprudential step forward in the case: the Supreme Court's rejection of the argument, at odds with the expectations of disadvantaged groups and with Canada's international socio-economic rights obligations, that s. 7 cannot impose positive obligations on governments. The article then considers the court's two steps back in the Gosselin case: the majority's approach to the evidence and its treatment of Louise Gosselin's substantive argument. The article argues that Charter claimants in poverty cases continue to face prejudicial stereotypes and disproportionate evidentiary burdens. Their s. 7 claims are also consistently reframed by the courts and then found to be non-justiciable. The article concludes that the Supreme Court's failure to revisit Gosselin, or even to grant leave to appeal in any poverty case since then, represents a serious failure of constitutionalism in Canada.

En 2002, la Cour suprême du Canada a rejeté la contestation constitutionnelle déposée par Louise Gosselin à l'encontre d'une réglementation québécoise en matière d'aide sociale ayant réduit de deux tiers les prestations versées aux personnes de moins de trente ans, obligeant ces derniers à choisir entre la faim et l'itinérance. Dans cet article, l'auteure analyse l'impact de la décision rendue dans l'affaire Gosselin sur les droits et l'inclusion constitutionnelle de personnes vivant en situation de pauvreté. Elle considère tout d'abord l'importante affirmation, du point de vue jurisprudentiel, que l'on retrouve dans la décision : le rejet par la Cour suprême de l'argument selon lequel l'article 7 de peut imposer d'obligations positives aux gouvernements, le tout en contradiction avec les attentes des groupes désavantagés et les obligations internationales du Canada en matière de droits sociaux économiques. L'auteure s'intéresse ensuite aux reculs effectués dans l'affaire Gosselin : l'approche des juges majoritaires concernant les éléments de preuve et leur traitement de l'argument de fond articulé par Louise Gosselin. L'auteure fait valoir que les demandeurs qui invoquent la Charte dans des dossiers se rapportant à la pauvreté vont continuer de faire l'objet de stéréotypes défavorables et de subir des fardeaux de preuve disproportionnés. Leurs

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réclamations fondées sur l'article 7 sont également constamment recadrées par les tribunaux et considérées comme étant non justiciables. L'auteure conclut que le fait que la Cour suprême n'ait pas procédé à la révision de la décision rendue dans l'affaire Gosselin, voire de refuser toute autorisation d'appel depuis cet arrêt dans tous les cas soulevant la question de la pauvreté constitue un échec important du constitutionnalisme au Canada.

1. INTRODUCTION

In his 1989 judgment for a unanimous court in *Irwin Toy Ltd. c. Québec (Procureur général)*,¹ former Chief Justice Brian Dickson concluded that the intentional exclusion of property rights from s. 7 of the *Canadian Charter of Rights and Freedoms*² meant that “corporate-commercial economic rights” were not protected. He went on to affirm, however, that s. 7’s guarantee of security of the person could be read to include “economic rights fundamental to human life or survival.”³ As Chief Justice Dickson explained:

Lower courts have found that the rubric of ‘economic rights’ embraces a broad spectrum of interests, ranging from such rights included in international covenants, as rights to social security, equal pay for equal work, adequate food, clothing and shelter, to traditional property rights. To exclude all of these at this early moment in the history of *Charter* interpretation seems to us to be precipitous.⁴

In the late 1980s, Louise Gosselin launched such a socio-economic rights challenge, to a welfare regulation in Québec that reduced benefits for recipients under the age of 30 to one-third the amount the government had determined was required to meet basic needs.⁵ Ms. Gosselin argued the regulation was not only age-discriminatory, but violated Québec and Canadian *Charter* guarantees of security of the person.⁶ Ten years later, in *Gosselin c. Québec (Procureur général)*,⁷ the Supreme Court of Canada dismissed Ms. Gosselin’s claim that setting social assistance rates for young welfare recipients at 80% below the

¹ 1989 CarswellQue 115F, 1989 CarswellQue 115, (*sub nom.* *Irwin Toy Ltd. v. Quebec (Attorney General)*) [1989] 1 S.C.R. 927 (S.C.C.) at 1003 [*Irwin Toy*].

² *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c. 11 [*Charter*].

³ *Irwin Toy*, *supra* note 1 at 1003-1004.

⁴ *Ibid.*

⁵ *Gosselin c. Québec (Procureur général)*, 2002 CarswellQue 2706, 2002 CarswellQue 2707, (*sub nom.* *Gosselin v. Quebec (Attorney General)*) [2002] 4 S.C.R. 429 (S.C.C.) [*Gosselin* (SCC)], affirming 1999 CarswellQue 1203, [1999] R.J.Q. 1033 (C.A. Que.) [*Gosselin* (CA)], affirming 1992 CarswellQue 1685, [1992] R.J.Q. 1647 (C.S. Que.) [*Gosselin* (SC)].

⁶ *Gosselin* (SCC), *ibid.* (*Factum of the Appellant* at para. 18).

⁷ *Gosselin* (SCC), *ibid.*

poverty line⁸ was unconstitutional. In her majority judgment, Chief Justice McLachlin held that, although s. 7 might one day be interpreted as imposing positive obligations on Canadian governments to guarantee adequate living standards, the evidence was insufficient to prove a *Charter* violation in the *Gosselin* case.⁹

This article will examine the legacy of *Gosselin* for the s. 7 rights and constitutional inclusion of people living in poverty in Canada.¹⁰ After summarizing the facts and outcome in the case, the article will consider the step forward taken by the Supreme Court in *Gosselin*: its rejection of the argument that s. 7 cannot impose positive obligations on governments. The article will then examine the court's two steps back: first, the majority's approach to the evidence and, second, its approach to Louise Gosselin's substantive claim, leading it to conclude that the life, liberty and security of young welfare recipients were not infringed by a provincial regulation that effectively forced them to chose between hunger and homelessness.¹¹ The article will conclude that the legacy of *Gosselin* is a *Charter* being interpreted and applied by the courts to exclude those most in need of its protection.

2. THE GOSSELIN CASE

In a class action brought on behalf of herself and other young welfare recipients in Québec between 1985 and 1989, Louise Gosselin challenged s. 29(a) of the *Regulation respecting Social Aid*.¹² That provision, which came into effect

⁸ In 1987 the benefit rate for those under-30 was \$170/month as compared to Statistics Canada's low-income cut-off of \$914/month for a single person living in a large metropolitan area; *Gosselin* (SCC), *ibid.* at para. 7; *Gosselin* (SC), *supra* note 5 at 1660.

⁹ *Gosselin* (SCC), *ibid.* at paras. 82-83.

¹⁰ For recent overviews of the incidence and impact of poverty in Canada, see: Citizens for Public Justice, *Poverty Trends 2017* (Ottawa: Citizens for Public Justice, 2017) [*Poverty Trends 2017*]; Canadian Centre for Policy Alternatives, *High Stakes, Clear Choices: Alternative Federal Budget 2017* (Ottawa: Canadian Centre for Policy Alternatives, 2017) 118-121. See also: Canada Without Poverty & Citizens for Social Justice, *Dignity for All: A National Anti-poverty Plan for Canada* (Ottawa: Dignity for All, 2015); Melissa Brittain & Cindy Blackstock, *First Nations Child Poverty: A Literature Review and Analysis* (Ottawa: First Nations Children's Action Research and Education Service, 2015); Valerie Tarasuk, Andy Mitchell & Naomi Dachner, *Household Food Insecurity in Canada, 2014* (Toronto: Research to Identify Policy Options to Reduce Food Insecurity (PROOF), 2014); House of Commons Standing Committee on Human Resources, Skills and Social Development and the Status of Persons with Disabilities, *Federal Poverty Reduction Plan: Working in Partnership Towards Reducing Poverty in Canada* (November 2010) (Chair: Candice Hoepfner); Senate, Subcommittee on Cities of the Standing Senate Committee on Social Affairs, Science and Technology, *In from the Margins: A Call to Action on Poverty, Housing and Homelessness* (December 2009) (Chair: Honourable Art Eggleton, PC).

¹¹ *Gosselin* (SC), *supra* note 5 at 1659.

¹² *Regulation Respecting Social Aid*, R.R.Q., c. A-16, r. 1, s. 29(a) [*Regulation*].

when Québec's *Social Aid Act*¹³ was adopted in 1969, reduced the level of financial assistance for those under 30 to roughly one third of the "basic needs amount" deemed under s. 23 of the *Regulation* to be required to meet a recipient's basic needs for food, clothing, personal and household requirements, and shelter.¹⁴ In 1987, for example, while those over the age of 30 were entitled to the basic needs amount of \$466/month, recipients under the age of 30 received two-thirds less, or roughly \$170/month.¹⁵

Amendments to the social assistance regime introduced by the Québec government in 1984 enabled young welfare recipients to increase their benefits to the basic needs amount — still almost 50% below the poverty line¹⁶ — if they participated in on-the-job training or community work programs. Benefits could be increased to within \$100 of the basic needs amount through participation in remedial education programs.¹⁷ There were, however, significant administrative delays and numerous barriers to participation in all three programs, compounded by an absolute shortage of available placements.¹⁸ By the province's own calculations 85,000 young recipients were vying with recipients over the age of 30 (who could also increase their benefits through program participation) for only 30,000 spaces.¹⁹ As a result, only 11% of recipients under the age of 30 achieved the full basic needs amount while 73%, including Louise Gosselin for most of the relevant period, were forced to subsist on the \$170/month rate.²⁰

(a) Louise Gosselin's *Charter* Claim

Louise Gosselin argued that s. 29(a) of the *Regulation* violated the right to security of the person under s. 7 of the Canadian *Charter*; the prohibition against age discrimination under s. 15; and the right to "an acceptable standard of living" under s. 45 of Québec's *Charter of Human Rights and Freedoms*.²¹ The

¹³ *Social Aid Act*, R.S.Q., c. A-17.

¹⁴ *Regulation*, *supra* note 12, s. 23; *Gosselin* (SCC), *supra* note 5 para. 171; *Gosselin* (SC), *supra* note 5 at 1650-51.

¹⁵ *Gosselin* (SCC), *ibid.* at para. 7; *Gosselin* (SC), *ibid.* at 1650.

¹⁶ *Gosselin* (SC), *ibid.*, at 1661.

¹⁷ *Regulation Respecting Social Aid*, *supra* note 12, s. 35; *Gosselin* (SCC), *supra* note 5 at paras. 159-162; *Gosselin* (SC), *ibid.* at 1652, 1662.

¹⁸ *Gosselin* (SCC), *ibid.* (*Factum of the Appellant* at paras. 114-128); *Gosselin* (SCC), *ibid.* at paras. 158-163, 276-286.

¹⁹ *Gosselin* (SCC), *ibid.* (*Factum of the Appellant* at para. 114); *Gosselin* (SCC), *ibid.*, at para. 283.

²⁰ *Gosselin* (SCC), *ibid.*, at para. 276.

²¹ *Charter of Human Rights and Freedoms*, R.S.Q. c. C-12, s. 45 [Québec *Charter*]. Section 45 provides: "Every person in need has a right, for himself and his family, to measures of financial assistance and to social measures provided for by law, susceptible of ensuring such person an acceptable standard of living." See generally: Pierre Bosset & Lucie Lamarche, eds, *Droit de cité pour les droit économiques, sociaux et culturels: La Charte*

evidentiary record submitted by Ms. Gosselin²² in support of her claim included expert evidence from economists and current and former government officials in the fields of social policy, income security, labour, youth services and education, as well as testimony from a social worker, a dietician, a psychologist, and a physician in a community health practice who had worked closely with young welfare recipients. Ms. Gosselin also submitted extensive documentary evidence, including World Health Organization, Canadian and provincial government and non-governmental reports, statistics and studies.²³ Finally, Ms. Gosselin described the impact of the *Regulation* on her own life, including her efforts to survive on the under-30 rate and to access the on-the-job training, community work and remedial educations programs.²⁴

The expert evidence showed that youth living on the reduced rate were malnourished, socially isolated, often homeless, and in poor physical and psychological health.²⁵ In the words of the trial judge: “Leur situation économique précaire les prive de toute vie sociale et affecte leur santé mentale.”²⁶ Young recipients were faced with an impossible choice: “Le dilemme de ces jeunes est de payer un maigre loyer et de quêter la nourriture, ou de se passer de loyer et de s’abriter tant bien que mal afin d’utiliser le petit montant qu’ils reçoivent pour se nourrir.”²⁷ Some recipients resorted to prostitution and selling drugs to earn enough money to pay their rent; others attempted suicide.²⁸ Lack of stable housing, a phone, or presentable clothing made it difficult for recipients to find work. One expert queried: “Quel employeur ira engager une personne qui ne peut pas lui donner un numéro de téléphone pour le rappeler quand des postes ouvrent? Quel employeur ira engager un jeune avec des trous dans ses vêtements?”²⁹

québécoise en chantier (Cowansville : Éditions Yvon Blais, 2011); David Robitaille, *Normativité, interprétation et justification des droits économiques et sociaux: les cas québécois et sud-africain* (Brussels : Éditions Bruylant, 2011) [Robitaille, *Droits économiques et sociaux*].

²² At the Supreme Court of Canada, the record in *Gosselin* totalled 19 volumes and some 5000 pages; see: < <http://www.scc-csc.ca/case-dossier/info/dock-regi-eng.aspx?cas=27418> > .

²³ *Gosselin* (SC), *supra* note 5 at 1655-1661.

²⁴ *Gosselin* (SCC), *supra* note 5 (*Appellant’s Record, Testimony of Louise Gosselin*, vol 1).

²⁵ *Gosselin* (SC), *supra* note 5 at 1658-59.

²⁶ *Ibid.* at 1659 [author’s translation: “Their precarious economic situation deprives them of any social life and affects their mental health.”].

²⁷ *Ibid.* at 1659 [author’s translation: “The dilemma facing these young people is whether to pay for meagre lodging and beg for their food or to forego rent and find whatever shelter they can, in order to use the small amount they receive to feed themselves.”].

²⁸ *Ibid.* at 1658.

²⁹ *Ibid.* at 1659 [author’s translation: “What employer would hire a person who couldn’t provide a telephone number to call when a position opened? What employer would hire a youth with holes in their clothes?”].

Louise Gosselin's direct experience of the *Regulation* was one of acute material and psychological insecurity, deprivation and indignity. She was often hungry, in constant fear of not having enough to eat, and suffering symptoms of malnourishment, including anxiety, fatigue, vulnerability to infections and illness, and lack of concentration.³⁰ In order to obtain food, she was forced to rely on her family and resorted to soup kitchens and other charity-run food programs. As she put it: "Quand quelqu'un me donnait à manger, j'y allais."³¹ Ms. Gosselin lived in unsafe and substandard housing, and was frequently homeless. She described one basement apartment in which she spent the winter: "C'était mal éclairé, il y avait des 'bibittes' partout, ce n'était pas chauffé, j'avais loué chauffé au propriétaire mais on gelait comme des rats, j'avais les pieds bleus l'hiver, j'avais tellement mal aux chevilles que j'avais de la difficulté à marcher, puis j'avais froid."³² At times, she exchanged sex for money, food or a place to stay.³³ Ms. Gosselin testified that, of all the things she lacked, paid employment was what she most wanted: "Des amis, avoir une vie sociale, avoir, travailler, ce n'est pas compliqué, moi tout ce que je pensais c'était avoir un travail."³⁴ But finding and keeping work under such circumstances was virtually impossible:

Bon il n'y a jamais personne qui m'a rappelée, j'étais incapable de me présenter convenablement devant un employeur puis de me vendre comme bonne ouvrière, j'étais complètement démunie au niveau de l'estime de moi-même puis au niveau de la confiance en moi, mes repas n'étaient pas équilibrés, ma vie sociale non plus, je n'avais absolument rien pour être en forme, pour pouvoir travailler premièrement là, alors souvent les endroits étaient complets.³⁵

Ms. Gosselin pointed out that: "Le système d'aide social constitue le dernier recours des personnes dans le besoin. Pour être admissible aux prestations d'aide sociale, une personne doit être totalement privée de moyens de subsistance. Ce n'est pas par choix que ces personnes s'adressent à l'État, c'est par nécessité

³⁰ *Ibid.* at 1658.

³¹ *Gosselin (SCC)*, *supra* note 5 (*Appellant's Record, Testimony of Louise Gosselin*, vol 1 at 134) [author's translation: "When someone gave me food, I went."].

³² *Ibid.*, (*Appellant's Record, Testimony of Louise Gosselin*, vol. 1 at 106) [author's translation: "It was badly lit, there were bugs everywhere, it wasn't heated. I rented it from the landlord heated but we froze like rats, my feet were blue all winter, my ankles hurt so much that I had trouble walking and I was cold."].

³³ *Gosselin (SC)*, *supra* note 5 at 1655.

³⁴ *Gosselin (SCC)*, *supra* note 5 (*Appellant's Record, Testimony of Louise Gosselin*, vol 1 at 111) [author's translation: "Friends, having a social life, having things, working, it's not complicated, all I thought about was having a job."].

³⁵ *Ibid.* (*Appellant's Record, Testimony of Louise Gosselin*, vol 1 at 110) [author's translation: "Well, there was never anyone who called me back. I was unable to present myself properly to an employer and to sell myself as a good worker, I was completely lacking in terms of self-esteem and in terms of self-confidence, my meals weren't balanced, my social life wasn't either, I had absolutely nothing to keep myself together, to work, so often the places were filled."].

absolue.”³⁶ Ms. Gosselin alleged that, by reducing benefits for those under-30 far below the minimum the Québec government itself had determined was required to meet an individual’s basic needs, the *Regulation* infringed the physical, psychological and social security of the person of young welfare recipients in a manner not in accordance with the principles of fundamental justice.³⁷ Ms. Gosselin rejected the province’s argument that the availability of on-the-job training, community work and remedial education programs justified the *Regulation* under s. 1 of the *Charter*, countering that, even accepting the validity of the government’s objectives,³⁸ the regime was not a rational,³⁹ minimal,⁴⁰ or proportionate⁴¹ impairment of young welfare recipients’ equality or security of the person rights. She asked the court to declare the *Regulation* was unconstitutional and to order the government to reimburse claimants the benefits they were denied during the relevant period, totalling roughly \$389 million.⁴²

(b) The Lower Court Rulings in *Gosselin*

In his 1992 Québec Superior Court decision, Justice Reeves concluded that Louise Gosselin’s evidence was insufficient to support her *Charter* claim.⁴³ Justice Reeves took issue with the fact that Ms. Gosselin was the only witness on behalf of the entire class of welfare recipients affected by the reduced rate, and he accepted the government’s characterization of the expert reports and evidence submitted in relation to the circumstances of other young welfare recipients as hearsay.⁴⁴ Justice Reeves also criticized the lack of evidence about the comparative situation of recipients over the age of 30, who received the full basic needs amount.⁴⁵ In terms of Ms. Gosselin’s substantive arguments, Justice Reeves found that the s. 7 right to life, liberty and security of the person did not include a positive right to social assistance from the state.⁴⁶ He also held that the *Regulation* was not discriminatory under s. 15 of the *Charter*, since recipients could obtain parity of benefits by participating in the available education and job training programs, and because the differential regime reflected the actual

³⁶ *Gosselin* (SCC), *supra* note 5 (*Factum of the Appellant* at para. 50) [author’s translation: “The social assistance system is the final recourse for persons in need. To be eligible for welfare benefits, a person must be totally without means. It is not by choice that such persons turn to the State, but from absolute necessity.”].

³⁷ *Ibid.* (*Factum of the Appellant* at paras. 53-54).

³⁸ *Ibid.* at paras. 98-99.

³⁹ *Ibid.* at paras. 100-121.

⁴⁰ *Ibid.* at paras. 122-144.

⁴¹ *Ibid.* at paras. 145-159.

⁴² *Ibid.* at para. 221; *Gosselin* (SCC), *supra* note 5 at para. 9.

⁴³ *Gosselin* (SC), *supra* note 5 at 1664.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ *Ibid.* at 1669.

characteristics of the targeted group and was designed to promote the beneficial objective of encouraging young welfare recipients to become financially independent.⁴⁷

In 1999, the Québec Court of Appeal dismissed Louise Gosselin's appeal. Justices Mailhot, Baudouin and Robert agreed with Justice Reeves that Louise Gosselin's claim to an adequate level of assistance involved an economic right that was not included in s. 7.⁴⁸ With regard to Ms. Gosselin's s. 15 argument, Justice Mailhot decided that the differential regime, taken as a whole, did not have a disadvantageous impact on young welfare recipients.⁴⁹ Justice Baudouin found that the *Regulation* discriminated based on age, but was saved by s. 1.⁵⁰ Justice Robert also found the reduced rate was age-discriminatory.⁵¹ But, contrary to Justice Baudouin, he concluded the *Regulation* could not be justified under s. 1 of the *Charter*, since the purported benefit of inciting young people to move off social assistance did not outweigh the severe negative effects of the regime.⁵²

(c) The Supreme Court of Canada's Judgment in *Gosselin*

In her 2002 judgment for the majority of the Supreme Court, Chief Justice McLachlin, joined by Justices Gonthier, Iacobucci, Major and Binnie, upheld the lower and appeal court rulings on the constitutionality of the *Regulation* and dismissed Louise Gosselin's appeal.⁵³ The Chief Justice rejected Ms. Gosselin's argument that the reduced benefit amount for those under-30 violated s. 15 of the Canadian *Charter*, on the grounds that the differential regime was designed to enhance the dignity of young welfare recipients.⁵⁴ In her view: "The age-base

⁴⁷ *Ibid.* at 1681. Justice Reeves dismissed Louise Gosselin's claim under the Québec *Charter* on the grounds that s. 45 is a statement of policy that provides no authority for the courts to review the adequacy of social measures the legislature chooses to adopt; *ibid.* at 1667.

⁴⁸ *Gosselin (CA)*, *supra* note 5 at 1042-43.

⁴⁹ *Ibid.* at 1042.

⁵⁰ *Ibid.* at 1047.

⁵¹ *Ibid.* at 1061.

⁵² *Ibid.* at 1089. Justice Robert further determined the *Regulation* violated s. 45 of the Québec *Charter*. However he found that, in accordance with the remedial and anti-derogation provisions set out under ss. 49 and 52 the *Charter*, s. 45's guarantee of financial assistance "susceptible of ensuring . . . an acceptable standard of living" was not judicially enforceable; *ibid.* at 1119. See generally, Robitaille, *Droits économiques et sociaux*, *supra* note 21 at 197-208.

⁵³ *Gosselin (SCC)*, *supra* note 5, para. 5. The majority of the court also rejected Louise Gosselin's claim under the Québec *Charter* concluding, at para. 88, that while s. 45 required the government to provide social assistance, it placed the adequacy of the particular measures adopted beyond judicial review.

⁵⁴ *Ibid.*, at para. 66. For a critique of this aspect of the decision see: Dianne Pothier, "But it's for Your Own Good" in Margot Young et al eds, *Poverty: Rights, Social Citizenship and Legal Activism* (Vancouver: UBC Press, 2007) 40 [Young et al, *Poverty: Rights*]; Diana Majury, "Women are Themselves to Blame: Choice as a Justification for Unequal

distinction was made for an ameliorative, non-discriminatory purpose and its social and economic thrust and impact were directed to enhancing the position of young people in society by placing them in a better position to find employment and live fuller, more independent lives.”⁵⁵ The Chief Justice also rejected Ms. Gosselin’s s. 7 claim. On the broader question of whether “the right to a level of assistance sufficient to meet basic needs”⁵⁶ fell within s. 7, she opined that: “One day s. 7 may be interpreted to include positive obligations.”⁵⁷ However, upholding Justice Reeves’ decision at trial, the Chief Justice found there was insufficient evidence to support such a claim in Louise Gosselin’s case.⁵⁸

In contrast to the majority, Justices Bastarache, LeBel, Arbour and L’Heureux-Dubé agreed with Ms. Gosselin that the *Regulation* contravened the *Charter*’s equality guarantee.⁵⁹ Justice L’Heureux-Dubé summarized the s. 15 violation: “As a result of s. 29(a), adults under 30 were uniquely exposed by the legislative scheme to the threat of living beneath what the government itself considered to be a subsistence level of income.”⁶⁰ The dissenting justices further found that this rights violation could not be justified under s. 1 of the *Charter*.⁶¹ In Justice Bastarache’s analysis: “In the legislative and social context of the legislation, which provided a safety net for those without means to support themselves, a rights-infringing limitation must be carefully crafted. In this case, the programs left too many opportunities for young people to fall through the seams of the legislation.”⁶²

In her dissenting judgment, concurred in by Justice L’Heureux-Dubé, Justice Arbour also accepted Louise Gosselin’s argument that the *Regulation* violated s. 7 of the *Charter*.⁶³ Justice Arbour pointed to the physical and psychological health risks flowing directly from living conditions under the reduced rate: inability to pay for adequate clothing, electricity, hot water or shelter;⁶⁴

Treatment” in Margaret Denike, Fay Faraday & M. Kate Stephenson, eds, *Making Equality Rights Real: Substantive Equality Under the Charter* (Toronto: Irwin Law, 2006) 209; Sheila McIntyre, “A Thin and Impoverished Notion of Judicial Review” (2006), 31 Queen’s LJ 731; Martha Jackman, “Sommes nous dignes? L’égalité et l’arrêt *Gosselin*” (2006), 16 CJWL 161; Gwen Brodsky, “*Gosselin v. Québec (Attorney General):* Autonomy with a Vengeance” (2003), 15 CJWL 194.

⁵⁵ *Gosselin* (SCC), *ibid.* at para. 70.

⁵⁶ *Ibid.* at para. 76.

⁵⁷ *Ibid.* at para. 82.

⁵⁸ *Ibid.* at para. 83.

⁵⁹ *Ibid.* at para. 134, per L’Heureux-Dubé J. para. 258, per Bastarache J. para. 395 per Arbour J. para. 413, per LeBel J.

⁶⁰ *Ibid.* at para. 130.

⁶¹ *Ibid.* at para. 140 per l’Heureux-Dubé J. para. 290, per Bastarache J. para. 394, per Arbour J. para. 413, per LeBel J.

⁶² *Ibid.* at para. 290.

⁶³ *Ibid.* at para. 385.

⁶⁴ *Ibid.* at para. 373.

malnourishment;⁶⁵ a “spiral of isolation, depression, humiliation, low self-esteem, anxiety, stress and drug addiction”; and a heightened risk of suicide.⁶⁶ She noted that these effects were experienced by Louise Gosselin herself and, as the expert evidence documented, by other young welfare recipients subject to the *Regulation*.⁶⁷ As for the possibility of justifying the *Regulation* under s. 1 of the *Charter*, Justice Arbour averred: “it will be a rare case indeed in which the government can successfully claim that the deleterious effects of denying welfare recipients their most basic requirements are proportional to the salutary effects of doing so.”⁶⁸

3. ONE STEP FORWARD: POSITIVE OBLIGATIONS UNDER S. 7 OF THE CHARTER

(a) Interpretive Context and Expectations

Canada was an active participant in the international post-war movement towards more expansive and effective human rights protection, especially for members of historically disadvantaged groups — the backdrop against which the Canadian *Charter* was proposed, negotiated and ultimately adopted. Beginning with its endorsement of the *Universal Declaration of Human Rights* in 1948,⁶⁹ Canada undertook substantial socio-economic rights commitments culminating in the *International Covenant on Economic Social and Cultural Rights (ICESCR)*⁷⁰ which, with the *International Covenant on Civil and Political Rights (ICCPR)*,⁷¹ was ratified by Canada in 1976 with the consent of the

⁶⁵ *Ibid.* at paras. 374-375.

⁶⁶ *Ibid.* at para. 332.

⁶⁷ *Ibid.* at para. 371.

⁶⁸ *Ibid.* at para. 394.

⁶⁹ GA Res 217 (III), UNGAOR, 3d Sess, Supp No 13, UN Doc A/810 (1948) [*UN Declaration*]. In particular, Article 25(1) of the *UN Declaration* affirms that: “Everyone has the right to a standard of living adequate for 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.”

⁷⁰ *International Covenant on Economic, Social and Cultural Rights*, December 16, 1966, 993 UNTS 3, Can TS 1976 No 46 (entered into force January 3, 1976, accession by Canada May 19, 1976) [*ICESCR*]. Of direct relevance in the *Gosselin* case, article 9 of the *ICESCR* guarantees the right to social security and social insurance; article 11, the right to an adequate standard of living, including adequate food, clothing and housing; and article 12, the right to the highest attainable standard of physical and mental health.

⁷¹ *International Covenant on Civil and Political Rights*, December 19, 1966, 999 UNTS 171, Can TS 1976 No 47 (entered into force March 23, 1976, accession by Canada May 19, 1976) [*ICCPR*]. In tandem with the *ICESCR*, the *ICCPR* abandons the outmoded distinction between positive and negative rights. As the preambles of both *Covenants* affirm: “the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy . . . economic, social and

provinces and shortly before the Trudeau government launched the constitutional reform process that culminated in the enactment of *Constitution Act, 1982* and the *Charter*. In particular, article 11(1) of the *ICESCR* affirms that: “States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right. . .”⁷² In ratifying the *ICESCR*, Canada formally acknowledged that adequate food, housing, health care, education and social security were not simply desirable social policy objectives but were basic human rights, requiring progressive realization “to the maximum of available resources” and effective remedies when governments failed to meet their obligations.⁷³ There was a shared expectation within the human rights community that these international undertakings would inform the interpretation and application of the *Charter*. As the Supreme Court of Canada has repeatedly affirmed: “the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in the international human rights documents which Canada has ratified.”⁷⁴

cultural rights as well as . . . civil and political rights. . .” All subsequent international human rights treaties ratified by Canada similarly reflect the principle of interdependence of all human rights and impose positive obligations on Canadian governments to protect health, welfare and other security of the person related interests without discrimination. See generally Bruce Porter, “International Human Rights in Anti-poverty and Housing Strategies: Making the Connection” [Porter, “Making the Connection”] in Martha Jackman & Bruce Porter, eds, *Advancing Social Rights in Canada* (Toronto: Irwin Law, 2014) [Jackman & Porter, *Advancing Social Rights*] 33; Leilani Farha, “Committee on the Elimination of Discrimination against Women: Women Claiming Economic, Social and Cultural Rights — the CEDAW Potential” in Malcolm Langford, ed., *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (New York: Cambridge University Press, 2008) 553; Gwen Brodsky & Shelagh Day, “Beyond the Social and Economic Rights Debate: Substantive Equality Speaks to Poverty” (2002), 14 CJWL 185.

⁷² *ICESCR*, *supra* note 70, article 11(1). Article 28 provides that “The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions”; see generally Porter, “Making the Connection”, *ibid.*; Martha Jackman, “The Protection of Welfare Rights Under the *Charter*” (1988), 20 Ottawa L Rev 257 [Jackman, “Welfare Rights”].

⁷³ *ICESCR*, *ibid.*, article 2(1); United Nations Committee on Economic, Social and Cultural Rights, *General Comment 3: The Nature of States Parties Obligations (art 2, para 1 of the Covenant)*, UNCESCROR, 5th Sess, UN Doc E/1991/23, (1990); Porter, “Making the Connection”, *ibid.*

⁷⁴ *Reference re Public Service Employee Relations Act (Alberta)*, 1987 CarswellAlta 580, 1987 CarswellAlta 705, [1987] 1 S.C.R. 313 (S.C.C.) at para. 59; *Health Services & Support-Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, 2007 CarswellBC 1289, 2007 CarswellBC 1290, [2007] 2 S.C.R. 391 (S.C.C.) at para. 70 [Health Services Assn]; *Fraser v. Ontario (Attorney General)*, 2011 SCC 20, 2011 CarswellOnt 2695, 2011 CarswellOnt 2696, [2011] 2 S.C.R. 3 (S.C.C.) at para. 92; *SFL v.*

Emerging domestic rights-based approaches to social justice also fed into debates about the language and content of the new constitutional guarantees.⁷⁵ United in their criticism of the courts' negative and circumscribed reading of the *Canadian Bill of Rights*,⁷⁶ women's, disability and other equality seeking groups mobilized in support of a new rights paradigm — one that would see the *Charter* and Canadian courts directly engage with government obligations to institute programs and benefits to address historic patterns of exclusion and disadvantage.⁷⁷ Building on Canada's international obligations and drawing on remedial jurisprudence under provincial and federal human rights legislation, it was expected that access to housing, health care, food, jobs, child care and social assistance for those in need would be accorded as much importance as negative guarantees against unreasonable government interference with life, liberty, security of the person and other individual rights. Francine Fournier explained: "face à la discrimination individuelle et systémique, des recours existent ou sont possibles. Ils doivent être développés, raffinés et renforcés. Mais ces interventions doivent aller de pair avec la reconnaissance concrète des droits économiques et sociaux. L'égalité réelle exige le développement de ceux-ci."⁷⁸

Feminist constitutional lawyers and scholars, including Marilou McPhedran, Mary Eberts, Tamra Thomson and Beverley Baines, were articulate proponents of this understanding of the *Charter*, working successfully with women's and other equality seeking organizations to reframe s. 15 in particular, to require affirmative measures to address socio-economic marginalization and remedy disadvantage. As Mary Eberts described it: "full substantive equality . . . was the groups' goal."⁷⁹ The expectation the *Charter* would require positive action by

Saskatchewan, 2015 SCC 4, 2015 CarswellSask 32, 2015 CarswellSask 33, (*sub nom.* Saskatchewan Federation of Labour v. Saskatchewan) [2015] 1 S.C.R. 245 (S.C.C.) at paras. 62-65; see generally Porter, *ibid.*; Martha Jackman & Bruce Porter, "Introduction: Advancing Social Rights in Canada" in Jackman & Porter, *Advancing Social Rights*, *supra* note 71 at 5-6.

⁷⁵ See Jackman & Porter, *ibid.* at 6-10; Martha Jackman & Bruce Porter, "Social and Economic Rights" in Peter Oliver, Patrick Macklem & Nathalie DesRosiers, eds, *The Oxford Handbook of the Canadian Constitution* (New York: Oxford University Press, 2017) 843 [Oliver, *Oxford Handbook*]; Bruce Porter, "Expectations of Equality" (2006), 33 Sup Ct L Rev 23 [Porter, "Expectations of Equality"].

⁷⁶ S.C. 1960, c. 44.

⁷⁷ See Kerri A. Froc, "A Prayer for Original Meaning: A History of Section 15 and What it Should Mean for Equality" (2018), 38 NJCL 35 [Froc, "Original Meaning"]; Bruce Porter, "Expectations of Equality", *supra* note 75.

⁷⁸ Francine Fournier, "Égalité et droits à l'égalité" in Lynn Smith et al eds, *Righting the Balance: Canada's New Equality Rights* (Saskatoon: The Canadian Human Rights Reporter, 1986) [Smith, "Righting the Balance"] 25 at 36.

⁷⁹ Mary Eberts, "The Fight for Substantive Equality: Women's Activism and Section 15 of the *Canadian Charter of Rights and Freedoms*" (2015/2016), 37:2 *Atlantis: Critical Studies in Gender, Culture & Social Justice* 100 at 104; Audrey Doerr & Micheline Carrier, eds, *Women and the Constitution in Canada* (Ottawa: Canadian Advisory

governments to ensure the substantive benefit and equal enjoyment of *Charter* rights, especially for members of historically disadvantaged communities, was shared beyond the nascent feminist legal academy. In a 1982 review of the newly enacted *Charter*, Rod Macdonald dismissed the idea that the *Charter* entrenched a purely negative concept of freedom.⁸⁰ In an echo of Frank R. Scott,⁸¹ Macdonald argued that “the most fundamental right for the majority of Canadians is not a right to be free from certain kinds of governmental activity, but rather the right to be free to benefit equally from the advantages that organized government fosters.”⁸²

In his 1983 analysis of s. 7 of the *Charter*, John Whyte likewise argued against a narrow interpretation of s. 7 that would offer safeguards only against negative state action, or that would restrict constitutionally protected life, liberty and security of the persons’ interests to those at risk in the criminal justice system.⁸³ In proposing a substantive understanding of the principles of fundamental justice, Whyte observed that: “It is now commonplace to think of the state’s imposition of burdens and benefits (relating to, among other things, life, liberty and security of the person) as either promoting social justice or, on the contrary, as being fundamentally unjust.”⁸⁴ In terms of the range of interests protected under s. 7, Whyte contended:

Council on the Status of Women, 1981); Anne F. Bayefsky & Mary Eberts, eds, *Equality Rights and the Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1985); Lynn Smith, “A New Paradigm for Equality Rights” in Smith, “Righting the Balance”, *ibid.*, 353; The Charter of Rights Educational Fund, *The Study Day Papers* (Toronto: Charter of Rights Educational Fund, 1985); Sheilah L. Martin & Kathleen E. Mahoney, eds, *Equality and Judicial Neutrality* (Toronto: Carswell, 1987); Gwen Brodsky & Shelagh Day, *Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back?* (Ottawa: Canadian Advisory Council on the Status of Women, 1989); Marilou McPhedran, Judith Erola & Loren Braul, “‘28 - Helluva Lot to Lose in 27 Days’: The Ad Hoc Committee and Women’s Constitutional Activism in the Era of Patriation” in Lois Harder & Steve Patten, eds, *Patriation and Its Consequences Constitution Making in Canada* (Vancouver: UBC Press, 2015) 203; and see generally Froc, “Original Meaning”, *supra* note 77; Beverley Baines & Ruth Rubio-Marin, “Feminist Constitutionalism in Canada in Oliver, *Oxford Handbook*, *supra* note 75 at 965; Porter, “Expectations of Equality”, *supra* note 75.

⁸⁰ Roderick A. Macdonald, “Postscript and Prelude — The Jurisprudence of the *Charter*: Eight Theses” (1982), 4 Sup Ct L. Rev. 321 [Macdonald, “The Jurisprudence of the *Charter*”].

⁸¹ As Scott himself argued: “to allow the still unresolved problems of our economic system to deprive [people of . . . essentials to the good life] without taking steps to alleviate the deprivations, is to take away human rights.”; Frank R. Scott, “Expanding Concepts of Human Rights” in *Essays on the Constitution* (Toronto: University of Toronto Press, 1977) 353 at 357.

⁸² Macdonald, “The Jurisprudence of the *Charter*”, *supra* note 80 at 344.

⁸³ John Whyte, “Fundamental Justice: The Scope and Application of Section 7 of the *Charter*” (1983), 13 Manitoba LJ 455 [Whyte “Fundamental Justice”].

⁸⁴ *Ibid.* at 28.

Assuming that the *Charter* is dedicated to granting rights over matters of fundamental importance, “security of the person” will include conditions necessary for life, such as food and shelter. Hence governmental actions which take away shelter and food, (or the capacity to obtain shelter and food), would be subject to court review under section 7.⁸⁵

(b) The Argument Against S. 7 as a Source of Positive Obligations

It is, however, Peter Hogg’s contrary view of s. 7⁸⁶ that was largely embraced by Canadian courts called upon to decide early *Charter* claims brought by people living in poverty.⁸⁷ Although s. 32 states that the *Charter* applies “in respect of all matters within the authority of” federal and provincial governments,⁸⁸ Hogg affirmed that: “Section 7, like all the other *Charter* rights, applies only to ‘governmental action’, as defined in s. 32 of the *Charter*.”⁸⁹ Acknowledging that: “It has been suggested that ‘security of the person’ includes the economic capacity to satisfy basic human needs”⁹⁰ Hogg warned that: “The trouble with

⁸⁵ *Ibid.* at 40.

⁸⁶ Peter Hogg, *Constitutional Law of Canada*, 2nd ed. (Toronto: Carswell, 1985) at 44.5 [Hogg, *Constitutional Law*].

⁸⁷ See for example *Masse v. Ontario (Ministry of Community & Social Services)*, 1996 CarswellOnt 338, 134 D.L.R. (4th) 20 (Ont. Div. Ct.) at 43, leave to appeal refused 1996 CarswellOnt 1453 (Ont. C.A.), leave to appeal refused (1996), 40 Admin. L.R. (2d) 87 (note) (S.C.C.) and see generally: David Wiseman, “Methods of Protection of Social and Economic Rights in Canada” in Fons Coomans, ed., *Justiciability of Economic and Social Rights: Experiences from Domestic Systems* (Antwerpen: Intersentia, 2006) 173; Brodsky & Day, “Beyond the Social and Economic Rights Debate”, *supra* note 71; Martha Jackman & Bruce Porter, “Women’s Substantive Equality and the Protection of Social and Economic Rights Under the *Canadian Human Rights Act*”, in Status of Women Canada, *Women and the Canadian Human Rights Act: A Collection of Policy Research Reports* (Ottawa: Status of Women Canada, 1999) 43; Martha Jackman, “Poor Rights: Using the *Charter* to Support Social Welfare Claims” (1993), 19 Queen’s LJ 65.

⁸⁸ *Charter*, *supra* note 2, s. 32(1). The argument that s. 32(1) demands government action was rejected by the Supreme Court in *Vriend v. Alberta*, 1998 CarswellAlta 210, 1998 CarswellAlta 211, [1998] 1 S.C.R. 493 (S.C.C.). Citing Dianne Pothier, “The Sounds of Silence: *Charter* Application when the Legislature Declines to Speak” (1996), 7 Constitutional Forum 113 at 115, Justice Cory stated, at para. 60:

The relevant subsection, s. 32(1) (b), states that the *Charter* applies to “the legislature and government of each province in respect of all matters within the authority of the legislature of each province”. There is nothing in that wording to suggest that a positive act encroaching on rights is required; rather the subsection speaks only of matters within the authority of the legislature. Dianne Pothier has correctly observed that s. 32 is “worded broadly enough to cover positive obligations on a legislature such that the *Charter* will be engaged even if the legislature refuses to exercise its authority.” The application of the *Charter* is not restricted to situations where the government actively encroaches on rights.

See generally: Martha Jackman & Bruce Porter, “Rights-Based Strategies to Address Homelessness and Poverty in Canada: The *Charter* Framework” in Jackman & Porter, *Advancing Social Rights*, *supra* note 71 65 [Jackman & Porter, “Rights-Based Strategies”].

⁸⁹ Hogg, *Constitutional Law*, *supra* note 86 at 44.5.

this argument is that it accords to s. 7 an economic role that is incompatible with its setting in the legal rights portion of the *Charter*.”⁹¹ In Hogg’s opinion:

The suggested role also involves a massive expansion of judicial review, since it would bring under judicial scrutiny all the elements of the modern welfare state, including . . . of course, the level of public expenditures on social programmes. As Oliver Wendell Holmes would have pointed out, these are the issues upon which elections are won and lost; the judges need a clear mandate to enter that arena, and s. 7 does not provide that clear mandate.⁹²

In *Gosselin*, the Attorney General of Québec repeatedly cited Peter Hogg in arguing that s. 7 of the *Charter* applies only to government action that directly threatens an individual’s physical and psychological integrity;⁹³ that it excludes socio-economic rights;⁹⁴ and that it imposes no positive obligations on governments.⁹⁵ Referencing Hogg’s analysis, Québec insisted that the *Charter* does not permit judicial review of publicly funded social policies and that the principle of Parliamentary sovereignty continued to apply in this area.⁹⁶ It concluded: “L’État n’a donc aucune obligation constitutionnelle d’adopter des mesures pour promouvoir ou assurer la sécurité des personnes.”⁹⁷

In its intervention before the Supreme Court in *Gosselin*, the Attorney General of Ontario likewise maintained that “section 7 exists to constrain government action rather than to impose an obligation on the government to provide a minimum guaranteed income”⁹⁸ and it invoked Hogg’s warning about the wide array of social programs in the areas of housing, health care, utilities, food, and others, that would become subject to judicial review if s. 7 were read to include positive obligations.⁹⁹ Pointing out that “the courts have consistently ruled that . . . section 7 does not impose positive legal obligations on governments”,¹⁰⁰ Ontario averred that “section 7 is restricted to the protection of individuals from direct state interference with physical and psychological integrity.”¹⁰¹

⁹⁰ *Ibid.* at 44.8.

⁹¹ *Ibid.*

⁹² *Ibid.*

⁹³ *Gosselin* (SCC), *supra* note 5 (*Factum of the Respondent* at para. 198).

⁹⁴ *Ibid.* at para. 208.

⁹⁵ *Ibid.* at para. 202.

⁹⁶ *Ibid.* at para. 220.

⁹⁷ *Ibid.* at para. 211 [author’s translation: “The State therefore has no constitutional obligation to adopt measures to promote or guarantee the security of persons.”].

⁹⁸ *Gosselin* (SCC), *ibid.* (*Factum of the Intervenor, The Attorney General of Ontario* at para. 30).

⁹⁹ *Ibid.* at para. 46.

¹⁰⁰ *Ibid.* at para. 58.

¹⁰¹ *Ibid.*

(c) The Supreme Court's Ruling on Positive Obligations in *Gosselin*

This narrow reading of s. 7 was rejected by eight of the nine Supreme Court justices in *Gosselin*. Only Justice Bastarache took the position that “a s. 7 claim must arise as a determinative state action that in and of itself deprives the claimant of the right to life, liberty and security of the person.”¹⁰² Justice Bastarache maintained that Louise Gosselin's s. 7 claim could not succeed because the threat to her security of the person “was brought upon her by the vagaries of a weak economy not by the legislature's decision not to accord her more financial assistance.”¹⁰³ He concluded that any harm caused by the under-inclusive nature of the welfare regime could be successfully challenged only under s. 15.¹⁰⁴

While agreeing with his finding that the impugned *Regulation* violated Louise Gosselin's s. 15 rights,¹⁰⁵ Justice LeBel disagreed with Justice Bastarache's “interpretation and application” of s. 7.¹⁰⁶ Chief Justice McLachlin, with the concurrence of Justices Gonthier, Iacobucci, Major and Binnie, also rejected Justice Bastarache's argument that s. 7 could not apply absent state action.¹⁰⁷ The Chief Justice noted that s. 7 had so far been interpreted by the Supreme Court as a negative guarantee restricting the state from depriving people of life, liberty or security of the person.¹⁰⁸ However she affirmed that “One day section 7 may be interpreted to included positive obligations.” Referring to Lord Sankey's “living tree” metaphor,¹⁰⁹ and to Justice LeBel's caution in *Blencoe v.*

¹⁰² *Ibid.*, at para. 213. Justice Bastarache's narrow reading of s. 7 in *Gosselin* was particularly disappointing in light of his Court of Appeal dissent, subsequently adopted by the Supreme Court of Canada, in *New Brunswick (Minister of Health & Community Services) v. G. (J.)*, 1997 CarswellNB 145, 187 N.B.R. (2d) 81 (N.B. C.A.), reversed 1999 CarswellNB 305, 1999 CarswellNB 306, [1999] 3 S.C.R. 46 (S.C.C.). In that case, Justice Bastarache concluded that the New Brunswick government had a positive obligation to provide legal aid to a sole support mother on social assistance who was at risk of losing custody of her children, and who couldn't afford a lawyer to represent her. Referencing John Whyte's s. 7 analysis, *supra* note 83, Justice Bastarache observed, at p. 12:

In modern societies, rights cannot be fully protected by preventing government intrusions in the lives of citizens. Some rights in effect require governmental action . . . It is also important to look at individual international instruments . . . for instance, section 25 of the *Universal Declaration of Human Rights* . . . speaks of “the right to **security** in the event of unemployment, sickness, disability, widowhood, old age and other lack of livelihood in circumstances beyond [one's] control” (my emphasis). The *Charter* must limit the intrusion of the state in the lives of its citizens; it must also mandate its function in those limited cases where individuals can make legitimate claims against it in the name of liberty and human dignity.

¹⁰³ *Gosselin* (SCC), *ibid.* at para. 217.

¹⁰⁴ *Ibid.* at para. 223.

¹⁰⁵ *Ibid.* at para. 401.

¹⁰⁶ *Ibid.* at para. 82.

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.* at para. 81.

¹⁰⁹ *Edwards v. Canada (Attorney General)*, 1929 CarswellNat 2, [1930] A.C. 124 (Jud. Com. of Privy Coun.) at 136.

*British Columbia (Human Rights Commission)*¹¹⁰ “that it would be dangerous to freeze the development” of s. 7,¹¹¹ the Chief Justice concluded:

The question therefore is not whether s. 7 has ever been — or will ever be — recognized as creating positive rights. Rather, the question is whether the present circumstances warrant a novel application of s. 7 as the basis for a positive state obligation to guarantee adequate living standards . . . I leave open the possibility that a positive obligation to sustain life, liberty or security of the person may be made out in special circumstances. However, this is not such a case.¹¹²

Justices Arbour and L’Heureux-Dubé not only rejected the narrow reading of s. 7 put forward by the province and adopted by Justice Bastarache and the trial and Court of Appeal, they further held that Louise Gosselin’s s. 7 rights were violated by the gross inadequacy of the welfare benefits provided by the *Regulation*. In contrast to the Chief Justice’s focus on previous jurisprudence, Justice Arbour argued:

There is a suggestion that s. 7 contains only negative rights of non-interference and therefore cannot be implicated absent any positive state action. This is a view that is commonly expressed, but rarely examined . . . We must not sidestep a determination of this issue by assuming from the start that s. 7 includes a requirement of affirmative state action. That would be to beg the very question that needs answering.¹¹³

Justice Arbour underscored the need to “deconstruct the various firewalls that are said to exist around s. 7”,¹¹⁴ starting with the premise that the exclusion of property rights from s. 7 was determinative of Louise Gosselin’s claim.¹¹⁵ Referring to the distinction drawn by Chief Justice Dickson in *Irwin Toy*,¹¹⁶ between “corporate-commercial economic rights” and “economic rights fundamental to human life or survival”, Justice Arbour argued that: “the rights at issue here are so intimately intertwined with considerations related to one’s basic health (and hence ‘security of the person’) — and, at the limit, even of one’s survival (and hence ‘life’) — that . . . it is a gross mischaracterization to attach to them the label of ‘economic rights’.”¹¹⁷

Justice Arbour contested the proposition that s. 7 rights “cannot be implicated absent any positive state action”¹¹⁸ as contradicted by the language of

¹¹⁰ 2000 CarswellBC 1860, 2000 CarswellBC 1861, [2000] 2 S.C.R. 307 (S.C.C.) at para. 188.

¹¹¹ *Gosselin* (SCC), *supra* note 5 at para. 82.

¹¹² *Ibid.* at paras. 82-83.

¹¹³ *Ibid.* at para. 319.

¹¹⁴ *Ibid.* at para. 309.

¹¹⁵ *Ibid.* at para. 311.

¹¹⁶ *Supra* note 1.

¹¹⁷ *Gosselin* (SCC), *supra* note 5 at para. 312.

s. 7 itself, as well as by Supreme Court jurisprudence,¹¹⁹ including the court's decision in *New Brunswick (Minister of Health & Community Services) v. G. (J.)* in which Chief Justice Lamer imposed a positive obligation on the provincial government to provide state funded legal counsel to a mother in receipt of social assistance in a child protection proceeding.¹²⁰ Justice Arbour further questioned "the general assertion that positive claims against the state for the provision of certain needs are not justiciable" because deciding them would, in Peter Hogg's words, "bring under judicial scrutiny all of the elements of the modern welfare state", something the courts are not competent to do.¹²¹ Justice Arbour countered that: "While it may be true that courts are ill-equipped to decide policy matters concerning resource allocation — questions of how much the state should spend, and in what manner — this does not support the conclusion that justiciability is a threshold issue barring the consideration of the substantive claim in this case."¹²² Justice Arbour concluded that "any acceptable approach to *Charter* interpretation — be it textual, contextual or purposive — quickly makes apparent that interpreting the rights contained in s. 7 as including a positive component is not only possible, but necessary."¹²³

In summary, eight of nine Supreme Court justices in the *Gosselin* case rejected the argument that s. 7 could not be invoked absent direct state action and could not be applied to impose positive obligations on governments to protect, life, liberty and security of the person. While a majority of the court upheld Justice Reeves' finding that the evidentiary record was insufficient to support Louise Gosselin's challenge, the court explicitly left open the possibility that s. 7 could be read to include socio-economic rights. Justices Arbour and L'Heureux-Dubé held not only that s. 7 provided a sound doctrinal basis for Louise Gosselin's claim, but that the reduced benefits for those under-30 violated their *Charter* rights to security of the person. Chief Justice McLachlin ruled that the circumstances in which s. 7 would be applied as the basis for an affirmative government obligation to guarantee adequate living standards remained to be decided in a future case. This aspect of the *Gosselin* decision represented a step forward for the *Charter* rights of people living in poverty.

4. TWO STEPS BACK: THE COURT'S APPROACH TO LOUISE GOSSELIN'S SECTION 7 CLAIM

The Supreme Court's rejection of the narrow reading of s. 7 that prevailed in Peter Hogg's and other scholarly commentary,¹²⁴ in government submissions,

¹¹⁸ *Ibid.* at para. 319.

¹¹⁹ *Ibid.* at paras. 321-325.

¹²⁰ *Supra* note 102.

¹²¹ *Gosselin* (SCC), *supra* note 5 at paras. 330-331 citing Hogg, *Constitutional Law of Canada*, *supra* note 86.

¹²² *Gosselin* (SCC), *ibid.* at para. 332.

¹²³ *Ibid.* at para. 335.

and in Canadian lower court jurisprudence up to that point, was a positive development for the advancement of poor people's *Charter* rights. As outlined below, however, the majority's uncritical and stereotype-infused approach to the evidence, and the way in which the majority of the court reframed and then dismissed Louise Gosselin's s. 7 claim, were equally significant set-backs for the constitutional inclusion of people living in poverty.

(a) The Court's Approach to the Evidence

At trial Justice Reeves concluded there was insufficient evidence to support Louise Gosselin's *Charter* challenge. He characterized the expert evidence she adduced as hearsay and he found that her personal testimony was insufficient to support her claim on behalf of all other young welfare recipients adversely affected by the *Regulation*. In his view:

On ne peut considérer comme vrais les faits sur lesquels les experts ont fondé leurs conclusions et formulé leurs généralisations. Il est donc fort douteux que la demanderesse représentante, agissant pour le compte de quelque 75 000 individus, ait déchargé le fardeau de la preuve quant à savoir si l'application de la loi a produit à leur égard des effets défavorables.¹²⁵

At the same time, Justice Reeves' appraisal of Louise Gosselin's evidence and substantive argument was rife with prejudicial stereotypes about the nature and causes of poverty and about people living in poverty as individuals and as a group.

In particular, Justice Reeves maintained that while poverty could in some cases be attributed to external factors beyond individual control, most poverty was the result of "intrinsic" characteristics of the poor.¹²⁶ Justice Reeves explained: "Les études démontrent que la majorité des pauvres le sont pour des raisons intrinsèques. Il s'agit de personnes sous-scolarisées ou psychologiquement vulnérables, ou chez qui l'éthique du travail n'est guère favorisée."¹²⁷ He argued further: "En effet, il est constant que l'être humain qui a développé les qualités de force, courage, persévérance et discipline surmonte et

¹²⁴ In *Gosselin (SC)*, *supra* note 5, Justice Reeves and the Attorney General of Québec also relied on Patrice Garant, "Fundamental Rights and Fundamental Justice" in Gérald-A. Beaudoin & Ed Ratushny, eds, *The Canadian Charter of Rights and Freedoms*, 2nd ed. (Toronto: Carswells, 1989) 331.

¹²⁵ *Gosselin (SC)*, *ibid.* [author's translation: "We cannot assume the facts upon which the experts based their conclusions and formulated their generalizations to be true. It is thus highly doubtful that the representative plaintiff, acting on behalf of some 75,000 individuals, has discharged the burden of proof as to the negative effects the application of the law had upon them."].

¹²⁶ *Ibid.* at 1670.

¹²⁷ *Ibid.* at 1676 [author's translation: "Studies show that the majority of the poor are poor for intrinsic reasons. They are persons who are under-educated or psychologically vulnerable, or who have a weak work ethic."].

maîtrise généralement les obstacles éducatifs, psychiques et même physiques qui pourraient l'entraîner dans la pauvreté matérielle."¹²⁸ As an illustration, Justice Reeves pointed to the high incidence of respiratory illnesses among people living in poverty, coupled with the fact that the most economically disadvantaged were twice as likely to smoke, notwithstanding the high cost of cigarettes.¹²⁹ This, he asserted, demonstrated that any financial assistance provided to the poor, including to young welfare recipients, had to be conditional:

Pourquoi le pauvre affecte-t-il une part importante de son maigre budget au tabac (et à l'alcool)? Il s'agit évidemment d'usage de drogues bénignes qui soulagent sa détresse psychologique. La conclusion s'impose : l'assistance pécuniaire doit s'accompagner d'éducation et d'encouragement à délaisser les habitudes coûteuses et nocives. C'est la philosophie qui inspire les programmes offerts aux 18 à 30 ans qui désirent obtenir la parité.¹³⁰

Instead of censuring Justice Reeves' reliance on these discriminatory stereotypes, Chief Justice McLachlin expressed full agreement with his ruling on the insufficiency of Louise Gosselin's evidence. In her words: "the trial judge, after a lengthy trial and careful scrutiny of the record, found that Ms. Gosselin had failed to establish actual adverse effect . . . I can find no basis upon which this Court can set aside this finding"¹³¹ With regard to Louise Gosselin's s. 7 claim in particular, the Chief Justice was unequivocal. Making virtually no reference either to the expert evidence, or to Louise Gosselin's own testimony about the multiple harms to the lives and security of young welfare recipients caused by the *Regulation*, she concluded: "The frail platform provided by the facts of this case cannot support the weight of a positive state obligation of citizen support."¹³²

Conversely, even in the absence of any supporting evidence, Chief Justice McLachlin was unqualified in her acceptance of the government's claims in defence of the impugned *Regulation* — claims that reflected and perpetuated equally prejudicial stereotypes about poverty and young welfare recipients. In particular, although the government failed to provide any concrete evidence of

¹²⁸ *Ibid.* at 1676 [author's translation: "In fact, it is a given that a human being who has developed the qualities of strength, courage, perseverance and discipline generally overcomes and masters the educational, psychological and even physical obstacles that could lead them into material poverty"].

¹²⁹ *Ibid.* at 1677.

¹³⁰ *Ibid.* [author's translation: "Why does a poor person devote a large portion of his meagre budget to tobacco (and to alcohol)? This is obviously the use of benign drugs to relieve psychological distress. The conclusion is unavoidable: financial assistance must be combined with education and encouragement to abandon costly and harmful habits. This is the philosophy that underlies the programs offered to those aged 18 to 30 who wish to achieve parity of benefits."].

¹³¹ *Gosselin* (SCC), *supra* note 5 at paras. 46-47.

¹³² *Ibid.* at paras. 82-83.

the *Regulation's* benefits or effectiveness in promoting the integration of young welfare recipients into the workforce or broader society, the Chief Justice accepted that: “notwithstanding its possible short-term negative impact on the economic circumstances of some welfare recipients under 30 . . . the thrust of the program was to improve the situation of people in this group, and to enhance their dignity and capacity for long-term self-reliance.”¹³³ Chief Justice McLachlin likewise approved the province’s unsubstantiated claim that, left to their own devices, young people would develop long term dependence on government assistance, and therefore had to be forced off welfare for their own good. In her view: “Simply handing over a bigger welfare cheque would have done nothing to help welfare recipients under 30 escape from unemployment.”¹³⁴ She stressed that “reliance on welfare can contribute to a vicious circle”¹³⁵ and charged that: “opposition to the incentive program entirely overlooks the cost to young people of being on welfare during the formative years of their working lives.”¹³⁶

Chief Justice McLachlin also accepted the Québec government’s argument that difficulties facing young welfare recipients were owing not to the government’s actions, but to personal circumstances and individual choice. Although, as Justice Bastarache detailed in his s. 15 dissent,¹³⁷ there were numerous barriers to accessing the remedial education and job training programs,¹³⁸ the Chief Justice affirmed: “there is no evidence in the record that any welfare recipient under 30 wanting to participate in one of the programs was refused enrollment.”¹³⁹ As for Louise Gosselin herself, the Chief Justice concluded that she “ended up dropping out of virtually every program she started, apparently because of her own personal problems and personality traits” rather than because of any flaws in the programs themselves.¹⁴⁰ The Chief Justice’s inattention to, if not callous disregard for, the actual experience of the claimants, exhaustively documented in the expert and Louise Gosselin’s own evidence, produced a decision completely out of touch with the reality of the impugned regime and young welfare recipients’ lives.¹⁴¹

¹³³ *Ibid.* at para. 66.

¹³⁴ *Ibid.* at para. 43.

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

¹³⁷ *Ibid.* at paras. 158-163; 276-285.

¹³⁸ *Ibid.* (*Factum of the Appellant* at paras. 114-128).

¹³⁹ *Ibid.* at para. 47.

¹⁴⁰ *Ibid.* at paras. 8, 48.

¹⁴¹ For a critique of this aspect of the *Gosselin* decision see: Martha Jackman, “Reality Checks: Presuming Innocence and Proving Guilt in *Charter* Welfare Cases” in Young et al, *Poverty: Rights*, *supra* note 54 23; Natasha Kim & Tina Piper, “*Gosselin v. Québec*: Back to the Poorhouse” (2003), 48 McGill LJ 749.

Unfiltered by stereotypes or preconceptions about the respective motivations of governments and those seeking financial assistance, the dissenting justices' more critical appraisal of the evidence led them to very different conclusions. Having earlier referred to the multiple ways in which the inadequate benefits threatened the physical and mental health and security of young welfare recipients,¹⁴² Justice Arbour underlined the challenge of job hunting for those who could not afford a telephone, suitable clothes or transportation and the reality that "inadequate food and shelter interfere with the capacity both for learning as well as for work itself."¹⁴³ As she observed: "the long-term importance of continuing education and integration into the workforce is undermined when those at whom such 'help' is directed cannot meet their basic short-term subsistence requirements."¹⁴⁴ In terms of the efficacy of the remedial education and job training programs, Justice Arbour was succinct: "The various remedial programs put in place in 1984 simply did not work: a startling 88.8 percent of the young adults who were eligible to participate in the programs were unable to increase their benefits to the level payable to adults 30 and over. In these conditions, the physical and psychological security of young adults was severely compromised."¹⁴⁵

For his part, pointing to the weight of expert evidence relating to youth unemployment in Québec in the mid-eighties, Justice LeBel asserted: "Young social assistance recipients in the 1980s certainly did not latch onto social assistance out of laziness; they were stuck receiving welfare because there were no jobs available."¹⁴⁶ Justice LeBel observed that the province had offered no evidence that young welfare recipients would not have participated in the education and job training programs without the financial incentive created by the differential regime. In his view: "the Québec government could have achieved its objective of developing employability just as well without abandoning recipients under the age of 30 to these paltry benefits."¹⁴⁷

(b) The Framing of Louise Gosselin's S. 7 Claim

Like the Chief Justice's approach to the evidence in *Gosselin*, the manner in which her majority judgment framed Louise Gosselin's s. 7 claim proved highly problematic not only for the success Ms. Gosselin's argument, but in subsequent poverty-related *Charter* cases. What Ms. Gosselin asked the court to decide was whether, by reducing the under-30 welfare rate to a level that made recipients sick, homeless, hungry and even suicidal, the Québec government had violated their s. 7 rights to security of the person. What the majority did, however, was to

¹⁴² *Gosselin* (SCC), *supra* note 5 at paras. 373-377.

¹⁴³ *Ibid.* at para. 392.

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.* at para. 371.

¹⁴⁶ *Ibid.* at para. 409.

¹⁴⁷ *Ibid.* at para. 410.

transform her challenge to the *Regulation* into a far more abstract and sweeping claim. As the Chief Justice put it, Ms. Gosselin was seeking “a novel application of s.7 as the basis for a positive state obligation to guarantee adequate living standards” — one that, in her view, the evidence failed to support.¹⁴⁸ Instead of examining the actual impact of the impugned *Regulation* on the physical and psychological security and integrity of those affected — the issue that was the primary focus of Louise Gosselin’s exhaustive personal and expert evidence — the Chief Justice failed even to acknowledge those egregious harms. Instead, the starting point for her analysis became a different question: whether, in the absence of any state action, s. 7 guaranteed a right to adequate welfare.¹⁴⁹ Framed in this way, Louise Gosselin faced what became an insurmountable doctrinal and evidentiary burden.

Again, the difference between the majority and dissenting justices’ analyses of Louise Gosselin’s claim is striking. From Justice Arbour’s perspective, there was no doubt that the reduction in the basic needs benefit imposed by the *Regulation* seriously infringed the physical integrity and security of those affected: “First, there are the health risks that flow directly from the dismal living conditions that \$170/month affordSecond, the malnourishment and undernourishment of young welfare recipients also result in a plethora of health problems.”¹⁵⁰ The deprivation of psychological security of the person caused by the *Regulation* was, in Justice Arbour’s view, equally devastating: “isolation, depression, humiliation, low self-esteem, stress and drug addiction.”¹⁵¹ As Justice Arbour summarized it: “this evidence overwhelmingly demonstrates that the exclusion of young adults from the full benefits of the social assistance regime substantially interfered with their fundamental right to security of the person and, at the margins, perhaps with their right to life as well.”¹⁵²

Justice l’Heureux-Dubé concurred with Justice Arbour’s analysis.¹⁵³ In her view:

There is little question that living with the constant threat of poverty is psychologically harmful. There is no dispute that Ms. Gosselin lived at times below the government’s own standard of bare subsistence. In 1987, the monthly cost of proper nourishment was \$152. The guaranteed monthly payment to young adults was \$170. I cannot imagine how it can be maintained that Ms. Gosselin’s physical integrity was not breached.¹⁵⁴

¹⁴⁸ *Ibid.* at paras. 82-83.

¹⁴⁹ *Ibid.* at para. 76.

¹⁵⁰ *Ibid.* at paras. 373-375.

¹⁵¹ *Ibid.* at para. 376.

¹⁵² *Ibid.* at para. 377.

¹⁵³ *Ibid.*, at para. 141.

¹⁵⁴ *Ibid.* at para. 130.

Instead of ruling on Louise Gosselin's s. 7 claim in the abstract, Justices Arbour and L'Heureux-Dubé looked to the actual evidence of the impact of the *Regulation* on young welfare recipients' physical and psychological health and security. Assessed in light of the real-life consequences of the *Regulation*, rather than against a preconceived doctrinal backdrop, Justices Arbour and L'Heureux-Dubé found it impossible to see the government's decision to provide a grossly inadequate level of benefits to those under the age of 30 as anything but unconstitutional.

5. THE LEGACY OF *GOSSSELIN*

In principle, the Supreme Court's rejection of the narrow interpretation of s. 7 that prevailed prior to *Gosselin* was a significant step forward for the *Charter* rights of people living in poverty. In reality, in the 15 years since the decision in *Gosselin*, lower and appellate courts have invoked the majority's ruling to further buttress the argument that s. 7 does not protect socio-economic rights or require governments to take affirmative steps to protect life, liberty or security of the person. *Charter* claimants in poverty-related cases have continued to confront adverse stereotypes and more onerous evidentiary burdens than government defendants.¹⁵⁵ In many cases, the serious harms to life and security of the person they have painstakingly documented in their own testimony, and through expert evidence, have been discounted or even ignored.¹⁵⁶ And, like in *Gosselin*, the s. 7

¹⁵⁵ See for example *R. v. Banks*, 2001 CarswellOnt 2757, 55 O.R. (3d) 374 (Ont. C.J.), reversed in part 2005 CarswellOnt 115 (Ont. S.C.J.), affirmed 2007 CarswellOnt 111 (Ont. C.A.), leave to appeal refused 2007 CarswellOnt 5670, 2007 CarswellOnt 5671 (S.C.C.) [*Banks* (CJ)] where the Ontario Court of Justice dismissed a *Charter* challenge to the Ontario *Safe Streets Act* and convicted the claimants of panhandling. Babe J. commented at 404, in relation to the s. 15 evidence, that:

Much of the affidavit material filed by the defendants consists of complaints about the general thrust of current provincial social policy in Ontario; the affiants all have an obvious socio-economic and political perspective that is diametrically opposed to that of the government of the day. It is, however, frankly difficult to discern how the legislation in question in itself can be said to have a prejudicial effect on their 'essential human dignity' by placing restrictions on the place and manner of solicitation.

Babe J was even more emphatic in relation to the claimants' evidence in support of their s. 2 argument, stating at 409 that: "I find assertions by affiants and authors relied upon by the defence to the contrary unconvincing; it may be that they consider the presence of aggressive beggars in the streets conducive to the advancement of their own socio-political points of view, but there is no evidence at all that the defendants themselves or others like them are intending to make a political point by soliciting for funds."

¹⁵⁶ See for example *Toussaint v. Canada (Attorney General)*, 2011 FCA 213, 2011 CarswellNat 3685, 2011 CarswellNat 6061 (F.C.A.) at para. 113, leave to appeal refused 2012 CarswellNat 943, 2012 CarswellNat 944 (S.C.C.) [*Toussaint* (FCA)], where Justice Stratas ignored the expert evidence to the contrary and rejected a *Charter* challenge to the denial of federal health coverage to an undocumented migrant, on the grounds that: "If the appellant were to prevail in this case and receive medical coverage under the Order in Council without complying with Canada's immigration laws, others could be expected to come to Canada and do the same. Soon, as the Federal Court warned, Canada could

claims of people living in poverty continue to be reframed in a way that reflects and reinforces the discriminatory and outmoded positive *versus* negative rights paradigm that the *Charter* was expected to overcome. Instead of examining the actual impact of governments' actions and inaction on claimants' lives and physical and psychological health and security, lower courts are, like in *Gosselin*, characterizing the *Charter* claims of people living in poverty as broad and presumptively non-justiciable demands for free standing rights to welfare, housing or health care, and dismissing them on that basis.¹⁵⁷

(a) The Tanudjaja Case

The decision in *Tanudjaja v. Canada (Attorney General)*¹⁵⁸ provides the clearest illustration of *Gosselin*'s legacy in this regard. The Applicants in *Tanudjaja* included the Centre for Equality Rights in Accommodation,¹⁵⁹

become a health care safe haven, its immigration laws undermined." See: *Nell Toussaint v. Canada*, UN Human Rights Committee, Communication No. 2348/2014. Petition filed on November 27, 2013 by Andrew Dekany and Bruce Porter on behalf of Nell Toussaint, paras. 43-46, 54-56. Online: <<http://www.socialrightscura.ca/documents/legal/tousaint%20IFBH/Toussaint%20v%20Canada%20HRC%20No%202348-2014.pdf>> ; and see generally: David Wiseman, "Managing the Burden of Doubt: Social Science Evidence, the Institutional Competence of Courts, and the Prospects for Anti-poverty *Charter* Claims" (2014), 33 NJCL 1; Jennie Abell, "Poverty and Social Justice at the Supreme Court during the McLachlin Years: Slipsliding Away" 50 SCLR (2d) 257 [Abell, "Poverty and Social Justice"]; Faisal Bhabha, "Institutionalizing Access-to-Justice: Judicial, Legislative and Grassroots Dimensions" (2007), 33 Queen's LJ 139; Patricia Cochran, "Taking Notice: Judicial Notice and the 'Community Sense' in Anti-Poverty Litigation" (2007), 40 UBC L Rev 559; David Wiseman, "The *Charter* and Poverty: Beyond Injusticiability" (2001), 51 UTLJ 425.

¹⁵⁷ See generally: Bruce Porter, "Inclusive Interpretations: Social and Economic Rights and the Canadian *Charter*" in Helena Alviar García, Karl Klare & Lucy A. Williams, eds, *Social and Economic Rights in Theory and Practice: Critical Enquiries* (New York: Routledge, 2014) 215 [Porter, "Inclusive Interpretations"]; Jessica Eisen, "On Shaky Grounds: Poverty and Analogous Grounds under the *Charter*" (2013), 2 CJ Poverty Law 1; Margot Young, "The Other Section 7" (2013), 62 SCLR (2d) 3; Cara Wilkie & Meryl Zisman Gary, "Positive and Negative Rights under the *Charter*: Closing the Divide to Advance Equality" (2011), 30 Windsor Rev Legal Soc Issues 37; Martha Jackman, "Constitutional Castaways: Poverty and the McLachlin Court", (2010), 50 Supreme Court Law Review (2d) 297 [Jackman, "Constitutional Castaways"]; Abell, "Poverty and Social Justice", *ibid.*; Bruce Porter, "Claiming Adjudicative Space: Social Rights, Equality and Citizenship" in Young et al, *Poverty: Rights, supra* note 54 77; Yavar Hameed & Nitti Simmonds, "The *Charter*, Poverty Rights and the Space Between: Exploring Social Movements as a Forum for Advancing Social and Economic Rights in Canada" (2007), 23 NJCL 181; Margot Young, "Section 7 and the Politics of Social Justice" (2005), 38 UBC L Rev 539.

¹⁵⁸ *Tanudjaja v. Canada (Attorney General)*, 2013 ONSC 5410, 2013 CarswellOnt 12551 (Ont. S.C.J.) [*Tanudjaja* (SC)], affirmed 2014 ONCA 852, 2014 CarswellOnt 16752 (Ont. C.A.) [*Tanudjaja* (CA)], leave to appeal refused 2015 CarswellOnt 9613, 2015 CarswellOnt 9614 (S.C.C.). The judgments, Notice of Application, *Facta* of the parties and interveners, Applicant and Expert Witness Affidavits, and other key documents in

Jennifer Tanudjaja, and three other individuals who were homeless or had experienced homelessness.¹⁶⁰ The Application relied on an extensive evidentiary record compiled over a two-year period showing that the cumulative effect of the Canadian and Ontario governments' affordable housing, income support and accessible housing policies was widespread homelessness, disproportionately affecting Indigenous and racialized people, people with disabilities, newcomers, seniors, social assistance recipients, and youth. The evidence in *Tanudjaja* also documented the severe physical, psychological and social consequences of homelessness and housing insecurity for those affected.¹⁶¹

Based on that evidence, in May 2010, the Applicants filed a Notice of Application in the Ontario Superior Court, arguing that the Ontario and Canadian governments' failure to implement strategies to reduce and eliminate homelessness violated ss. 7 and 15 of the *Charter* and could not be justified under s. 1. The Applicants requested a declaration to that effect, and they asked the court to order the federal and Ontario governments to design and implement national and provincial strategies to reduce and eliminate homelessness as an

the *Tanujaja* case can be found at: <http://socialrightscura.ca/eng/legal-strategies-charter-challenge-homlessness-motion-to-strike.html>.

¹⁵⁹ CERA is a non-profit organization providing services to low income tenants and the homeless in Ontario; see <<http://www.equalityrights.org/cera/>>. The Application was supported by a number of interveners working in coalition, including the Charter Committee on Poverty Issues, Pivot Legal Society, Justice for Girls, the Income Security Advocacy Centre, Amnesty International, the International Network for Economic, Social and Cultural Rights (ESCR-Net), the David Asper Centre for Constitutional Rights, and (at the Ontario Court of Appeal) the Ontario Human Rights Commission, the ODSP Action Coalition, the Steering Committee on Social Assistance, the Colour of Poverty/Colour of Change Network, the ARCH Disability Law Centre, the Dream Team, the Canadian HIV/AIDS Legal Network and HIV/AIDS Legal Clinic and the Women's Legal Education and Action Fund (LEAF). The author, with Jackie Esmonde at the Ontario Superior Court and Benjamin Ries at the Court of Appeal, represented the Charter Committee Coalition.

¹⁶⁰ *Tanudjaja* (SC), *supra* note 158 (*Amended Notice of Application* at paras. 1-5); *Tanudjaja* (SC), *ibid* (*Factum of the Applicants (Respondents on the Motion)* at para. 8); *Tanudjaja* (SC), *ibid* paras. 12-14. Jennifer Tanudjaja, a young single mother in receipt of social assistance, was living with her two sons in an apartment that cost more than her total monthly social assistance benefit, and had been on a waiting list for subsidized housing for over two years. Diagnosed with cancer, Brian DuBourdieu was unable to work or to pay his rent and lost his apartment, living on the streets and in shelters, and on a waiting list for subsidized housing for four years. Ansar Mahmood, severely disabled in an industrial accident, lived with his wife and four children including one son confined to a wheelchair, in a two-bedroom apartment that was not accessible. He and his family had been on a waiting list for subsidized accessible housing for four years. Following the sudden death of her spouse, Janice Arsenault became homeless, living in shelters and on the streets for several years and forced to place her young two sons in her parents' care, until she was able to find rental housing that consumed two-thirds of her limited monthly income, putting her at constant risk of becoming homeless again.

¹⁶¹ *Tanudjaja* (SC) (*Amended Notice of Application* at paras. 27-32), *ibid.*; *Tanudjaja* (SC) (*Factum of the Applicants (Respondents on the Motion)* at paras. 15-18), *ibid.*

appropriate remedy under s. 24(1) of the *Charter*.¹⁶² With regards to s. 7 in particular, the *Tanudjaja* Application did not contend that the provision of housing or housing subsidies was constitutionally guaranteed. Nor did the Applicants demand the governments be ordered to provide a particular “economic” benefit. Rather they argued that Ontario and federal government policies and decisions had created and sustained conditions of homelessness and inadequate housing, and that both governments had consistently refused to implement a coherent strategy to address this situation. The Applicants alleged that the governments’ actions and inaction together resulted in serious harm to life and to security of the person of those directly affected, including physical and mental illness, shortened lives and even death — interests the courts had previously recognized as falling directly within the ambit of s. 7.¹⁶³

In May 2012, two years after the Notice of Application was filed and six months after the full record was served,¹⁶⁴ the Ontario and Canadian governments brought a motion to strike the *Tanudjaja* claim for disclosing no reasonable cause of action.¹⁶⁵ In support of that motion, the Attorney General of Ontario argued that the Application was “in effect an effort to constitutionalize a right to housing.”¹⁶⁶ Citing Peter Hogg as authority, Ontario affirmed that: “s. 7 protects against deprivations of rights; it does not establish positive rights or obligations on the state. Nor does it provide protection to purely economic rights, including the right to affordable housing or a minimum standard of living.”¹⁶⁷ In the Attorney General of Canada’s submission: “The Court’s decision in *Gosselin* did not overrule any previous jurisprudence. Rather the majority decision affirmed that section 7 has not been recognized to provide for positive rights or economic benefits.”¹⁶⁸

In his 2013 Ontario Superior Court ruling, Justice Lederer granted the governments’ motion to strike the *Tanudjaja* claim.¹⁶⁹ In response to the Applicants’ argument that the governments’ actions, both in contributing to and failing to address homelessness, had infringed the security of the person of the Applicants and others similarly affected, Justice Lederer opined that: “the programs and decisions noted and complained of are not the cause of the harm

¹⁶² *Tanudjaja* (SC) (*Amended Notice of Application*), *ibid.*

¹⁶³ *Tanudjaja* (SC), *supra* note 158 (*Factum of the Applicants (Respondents on the Motion)*) at paras. 1, 46-47; *Tanudjaja* (CA), *supra* note 158 (*Factum of the Appellants*) at para. 6).

¹⁶⁴ Justice Feldman noted that the Applicants’ record comprised 16 volumes totalling 10,000 pages containing 19 Affidavits, of which 13 were from experts; *Tanudjaja* (CA), *ibid.*, at para. 66.

¹⁶⁵ *Tanudjaja* (SC) (*Notice of Motion*).

¹⁶⁶ *Tanudjaja* (CA), *supra* note 158 (*Factum of the Respondent, the Attorney General of Ontario*) at para. 2).

¹⁶⁷ *Ibid.* at para. 24.

¹⁶⁸ *Tanudjaja* (CA), *ibid.* (*Factum of the Respondent, the Attorney General of Canada*) at para. 30).

¹⁶⁹ *Tanudjaja* (SC), *supra* note 158 at para. 152.

described by the applicants. They are, if anything, part of the cure.”¹⁷⁰ Justice Lederer was unpersuaded by the Applicants’ contention that the Supreme Court of Canada intended to, and did in *Gosselin*, leave open the possibility that s. 7 could impose positive obligations on governments to protect life, liberty and security of the person, affirming that: “Section 7 of the *Charter* does not provide a positive right to affordable, adequate, accessible housing.”¹⁷¹ He also discounted the Applicants’ submission that the important constitutional issues raised in *Tanudjaja* should not be disposed of without a full hearing, on an interlocutory motion to strike.¹⁷² Instead Justice Lederer concluded: “It is plain and obvious that the Application cannot succeed . . . Quite apart from the question of whether there is a viable claim for breaches of the *Charter*, what the Court is ultimately being asked to do is beyond its competence and not justiciable.”¹⁷³

In its 2014 judgment, a 2-1 majority of the Ontario Court of Appeal upheld Justice Lederer’s order.¹⁷⁴ In her dissenting opinion, Justice Feldman found that Justice Lederer erred in deciding that the issue of positive obligations under s. 7 was settled law notwithstanding the Supreme Court’s contrary ruling in *Gosselin*.¹⁷⁵ Even more problematic in her view, was his order to dismiss the Application at the pleadings stage¹⁷⁶ — a misuse of the motion to strike “to frustrate potential developments in the law.”¹⁷⁷ Justice Pardu, with the concurrence of Justice Strathy,¹⁷⁸ agreed with Justice Lederer that the Applicants were arguing “that s. 7 confers a general freestanding right to adequate housing.”¹⁷⁹ She held that the Application contained “no sufficient legal component to engage the decision-making capacity of the courts”¹⁸⁰ and that it was not therefore justiciable.¹⁸¹ As a result, Justice Pardu held it was unnecessary to consider “the extent to which positive obligations may be imposed on government to remedy violations of the *Charter*, a door left slightly ajar in *Gosselin*.”¹⁸² In 2015, the Supreme Court of Canada refused leave to appeal, and the *Tanudjaja* claim was struck.¹⁸³

¹⁷⁰ *Ibid.* at para. 113.

¹⁷¹ *Ibid.* at para. 81.

¹⁷² *Ibid.* at paras. 55-56.

¹⁷³ *Ibid.* at paras. 147-148.

¹⁷⁴ *Tanudjaja (CA)*, *supra* note 158 at para. 39.

¹⁷⁵ *Ibid.* at para. 62.

¹⁷⁶ *Ibid.* at para. 64.

¹⁷⁷ *Ibid.* at para. 49.

¹⁷⁸ *Ibid.* at para. 39.

¹⁷⁹ *Ibid.* at para. 30.

¹⁸⁰ *Ibid.* at para. 27.

¹⁸¹ *Ibid.* at para. 19.

¹⁸² *Ibid.* at para. 37.

(b) *Gosselin* and the Failure of Constitutionalism

The Applicants in *Tanudjaja* exercised their rights under s. 24(1) of the *Charter* to seek a judicial hearing and to obtain a legal remedy for a constitutional rights violation grounded in the text of s. 7 and supported by a full evidentiary record. Although Canadian governments are, following Canada's ratification of the *ICESCR*,¹⁸⁴ under binding international obligation to respect these core socio-economic rights, the Applicants did not argue they had a *Charter* right to housing or to an adequate level of income. Rather they submitted that their s. 7 rights to life and security of the person were infringed by policies and programs that left them homeless, and by governments' refusal to take appropriate measures to address this situation, thereby threatening the integrity of families, physical and psychological health, personal inviolability and life itself. These types of harms had all been subject to s. 7 review in previous Supreme Court cases.¹⁸⁵ Nevertheless, the Applicants' *Charter* argument was characterized as a sweeping demand for a freestanding right to housing that fell beyond the ambit of s. 7. Justice Lederer summarized why the *Tanudjaja* claim could not, in his view, be allowed to continue:

[W]hat is being sought here is a determination that every citizen has a right, protected by the *Charter*, to a minimum standard of living . . . Any application built on the premise that the *Charter* imposes such a right cannot succeed and is misconceived. General questions that reference, among many other issues, assistance to those in poverty, the levels of housing supports and income supplements, the basis on which people may be evicted from where they live and the treatment of those with psycho-social and intellectual disabilities are important, but the courtroom is not the place for their review.¹⁸⁶

The Applicants in *Tanudjaja* were not merely required to meet a disproportionate evidentiary standard or to combat negative stereotypes and judicial preconceptions about the homeless and homelessness. They were denied the very opportunity to have their evidence and arguments fully heard. In spite of the implications of upholding Justice Lederer and the Ontario Court of Appeal's decision to strike the *Tanudjaja* Application at the pleadings stage, the Supreme Court refused leave to appeal, as it has done in virtually every poverty-related *Charter* case since *Gosselin*.¹⁸⁷ In 2007 for instance, the Supreme Court

¹⁸³ *Supra* note 158.

¹⁸⁴ *Supra* note 70.

¹⁸⁵ See for example *New Brunswick (Minister of Health & Community Services) v. G. (J.)*, *supra* note 102; *PHS Community Services Society v. Canada (Attorney General)*, 2011 CarswellBC 2443, 2011 CarswellBC 2444, [2011] 3 S.C.R. 134 (S.C.C.); and see generally Jackman & Porter, "Rights-Based Strategies", *supra* note 88; Margot Young, "Section 7: The Right to Life, Liberty and Security of the Person" in Oliver, *Oxford Handbook*, *supra* note 75 at 777.

¹⁸⁶ *Tanudjaja* (SC), *supra* note 158 at para. 120.

refused leave to appeal the lower courts' ruling in *R. v. Banks*,¹⁸⁸ dismissing a constitutional challenge to the Ontario *Safe Streets Act*.¹⁸⁹ The *Charter* claim was rejected in that case because the lower courts found no evidence that prohibiting panhandling interfered with the homeless claimants' ability to survive¹⁹⁰ and because, in the trial judge's view, allowing such a claim would "bring all the elements of the welfare state under scrutiny just as surely as a claim to state largesse."¹⁹¹ In 2008, the Supreme Court denied leave in *Canadian Bar Assn. v. British Columbia*,¹⁹² which invoked s. 7 to challenge the civil legal aid system's failure to ensure that people living in poverty, and especially women, had meaningful access to justice in situations affecting their *Charter*-protected interests. The B.C. courts ruled that the claim should be struck because "the CBA does not challenge any legislation, nor indeed any government action . . . Rather it seeks a sweeping review of the entire program."¹⁹³

In 2009, the Supreme Court denied leave in *Boulter v. Nova Scotia Power Assn. Inc.*,¹⁹⁴ in which the claimants challenged the province's approach to electricity pricing on the grounds that it exacerbated the unaffordability of residential hydro services for people living in poverty.¹⁹⁵ In rejecting the Applicants' *Charter* claim in that case, the Nova Scotia Court of Appeal averred: "That poverty's plight appeals for relief does not mean the redress is

¹⁸⁷ See generally Sanda Rodgers "Getting Heard: Leave to Appeal, Interveners and Procedural Barriers to Social Justice in the Supreme Court of Canada" in Sanda Rodgers and Sheila McIntyre, eds, *The Supreme Court of Canada and Social Justice: Commitment, Retrenchment or Retreat* (Markham: LexisNexis Canada, 2011) 1; Gwen Brodsky, "The Subversion of Human Rights by Governments in Canada" in Jackman & Porter, *Advancing Social Rights*, *supra* note 71 35.

¹⁸⁸ *Banks* (CJ), *supra* note 155, affirmed *R. v. Banks*, 2005 CarswellOnt 115, [2005] O.J. No. 98 (Ont. S.C.J.) [*Banks* (SC)], affirmed 2007 CarswellOnt 111, [2007] O.J. No. 99 (Ont. C.A.) [*Banks* (CA)], leave to appeal refused 2007 CarswellOnt 5670, 2007 CarswellOnt 5671, [2007] S.C.C.A. No. 139 (S.C.C.).

¹⁸⁹ S.O. 1999, c. 8.

¹⁹⁰ *Banks* (CA), *supra* note 188 at para. 81; *Banks* (SC), *supra* note 188 at para. 50.

¹⁹¹ *Banks* (SC), *ibid.* at para. 51.

¹⁹² *Canadian Bar Assn. v. British Columbia*, 2006 CarswellBC 2193, [2006] B.C.J. No. 2015 (B.C. S.C.), additional reasons 2007 CarswellBC 361 (B.C. S.C. [In Chambers]), affirmed 2008 CarswellBC 379, [2008] B.C.J. No. 350 (B.C. C.A.) [*Canadian Bar Assn.* (CA)], leave to appeal refused 2008 CarswellBC 1610, 2008 CarswellBC 1611, [2008] S.C.C.A. No. 185 (S.C.C.). See Kerri Froc, "Is The Rule of Law the Golden Rule? Accessing "Justice" for Canada's Poor" (2008), 87 *Canadian Bar Review* 459; Jackman, "Constitutional Castaways", *supra* note 157.

¹⁹³ *Canadian Bar Assn.* (CA), *ibid.* at para. 35.

¹⁹⁴ *Boulter v. Nova Scotia Power Assn. Inc.*, 2009 CarswellNS 79, [2009] N.S.J. No. 65 (N.S. C.A.), leave to appeal refused 2009 CarswellNS 485, 2009 CarswellNS 486, [2009] S.C.C.A. No. 172 (S.C.C.).

¹⁹⁵ See generally Claire McNeil & Vincent Calderhead, "Access to Energy: How Form Overtook Substance and Disempowered the Poor in Nova Scotia" in Jackman & Porter, *Advancing Social Rights*, *supra* note 71 253.

constitutional.”¹⁹⁶ And, in 2012, the Supreme Court refused leave to appeal the decision in *Toussaint v. Canada (Minister of Citizenship & Immigration)*,¹⁹⁷ in which the Federal courts dismissed a s. 7 challenge to the federal government’s denial of health care benefits to an undocumented migrant in urgent need of medical care, on the grounds her own conduct was the “operative cause” of any injury to her s. 7 rights,¹⁹⁸ and because Canada might otherwise become a “health care safe haven.”¹⁹⁹

The Supreme Court’s refusal to grant leave to appeal in these or virtually any other poverty-related s. 7 case in the 15 years since *Gosselin* was decided stands in sharp contrast to its approach to the *Charter* claim in *Chaoulli c. Québec (Procureur général)*.²⁰⁰ The Appellants in *Chaoulli*, an elderly patient who had experienced delays obtaining two hip replacements and a physician engaged in a long-running battle with the province over restrictions on his ability to deliver private care,²⁰¹ invoked s. 7 not to defend but to undermine the one socio-

¹⁹⁶ *Boulter (CA)*, *supra* note 194 at para. 43.

¹⁹⁷ *Toussaint (FCA)*, *supra* note 156, affirming 2010 FC 810, 2010 CarswellNat 4413, 2010 CarswellNat 2695 (F.C.) [*Toussaint (FC)*]. In *Toussaint v. Canada (Minister of Citizenship & Immigration)*, 2011 FCA 146, 2011 CarswellNat 1943, 2011 CarswellNat 1446 (F.C.A.), leave to appeal refused 2011 CarswellNat 4397, 2011 CarswellNat 4398 (S.C.C.), reversing 2009 FC 873, 2009 CarswellNat 2595, 2009 CarswellNat 5173 (F.C.); the court had earlier rejected Ms. Toussaint’s *Charter* challenge to the failure of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 to allow for a waiver of the \$550 processing fee for applications for permanent residency based on humanitarian and compassionate considerations.

¹⁹⁸ *Toussaint (FCA)*, *ibid.* at paras. 72-73; *Toussaint (FC)*, *ibid.* at paras. 91, 93. In its subsequent decision in *Canadian Doctors for Refugee Care v. Canada (Attorney General)*, 2014 FC 651, 2014 CarswellNat 2430, 2014 CarswellNat 2431 (F.C.) at para. 571, the Federal Court ruled that revisions to the Interim Federal Health Benefit Program to exclude certain categories of refugee claimants did not violate s. 7 because “the *Charter*’s guarantees of life, liberty and security of the person do not include the positive right to state funding for health care.”

¹⁹⁹ *Toussaint (FCA)*, *ibid.* at para. 112; *Toussaint (FC)*, *ibid.* at para. 94. The UN Human Rights Committee recently ruled that Canada’s actions violated Ms. Toussaint’s right to life under article 6 and her right to equality under article 26 of the ICCPR and it ordered Canada to provide Ms. Toussaint “with adequate compensation for the harm she suffered” and “to take steps to prevent similar violations in the future, including reviewing its national legislation to ensure that irregular migrants have access to essential health care to prevent a reasonably foreseeable risk that can result in loss of life.”; UNHRC, Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication No. 2348/2014 (August 7, 2018) CCPR/C/123/D/2348/2014, online: <<http://www.socialrights.ca/2018/Toussaint%20v%20Canada%202018.pdf>> .

²⁰⁰ 2005 CarswellQue 3276, 2005 CarswellQue 3277, (*sub nom.* *Chaoulli v. Canada (Attorney General)*) [2005] 1 S.C.R. 791 (S.C.C.) [*Chaoulli (SCC)*], reversing 2002 CarswellQue 598, [2002] R.J.Q. 1205 (C.A. Que.) [*Chaoulli (CA)*], affirming 2000 CarswellQue 182, [2000] R.J.Q. 786 (C.S. Que.) [*Chaoulli (SC)*].

²⁰¹ *Chaoulli (SC)*, *ibid.* at paras. 19-43. After summarizing Dr. Chaoulli’s evidence at trial, Justice Piché observed, at para. 43: “Tout ceci amène le Tribunal à se poser des questions

economic right that is widely recognized in Canada: access to health care based on need rather than ability to pay.²⁰² Although the claim in *Chaoulli* was unanimously rejected at trial and by the Québec Court of Appeal, the Supreme Court granted the Appellants leave to appeal. The majority of the court then set aside the trial judge's evidentiary findings and reversed the lower courts' ruling that Québec's prohibition on private health insurance was constitutionally unobjectionable because it was designed to safeguard the publicly funded system upon which everyone, including those unable to pay for private care, relies.²⁰³

In doing so, unlike in *Gosselin*, the majority did not question whether the evidence of two individual claimants was sufficiently representative of the impact on all Québec patients of prohibiting private insurance.²⁰⁴ Nor did it doubt the sufficiency of the evidence of the single witness who, against the weight of expert opinion in the case,²⁰⁵ maintained that allowing parallel private care would provide a solution to wait times.²⁰⁶ The majority rejected Justice Delisle's conclusion at the Court of Appeal²⁰⁷ that the Appellants were asserting a right to buy private insurance — an economic right that was excluded from s. 7 of the *Charter*.²⁰⁸ The majority did not suggest the Appellants were asking the court to recognize a free-standing right to private health care. Rather it emphasized that

sur les véritables motivations du Dr Chaoulli dans le présent débat. On ne peut qu'être frappé par les contradictions dans le témoignage et l'impression que le Dr Chaoulli s'est embarqué dans une croisade dont les enjeux lui échappent aujourd'hui." [author's translation: "All of this brings the Court to question what is really motivating Dr. Chaoulli in the present debate. One cannot help being struck by the contradictions in his testimony and the impression that Dr. Chaoulli has embarked on a crusade in which he now fails to grasp the stakes."]

²⁰² See generally Marie-Claude Prémont, "L'affaire *Chaoulli* et le système de santé du Québec: cherchez l'erreur, cherchez la raison" (2006), 51 McGill LJ 167.

²⁰³ *Chaoulli* (SCC), *supra* note 200 at para. 159. As Justice Piché affirmed at trial: "Il ne faut pas jouer à l'autruche. L'établissement d'un système de santé parallèle privé aurait pour effet de menacer l'intégrité, le bon fonctionnement ainsi que la viabilité du système public." [author's translation: "We can't stick our heads in the sand. The establishment of a parallel, private health care system would threaten the integrity, the effective operation and the existence of the public system."]; *Chaoulli* (SC), *ibid.*, at para. 263.

²⁰⁴ *Chaoulli* (SCC), *ibid.* at para. 35; see Kent Roach, "The Courts and Medicare: Too Much or too Little Judicial Activism" in Colleen M. Flood, Kent Roach & Lorne Sossin, eds, *Access to Care, Access to Justice: The Legal Debate Over Private Health Insurance in Canada* (Toronto: University of Toronto Press, 2005) [Flood et al, *Access to Care*] 184.

²⁰⁵ In the trial judge's words: "le Dr Coffey fait cavalier seul avec son expertise et les conclusions auxquelles il arrive [Author's translation: Dr. Coffey is a lone rider in his expertise and the conclusions he arrives at.];" *Chaoulli* (SC), *supra* note 200 at para. 120.

²⁰⁶ The evidence accepted by the trial judge proved the reverse: that eliminating the ban on private insurance would, by diverting resources away from the public and into the private system, result in increased wait times for publicly funded care; *ibid.* at paras. 106-107.

²⁰⁷ *Chaoulli* (CA), *supra* note 200 at 1211.

²⁰⁸ *Chaoulli* (SCC), *supra* note 200 at paras. 14, 34.

the Appellants were arguing only that their life, liberty and security of the person were threatened by Québec's prohibition on private health insurance.²⁰⁹

The majority in *Chaoulli* was unconcerned by issues of justiciability or institutional competence raised by the Appellants' challenge to the single-payer health care system. As Chief Justice McLachlin affirmed:

While the decision about the type of health care system Québec should adopt falls to the Legislature of that province, the resulting legislation, like all laws, is subject to constitutional limits, including those imposed by s. 7 of the *Charter*. The fact that the matter is complex, contentious or laden with social values does not mean that the courts can abdicate the responsibility vested in them by our Constitution to review legislation for *Charter* compliance when citizens challenge it.²¹⁰

The result was a Supreme Court decision highly prejudicial to the *Charter* rights and health interests of people living in poverty. Disregarding the evidence of the negative impact of striking down the ban on private insurance for those who depend on the publicly funded system,²¹¹ the majority granted a remedy available only to individuals who could afford to buy private insurance to jump the public queue.²¹² The majority's ruling in *Chaoulli* appeared to suggest that, while s. 7 does not guarantee access to health care based need, it does ensure a right to health care based on ability to pay.²¹³

In this context, the Supreme Court's failure to grant leave to appeal in *Tanudjaja*, and to finally revisit its decision in *Gosselin*, represents clear a failure of constitutionalism. As the Charter Committee Coalition argued in its intervention before the Ontario Court of Appeal in *Tanudjaja*, the issues raised in the s. 7 *Charter* claims of people living in poverty:

. . . bear directly on the relationship between members of the most marginalized groups in Canadian society and the constitutional rights and values that underpin Canada's constitutional democracy . . . The

²⁰⁹ *Ibid.* at paras. 103; 108, 110.

²¹⁰ *Ibid.* at para. 107.

²¹¹ *Ibid.* at para. 152.

²¹² See generally: Bruce Porter, "A Right to Health Care in Canada — Only if You Can Pay for it" (2005), 6 *ESR Review* 8; Martha Jackman, "The Last Line of Defence for [Which?] Citizens': Accountability, Equality and the Right to Health in *Chaoulli*" (2006), 44 *Osgoode Hall LJ* 349; Lorne Sossin, "Towards a Two-Tier Constitution? The Poverty of Health Rights" in Flood et al, *Access to Care*, *supra* note 204 161.

²¹³ The *Chaoulli* decision has prompted a further s. 7 challenge to the single payer system, led by Dr. Brian Day in B.C. in *Cambie Surgeries v. British Columbia (Medical Services Commission)*, Doc. S090663 (Vancouver); see also BC Health Coalition, "Clinics Case Court Documents", online: <<http://www.bchealthcoalition.ca/what-you-can-do/save-medicare/court-documents>>; Martha Jackman, "From *Chaoulli* to *Cambie*: Charter Challenges to the Regulation of Private Health Funding and Care" in Colleen M Flood & Bryan Thomas, eds, *Is Two-Tier Health Care the Future?* (Ottawa: University of Ottawa Press, 2019) (forthcoming).

courts have a constitutional mandate to interpret and apply the *Charter* in a manner that secures every individual in Canada the full benefit of the *Charter*'s protection. This, rather than any preconceived idea of what kinds of issues (and, by definition what types of claimants) belong in the courtroom should be the starting point of any *Charter* analysis.²¹⁴

6. CONCLUSION

In the *Tanudjaja* case, a single judge on a motion to strike essentially overruled the Supreme Court of Canada, declaring:

The law is established. As it presently stands there can be no positive obligation on Canada and Ontario to put in place programs that are directed to overcoming concerns for the “life, liberty and security of the person . . . The majority in *Gosselin* does not depart from this view. It confirms what has been understood since the early days of the *Charter*.

Notwithstanding the doctrinal significance and access to justice consequences of allowing Justice Lederer's ruling to stand, the Supreme Court refused leave to appeal the *Tanudjaja* decision. The experience of *Charter* claimants in poverty-related cases before and since *Gosselin*, culminating in the motion to strike in *Tanudjaja*, is one of constitutional exclusion — the Supreme Court's approach to s. 7 having effectively immunized an entire sphere of government action from *Charter* review. By imposing discriminatory evidentiary burdens on those challenging government action and inaction leading to hunger, poverty and homelessness, and in some cases ignoring their experience and evidence outright, and by characterizing their constitutional arguments as non-justiciable demands for free-standing rights not found in the *Charter*, the courts have erected a nearly impenetrable barrier to the life, liberty and security of the person claims of people living in poverty. In those too few *Charter* cases in which the poverty-related claims been accepted by the courts, it is precisely because they fit a negative rights paradigm and demand only that governments do nothing.

In the 2008 *Victoria (City) v. Adams*²¹⁵ case for instance, the homeless residents of a tent city in Victoria were successful in their s. 7 challenge to a municipal bylaw prohibiting them from erecting temporary structures in public parks at night.²¹⁶ At trial, Justice Ross found that the shortage of shelter spaces in Victoria meant that “hundreds of people are left to sleep in public places in the City”²¹⁷ and that the government's interference with homeless people's ability to

²¹⁴ *Tanudjaja* (CA), *supra* note 158 (*Factum of the Interveners: Charter Committee Coalition* at paras. 1, 6).

²¹⁵ 2009 BCCA 563, 2009 CarswellBC 3314 (B.C. C.A.) [*Adams* (CA)], reversing in part 2008 BCSC 1363, 2008 CarswellBC 2156 (B.C. S.C.) [*Adams* (SC)].

²¹⁶ *Adams* (SC), *ibid.* at para. 70.

²¹⁷ *Ibid.* at para. 58.

provide themselves with temporary shelter exposed them to a risk of serious harm, including death by hypothermia. In deciding that the bylaw violated s. 7, Justice Ross underscored the fact that the homeless claimants were not arguing the government was required to provide them with adequate shelter, but instead were challenging negative restrictions on their ability to shelter themselves, akin to the situation in *Chaoulli*.²¹⁸ In upholding Justice Ross's ruling striking down the Victoria bylaw, the B.C. Court of Appeal also emphasized that it was applying s. 7 as a negative "restraint" on government action, rather than as a source of positive obligations to address the problem of homelessness or the rights of the homeless.²¹⁹

Examining the role of judicial interpretation in the realization of socio-economic rights in Canada, Bruce Porter has observed:

Negative rights interpretations have been adopted not on the basis of coherent or reasonable principles of interpretation but rather in the service of preconceived ideas of a restricted role of courts. The consequences of such restrictive interpretations for the integrity of the meanings of rights are severe. By retreating from understandings that may require positive measures or transformative change, courts stultify interpretation around existing patterns of discrimination, marginalization and exclusion. They exclude from their interpretation of rights the circumstances of disadvantaged and marginalized groups — those whose rights are most frequently denied by existing patterns of exclusion and by governments' failures to take positive measures to address these systemic violations.²²⁰

In sharp contrast to the current judicial approach, in the period leading up to and following its enactment, disadvantaged groups advocated for an interpretation and application of the *Charter* that would reflect and reinforce Canada's international socio-economic rights commitments, moving beyond the discredited and outmoded dichotomy between positive and negative rights that was abandoned under the *UN Declaration* and the two *International*

²¹⁸ *Ibid.* at paras. 119-120.

²¹⁹ *Adams (CA)*, *supra* note 215 at para. 95. The B.C. Supreme Court relied on *Adams* in coming to a similar finding that an Abbotsford bylaw prohibiting the erection of temporary shelter or sleeping in parks overnight violated s. 7, again underlining that the claimants were "not seeking to impose any positive obligations on the City"; *Abbotsford (City) v. Shantz*, 2015 BCSC 1909, 2015 CarswellBC 3020 (B.C. S.C.) at para. 148, additional reasons 2016 CarswellBC 3671 (B.C. S.C.); see generally Margot Young, "Charter Eviction: Litigating out of House and Home" (2015), 24 *Journal of Law & Social Policy* 46; Martha Jackman, "Charter Remedies for Socio-economic Rights Violations: Sleeping under a Box?" in Robert J Sharpe and Kent Roach, eds, *Taking Remedies Seriously* (Ottawa: Canadian Institute for the Administration of Justice, 2010) 279 [Jackman, "Sleeping under a Box?"]; Margot Young, "Rights, the Homeless, and Social Change: Reflections on *Victoria (City) v. Adams* (BCSC)" (Winter 2009/10), 164 *BC Studies* 103.

²²⁰ Porter, "Inclusive Interpretations", *supra* note 157 at 216-17.

Covenants.²²¹ Disadvantaged groups insisted that governments' inattention to, or deliberate failure to address the consequences of unemployment, homelessness, poverty, inadequate health services, and lack of social supports, should receive the same level of *Charter* scrutiny as direct violations of security of the person and other fundamental rights. As Justice Arbour underscored in *Gosselin*:

Freedom from state interference with bodily or psychological integrity is of little consolation to those who, like the claimants in this case, are faced with a daily struggle to meet their most basic bodily and psychological needs. To them, such a purely negative right to security of the person is essentially meaningless: theirs is a world in which the primary threats to security of the person come not from others, but from their own dire circumstances. In such cases . . . positive state action is what is required in order to breathe purpose and meaning into their s. 7 guaranteed rights.²²²

Three decades on, people living in poverty would surely have anticipated that the s. 7 right to life, liberty and security of the person would, as Louise Gosselin believed, translate into a level of social assistance that didn't force those in need to choose between hunger and homelessness. They would take as a given Chief Justice McLachlin and Justice Lebel's insistence that "the *Charter*, as a living document, grows with society and speaks to the current situation and needs of Canadians. Thus Canada's current international law commitments and the current state of international thought on human rights provide a persuasive source for interpreting the scope of the *Charter*."²²³ People living in poverty would have predicted the *Charter* would, as Jennifer Tanudjaja affirmed, require Canadian governments to adopt strategies to combat and eventually put an end to poverty and widespread housing insecurity. They would have expected the courts to recognize the disproportionately adverse impact government inaction has on the most socially and economically disadvantaged members of Canadian society: Indigenous people, people with disabilities; new immigrants and refugees, and sole support mothers and their children.²²⁴ Instead of one tenuous step forward by the Supreme Court of Canada in *Gosselin*, they would have expected Canadian courts at every level to hold governments fully accountable for failing to take affirmative steps to remedy poverty and the serious human rights violations that result. People living in poverty could not have foreseen that, 35 years after the *Charter*'s enactment, s. 7's promise of life, liberty and security of the person would offer no more than a right to sleep in a park at night under a piece of plastic or a cardboard box.²²⁵ Most of all, people

²²¹ *Supra* notes 69-71.

²²² *Gosselin* (SCC), *supra* note 5 at para. 377.

²²³ *Health Services Assn*, *supra* note 74 at para. 78.

²²⁴ One in seven people in Canada live in poverty, including 25.3% of Indigenous people; 23% of people with disabilities; 34.2% of new immigrants and refugees; 32.4% of single parent families (80% of which are female-led) and 43.4% of children in those families; *Poverty Trends 2017*, *supra* note 10 at 1-4.

living in poverty could not have imagined their *Charter* claims would no longer even be heard. Yet that, to all appearances, is the legacy of *Gosselin*.

²²⁵ See Jackman, “Sleeping under a Box?”, *supra* note 219.

35.	Paul Taylor, <i>A commentary on the International Covenant on Civil and Political Rights: The UN Human Rights Committee's Monitoring of ICCPR Rights</i> (Cambridge: Cambridge University Press, 2020)
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Article 6: The Right to Life

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Covenant Article 6

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.
3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this Article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.
4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.
5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.
6. Nothing in this Article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

Comparable Provisions in Other International Instruments

European Convention: Article 2.

American Convention on Human Rights: Article 4.

African Charter on Human and Peoples' Rights: Article 4.

INTRODUCTION

The right to life is a *jus cogens* norm, described as ‘the supreme right of the human being’.¹

Article 6(1) opens by proclaiming ‘the inherent right to life’ of every human being. The guarantees in the two sentences which follow are that the right to life must be protected by law, and that that no one may be ‘arbitrarily’ deprived of life.

The obligation to protect life is the nucleus of Article 6. The text alone does not disclose its full reach, requiring preventative and positive measures to meet certain foreseeable threats to life, and suitable institutional and organisational mechanisms, in a wide range of circumstances. The sources of risk are diverse. In some countries they include armed groups, militias² or counter-revolutionaries;³ in others, attacks on life are religiously motivated.⁴ Forced disappearance, extra-judicial, summary or arbitrary executions, and unlawful killings though associated with military or civilian dictatorships are not confined to them.⁵ The excessive use of force by enforcement officials is a universal issue,⁶ as is domestic violence.⁷ Less common is femicide,⁸ and of escalating concern are the threats to life posed by human trafficking and trafficking in body parts.⁹ With a broad perspective on the protective requirements of Article 6 the Committee has maintained its concern that States: reduce infant mortality;¹⁰ increase life expectancy;¹¹ meet food and

1 *Suarez de Guerrero v. Colombia*, Communication No. R.11/45, Supp. No. 40 (A/37/40) at 137 (1982), 31 March 1982 [13.1]; a principle repeated in numerous Art. 6 cases since, and expressed in *CCPR General Comment No. 6: Article 6 (Right to Life)*, 30 April 1982 (GC 6) [1]; *Article 6 (Right to Life) Nuclear Weapons and the Right to Life*, 9 November 1984 (GC 14) [1]; *General Comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the right to life*, CCPR/C/GC/36, 30 October 2018, advance unedited version (GC 36)) [2]. For an introduction, see Christian Tomuschat, ‘The Right to Life: Legal and Political Foundations’, in Christian Tomuschat, Evelyne Lagrange and Stefan Oeter (eds), *The Right to Life* (Martinus Nijhoff, 2010), p. 3. Elizabeth Wicks pays particular attention to the interests at issue with different facets of the right to life, including armed conflict, crime prevention, autonomy, quality of life and finite resources, in *The Right to Life and Conflicting Interests* (Oxford University Press, 2010).

2 Lebanon A/38/40 (1983) 346. 3 Nicaragua A/38/40 (1983) 229.

4 Indonesia CCPR/C/IDN/CO/1 (2013) 17.

5 E.g., Colombia CCPR/CO/80/COL (2004) 11; Brazil CCPR/C/BRA/CO/2 (2005) 12; Congo CCPR/C/COD/CO/3 (2006) 15; Libya CCPR/C/LBY/CO/4 (2007) 14; Central African Republic CCPR/C/CAF/CO/2 (2006) 12; Mozambique CCPR/C/MOZ/CO/1 (2013) 11.

6 See section ‘Excessive Use of Force’, below.

7 See chapter on Article 3: The Equal Right of Men and Women to the Enjoyment of Covenant Rights, section ‘Violence against Women, including Domestic Violence’.

8 E.g., Mexico CCPR/C/MEX/CO/5 (2010) 9; Guatemala CCPR/C/GTM/CO/3 (2012) 19; Costa Rica CCPR/C/CRI/CO/6 (2016) 21; Guatemala CCPR/C/GTM/CO/4 (2018) 12.

9 Mozambique CCPR/C/MOZ/CO/1 (2013) 17.

10 E.g., Rwanda A/37/40 (1982) 221; Peru A/38/40 (1983) 264; Sri Lanka A/39/40 (1984) 105; Korea (DPRK) CCPR/CO/72/PRK (2001) 12. For discussion on child mortality in the scheme of human rights protection, see Eibe Riedel, ‘The Right to Life and the Right to Health, in Particular the Obligation to Reduce Child Mortality’, in Christian Tomuschat, Evelyne Lagrange and Stefan Oeter (eds), *The Right to Life* (Martinus Nijhoff, 2010), p. 351.

11 Korea (DPRK) CCPR/CO/72/PRK (2001) 12.

nutrition needs;¹² address the causes and consequences of drought, epidemics, natural and nuclear disasters;¹³ improve public health and raise the standard of living;¹⁴ protect the civilian population in war zones;¹⁵ and combat HIV/AIDS and other threats where prevalent.¹⁶

The death penalty occupies the bulk of the text of Article 6, and sends a clear message that the death penalty, though permitted under the Covenant, is strongly discouraged. Pending abolition in any country, it may be imposed in confined cases and on certain preconditions.

Interaction between Article 6 and Other Covenant Provisions

Articles 6 and 9 are closely related in the overlap between the right to personal security in Article 9(1) and the right to life in cases of death threats or attempts on life. Enforced disappearance poses grave risks to life touching on both the personal security and deprivation of liberty limbs of Article 6, and entails the concurrent violation of numerous other Covenant provisions. Article 7 is engaged in the mental suffering by the relatives of those arbitrarily deprived of life. Articles 7 and 10(1) arise in the treatment of detainees, including conditions of detention which may themselves present a threat to life, for example, through an insanitary environment or unchecked propagation of life-threatening diseases,¹⁷ or when prison authorities refuse medical care essential for sustaining life.

There are numerous facets to the intersection between Article 6 and the Covenant's non-discrimination provisions. Articles 3 (gender equality) and 6 apply concurrently to such practices as female infanticide, domestic violence, the burning of widows and dowry killings. Articles 3, 6, 7 (cruel, inhuman or degrading treatment), 17 (privacy, family and home) and 23 (protection for the family) are engaged in situations of unduly restrictive access to abortion services. The discriminatory violation of Article 6 may include the raised incidence of executions in ethnic minority areas,¹⁸ the heightened exposure to risk of abduction and disappearance of certain vulnerable minority groups,¹⁹ the unequal basis on

12 E.g., Peru A/38/40 (1983) 264; Sri Lanka A/39/40 (1984) 105; Korea (DPRK) CCPR/CO/72/PRK (2001) 12.

13 Rwanda A/37/40 (1982) 221 (epidemics); Sri Lanka A/39/40 (1984) 105 (children and epidemics); Korea (DPRK) CCPR/CO/72/PRK (2001) 12 (drought); Japan CCPR/C/JPN/CO/6 (2014) 24 (nuclear contamination in Fukushima).

14 E.g., Tanzania A/36/40 (1981) 211 (improving public health in rural areas); Peru A/38/40 (1983) 264.

15 E.g., Uganda CCPR/CO/80/UGA (2004) 12 (internally displaced); Congo CCPR/C/COD/CO/3 (2006) 13 (women and children).

16 E.g., Namibia CCPR/CO/81/NAM (2004) 10 (measures on an appropriate scale to combat HIV/AIDS).

17 *Titiahonjo v. Cameroon*, Communication 1186/2003, CCPR/C/91/D/1186/2003, 26 October 2007 [6.2].

18 E.g., Iran CCPR/C/IRN/CO/3 (2011) 12.

19 E.g., Kosovo CCPR/C/UNK/CO/1 (2006) 13 (ethnic Albanians and 683 non-Albanians, including Serbs, Roma, Ashkali and Egyptians, continued to be reported as missing); Canada CCPR/C/

which a death sentence pardon is available (e.g., depending on whether financial compensation (blood money) is acceptable to the victim's family),²⁰ the criminalisation of same-sex conduct where it is still a capital offence, as well as life-threatening incidents of violence on the basis of LGBTI status.²¹

Obligations of special protection towards children, required by Article 24, are violated most obviously by capital punishment contrary to Article 6(5).

Articles 18 and 19 are particularly relevant to Article 6 when extradition or deportation would expose those returned to certain countries to real risk of loss of life, because of their religion (e.g., because they have changed religion), or because of their expression of political opposition. The exercise of freedoms under Articles 19 and 21 also commonly gives rise to Article 6 issues in instances of excessive use of force and extrajudicial killings by the police and the military during protests,²² and in recent times the Committee has frequently referenced the incidence of threats, violent assaults and murder of journalists, human rights defenders and others.²³

Chapter Outline

This chapter follows the format of the text of Article 6. It provides coverage of the protective obligations on States, and describes the now well-established element

CAN/CO/6 (2015) 9 (indigenous women and girls are disproportionately affected by life-threatening forms of violence, homicides and disappearances); Norway CCPR/C/NOR/CO/7 (2018) 31 (unaccompanied asylum-seeking minors from reception centres).

20 Yemen CCPR/CO/84/YEM (2005) 15 (the right to seek a pardon is not guaranteed for all on an equal footing; noting the preponderant role of the victim's family in deciding whether or not the penalty is carried out on the basis of financial compensation ('blood money')).

21 See chapter on Article 26: Equality before the Law Equal Protection of the Law, sections 'Grounds of Discrimination', 'Sex, Sexual Orientation, Gender Identity, Transgender Status'.

22 E.g., Indonesia CCPR/C/IDN/CO/1 (2013) 16. See also Algeria CCPR/C/DZA/CO/4 (2018) 45 (violent dispersal of public and private gatherings).

23 E.g., Russian Federation CCPR/C/RUS/CO/6 (2009) 16 (threats, violent assaults and murders of journalists, human rights defenders and others, which has created a climate of fear and a chilling effect on the media). See also Colombia CCPR/C/COL/CO/7 (2016) 38 (allegations of intimidation, threats and/or attacks, including murders, targeting human rights defenders, journalists, trade unionists, judicial officials, lawyers or social or human rights activists); Bangladesh CCPR/C/BGD/CO/1 (2017) 28 (recommendation to protect from unlawful killings, physical attacks and harassment journalists, bloggers, human rights defenders and civil society organisations); Congo CCPR/C/COD/CO/4 (2017) 40 (harassment, threats or intimidation against journalists, political opponents and human rights defenders); Dominican Republic CCPR/C/DOM/CO/6 (2017) 31 (concern at acts of violence and intimidation to which human rights defenders and journalists were subjected); Honduras CCPR/C/HND/CO/2 (2017) 40 (extreme concern at acts of violence and intimidation and the persistently high murder rates among human rights defenders, journalists, trade unionists, environmental activists, indigenous persons and LGBTI, committed by State officials and private individuals); Pakistan CCPR/C/PAK/CO/1 (2017) 37 (reports of disappearance, killing and intimidation of journalists, human rights defenders and lawyers by State and non-State actors); Guatemala CCPR/C/GTM/CO/4 (2018) 36 (grave concern at the increase in acts of violence, intimidation, stigmatisation and murder of human rights defenders, journalists and trade unionists against a backdrop of widespread impunity); El Salvador CCPR/C/SLV/CO/7 (2018) 37 (concern at violence and intimidation against human rights defenders and journalists, and the lack of measures to protect them).

of arbitrariness. The death penalty provisions are considered in turn (Articles 6(2)–(6)). To provide context the right to life is then considered in particular practical settings. The chapter finally addresses issues of implementation.

ARTICLE 6(1)

Protection of Life by Law

The right to life must be ‘protected by law’.

Grounds for Deprivation of Life must be Prescribed by Law and Defined with Precision

The requisite properties of any legal authorisation for the deprivation of life are summarised in General Comment 36. For this the Committee drew on its Article 9 General Comment 35 (and corresponding case law on liberty and security of person), because of the similarity between Article 9(1) and Article 6(1) in the former requiring any deprivation of liberty to be ‘on such grounds and in accordance with such procedure as are established by law’:

The duty to protect by law the right to life entails that any substantive ground for deprivation of life must be prescribed by law, and defined with sufficient precision to avoid overly broad or arbitrary interpretation or application.²⁴

Suarez de Guerrero v. Colombia is an early case which involved the police killing of seven suspected kidnappers where an enactment gave sanction to the use of lethal police action in too broad a range of circumstances. The police laid in wait at a house where a former ambassador was (wrongly) believed to be held captive, and shot the suspected kidnappers at intervals at point-blank range as they arrived at the house. The police were exonerated in domestic law by a decree which provided a defence for punishable acts committed in the course of operations directed against extortion, kidnapping and drug-trafficking. After reciting that ‘the law must strictly control and limit the circumstances in which a person may be deprived of his life by the authorities of a State’, a principle reflected in General Comments 6 and 36,²⁵ and finding that the police action was disproportionate to the

²⁴ *General Comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life*, CCPR/C/GC/36, 30 October 2018 (Advance unedited version) (GC 36) [19]. The corresponding text of *General Comment No. 35: Article 9 (Liberty and Security of Person)*, 16 December 2014, CCPR/C/GC/35 (GC) 35 [22] reads: ‘The third sentence of paragraph 1 of Article 9 provides that no one shall be deprived of liberty except on such grounds and in accordance with such procedure as are established by law. Any substantive grounds for arrest or detention must be prescribed by law and should be defined with sufficient precision to avoid overly broad or arbitrary interpretation or application.’

²⁵ *General Comment No. 6: Article 6 (Right to Life)*, 30 April 1982 (GC 6) [3]; applied, e.g., in *Umateliev v. Kyrgyzstan*, CCPR/C/94/D/1275/2004, 30 October 2008 [9.5].

requirements of law enforcement in the circumstances, the Committee decided that ‘inasmuch as the police action was made justifiable as a matter of Colombian law by [the authorising decree], the right to life was not adequately protected by the law of Colombia as required by Article 6(1)’.²⁶

In addition to stipulating precision in the relevant law, General Comment 36 insists that ‘States parties must ensure full compliance with all of the relevant legal provisions’,²⁷ reinforcing the need for all safeguards under which lethal force is permitted in suitably drafted domestic law to be met in full.

Among the practical measures identified by General Comment 36 to prevent arbitrary deprivation of life by law enforcement officials are: proper planning of enforcement action; mandatory reporting, review and investigation of lethal incidents; and support for those engaged in crowd control to reduce the need to resort to lethal force.²⁸ In Concluding Observations the Committee often refers to the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990),²⁹ less frequently to the Code of Conduct for Law Enforcement Officials,³⁰ and only occasionally to the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions.³¹

Lack of Legal Basis and Arbitrariness

General Comment 36 observes how the ‘protected by law’ requirement and the prohibition against ‘arbitrary’ deprivation of life, though independent, are overlapping in that ‘a deprivation of life that lacks a legal basis or is otherwise inconsistent with life-protecting laws and procedures is, as a rule, arbitrary in nature’.³² It gives the well-acknowledged example of a death sentence following an unfair trial conducted in breach of domestic laws of criminal procedure or

26 *Suarez de Guerrero v. Colombia*, Communication No. R.11/45, Supp. No. 40 (A/37/40) at 137 (1982), 31 March 1982 [13.1]–[13.3]; GC 36 [19].

27 GC 36 [19]. 28 GC 36 [13].

29 Use of Force: Guidelines for Implementation of the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August–7 September 1990, cited, e.g., at USA CCPR/C/79/Add.50 (1995) 32 and USA CCPR/C/USA/CO/4 (2014) 11; Honduras CCPR/C/HND/CO/1 (2006) 10; Bulgaria CCPR/C/BGR/CO/3 (2011) 11; Armenia CCPR/C/ARM/CO/2 (2012) 13; Haiti CCPR/C/HTI/CO/1 (2014) 10; Indonesia CCPR/C/IDN/CO/1 (2013) 16; Israel CCPR/C/ISR/CO/4 (2014) 13; Benin CCPR/C/BEN/CO/2 (2015) 21; Burkina Faso CCPR/C/BFA/CO/1 (2016) 26; Kuwait CCPR/C/KWT/CO/3 (2016) 43; South Africa CCPR/C/ZAF/CO/1 (2016) 27; Congo CCPR/C/COD/CO/4 (2017) 44; El Salvador CCPR/C/SLV/CO/7 (2018) 24.

30 Code of Conduct for Law Enforcement Officials, 5 February 1980, A/RES/34/169, cited at Tunisia A/42/40 (1987) 121; Japan A/43/40 (1988) 604; Italy A/44/40 (1989) 562; Uruguay A/44/40 (1989) 288; Azerbaijan CCPR/C/AZE/CO/3 (2009) 11; Nepal CCPR/C/NPL/CO/2 (2014) 10.

31 Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, 24 May 1989, recommended by ECOSOC Res. 1989/65 of 24 May 1989, cited, e.g., at Togo CCPR/CO/76/TGO (2002) 9.

32 GC 36 [11].

evidence. The counterpart connection between arbitrariness and unlawfulness under Article 9 is illustrated in General Comment 35 by unauthorised confinement of prisoners beyond the length of their sentences, the unauthorised extension of other forms of detention, and continued confinement of detainees in defiance of a judicial order for their release.³³

Broader Protective and Other Duties

To Protect the Right to Life

The obligation of the State under Article 6 is to protect the right to life of every person ‘within its territory and under its jurisdiction’.³⁴ It extends to actions within the jurisdiction by other States.³⁵

States must take measures to prevent and punish deprivation of life by criminal acts, and also to prevent arbitrary killing by their own security forces, or other groups under its control.³⁶ Protection is also needed against the risks to life from non-State actors, such as in cases of lynching,³⁷ conflict between different interest groups,³⁸ the use of private armies and vigilante groups,³⁹ illegal armed groups,⁴⁰ private militia,⁴¹ private security forces,⁴² private contractors to the State⁴³ and killing by private individuals.⁴⁴

As part of their Article 2(1) obligation States must take appropriate preventative measures.⁴⁵ In *Pathmini Peiris v. Sri Lanka* the State’s failure to respond adequately to reported death threats constituted an Article 6 violation. The authorities took no action to protect the author’s husband, who was shot dead by masked men, long after death threats were made to coerce the family into withdrawing complaints against police.⁴⁶

33 GC 35 [11].

34 *Chongwe v. Zambia*, CCPR/C/70/D/821/1998 (2000), 25 October 2000 [5.2] (the State authorised the use of lethal force without lawful reasons, which could have led to the killing of the author); *Vaca v. Colombia*, CCPR/C/74/D/859/1999, 25 March 2002 [7.3] (threats and harassment which led to an attempt on the author’s life were carried out by agents of the State).

35 *García v. Ecuador*, CCPR/C/40/D/319/1988, 5 November 1991 [5.2] (violations of Arts 7, 9 and 13 by Ecuador as a result of violations occurring during operations by the US Drug Enforcement Agency in Ecuador).

36 GC 6 [3]; *El Alwani v. Libya*, CCPR/C/90/D/1295/2004, 11 July 2006 [6.7]; *Hernandez v. Philippines*, CCPR/C/99/D/1559/2007, 26 July 2010 [7.3].

37 Guatemala CCPR/CO/72/GTM (2001) 16; Guatemala CCPR/C/GTM/CO/3 (2012) 18; Mozambique CCPR/C/MOZ/CO/1 (2013) 12.

38 Burkina Faso CCPR/C/BFA/CO/1 (2016) 41 (conflicts between pastoralists and farmers affecting the Fulani (*Peulh*) communities led to physical injuries and deaths).

39 Philippines CCPR/C/PHL/CO/4 (2012) 14. 40 Colombia CCPR/C/COL/CO/7 (2016) 22.

41 Cameroon CCPR/C/79/Add.116 (1999)16. 42 Guatemala CCPR/C/GTM/CO/3 (2012) 16.

43 USA CCPR/C/USA/CO/4 (2014) 5.

44 Honduras CCPR/C/HND/CO/2 (2017) 40 (persistently high murder rates).

45 *General Comment No. 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13 [8].

46 *Peiris v. Sri Lanka*, CCPR/C/103/D/1862/2009, 26 October 2011 [7.2].

A response is demanded to threats to life which are foreseeable, particularly where an effective one is reasonably available and accessible. The right to health, as such, is not protected by the provisions of the Covenant.⁴⁷ Yet the author in *Nell Toussaint v. Canada* successfully claimed a violation of her right to life when, as someone diagnosed with a pulmonary embolism, poorly controlled diabetes and other conditions she was denied coverage under the Federal Government's programme of healthcare for immigrants (IFHP). She did not fit into any of the four categories of immigrants eligible, because she had lawfully entered Canada as a visitor from Grenada and worked in Canada from 1999 to 2008 without obtaining residency status or permission to work. Her already critical health deteriorated to life-threatening status in 2009 and domestic courts agreed that her life and health had been put at significant risk by denying her access to the IFHP scheme. The Committee found a violation of Article 6 (and 26) because, at a minimum, States Parties have the obligation to provide access to existing healthcare services, that are reasonably available and accessible, when lack of access to them would expose a person to a reasonably foreseeable risk that can result in loss of life.⁴⁸

In its latest General Comment the Committee qualified the principle that States are under a due diligence obligation to undertake reasonable positive measures, with the words 'which do not impose on them disproportionate burdens' (based in Inter-American and European jurisprudence).⁴⁹

Remedies, Criminal Investigation, Prosecution and Punishment

Article 2(3) requires States to ensure that all persons have accessible, effective and enforceable remedies in order to vindicate Covenant rights.

States must ensure that those responsible are brought to justice when investigations reveal the violation of a right recognised domestically or internationally as criminal, such as torture, cruel, inhuman and degrading treatment (Article 7), summary and arbitrary killing (Article 6) and enforced disappearance (Articles 7, 9 and frequently Article 6).⁵⁰ Criminal prosecution and, where appropriate, punishment are required.⁵¹ Failure to carry out a prompt, thorough and effective investigation into the circumstances of death are likely to result in findings of violation of Article 6, read alone

47 *Linder v. Finland*, CCPR/C/85/D/1420/2005, 28 October 2005 [4.3].

48 *Toussaint v. Canada*, CCPR/C/123/D/2348/2014, 24 July 2018 [11.2]–[11.5].

49 GC 36 [21]; *Sawhoyamaya Indigenous Community v. Paraguay*, IACtHR Judgment, 29 March 2006 [155]; *Kiliç v. Turkey*, ECHR Judgment of 28 March 2000, Application No. 22492/93 [62], [63]; *Osman v. United Kingdom*, Judgment of 28 October 1998, Reports of Judgments and Decisions 1998-VIII [115], [116].

50 GC 31 [15], [18].

51 *Sathasivam and Saraswathi v. Sri Lanka*, CCPR/C/93/D/1436/2005, 8 July 2008 [6.4]; *Amirov v. Russian Federation*, CCPR/C/95/D/1447/2006, 2 April 2009 [11.2]; *Olmedo v. Paraguay*, CCPR/C/104/D/1828/2008, 22 March 2012 [7.3].

and in conjunction with Article 2(3).⁵² Such findings are said to be particularly warranted in cases where the State's direct responsibility for excessive use of force is indicated by use of a firearm.⁵³ The absence of investigation to establish responsibility for the kidnapping and murder in *Marcellana and Gumanoy v. Philippines*, and the arrest, ill-treatment and killing in *Chaulagain v. Nepal* amounted to a denial of justice, in violation of Article 6 in the former case, and of Articles 6(1), 7, 9 and 10 in the latter, each in conjunction with Article 2(3).⁵⁴ The lack of investigation prevents the victim, and family members, from pursuing a claim for compensation.⁵⁵

Article 2(3) provided an available basis for a finding in *Novaković v. Serbia*, in conjunction with Article 6, when there was insufficient evidence to attribute direct responsibility to the State in the case of death as a result of inadequate medical treatment. It lay in the failure to investigate properly the death and take appropriate action against those responsible.⁵⁶ A similar finding was made in *Bhandari v. Nepal* when the State failed to explain the effectiveness and adequacy of its investigations and the concrete steps taken to clarify the circumstances of the detention and the cause of alleged death, or to locate the mortal remains and return them to the author's family.⁵⁷

According to the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, in all suspected cases of extra-legal, arbitrary and summary executions the purpose of the investigation is to determine the cause, manner and time of death, the person responsible, and any pattern or practice which may have brought about death. It should include an autopsy, collection and analysis of all physical and documentary evidence and

52 E.g., *Zakharenko v. Belarus*, CCPR/C/119/D/2586/2015, 17 March 2017 [7.3], [8]; *Bolakhe v. Nepal*, CCPR/C/123/D/2658/2015, 19 July 2018 [7.14]. The relevant obligations of States are analysed in Vera Rusinova, 'The Duty to Investigate the Death of Persons Arrested and/or Detained by Public Authorities', in Christian Tomuschat, Evelyne Lagrange and Stefan Oeter (eds), *The Right to Life* (Martinus Nijhoff, 2010), p. 65.

53 E.g., *Umetaliev and Tashtanbekova v. Kyrgyzstan*, CCPR/C/94/D/1275/2004, 30 October 2008 [9.6] (six years after the victim's corpse was found with a wound on his neck from a firearm the official investigation had not progressed); *Amirov v. Russian Federation*, CCPR/C/95/D/1447/2006, 2 April 2009 [11.3]. See also *Pestaño v. Philippines*, CCPR/C/98/D/1619/2007, 23 March 2010 [7.3] (staged suicide by shooting; fifteen years after the victim's death the authorities had still not initiated an independent investigation).

54 *Marcellana and Gumanoy v. Philippines*, CCPR/C/94/D/1560/2007, 30 October 2008 [7.4] (over five years elapsed since the killings took place, but the authorities had not indicted, prosecuted or brought to justice anyone); *Chaulagain v. Nepal*, CCPR/C/112/D/2018/2010, 28 October 2014 [11.4]–[11.5].

55 E.g., *Moidunov and Zhumbaeva v. Kyrgyzstan*, CCPR/C/102/D/1756/2008, 19 July 2011 [3.3], [8.10]. See also *Vaca v. Colombia*, CCPR/C/74/D/859/1999, 25 March 2002 [7.2].

56 *Novaković v. Serbia*, CCPR/C/100/D/1556/2007, 21 October 2010 [7.2]–[7.3] (the first suspect was not interrogated and the criminal procedure was not initiated until forty months after the death; an indictment was not raised until five years after the death).

57 *Bhandari v. Nepal*, CCPR/C/112/D/2031/2011, 29 October 2014 [8.9] (violations of Art. 6(1), and of Art. 2(3) read in conjunction with Art. 6).

statements from witnesses. The investigation should distinguish between natural death, accidental death, suicide and homicide.⁵⁸ Investigations should be pursued through an independent commission of inquiry or similar procedure in cases in which the established investigative procedures are inadequate because of lack of expertise or impartiality, because of the importance of the matter or because of the apparent existence of a pattern of abuse, and in cases where there are complaints from the family of the victim about inadequacies in these respects or other substantial reasons.⁵⁹

Organisational Requirements

In General Comment 36 the Committee highlighted the need for institutional and organisational mechanisms to support the obligation to protect life, following the Inter-American decision in *González et al. v. Mexico*, which attracted international attention principally because of government failure to intervene to prevent extreme violence against women and to call those responsible to account: ‘the duty to protect by law the right to life also requires States parties to organize all State organs and governance structures through which public authority is exercised in a manner consistent with the need to respect and ensure the right to life, including establishing by law adequate institutions and procedures for preventing deprivation of life, investigating and prosecuting potential cases of unlawful deprivation of life, meting out punishment and providing full reparation’.⁶⁰

Obligations on Expulsion or Extradition

When an individual is removed from a country against their will, by way of extradition or expulsion, responsibility rests with the State of departure not to expose them to ‘real risk’ (meaning a necessary and foreseeable consequence)⁶¹ of ‘irreparable harm’⁶² in the country to which they are sent. This stems from the

58 For examples of staged suicide, see *Pestaño v. Philippines*, CCPR/C/98/D/1619/2007, 23 March 2010; *Turdukan Zhumbaeva v. Kyrgyzstan*, CCPR/C/102/D/1756/2008, 19 July 2011.

59 Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions [9], [11]. See also *Eshonov v. Uzbekistan*, CCPR/C/99/D/1225/2003, 22 July 2010 [9.5] (the author complained about a lack of impartiality in the investigation and provided a detailed description of injuries suggesting that the victim had died from a violent death; official investigations concluded there were no grounds for criminal proceedings for lack of *corpus delicti*).

60 GC 36 [19] (footnote omitted). The relevant passage is at *González et al. (“Cotton Field”) v. Mexico*, Inter-American Court of Human Rights, 16 November 2009 [236].

61 *Kindler v. Canada*, CCPR/C/48/D/470/1991, 30 July 1993 [14.1].

62 GC 31 [12]; e.g., *Warsame v. Canada*, CCPR/C/102/D/1959/2010, 21 July 2011 [8.2]–[8.3] (deportation to Somalia would, if implemented, constitute a violation of Arts 6(1) and 7 as the author lacked clan support, was at risk of forced recruitment by pirate or Islamist militia groups and would be exposed to generalised violence); *X v. Sweden*, CCPR/C/103/D/1833/2008, 1 November 2011 [9.2]–[9.4] (deportation to Afghanistan constituted a violation of Arts 6 and 7 where homosexual activities were punishable as *Hudood* crimes attracting (as a maximum) the

obligation in Article 2(1) to ‘respect and ensure’ Covenant rights for everyone either ‘in their territory’ or ‘under their control’. A State’s Article 2 duty would be negated by handing over of a person to another State where treatment contrary to the Covenant is certain, or is the very purpose of handing them over.⁶³

States parties to the Covenant must ensure that they carry out all their legal commitments, whether under domestic law or under agreements with other States, in a manner consistent with the Covenant.⁶⁴ ‘Irreparable harm’ means harm such as that contemplated by Articles 6 (as ‘the most essential of all Covenant rights’),⁶⁵ and 7.⁶⁶ States should give sufficient weight to the real and personal risk that a person might face.⁶⁷ The responsibility also derives from the substantive Covenant provisions at stake. It should not be subject to any balancing with considerations concerning the type of criminal conduct of which an individual is accused or suspected.⁶⁸ Authorities must not overlook important evidence, such as that indicating previous torture, and their reasoning must be supportable.⁶⁹

In OPI petitions the Committee requires ‘substantial grounds’ for considering that there is real risk of such harm.⁷⁰ In assessing the existence of a real risk ‘all relevant considerations’ must be taken into account, including those specific to the author and more generally the circumstances prevailing in the receiving State. The author in *Nikolai Valetov v. Kazakhstan* was a Russian Federation national in Kazakhstan who claimed that if extradited to Kyrgyzstan he would be tortured (he was in fact extradited before the Committee made its decision). The background to his claim was that while staying in Kyrgyzstan with his niece, who was intimately involved with a police officer, he witnessed his niece commit a murder, for which the author was framed, and while detained for that (and other crimes which he denied) he was tortured with such severity that he was invalided. He managed to escape to Kazakhstan. Kazakh authorities conducted an investigation with the aim of verifying the allegations of torture, but the author’s uncontested claim was that this ‘verification was purely a formality’, he could not participate in the investigation procedure, he was never questioned and no forensic examination was conducted. Kazakhstan offered no explanation as to why it rejected his claims of torture without carrying out forensic examination before deporting him, as this

death sentence; the authorities gave insufficient weight to the risks the author faced in Afghanistan, focusing instead mainly on inconsistencies in his account and attributing low credibility).

63 E.g., *Ng v. Canada*, CCPR/C/49/D/469/1991, 5 November 1993 [6.2].

64 E.g., *G.T. v. Australia*, CCPR/C/61/D/706/1996, 4 November 1997 [8.1].

65 GC 31 [12]; *Kindler v. Canada*, CCPR/C/48/D/470/1991, 30 July 1993 [13.1].

66 For Art. 7 risks, see chapter on Article 7: Torture, Cruel, Inhuman or Degrading Treatment or Punishment, section ‘Obligations on Expulsion or Extradition’.

67 E.g., *H.A. v. Denmark*, CCPR/C/123/D/2328/2014, 9 July 2018 [9.8]; *K.H. v. Denmark*, CCPR/C/123/DR/2423/2014, 16 July 2018 [8.7].

68 E.g., *Valetov v. Kazakhstan*, CCPR/C/110/D/2104/2011, 17 March 2014 [14.2].

69 E.g., *C.L. and Z. v. Denmark*, CCPR/C/122/D/2753/2016, 26 March 2018 [8.4], [8.7].

70 E.g., *Fong v. Australia*, CCPR/C/97/D/1442/2005, 23 October 2009 [9.4].

would have verified his claim that he still bore the scars and signs of torture. The Committee noted that ‘at the time of the author’s extradition, it was known, or should have been known, to [Kazakh] authorities that there were credible public reports of widespread use of torture against detainees in Kyrgyzstan’.⁷¹

In some cases a real risk is to be deduced from the intent of the country to which the person concerned is to be deported, as well as from the pattern of conduct shown by the country in similar cases. However, in *G.T. v. Australia* the Committee could not conclude that it was a foreseeable and necessary consequence of deportation that the individual would be tried, convicted and sentenced to death, because Malaysia had not requested his return, nothing otherwise pointed to any intention on the part of Malaysian authorities to prosecute him, and in similar cases no prosecution had occurred.⁷²

Many claims fail for being insufficiently substantiated for the purposes of admissibility. In *X v. Denmark* mere membership of a particular Christian church was insufficient, in the case of deportation to Afghanistan, to ground claims under Articles 7, 18 and 26, following the author’s conversion from the Sunni Muslim faith, when this would be unlikely to be known by the authorities in Afghanistan.⁷³

Assurances

In practice arrangements for inter-country transfers are addressed in bilateral agreements, such as extradition treaties. Contracting parties to the Covenant must ensure that they meet their obligations under such arrangements in a manner consistent with the Covenant.⁷⁴

In the case of extradition on a capital offence a State is able to seek diplomatic assurances that the death penalty will not be imposed, but to be effective they must be sufficient to eliminate the risk of that eventuating. They should contain a monitoring mechanism and be safeguarded by arrangements made outside the text of the assurances themselves to provide for their effective implementation.⁷⁵ The existence of such assurances, their content and the availability of enforcement

71 *Valetov v. Kazakhstan*, CCPR/C/110/D/2104/2011, 17 March 2014 [14.5]. Cf. *Z.H. v. Denmark*, CCPR/C/119/D/2602/2015, 27 March 2017 [7.5] (although there were reports of blood-feud crimes neither the author nor his family were directly targeted by the blood feud).

72 *G.T. v. Australia*, CCPR/C/61/D/706/1996, 4 November 1997 [8.4]. See also *H.A. v. Denmark*, CCPR/C/123/D/2328/2014, 9 July 2018 [9.8] (the Committee was not in a position to assess the extent to which the situation in Afghanistan may impact the author’s *personal* risk); *B.L. v. Australia*, CCPR/C/112/D/2053/2011, 16 October 2014 [7.4] (not shown that the authorities in Senegal would not generally be willing and able to provide impartial, adequate and effective protection to the author against threats to his physical safety, and not unreasonable to expect him to settle in a location where such protection would be available to him).

73 *X v. Denmark*, CCPR/C/113/D/2515/2014, 1 April 2015 [4.3].

74 *Kindler v. Canada*, CCPR/C/48/D/470/1991, 30 July 1993 [13.1].

75 *Alzery v. Sweden*, CCPR/C/88/D/1416/2005, 25 October 2006 [11.5].

mechanisms are all elements relevant to the overall determination of whether there is, in fact, a real risk. They were insufficient in *Maksudov et al. v. Kyrgyzstan* for a number of authors who were sought by Uzbekistan for offences which carried the death penalty.⁷⁶ The ineffectiveness of the assurances procured in *Valetov v. Kazakhstan* was indicated by the failure by Kazakh authorities to visit the author where he was detained in Kyrgyzstan.⁷⁷

Duty to Investigate Issues Raised

Failure to undertake a serious examination of the authenticity of allegations about the risks of harm before deporting may result in a finding under Article 6(1). In *Shakeel v. Canada* Canadian authorities were proposing to expel a Christian evangelist pastor to Pakistan in spite of a fatwa in Pakistan calling for his death. The fatwa was not given any weight by Canadian authorities because it was in Urdu, yet had an English-language signature stamp; and in the English-language footer the word ‘Colony’ was misspelled ‘Calony’. They conducted no official expert analysis, nor any thorough investigation into the person responsible for the fatwa, his profile or his authority to issue fatwas. Investigation was all the more critical given that the fatwa was issued by the same person who initiated police proceedings against the author for blasphemy, a capital offence. Added to this, the author’s brother was severely beaten (and subsequently died) by unknown assailants enquiring about the whereabouts of the author following the fatwa.⁷⁸

The danger was less obviously personally directed at the author in *Ostavari v. Korea*, but was sufficient to conclude that he would be exposed to a real risk of irreparable harm in his circumstances, as a Muslim convert to Christianity. Although apostasy was not codified as a crime under Iranian law there were indications that it may be treated as such by prosecutors and judges, and it had led to a number of instances of arbitrary arrest, imprisonment in solitary confinement, torture, conviction and even execution. Korean authorities failed to give due consideration to the personal risk he faced in Iran not only as a Christian convert, but also as a theologian with a conspicuous evangelist profile, given that Christians engaged in proselytising were exposed to serious risks of persecution, as well as penal consequences.⁷⁹ It was also noteworthy that when an official from the Iranian Embassy visited the author at the Korean authorities’ request (to issue a new passport to allow his repatriation) the author was asked to reconvert to the Muslim faith. He also received a subsequent visit from another official from the Iranian Embassy, who tried to persuade him to

⁷⁶ *Maksudov et al. v. Kyrgyzstan*, CCPR/C/93/D/1461, 1462, 1476 & 1477/2006, 16 July 2008 [12.4]–[12.6].

⁷⁷ *Valetov v. Kazakhstan*, CCPR/C/110/D/2104/2011, 17 March 2014 [14.6].

⁷⁸ *Shakeel v. Canada*, CCPR/C/108/D/1881/2009, 24 July 2013 [8.5] (expulsion would constitute a violation of Arts 6(1) and 7).

⁷⁹ *Ostavari v. Korea*, CCPR/C/110/D/1908/2009, 25 March 2014 [11.4]–[11.5].

reconvert to Islam. In general, when conversion to another religion is raised as a risk after an asylum request has been dismissed, it may be reasonable to carry out an in-depth examination of the circumstances of the conversion by the authorities.⁸⁰

Authorities should not be distracted in their duty to investigate. The refugee claim in *Choudhury v. Canada* stalled at the initial stage because the author and his wife did not credibly establish their identity (the author's identity document did not contain certain expected characteristics, and his wife's identity card was listed among documents that had been declared stolen by the government of Pakistan). This prevented a proper examination of allegations that he and his wife had been physically attacked and threatened with death by an extremist group for speaking out against Islamist fundamentalism and violence, which caused that group to file a police complaint alleging blasphemy. An arrest warrant followed. The Committee found that the extradition of the author and his family would be in violation of Articles 6(1) and 7, read in conjunction with Article 2(3), noting that religious minorities in Canada, including Shias such as the author, continued to face fierce persecution and insecurity in Pakistan, and the Pakistani authorities were unable, or unwilling, to protect them. In spite of the fact that death sentences had reportedly not been carried out, several instances were reported of extrajudicial assassination, by private actors, of members of religious minorities accused under the blasphemy law.⁸¹

Similarly in *X v. Sweden*, the Committee found that the author's forced return to Afghanistan violated Articles 6 and 7. The authorities rejected his application to remain in Sweden on the ground that at a late stage in the asylum process he based his claim on sexual orientation, which substantially undermined his credibility. This was in spite of his unchallenged sexual orientation and its impact on him in the particular circumstances in Afghanistan, including as a famous playwright of works on bisexual themes, and that certain same-sex activities in Afghanistan were punishable as *Hudood* crimes by a maximum sentence of death.⁸²

Arbitrary Deprivation of Life

Elements of Inappropriateness, Injustice, Lack of Predictability and Due Process of Law, as well as Elements of Reasonableness, Necessity and Proportionality

A deprivation of life may be authorised by domestic law and still be arbitrary. The notion of 'arbitrariness' under both Articles 6 and 9 includes elements of

80 Office of the United Nations High Commissioner for Refugees, Guidelines on International Protection: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees, HCR/GIP/04/06, 28 April 2004 [34], cited, e.g., in *S.A.H. v. Denmark*, CCPR/C/121/D/2419/2014, 8 November 2017 [11.8]; *K.H. v. Denmark*, CCPR/C/123/DR/2423/2014, 16 July 2018 [8.5].

81 *Choudhary v. Canada*, CCPR/C/109/D/1898/2009, 28 October 2013 [9.7]–[9.8].

82 *X v. Sweden*, CCPR/C/103/D/1833/2008, 1 November 2011 [9.3]–[9.4].

‘inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality’.⁸³ The illustrative application of these principles in General Comment 36, in situations of self-defence or the defence of others, emphasises that the use of potentially lethal force must be ‘strictly necessary’ in view of the threat posed, a means of ‘last resort after other alternatives have been exhausted or deemed inadequate’, not exceeding an amount ‘strictly needed for responding to the threat’, ‘carefully directed’ (only against the attacker), and, in the case of law enforcement, must be regarded as ‘an extreme measure’.⁸⁴ Lethal force may only be used to meet a proportionate threat.⁸⁵

Excessive Use of Force

In finding that the police actions in *Suarez de Guerrero v. Colombia* were disproportionate to the requirements of law enforcement the Committee noted the following: the killings were deliberate; they occurred without warning to the victims, who had not fired a shot and had no opportunity to surrender to the police or explain their presence or intentions; there was no evidence that the police action was in self-defence or that of others, or that it was necessary to arrest the victims to prevent their escape; the victims were no more than suspects in a kidnapping that had occurred some days earlier; and their killing deprived them of all the protections of due process of law.⁸⁶ Proportionality is judged by the circumstances prevailing at the moment force is applied. In *Rickly Burrell v. Jamaica* the Committee found that authorities had failed to take effective measures to protect the author’s life when a death row prisoner was shot dead in a warder hostage-taking incident, after the warders had been rescued.⁸⁷

In Concluding Observations the Committee has criticised the excessive use of force by law enforcement officials,⁸⁸ including in the context of peaceful protests,⁸⁹

83 GC 36 [12] (footnotes omitted), adopting similar text from GC 35 [12]. The Committee has endorsed such criteria in a number of Art. 9 decisions, e.g., *Van Alphen v. Netherlands*, CCPR/C/39/D/305/1988, 23 July 1990 [5.8]; *Mukong v. Cameroon*, CCPR/C/51/D/458/1991, 21 July 1994 [9.8]; *Gorji-Dinka v. Cameroon*, CCPR/C/83/D/1134/2002, 17 March 2005 [5.1].

84 GC 36 [12]. 85 E.g., *Baumgarten v. Germany*, CCPR/C/78/D/960/2000, 31 July 2003 [9.4].

86 *Suarez de Guerrero v. Colombia*, Communication No. R.11/45, Supp. No. 40 (A/37/40) at 137 (1982), 31 March 1982 [13.2]–[13.3].

87 *Burrell v. Jamaica*, CCPR/C/53/D/546/1993, 18 July 1996 [9.5].

88 E.g., Dominican Republic A/40/40 (1985) 390 (incidents involving the use of excessive force by police leading to death and injury); Korea A/47/40 (1992) 506 (concern at excessive use of force by police); Brazil CCPR/C/BRA/CO/2 (2005) 12 (widespread use of excessive force by law enforcement officials); Malawi CCPR/C/MWI/CO/1 (2011) 11 (reported excessive use of force by police officers during arrests, and deaths in custody).

89 E.g., Azerbaijan CCPR/C/AZE/CO/4 (2016) 38 (allegations of frequent use of excessive force against persons participating in planned or spontaneous peaceful protests).

public meetings and demonstrations,⁹⁰ riots,⁹¹ when aliens are deported,⁹² and the use of particular weapons such as tasers (given they can lead to severe pain and life-endangering injury).⁹³ It has recommended prompt and impartial investigation of law enforcement officials (and publication of the results), criminal proceedings where appropriate, training with regard to the criminal nature of the excessive use of force, as well as on the principle of proportionality when using force.⁹⁴

Arbitrariness through Inconsistency with International Law or Domestic Law

Florentina Olmedo v. Paraguay arose out of the police killing of a farmworker while attending a 1,000-strong demonstration urging implementation by authorities of agreements signed by the Ministry of Agriculture, when demonstrators came face-to-face with a large number of regular police, anti-riot police and military personnel. Since the authorities' investigation into the victim's death was botched, to the extent it was progressed at all, it shed little light on events. The Committee concluded with unusual brevity that the State had failed to meet its obligation to protect the life of the demonstrators and found a violation of Article 6(1), and of Article 2(3) read in conjunction with Article 6(1).⁹⁵ *Umateliev v. Kyrgyzstan* similarly concerned the killing of a demonstrator, by militia in the course of crowd dispersal during a mass protest at the treatment of an MP in retaliation for critical remarks against the government. The Committee accepted the evidence of the State's direct responsibility for the victim's death through excessive use of force, relying on the principle that the law must strictly control and limit the circumstances in which a person may be deprived of life by the authorities.⁹⁶

90 E.g., Venezuela CCPR/C/VEN/CO/4 (2015) 14 (reports of the involvement of military personnel in the policing of public gatherings and demonstrations); Colombia CCPR/C/COL/CO/7 (2016) 36 (excessive use of force during public demonstrations); Congo CCPR/C/COD/CO/4 (2017) 43 (allegations that police and security officers used excessive force to disperse demonstrations, resulting in deaths and injuries); Algeria CCPR/C/DZA/CO/4 (2018) 46(d) (recommendation to take effective measures to ensure that law enforcement personnel do not use excessive force during crowd dispersal operations).

91 Cameroon CCPR/C/CMR/CO/4 (2010) 18.

92 E.g., Belgium CCPR/CO/81/BEL (2004) 14 (allegations of excessive force being used when aliens are deported); Switzerland CCPR/CO/73/CH (2001) 13 (in the course of the deportation of aliens, use of excessive force, resulting on some occasions in death). See also Italy CCPR/C/ITA/CO/6 (2017) 20 (reports of frequent use of excessive force by police and other law enforcement officials, particularly in the context of migrant identification procedures at certain 'hotspots').

93 Belgium CCPR/C/BEL/CO/5 (2010) 13.

94 Georgia CCPR/C/79/Add.75 (1997) 9. For similar recommendations see, e.g., Brazil CCPR/C/BRA/CO/2 (2005) 12 (investigation by an independent body, with the accused subject to suspension or re-assignment during the process of investigation).

95 *Olmedo v. Paraguay*, CCPR/C/104/D/1828/2008, 22 March 2012 [7.5].

96 *Umateliev v. Kyrgyzstan*, CCPR/C/94/D/1275/2004, 30 October 2008 [9.5].

General Comment 36 draws on principles established under the African Charter, as does the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, for the proposition that deprivation of life is, as a rule, arbitrary if it is inconsistent with international law or domestic law.⁹⁷ In holding that deprivation of life through acts or omissions that violate Covenant provisions other than Article 6 is also, as a rule, arbitrary in nature, General Comment 36 gives the example of excessive use of force against demonstrators exercising their right of freedom of assembly.⁹⁸ The Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions comments that arbitrariness may be inferred from laws and practices that violate the principle of non-discrimination, and that may be unnecessary and disproportionate; any deprivation of life based on discrimination in law or in practice is *ipso facto* arbitrary in nature.⁹⁹ Article 9 jurisprudence is instructive to the extent it addresses arbitrariness subsisting in detention which is incompatible with a Covenant provision.¹⁰⁰

ARTICLE 6(2)–(6): DEATH PENALTY PROVISIONS

The scheme of Articles 6(2)–(6) is to create a narrow exception to the right to life to allow the death penalty to continue in those countries that have not yet abolished it, and to lay down the terms on which that exception applies.¹⁰¹

Article 6(2): Preconditions for Imposition of the Death Penalty

Since the death penalty provisions were to appease certain countries that retained the death penalty, and were concessionary, the right to life in Article 6(1) is to be interpreted widely, and Article 6(2) narrowly.¹⁰² Violation of Article 6(2) is also in violation of Article 6(1). For those countries that have not already abolished the

⁹⁷ GC 36 [12]; A/HRC/35/23 (2017) [30].

⁹⁸ GC 36 [17] cites the report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions A/HRC/26/36 (2014) [75], which in turn cites the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials. It gives as a second example the principle that a death sentence may be imposed *only* in accordance with the law and not contrary to the provisions of the Covenant. As expressed in decision-making, it implies that ‘the procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review by a higher tribunal’: e.g., *Burdyko v. Belarus*, CCPR/C/114/D/2017/2010, 15 July 2015 [8.6].

⁹⁹ *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, A/73/314, 7 August 2018 [15]. See also her report at A/HRC/35/23 (2017) [30]–[32].

¹⁰⁰ See chapter on Article 9: Liberty and Security, section ‘Arbitrariness Where Detention is Incompatible with a Covenant Provision’.

¹⁰¹ For an early synopsis of the Committee’s Art. 40 role and relevant jurisprudence, see Christina Cerna, ‘Universality of Human Rights: the Case of the Death Penalty’, (1997) 3(2) ISLA J. Int. & Com. Law, p. 477.

¹⁰² *Judge v. Canada*, CCPR/C/78/D/829/1998, 5 August 2002 [10.5].

death penalty, Article 6(2) permits its imposition only ‘for the most serious crimes’, to emphasise the ‘utmost gravity’ of the deprivation of life by the authorities of the State,¹⁰³ which do not include: aggravated robbery using a firearm (resulting in a wound to the thigh but no fatality);¹⁰⁴ statutory rape defined to cover crimes of different degrees of seriousness;¹⁰⁵ drug trafficking;¹⁰⁶ armed robbery;¹⁰⁷ corruption, abduction or piracy.¹⁰⁸

Insofar as the death sentence is permitted at all, it must be imposed in accordance with the law in force at the time of the offence,¹⁰⁹ and be ordered by final judgment of a competent court. It must also not be contrary to the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention),¹¹⁰ or the Covenant. The Covenant provisions of particular relevance are: Article 7, so that it must not involve execution constituting ‘cruel, inhuman or degrading treatment or punishment’;¹¹¹ Article 15, which rules out retroactive operation of criminal liability and sanctions;¹¹² and Article 14, the most commonly actuated in this context.¹¹³ The imposition of the death penalty as a result of proceedings in violation of Article 14 is arbitrary in nature, and a violation of Article 6.¹¹⁴ Most examples occur as multiple Article 14 violations, including as many as Article 14(1), (2), (3)(b), (3)(g) and (5) in a single case,¹¹⁵

103 *Husband of Maria Fanny Suarez de Guerrero v. Colombia*, Communication No. R.11/45, Supp. No. 40 (A/37/40) at 137 (1982), 31 March 1982 [13.1]. See also *Iraq CCPR A/53/40* (1998) 99; *Kuwait CCPR/C/KWT/CO/3* (2016) 22.

104 *Chisanga v. Zambia*, CCPR/C/85/D/1132/2002, 18 October 2005 [7.4] (the mandatory imposition of the death penalty was based solely upon the category of crime, without giving the judge any margin to evaluate the circumstances of the particular offence).

105 *Rolando v. Philippines*, CCPR/C/82/D/1110/2002, 3 November 2004 [5.2].

106 *Thailand CCPR/CO/84/THA* (2005) 14 (concern that the death penalty was applicable to drug trafficking).

107 *Chisanga v. Zambia*, CCPR/C/85/D/1132/2002, 18 October 2005 [7.4]; *Lubuto v. Zambia*, CCPR/C/55/D/390/1990/Rev.1, 31 October 1995 [7.2].

108 See examples at GC 36 [35].

109 *Ashby v. Trinidad and Tobago*, CCPR/C/74/D/580/1994, 21 March 2002 [10.8] (execution carried out while a sentence was still under challenge was in violation of both Art. 6(1) and (2)).

110 Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, UNTS vol. 78, p. 277, entered into force 12 January 1951.

111 See chapter on Article 7: Torture, Cruel, Inhuman or Degrading Treatment or Punishment, section ‘Capital Punishment, Means of Execution’.

112 See chapter on Article 15: Retroactive Criminal Law.

113 On the similarities and divergences in fair trial standards in capital trials, see Walter Kälin, ‘“Death is Different”: the Death Penalty and the Right to a Fair Trial’, in Christian Tomuschat, Evelyne Lagrange and Stefan Oeter (eds), *The Right to Life* (Martinus Nijhoff, 2010), p. 21.

114 E.g., *Levy v. Jamaica*, CCPR/C/64/D/719/1996, 25 November 1998 [8] (violation of Art. 14(3)(d), and consequently Art. 6(2)); *Marshall v. Jamaica*, CCPR/C/64/D/730/1996, 25 November 1998 [6.6] (violation of Art. 14(3)(d), and consequently Art. 6(2)); *Kurbanov v. Tajikistan*, CCPR/C/79/D/1096/2002, 6 November 2003 [7.7] (violation of the right to a fair trial and thus also in breach of Art. 6).

115 E.g., *Kovaleva and Kozyar v. Belarus*, CCPR/C/106/D/2120/2011, 29 October 2012 [11.8]. See also *Morrison v. Jamaica*, CCPR/C/64/D/663/1995, 25 November 1998 [8.7] (violation of Arts 14(3)(c), (d) and 5, and consequently Art. 6(2)); *Phillip v. Trinidad and Tobago*, CCPR/C/64/D/

though most involve fewer,¹¹⁶ and in some cases only a single Article 14 violation.¹¹⁷ Related violations of Article 7 (torture to extract a confession) and Article 14(3)(g) (not to be compelled to confess guilt) are distinct and temporally separate in that torture is antecedent to admitting the resulting incriminating confession into evidence, rendering the trial unfair.¹¹⁸ The State may have avoided the sentences of death passed in the circumstances of *Gunan v. Kyrgyzstan* and *Chikumova v. Uzbekistan* if it had properly investigated, as it was bound to, allegations of torture to extract a confession, but it failed to do so. (Those two cases also illustrate how the Committee at times couches its findings in cases of the death sentence following violation of the relevant Article 14 provision, as a violation of Article 6(2) read in conjunction with Article 14,¹¹⁹ and at others as a violation of Article 14, read together with Article 6.¹²⁰)

It is well-established that the automatic and mandatory imposition of the death penalty constitutes an arbitrary deprivation of life, under Article 6(1), in circumstances where it is imposed without any possibility of taking into account the defendant's personal circumstances or the circumstances of the particular offence.¹²¹ The principle acknowledges that the death penalty is an exceptional form of punishment. The existence of a de facto moratorium on the death penalty,

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- 594/1992, 3 December 1998 [8] (violation of Art. 14(3)(b) and (d), and consequently of Art. 6); *Idiev v. Tajikistan*, CCPR/C/95/D/1276/2004, 31 March 2009 [9.7] (death sentence in violation of Arts 7 and 14(3)(g); and Art. 14(3)(d) and (e), thus also Art. 6(2)); *Khoroshenko v. Russian Federation*, CCPR/C/101/D/1304/2004, 29 March 2011 [9.10] (violation of Art. 6 read together with Art. 14, and of Art. 14(3)(a), (b), (d) and (g)); *Selyun v. Belarus*, CCPR/C/115/D/2289/2013, 6 November 2015 [7.3], [8] (violation of Arts 6, 7, 9(3) and 14(2) and (3)(b), (d) and (g)).
- 116 *Yuzepchuk v. Belarus*, CCPR/C/112/D/1906/2009 (2014), 24 October 2014 [8.6] (Art. 14(3)(e) and (g)). For similar findings in relation to Art. 14(3)(g), see also *Uteev v. Uzbekistan*, CCPR/C/91/D/1150/2003, 26 October 2007 [7.4]; *Zhuk v. Belarus*, CCPR/C/109/D/1910/2009, 30 October 2013 [8.7].
- 117 *Mansaraj et al. v. Sierra Leone*, CCPR/C/72/D/839, 840 & 841/1998, 16 July 2001 [5.6] (Art. 14(5)); *Khalilova v. Tajikistan*, CCPR/C/83/D/973/2001, 30 March 2005 [7.5] (Art. 14(5)).
- 118 *Khoroshenko v. Russian Federation*, CCPR/C/101/D/1304/2004, 29 March 2011 [9.11] (violation of Art. 6 read together with Art. 14).
- 119 *Gunan v. Kyrgyzstan*, CCPR/C/102/D/1545/2007, 25 July 2011 [6.2]–[6.5] (violation of Art. 6(2), read in conjunction with Art. 14). See also *Karimov and Nursatov v. Tajikistan*, CCPR/C/89/D/1108 & 1121/2002, 27 March 2007 [7.6] (in which death sentences in violation of Art. 14(3)(b) and (d), resulted in findings of violation of Art. 6(2)).
- 120 *Chikumova v. Uzbekistan*, CCPR/C/89/D/1043/2002, 16 March 2007 [7.5], [8].
- 121 E.g., *Thompson v. St. Vincent and the Grenadines*, CCPR/C/70/D/806/1998, 18 October 2000 [8.2]; *Kennedy v. Trinidad and Tobago*, CCPR/C/74/D/845/1998, 26 March 2002 [7.3] (the death penalty was based solely on the particular category of crime of which the accused person was found guilty); *Carpo et al. v. Philippines*, CCPR/C/77/D/1077/2002, 28 March 2003 [8.3] (if a single act constitutes at once two crimes, the maximum penalty for the most serious crime must be applied; an attempted murder therefore attracted the death penalty as the maximum possible penalty for murder); *Rayos v. Philippines*, CCPR/C/81/D/1167/2003, 27 July 2004 [7.2]; *Hussain et al. v. Guyana*, CCPR/C/85/D/862/1999, 25 October 2005 [6.2]; *Chan v. Guyana*, CCPR/C/85/D/913/2000, 31 October 2005 [6.5]; *Persaud v. Guyana*, CCPR/C/86/D/812/1998, 21 March 2006 [7.2]; *Mwamba v. Zambia*, CCPR/C/98/D/1520/2006, 10 March 2010 [6.3]. See also *Barbados CCPR/C/BRB/CO/3* (2007) 9; *Ghana CCPR/C/GHA/CO/1* (2016) 19; *Kuwait CCPR/C/KWT/CO/3* (2016) 22(c).

which often occurs in countries transitioning away from the death penalty, is not sufficient to render a mandatory death sentence consistent with the Covenant.¹²²

Article 6(3): No Implied Derogation from Genocide Convention

By virtue of Article 6(3) nothing in Article 6 can be relied on to permit any derogation from a State's obligations under the Genocide Convention. The obligations remain to prevent and punish all deprivations of life which constitute part of a crime of genocide. The *travaux* indicate that a reference to this convention was necessary because the individual's right to life could not be safeguarded adequately if the group to which a person belonged was threatened with extinction.¹²³

Article 6(4): Right to Seek Pardon and Commutation

Article 6(4) mandates the right to seek a pardon or commutation of a death sentence. It also provides that an amnesty, pardon or commutation may be granted in all cases,¹²⁴ regardless of the crime committed.¹²⁵

States should ensure that everyone sentenced to death, after exhaustion of all legal avenues of appeal, has an effective opportunity to exercise the right to seek a pardon or commutation of sentence from the relevant authorities.¹²⁶ The power of pardon, commutation and reprieve should be genuinely available to those sentenced to death.¹²⁷ States retain discretion for spelling out the modalities of the exercise of the rights under Article 6(4).¹²⁸ It is not secured if an amnesty, pardon or commutation is available at the discretion of the executive.¹²⁹ A failure

122 E.g., *Weerawansa v. Sri Lanka*, CCPR/C/95/D/1406/2005, Views adopted on 17 March 2009 [7.2] (a moratorium on the death penalty applied for nearly thirty years); *Johnson v. Ghana*, CCPR/C/110/D/2177/2012, 27 March 2014 [7.3] (there was no room for judicial discretion at first instance or appeal courts so as not to impose the only sentence provided by law, that is, the death penalty, after the author had been convicted for murder).

123 Haji N. A. Noor Muhammad, 'Due Process of Law for Persons Accused of a Crime', in Louis Henkin (ed.), *The International Bill of Rights: the Covenant on Civil and Political Rights* (Columbia University Press, 1981), p. 159. See also A/2929, Ch.VI (1955), p. 30, [8].

124 In *Chisanga v. Zambia*, CCPR/C/85/D/1132/2002, 18 October 2005 [7.5] the Committee considered that taking the author from death row and then refusing to apply to him an amnesty applicable to those who had been on death row for ten years, when he had been in detention for eleven years, deprived him of an effective remedy in relation to his right to seek amnesty or commutation under Art. 6(4), together with Art. 2.

125 E.g., *Iraq* CCPR/C/IRQ/CO/5 (2015) 28. 126 E.g., *Iran* CCPR/C/IRN/CO/3 (2011) 12.

127 *Japan* CCPR/C/JPN/CO/5 (2008) 16, 17 (requests for retrial or pardon did not have the effect of staying the execution of a death sentence); *Malawi* CCPR/C/MWI/CO/1/Add.1 (2014) 11 (concern that the right to seek a pardon was not effectively ensured).

128 *Kennedy v. Trinidad and Tobago*, CCPR/C/74/D/845/1998, 26 March 2002 [7.4].

129 *Thompson v. St Vincent and the Grenadines*, CCPR/C/70/D/806/1998, 18 October 2000 [8.2]. In this context note the Individual Opinion (dissenting) by Mr David Kretzmer, co-signed by Mr Abdelfattah Amor, Mr Maxwell Yalden and Mr Abdallah Zakhia, summarising their understanding that the Covenant expressly demands that States have regard to particular circumstances of the defendant or the particular offence before carrying out a death sentence, and that

to respond to a request for a pardon constitutes a breach of Article 6(4).¹³⁰ Non-compliance with Article 6(4), through lack of express implementation in domestic law, has been a frequent Committee concern.¹³¹

Article 6(5): Crimes Committed by Those Under 18

States may not impose the death sentence on anyone below the age of 18, or on a pregnant woman.¹³² The Committee has pointed out non-compliance with Article 6(5) where the law has authorised the death penalty on those under 18 years,¹³³ or on those below 18 at the time of the alleged offence,¹³⁴ and it has deplored carrying out the execution in such circumstances.¹³⁵ It has examined closely how the prohibition in Article 6(5) is achieved domestically, including whether it prevents execution of a woman even after confinement, given the needs of the infant.¹³⁶ Where domestic law has been brought into compliance it has expected applicable reservations and declarations to be withdrawn.¹³⁷ It considers reservations to Article 6(5) to be incompatible with the object and purpose of the Covenant.¹³⁸

a State has a legal obligation to take such circumstances into account in considering applications for pardon or commutation; the consideration must be carried out in good faith and according to a fair procedure.

- 130 *Chikumova v. Uzbekistan*, CCPR/C/89/D/1043/2002 (2007), 16 March 2007 [7.6] (execution carried out prior to the examination of the condemned person's request for a pardon; several pardon requests were filed but no reply was received).
- 131 E.g., Guatemala CCPR/CO/72/GTM (2001) 18 (concern about the elimination of the right to seek pardon or commutation of the death sentence; should adopt provisions to ensure that the right to seek pardon may be exercised); Yemen CCPR/CO/75/YEM (2002) 15 (calls upon the State Party to bring its legislation and practice into line with Art. 6(4)); Japan CCPR/C/JPN/CO/5 (2008) 16 (concern at the non-use of the power of pardon, commutation or reprieve and the absence of transparency concerning procedures for seeking benefit for such relief); Iraq CCPR/C/IRQ/CO/5 (2015) 27 (certain crimes punishable with the death penalty are explicitly excluded from being granted special pardon); Japan CCPR/C/JPN/CO/6 (2014) 13(d) (requests for retrial or pardon should have a suspensive effect).
- 132 E.g., *Clive Johnson v. Jamaica*, CCPR/C/64/D/592/1994, 25 November 1998 [10.3] (the author demonstrated he was under 18 when the crime for which he was sentenced was committed, in violation of Art. 6(5)).
- 133 E.g., India CCPR/C/79/Add.81 (1997) 20; Barbados A/43/40 (1988) 551. In this context, see Philip Sapsford, 'An End to the Death Penalty for Juvenile Offenders', (2005) 45 Va. J. Int. L., p. 799.
- 134 E.g., Cyprus CCPR/C/79/Add.39 (1994) 6 (concern that the domestic law allows the death penalty for those between 16 and 18 years of age); Yemen CCPR/C/YEM/CO/5 (2012) 14 (concern that the law de facto permits the imposition of the death penalty on persons below 18 years of age at the time of the alleged commission of the offence).
- 135 Yemen CCPR A/50/40 (1995) 256 (deplores that, according to information, executions of persons below the age of 18 have taken place); Iran CCPR/C/IRN/CO/3 (2011) 13 (gravely concerned about the continued execution of minors and the imposition of the death penalty for persons who were found to have committed a crime while under 18 years of age).
- 136 Mali A/36/40 (1981) 235.
- 137 Thailand CCPR/CO/84/THA (2005) 14 (regret that, despite prohibiting imposition of the death penalty on persons below 18 years of age, it has not yet withdrawn its declaration to Art. 6(5)).
- 138 USA CCPR/C/79/Add.50 (1995) 14, 27. See also USA CCPR/C/USA/CO/4 (2014) 3(a).

Article 6(6): Abolition

Article 6(6) prevents the permissive approach towards the death penalty to be used as a basis for advocating its retention or to delay its abolition.

RIGHT TO LIFE IN PARTICULAR SETTINGS**Death Penalty Cases**

Kindler v. Canada is a case that no longer fully represents the Committee's approach to questions of extradition to a country where the relevant offence carries the death penalty. The Committee found that the author's extradition to the United States following his conviction for premeditated murder did not amount to violation by Canada. Canada had abolished capital punishment (except for certain military offences). It was entitled under the relevant extradition treaty to seek assurances that the death penalty would not be imposed. The Committee observed that when exercising discretion whether to seek such assurances under an extradition treaty, it is in principle to be expected that a State that has itself abandoned capital punishment would give serious consideration to its own chosen policy in making its decision, although Article 6 does not necessarily require a State to refuse to extradite or to seek assurances. Of course, there would be an Article 6 violation if the decision to extradite without assurances was taken arbitrarily or summarily. Important risk factors in considering whether to extradite include the availability of due process in the requesting country and, of greater relevance in that case, the importance of not providing a safe haven for those convicted or accused of murder.¹³⁹

In tightening that approach, in *Judge v. Canada* the Committee revisited the basis for the apparently permissive text of Article 6(2) and recalled that though it contemplates that the death penalty may still be imposed in some countries, it was not a pretext for delaying or preventing abolition. Article 6 applied differently between those countries that had abolished the death penalty and those that had not. For countries that had abolished the death penalty, there was an obligation not to expose a person to the real risk of its application. If an abolitionist State deported someone to a country where they were under sentence of death, it established a crucial link in the causal chain that would make possible that person's execution. The Committee therefore concluded that Canada, as a State that had abolished the death penalty, violated Article 6(1) by deporting the author to the United States where he was under a sentence of death, without ensuring that the death penalty would not be carried out. In addition, since the author was swiftly deported following the rejection of his application for a stay of

139 *Kindler v. Canada*, CCPR/C/48/D/470/1991, [14.5]–[14.6].

deportation, he was not able to challenge it, and it meant he could not pursue further available remedies, in violation of Article 6, together with Article 2(3).¹⁴⁰

The obligation not to expose a person to the risk of being sentenced to death when removed overseas holds even if there is uncertainty as to the particular charges or the likelihood of a guilty finding, and even over whether the death sentence would be imposed in the receiving country, as was the case in *Fong v. Australia*. Authorities in China had issued an arrest warrant on charges of corruption carrying the non-mandatory death penalty. A significant influence on the Committee's finding that the author's enforced removal would amount to violation of Article 6 was that the risk to her life would be definitively known only when it was too late for the sending State to protect her right to life. It is not necessary to prove that the author 'will' be sentenced to death, but merely that there is a 'real risk' of it. The Committee also considered itself obliged to give due weight to the risk of an unfair trial on return.¹⁴¹

Detainees (on Remand or in Prison Custody, or Detained for Health Reasons)

Those in custody are particularly vulnerable to abuse and the Committee frequently reaches the conclusion that deprivation of life in custody is arbitrary in the absence of persuasive State rebuttal. By arresting and detaining an individual the State takes responsibility to care for their life.¹⁴² It is incumbent on States to ensure the right to life of detainees, and not on the latter to request protection.¹⁴³

The burden of proof does not rest solely on the author in OP1 claims, given that the State alone often has access to the relevant information to support allegations (among other factors which render access to evidence unequal). Although this principle applies generally, it is particularly important in death in custody cases.¹⁴⁴ Loss of life in custody, in unnatural circumstances, creates a presumption of arbitrary deprivation of life by State authorities, which can be rebutted only by a thorough, prompt and impartial investigation,¹⁴⁵ especially when complaints by relatives or other

140 *Judge v. Canada*, CCPR/C/78/D/829/1998, 5 August 2002 [10.4]–[10.5], [10.9].

141 *Fong v. Australia*, CCPR/C/97/D/1442/2005, 23 October 2009 [9.5]–[9.7].

142 *Zhumbaeva v. Kyrgyzstan*, CCPR/C/102/D/1756/2008, 19 July 2011 [8.6].

143 *Lantsov v. Russian Federation*, CCPR/C/74/D/763/1997, 26 March 2002 [9.2] (after the deterioration of the health of the victim, he received medical care only during the last few minutes of his life; prison authorities refused such care during the preceding days and that situation caused his death).

144 *Bleier v. Uruguay*, Communication No. R.7/30, Supp. No. 40 (A/37/40) at 130 (1982), 29 March 1982 [13.3]; *Barbato et al. v. Uruguay*, Communication No. 84/1981, CCPR/C/OP/2 at 112, 29 March 1982 [9.2], [9.6]; *Zhumbaeva v. Kyrgyzstan*, CCPR/C/102/D/1756/2008, 19 July 2011 [8.7].

145 GC 36 [29].

reliable reports evidence unnatural death,¹⁴⁶ and even if it is necessary to exhume a body to examine the allegations.¹⁴⁷

The Committee is able to find a violation of Article 6(1) in cases of death in custody even if it is unable to reach definitive conclusions on the cause of death. In *Barbato et al. v. Uruguay* the Committee could not arrive at a definite conclusion as to whether the victim committed suicide, was driven to suicide or was killed by others while in custody, but reached the ‘inescapable conclusion’ that in all the circumstances the authorities either by act or by omission were responsible for not taking adequate measures to protect his life, as required by Article 6(1).¹⁴⁸ In *Sathasivam and Sarawathi v. Sri Lanka* it was prepared to make the ‘presumption’ of arbitrary deprivation of life when eyewitnesses testified to seeing the victim in normal health when he was taken into custody, and shortly after with severe injuries, following which he died. It could attribute both the injury and death suffered in custody to the State.¹⁴⁹

The presence of a medical condition imposes additional duties on the State. In *Titiahonjo v. Cameroon* the Committee found a violation of the obligation to protect the victim’s right to life where his death was caused by failure to allow a nurse access to the detainee’s cell when he was clearly severely ill.¹⁵⁰ In the case of a detainee with a medical condition, the State must organise its detention facilities so that it knows about the state of health of its detainees as far as may be reasonably expected. Lack of financial means cannot reduce this responsibility. In *Lantsova v. Russian Federation* the Committee stressed that a properly functioning medical service within the detention centre could and should have known about a dangerous change in the state of health of its detainee. It held the State responsible under Article 6(1) for failing to take appropriate measures to protect his life while held there.¹⁵¹ Similarly in *Chiti v. Zambia*, in the absence of proper explanation, the premature death of an HIV-positive detainee with cancer was attributable to the denial of the necessary drugs, as well as the torture and inhuman conditions of detention to which he was subjected.¹⁵² Although there is no

146 *Telitsin v. Russian Federation*, CCPR/C/80/D/888/1999, 29 March 2004 [7.6]; similarly *Zhumbaeva v. Kyrgyzstan*, CCPR/C/102/D/1756/2008, 19 July 2011 [8.8] (in the absence of persuasive arguments by the State rebutting the suggestion that the victim was killed in custody, and failure to evaluate importance discrepancies in official statements, the State was responsible for arbitrary deprivation of the victim’s life).

147 *Eshonov v. Uzbekistan*, CCPR/C/99/D/1225/2003, 22 July 2010 [9.6]; Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions [12].

148 *Barbato et al. v. Uruguay*, Communication No. 84/1981, CCPR/C/OP/2 at 112, 29 March 1982 [9.2], [9.6].

149 *Sathasivam and Saraswathi v. Sri Lanka*, CCPR/C/93/D/1436/2005, 8 July 2008 [6.2]. See also *Akunov v. Kyrgyzstan*, CCPR/C/118/D/2127/2011, 27 October 2016 [8.6], [8.7].

150 *Titiahonjo v. Cameroon*, CCPR/C/91/D/1186/2003, 26 October 2007 [6.2]. See also *Mulezi v. Congo*, CCPR/C/81/D/962/2001, 8 July 2004 [5.4].

151 *Lantsova v. Russian Federation*, CCPR/C/74/D/763/1997, 26 March 2002 [9.2].

152 *Chiti v. Zambia*, CCPR/C/105/D/1303/2004, 26 July 2012 [12.2]. Cf. *Tornel v. Spain*, CCPR/C/95/D/1473/2006, 20 March 2009 [7.2] (in which the Art. 6(1) claim failed for want of an

Covenant ‘right to health’ a failure to separate detainees with communicable diseases from other detainees could raise issues under Articles 6(1) and 10(1).¹⁵³

Particularly vulnerable detainees are those held in mental health institutions and in immigration detention.¹⁵⁴

Failure to take necessary measures to protect against cellmates resulted in an adverse finding in *Ernazarov v. Kyrgyzstan* because the victim was conspicuously vulnerable as a sex offender and was placed in a cell with six cellmates and was abused constantly by them. The State did no more than deny the allegations that the guards knew of the abuse. In its finding the Committee referred to the duty of the State party to afford protection to everyone in detention ‘as may be necessary’ against threats to life.¹⁵⁵

Enforced Disappearance

Those subjected to enforced disappearance are particularly vulnerable, since their deprivation of liberty, followed by concealment of their fate or whereabouts, removes them from the protection of the law and places their lives at serious and constant risk, for which the State is accountable.¹⁵⁶ In addition to violating Articles 9, 7 and 10 enforced disappearance constitutes a grave threat to the right to life, and a finding will easily be made under Article 6(1) in the absence of evidence of the State meeting its obligation to protect the victim’s life.¹⁵⁷ The Covenant demands that each State Party concern itself with the fate of every individual and treat every individual with respect for the dignity inherent in every human being.¹⁵⁸

established causal link between the death of an incurably ill prisoner and his continuing incarceration, and insufficient proof that medical treatment was inadequate).

153 *Cabal and Bertran v. Australia*, CCPR/C/78/D/1020/2001, 7 August 2003 [7.7].

154 For further discussion in the context of Art. 10, see chapter on Article 10: Treatment of Those Deprived of Their Liberty, sections ‘Vulnerable Detainees and Prisoners’, ‘Immigration Detention’. For examples of recent Art. 6 concerns for refugees, see Cameroon CCPR/C/CMR/CO/5 (2017) 35. For those in public care facilities, see Romania CCPR/C/ROU/CO/5 (2017) 29; and arising out of prison conditions or death in prison, see Bangladesh CCPR/C/BGD/CO/1 (2017) 25; Cameroon CCPR/C/CMR/CO/5 (2017) 29; Congo CCPR/C/COD/CO/4 (2017) 33, 34; Honduras CCPR/C/HND/CO/2 (2017) 30; Jordan CCPR/C/JOR/CO/5 (2017) 18, 19; Madagascar CCPR/C/MDG/CO/4 (2017) 37; Mauritius CCPR/C/MUS/CO/5 (2017) 35; Gambia CCPR/C/GMB/CO/2 (2018) 33; Guatemala CCPR/C/GTM/CO/4 (2018) 28; Lebanon CCPR/C/LBN/CO/3 (2018) 35. See also Switzerland CCPR/C/CHE/CO/4 (2017) 32 (death during forced repatriation).

155 *Ernazarov v. Kyrgyzstan*, CCPR/C/113/D/2054/2011, 25 March 2015 [9.4].

156 For further discussion on issues affecting disappeared persons, see chapter on Article 7: Torture, Cruel, Inhuman or Degrading Treatment or Punishment, section ‘Enforced Disappearance’.

157 *Sarma v. Sri Lanka*, CCPR/C/78/D/950/2000, 31 July 2003 [9.3]; *Bousroual v. Algeria*, CCPR/C/86/D/1085/2002, 15 March 2006 [9.2]; *Boucherf v. Algeria*, CCPR/C/86/D/1196/2003, 30 March 2006 [9.2]; *Madoui v. Algeria*, CCPR/C/94/D/1495/2006, 28 October 2008 [7.2]; *Sharma v. Nepal*, CCPR/C/94/D/1469/2006, 28 October 2008 [7.4]; *Il Khwildy v. Libya*, CCPR/C/106/D/1804/2008, 1 November 2012 [7.4]; *Sharma v. Nepal*, CCPR/C/122/D/2265/2013, 6 April 2018 [10.6].

158 E.g., *Ammari v. Algeria*, CCPR/C/112/D/2098/2011, 30 October 2014 [8.2].

States Parties should take specific and effective measures to prevent the disappearance of individuals and establish facilities and procedures to investigate thoroughly, by an appropriate impartial body, cases of missing and disappeared persons in circumstances which may involve a violation of the right to life.¹⁵⁹ The Committee is able to make a factual comparison with other claims arising in similar circumstances in which victims were killed or failed to reappear alive.¹⁶⁰ Circumstantial evidence of disappearance frequently suffices, particularly if unrefuted, and where there is a failure to investigate.¹⁶¹

Vulnerable

General Comment 36 highlights the need for special measures of protection towards those whose lives are put at risk, and it identifies among them human rights defenders, humanitarian workers, journalists, officials fighting corruption and organised crime, witnesses to crime, prominent public figures, victims of domestic and gender-based violence and human trafficking, unaccompanied migrant children, children in situations of armed conflict, members of ethnic and religious minorities, indigenous peoples, LGBTI persons, those with albinism, alleged witches, displaced persons, asylum seekers, refugees and stateless persons.¹⁶²

Abortion

The Committee's main Article 6 concerns with abortion have been to ensure the availability of abortion services: where the life of the mother is endangered; for therapeutic reasons (such as fatal foetal abnormality or where the foetus is not viable);¹⁶³ where pregnancy resulted from rape or incest;¹⁶⁴ and where restrictive availability would cause women to resort to clandestine abortions, which could

159 GC 6 [4]; GC 36 [58]; *Bashasha and Bashasha v. Libya*, CCPR/C/100/D/1776/2008, 20 October 2010 [7.3].

160 E.g., *Khwildy v. Libya*, CCPR/C/106/D/1804/2008, 1 November 2012 [7.12]; *Al-Rabassi v. Libya*, CCPR/C/111/D/1860/2009, 18 July 2014 [7.3]; *Neupane v. Nepal*, CCPR/C/120/D/2170/2012, 21 July 2017 [10.4]; *Sharma et al. v. Nepal*, CCPR/C/122/D/2364/2014, 6 April 2018 [9.4].

161 *González v. Argentina*, CCPR/C/101/D/1458/2006, 17 March 2011 [9.2]; *Khadzhiyev and Muradova v. Turkmenistan*, CCPR/C/122/D/2252/2013, 6 April 2018 [7.4]; *Millis v. Algeria*, CCPR/C/122/D/2398/2014, 6 April 2018 [7.5].

162 GC 36 [23].

163 E.g., Ireland CCPR/C/IRL/CO/4 (2014) 9; UK CCPR/C/GBR/CO/7 (2015) 17 (Northern Ireland); Costa Rica CCPR/C/CRI/CO/6 (2016) 17; Jamaica CCPR/C/JAM/CO/4 (2016) 26.

164 E.g., Guatemala CCPR/C/GTM/CO/3 (2012) 20; Angola CCPR/C/AGO/CO/1 (2013) 13; Chile CCPR/C/CHL/CO/6 (2014) 15; Malta CCPR/C/MLT/CO/2 (2014) 13; Sierra Leone CCPR/C/SLE/CO/1 (2014) 14; Sri Lanka CCPR/C/LKA/CO/5 (2014) 10; Côte d'Ivoire CCPR/C/CIV/CO/1 (2015) 15; Congo CCPR/C/COD/CO/4 (2017) 21; Jordan CCPR/C/JOR/CO/5 (2017) 20, 21; Mauritius CCPR/C/MUS/CO/5 (2017) 15, 16; Algeria CCPR/C/DZA/CO/4 (2018) 25; Guatemala CCPR/C/GTM/CO/4 (2018) 14; Lebanon CCPR/C/LBN/CO/3 (2018) 26; Sudan CCPR/C/SDN/CO/5 (2018) 28.

endanger their own lives.¹⁶⁵ Abortion must also not be prevented where to do so would violate Articles 7 (cruel, inhuman or degrading treatment) or 17 (arbitrary interference with private life), or be discriminatory.¹⁶⁶

In *Mellet v. Ireland* the Committee found violations of Articles 7, 17 and 26. The author discovered in the twenty-first week of her pregnancy that her foetus had congenital defects and would die in utero or shortly after birth and, because of the prohibition of abortion in Irish law, was confronted with the option of continuing the pregnancy to term, knowing that the foetus would most likely die inside her, or having a voluntary termination of pregnancy in a foreign country.¹⁶⁷

The Committee has recommended lifting a requirement for prior court authorisation for therapeutic abortions, and abortions following rape or incest, in order to effectively guarantee access to legal, safe abortions, because of the difficulties involved in obtaining the authorisation,¹⁶⁸ and lifting measures to prevent women treated in public hospitals from being reported by the medical or administrative staff for the offence of abortion.¹⁶⁹ It has been concerned at the persistently high incidence of adolescent pregnancy and maternal mortality in some countries,¹⁷⁰ as well as suicide among young girls related to the prohibition of abortion.¹⁷¹ It has underlined the importance of reproductive and sexual health education in school curricula and for the broader public.¹⁷² Conscientious objection by physicians has been a concern where it results in difficulties in accessing legal abortions owing to

165 For recent examples of the Committee's approach to such issues, see Jamaica CCPR/C/JAM/CO/4 (2016) 26; Bangladesh CCPR/C/BGD/CO/1 (2017) 15; Cameroon CCPR/C/CMR/CO/5 (2017) 21; Dominican Republic CCPR/C/DOM/CO/6 (2017) 15; Honduras CCPR/C/HND/CO/2 (2017) 16; Pakistan CCPR/C/PAK/CO/1 (2017) 15, 16; Swaziland CCPR/C/SWZ/CO/1 (2017) 28; Belize CCPR/C/BLZ/CO/1/Add.1 (2018) 20; El Salvador CCPR/C/SLV/CO/7 (2018) 15; Gambia CCPR/C/GMB/CO/2 (2018) 17; Guinea CCPR/C/GIN/CO/3 (2018) 25; Liberia CCPR/C/LBR/CO/1 (2018) 27.

166 See chapters on Article 3: The Equal Right of Men and Women to the Enjoyment of Covenant Rights, section 'Abortion'; Article 7: Torture, Cruel, Inhuman or Degrading Treatment or Punishment, section 'Reproductive Rights (Denial of Abortion and Sterilisation)'; Article 17: Privacy, Home, Correspondence; Honour and Reputation, section 'Denial of Abortion Services'. For concern to ensure there are no undue restrictions, see, e.g., Zambia CCPR/C/ZMB/CO/3 (2007) 18; Philippines CCPR/C/PHL/CO/4 (2012) 13; Ireland CCPR/C/IRL/CO/4 (2014) 9; Morocco CCPR/C/MAR/CO/6 (2016) 21, 22. For an exploration of the right to life and the disabled, see Luke Clements and Janet Read, *Disabled People and the Right to Life: the Protection and Violation of Disabled People's Most Basic Human Rights* (Routledge, 2008).

167 *Mellet v. Ireland*, CCPR/C/116/D/2324/2013, 31 March 2016 [7.7]–[7.11]. See also *Whelan v. Ireland*, CCPR/C/119/D/2425/2014, 17 March 2017 [7.3]–[7.12] (findings under Arts 7, 17 and 26).

168 Bolivia CCPR/C/BOL/CO/3 (2013) 9. 169 El Salvador CCPR/C/SLV/CO/6 (2010) 10.

170 Kenya CCPR/CO/83/KEN (2005) 14; Dominican Republic CCPR/C/DOM/CO/5 (2012) 15; Peru CCPR/C/PER/CO/5 (2013) 14; Cameroon CCPR/C/CMR/CO/5 (2017) 21; Guinea CCPR/C/GIN/CO/3 (2018) 25; Lao CCPR/C/LAO/CO/1 (2018) 21.

171 Ecuador CCPR/C/79/Add.92 (1998) 11; El Salvador CCPR/C/SLV/CO/7 (2018) 15.

172 Moldova CCPR/C/MDA/CO/2 (2009) 17; Argentina CCPR/C/ARG/CO/5 (2016) 12. For examples of recommendations of guaranteed access to reproductive health services, and education and awareness-raising programmes that focus on the importance of contraception and of sexual and reproductive health rights, see Angola CCPR/C/AGO/CO/1 (2013) 13;

the high number and distribution across the country of physicians who refuse to perform abortions.¹⁷³ Countries are also recommended to take all measures necessary to combat the stigma associated with abortion.¹⁷⁴

Relevant standards include those established by the World Health Organisation and the Committee on the Rights of the Child (CRC).¹⁷⁵

Suicide and Euthanasia

The Committee has concern for high suicide rates, especially amongst young people (for those between 20 and 30 it is the highest cause of death in some countries),¹⁷⁶ and the occurrence of suicide in detention, which requires proper investigation and reporting.¹⁷⁷ It has recommended efforts to prevent suicide by studying its root causes and to improve suicide prevention policies.

On the subject of dying with dignity, the CESCR in its General Comment on the highest attainable standard of health addressed a number of measures with a view to realising the right to health of older persons, and emphasised the importance of an integrated approach, combining elements of preventive, curative and rehabilitative health treatment, including attention and care for chronically and terminally ill persons, ‘sparing them avoidable pain and enabling them to die with dignity’.¹⁷⁸

Paraguay CCPR/C/PRY/CO/3 (2013) 13; Sierra Leone CCPR/C/SLE/CO/1 (2014) 14; Côte d’Ivoire CCPR/C/CIV/CO/1 (2015) 15; San Marino CCPR/C/SMR/CO/3 (2015) 15.

173 Italy CCPR/C/ITA/CO/6 (2017) 16. See also Colombia CCPR/C/COL/CO/7 (2016) 20 (conscientious objection on the part of healthcare personnel without appropriate referrals); Poland CCPR/C/POL/CO/7 (2016) 23 (the ‘conscience clause’ had, in practice, often been inappropriately invoked, with the result that access to legal abortion was unavailable in entire institutions and in one region of the country; recommendation to ensure that women were not obliged, as a consequence of conscientious objection, to resort to clandestine abortion, by enhancing the effectiveness of the referral mechanism to ensure access to legal abortion in cases of conscientious objection by medical practitioners). For procedural obstacles posed by conscientious objection when abortion was not widely available, see Argentina CCPR/C/ARG/CO/5 (2016) 11; Swaziland CCPR/C/SWZ/CO/1 (2017) 28; Lebanon CCPR/C/LBN/CO/3 (2018) 25, and for an overview of policies regulating conscience issues in Latin America, see Diya Uberoi and Beatriz Galli, ‘Refusing Reproductive Health Services on Grounds of Conscience in Latin America’, (2016) 24 SUR – Int. J. on Hum. Rts, p. 105.

174 Burkina Faso CCPR/C/BFA/CO/1 (2016) 19; Ghana CCPR/C/GHA/CO/1 (2016) 23; Congo CCPR/C/COD/CO/4 (2017) 22; Pakistan CCPR/C/PAK/CO/1 (2017) 16; Algeria CCPR/C/DZA/CO/4 (2018) 26; Gambia CCPR/C/GMB/CO/2 (2018) 18; Liberia CCPR/C/LBR/CO/1 (2018) 26.

175 CRC, *General Comment No. 4 (2003): Adolescent Health and Development in the Context of the Convention on the Rights of the Child*, 1 July 2003, CRC/GC/2003/4 [27], [33]; WHO *Guidelines on Safe Abortions World Health Organization, Safe Abortion: Technical and Policy Guidance for Health Systems*, 2nd edn (WHO, 2012).

176 Korea CCPR/C/KOR/CO/4 (2015) 24. See also Switzerland CCPR/C/CHE/CO/3 (2009) 12 (concern at the high incidence of firearms-related suicides).

177 Latvia CCPR/C/LVA/CO/3 (2014) 10; UK CCPR/C/GBR/CO/7 (2015) 16. See also Sweden CCPR/C/SWE/CO/6 (2009) 14.

178 CESCR *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, 11 August 2000, E/C.12/2000/4 [25]. For focus on assisted suicide, see

The focus of the Committee's attention on assisted suicide has been to ensure independent or judicial oversight to determine that a person seeking assistance to commit suicide is operating with full free and informed consent. It recommended that Switzerland consider amending its legislation in order to ensure independent or judicial oversight to determine that a person who is seeking assistance for suicide is indeed acting with full free and informed consent.¹⁷⁹ It more insistently urged the Netherlands to review its legislation out of concern at the extent of euthanasia and assisted suicides there. Although a second physician must give an opinion, they may terminate a patient's life without any independent review by a judge or magistrate to guarantee that this decision was not the subject of undue influence or misapprehension.¹⁸⁰

The Committee has expressed the belief that where a State Party seeks to relax legal protection with respect to an act deliberately intended to put an end to human life, the Covenant obliges it to apply the most rigorous scrutiny to determine whether the State Party's obligations to ensure the right to life are being complied with. It was therefore concerned that the Netherlands system may fail to detect and prevent situations where undue pressure could lead to the circumvention of the stipulated criteria (the 'voluntary and well-considered request' of the patient in a situation of 'unbearable suffering' offering 'no prospect of improvement' and 'no other reasonable solution'). It was also concerned that, with the passage of time, such a practice may lead to routinisation and insensitivity to the strict application of the requirements in a way not anticipated, and it learned with unease that in the Netherlands more than 2,000 cases of euthanasia and assisted suicide were reported to its review committee in 2000, and that committee came to a negative assessment only in three cases. The large numbers involved raised doubts whether the system was only being used in extreme cases in which all the substantive conditions were scrupulously maintained.¹⁸¹

War

The Covenant does not contain in Article 6 or any other the provision a prohibition against the threat or use of force by one State against another, even though contemplated by the UN Charter (in the inherent right of self-defence).¹⁸² The

Paul Tiensuu, 'Whose Right to What Life: Assisted Suicide and the Right to Life as a Fundamental Right', (2015) 15 HRLR, p. 251. Broader attention is given to issues of dignity in works such as Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights', (2008) 19 Eur. J. Int. L., p. 655; and Elizabeth Wicks, 'The Meaning of Life: Dignity and the Right to Life in International Human Rights Treaties', (2012) 12 HRLR, p. 199, and more extensively Christopher McCrudden, *Understanding Human Dignity* (OUP/British Academy, 2014).

179 Switzerland CCPR/C/CHE/CO/3 (2009) 13.

180 Netherlands CCPR/C/NLD/CO/4 (2009) 7. 181 Netherlands CCPR/CO/72/NET (2001) 5.

182 Charter of the United Nations, 24 October 1945, 1 UNTS XVI, Art. 51.

only reference in the Covenant to war is in Article 20(1), requiring States to prohibit propaganda for war.

Article 6 applies during situations of armed conflict, though rules of international humanitarian law also then apply, in addition to the provisions in Article 4 which prevents the abuse of a State's emergency powers.¹⁸³

Issues raised by the Committee concerning armed conflict include: ensuring that amnesty and immunity provisions are not applied to the most serious human rights violations that amount to crimes against humanity or war crimes;¹⁸⁴ ensuring adequate support for protection of witnesses of war crimes;¹⁸⁵ the effective investigation and prosecution of war crimes, and compensation for victims;¹⁸⁶ the harms of discriminatory selection of such cases;¹⁸⁷ and the lack of implementation of the principle of command responsibility.¹⁸⁸

The position of children in situations of armed conflict has received recent attention in Security Council Resolution 2427 (2018), adding further to the framework for addressing the protection of children affected by armed conflict.¹⁸⁹ For relevant Committee concerns for children in situations of armed conflict, and

183 *General Comment No. 29: Article 4: Derogations during a State of Emergency*, 31 August 2001, CCPR/C/21/Rev.1/Add.11 (GC 29) [3]. See also chapter on Article 4: Derogation in Times of Officially Proclaimed Public Emergency Threatening the Life of the Nation, sections 'Derogation is Permitted only to the Extent Strictly Required by the Exigencies of the Situation' and 'Implementation'. For a summary of the recent revisions to the *UN Manual on the Effective Prevention of Extra-legal, Arbitrary and Summary Executions* (the Minnesota Protocol), see A/HRC/32/39/Add.4 16 June 2016 [1]–[10].

184 Kosovo CCPR/C/UNK/CO/1 (2006) 12; Macedonia CCPR/C/MKD/CO/2 (2008) 12; Sierra Leone CCPR/C/SLE/CO/1 (2014) 17. See also General Assembly, Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, UNTS, vol. 78, p. 277; UN Security Council Resolution 1674, adopted 28 April 2006 (after reaffirming Resolutions 1265 (1999) and 1296 (2000) concerning the protection of civilians in armed conflict and Resolution 1631 (2005) on cooperation, it stressed a comprehensive approach to the prevention of armed conflict and its recurrence). For an international criminal law perspective, see William Schabas, *War Crimes and Human Rights: Essays on the Death Penalty, Justice, and Accountability* (Cameron May, 2008).

185 Serbia and Montenegro CCPR/CO/81/SEMO (2004) 12; Bosnia and Herzegovina CCPR/C/BIH/CO/1 (2006) 13.

186 Croatia CCPR/CO/71/HRV (2001) 10; Sudan CCPR/C/SDN/CO/3 (2007) 9; Serbia CCPR/C/SRB/CO/2 (2011) 10; Georgia CCPR/C/GEO/CO/4 (2014) 10; Croatia CCPR/C/HRV/CO/3 (2015) 11; Iraq CCPR/C/IRQ/CO/5 (2015) 17, 18; Serbia CCPR/C/SRB/CO/3 (2017) 22; Liberia CCPR/C/LBR/CO/1 (2018) 10; Sudan CCPR/C/SDN/CO/5 (2018) 12.

187 Croatia CCPR/C/HRV/CO/2 (2009) 10 (disproportionally directed at ethnic Serbs).

188 Serbia and Montenegro CCPR/CO/81/SEMO (2004) 12. Ian Park identifies and analyses relevant law and State practice, and makes proposals for compliance with the right to life obligations in *The Right to Life in Armed Conflict* (OUP, 2018). For an assessment of the Committee's involvement, see David Weissbrodt, 'The Role of the Human Rights Committee in Interpreting and Developing Humanitarian Law', (2010) 31 U. Pa. J. Int. L., p. 1185; Vito Todeschini, 'The ICCPR in Armed Conflict: An Appraisal of the Human Rights Committee's Engagement with International Humanitarian Law', (2017) 35 Nord. J. Hum. Rts, p. 203.

189 Security Council Resolution 2427, 9 July 2018.

references to the Optional Protocol on the Involvement of Children in Armed Conflict see the chapter on Article 24.¹⁹⁰

From its perspective in 1984 the Committee's General Comment 14 voiced concern at the shift from conventional weapons in armed conflict to nuclear and other weapons of mass destruction, concluding that the production, testing, possession, deployment and use of nuclear weapons should be prohibited and recognised as crimes against humanity.¹⁹¹ This was already the subject of the non-proliferation treaty, and more recent initiatives, including those with specific reference to bacteriological and chemical weapons.¹⁹²

IMPLEMENTATION

The Article 6(1) requirement that the right to life be protected 'by law' domestically is most immediately addressed in criminal law provisions proscribing and penalising the taking of life, and acts endangering life, extending also to such matters as regulation of the conduct of security forces, and the possession and use of firearms and other weapons, among many other such measures to minimise risk. Protection 'by law' is self-evidently insufficient given an enduring need for other practical and effective measures to guarantee the right. At the same time, a great many threats to life (including those on a mass scale) are not amenable at all to legal protection and require strategic risk-containment and other responses from States to address situations such as malnutrition, infant mortality, epidemics, natural and other disasters.

Articles 6(2)–(5) are anomalous subparagraphs in a provision designed to guarantee the right to life. Because they represent a concession to those countries that have not yet abolished the death penalty they curtail its imposition in precise terms. The role of domestic law is therefore to prohibit the death penalty in all circumstances other than allowed by those provisions, and the Committee has inevitably seized on non-compliance in domestic law, for example, concerning the

190 Chapters on Article 24: Protection Required for Children; Article 8: Slavery, Servitude and Forced or Compulsory Labour.

191 *CCPR General Comment No. 14: Article 6 (Right to Life) Nuclear Weapons and the Right to Life*, 9 November 1984 [6].

192 Respect for Human Rights in Armed Conflicts, Resolution 2444 (XXIII) of the United Nations General Assembly, 19 December 1968; Treaty on the Non-proliferation of Nuclear Weapons, 1 July 1968, 729 UNTS 161, entered into force 3 May 1970; Convention on the Prohibition of the Use of Nuclear Weapons, 11 January 2006, A/RES/60/88; Treaty on the Prohibition of Nuclear Weapons, New York, 7 July 2017, TREATIES-XXVI-9 of 9 August 2017 (not in force). See also Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, 10 April 1972, 1015 UNTS 163; Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, Geneva, 3 September 1992, 1974 UNTS 45; Resolution Adopted by the General Assembly [on the report of the First Committee (A/54/572)] 54/63 Comprehensive Nuclear-Test-Ban Treaty, 10 January 2000, A/RES/54/63.

use of mandatory death sentences, and the death penalty for offences which do not represent the most serious crimes. Reservations, as always, attract Committee attention. A commonly recurring Article 6 recommendation is abolition of the death penalty at the earliest opportunity and the removal of all covering reservations. Less common are reservations under Article 6(5), but they have endured.¹⁹³

There is also a strong emphasis on domestic provisions concerning abortion, to ensure that criminal and other restrictions allow suitable exceptions, and to ensure that relevant services are not restricted where to do so would be in violation of Article 7 or 17, or are available on a discriminatory basis.

The Committee has also directed some, though confined, attention at domestic law provisions which do not adequately prevent the risk of deportation to countries in circumstances where that would be contrary to international standards.¹⁹⁴

CONCLUSION

The effectiveness of the right to life guaranteed in Article 6 depends critically on the obligations on States in Article 2(1) to respect and to ensure the right to life, and in Article 2(3) to ensure that any victim of violation has an effective remedy. Article 2(1) and (3) are inseparable from Article 6 in the obligation on States to protect life, including in a vast array of circumstances where there may be no attributable State or human fault; and they give rise to strict obligations to investigate Article 6 allegations, to prosecute and punish offenders, and to provide reparation.

Within the Committee's jurisprudence, issues concerning the right to life have occupied a relatively narrow compass: the misuse of the death penalty, obligations of *non-refoulement*, excessive force in law enforcement, extrajudicial killing and, overlapping with the right to liberty and security in Article 9, enforced disappearance and attempts on a person's life. However, as the Committee's latest General Comment makes particularly clear, the right to life is not to be interpreted narrowly, and protective measures incumbent on the State are wide-ranging. Although signalled in many years of Concluding Observations, General Comment 36, far more than its predecessor, demonstrates the necessity for appropriate measures to address the general conditions in society that may give rise to direct threats to life. These include gun violence, recurrent traffic and industrial accidents, environmental degradation, the prevalence of life threatening diseases, substance abuse, widespread hunger and malnutrition, extreme poverty and homelessness. It also suggests a number of

¹⁹³ See above, section 'Articles 6(2)–(6): Death Penalty Provisions'.

¹⁹⁴ Kuwait CCPR/C/KWT/CO/3 (2016) 36; Jamaica CCPR/C/JAM/CO/4 (2016) 37; Norway CCPR/C/NOR/CO/7 (2018) 32. See also Serbia CCPR/C/SRB/CO/3 (2017) 33.

long-term measures, including access to food, healthcare, water sanitation, effective emergency health services and emergency response operations (fire, ambulance and police), among many others.¹⁹⁵ The economical text of the core guarantees in Article 6(1) belies the wider significance and breadth of the inherent right to life.

195 GC 36 [26], [62].

36.	Craig Scott, " Canada's International Human Rights Obligations and Disadvantaged Members of Society: Finally into the Spotlight? " (1999) 10:4 Forum Constitutional Forum 97.
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CANADA'S INTERNATIONAL HUMAN RIGHTS OBLIGATIONS AND DISADVANTAGED MEMBERS OF SOCIETY: FINALLY INTO THE SPOTLIGHT?

Craig Scott

INTRODUCTION

The *International Covenant on Civil and Political Rights (ICCPR)* and the *International Covenant on Economic, Social and Cultural Rights (ICESCR)* are the two central treaties within the United Nations' human rights system.¹ After the adoption in 1948 of the *Universal Declaration of Human Rights (UDHR)* by the UN General Assembly, Cold War politics and different ideologies of appropriate legal protection for human rights clashed over how the moral statements contained in the UDHR should be translated into binding treaty obligations.² In the result, states decided to apportion the holistic group of rights found in the UDHR (ranging from Article 3's classical 'liberal' "right to life, liberty and security of the person" to Article 25's "right to a standard of living adequate for . . . health and well-being") into these two separate treaties, the *ICCPR* and *ICESCR*. In so doing, they invented as much as recognized a distinction between so-called "civil and political rights" and so-called "economic, social and rights" that has ever since hovered like an albatross over the development of human rights protection.

For example, even as we approach the year 2000, it still remains something of an open question, for some in Canada's legal community, whether the right to life, liberty and security of the person in section 7 of the *Canadian Charter of Rights and Freedoms*³ can be 'stretched' so far as to include rights to material

assistance and support — a question still formally open even after the very recent judgment in the case of *Baker v. Canada* which some had hoped would be used by the Supreme Court of Canada as the opportunity to adopt such a reading of section 7.⁴ For those inclined against

⁴ Such an interpretation was left formally open by the Supreme Court of Canada in *Irwin Toy Ltd. v. Quebec (Attorney General)* [hereinafter *Irwin Toy*] in which it made clear that "economic" rights in the commercial and corporate context would not be protected by s.7 but that rights of a different "ilk" — those related to material human needs — were not affected by this conclusion: [1989] 1 S.C.R. 927 at 1003–1004. The extent to which such social rights could be interpreted as components of life, liberty and security of the person would be left for future cases. *Irwin Toy* had, however, to be read alongside of a case decided by the Court in the same year, *Slaight Communications v. Davidson* [1989] 1 S.C.R. 1038 at 1056–1057. Chief Justice Dickson, for a 4-2 majority, found that the *Charter* is to be interpreted in such a way as to give effect to a presumption that the *Charter* offers at least as much protection as rights Canada is bound to ensure under international human rights law; the right on which he placed some reliance in his reasoning (within his s. 1 analysis as to whether an employer's freedom of expression could be justifiably limited in order to protect a former employee) was the right to work as set out in (Article 6) of the International Covenant on Economic, Social and Cultural Rights. However, no Supreme Court case has specifically revisited that which *Irwin Toy* left open. Alongside s. 7, the interpretive evolution of s. 15 of the *Charter* has made it ideally suited to the kind of purposive interpretation that would help give full effect to the *Slaight Communications* presumption. In recent years, the Supreme Court has begun to interpret s. 15's equality rights in such a way that many aspects of "social, economic and cultural rights" should now receive protection in view of the Court's understanding of how the guarantee of equality in s. 15 relates to government responsibility to counteract social inequalities suffered by presumptively disadvantaged and vulnerable groups: see notably *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 and the discussion of the implications of the *Eldridge* reasoning in Bruce Porter, "Beyond *Andrews*: Substantive Equality and Positive Obligations After *Eldridge* and *Vriend*" (1998) 1 Constitutional Forum 71. In two sets of oral arguments heard in November 1998, the Supreme Court was asked to follow this normative trajectory and confirm that ss. 7 and 15, in combination, should be invested with a content that robustly draws on Canada's international human rights obligations towards disadvantaged members of society: see *Baker v. Canada (Minister of Citizenship and Immigration)*, S.C.C. No.

¹ *International Covenant on Civil and Political Rights*, adopted 19 December 1966, UN Doc. ST/DPI/246, 999 U.N.T.S. 171 (entered into force 23 March 1976, accession by Canada 19 May 1976) [hereinafter *ICCPR*] and *International Covenant on Economic, Social and Cultural Rights*, adopted 16 December 1966, UN Doc. A/6316 (1966) 993 U.N.T.S. 3 (entered into force 3 January 1976) [hereinafter *ICESCR*].

² *Universal Declaration of Human Rights*, adopted 10 December 1948, reprinted in 43 A.J.I.L. 127 (Supp. 1949).

³ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c.11 [hereinafter *Charter*].

such a broad interpretation, a formalistic conception of international human rights law can be invoked in support of their position. Not only are these two rights mentioned in separate articles of the UDHR (the above-noted Articles 3 and 25) but they are also located in two separate treaties, only one of which — the *ICCPR* — triggers the possibility of a claim procedure analogous to bringing a rights claim under the *Charter*.⁵ Thus, so the

25823 and *Godin v. New Brunswick (Minister of Health and Community Services et al.)* S.C.C. No. 26005. On 9 July 1999, judgment in *Baker* was rendered: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] S.C.J. No. 39 [hereinafter *Baker*]. The Court found it unnecessary to address the *Charter* issues, opting instead to decide the case on other grounds. However, L'Heureux-Dubé J., speaking for the entire Court on this point, took care to add something to the formulation of the *Slaight Communications* interpretive presumption by noting that "international human rights law . . . is . . . a critical influence on the interpretation of the scope of the rights included in the *Charter*." *Baker* at para. 70 [emphasis added]. In his minority judgment (partly dissenting, but not on this point), Iacobucci J. (Cory J. concurring) referred to the "interpretive presumption, established by the Court's decision in *Slaight Communications* . . . , and confirmed in subsequent jurisprudence, that administrative discretion involving Charter rights be exercised in accordance with similar international human rights law:" *Baker*, para. 78. For a discussion of the fact situation and the principle stated by the Court in *Baker* about the independent interpretive effect of international human rights treaties on Canadian law without the need to invoke the *Charter*, see text *infra* note 13.

⁵ A supervisory body called the Human Rights Committee (HRC) is charged with monitoring state compliance through a "state report" procedure under the *ICCPR* itself; states like Canada periodically must submit a written report detailing their records of compliance with the *ICCPR*, defend that report orally before the eighteen-member HRC, and then receive the HRC's evaluation of compliance in the form of a set of conclusions known as *Concluding Observations*. But, this is not the only procedure for assessing compliance available under the *ICCPR* regime. States party to the *ICCPR* can also, by ratifying another treaty called the (First) Optional Protocol to the *ICCPR*, assign the HRC responsibility to receive and pass judgment on written communications received from individuals who claim that *ICCPR* rights have been violated by their state. The assessments handed down by the HRC — taking the form of "views" — look and function much like court judgments in domestic legal systems, setting out the alleged violation, the contending claims of the claimant and the state, the facts as the HRC determines them, a discussion of the law under the *ICCPR* on the point in question, and finally an assessment of whether the facts disclose a violation of that law and, if so, what remedy follows. A good percentage of the HRC's case law that has emerged from this communication procedure over the last twenty years has been generated by claims brought against Canada. In contrast, the *ICESCR* is overseen by its own eighteen-member monitoring body (the Committee on Economic, Social and Cultural Rights — the CESCR) whose authority is limited to issuing *Concluding Observations* on state reports. Although the CESCR has put forward a draft, states (operating through the UN's Commission on Human Rights) have not yet agreed to open negotiations on an Optional Protocol which would contain a communications procedure for that treaty which would parallel the procedure

(legalistic) legal mind might reason, the *Charter* cannot be intended to protect a "social and economic" right such as that to an adequate standard of living. The present comment is not the occasion to lay bare the problematic assumptions behind this line of reasoning.⁶ Suffice it to point out that the evocative preamble of each of the sibling treaties sent a normative counter-signal from the moment of the joint adoption in 1966 of the two Covenants. The rights in the two treaties are interdependent in important respects and share the overarching animus of the ideals that underpin the parent UDHR, as reflected in each Covenant's preamble:⁷

Recognizing that, in accordance with the Universal Declaration of Human Rights, *the ideal of free human beings* enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, *as well as* his economic, social and cultural rights. . .

long available under the *ICCPR*: see Committee on Economic, Social and Cultural Rights, *Report to the Commission on Human Rights on a Draft Optional Protocol for the Consideration of Communications Concerning Non-Compliance with the International Covenant on Economic, Social and Cultural Rights*, (1998) 5 International Human Rights Reports 527. The World Conference on Human Rights which met in Vienna in 1993 instructed the UN to look into the possibility of such an optional protocol both for the *ICESCR* and for the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW): see UN World Conference on Human Rights, *Vienna Declaration and Programme of Action*, (1993) 32 I.L.M. 1661, Pt. II, para. 75 and para. 40. On 12 March 1999, the UN Commission on the Status of Women recommended to the UN General Assembly that it adopt and open for signature such a protocol for CEDAW: for the CSW's recommendatory resolution, see UN Doc. E/CN.6/1999/WG/L.3 (11 March 1999) and, for the Revised Draft Optional Protocol, see UN Doc. E/CN.6/1999/WG/L.2 (10 March 1999).

⁶ See Craig Scott, "The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights" (1989) 27 *Osgoode Hall L.J.* 769 and Craig Scott, "Reaching Beyond (Without Abandoning) the Category of 'Economic, Social, and Cultural Rights'" (1999) 21 *Hum. Rts. Q.* 633 (especially on "negative inferentialism" as a problematic interpretive method).

⁷ Third preambular paragraph of the *ICCPR*. [Italics added; underlined emphasis in original.] The corresponding preambular paragraph of the *ICESCR* conveys a similar message with some difference in word order and with the omission of the words "civil and political freedom." "Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights . . ." [emphasis added].

The promise of a normative interplay between the two Covenants such as suggested by this statement of purpose has, with time, more and more become reality as the *ICCPR*'s Human Rights Committee (HRC) and the *ICESCR*'s Committee on Economic, Social and Cultural Rights (CESCR) have forged overlapping interpretations of the two treaties' provisions, and not only in areas where there are facially similar or identically phrased rights.⁸ The HRC has long made clear in its general summaries of jurisprudence, known as General Comments, that rights often thought to be the heritage of the classical liberal tradition (and the ongoing American constitutional tradition) — those based on protection from interference by the state, or 'negative rights' — place duties on the state to address those material conditions and associated inequalities that render those rights ineffective for some members of society. So, for instance, the HRC interpreted, very early on in its mandate, the "right to life" in Article 6(1) of the *ICCPR* as requiring that positive measures be taken, *inter alia*, to reduce infant mortality that results from inadequate health and nutritional conditions.⁹ That committee soon also made clear that the right to equal protection of the law in Article 26 of the *ICCPR* places affirmative duties on states to address social and economic inequalities where treating certain groups of people the same as others (including by doing nothing) either causes or exacerbates the disadvantage of such persons.¹⁰

⁸ On facially similar provisions, compare, for example, Articles 10(1) and 10(3) of the *ICESCR* ("the widest possible protection and assistance should be accorded to the family, . . . particularly for its establishment and while it is responsible for the care and education of dependent children. . . . "Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reason of parentage or other conditions.") and Articles 23 and 24 of the *ICCPR* ("The family . . . is entitled to protection by society and the State" and "[e]very child shall have, without any discrimination . . . , the right to such measures of protection as are required by his status as a minor"). Or see Article 8(1)(a) of the *ICESCR* ("the right of everyone to form trade unions and join the trade union of his choice") and Article 22(1) of the *ICCPR* ("the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests"), as well as Article 6(1) of the *ICESCR* ("the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses and accepts") and Article 8(3)(a) of the *ICCPR* ("No one shall be required to perform forced or compulsory labour.").

⁹ See Human Rights Committee, General Comment No. 6/16, Right to Life (Article 6), reprinted in Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (Kehl am Rhein/Strasbourg/Arlington: N. P. Engel, 1993) at 851.

¹⁰ See Human Rights Committee, General Comment No. 4/3, Gender Equality: General Comment No. 17/35, Rights of the Child; and General Comment No. 18/37, Non-Discrimination,

Consistent with such an approach, the HRC, in its questioning of states on *ICCPR* compliance as part of the treaty's state report procedure, has not infrequently ventured into areas which formalists would treat as the exclusive preserve of a discrete category of "economic, social and cultural rights" and as thus being the sole responsibility of the committee overseeing the *ICESCR*, the CESCR. Yet these efforts have been relatively *ad hoc* and cross-pollination with the human rights norms found in the *ICESCR* has not, until now, been pursued on a sustained basis.

Within the space of less than half a year, however, a remarkable pair of events occurred as a result of Canada's state reports under each of the *ICESCR* and the *ICCPR* having been before the CESCR and the HRC. On 4 December 1998, the CESCR released its *Concluding Observations* after scrutiny of Canada's most recent state report under the *ICESCR* and, on 7 April 1999, the HRC did likewise.¹¹ These *Concluding Observations* represent an interlinked expression of concern about a host of failures by Canada to adhere fully to its international human rights obligations in the two treaties. Indeed, it is not an overstatement to describe the two sets of *Concluding Observations* as pathbreaking in their focused treatment of the overlapping and shared obligations which emanate from the two Covenants as a partly fused legal order. In particular, the rich potential meaning the HRC has already given to the right to life and the right to non discrimination in the above-mentioned General Comments has moved from the realm of potential to the realm of firm legal obligations vis-à-vis the less advantaged in an affluent state like Canada. Significantly, both committees' *Concluding Observations* also address a number of inadequacies in the opportunities for legal protection in Canada's legal system of Covenant rights in such a way that we cannot, if we act at all in good faith, relegate the committees' concerns to some rarefied international space. If taken

in Nowak, *ibid.* at 850, 865 and 868.

¹¹ Committee on Economic, Social and Cultural Rights, *Concluding Observations on Canada*, 57th Session, UN Doc. E/C.12/1/Add.31 (4 December 1998) [hereinafter CESCR *CO* 1998] and Human Rights Committee, *Concluding Observations on Canada*, 65th Session, UN Doc. CCPR/C/79/Add.105 (7 April 1999) [hereinafter HRC *CO* 1999]. The full text of each of these *Concluding Observations* can be found on the web site of the Human Rights Directorate of Canadian Heritage, the federal department responsible for coordinating and preparing Canada's state reports to international human rights treaty bodies: see online: <http://www.pch.gc.ca/ddp-hrd/ENGLISH/cesc/concobs.htm> (accessed 1 December 1999) for the CESCR's *Concluding Observations* and online: <http://www.pch.gc.ca/ddp-hrd/ENGLISH/Covenant.htm> (accessed 1 December 1999) for the HRC's *Concluding Observations*.

seriously within Canada, the two *Concluding Observations* could represent a legal landmark for the evolution of our statutory and constitutional protection of human rights.

At the very least, the interdependent approach to the content of the two Covenants now firmly demonstrated by the committees should have significant interpretive impact on the *Charter of Rights*. While this had already been made clear by the Supreme Court's *Slaight Communications* doctrine, that doctrine has, in the decade since its articulation, been little-invoked by the legal profession and little-applied by the lower courts.¹² With *Baker*, we have reaffirmation — indeed, in view of the words chosen by the Court, even a bolstering — of the *Slaight Communications* doctrine of constitutional reception of Canada's international human rights obligations.¹³

Baker dealt with the exercise of administrative discretion to deport a Jamaican woman who was a long-term, but illegal, resident of Canada. Her situation was such that her mental health could easily be detrimentally affected, as would the well-being of her four Canadian children. Her children had to 'choose' between either being separated from their mother (if they were to stay in Canada after her expulsion) or separated from their country (if they moved with her to Jamaica). In the appeal to the Court from the Federal Court of Appeal, the issue of sections 7 and 15 of the *Charter* operating as the primary sites of interpretive reception of Canada's international human rights obligations was raised.¹⁴ The appellant, Mavis Baker, and three supporting intervenors asked the Court to understand the *Charter* to protect a range of associated rights found primarily in the UN Convention on the Rights of the Child (CRC or the Convention) but also in the *ICCPR* and the *ICESCR*.¹⁵ Rather than decide on the extent to which these international human rights constrained the exercise of

administrative discretion by virtue of being part of the *Charter*, the Court chose to find in favour of Ms. Baker on grounds of discriminatory and generally unreasonable consideration of her case by the immigration officials, consideration which had used her struggle with mental illness (post-partum psychosis), her status as a single mother with children, her recourse to the social assistance system, and a denigration of her contribution to Canadian society (by pointing to a lack of skills other than those of a domestic worker) as reasons to deny her the right to stay in Canada rather than reasons to look sympathetically on her case. In the course of the analysis of whether or not the refusal to allow her to stay exceeded the bounds of reasonableness, the Court addressed the issue that the trial judge in *Baker* had endorsed as a "certified question" to be dealt with on appeal, namely: were the immigration authorities' statutory powers to decide not to admit Ms. Baker to Canada limited by virtue of the constraining effect of the Convention on the Rights of the Child on the exercise of administrative discretion in accordance with the long-recognised principle of statutory interpretation that the legislature is presumed to have legislated in conformity with international law — despite the fact that the provisions of the Convention relevant to federal jurisdiction over immigration had not been formally implemented into Canadian law by Parliament? Here, the Court seized the moment to advance a robust understanding of this principle of statutory interpretation. The Court can be read as having embraced a cosmopolitan conception of the rule of law, one feature of which being that Canadian courts should show fidelity to the international legal order by seeking to harmonise domestic law with international law as much as interpretive space allows. The Court found, by a majority of 5–2, that the presumption of compliance with international law indeed includes to Canada's legal obligations under unincorporated treaties — i.e., treaties which Canada has ratified but which have not been legislatively transformed into Canadian law by Parliament or the provincial legislatures. In the course of her reasoning, Justice L'Heureux-Dubé had the following to say with respect to the impact of Canada's international human rights treaty obligations on the interpretive content of the *Charter*:¹⁶

[T]he values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review. As stated in R. Sullivan, *Driedger on*

¹² *Slaight Communications*, *supra* note 4.

¹³ *Baker*, *supra* note 4. For ease of reference, the quotation found in note 4 will be reproduced again here: "International human rights law . . . is . . . a critical influence on the interpretation of the scope of the rights included in the *Charter*" [emphasis added].

¹⁴ For the manner in which these issues were handled by Strayer J. A. of the Federal Court of Appeal, see *Baker v. (Canada) Minister of Citizenship and Immigration*, [1997] 2 F.C. 127.

¹⁵ *ICCPR* and *ICESCR*, *supra* note 2. Convention on the Rights of the Child, adopted 20 Nov. 1989, G.A. Res. 44/25, UN GAOR, 44th Sess., Supp. No. 49, UN Doc. A/44/49 (1989) (entered into force 2 Sept. 1990), reprinted in (1989) 28 I.L.M. 1448 [hereinafter the CRC]. See factums on file with the Registry of the Supreme Court of Canada of the Appellant Mavis Baker and the intervenors Charter Committee on Poverty Issues, Canadian Council of Churches and Justice for Children and Youth.

¹⁶ *Baker*, *supra* note 4 at para. 70 [emphasis by L'Heureux-Dubé J.].

the Construction of Statutes (3rd ed. 1994), at p. 330:

[T]he legislature is presumed to respect those values and principles contained in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. *In so far as possible therefore, interpretations that reflect these values and principles are preferred.*

Endorsement in these terms of the presumption of compliance with international law is especially relevant to the interaction of international human rights treaty law and Canadian domestic law given that the Court situates its invocation of the presumption within a broader value-laden web of “values and principles” which frame what is and is not reasonable administrative decision-making. Earlier in its judgment in *Baker*, the Court stated:¹⁷

[T]hough discretionary decisions will generally be given considerable respect, that discretion must be exercised in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the *Charter*.

It seems, then, that it is not simply a rule-of-law concern with the formal legal status of Canada’s international legal commitments that determines the depth of interpretive influence of international norms on statutory interpretation but also (and more so) those commitments’ resonance with Canadian law and society’s fundamental constitutive values and principles. In this respect, it is useful to remember how Chief Justice Dickson spoke about a circle of “values and principles” in the following terms:¹⁸

Generally speaking, the international human rights obligations taken on by Canada reflect the values and principles of a free and democratic society, and thus those values and principles that underlie the *Charter* itself.

While the principle of statutory interpretation digested from Sullivan’s *Driedger* is generally applicable to Canada’s international commitments, the normative

force of any given commitment being called in aid must vary with the subject matter of the international norms and with some appreciation of how the context in which it has been produced relates to our “free and democratic” ideals. In other words, *Baker* helps us understand how international human rights law has a special interpretive force within Canada’s legal order(s).¹⁹

Having linked the significance of the two UN committees’ findings to a deepening embrace by Canada’s highest court of international human rights law, the remainder of this article will seek to: summarize the key common findings of the two committees; draw attention to some of the inconsistent, indeed disingenuous, conduct involved in Canada’s professions of compliance with the two human rights treaties over the years; and, finally, discuss the concrete suggestions made by the committees on how Canada should remedy the structural and procedural deficits in protection of the Covenants’ human rights by Canada’s domestic legal order.

THE COMMITTEES’ FINDINGS ON CANADA’S NON-COMPLIANCE WITH ONE OR BOTH OF THE COVENANTS

The following is a *précis* of only some of the findings made by the committees in the two *Concluding Observations*. Each Concluding Observation runs to several pages; this being so, the original documents must be consulted to gain a full appreciation of the range of concerns expressed by the committees. For ease of exposition, the selected findings will be presented in point form.²⁰

¹⁷ *Ibid.* at para. 56.

¹⁸ *R. v. Keegstra*, [1990] 3 S.C.R. 697 at 750.

¹⁹ On the question of why the special content of international human rights treaties should distinguish them from other kinds of treaties in terms of their effects within the Canadian legal order, see Alan Brudner, “The Domestic Enforcement of International Covenants on Human Rights: A Theoretical Framework” (1985) U.T.L.J. 219.

²⁰ After each point, I will indicate in parentheses the paragraph number in which a given committee made comments on the subject matter in question. For example, “HRC, para. #” refers to the *Concluding Observations* of 7 April 1999, of the Human Rights Committee with reference to rights in the *ICCPR* and “CESCR, para. #” refers to the *Concluding Observations* of 4 December 1998, of the Committee on Economic, Social and Cultural Rights with reference to rights in the *ICESCR*.

COMMON FINDINGS

Inadequacy of Remedies in Canada's Legal System for Violations of Rights in the Covenants

- Both committees emphasized the failure of Canada to fully implement the two human rights treaties. This failure results from the inadequate formal legal protection that currently exists in Canada's legal system for the human rights in the Covenants, as a combined result of recalcitrant interpretation of the *Canadian Charter of Rights and Freedoms* by many lower courts and failure of Parliament and the provincial legislatures to make all Covenant rights enforceable through enactment of appropriate legislation (HRC, para. 10; CESCR, paras. 51 and 52).
- Each committee also drew special attention to ineffective remedies for breaches of rights to non-discrimination in the private sector due to the inadequacy of the avenues of redress provided by the provincial and federal human rights (non-discrimination) codes. Each called for legislative amendments that would allow a human rights claimant to present her case before a "competent . . . tribunal" rather than continue to allow the various human rights commissions across the country to continue to play a gatekeeper role as to whether or not a person can access such a tribunal (HRC, para. 9; CESCR, para. 51).

Indigenous Rights

- The practice of Canadian governments of insisting that Aboriginal rights must be extinguished as part of settlement of Aboriginal claims should be abandoned (HRC, para. 8; CESCR, para. 18).
- The economic marginalization and material deprivations of Aboriginal peoples and persons constitute a serious failure by Canada to protect human rights guaranteed under both Covenants, including the right to self-determination found in common Article 1 (HRC, para. 8; CESCR, paras. 17, 18, 43).
- The recommendations of the Royal Commission on Aboriginal Peoples (RCAP) must be "urgent[ly]" implemented (HRC, para. 8; CESCR, para. 43).

Homelessness and Poverty in General

- Canada's failure to take adequate measures to prevent and respond to homelessness represents a failure to ensure rights to housing, health and life itself. Positive measures must be taken to tackle this combined rights violation (HRC, para. 12; CESCR, paras. 24, 28, 34, 46).
- Rights to non-discrimination have been breached by program cuts — including by the replacement of the federal Canada Assistance Plan (CAP) with the Canada Health and Social Transfer (CHST) and by cuts to provincial social assistance rates (e.g., 35 per cent for single people in Nova Scotia and 21.6 per cent across the board in Ontario) — that have worsened the situation of disadvantaged groups, in part by disproportionately exacerbating poverty of women and children dependent on them (HRC, para. 20; CESCR, paras. 19–21, 23, 25, 35, 40–42).
- Non-compliance with both Covenants' guarantee of the special rights of children to protection has resulted in treaty violations in those provinces where the new federal National Child Benefit (NCB) does not reach the children of parents on social assistance because the policy of most provincial governments is to deduct the NCB payment from the amount of social assistance received by the parents (HRC, para. 18; CESCR, paras. 22, 44).

Violation of Rights to Freedom of Association of "Workfare" Recipients

- Ontario's 1998 Act to prevent unionization²¹ of "workfare" participants fails to comply with both Covenants' guarantee that workers may join a trade union and bargain collectively (HRC, para. 17; CESCR, paras. 31, 55).

These nine common findings represent a remarkable overlap of legal concern about human rights violations that simultaneously engage Canada's commitments in each treaty. The purpose of the two sub-sections which follow is to make mention of some specific findings of rights violations made by one committee that either was not replicated in the *Concluding Observations* of the other committee or was not phrased in as clear a fashion;

²¹ *Prevention of Unionization Act*, S.O. 1998 c.17.

this catalogue represents only a portion of each committee's independent findings.²²

EXAMPLES OF OTHER FINDINGS OF ICCPR NON-COMPLIANCE BY THE HUMAN RIGHTS COMMITTEE

- The HRC called for the “elimination” of “increasingly intrusive measures” being taken in violation of the privacy rights of social assistance recipients, including what can only be called the Orwellian policy of some provincial governments of using fingerprinting and retinal scanning to identify such persons as a supposedly necessary means to root out welfare fraud (HRC, para. 16).
- Several paragraphs were devoted to policies and practices of the federal Immigration Department which, since the coming to power of the Liberal government, seem to have been planned and carried out oblivious to any real concern to respect Canada's international human rights obligations. The committee called Canada to account for invoking so-called national “security” rationales as justification for deporting aliens to countries where they may face a substantial risk of either torture or other cruel, inhuman or degrading treatment. It also criticized Canada's willingness to expel long-term residents of Canada who are not formally Canadian citizens without serious consideration being given to whether a breach of family rights and children's rights to care by their parents will be triggered by separation through deportation (HRC, paras. 13–15).
- As already noted, Article 1 of the *ICCPR* (which is identical to Article 1 of the *ICESCR*) guarantees the right of all peoples to self-determination. In a path-breaking interpretation which explicitly confirmed what many scholars and Aboriginal representatives have long contended to be the case, the Human Rights Committee held that this collective right is a right of Aboriginal peoples no less than of other peoples. Further, the committee also noted that the right to self-determination includes, *per Art. 1(2)* of both Covenants, the right of Aboriginal peoples to be able freely to dispose of their natural wealth and

²² It must of course be noted that, while the combined focus of both committees adds significantly to the seriousness of a given human rights violation, Canada is no less bound to respond to a finding of a rights violation limited to one Covenant.

resources and not to be deprived of their means of subsistence (HRC, para. 8).

- The committee expressed “deep concern” about the failure of Ontario to hold a public inquiry into the possible role and responsibility of public officials (including the Premier of Ontario) in the shooting death of Aboriginal activist Dudley George at Ipperwash in 1995 (HRC, para. 11).

EXAMPLES OF OTHER FINDINGS OF NON-COMPLIANCE WITH THE ICESCR BY THE COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

- The CESCR discussed the material conditions of life of many Aboriginal people in terms of a “gross disparity” with the lot of the majority of Canadians, drawing specific attention not only to the shortage of adequate housing and endemic mass unemployment but also to what can only be called the Fourth World situation of lack of adequate and safe drinking water in some Aboriginal communities (CESCR, para. 17).
- Following up its earlier signalling of concern to Canada, as expressed in a letter sent by the committee to Canada in 1995, the committee discussed in some detail the repeal of the Canada Assistance Plan in terms that made clear this action triggered the prohibition on states taking retrogressive measures without adequate justification²³ (CESCR, para. 19). The committee then called for the re-establishment of a “national program with designated cash transfers for social assistance and social services which include

²³ On the 1995 letter and the doctrine of non-retrogressive measures, see Craig Scott, “Covenant Constitutionalism and the Canada Assistance Plan” (1995) 6 *Constitutional Forum* 79 [hereinafter “Covenant Constitutionalism”], including the Appendix (at 87) in which the committee's letter to Canada is reproduced. Note that the committee's veiled reference in the last sentence of para. 19 of the *Concluding Observations* — “The committee also recalls in this regard paragraph nine of General Comment No. 3” — is to the doctrine of non-retrogressive measures. See Committee on Economic, Social and Cultural Rights, General Comment No. 3, The nature of States' parties obligations (Art. 2, para. 1 of the Covenant), UN Doc. E/1991/23 (1990) at para. 9, reprinted in Asbjorn Eide, Catarina Krause, and Allan Rosas, eds., *Economic, Social and Cultural Rights: A Textbook*, 1st ed. (Dordrecht/Boston/London: Martinus Nijhoff, 1995) [2nd ed. forthcoming in 2000] [hereinafter CESCR, General Comment No. 3].

universal entitlements and national standards, specifying a legally enforceable right to adequate assistance for all persons in need, a right to freely chosen work, a right to appeal and a right to move freely from one job to another” (CESCR, para. 42).

- The committee is trenchant in its insight into the false success claimed for restrictions on unemployment insurance benefits (UIB) that have resulted in about half the previous number of people receiving UIB. The exclusions from coverage under the UI system are canvassed; attention is then drawn to the resulting inadequate protection that now exists for many disadvantaged groups: “[T]he fact is that fewer low-income families are eligible to receive any benefits at all” (CESCR, para. 20). The committee notes that this situation does not conform to the right to social security and calls for reform of the UI scheme “so as to provide adequate coverage for all unemployed workers” in terms of both benefit amount and duration of coverage (CESCR, para. 45).
- The decline in social assistance rates and the inadequacy of the minimum wage across Canada are dealt with in detail as being breaches of the right to an adequate standard of living: “These cuts appear to have had a significantly adverse impact on vulnerable groups, causing increases in already high levels of homelessness and hunger The Committee urges the State Party . . . to establish social assistance at levels which ensure the realization of an adequate standard of living for all” (CESCR, paras. 21, 23, 25, 25, 32, 35, 40, 41, and 46; paras. 21 and 41 are quoted). The discussion shows a nuanced concern to pay special attention to the specific harms caused to certain groups like single mothers and to consider the interactive effects of the inadequacy of social assistance and lack of access to adequate housing. For example, the committee reasons:

[T]he significant reductions in provincial social assistance programmes, the unavailability of affordable and appropriate housing and widespread discrimination with respect to housing create obstacles for women escaping domestic violence. Many women are forced, as a result of those obstacles to choose between returning to or staying in a violent situation, on the one hand, or homelessness and inadequate food and clothing for themselves and their children, on the other (CESCR, para. 28).

THE CESCR CALLS CANADA ON A MIX OF DISINGENUOUS COMPLACENCY, INCONSISTENCY AND HYPOCRISY

It seems accurate to say that, as a society, we in Canada like to think we are committed to, and governed by, the rule of law. We also tend to be proud of a culture that takes human rights seriously, in close association with a commitment to healthy communities and an ethic of social inclusion. Furthermore, given our self-understanding of our country’s Pearsonian tradition in international affairs, Canadians are just as quick to associate themselves with the ideal of the *international* rule of law, especially as regards the gradual evolution of human rights standards in the international legal order.

Our governments — at least our federal governments — have tended to piggyback on such general cultural dispositions and, over the years, have tried to portray Canada as a model country in their statements not only in the international arena but also before domestic audiences. To our federal government’s credit, Canada has indeed been one of the main promoters and contributors to such bulwarks of international justice as the UN peacekeeping system and the UN human rights treaty order. Yet, somehow, with respect to scrutiny by UN human rights bodies of our own record of compliance with treaties, we have collectively displayed a remarkable apathy punctuated by American-style bouts of reactionary resentment: how dare upstart UN bodies (which include, by the way, experts from states with truly bad human rights records) compromise our sovereignty by challenging our self-image of purity on the human rights front? International human rights law in Canada has lived a life outside the spotlight of both legal scrutiny and political debate, matching the near invisibility and powerlessness of those members of society who would most benefit from having those rights taken more seriously by our legal and political orders.

In the face of such resistance, a significant number of nongovernmental organizations (notably in the anti-poverty, equality-seeking, aboriginal rights and migration sectors) have been trying, despite ever-dwindling resources, to take the international human rights process seriously. They have toiled, especially over the past decade, to have Canadian society pay attention when all eighteen members of a body such as the Human Rights Committee or the Committee on Economic, Social and Cultural Rights have reached a

consensus decision that Canada has fallen short of its international human rights commitments, especially to the less-privileged groups in society. To little avail. Instead, the discourse of international human rights promoted by governments and most mainstream nongovernmental organizations in Canada has very much been one which pays attention not to the “others” of Canadian society, but rather to those “other” state-societies where “real” human rights violations occur. Our governments have been getting away with a dubious discourse of which the central rhetorical plank has been various versions of the question: Given that others are, on the whole, worse at respecting human rights, how can we be criticized? Opposition parties, including the New Democratic Party, have been embarrassingly inept at making UN human rights treaty bodies’ judgements about Canada’s international human rights compliance part of the national political agenda. The news media’s coverage is sporadic at best, amounting to sketchy and brief reports the day after a UN body states its concerns — and then nothing. All told, a combination of ignorance and apathy is probably an accurate description of the attitude of Canadian society as a whole to the international human rights treaty order’s relevance to Canada itself. Canada has needed a normative kick in the pants for some time. And that is exactly what the two committees have given us. A politely diplomatic kick, but a kick nonetheless.

One rhetorical strategy highly favoured by federal governments warrants specific mention. How often have we seen a Canadian prime minister stand up in the House of Commons and invoke, in a virtual chortle, Canada’s second-to-none ranking in the UN Development Program’s Human Development Index (HDI) as a defence to Question Period queries from the opposition following UN criticism of Canada’s human rights performance? The CESCR made clear how casuistic it views this defence when it stated, in noting positive aspects of Canada’s record, that:²⁴

[F]or the last five years, Canada has been ranked at the top of the United Nations Development Programme’s Human Development Index (HDI). The HDI indicates that, *on average*, Canadians enjoy a singularly high standard of living and that Canada has the capacity to achieve a high level of respect for all Covenant rights. That this has not yet been achieved is reflected in the fact that UNDP’s Human Poverty Index ranks Canada tenth on the list for industrialized countries.

²⁴ CESCR CO 1998, *supra* note 11 at para. 3 [emphasis added].

Canadian governments have long invoked averages and medians as adequate accounts of the state of human rights enjoyment in Canada, thereby showing just how little understanding (or sincere attempt to understand) there is of the very nature of human rights. The CESCR has, for almost a decade now, been clearly and firmly requiring governments to provide detailed information on the extent to which *all* individuals’ social rights are being attended to. In order to do this, disaggregated information on the situation of those persons and social groups who fall below the median or average is indispensable. That Canadians on average are not homeless, have adequate nutrition, go to adequate schools, or can raise their children in a dignified way says *nothing at all* about whose human rights are being respected and whose are being violated.

Not only did the CESCR catch us out on our official failure to grasp the concept of rights but it went on, ever so gently, to point out the Kafkaesque situation produced by Canada’s duplicitous claims with respect to those standards in Canada that come closest to tracking the incidence and nature of poverty in Canada:²⁵

While the Government of Canada has consistently used Statistics Canada’s “Low Income Cut-Off” [known as LICOs] as a measure of poverty when providing information to the Committee about poverty in Canada, it informed the Committee that it does not accept the Low Income Cut-Offs as a poverty line, although this measure is widely used by experts to consider the extent and depth of poverty in Canada. *The absence of an official poverty line makes it difficult to hold the federal, provincial and territorial governments accountable to their obligations under the Covenant.*

In one fell swoop, Canada is exposed not only for acting with no small degree of hypocrisy but also for cutting international scrutiny off at the knees. We have, in effect, brazenly admitted that we have failed in the most primary of obligations under the *ICESCR*, namely that which requires states to put into place an official system of measurement and monitoring that allows each state to know the extent of poverty as the necessary first step in designing policies to address such poverty.²⁶ Five years earlier, in the CESCR’s 1993 *Concluding Observations* on Canada, the committee was even more

²⁵ *Ibid.* at para. 13 [emphasis added].

²⁶ See CESCR, General Comment No. 3., *supra* note 23 at paras. 3–4.

direct in expressing a dismay which bordered on incredulous annoyance that Canada had appeared before the committee with no official figures or solid information on the numbers of homeless in Canada.²⁷

In its 1998 *Concluding Observations*, the committee followed up diplomatic hints sent to Canada in a 1995 letter in which it had indicated that the abolition of the Canada Assistance Plan had consequences for Canada's compliance with the *ICESCR*.²⁸ The committee incisively (but, as always, in measured and non-polemical terms) took Canada to task for its hypocrisy — or, more euphemistically, its inconsistency.²⁹

The replacement of the Canada Assistance Plan (CAP) by the Canada Health and Social Transfer (CHST) entails a range of adverse consequences for the enjoyment of Covenant rights by disadvantaged groups in Canada. The Government informed the Committee in its 1993 report that the CAP set national standards for social welfare, required that work by welfare recipients be freely chosen, guaranteed the right to an adequate standard of living, and facilitated court challenges to federally-funded provincial social assistance programmes which did not meet the standards prescribed in the Act. In contrast, the CHST has eliminated each of these features and significantly reduced the amount of cash transfer payments provided to the provinces to cover social assistance.

The committee did not stop there. It carefully homed in on the structural double standards represented by the replacement of the CAP with the CHST:³⁰

[Canada] did, however, *retain national standards in relation to health* under CHST, thus denying provincial “flexibility” in one area, while insisting upon it in others [notably social assistance]. *The delegation provided no explanation for this inconsistency.*

Finally, the committee, joined by the Human Rights Committee, drew attention to conduct of Canada that draws into question the good faith of Canada's commitment to doing what is necessary to implement Covenant rights within the Canadian legal order.³¹ Reproduction of the two committees' own words, on three issues, is adequate to the task of conveying the nature of the problem. On the issue of legislative reversals of *ICESCR*-sensitive interpretations of provincial human rights codes, the Committee on Economic, Social and Cultural Rights said:³²

The Committee is concerned that in both Ontario and Quebec, governments have adopted legislation to redirect social assistance payments directly to landlords without the consent of recipients, *despite the fact that the Quebec Human Rights Commission and an Ontario Human Rights Tribunal have found this treatment of social assistance recipients to be discriminatory.*

On the issue of deportations from Canada, the Human Rights Committee expressed its concern that the federal government has gone so far as to adopt a policy of having full discretion to deport someone to substantial risk of danger even in defiance of an “interim measure” request by international human rights bodies to Canada not to deport until the body has had a chance to consider the merits lest deportation result in irreversible harm.³³

The Committee expresses its concern that that the State party considers that it is not required to comply with requests for interim measures of protection [e.g. staying a deportation order] issued by the Committee. The Committee urges Canada to revise its policy so as to ensure that

²⁷ Committee on Economic, Social and Cultural Rights, *Concluding Observations on Canada*, UN Doc. E/1994/23 (1993) at para. 19 reprinted in (1995) 2 International Human Rights Reports 682 at 684.

²⁸ Scott, “Covenant Constitutionalism” *supra* note 23 at 87.

²⁹ CESCR CO 1998, *supra* note 11 at para. 19 [emphasis added]. Note that Canada, in its previous state reports and oral representations under the *ICESCR*, had proudly and prominently invoked the CAP not just descriptively (i.e., as being, in the committee's words, “national standards for social welfare”) but also normatively (i.e., as the basis on which Canada was in compliance with many of the *ICESCR* rights). By choosing not to point this discrepancy out in stronger terms, the committee has clearly chosen to be as deferential as possible without conceding the basic point it wishes to signal.

³⁰ *Ibid.* [emphasis added]. See Scott, “Covenant Constitutionalism” *supra* note 23 at 80 for discussion of health being treated by the government as a middle-class right and how retaining protections for it but not for social assistance was, in effect, structural discrimination against economically disadvantaged groups.

³¹ See more generally Committee on Economic, Social and Cultural Rights, Comment No. 9, *The domestic application of the Covenant*, UN Doc. E/C.12/1998/24 (1 December 1998) reprinted in (1999) 6 International Human Rights Reports 289.

³² CESCR CO 1998, *supra* note 11 at para. 26 [emphasis added].

³³ HRC CO 1999, *supra* note 11 at para. 14. One such case was the deportation of Tejinder Pal Singh by the federal immigration authorities in 1997, despite a request by the UN Committee Against Torture not to do so: Information from Barbara Jackman, Jackman, Waldman & Associates, Toronto.

all such requests are heeded in order that implementation of Covenant rights is not frustrated.

Finally, on the stance taken by government lawyers in Canadian courts, the Committee on Economic, Social and Cultural Rights addressed submissions from NGOs that the committee should find it incompatible with the Covenant for a government to go into its country's courts and argue that Covenant rights are not judicially protected in Canada's legal order where either constitutional or statutory provisions are sufficiently broadly worded to be interpreted to protect those rights in accordance with the presumption recognized in most legal systems, including Canada's, that domestic law accords with international law. The committee first addressed a specific concern when it made the following significant criticism:³⁴

The Committee has received information about a number of cases in which claims were brought by people living in poverty (usually women with children) against government policies which denied the claimants and their children adequate food, clothing and housing. Provincial governments have urged upon their courts in these cases an interpretation of the Charter which would deny any protection of Covenant rights and consequently leave the complainants without the basic necessities of life and without any legal remedy.

It then stated clearly and unequivocally:³⁵

The Committee urges the federal, provincial, and territorial governments to adopt positions in litigation which are consistent with their obligation to uphold the rights recognized in the Covenant.

The need for the committee to expressly state something which clearly follows from the basic duty of a state to give legal effect to its Covenant obligations is obvious to anyone who litigates before Canadian courts or administrative tribunals and attempts to invoke international human rights law as interpretive support for legal arguments. For example, the federal government's lawyers, especially those serving the Department of Immigration, have been zealous in marching into court on almost a daily basis and going so far as to argue that the Canadian *Charter of Rights and Freedoms* cannot be

read to prohibit deporting someone where there is a substantial risk that the person will face torture after arrival at his destination — in the face of clear textual provisions and case law laying down such a prohibition emerging from the UN Convention Against Torture regime.³⁶ In the aforementioned *Baker* case, government lawyers appeared to be under instructions to stand before the Supreme Court of Canada and argue that rights in international human rights treaties that protect against family separation cannot be understood as being part of “life, liberty and security of the person” protected by section 7 of the *Charter*. But here, as in other areas, Canada has gone on record before an international body claiming — or at least giving the strong impression of — the opposite. The Court was asked in oral arguments by the intervenors to take note of one arm of the same federal executive saying one thing before an international legal audience and another thing before a domestic legal audience.³⁷

³⁶ These arguments have tended to win the day in the Federal Court of Canada, where most refugee and immigration cases are adjudicated. For a leading example of judicial reasoning that is lacking in (international) human rights sensibilities, see the judgment of Tremblay-Lamer J. in *Suresh v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. 28 (Judgment of 16 January 1998). Compare to the reasons of Lane J. of the Ontario Court of Justice, General Division, who not only arrived at the opposite conclusion on the same facts but exercised his power to take jurisdiction over a case that had already been decided (by Tremblay-Lamer J.) in the Federal Court system: *Suresh v. Canada (Minister of Citizenship and Immigration)* (1998), 38 O.R. (3d) 267. These two contrasting judgments represent a rare opportunity to see how two trial judges can approach *exactly* the same case differently. In our study of judicial decision-making, we are usually limited to comparing the trial judge's reasons with those of courts on appeal in any given case.

³⁷ In 1995, a set of representations was made by Canada's delegation presenting Canada's state report to the Committee on the Rights of the Child — three separate times by three different spokespersons — that CRC rights are subject to protection under either or both of the *Charter* and statutory human rights codes combined: see Committee on Rights of the Child, Summary Record, 214th Meeting, 9th Sess., UN Doc. CRC/C/SR.214 (30 May 1995) p. 10/para. 40 (Mr. Duern [Canada]); p. 11/para. 47 (Mr. McAlister [Canada]); and p. 12/para. 49 (Ms. McKenzie [Canada]). In *Baker*, counsel for CCPI [the author] delivered oral arguments on this point relying on materials contained in the book of authorities prepared by another intervenor, Justice for Children and Youth: “Argument for the Intervenor Charter Committee on Poverty Issues,” *Baker v. Canada (Minister of Citizenship and Immigration)*, Transcription of Cassettes, Wednesday, 4 November 1998, 09:46 hours, p. 32 at pp. 36–39. In its judgment in *Baker*, the Court did not allude to this problem of inconsistency of argument at the national and international levels.

³⁴ CESCR CO 1998, *supra* note 11 at para. 14.

³⁵ *Ibid.* at para. 50.

LINK-UPS BETWEEN THE INTERNATIONAL AND THE NATIONAL: RECOMMENDATIONS THAT THE CANADIAN LEGAL AND POLITICAL SYSTEM TAKE PROFESSED COMMITMENTS TO INTERNATIONAL HUMAN RIGHTS OBLIGATIONS MORE SERIOUSLY

The preceding section discussed the linked problems of inconsistency and lack of commitment which plague the executive arms of Canadian governments. However, the committees also addressed the inadequate performance of the Canadian judiciary and Canadian legislatures. The CESCR deftly linked the Canadian executive's international representations to the lack of receptivity of Canadian lower courts in the following terms:³⁸

The Committee is deeply concerned to receive information that provincial courts in Canada have *routinely opted for an interpretation which excludes protection of the right to an adequate standard of living and other Covenant rights*. The Committee notes with

concern that the courts have taken this position despite the fact that the Supreme Court of Canada has stated, as has the Government of Canada before this Committee, that the Charter can be interpreted so as to protect these rights.

The committee reiterates its recommendation that one part of rectifying this antipathy towards Covenant-sensitive adjudication is for the Canadian Judicial Council to "encourage training for judges on Canada's obligations under the Covenant."³⁹

However, neither committee was under any illusion that a more active and sensitive judiciary could alone solve the problem of inadequate formal avenues of redress in Canadian law for seeking vindication of breached treaty rights. In this regard, rights in all categories are best understood as being a shared project amongst all branches of the state such that robust judicial protection cannot be fully achieved without a conducive legislative and regulatory environment.⁴⁰ Furthermore, on the question of the formal sources of rights protection in Canadian domestic law, the committees are not in a position to judge how far the protections of the *Charter of Rights* should or will go in including all or most human rights found in the treaties — apart, of course, from relying on representations made by Canada about those domestic law sources. Accordingly, they have no choice but to work from the assumption that some Covenant rights (or some dimensions of some rights) may not have constitutional counterparts and thus that legislatures must interact directly with the international legal order in order to put into place the necessary statutory protections to allow for conformity with the Covenant obligations. In any case, even if every Covenant right is protected by the *Charter* (notably by virtue of the combined operation of sections 7 and 15), the effective protection of human rights cannot rely on waiting for *ad hoc* court cases to be brought before legislatures which assume their self-standing responsibilities to protect human rights. Finally, neither courts nor legislatures, as currently constituted, have any

³⁸ CESCR CO 1998, *supra* note 11 at para. 15 [emphasis added]. Some may see the last clause as potentially misleading. While it follows from *Irwin Toy* and *Slaight Communications* combined that the *Charter* "can" be interpreted to protect ICESCR rights, the Supreme Court had not yet, at the time of the committee's *Concluding Observations*, taken the step of positively affirming this interpretation. Indeed, with *Baker*, the Court has further declined to take the opportunity to close the loop, although it may well use *Godin* (*supra* note 4) for that purpose. International Court of Justice Judge (and former member of the Human Rights Committee) Rosalyn Higgins convincingly discusses the difference national judicial cultures make to the extent to which international law has a life in domestic law. In drawing attention to the "culture of resistance to international law," she notes that this culture tends to feed on the formal separation between domestic statutory law and international treaty norms in Westminster-style "dualistic" systems (like Canada's) that require *legislative transformation* of treaty norms before they can have the *direct* force of law in such systems: Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press: Oxford, 1994) at 206–207. In his trenchant critique of the standard approach to date of the English judiciary (at least prior to the new bill of rights act), Murray Hunt goes so far as to refer to "atavistic dualism" as being at the heart of the unwillingness of most English judges to employ the presumption that domestic law conforms to international law in order to give *indirect* effect to international human rights treaty norms through interpretive acts of *judicial transformation*: see Murray Hunt, *Using Human Rights Law in English Courts* (Hart Publishing: Oxford, 1997) at 25–28.

³⁹ CESCR CO 1998, *supra* note 11 at para. 57. Note also the recommendation at para. 59: "The Committee recommends that the Federal Government extend the Court Challenges Programme to include challenges to provincial legislation and policies which may violate the provisions of the Covenant."

⁴⁰ On the notion of a shared burden of responsibility in the interpretation and implementation of human rights, see Amy Gutmann, "The Rule of Rights or the Right to Rule?" in J. Roland Pennock and John W. Chapman, eds., *Justification* (New York: NYU Press, 1987) 165 at 166 ("the unity of moral labour") and Craig Scott, "Social Rights: Towards a Principled, Pragmatic Judicial Role" (1999) 1 *Economic and Social Rights Review* 4 at 4 [hereinafter "Social Rights"].

necessary claim to be the best-suited institutions to monopolize the interpretation and operationalization of human rights. Various new institutional arrangements could be legislated to complement the functions of both courts and legislatures.

It is with all the foregoing in mind that we can fully appreciate the horizons that might be opened up by the following two recommendations by the Human Rights Committee and Committee on Economic, Social and Cultural Rights. The HRC suggests that some kind of interface institution might help bring Covenant norms into the legislative process(es).⁴¹

The Committee . . . recommends measures to ensure full implementation of Covenant rights. In this regard, the Committee recommends the establishment of *a public body responsible for overseeing implementation of the Covenant and for reporting on any deficiencies.*

The CESCR inserts itself into the debate over how a new federal system of social rights protection should look by simultaneously insisting on the enforceability of its Covenant's rights and opening the door for pluralistic and creative institutional design.⁴²

The Committee, as in its previous review of Canada's report, reiterates that economic and social rights should not be downgraded to "principles and objectives" in the ongoing discussions between the federal government and the provinces and territories regarding social programmes. The Committee consequently urges the Federal Government to take concrete steps to ensure that the provinces and territories are made aware of their legal obligations under the Covenant *and that the Covenant rights are enforceable within the provinces and territories through legislation or policy measures and the establishment of independent and appropriate monitoring and adjudication mechanisms.*

Tied closely to the concern of both committees to prod Canada to put into place domestic institutions that will translate Covenant law into Canadian reality is the flipside: ensuring that all relevant legislative jurisdictions are engaged in the process of justifying

treaty performance at the international level. The HRC said:⁴³

The Committee expresses its appreciation for the presence of the large delegation representing the Government of Canada. . . . However, the Committee is concerned that the delegation was not able to give up-to-date answers or information about compliance with the Covenant by provincial authorities.

The CESCR was more direct:⁴⁴

While the Committee notes that the delegation was composed of a significant number of experts too many questions failed to receive detailed or specific answers. Moreover, in the light of the federal structure of Canada and the extensive provincial jurisdiction, the absence of any expert representing particularly the largest provinces, other than Quebec, significantly limited the potential depth of the dialogue on key issues.

CONCLUSION

The committees have thus, acting in efficient partnership, shone an international spotlight on substantive, attitudinal and institutional deficiencies in Canada's approach to its human rights treaty obligations. It is crucial that their combined judgment not become yet another occasion when considered and articulate evaluations of Canada's human rights system by authoritative human rights treaty bodies sink below the horizon of the Canadian radar screen. There must be a commitment from Canadian governments, especially the federal government, and ultimately Parliament and all the legislatures, to move from these two sets of *Concluding Observations* to a new human rights dispensation. Here, it is heartening that the dialogue generated by the international human rights process has pointed the way forward. The delegation that appeared before the Human Rights Committee in March 1999 was headed by federal Cabinet minister Hedy Frye. She gave undertakings before the committee, that Canada would move forward on ensuring that the Canadian legal and political orders are, in future, institutionally better designed to take Covenant rights seriously. Her undertakings were understood by the committee as follows:⁴⁵

⁴¹ HRC CO 1999, *supra* note 11 at para. 10 [emphasis added].

⁴² CESCR CO 1998, *supra* note 11 at para. 52 [emphasis added].

⁴³ HRC CO 1999, *supra* note 11 at para. 2.

⁴⁴ CESCR CO 1998, *supra* note 11 at para. 2.

⁴⁵ HRC CO 1999, *supra* note 11 at para. 3.

The Committee welcomes the delegation's commitment to ensure effective follow-up in Canada of the Committee's concluding observations and to further develop and improve mechanisms for ongoing review of compliance of the State party with the provisions of the Covenant. In particular, the Committee welcomes the delegation's commitment to inform public opinion in Canada about the Committee's concerns and recommendations, to distribute the Committee's concluding observations to all members of Parliament and to ensure that a parliamentary committee will hold hearings of issues arising from the Committee's observations.

Canada's promise cannot but hold good for the follow-up treatment of the *Concluding Observations* under the *ICESCR* as well.

The commitment by the Minister to "develop and improve [compliance] mechanisms" and to begin that process with a parliamentary committee has much potential. However, it will be crucial that this parliamentary consideration not be a token one-off affair. The movement toward a "public body" (HRC's language) and the "appropriate mechanisms" (CESCR's language) for enforcing Covenant rights can easily grind to a halt unless a special parliamentary standing committee is created to deal with the interface between Canada's human rights treaty obligations and its domestic order. At some point, this effort must fan out into other crucial institutional contexts such as the "social union" process and the legislative processes of each province. From the entirety of this effort, substantive and institutional changes must come about if Canada is not to side-step its promises to the Human Rights Committee.

At the centre of all this must be the groups from within civil society which have long taken the UN human rights treaty system seriously and without which it is unlikely the two committees would have come to understand the Canadian human rights map in the detail and with the sophistication that they have.⁴⁶ But, most of all, what is needed is a new state of mind in approaching the linking-up of the Canadian constitutional order and

⁴⁶ For one account of Canadian NGO legal advocacy before the UN human rights treaty bodies, see Bruce Porter, "Socio-economic Advocacy — Using International Law: Notes from Canada" (1999) 2 *Economic and Social Rights Review* [forthcoming].

the international human rights order. Here I would like to rely on the evocative conceptualizations by two judges of the Supreme Court of Canada in two relatively recent speeches. Chief Justice Antonio Lamer affirmed in a keynote address at York University:⁴⁷

[T]he Charter should be, and has been, understood as part of the international human rights movement. . . . For international human rights law to be effective, . . . it must be supported by what I would term a "human rights culture," by which I mean a culture in which there is a firm and deep-seated commitment to the importance of human rights in our world . . . I turn now to the second aspect of what I have termed the "institutional moment" of international human rights law, the growth of institutional dialogue between international human rights bodies and national courts. Like any true dialogue, this dialogue depends on the willing participation of both parties. . . . [B]y looking to international treaties and the jurisprudence of international human rights bodies in the interpretation of domestic human rights norms[,] . . . judges raise the profile of those international treaties and further the creation of a human rights culture.

His former colleague on the bench, Justice Gérard La Forest, has spoken (generously, it must be said) about the cultivation of a certain cosmopolitan institutional orientation, or ethos, by the Canadian judiciary as a whole.⁴⁸

What is happening is that we are absorbing international legal norms affecting the individual through our constitutional pores . . . Thus our courts — and many other national courts — are truly becoming international courts in many areas involving the rule of law. They will become more so as they continue to

⁴⁷ The Rt. Hon. Antonio Lamer, Chief Justice of Canada, "Enforcing International Human Rights Law: The Treaty System in the 21st Century" (Address at York University, Toronto, 22 June 1997) at 3, 4 and 7.

⁴⁸ The Hon. Mr. Justice Gérard La Forest, "The Expanding Role of the Supreme Court of Canada in International Law Issues" (1996) 34 *Can. Y. B. Int'l L.* 89 at 98, 100–101. I say "generously" because the orientation which La Forest J. saw as already existing (or at least as quickly emerging) still applies much more to the Supreme Court than it does to most lower courts. As such, La Forest J. is as much speaking about a desirable orientation for the future as he is of any extant and widespread judicial ethos.

rely on and benefit from one another's experience. Consequently, it is important that . . . national judges adopt an international perspective.

But, to return to an earlier theme and to revert to words I have used in another constitutional context (South Africa), "We should be cautious not to create the perception that rights are the domain of the courts alone."⁴⁹ Instead, "[w]e need a constitutional ethos to permeate all government decision-making."⁵⁰ In short, what is needed in the wake of the committees' *Concluding Observations*, as we grapple with the challenge of bringing the "international" into our "national" human rights culture, is not simply the ethic of judicial transformation advocated by Justices Lamer and La Forest (and now by *Baker*) but also a transformation in political ethics that eventually lead to a healthy interaction between the courts and other institutions which take international human rights law seriously.⁵¹ □

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The author wishes to acknowledge the generous financial assistance of the Social Sciences and Humanities Research Council of Canada.

⁴⁹ Scott, "Social Rights" *supra* note 40 at 4.

⁵⁰ *Ibid.*

⁵¹ To that end, Canadian legislators would be well-advised to consult in addition to the Committee on Economic, Social and Cultural Rights' General Comment No. 9 on the domestic application of the Covenant, *supra* note 30, the committee's General Comment No. 10, *The role of national human rights institutions in the protection of economic, social and cultural rights*, UN Doc. E/C.12/1998/12 (1 Dec. 1998). In addition, legislators may wish to consult the two most recent substantive General Comments of the committee, on rights to primary education and to food, in order to help get a sense of how diverse institutional roles might link up with the kinds of duties placed on states by substantive rights: see General Comment No. 11, Plans of action for primary education (Art. 14), UN Doc. E/C.12/1999/4 (10 May 1999) and General Comment No. 12, The right to adequate food (Art. 11), UN Doc. E/C.12/1999/5 (12 May 1999). See also General Comment No. 4, *The right to adequate housing (Art. 11(1))*, UN Doc. E/1992/23 (1992) reprinted in Eide *et al.*, *supra* note 22 at 446. Finally, consideration is being given to a general comment on the framework role of "benchmarks" for assessing progress in the realization of economic, social and cultural rights: for the current draft, see Committee on Economic, Social and Cultural Rights, Summary Record, 45th Meeting, 19th session, 26 November 1998, UN Doc. E/C.12/1998/SR.45 (30 November 1998) at paras. 68-69.

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Extending the Right to Life Under the International Covenant on Civil and Political Rights: General Comment 36

Sarah Joseph*

KEYWORDS: right to life, Human Rights Committee General Comment 36, Article 6 International Covenant on Civil and Political Rights

1. INTRODUCTION

The following commentary analyses General Comment 36 on the right to life in Article 6 of the International Covenant on Civil and Political Rights (ICCPR),¹ which was adopted by the treaty's monitoring body, the Human Rights Committee (HRC), in October 2018.² General Comment 36 replaces two earlier General Comments on the right to life: General Comment 6 (1982)³ and General Comment 14 (1984).⁴ General Comment 6 was typical of the HRC's earliest General Comments, in that it added little beyond the obvious to the actual text of the right. General Comment 14 specifically targeted the waging of war and the possession of nuclear weapons.

General Comment 36 has been developed over four years, with extensive opportunities for feedback from States, other United Nations (UN) institutions, national human rights institutions, academics and civil society.⁵ It manifests a new approach to General Comments in that the HRC clearly goes far beyond its own jurisprudence in explaining the scope of the right. In contrast to the earlier General Comments, the extensively footnoted document is 24 pages long, as opposed to the bare one-and-a-half pages in General Comment 6.

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1 1966, 999 UNTS 171.

2 Human Rights Committee, General Comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the right to life, 30 October 2018 ('General Comment 36').

3 Human Rights Committee, General Comment No. 6: Article 6 (Right to Life), 30 April 1982 ('General Comment 6').

4 Human Rights Committee, General Comment No. 14: Article 6 (Right to Life) Nuclear Weapons and the Right to Life, 9 November 1984.

5 See the list of submissions in 2017 at: www.ohchr.org [last accessed 23 February 2019].

Below, the major points of interest within the General Comment are discussed, with an emphasis on those areas where it goes beyond the HRC's prior jurisprudence and where it clarifies the composite outcome of disparate prior statements. Areas of continued uncertainty are also identified. For example, the General Comment adds considerably, or consolidates, prior jurisprudence on abortion and voluntary dying; hence, these topics are addressed in detail below. In contrast, the commentary in the General Comment on the need for and required character of investigations of deaths at the hands of the State, the right's non-derogable status, the incompatibility of reservations thereto and on the relationship between *refoulement* and amnesties with the right to life is not addressed in detail below. While all of those topics are important, the General Comment does not add much of significance to the HRC's prior jurisprudence on those topics.

This article concludes with a summary of the major extensions to Article 6 jurisprudence arising from General Comment 36, as well as on the key questions remaining regarding the scope of Article 6. The expansive methodology evinced in the drafting on this new General Comment is also noted and welcomed.

2. ARTICLE 6(1): THE GENERAL GUARANTEE

Article 6(1) contains the general guarantee of the right and reads:

Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

At paragraph 3 of General Comment 36, the HRC states that the right must 'not be interpreted narrowly'. In that regard, it concerns

the entitlement of all individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death, as well as to enjoy a life with dignity.

Much of the General Comment is spent fleshing out the means by which States parties to the ICCPR are required to protect people's lives from acts and omissions, whether they emanate from the State or another actor. As explained below, threats to life can also arise from general societal conditions. The intriguing separate reference to enjoying 'a life with dignity' is paid comparatively little attention and is discussed further below.

At paragraph 63, the HRC confirms the territorial scope of Article 6. States parties have extraterritorial obligations under Article 6 with regard to external territories under their effective control and over 'all persons over whose enjoyment of the right to life it exercises power or effective control'. It adds:

This includes persons located outside any territory effectively controlled by the State, whose right to life is nonetheless impacted by its military or other activities in a direct and reasonably foreseeable manner.

Here the HRC manifests a clear difference between the application of the rights to life under, respectively, the ICCPR and the European Convention on Human Rights (ECHR).⁶ Under the latter treaty, it seems that a State's extraterritorial obligations do not necessarily extend to the use of lethal force against persons if those persons were not under the State's prior physical control.⁷ In contrast, the HRC clearly states that such instances do come within Article 6 of the ICCPR.

A. Law Enforcement

The right to life is not absolute. One can be deprived of one's life in circumstances that are not arbitrary. In certain circumstances, a person can be killed due to the threat, or perceived threat, that that person poses to the life of another or the lives of others. In paragraph 12, the HRC addresses the circumstances in which a private individual or a law enforcement officer may use lethal force. In regard to the latter, the HRC states:

The use of potentially lethal force for law enforcement purposes is an extreme measure, which should be resorted to only when strictly necessary in order to protect life or prevent serious injury from an imminent threat. It cannot be used, for example, in order to prevent the escape from custody of a suspected criminal or a convict who does not pose a serious and imminent threat to the lives or bodily integrity of others. The intentional taking of life by any means is permissible only if it is strictly necessary in order to protect life from an imminent threat.

Before addressing the normative content of this paragraph, its language must be remarked upon. In particular, the HRC opens by saying that the use of potentially lethal force 'should' only be resorted to in very limited circumstances. The use of the word 'should' might indicate that this guidance is recommendatory only, rather than an indication of what the HRC believes to be the scope of the Article 6 obligation.⁸ However, the 'should' of the first sentence is followed by stronger language in the form of 'cannot' in the second, which indicates the HRC's assertion of an actual obligation. The third sentence, in its use of 'permissible only' confirms that assertion. This language mismatch, in particular the unfortunate use of the word 'should', occurs several times in the General Comment, as further noted below.

The application of Article 6 to law enforcement action has evolved considerably from the early Optional Protocol decision in *Suarez de Guerrero v Colombia*,⁹ decided in 1982. In that case, the HRC indicated that lethal force could be used to 'effect the

6 European Convention for the Protection of Fundamental Rights and Freedoms 1950, ETS 5.

7 See *Al-Saadoon v Secretary of State for Defence* [2016] EWCA Civ 811, interpreting the ECHR law on this point. Such killings would come within a State's jurisdiction if it arose in territory over which it exercised effective control or in territory over which it exercised public powers: see Joseph and Dipnall, 'Scope of Application' in Moeckli, Shah and Sivakumaran (eds), *International Human Rights Law*, 3rd edn (2017), 110 at 123.

8 The HRC is a quasi-judicial body so its findings are authoritative interpretations of the obligations in the ICCPR, rather than legally binding of themselves.

9 (45/1979), Views, CCPR/C/15/D/45/1979 at para 13.2.

arrest or prevent the escape' of a person.¹⁰ The HRC was reflecting the actual words of exceptions to the right to life in Article 2 of the ECHR. The interpretation of Article 6 has evolved to the point that lethal force can only be used against a person who poses a lethal threat or a threat to bodily integrity.¹¹

Two issues remain unclarified in the General Comment. First, it is possible for a lethal threat to be mistakenly but reasonably perceived. This circumstance is not clearly included as an exception to the right to life in General Comment 36, though it seems likely that it would constitute an exception.¹² Second, each scenario outlined by the HRC requires that the threat posed by the person against whom force is to be used be 'imminent'. In this respect, the HRC seems to extend Article 6 obligations beyond those outlined in the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials 1990.¹³ Principle 9 of the Basic Principles states:

Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.

As can be seen, the need for an 'imminent' threat under Principle 9 only arises with regard to shooting in self-defence or the defence of others. It does not explicitly relate to the use of lethal force to prevent a crime involving a grave threat to life or to effect the arrest of or the escape of a person who poses such a threat. General Comment 36 explicitly extends the need for 'imminence' to all scenarios.

What is an 'imminent' threat? Clearly, the threat must concern a likelihood arising in the near future, but how close must that near future be? For example, an armed terrorist with hostages clearly poses an imminent threat to the lives of the hostages. However, if that terrorist is clearly disarmed and somehow escapes, is it permissible for the police to use potentially lethal force if that is the only way to prevent escape, given that it is probably reasonable to assume that the escapee continues to harbour deadly terroristic intentions? It is submitted that many police forces in the world, particularly those involved in counterterrorism operations, would use potentially lethal force in that instance.¹⁴ Nevertheless, the meaning of 'imminent' has been interpreted by the Special Rapporteur on extrajudicial, summary or arbitrary executions to mean 'a matter

10 These circumstances were not relevant on the facts of the case, so the apparent breadth of the power to use lethal force was not at issue.

11 The same evolution has occurred under Article 2 of the ECHR: see *McCann and Others v United Kingdom* Application No 18984/91, Merits and Just Satisfaction, 27 September 1995 (Grand Chamber).

12 The mistaken but reasonable use of lethal force has been accepted, for example, by the European Court of Human Rights in *McCann and Others v United Kingdom*, *ibid.* at para 195-200.

13 Adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August–7 September 1990.

14 Geneva Academy of International Humanitarian Law and Human Rights, *Use of Force in Law Enforcement and the Right to Life: The Role of the Human Rights Council* (November 2016) at 13.

of seconds, not hours.’¹⁵ That Special Rapporteur, Professor Christof Heyns, has ended his term, and now sits as a member of the HRC itself. As noted in a recent report on the use of lethal force by law enforcement, the meaning of ‘imminent’ under Article 6 is a matter that ‘requires normative confirmation.’¹⁶

B. Abortion

General Comment 36 addresses the topic of abortion in paragraph 8. The dominant theme of the paragraph concerns the protection of pregnant women from unsafe abortions. At no point does the HRC refer to any right to life for a foetus. Indeed, nothing in the General Comment clarifies when entitlement to the right commences, beyond the statement that it belongs to ‘all human beings’ in paragraph 2. The only point in the General Comment that relates to a right to life before birth concerns the explicit prohibition of the death penalty for pregnant women in Article 6(5) (see below). No comment is made, for example, about any general requirement for States to take measures to prevent harm to pregnant women that might cause the involuntary termination of her pregnancy. Hence, the implication from the General Comment is that Article 6 offers no protection to the unborn.

Paragraph 8 opens by noting that ‘States parties may adopt measures designed to regulate voluntary terminations of pregnancy.’ However, such measures must not violate the life of the pregnant woman, nor any other of her Covenant rights. The rest of the paragraph outlines that those restrictions on the regulation of abortion are extensive. Regarding the right to life of the pregnant woman, ‘States parties must provide safe, legal and effective access to abortion where the life and health of the pregnant woman or girl is at risk.’ Furthermore, the HRC sets out:

States parties may not regulate pregnancy or abortion in all other cases in a manner that runs contrary to their duty to ensure that women and girls do not have to undertake unsafe abortions, and they should revise their abortion laws accordingly. For example, they should not take measures such as criminalizing pregnancies by unmarried women or apply criminal sanctions against women and girls undergoing abortion or against medical service providers assisting them in doing so, since taking such measures compel women and girls to resort to unsafe abortion. States parties should not introduce new barriers and should remove existing barriers that deny effective access by women and girls to safe and legal abortion, including barriers caused as a result of the exercise of conscientious objection by individual medical providers. States parties should also effectively protect the lives of women and girls against the mental and physical health risks associated with unsafe abortions. . . . States parties should ensure the availability of, and effective access to, quality prenatal and post-abortion health care for women and girls, in all circumstances, and on a confidential basis.¹⁷

15 Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, A/HRC/26/36, 1 April 2014, at para 59.

16 Geneva Academy of International Humanitarian Law and Human Rights, *supra* n 14 at 12.

17 States should also ‘prevent the stigmatisation of women and girls seeking abortion.’

Unsafe abortions threaten the lives of those who undergo them. The further necessary implication is that States must refrain from measures that effectively compel women to seek and undergo illegal abortions, which are notoriously unsafe because they are unregulated. Certainly, some restrictive measures are more likely than others to drive a woman to seek an unsafe abortion, such as prohibitions in even the most extreme of circumstances, such as when the foetus is unviable or when it is conceived from rape or incest or where the mother is a child. However, a law that distinguished severe from non-severe circumstances, only prohibiting abortions in the latter situations, would still prompt women to seek unsafe abortions. Berer notes: 'Countries with almost no deaths from unsafe abortion are those that allow abortion on request without restriction.'¹⁸ The HRC agrees, hence it states, without apparent exceptions, that States should not criminalise abortion for either the person performing or the person having the abortion.

Furthermore, States are directed to remove barriers and not introduce new obstacles to rights of access to 'safe and legal abortion', so barriers beyond criminalisation are also addressed. Such barriers would include bureaucratic obstacles such as a requirement of the consent of people beyond the mother, compulsory counselling or further medical tests.¹⁹ Interestingly, there is no apparent concession by the HRC regarding restrictions on late-term abortions, which are common amongst States.²⁰ Having said that, the HRC's guidance here is obfuscated by its use of the word 'should' in clarifying the measures to be taken as a result of the 'duty' to ensure that States take measures to eradicate unsafe abortions.

General Comment 36 goes beyond the right to life of the pregnant woman, in basing further restrictions on a State's capacity to restrict access to abortion on other Covenant rights. It states:

[R]estrictions on the ability of women or girls to seek abortion must not . . . subject them to physical or mental pain or suffering which violates article 7, discriminate against them or arbitrarily interfere with their privacy. . . . States parties must provide safe, legal and effective access to abortion . . . where carrying a pregnancy to term would cause the pregnant woman or girl substantial pain or suffering, most notably where the pregnancy is the result of rape or incest or is not viable.

In this General Comment, the HRC goes further than it has before in recognising a human right to have an abortion on request, though its substance can probably have been pieced together from the sum of its prior jurisprudence, including numerous Concluding Observations pursuant to State reports. Its decision in *Mellet v Ireland*²¹ had previously established a right to an abortion in cases where the foetus was not viable. While there is apparently still scope for 'regulation' of abortion, such regulation should not impose significant restrictions on a person's ability to access an abortion. Instead,

18 Berer, 'Abortion Law and Policy Around The World: In Search of Decriminalisation' (2017) 19 *Health and Human Rights Journal* 13 at 15.

19 Ibid. at 18–19.

20 Ibid. at 23–4.

21 (2324/13), Views, CCPR/C/116/D/2324/2013.

regulation could relate to the facilitation of access to safe abortions, such as through appropriate requirements regarding the credentials of abortion providers.

C. Voluntary Dying

The HRC has rarely addressed voluntary dying. There are no Optional Protocol cases on the matter, and the HRC has issued only a few relevant comments in its Concluding Observations.²² Paragraph 9 of General Comment 36 states:

While acknowledging the central importance to human dignity of personal autonomy, States should take adequate measures, without violating their other Covenant obligations, to prevent suicides, especially among individuals in particularly vulnerable situations, including individuals deprived of their liberty.

Even though Article 6 demands that States combat premature death, this does not mean that they should prohibit and punish suicide. Obviously, such a prohibition has limited utility. The punishment of a failed suicide attempt inflicts further distress on a vulnerable person, and almost certainly breaches rights regarding personal autonomy in Article 17 of the ICCPR. States are, however, prompted to take measures to dissuade people from suicide or to prevent people from becoming suicidal. Such measures would include the funding of suicide prevention programmes like counselling and telephone 'life lines'. States have special obligations with regard to persons in detention (see below), who are particularly vulnerable to instances of suicide. Hence, States should take measures to reduce the opportunities for such people to commit suicide, such as the removal of fixtures that might enable a prisoner to hang themselves.

The HRC goes on at paragraph 9 to discuss voluntary assisted suicide:

States parties that allow medical professionals to provide medical treatment or the medical means in order to facilitate the termination of life of afflicted adults, such as the terminally ill, who experience severe physical or mental pain and suffering and wish to die with dignity, must ensure the existence of robust legal and institutional safeguards to verify that medical professionals are complying with the free, informed, explicit and, unambiguous decision of their patients, with a view to protecting patients from pressure and abuse.

Voluntary dying in such circumstances is often called voluntary assisted suicide or 'euthanasia'. A distinction is drawn between 'active' euthanasia, where a person (often a medical professional) performs a positive act that causes someone to die (such as the injection of a lethal drug) and 'passive' euthanasia, where a medical professional refrains from intervening to save a life. The latter practice is effectively legal in some circumstances; medical professionals do not have to provide life-saving treatment in every circumstance, especially where such treatment is only likely to prolong life for a short period of time or where a person refuses treatment. The real controversy

22 See, for example, Human Rights Committee, Concluding Observations regarding Switzerland, 29 October 2009, CCPR/C/CHE/CO/3, at para 13.

surrounds active euthanasia. Few States permit such a practice, though that number is growing. For example, the practice is legal in certain circumstances in the Netherlands, Belgium, Switzerland and Luxembourg, as well as some sub-State jurisdictions such as Oregon in the United States and Victoria in Australia.

The HRC confirms that the legalisation of 'active euthanasia' is not *per se* a breach of the right to life. At a minimum, States must ensure that the person who is being assisted to die has made a truly voluntary decision. Interestingly, the HRC does not explicitly limit the Article 6 compliance of assisted voluntary dying regimes to those with a terminal illness, as such instances are mentioned only as an example. Some States, such as Switzerland, permit access to assisted voluntary dying for people who do not have a terminal disease.²³

Voluntary dying laws are applicable to minors in Belgium and the Netherlands. In 2001, regarding the Netherlands, the HRC had stated that it found it difficult 'to reconcile a reasoned decision to terminate life with the evolving and maturing capacities of minors'.²⁴ Yet in General Comment 36, the HRC does not explicitly rule out Article 6 compliance when such regimes are applied to children with their consent. However, it is possible that the singling out of regimes regarding 'afflicted adults' implies the non-compatibility with Article 6 for the application of such regimes to children.

3. POSITIVE PROTECTION OF LIFE

General Comment 36 provides that States must undertake positive actions to prevent unnecessary or premature deaths, as well as refrain from acts that arbitrarily deprive people of life.

A. Non-State Actors

The State must not only control its own agents with regard to the right to life, but must also take measures to combat threats to life arising from non-state actors. Hence, it must adopt an appropriate criminal framework to address all forms of potentially deadly violence, including organized crime, family violence, honour killings, lynching, terrorism and hate crimes.²⁵ Special protection measures should be adopted with regard to those who are especially vulnerable to deadly threats, such as human rights defenders, victims of family abuse, witnesses to crime, people with albinism in certain societies and alleged witches.²⁶ At paragraph 23, the HRC states:

States parties must respond urgently and effectively in order to protect individuals who find themselves under a specific threat, by adopting special measures such as the assignment of around-the-clock police protection, the issuance of protection and restraining orders against potential aggressors and, in exceptional cases, and

23 For example, persons who have utilized Swiss suicide clinics include Sir Edward Downes, who wished to die with his terminally ill wife, and the Australian scientist David Goodall, who chose to die at the age of 104 years.

24 Human Rights Committee, Concluding Observations regarding the Netherlands, 26 April 2001, CCPR/C/72/NET, at para 5(c).

25 General Comment 36, *supra* n 2 at para 20.

26 *Ibid.* at para 23.

only with the free and informed consent of the threatened individual, protective custody.

At paragraph 21, the HRC clarifies:

States parties are . . . under a due diligence obligation to undertake reasonable positive measures, which do not impose on them disproportionate burdens, in response to reasonably foreseeable threats to life originating from private persons and entities, whose conduct is not attributable to the State. Hence, States parties are obliged to take adequate preventive measures in order to protect individuals against reasonably foreseen threats of being murdered or killed by criminals and organized crime or militia groups, including armed or terrorist groups. States parties should also disband irregular armed groups, such as private armies and vigilante groups, that are responsible for deprivations of life and reduce the proliferation of potentially lethal weapons to unauthorized individuals. States parties must further take adequate measures of protection, including continuous supervision, in order to prevent, investigate, punish and remedy arbitrary deprivation of life by private entities, such as private transportation companies, private hospitals and private security firms.²⁷

Hence, the HRC refrains from imposing an impossible or even disproportionate burden on States with regard to non-state threats to life. In doing so, it cites the Inter-American Court of Human Rights judgment in *Sawhoyamaya Indigenous Community v Paraguay*, which stated:

It is clear for the Court that a State cannot be responsible for all situations in which the right to life is at risk. Taking into account the difficulties involved in the planning and adoption of public policies and the operative choices that have to be made in view of the priorities and the resources available, the positive obligations of the State must be interpreted so that an impossible or disproportionate burden is not imposed upon the authorities.²⁸

However, while the purported obligation here is softened by avoidance of disproportionate requirements, the due diligence requirement is couched as an obligation rather than a recommendation, apart from the reference to the disbanding of irregular armed groups. At that point in the paragraph, the HRC reverts to the softer language of 'should'. While the disbanding of such groups is no doubt difficult in some circumstances, it seems odd that the HRC should soften its language with regard to a phenomenon that is such an egregious threat to life.

27 Similar duties are imposed on States with regard to threats to life 'by other States, international organisations and foreign corporations' and with regard to lethal threats to people 'subject to their jurisdiction . . . outside their territory'; see *ibid.* at para 22.

28 IACtHR Series C No 146 (2006) at para 155.

States have special duties to protect the lives of persons within State custody. The duty extends to all 'liberty-restricting State-run facilities' such as psychiatric facilities and refugee camps. Indeed, the HRC goes so far as to say that any unnatural loss of life in custody 'creates a presumption' of a breach of Article 6, 'which can only be rebutted by a proper investigation which establishes the State's compliance' therewith.²⁹ These obligations have been confirmed before.³⁰ However, the HRC takes them a step further in adding that 'the same heightened duty of care attaches to individuals held in private incarceration facilities operating pursuant to an authorization by the State.'³¹

B. Socio-Economic Aspects of the Right to Life

The most radical part of General Comment 6 had been its extension of the right to life into the socio-economic arena, regarding which the HRC had stated that:

the Committee considers that it would be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.³²

The inclusion of socio-economic aspects to the right is alluded to in paragraph 3 of General Comment 36, which confirms that Article 6 entails an 'entitlement of individuals . . . to enjoy a life with dignity'. This notion of a 'life with dignity' is not mentioned again until paragraph 26, which captures and expands far beyond the socio-economic aspects originally signaled in General Comment 6:

The duty to protect life also implies that States parties should take appropriate measures to address the general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity. These general conditions may include high levels of criminal and gun violence, pervasive traffic and industrial accidents, degradation of the environment, deprivation of land, territories and resources of indigenous peoples, the prevalence of life threatening diseases, such as AIDS, tuberculosis or malaria, extensive substance abuse, widespread hunger and malnutrition and extreme poverty and homelessness.

The notion of a 'dignified life' is linked to freedom from threats to life that arise from general societal conditions, whether driven by man-made and natural phenomena. The HRC goes on at paragraph 26 to outline how States address such societal conditions:

The measures called for addressing adequate conditions for protecting the right to life include, where necessary, measures designed to ensure access without delay by individuals to essential goods and services such as food, water, shelter, health-care, electricity and sanitation, and other measures designed to promote and

29 General Comment 36, supra n 2 at para 29.

30 See, for example, *Eshonov v Uzbekistan* (1225/03), Views, CCPR/C/99/D/1225/2003.

31 General Comment 36, supra n 2 at para 25.

32 General Comment 6, supra n 3 at para 5.

facilitate adequate general conditions such as the bolstering of effective emergency health services, emergency response operations (including fire-fighters, ambulances and police forces) and social housing programs. States parties should also develop strategic plans for advancing the enjoyment of the right to life, which may comprise measures to fight the stigmatization associated with disabilities and diseases, including sexually transmitted diseases, which hamper access to medical care; detailed plans to promote education to non-violence; and campaigns for raising awareness of gender-based violence and harmful practices, and for improving access to medical examinations and treatments designed to reduce maternal and infant mortality. Furthermore, States parties should also develop, when necessary, contingency plans and disaster management plans designed to increase preparedness and address natural and man-made disasters, which may adversely affect enjoyment of the right to life, such as hurricanes, tsunamis, earthquakes, radio-active accidents and massive cyberattacks resulting in disruption of essential services.

This paragraph probably represents the most onerous of the suggested means of implementing Article 6, given the huge range of measures required in many fields of life, ranging from traffic management, occupation health and safety and health care to gun control and disaster preparedness. At the same time, it is arguably written in the language of aspiration, with the continuous use of the word 'should' and other forms of soft language.

This paragraph highlights the permeability between the right to life and economic, social and cultural rights. The latter rights are protected under the International Covenant on Economic, Social and Cultural Rights (ICESCR).³³ Such permeation between the two Covenants is now entrenched in the HRC's jurisprudence, though it may still cause consternation amongst States. A common objection to such permeation is that ICESCR obligations are progressive and subject to available resources under its obligation provision in Article 2(1). The comparative obligation in Article 2(1) of the ICCPR does not afford such flexibility, dictating the immediate implementation of all obligations once the treaty comes into force for a State.³⁴

It is arguable that paragraph 26 encapsulates much of the 'minimum core' content of economic social and cultural rights identified under the ICESCR. These are obligations under that other Covenant that 'ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party.'³⁵ Minimum core obligations differ from standard ICESCR obligations in that they are presumptively immediate obligations.³⁶ The duties outlined in paragraph 26 of General Comment

33 1966, 993 UNTS 3.

34 See, for example, the observations of the United States of America (US) on the Human Rights Committee's Draft General Comment No 36 on Article 6: Right to Life, 6 October 2017, at para 7, available at: www.ohchr.org [last accessed 23 February 2019].

35 Committee on Economic Social and Cultural Rights (CESCR), General Comment No 3: The Nature of States Parties' Obligations (Art. 2, para 1, of the Covenant), 14 December 1990, at para 10.

36 See Tasioulas, 'Minimum Core Obligations: Human Rights Obligations in the Here and Now', Research Paper Commissioned by the Nordic Trust Fund and the World Bank (October 2017) especially at Chapter 4.

36 seem likely to overlap considerably with those ICESCR minimum core obligations. The paragraph 26 obligations could be narrower, as they may only relate to matters that feasibly threaten life. Hence, the provision of ‘basic education’ may be a minimum core obligation under the ICESCR³⁷ but perhaps not a relevant duty under Article 6, as a poor education does not generally threaten one’s life.

However, it is unclear whether the reference in the General Comment to a ‘life with dignity’ entails more than just living a life, but rather living a life above a certain standard. General Comment 36 refers to the obligation to address ‘direct threats to life’ or to remove obstacles to the enjoyment of a right to life with dignity in paragraph 26, indicating two different obligations. The same allusion to a separate right to a life with dignity arises in paragraph 3, quoted above. The incorporation of a right to a dignified life within the right to life is found in certain domestic jurisdictions, such as India.³⁸

Nevertheless, it seems doubtful that Article 6 itself includes a general right to live a life ‘with dignity’, given that such a right can be found in the combination of a range of other human rights, including all others in the ICCPR, the ICESCR and in the other core UN human rights treaties. In its comments on an earlier draft of General Comment 36, the Government of Australia argued that: ‘not all human rights violations are connected to the right to life. Rather, each provision of the Covenant should be interpreted and applied independently.’³⁹

It is submitted that the preferable interpretation is that Article 6 addresses those circumstances that plausibly threaten one’s life and simultaneously undermine dignity. There must be some link to a potentially deadly threat in order for Article 6 to be enlivened.

The issue of a ‘life with dignity’ is referred to once more in General Comment 36 at paragraph 62:

Environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life. Obligations of States parties under international environmental law should thus inform the contents of article 6 of the Covenant . . . Implementation of the obligation to respect and ensure the right to life, *and in particular life with dignity*, depends, inter alia, on measures taken by States parties to preserve the environment and protect it against harm, pollution and climate change caused by public and private actors. States parties should therefore ensure sustainable use of natural resources, develop and implement substantive environmental standards, conduct environmental impact assessments and consult with relevant States about activities likely to have a significant impact on the environment, provide notification to other States concerned about natural disasters and emergencies and cooperate with them, provide appropriate access

37 CESCR General Comment 3, supra n 35 at para 10.

38 See, for example, the decision by the Supreme Court of India in *Francis Coralie Mullin v The Administrator* [1981] 2 SCR 516.

39 Submission of the Australian Government: Draft General Comment No 36 on Article 6 of the International Covenant on Civil and Political Rights: Right to Life, para 6, available at: www.ohchr.org [last accessed 23 February 2019].

to information on environmental hazards and pay due regard to the precautionary approach. (emphasis added).

The sources of harm mentioned in this paragraph pose potentially deadly threats to human beings, again indicating that a 'life with dignity' is restricted to a right to live free from those threats that can potentially kill.

The possibility of Article 6 rights for future generations arose in *E.H.P. v Canada*,⁴⁰ an early Optional Protocol complaint about the dumping of nuclear waste in a particular locality; however, the HRC did not ultimately decide if such rights existed as the case was declared inadmissible due to a failure to exhaust local remedies. Paragraph 62 is the only mention in the General Comment of any requirement to take measures to protect the lives of future generations, though their apparently separate rights to lives with dignity may provide a clearer basis for these obligations. The references in this part of the General Comment are to international environmental instruments rather than HRC jurisprudence, and the paragraph arguably represents an extension of the scope of Article 6. Alternatively, it may signal its future development, as the language of this paragraph is soft with its use of the word 'should'.

4. THE DEATH PENALTY

The death penalty is prohibited for the 86 States that are parties to the Second Optional Protocol to the ICCPR, which was adopted in 1989 and came into force in 1991.⁴¹ However, the death penalty is otherwise explicitly allowed in certain circumstances under Article 6. Article 6(2) reads:

In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.

In General Comment 36, the HRC confirms its prior narrow interpretation of this provision by restricting its application only to those States that 'have not abolished the death penalty.' Hence, other States cannot benefit in any way from the exception, so for example they cannot reintroduce the death penalty.⁴² Nor can they extradite a person to a State that might charge the person with a capital crime in the absence of credible and effective assurances that the death penalty will not be imposed.⁴³ The HRC takes that principle further in General Comment 36 at the end of paragraph 34:

40 (67/80), Admissibility, CCPR/C/OP/1 at 20 (1984).

41 Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, UN GA Res 44/128, 15 December 1989, A/RES/44/128.

42 General Comment 36, supra n 2 at para 34.

43 Ibid. at para 34. See also *Judge v Canada* (829/98), Views, CCPR/C/78/D/829/1998.

In the same vein, the obligation not to reintroduce the death penalty for any specific crime requires States parties not to deport, extradite or otherwise transfer an individual to a country in which he or she is expected to stand trial for a capital offence, if the same offence does not carry the death penalty in the removing State, unless credible and effective assurances against exposing the individual to the death penalty have been obtained.

Not only is the death penalty exception narrow in terms of the States to which it applies, it is also narrow in terms of its scope for retentionist States. The HRC clarifies its prior decisions that the death penalty must never constitute a mandatory penalty.⁴⁴ Furthermore, any death sentence imposed in contravention of the right to a fair trial in Article 14 breaches Article 6 as well.⁴⁵ The death penalty must not be imposed in a discriminatory manner so it may not be disproportionately imposed upon racial, ethnic and other minorities including the indigent.⁴⁶

The crucial definition of ‘most serious crimes’ for the purposes of Article 6(2) is restricted only to ‘crimes of extreme gravity involving intentional killing.’⁴⁷ Furthermore,

a limited degree of involvement or of complicity in the commission of even the most serious crimes, such as providing the physical means for the commission of murder, cannot justify the imposition of the death penalty.

Hence, accessorial involvement in a murder does not count as a ‘most serious crime’ that exposes a person to the death penalty. It is uncertain if this principle applies even to those who direct others to perpetrate a murder, such as an organized crime boss or the leader of a terrorist group.

The death penalty must be imposed with due regard for Article 7, the right to freedom from torture, inhuman and degrading treatment. Hence, certain methods of execution are prohibited. The HRC seems quite conservative at this point in the General Comment, given it does not single out common methods of execution as cruel, such as hanging, firing squad, lethal injection⁴⁸ and even beheading. It does, however, specify that injection with ‘untested lethal drugs’ is prohibited.⁴⁹ Numerous pharmaceutical manufacturers now prohibit the use of their drugs in executions. If this trend continues, it will become increasingly difficult to execute people with ‘tested’ drugs.⁵⁰

44 General Comment 36, *ibid.* at para 37. See also *Thompson v St Vincent and the Grenadines* (806/98), Views, CCPR/C/70/D/806/1998.

45 General Comment 36, *ibid.* at para 41.

46 *Ibid.* at para 44.

47 *Ibid.* at para 35.

48 The use of lethal injection was found not to breach Article 7 of the ICCPR in *Cox v Canada* (539/93), Views, CCPR/C/52/D/539/1993, at para 17.3.

49 General Comment 36, *supra* n 2 at para 40.

50 See, for example, Dunne, ‘Drug Companies Opposed to the Death Penalty Have Changed Executions’, *Washington Examiner*, 14 August 2018.

The HRC has not followed other courts, such as the European Court of Human Rights⁵¹ and the Judicial Committee of the Privy Council,⁵² in prohibiting protracted periods of time on death row prior to execution, known as the ‘death row phenomenon’. The death row phenomenon has been found to constitute inhuman and degrading treatment by those courts, rather than a breach of the right to life, entailed in the mounting stress and anxiety as one waits for the grim appointment with a government executioner. In *Johnson v Jamaica*,⁵³ the HRC declined to declare a long period of time on death row *per se* as a breach of the Covenant. Amongst other reasons, it did not want to adopt an approach that might encourage the swifter carrying out of death sentences. The HRC explains its contemporary approach to the issue at the end of paragraph 40:

Extreme delays in the implementation of a death penalty sentence, which exceed any reasonable period of time necessary to exhaust all legal remedies, may also entail the violation of article 7 of the Covenant, especially when the long time on death row exposes sentenced persons to harsh or stressful conditions, including, solitary confinement, and when they are particularly vulnerable due to factors such as age, health or mental state.

The reference to delays ‘which exceed any reasonable period of time necessary’ to pursue avenues of appeal or clemency may signal a deviation from *Johnson*. However, that statement is qualified by the use of the word ‘may’ and the addition of the references to further aggravating factors in the rest of the quote.

At paragraph 43, the HRC again extends its prior jurisprudence with interesting comments regarding the burden of proof in capital trials, as well as after sentencing:

The execution of sentenced persons whose guilt has not been established beyond reasonable doubt also constitutes an arbitrary deprivation of life. States parties must therefore take all feasible measures in order to avoid wrongful convictions in death penalty cases, to review procedural barriers to reconsideration of convictions and to reexamine past convictions on the basis of new evidence, including new DNA evidence. States parties should also consider the implications for the evaluation of evidence presented in capital cases of new reliable studies, including studies suggesting the prevalence of false confessions and the unreliability of eyewitness testimony.

It is possible for an innocent person to be found guilty of a crime, even a capital crime, beyond a reasonable doubt and pursuant to a fair trial. This factor is presumably what led the late US Supreme Court Justice Antonin Scalia to, state notoriously:

51 See *Soering v United Kingdom* Application No 14038/88, Merits and Just Satisfaction, 7 July 1989.

52 See *Pratt and Morgan v Attorney-General for Jamaica* [1993] 4 All ER 769.

53 *Johnson v Jamaica* (588/94), Views, CCPR/C/56/D/588/1994.

This [Supreme] Court has never held that the [US] Constitution forbids the execution of a convicted defendant who has had a full and fair trial but is later able to convince a habeas court that he is 'actually' innocent.⁵⁴

The HRC, in contrast, states that States must take all feasible measures to avoid execution of the innocent. Moreover, they 'should' be prepared to reassess evidence in capital cases, presumably where a person continues to maintain their innocence, to ensure that only the guilty are executed.

The limitations on the death penalty exception confirmed by the HRC in General Comment 36 indicate that few if any death sentences imposed and carried out by States parties to the ICCPR will comply with the treaty. The lack of independent courts⁵⁵ and a 'general lack of fairness in the criminal process'⁵⁶ in many States parties deprive all death sentences in such States of ICCPR compliance. Death sentences for crimes short of murder, such as drug trafficking, which are common in Asia, breach Article 6. Discriminatory application of the death penalty also breaches the ICCPR, and such is almost always present with regard to the indigent if not other minorities.⁵⁷ Finally, few States assiduously revisit evidence after the conclusion of capital trials with the rigour suggested by the HRC, though that section of the General Comment is partly qualified by recommendatory rather than obligatory language.

The General Comment adds little to prior jurisprudence regarding the rights of all condemned prisoners to seek a pardon in Article 6(4),⁵⁸ and the prohibition on the execution of pregnant women and people who were under the age of 18 years at the time of the perpetration of a relevant capital crime in Article 6(5).⁵⁹ The HRC does, however, purport to extend the range of persons who must not be sentenced to death at paragraph 49:

States parties must refrain from imposing the death penalty on individuals who face special barriers in defending themselves on an equal basis with others, such as persons whose serious psycho-social and intellectual disabilities impeded their effective defense, and on persons that have limited moral culpability. They should also refrain from executing persons that have diminished ability to understand the reasons for their sentence, and persons whose execution would be exceptionally cruel or would lead to exceptionally harsh results for them and their families, such as persons at an advanced age, parents to very young or dependent children, and individuals who have suffered in the past serious human rights violations.

Paragraph 49 closes the door further on the death penalty exception by extending the HRC's prior jurisprudence regarding persons exempt from the death penalty to those

54 In a dissenting judgment in *In re Troy Anthony Davis* 557 U.S. 952 (2009) at 955.

55 General Comment 36, supra n 2 at paras 41 and 45.

56 *Ibid.* at para 41.

57 The statistics gathered by the Death Penalty Information Center in the US indicate that African Americans are over represented in terms of those executed; see deathpenaltyinfo.org/race-death-row-inmates-executed-1976#defend [last accessed 23 February 2019].

58 General Comment 36, supra n 2 at para 47.

59 *Ibid.* at para 48.

who have particular problems in defending themselves. With regard to the other listed categories, those with a diminished understanding of the reasons for sentence, the parents of young children and human rights victims, the language is qualified in that States ‘should’ refrain from such executions.

Article 6(6) of the ICCPR reads: ‘Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.’

The HRC expands upon that provision at paragraph 50:

Article 6, paragraph 6 reaffirms the position that States parties that are not yet totally abolitionist should be on an irrevocable path towards complete eradication of the death penalty, *de facto* and *de jure*, in the foreseeable future. The death penalty cannot be reconciled with full respect for the right to life, and abolition of the death penalty is both desirable and necessary for the enhancement of human dignity and progressive development of human rights. It is contrary to the object and purpose of article 6 for States parties to take steps to increase *de facto* the rate and extent in which they resort to the death penalty, or to reduce the number of pardons and commutations they grant.

The language of this paragraph begins with the soft ‘should’ but escalates into harder obligatory language in its characterisation of an expansion in the application of the death penalty as being ‘contrary to the object and purpose’ of Article 6. Hence, a notable increase in a State’s use of the death penalty—as for example occurred in Indonesia at the commencement of the term in 2015 of its current President, Joko Widodo—is contrary to Article 6(6). So too, apparently, is the reversal of a moratorium.

The HRC concludes its discussion of the death penalty at paragraph 51:

Although the allusion to the conditions for application of the death penalty in article 6, paragraph 2 suggests that when drafting the Covenant the States parties did not universally regard the death penalty as a cruel, inhuman or degrading punishment *per se*, subsequent agreements by the States parties or subsequent practice establishing such agreements, may ultimately lead to the conclusion that the death penalty is contrary to article 7 of the Covenant under all circumstances. The increasing number of States parties to the Second Optional Protocol, as well as by other international instruments prohibiting the imposition or carrying out of the death penalty, and the growing number of non-abolitionist States that have nonetheless introduced a *de facto* moratorium on the exercise of the death penalty, suggest that considerable progress may have been made towards establishing an agreement among the States parties to consider the death penalty as a cruel, inhuman or degrading form of punishment. Such a legal development is consistent with the pro-abolitionist spirit of the Covenant, which manifests itself, *inter alia*, in the texts of article 6, paragraph 6 and the Second Optional Protocol.

The death penalty exception is a creature of the time of the ICCPR’s adoption in 1966, when most States had the death penalty. The HRC here highlights the glaring

anomaly, in light of contemporary standards, of a right to life provision that allows the death penalty. A similar exception was written into the right to life provision of the ECHR, Article 2, when it was adopted in 1951. Yet that instrument seems to have evolved so as to preclude the death penalty due its classification as a breach of its Article 3 (freedom from torture and inhuman and degrading treatment and/or punishment) rather than Article 2.⁶⁰ Indeed, it may be arguable that Article 2 itself has evolved due to state practice and later Protocols so as to prohibit the death penalty.⁶¹

Indeed, there is precedent for explicit ICCPR exceptions to evolve so as to no longer be applicable. Article 8 concerns the prohibition on slavery and, in paragraph 3, forced labour. Article 8(3)(c)(iii) states that ‘any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors’ is not to be interpreted as forced labour (emphasis added). It is clear that this provision contemplates the permissibility of regimes that do not permit conscientious objection to military service. Complaints in regard to such regimes were originally rejected by the HRC, largely due to the existence of Article 8(c)(iii).⁶² However, conscientious objection to compulsory military service has been recognized as a right under Article 18 (the freedom of thought, conscience and religion) since the decision in *Yoon and Choi v Republic of Korea*⁶³ in 2007, despite the words of Article 8.

A similar evolution could take place with regard to the death penalty, such that it becomes recognized as a breach of Article 7 regardless of the provisions of Article 6. In any case, as noted, the strict interpretation of Article 6(2), 6(4), 6(5) and 6(6) indicates that very few if any executions in the world today comply with the ICCPR if they are conducted by States parties.

5. RELATIONSHIP OF ARTICLE 6 TO OTHER LEGAL REGIMES

The last substantive part of the General Comment concerns the relationship between Article 6 and other human rights, as well as to other international legal regimes. I will focus on the latter. For example, paragraph 62 (reproduced above) discusses the relationship between Article 6 and international environmental law, especially that regarding climate change.

At paragraph 64, the HRC discusses the relationship between the right to life and the international laws of armed conflict:

Like the rest of the Covenant, article 6 continues to apply also in situations of armed conflict to which the rules of international humanitarian law are applicable,

60 Almost all parties to the ECHR are now parties to its Protocol No 13 2002, ETS 187, which prohibits the use of the death penalty in all circumstances. The European Court of Human Rights was influenced by this circumstance in stating in *Al-Saadoon and Mufdhi v United Kingdom* Application No 61498/08, Merits and Just Satisfaction, 2 March 2010 at para 120, that the Court no longer considered the wording of Article 2 to be a bar on the possibility of interpreting the death penalty as a form of ‘inhuman or degrading treatment or punishment’ for the purposes of Article 3 ECHR.

61 See Harris et al., *Harris, O’Boyle and Warbrick: Law of the European Convention on Human Rights*, 4th edn (2018) at 27 and 956.

62 See *L.T.K. v Finland* (185/84), Admissibility, CCPR/C/OP/2 at 61 (1990).

63 (1231–1322/04), Views, CCPR/C/88/D/1321–1322/2004. See also *Jeong et al. v Republic of Korea* (1642–1741/07), Views, CCPR/C/101/D/1642–1741/2007.

including to the conduct of hostilities. While rules of international humanitarian law may be relevant for the interpretation and application of article 6 when the situation calls for their application, both spheres of law are complementary, not mutually exclusive. Use of lethal force consistent with international humanitarian law and other applicable international law norms is, in general, not arbitrary.

Hence, the right to life continues to apply during times of armed conflict, but its scope is moulded by that circumstance. In particular, killings that take place in accordance with international humanitarian law (IHL) are not ‘arbitrary’, and therefore not in breach of Article 6. This reflects the opinion of the International Court of Justice (ICJ) in its *Nuclear Weapons Opinion*⁶⁴ that international human rights law applies alongside IHL. In the rare case of conflict, IHL prevails as the *lex specialis*. The HRC goes on:

By contrast, practices inconsistent with international humanitarian law, entailing a risk to the lives of civilians and other persons protected by international humanitarian law, including the targeting of civilians, civilian objects and objects indispensable to the survival of the civilian population, indiscriminate attacks, failure to apply the principles of precaution and proportionality, and the use of human shields, would also violate article 6 of the Covenant.

Killings in armed conflict in breach of IHL therefore breach Article 6. This statement again manifests a difference between the ICCPR and the ECHR insofar as they concern certain killings by a State party’s military forces outside its territory. As explained above, extraterritorial obligations under the ECHR do not necessarily extend to the use of lethal force against persons if the State lacks prior physical control over those persons,⁶⁵ even if the killings occur in breach of IHL. In the same paragraph, the HRC adds:

States parties should, in general, disclose the criteria for attacking with lethal force individuals or objects whose targeting is expected to result in deprivation of life, including the legal basis for specific attacks, the process of identification of military targets and combatants or persons taking a direct part in hostilities, the circumstances in which relevant means and methods of warfare have been used, and whether less harmful alternatives were considered. They must also investigate alleged or suspected violations of article 6 in situations of armed conflict in accordance with the relevant international standards.

The HRC says that States parties ‘should’ disclose whether ‘less harmful alternatives’ are considered in terms of targeting and conducting warfare. However, there is no requirement under IHL to use the least amount of force possible in pursuing legitimate military objectives.⁶⁶ This statement is emblematic of the occasional tendency of people within the international human rights field to presume to mould IHL, in defiance of the latter’s

64 *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion, ICJ Reports 1996, 226 at 240.

65 Joseph and Dipnall, *supra* n 7 at 123.

66 Shany, ‘Human Rights and Humanitarian Law as Competing Legal Paradigms for Fighting Terror’ in Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law* (2011) 13 at 28.

status as *lex specialis*.⁶⁷ Furthermore, the rules of engagement with regard to targeting and the use of lethal force will often be classified; it is very unlikely that States will share such information with the HRC.⁶⁸

At paragraph 65, the HRC addresses the relationship between Article 6 and the development of weaponry:

States parties engaged in the deployment, use, sale or purchase of existing weapons and in the study, development, acquisition or adoption of weapons, and means or methods of warfare, must always consider their impact on the right to life.

It is unclear whether this statement demands more of States parties than what might exist under IHL or under other regimes related to weaponry. Almost any weapon can be used to kill. IHL prohibits indiscriminate weapons that cannot be used in a way that distinguishes between combatants, or legitimate targets, and civilians or civilian targets. Unnecessary suffering is also prohibited, which actually preferences weapons that are more immediately lethal than those that prolong suffering prior to death. The only weapons discussed specifically in paragraph 65 are lethal autonomous weapons, which do not apparently exist yet. The HRC, unsurprisingly, supports the view of the previous Special Rapporteur on extrajudicial, summary or arbitrary executions that such weapons should not be developed given that they lack human compassion and judgment and raise difficult questions regarding accountability.⁶⁹

Paragraph 66 addresses ‘the threat or use of weapons of mass destruction’, including nuclear weapons. In General Comment 14, the HRC had stated: ‘The production, testing, possession, deployment and use of nuclear weapons should be prohibited and recognized as crimes against humanity.’⁷⁰

Paragraph 66 states:

The threat or use of weapons of mass destruction, in particular nuclear weapons, which are indiscriminate in effect and are of a nature to cause destruction of human life on a catastrophic scale is incompatible with respect for the right to life and may amount to a crime under international law. States parties must take all necessary measures to stop the proliferation of weapons of mass destruction, including measures to prevent their acquisition by non-state actors, to refrain from developing, producing, testing, acquiring, stockpiling, selling, transferring and using them, to destroy existing stockpiles, and to take adequate measures of protection against accidental use, all in accordance with their international

67 Shany, *supra* n 66 at 27–32, especially at 31. Shany was one of the HRC’s Rapporteurs in drafting General Comment 36.

68 See Comments of the Netherlands to the Draft General Comment No 36 on Article 6 of the International Covenant on Civil and Political Rights, available at: www.ohchr.org/EN/HRBodies/CCPR/Pages/GC36-Article6Righttolife.aspx [last accessed 23 February 2019].

69 Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, A/HRC/23/47, 9 April 2013.

70 General Comment 14, *supra* n 4 at para 7; see also paras 4–6.

obligations. They must also respect their international obligations to pursue in good faith negotiations in order to achieve the aim of nuclear disarmament under strict and effective international control and to afford adequate reparation to victims whose right to life has been or is being adversely affected by the testing or use of weapons of mass destruction, in accordance with principles of international responsibility.

Unlike that earlier General Comment, the HRC refrains from suggesting that the 'possession' of such weapons be recognised as a crime against humanity.⁷¹ The closest it comes is its direction that States 'destroy existing stockpiles . . . in accordance with their international obligations' and to negotiate nuclear disarmament in good faith. The HRC here acknowledges that it goes beyond the Advisory Opinion of the ICJ in the *Nuclear Weapons* case,⁷² where the ICJ majority could not conclude that the use or threat of use of nuclear weapons breached international law, including the ICCPR, in an 'extreme circumstance of self-defence, in which the very survival of a State' was at stake. It is possible, however, that international law has evolved in the 22 years since that controversial advisory opinion.

Finally, the HRC confirms that acts of aggression, which breach international norms against the use of force, 'violate *ipso facto* article 6'.⁷³

6. CONCLUSION

The General Comment is a valuable addition to the HRC's jurisprudence. General Comment 36 clarifies or extends its prior jurisprudence on the issues of abortion, voluntary dying and its relationship with other legal regimes including international environmental law. It extends the socio-economic component of Article 6. However, the precise scope of that component remains unclear, especially the meaning of a right to a 'life with dignity'. The same is true of certain aspects of the circumstances in which law enforcement officers may use lethal force, especially regarding the issue of 'imminence'. On the death penalty exception, the HRC entrenches and extends its prior case law to the point where it is doubtful whether there are any ICCPR-compliant executions by States parties. Finally, the HRC possibly overreaches regarding the linkages between Article 6 and IHL, ascribing too much of a role for the right in moulding IHL, rather than *vice versa*.

General Comment 36 represents a welcome embrace by the HRC of comparative jurisprudence on human rights. While most of the references contained therein are to its own jurisprudence, it includes numerous references amongst its 281 footnotes to other international material, including the jurisprudence of other UN treaty bodies, regional courts, special rapporteurs and other UN bodies. In contrast, its most recent prior General Comment, General Comment 35 adopted in 2014, contains few references beyond the HRC's own material in its 194 footnotes, and no regional references.⁷⁴ General

71 See General Comment 14, *supra* n 4 at para 6.

72 *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion, ICJ Reports 1996, 226 at 263.

73 General Comment 36, *supra* n 2 at para 70.

74 Human Rights Committee, General Comment 35: Article 9 (Liberty and Security of the Person), 16 December 2014.

Comment 34, adopted in 2011, contains no references beyond HRC jurisprudence in its 117 footnotes.⁷⁵

HRC members have occasionally displayed an unfortunate isolationism. For example, in *Yurich v Chile*,⁷⁶ a minority stated that the HRC must ‘apply the Covenant, the whole Covenant and nothing but the Covenant’. In contrast, the HRC in General Comment 36 applies the Covenant and a little more than the Covenant. It has used appropriate comparative and other UN material to fill gaps in its Article 6 *cache*. This approach facilitates the desirable development of consistent international human rights law across the globe.

75 Human Rights Committee, General Comment 34: Article 19: Freedoms of opinion and expression, 12 September 2011.

76 (1078/02), Views, CCPR/C/85/D/1078/2002, at dissenting opinion of Ms Chanet et al.

38.	Bruce Porter, " <u>Inclusive Interpretations: Social and Economic Rights and the Canadian Charter</u> " in Helena Alviar García, Karl Klare & Lucy A Williams, eds, <u>Social and Economic Rights in Theory and Practice: Critical Enquiries</u> (New York: Routledge, 2014) 215
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12 Inclusive interpretations

Social and economic rights and the Canadian charter

*Bruce Porter*¹

Introduction: judicial interpretation and the realization of social and economic rights

According to the traditional conception of separation of powers between legislatures and judiciaries, legislatures make law while courts interpret it. When it comes to the protection of fundamental rights, however, this conception is slightly adjusted. Legislatures do not make or revise constitutional or international human rights law in the same manner as they make or revise statutes and regulations. Fundamental rights bind legislatures in relation to the making of law. Nevertheless, courts continue to be conceived as having the restricted mandate of interpreting and applying law that is not of their own making. Rights are conceived as pre-existing and external to acts of interpretation and adjudication, inscribed in negotiated texts, constitutional bills of rights or transnational treaties and permanently guaranteed to citizens through democratically legitimated constitutional or ratification processes. Courts can then be seen as the referees of immutable rules to which legislative players have agreed to be bound. They are not themselves players and they did not make the rules.

This traditional understanding of the separation of the judicial and legislative functions is, however, at odds with our actual experience of human rights. Broadly framed rights to life, security of the person, or equality, or more recently, constitutionalized social and economic rights (SER) such as the rights to housing or an adequate standard of living have acquired legitimacy as fundamental rights not because they function as immutable guarantees or universally applicable rules but rather because they carry with them interpretive histories and provide gateways to new interpretations. Rights are given meaning and content *through* interpretation, and judges engage directly in the making of rights through interpretive practices. Rights are constitutionalized or negotiated at particular moments in time, but they are continually reconstituted and renegotiated in response to claims from previously unheard voices and elaborated anew in varied and unforeseen circumstances. Rights may be theorized as immutable Platonic forms but in the material and temporal world of human rights practice they are moving

shapes and shades. Rights engage with and project a multitude of diverse visions, identities, social projects, historical struggles, political protests and unpredicted events. As Jill Lepore has written of the U.S. Constitution:

The Constitution is ink on parchment. It is forty-four hundred words. And it is, too, the accreted set of meanings that have been made of those words, the amendments, the failed amendments, the struggles, the debates – the course of events – over more than two centuries. It is not easy. It is the stripes on William Grimes’s back, the rule of law, a shrine in the National Archives, a sign carried on the Washington Mall, the opinions of the Court and the noise all of us make when we disagree.

(Lepore 2012: 89–90)

What are the implications for understanding the judicial mandate and the separation of powers if human rights are no longer understood as immutable guarantees but rather as an “accreted set of meanings” linked to historical struggles, individual voices, social movements, international institutions and a myriad of interpretive acts? Courts engaged in constantly refashioning the meaning of rights cannot be understood as merely refereeing other branches of government on the basis of pre-negotiated rules. Like the croquet game in *Alice in Wonderland*, the rules keep changing in response to the play, and the referees are themselves players. Yet if judicial authority to interpret law is not circumscribed by a clear proscription against courts making or refashioning law and thus trespassing into the legislative domain, where are its boundaries? If judicial accountability is not referenced exclusively to externally defined, pre-negotiated guarantees, then to what are courts accountable in exercising their interpretive authority?

A primarily negative rights orientation has frequently been used by courts to distinguish the judicial function of interpreting law from the legislative function of making it. Courts have often refused in the name of separation of powers to engage with the transformative dimensions of rights, leaving to legislatures all decisions as to what positive measures, systemic change or new laws or programs may be necessary to realize rights. While it is important for courts to demarcate their interpretive role from the policy and law-making role of legislatures, it is also important for courts to ensure the legitimacy and integrity of their interpretations of rights. It does not make interpretive sense to restrict the meaning of rights such as the rights to life, equality or security to those aspects that require only non-interference by governments rather than positive measures such as legislative protection or enhanced social programs. Negative rights interpretations have been adopted not on the basis of coherent or reasonable principles of interpretation but rather in the service of preconceived ideas of a restricted role of courts. The consequences of such restrictive interpretations for the integrity of the meanings of rights are severe. By retreating from understandings that may require positive measures or transformative change, courts stultify

interpretation around existing patterns of discrimination, marginalization and exclusion. They exclude from their interpretation of rights the circumstances of disadvantaged and marginalized groups – those whose rights are most frequently denied by existing patterns of exclusion and by governments' failures to take positive measures to address these systemic violations. Rather than enhancing the democratic legitimacy of the judicial interpretive role, negative rights restrictions undermine democratic legitimacy by denying marginalized groups access to justice and disenfranchising them from meaningful inclusion in interpreting and fashioning of rights – a core component of equal citizenship in rights-based democracies.

Using the example of jurisprudence under the Canadian Charter of Rights and Freedoms,² this chapter will consider the role and responsibilities of courts in the context of the evolving meanings and transformative goals of human rights. It will propose a different understanding of the separation of powers and judicial accountability in which courts need not disengage rights interpretation from systemic change or the positive roles governments must play in realizing rights. It will assess courts' performance of their interpretive responsibilities according to the transformative spirit and historically constituted meanings embodied in the adoption of open ended human rights texts. It will assume that courts must provide fair hearings to rights claimants allowing them to bring to light previously ignored circumstances that may warrant positive measures and systemic change. Courts should nourish the collaborative social project of fashioning and refashioning the meaning of rights and eschew patterns of social exclusion that deny some groups an equal voice in that project. Interpretation should be guided by principles of democratic participation and social citizenship. Courts, it will be proposed, should apply principles of interpretation aimed at ensuring that marginalized groups are equal participants in and receive the full benefit of rights interpretation – what may be termed a “hermeneutic of inclusion” in which rights interpretation remains open to previously untold stories and to new meanings articulated by previously unheard voices.

This chapter will also propose that judicial accountability for rights interpretation be strengthened by aligning this work with international human rights jurisprudence and in particular with recent developments at the United Nations in the field of SER. The United Nations has finally recognized the importance of hearing and adjudicating SER claims, adopting new complaints and adjudication procedures under the International Covenant on Economic, Social and Cultural Rights (ICESCR)³ (Porter 2009; forthcoming), as well as complaint procedures inclusive of SER under the Convention on the Rights of Persons with Disabilities (CRPD)⁴ (O'Connell and Porter forthcoming) and the Convention on the Rights of the Child (CRC) (Nolan 2013).⁵ These developments, appropriately described by the Canadian jurist Louise Arbour when she was the UN High Commissioner of Human Rights as “human rights made whole” (Arbour 2008), offer new opportunities for a dynamic interaction and a framework of accountability

between domestic and international rights interpretation that is fully inclusive of SER and those who claim them.

Social and economic rights and interpretive constitutionalism in Canada

The Canadian experience makes particularly transparent the importance of rights interpretation to the realization of SER. The Canadian Charter was adopted in 1982 before the international trend toward the explicit inclusion of SER in new constitutions took hold. Human rights organizations had begun to focus on issues of poverty, access to housing and decent work as the most critical human rights issues in Canada, and they demanded that the new Charter address these problems as human rights issues (Porter 2006). Canada had ratified the ICESCR in 1976, and NGOs made frequent reference to SER under international human rights law. However, the dynamic human rights movement that emerged during the 1970s in Canada had addressed SER in domestic law primarily within the framework of rights to equality and non-discrimination. As a result, human rights advocates understood constitutional protection of SER as an issue of how the right to equality and other broadly framed rights then accepted as fully justiciable should be interpreted. They wished to ensure that courts would not adopt a negative rights approach to the interpretation of Charter rights and would instead recognize positive obligations of governments to ensure social and economic equality and security as components of broadly framed traditional rights. Rather than advocating for the inclusion of specifically enumerated SER, therefore, human rights groups focused their attention on interpretive issues arising in relation to rights to equality, life and security of the person. While in retrospect it may seem clear that explicitly enumerated SER would have been helpful in giving Canadian courts direction in recognizing positive government obligations, progressive movements were nevertheless correct in their assessment that the primary issue would be the spirit and orientation of the process of interpretation by which constitutional rights would be given content rather than the specific list of rights enumerated for protection.

Prior to the adoption of the Charter, positive measures to ensure disadvantaged groups access to housing, employment and services had been recognized as components of the right to equality and non-discrimination under human rights legislation.⁶ On the other hand, formalistic negative rights interpretations under an earlier statutory Canadian Bill of Rights⁷ had deprived equality-seeking groups of meaningful protections. Most infamously, the Supreme Court of Canada had held in *Bliss* that the denial of unemployment benefits to women during pregnancy did not constitute discrimination because there is no male comparator for pregnant women.⁸ During the negotiation of the Charter, human rights groups focused on combating this kind of discriminatory interpretation of rights and promoting inclusive, positive rights interpretations.

Women's organizations lobbied successfully for changes to the proposed right to "non-discrimination" in section 15 of the new Charter so as to have the section renamed positively as "equality rights." They mobilized across the country to press for an unprecedented additional reference in section 15 to the right to the equal *benefit* of the law to ensure that equality would be interpreted to include positive rights to social assistance, unemployment benefits, adequate social programs and regulatory legislative measures (Porter 2006: 25–9).⁹ Disability rights groups, newly constituted in the ferment of the International Year of Persons with Disabilities in 1981, organized to press for the inclusion of mental and physical disability as a prohibited ground of discrimination in section 15. While positive obligations to reasonably accommodate disability had been recognized under human rights legislation in Canada, there was no precedent in other countries at that time for constitutional recognition of the rights of persons with disabilities. Including disability in section 15 meant that courts would have to engage in assessing what positive measures were required to accommodate disability and remove systemic barriers. When disability rights groups succeeded in making Canada the first constitutional democracy to recognize the equality rights of people with disabilities, they brought to Charter interpretation an understanding of inequality as socially constructed and linked to positive obligations of governments to address unique needs and circumstances (Peters 2003). Systemic unemployment, poverty and inadequate housing were expected to achieve new attention, both legally and politically, as violations of substantive equality rights in Canada's new constitutional democracy (Porter 2006: 32–3).

Section 7 of the Charter, which guarantees the "right to life, liberty and security of the person" and the right not to be deprived thereof "except in accordance with principles of fundamental justice,"¹⁰ was worded to set a course of interpretation that would differ from U.S. jurisprudence and be more consistent with Canada's recognition of SER under international human rights law. The wording of the section was taken from article 3 of the Universal Declaration of Human Rights (UDHR) and hence interpretively situated in the UDHR's unified conception of civil and political and social and economic rights. A proposed amendment to add a right to "the enjoyment of property" to section 7 was rejected, and the phrase "fundamental justice" was chosen over "due process of law" to address concerns about invocation of the rights to property and due process in the U.S. during the *Lochner* era to strike down protections for vulnerable groups (Choudhry 2004; Jackman and Porter 2008: 211).

Social movements became vocal advocates for their interpretive expectations of the Charter. Appearing before a parliamentary committee looking into the new responsibilities of governments with the advent of the constitutional right to equality in section 15, women's organizations affirmed that "the poverty of women in Canada is a principal source of inequality in this country" and that "the goal of the section is equality, a positive concept, as

opposed to non-discrimination, a negative concept” (Porter 2006: 30). People with disabilities affirmed that equality means a decent place to live; access to meaningful work and an adequate income; access to a full range of social opportunities; having fundamental rights of citizenship recognized; and being able to advocate for rights (Porter 2006: 33). The struggle for SER in Canada thus became inextricably linked to demands by groups affected by growing poverty, homelessness and other SER violations for inclusion in the meaning and scope of broadly framed Charter rights to equality and to life, liberty and security of the person (Jackman and Porter 2008).

International and domestic law: the interpretive presumption

The understanding of fundamental rights in Canada has been closely tied to ongoing engagement with the development of international human rights norms. The Canadian John Humphrey was the primary author of the unified architecture of the UDHR. Canada ratified both the ICESCR and the International Covenant on Civil and Political Rights (ICCPR) shortly after these were opened for ratification. Although ratified treaties are not directly enforceable by courts in Canada, their interpretive influence is significant. The Charter is understood to be founded on international human rights values and to be part of Canada’s implementation of its international human rights obligations.¹¹ Ongoing engagement with international human rights interpretation has encouraged a view of human rights norms as historical accomplishments facilitated by social collaboration and the triumph of shared values over geographic distance and cultural diversity, a conception that resonates with Canada’s own demography, geography, and history.

As concerns mounted during the 1990s about unprecedented levels of homelessness, hunger and poverty amid affluence, civil society in Canada increasingly turned to UN human rights procedures as an important site for human rights practice. Civil society groups and indigenous peoples in Canada were among the earliest domestic human rights groups to make extensive use of international human rights procedures in advocacy and litigation strategies. Treaty monitoring bodies were encouraged to engage not only with legislative and programmatic inadequacies linked to poverty and homelessness, but also with legal protections of SER and the interpretive issues on which the protection of social rights under the Charter would depend (Porter 1999).

In response to questions from UN bodies about SER protection under the Charter, the Canadian government provided assurances that the rights to life, liberty and security of the person in section 7 would guarantee that people were not deprived of basic necessities such as food, clothing and housing (CESCR 1993: paras 3, 21; Government of Canada 1998: questions 16 and 53). The Committee on Economic, Social and Cultural Rights (CESCR) expressed concern that lower courts had interpreted the rights in section 7 as excluding Covenant rights and that “provincial governments

have urged upon their courts in these cases an interpretation of the Charter which would deny any protection of Covenant rights” (CESCR 1998a: paras 14–15). A repeated recommendation from the CESCR has been that “federal, provincial and territorial governments promote interpretations of the Canadian Charter of Rights and other domestic law in a way consistent with the Covenant” (CESCR 2006: paras 39–41). Canada’s statements to UN treaty bodies about Charter interpretation as well as treaty body recommendations have in turn been cited by claimants and relied upon by courts in Charter cases linked to SER. In *Victoria v. Adams*,¹² for example, in which bylaws preventing homeless people from erecting temporary shelter from the elements were found to violate section 7 of the Charter, the Court referred to Canada’s statements to the CESCR in support of an interpretation of section 7 incorporating at least some components of the right to adequate housing to which Canada is committed under international law.¹³

The Supreme Court has recognized that international human rights “reflect the values and principles of a free and democratic society, and thus those values and principles that underlie the *Charter* itself.”¹⁴ Although not specifically enumerated in the Charter, SER recognized under international law guide the interpretation of the content of Charter rights and also of their “reasonable limits” under section 1 of the Charter.¹⁵ In its 1989 decision in *Slight Communications*,¹⁶ for example, the Court found that an adjudicator’s order requiring an employer to provide a positive letter of reference to a wrongfully dismissed employee was a justifiable infringement of the employer’s right to freedom of expression, a right that is explicitly protected under section 2(b) of the Charter when balanced against the importance of “the right to work” that, though not specifically enumerated in the Charter, is a component of Canada’s commitments under the ICESCR.

Especially in light of Canada’s ratification of the *International Covenant on Economic, Social and Cultural Rights* ... and commitment therein to protect, *inter alia*, the right to work in its various dimensions found in Article 6 of that treaty, it cannot be doubted that the objective in this case is a very important one ... Given the dual function of s. 1 identified in *Oakes*, 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.¹⁷

In *Irwin Toy*,¹⁸ the Supreme Court rejected another challenge based on the freedom of expression – this time by a corporation challenging restrictions on advertising aimed at children under the age of 13. The Court noted the potential implications for vulnerable groups of a negative rights approach under the Charter. “Vulnerable groups will claim the need for protection by the government whereas other groups and individuals will assert that the government should not intrude.”¹⁹ The Court reiterated that: “In interpreting

and applying the *Charter* ... the courts must be cautious to ensure that it does not simply become an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons.”²⁰ While finding that corporate-commercial economic or property rights had been intentionally excluded from the text of section 7, the Court was careful to distinguish this category of economic rights from SER “included in various international covenants, as rights to social security, equal pay for equal work, adequate food, clothing and shelter ...” The Court left for future cases the question of whether these rights should be considered components of section 7, stating that it would be “precipitous” to exclude these rights from the scope of section 7 at an “early moment in the history of *Charter* interpretation.”²¹

The CESCR has made clear in its dialogue with Canada that if it is possible for courts to adopt a reasonable interpretation of Charter rights so as to ensure protections of SER to which Canada is committed under international human rights law, then courts ought to adopt such an interpretation. Moreover, governments should be promoting such interpretations before courts. The CESCR explained the basis for judicial interpretive accountability to international human rights in its General Comment No. 9:

Within the limits of the appropriate exercise of their functions of judicial review, courts should take account of Covenant rights where this is necessary to ensure that the State’s conduct is consistent with its obligations under the Covenant. Neglect by the courts of this responsibility is incompatible with the principle of the rule of law, which must always be taken to include respect for international human rights obligations.

It is generally accepted that domestic law should be interpreted as far as possible in a way which conforms to a State’s international legal obligations. Thus, when a domestic decision-maker is faced with a choice between an interpretation of domestic law that would place the state in breach of the Covenant and one that would enable the State to comply with the Covenant, international law requires the choice of the latter. Guarantees of equality and non-discrimination should be interpreted, to the greatest extent possible, in ways which facilitate the full protection of economic, social and cultural rights.

(CESCR 1998b: paras 14–15)

The demands and expectations of human rights organizations and social movements that Charter rights would be interpreted consistently with Canada’s commitment under international human rights law thus has a solid foundation in both domestic and international jurisprudence. Canada’s historic attachment to the unified architecture of rights under the UNDHR and its commitment to engagement and dialogue with evolving international human rights jurisprudence provide an important framework within which rights interpretation should be situated.

The interpretive struggle for social and economic rights under the Canadian Charter

Reflecting on the interpretation of rights in the Charter during her tenure as UN High Commissioner of Human Rights, Justice Louise Arbour noted that “the potential to give economic, social and cultural rights the status of constitutional entitlement represents an immense opportunity to affirm our fundamental Canadian values, giving them the force of law” (Arbour 2005). Yet, as Justice Arbour recognized from her experience on the Supreme Court of Canada, the struggle by people living in poverty and homelessness in Canada for inclusion in the meaning of Charter rights has been stalled. The question of whether section 7 rights should be interpreted to include SER such as the right to food, housing or social security, left open by the Supreme Court in *Irwin Toy* in 1989, has remained unanswered by the Court for a quarter of a century.

The question of the status to be accorded to an adequate income in the interpretation of section 7 has been directly addressed by the Court only once – in the 2002 decision in *Gosselin v. Quebec (AG)*.²² There the Court considered a Charter challenge to a provincial social assistance regulation reducing benefits payable to recipients under the age of 30 who were not enrolled in workfare or training programs by two-thirds, to levels that deprived them of access to basic necessities of food and housing. Justice Arbour in dissent, supported by Justice Claire L’Heureux-Dubé, held that the section 7 right to life and security of the person places positive obligations on governments to provide anyone in need with an amount of social assistance adequate to cover basic necessities:²³ “every suitable approach to *Charter* interpretation, including textual analysis, purposive analysis, and contextual analysis, mandates the conclusion that the s. 7 rights of life, liberty and security of the person include a positive dimension.”²⁴ Although the majority found such an interpretation to be inapplicable on the facts of *Gosselin*, viewing the impugned welfare regime as a means of encouraging young people to join the workforce, the Court nonetheless left open the possibility that this interpretation of section 7 could be applied in a future case. Reaffirming that rights interpretation must be grounded in historically evolving understandings, the Court noted that: “The full impact of s. 7 will remain difficult to foresee and assess for a long while yet. Our Court should be alive to the need to safeguard a degree of flexibility in the interpretation and evolution of s. 7 of the *Charter*.”²⁵

The Supreme Court has been willing to apply section 7 to the right to health but challenges have generally been framed by claimants and decided by the Court within a negative rights framework.²⁶ In a recent case, intravenous drug users living in the Downtown Eastside of Vancouver, one of the most destitute urban areas in Canada, challenged a decision by the Conservative federal government to shut down Insite, North America’s only safe injection services. When the federal minister refused to renew an

exemption for Insite from the prohibition of the possession of narcotics under the Controlled Drugs and Substances Act (CDSA),²⁷ those dependent on the services brought a Charter application to try to keep Insite open. The Court found in light of the overwhelming evidence of the life-saving benefits of safe injection and related health services that the minister's failure to exempt Insite violated the right to life and was inconsistent with fundamental justice because it was arbitrary and unreasonable.²⁸ Since the minister is bound to exercise discretion in accordance with the Charter "there can be only one response: to grant the exemption."²⁹ The Court remained largely within a non-interference paradigm, however, finding that the government may not act to unreasonably prohibit safe injection sites but not, as yet, finding that such sites must be provided where needed.³⁰

The extent to which equality rights under section 15 of the Charter should be interpreted to include positive obligations to address systemic disadvantage and SER violations also remains an ongoing struggle. The 1997 case of *Eldridge v. British Columbia*³¹ raised hopes that substantive equality approaches derived from positive obligations to accommodate disability would establish a firm foundation for SER claims under section 15. In that case the Supreme Court considered a challenge brought by deaf patients to the provincial government's failure to provide sign language interpretation services within the publicly funded health insurance system. The Court unanimously rejected arguments put forward by governments that the right to equality should not be interpreted to impose positive obligations to address conditions of disadvantage that were not caused by government actions. The Court described the governments' proposed negative rights interpretation of equality as "a thin and impoverished vision of s. 15(1)."³² Having determined that the failure to provide interpretation services violated section 15, the Court considered the cost of providing interpreter services in the context of competing demands on healthcare resources. It concluded that in light of the relatively small cost, the refusal to fund interpreter services was not reasonable and therefore not justifiable under section 1.³³

The Supreme Court further affirmed a positive rights approach to equality in *Vriend v. Alberta*.³⁴ The Court found that the omission of sexual orientation as a prohibited ground of discrimination in access to housing, employment and services in Alberta's Individual Rights Protection Act³⁵ violated the right to equality in section 15 of Charter. The government had argued that the Charter should only be applied by courts to government action or legislation and not to failures to act or to legislate. The Court responded that the Charter states that it applies to "all matters within the authority of the legislature ..."³⁶ and held that this scope of application is "worded broadly enough to cover positive obligations on a legislature such that the Charter will be engaged even if the legislature refuses to exercise its authority."³⁷ In considering remedial options, the Court chose to "read in" the missing legislative protection rather than strike down the legislation in its entirety.³⁸

Despite these important affirmations of a positive rights approach to section 15, there have been few applications of section 15 equality rights to issues of poverty, access to food, housing or work – the issues that were the focus of advocacy by social movements when the text of section 15 was negotiated. Section 15 has been used successfully by public housing tenants to extend security of tenure protections to include public housing tenants³⁹ and by single mothers relying on social assistance to strike down “spouse in the house” rules that disqualified them from eligibility when co-habiting with a man.⁴⁰ In these cases appellate courts recognized that those who, because of poverty, rely on public housing residency or receipt of public assistance are subject to discrimination and therefore entitled to “analogous grounds” protection under section 15. However, other poverty-related claims have been rejected by lower courts on the basis of formalistic equality analysis and findings that poverty does not qualify as an analogous ground of discrimination. The Supreme Court has yet to address these issues, having denied leave to appeal in cases in which poverty issues have been virtually “read out” of the meaning of equality by lower courts (Jackman 2010; Jackman and Porter forthcoming).⁴¹

The unresolved issues of interpretive inclusion or exclusion at stake in the struggle for SER in Canada have become starkly evident in the case of *Tanudjaja v. Canada*.⁴² In this case, a number of homeless individuals, joined by a housing rights organization and supported by a network of civil society organizations, brought a Charter application to address the crisis of widespread homelessness in Canada, challenging governments’ failure to implement an effective housing strategy in line with recommendations of international human rights bodies. The governments moved to dismiss the claim on the basis that the positive rights interpretations of sections 7 and 15 advanced by the claimants had no reasonable prospect of acceptance by courts. The facts relied upon in the notice of application,⁴³ uncontested for purposes of the motion to dismiss, included that homelessness in Canada causes severe health consequences and death and that it disproportionately affects people with disabilities and other protected groups. Despite the obvious connection with accepted meanings of the rights to life, security of the person and equality, the judge rejected the idea that the circumstances of homeless people should be included in the interpretation of Charter rights because such an interpretation would bring issues into courtrooms that, in his view, do not belong there.

By its nature, such an application would require consideration of how our society distributes and redistributes wealth. General questions that reference, among many other issues, assistance to those in poverty, the levels of housing supports and income supplements, the basis on which people may be evicted from where they live and the treatment of those with psycho-social and intellectual disabilities are important, but the courtroom is not the place for their review.⁴⁴

Critical issues of the meaning of core charter rights were thus reduced to the question of whether homeless people or those with mental health disabilities living on the cold streets should be in the courtroom at all. Because the judge was uncomfortable with the remedial role of courts that he believed would emanate from a positive rights approach, he refused to accept that the life, security and equality issues of homeless people should be included in the meaning of these rights. Such a decision has implications beyond determining who is welcome in Canadian courtrooms and who is not. It has a significant effect on whether widespread homelessness in the midst of affluence will be considered an urgent human rights crisis, as urged by UN human rights bodies, or simply a policy issue that the government is free to ignore (Jackman and Porter forthcoming).

Thus the Superior Court's interpretation in *Tanudjaja* was anticipated by its preliminary decision regarding participatory rights at the hearing. Ruling on motions from potential amici, the judge described the question at bar as a "narrow legal issue" in which those with experiential rather than academic, legal expertise would have little to offer.⁴⁵ Two coalitions of people with disabilities, homeless women and impoverished tenants living in insecure housing, were denied standing on the ground that their interest was "not informed by this narrow question, but by the broader questions surrounding the difficulties those they represent have in finding appropriate housing."⁴⁶

Lawyers and judges occasionally display this misapprehension that homeless people or those living in poverty who appear in courts to assert rights are primarily interested in the material benefits to which they claim entitlement rather than the interpretation of rights on which their claims rely. While the issues of material deprivation may certainly be a priority in such circumstances, there is no lack of interest among those trapped in homelessness and poverty in the question of whether core constitutional rights will be interpreted so as to recognize their dignity, equality and security. People living in poverty and homelessness recognize that exclusionary notions of rights are among the most important structural causes of the material deprivations and social marginalization they experience. Being denied a place in Canada's dominant rights culture is not an "academic" deprivation. People living in poverty have consistently fought against systemic denials of access to justice and equal access to rights (Porter 2005; Porter 2007). That is why members of the coalitions denied legal standing filled the courtroom for the *Tanudjaja* hearing at the Superior Court and are continuing to seek standing as the case proceeds on appeal to higher levels of courts.⁴⁷ The meaning of rights matters to them; and it matters which interpretations get the stamp of approval from courts.

Reinterpreting the separation of powers

Experiences in cases such as *Tanudjaja* make it clear that the development of the kind of inclusive rights hermeneutic that would give equal dignity and

place to SER claimants continues to run up against traditional conceptions of separation of powers in Canadian legal culture. The Supreme Court of Canada has rejected any restriction of the meaning of rights to their negative components but has not always been consistent in articulating or applying an alternative conception of separation of powers to encourage courts to engage more effectively with the positive and transformational dimensions of rights. Lower courts have continued to retreat from reasonable interpretations of rights when such interpretations would confront courts with questions about positive actions or legislative measures necessary to realize substantive rights (Jackman and Porter forthcoming).

The justification for courts engaging directly with the positive dimensions of law-making arose most clearly in the *Vriend* case, in which a “reading in” remedy added sexual orientation as a prohibited ground of discrimination to Alberta’s human rights legislation. Anticipating accusations of transgressing the bounds of judicial authority, the two concurring judges writing for the majority vigorously defended the legitimacy of the role the court was assuming in that case. Justice Iacobucci at one point invoked traditional social contract theory, noting that the adoption of the Charter and the mandate given to courts to resolve disputes about its meaning “were choices of the Canadian people through their elected representatives as part of a redefinition of our democracy.” The courts’ role in arbitrating disputes is “not in the name of the courts, but in the interests of the new social contract that was democratically chosen.”⁴⁸

The social contract, however, was clearly evolving. The Court in *Vriend* was not simply arbitrating a dispute about a pre-negotiated contract but rather responding to and participating in important historical transformations in the meaning of equality. The *Vriend* decision was an interpretive response to the historical struggle by gays and lesbians for inclusion in the meaning of the right to equality in the Charter. These groups had sought but had been denied inclusion in the list of prohibited grounds of discrimination during the negotiation of the text of section 15 (Smith 2005). In the intervening years, the meaning of equality had been transformed by myriad events to become inclusive of those who had been unjustly excluded. The court’s role was, quite properly, to provide a fair hearing to those who had been excluded and, in light of the compelling evidence of discrimination and inequality, to endorse the new, more inclusive meaning fashioned by evolving human rights values.

An alternative basis of the court’s democratic legitimacy that was more compatible with this reality was described in another passage from Iacobucci J in the same decision. Instead of relying on the democratic process through which rights had originally been guaranteed to assert the legitimacy of the court’s interpretive role, he referenced broader democratic principles that give legitimacy to the court’s interpretive role:

There is also another aspect of judicial review that promotes democratic values. Although a court’s invalidation of legislation usually involves

negating the will of the majority, we must remember that the concept of democracy is broader than the notion of majority rule, fundamental as that may be. In this respect, we would do well to heed the words of Dickson CJ in *Oakes, supra*, at p. 136:

The Court must be guided by the values and principles essential to a free and democratic society which I believe to embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.⁴⁹

Under this conception, the interpretation of rights is accountable to evolving democratic values of social justice and is part of a broader struggle for a more inclusive and equal society. Justice Cory concurring in *Vriend* situated the interpretive role of courts in a collective aspiration to equality and dignity, progressing from universal suffrage to the realization of substantive equality and dignity for all. Citing the notion of the “just society” promoted by Prime Minister Pierre Trudeau who initiated adoption of the Canadian Charter, Cory J wrote:

The rights enshrined in s. 15(1) of the *Charter* are fundamental to Canada. They reflect the fondest dreams, the highest hopes and finest aspirations of Canadian society. When universal suffrage was granted it recognized to some extent the importance of the individual. Canada by the broad scope and fundamental fairness of the provisions of s. 15(1) has taken a further step in the recognition of the fundamental importance and the innate dignity of the individual.

It is easy to praise these concepts as providing the foundation for a just society which permits every individual to live in dignity and in harmony with all. The difficulty lies in giving real effect to equality. Difficult as the goal of equality may be it is worth the arduous struggle to attain.⁵⁰

This conception of the courts’ role relies on the democratic principle of inclusive interpretation rather than simply the democratic adoption of the Charter. By linking interpretation to the aspirational dimension of rights, this principle ensures that the transformative dimensions of rights and the struggle for equality are not excluded from the evolving meaning of the rights. The role of the court is to adopt meanings that are consistent with democratic values, not to restrict meanings in service to a static conception of rights or restricted notion of courts’ authority and responsibilities *vis-à-vis* elected bodies.

The second aspect of positive rights claims that has troubled lower courts in Canada but was not at issue in *Vriend* is the question of judicial engagement with budgetary decisions and resource allocation. Steeped in the

Westminster tradition, lower Canadian courts tend to view legislative control of budgets as a cornerstone of parliamentary sovereignty and a central aspect of separation of powers. The Supreme Court took this issue up most directly in a case in which the Court found *against* claimants of a positive right to retroactive measures for pay equity. To the Court's credit, however, it did not rely in its decision on simple deference to the legislature on budgetary or policy issues linked to compliance with rights.⁵¹ In *Newfoundland (Treasury Board) v. NAFE*⁵² the Court considered a section 15 challenge to the decision of the government of Newfoundland to retroactively alter the implementation of a pay equity agreement so as to erase a \$24 million award that would have been owed to women public service workers. This decision was part of across-the-board expenditure cuts. The Court held that revoking a positive measure that would have redressed systemic inequality violated women's right to equality under section 15. However, the Court found the measure to be justified under section 1 of the Charter as reasonable and justifiable in light of what the court found to be a serious fiscal crisis. In considering whether the measure was reasonable, however, the Court rejected the approach of the court below, which held that broad deference must be accorded to legislatures' budgetary and policy decisions in order for courts to respect the separation-of-powers doctrine. Marshal JA had written for the Newfoundland Court of Appeal that courts have no mandate to contest fiscal decisions of governments or to interfere with their policy-making authority. The Charter, he stated, "extended the courts' interpretative role to ascertaining the impact of governmental measures on guaranteed rights; but bestowed no increased policy-making power for that purpose beyond that normally exercisable by courts in discharging their traditional interpretative role."⁵³ Binnie J for the Supreme Court insisted that under a correct understanding of separation of powers, it is the court's role, not the legislature's, to assess whether infringements of rights can be justified as reasonable on the basis of budgetary or any other policy considerations. He pointed out that everything legislatures and the executive do can be described as "policy-making" so that blanket deference to the legislature's policy-making authority proposed by Marshal JA would render rights illusory for many rights-holders.⁵⁴

No doubt Parliament and the legislatures, generally speaking, *do* enact measures that they, representing the majority view, consider to be reasonable limits that have been demonstrated to *their* satisfaction as justifiable. Deference to the legislative choice to the degree proposed by Marshall J.A. would largely circumscribe and render superfluous the independent second look imposed on the courts by s. 1 of the *Charter*.⁵⁵

In response to the argument that the legislature, not the court, is in the best position to weigh different budgetary options, Binnie J noted that budgetary decisions as much as any others engage with values that courts are obliged

to protect. “The weighing exercise has as much to do with social values as it has to do with dollars ... The delayed implementation of pay equity is an extremely serious matter, but so too (for example) is the lay-off of 1,300 permanent, 350 part-time and 350 seasonal employees, and the deprivation to the public of the services they provided”⁵⁶ (Williams, this volume).

The distinction proposed by Justice Binnie is critical to reconceiving separation of powers so as to properly situate the court’s interpretive role. Legislatures have the mandate to make law and policy. Courts have the ultimate mandate to interpret rights and to determine what is required for compliance with rights. Obviously, there is overlap and required dialogue between the two branches of government. It is the courts’ responsibility, however, to interpret and assess compliance with rights, whether or not this requires assessments of positive actions or budgetary allocations. The conception of the different roles articulated by the Supreme Court in *NAPE* is consistent, in fact, with the recently adopted Optional Protocols to the ICESCR and the CRC. These protocols direct the treaty body to “bear in mind that the State Party may adopt a range of possible policy measures for the implementation of the rights set forth in the Covenant.”⁵⁷ Proposals to include reference to a “wide margin of discretion” to be accorded states, however, were rejected for reasons very similar to the explanation given by the Supreme Court in *NAPE*: namely that it is the responsibility of the adjudicative body, not the government, to determine issues of compliance with rights. While it may be appropriate to defer to governments’ choices among a range of rights-compliant policy options, it is inappropriate and unfair to simply defer to one of the parties in relation to the assessment of compliance with rights (Porter forthcoming).

Conclusion: toward an inclusive hermeneutic of rights

The struggle for SER in Canada demonstrates that progressive realization of SER requires not only a commitment by the legislative and executive branches of government to developing and enacting appropriate policies and programs, but also a commitment within the judicial branch to a “hermeneutic of inclusion” – interpretations informed by and consistent with values of equal rights and citizenship and democratic engagement in the fashioning of the meaning of rights.

Promoting an inclusive hermeneutic of rights means that courts and administrative decision-makers must ensure access to justice by marginalized groups and establish processes that fully engage rights-holders in the evolving interpretation of rights. Claimant communities must have the means to take cases forward, present evidence and participate fully in hearings. Rights interpretation must accord due respect for the circumstances and voices of groups whose needs and interests are likely to have been ignored by governments and by previous interpretations.⁵⁸

International human rights bodies can play an important role in promoting more accountable and coherent principles of rights interpretation by engaging directly with domestic courts' interpretive responsibilities as components of state compliance. United Nations treaty monitoring bodies do not sit as appellate bodies to domestic courts, but as the CESCR has made clear, courts have important interpretive duties under international human rights law, and treaty monitoring bodies have not only the authority but the responsibility to review state-party compliance with these duties. As the UN Human Rights Committee has noted, "the fact that an act constituting a violation ... is committed by the judicial branch of government cannot prevent the engagement of the responsibility of the State party as a whole."⁵⁹ Judicial independence should not, therefore, be mistaken for exemption from any accountability to interpretive norms under international or domestic law. Self-regulating judicial bodies must recognize courts' responsibility to respond to and address concerns raised by international human rights bodies and to engage constructively with jurisprudence emerging from the new SER complaints and adjudication procedures at the United Nations.

Domestic interpretation of SER in the context of different national constitutional traditions has become part of a broader international project of "making human rights whole" that is founded on worldwide adjudication of diverse claims linked to material deprivation, economic inequality and social marginalization within a range of interpretive contexts (Porter 2009). Each individual claim and act of adjudication and reinterpretation must be situated within this broader human rights project, in which domestic courts are one of many players. Judicial accountability must reflect the values of dialogue and grassroots input at the same time as respecting judicial independence and the inheritance of previous interpretive acts. Rights interpretations must be grounded in democratic principles of social inclusion and equal dignity in rights – even where this requires governments to take positive action, create new legislation or address systemic inequality. Both democracy and the realization of human rights require that judges be held accountable in the performance of these interpretive responsibilities.

That interpretive orientations give shape to SER is not unique to Canada. Even where SER are accorded explicit protection, adjudication of rights requires interpretive responses to new claims and engagement with broader transformative goals (Liebenberg 2010). SER are linked to struggles to ensure access to material entitlements such as food and housing, but when issues of access to material goods are advanced in the form of human rights claims these struggles give rise to new meanings and interpretations of rights. Human rights interpretation and SER adjudication is thus a collaborative effort that is international in scope and dispersed among multiple actors.

Judiciaries must be independent of the political branches of government and of influence by particular interests if they are to fulfill their proper role in the adjudication of claims. However, the courts' role must not be construed as being independent of historical struggles or of the evolving

social construction of the meaning of rights; if it were, judicial interpretation of rights would be starved of nourishment and disconnected from the broader human rights project that gives individual interpretive acts legitimacy. In the final analysis, the fact that there is no immutable guarantee or ultimate authority on which to rely for definitive interpretations of rights is not the problem. It is the solution.

Notes

- 1 The author thanks Karl Klare and Lucy Williams for their expert guidance and astute commentary and is also grateful for comments on an earlier draft of the chapter received at a workshop in Bellagio, Italy.
- 2 *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter].
- 3 UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3 (hereinafter “ICESCR”). The new complaints procedure was adopted in UN General Assembly, Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: resolution/adopted by the General Assembly, 5 March 2009, A/RES/63/117 (hereinafter “OP-ICESCR”).
- 4 UN General Assembly, Convention on the Rights of Persons with Disabilities: resolution/adopted by the General Assembly, 24 January 2007, A/RES/61/106 (hereinafter “CRPD”). The complaints procedure was adopted in: UN General Assembly, Optional Protocol to the Convention on the Rights of Persons with Disabilities, 13 December 2006, A/RES/61/106, Annex II (hereinafter “OP-CRPD”).
- 5 UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3 (hereinafter “CRC”). The complaints procedure was adopted in: UN General Assembly, Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure: Resolution adopted by the UN General Assembly, 27 January 2012, A/RES/66/138 (hereinafter “OP-CRC (communications)”).
- 6 See, e.g., *Action Travail des Femmes v. C.N.R.*, [1987] 1 SCR 1114; Clément *et al.* 2012.
- 7 *Canadian Bill of Rights*, SC 1960, c 44.
- 8 *Bliss v. Canada (Attorney General)* [1979] 1 SCR 183.
- 9 Section 15(1) of the Charter reads: “(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”
- 10 Section 7 of the Charter reads: “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”
- 11 *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, para 70; *R v. Ewanchuk*, [1999] 1 SCR 330, para 73.
- 12 *Victoria (City) v. Adams*, 2008 BCSC 1363 (CanLII) <http://canlii.ca/t/215hs> 1363; *Victoria (City) v. Adams*, 2009 BCCA 563 (CanLII) <http://canlii.ca/t/26zww>.
- 13 *Ibid.* paras 98–100.
- 14 *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 SCR 313, *per* Dickson CJ, at p. 348, cited by the majority in *R. v. Keegstra*, [1990] 3 SCR 697, 750.

- 15 Section 1 provides that Charter rights are guaranteed “only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”
- 16 *Slaight Communications Inc. v. Davidson*, [1989] 1 SCR 1038.
- 17 *Ibid.* 1056–7.
- 18 *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 SCR 927 (hereinafter “*Irwin Toy*”).
- 19 *Ibid.* 993.
- 20 *Ibid.* citing *R. v. Edwards Books and Art Ltd.*, [1986] 2 SCR 713, 779.
- 21 *Ibid.* 1003.
- 22 *Gosselin v. Quebec (AG)*, [2002] 4 SCR 429 (hereinafter “*Gosselin*”).
- 23 *Ibid.* para 332 per Arbour J.
- 24 *Ibid.* para 357 per Arbour J.
- 25 *Ibid.* para 83 citing *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 SCR 307, para 188.
- 26 In *Chaoulli v. Quebec (AG)*, [2005] 1 SCR 791 the Supreme Court found that the Quebec government’s failure to ensure access to healthcare of reasonable quality within a reasonable time in the public healthcare system triggered the application of section 7. However, rather than ordering the government to take positive measures to ensure timely access in the public health care system, the Court upheld a claim from a relatively advantaged healthcare consumer and his doctor for a declaration that the prohibition of private insurance in these circumstances violates the right to life and is therefore of no force and effect. The Court’s attempt to remain in a negative rights paradigm had the precise results predicted in *Irwin Toy* – a privileging of the rights of advantaged claimants at the expense of disadvantaged groups (Jackman 2006; Porter 2005).
- 27 *Canada (Attorney General) v. PHS Community Services Society*, [2011] 3 SCR 134; Controlled Drug and Substances Act SC 1996, c 19.
- 28 *Ibid.* paras 127–36.
- 29 *Ibid.* para 150.
- 30 It should be noted, however, that in this case, as in others, the applicants themselves framed the case within a negative rights paradigm. As Louise Arbour (2005) has observed, the prevailing “timidity” with respect to SER claims under the Charter is seen both in the decisions of courts and among litigants.
- 31 *Eldridge v. British Columbia (Attorney General)*, [1997] 3 SCR 624.
- 32 *Ibid.* para 65.
- 33 *Ibid.* paras 87–94.
- 34 *Vriend v. Alberta*, [1998] 1 SCR 4 (hereinafter “*Vriend*”).
- 35 *Individual’s Rights Protection Act*, R.S.A. 1980, c.I 2.
- 36 Charter, op cit. s.32(1)(b).
- 37 *Vriend*, op. cit. para 60 quoting Pothier 1996: 115.
- 38 *Vriend*, op. cit. para 179.
- 39 *Dartmouth/Halifax (Country) Regional Housing Authority v. Sparks* (1993), 101 D.L.R. (4th) 224 (N.S.C.A.).
- 40 *Falkiner v. Ontario (Ministry of Community and Social Services)* (2002), 59 OR. (3d) 481 (CA).
- 41 See, e.g., the decision of the Nova Scotia Court of Appeal in *Boulter v. Nova Scotia Power Incorporation*, 2009 NSCA 17 (CanLII), <http://canlii.ca/t/22h4b>, finding that a prohibition of differential pricing of utilities to ensure access by impoverished household was not a violation of s.15 of the *Charter* (Calderhead and McNeil forthcoming).
- 42 *Tanudjaja v. Attorney General (Canada) (Application)*, 2013 ONSC 5410 (CanLII), <http://canlii.ca/t/g0jbc> (*Tanudjaja Application*).

- 43 *Tanudjaja v. Attorney General (Canada) (Application)*, 2013 ONSC 5410, Amended Notice of Application, Court File No. CV-10-403688, [http://socialrightscura.ca/documents/legal/Amended%20Not.%20of%20App.\(R2H\).pdf](http://socialrightscura.ca/documents/legal/Amended%20Not.%20of%20App.(R2H).pdf).
- 44 *Tanudjaja Application*, op. cit. para 120.
- 45 *Tanudjaja v. Attorney General (Canada)*, 2013 ONSC 1878 (CanLII), para 36, <http://canlii.ca/t/fwzk7>.
- 46 *Ibid.*
- 47 The decision of Lederer J has been appealed to the Court of Appeal for Ontario. *Tanudjaja v. Canada* OCA File No. C 57714.
- 48 *Vriend*, op. cit. para 135.
- 49 *Ibid.* para 140.
- 50 *Ibid.* para 68.
- 51 The right to equal pay for work of equal value is included in article 7 the ICESCR, op. cit., as a component of “the right to just and favourable conditions of work.” Article 7(1)(i) commits States parties to: “Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work.”
- 52 *Newfoundland (Treasury Board) v. NAPE*, [2004] 3 S.C.R. 381, 2004 SCC 66 (*NAPE SCC*).
- 53 *Newfoundland Assn of Public Employees v. R.*, 2002 NLCA 72 (CanLII), <http://canlii.ca/t/5ftb> para 548 (*NAPE NLCA*).
- 54 *NAPE SCC*, op. cit. para 111.
- 55 *Ibid.* para 103.
- 56 *Ibid.*
- 57 OP-ICESCR, op. cit. Article 8(4).
- 58 The Supreme Court of Canada cited John Hart Ely in its first decision under section 15 of the *Charter*, affirming that courts must protect “those groups in society to whose needs and wishes elected officials have no apparent interest in attending.” *Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143, 152 (per Wilson J).
- 59 *Anthony Fernando v. Sri Lanka*, Communication No. 1189/2003, UN Doc. CCPR/C/83/D/1189/2003 (2005).

39.	Margot Young, " Charter Eviction: Litigating Out of House and Home " Journal of Law and Social Policy 24. (2015)
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Charter Eviction: Litigating Out of House and Home

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Charter Eviction: Litigating Out of House and Home

MARGOT YOUNG*

La décision *Tanudjaja c Procureur général (Canada)* aborde, de façon nouvelle et complexe, la question des droits relatifs au logement en vertu de la *Charte canadienne des droits et libertés*. L'action et l'inaction gouvernementale que l'on caractérise de violations constitutionnelles et les vastes demandes de recours qui s'y retrouvent, reflètent l'aspect « pixelisé » des préoccupations actuelles relatives au logement, un aspect essentiel à la compréhension de la crise de sécurité du logement au Canada. En rejetant la contestation à un stade préliminaire, les cours supérieure et d'appel de l'Ontario risquent de rejeter la *Charte* comme instrument pouvant jouer un rôle relativement aux préoccupations profondes de notre pays en matière de justice sociale. Plus particulièrement, l'invocation judiciaire, sous forme de formule stricte, de préoccupations relatives aux droits positifs et à la justiciabilité, laisse les plus vulnérables d'entre nous sans aucun recours constitutionnel, et ce, plus particulièrement lorsque des questions de justice complexes sont en jeu.

The case of *Tanudjaja v Attorney General (Canada)* takes up the cause of housing rights under the *Canadian Charter of Rights and Freedoms* in a novel and complex way. The government actions and inactions cited as constitutional breaches and the broad remedial requests reflect the “pixelated” picture of housing concerns necessary to understanding Canada's housing security crisis. In dismissing the challenge at a preliminary stage, the Ontario Superior and Appeal Courts risk rendering the *Charter* irrelevant to the deep social justice concerns that cross our country. More specifically, formulaic judicial invocation of concerns about positive rights and justiciability leave the most vulnerable among us constitutionally outside in the cold, particularly when the issues of justice at stake are complex.

THE RECENT STRUGGLE TO ACCESS constitutional justice in the Ontario case of *Tanudjaja v Attorney General (Canada)*¹ marks well the current unsettled state of Canadian constitutional protection for those without adequate housing. The case, along with its novel remedial request, also illustrates the faceted character of housing as a social justice concern. Indeed, the complex nature of housing rights underscores the importance of this case and the applicants' specific and layered remedial request. Yet, before any substantive consideration could be given to the issues raised, the case has foundered: the challenge vacated at the urging of the governments² by a trial

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¹ *Tanudjaja v Canada (AG)*, 2013 ONSC 5410, 116 OR (3d) 574 Lederer J [*Tanudjaja*].

² See, for example, the Notice of Motion by the Attorney-General of Canada (11 June 2012), online: <<http://www.acto.ca/assets/files/cases/Notice%20of%20Motion%20to%20Strike%20-%20R2H.pdf>>.

court and an appeal court,³ each overly bound to restrictive constitutional narratives. While application for leave to appeal to the Supreme Court of Canada pends, the issues catalyzing the challenge thicken and worsen.⁴

The task this comment takes up is to critique the “eviction” to date of this case from the realm of justiciable constitutional claims. It is my argument that, unless socio-economic rights cases are allowed to proceed on the bases on which this case rests, we will largely confirm the irrelevance of constitutional protection for the most vulnerable in our society. The challenge’s target of a wide range of government action and inaction, and the call for a constitutionally imposed obligation to develop appropriately complex and nuanced ways to respond to the housing crisis, may best lend effective and coherent force to the rights at issue. The casting out of the *Tanudjaja* challenge on preliminary grounds related to remedy and cause of action threatens to expand significantly the uselessness of the *Charter* as a means of addressing some of the most pressing and pervasive social justice concerns of our time. The evidence the applicants bring will be left unconsidered and the governments will face no constitutional pressure to respond to a human rights calamity. Thus, my argument in this paper is specific to the kind of preliminary challenge *Tanudjaja* faces. Without recognition of the legitimacy of challenges of this sort, the key issues raised by housing rights will have no home within *Charter* justice. Early criticisms of the *Charter* as a document stuck in nineteenth century liberalism, blind to material inequality, and thus with no promise of meaningful rights for the economically marginalized, will be confirmed.⁵

I. HOUSING IN CANADA

To state the obvious, “[t]he provision of affordable housing is a basic pillar of a civilized society.”⁶ Among basic needs, housing is clearly front and centre. The case for housing as a key determinant of health, life chances, social inclusion, and well-being has been fully and convincingly made.⁷ From the South African post-Apartheid context, Judge Albie Sachs, when

³ *Tanudjaja v Canada (Attorney General)*, 2014 ONCA 852 [*Tanudjaja*, ONCA]. The appeal was argued May 26–27, 2014 at the Ontario Court of Appeal.

⁴ For example, the latest homelessness count in Vancouver shows an increase in unsheltered homelessness in 2014 from 2011. 2014 *Metro Vancouver Homeless Count Preliminary Report*, online: Stop Homelessness <http://stophomelessness.ca/wp-content/uploads/2008/09/Preliminary_release_report_final_April_23_14_to_be_posted.pdf>. See *infra*, text at note 5.

⁵ For an illustration of progressive critiques of constitutionally enshrined rights, see: Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997); Joel Bakan, “Constitutional Interpretation and Social Change: You Can’t Always Get What You Want (Nor What You Need)” (1991) 70:2 *Can L Rev* 307; Alan C Hutchinson & Andrew Petter, “Private Rights/Public Wrongs: The Liberal Lie of the Charter” (1988) 38:2 *UTLJ* 278; Andrew Petter, *The Politics of the Charter: The Liberal Promise of Constitutional Rights* (Toronto: University of Toronto Press, 2010).

⁶ William Strange, “The Unintended Consequences of Housing Policy” (2003), online: CD Howe Institute Backgrounder <http://www.cdhowe.org/pdf/backgrounder_75.pdf>.

⁷ The literature making these points is vast. See, for example, this selection of recent reports: Lorna Fox O’Mahony, “The Meaning of Home: From Theory to Practice” (2009) 5:2 *IJLBE* 156 at 157; Margaret Haworth-Brockman & Lissa Donner, “Housing and Health: A Sex and Gender-based Analysis from Manitoba” in Barbara Clow et al, eds, *Rising to the Challenge: Sex and Gender-Based Analysis for Health Planning, Policy and Research in Canada* (Atlantic Centre of Excellence for Women’s Health, 2009) 110; Michael Shapcott, “Housing in Canada” (2010), online: Wellesley Institute <<http://www.wellesleyinstitute.com/publications/new-report-precarious-housing-in-canada-2010/>> [Shapcott, *Precairous*]; Stephen Gaetz, Tanya Gulliver & Tim Richter, *The State of Homelessness in*

on that county's Constitutional Court, wrote that those without minimally adequate housing live lives "spent in systematized insecurity on the fringes of organized society."⁸ The Indian Supreme Court links access to housing with full human personhood.⁹ And, in Canada, too, it is acknowledged that it is difficult to do well on any measure of human flourishing without access to housing. The British Columbia Court of Appeal in *Victoria (City) v Adams* referred to the need for shelter for the homeless as involving "the needs of some of the most vulnerable members of our society for one of the most basic of human needs, shelter."¹⁰ A fixed address is a practical necessity for the realization of citizenship rights.¹¹ The persistence of housing insecurity in the face of such indisputable argument is shameful.

Distinctions between shelter and a "home" are also important pieces of the conversation about housing provision and inadequacy. There is considerable literature on this too.¹² Such an observation signals why adequate housing matters so much and why mere shelter provision is not enough. As Fox O'Mahony states, it is the relationship between the person and her or his home, that "marks 'home' out as different from other types of property."¹³ The "social, psychological and cultural factors which a physical structure acquires through use as a home" stand out.¹⁴ Adequate policy discussion of this issue will note "the intangible and uncommodifiable aspects of housing, most importantly the concept of home."¹⁵ Housing policy that meets our human rights commitments must take this into account.

II. THE RIGHT TO HOUSING

International human rights treaties recognize access to adequate housing as a fundamental human right, prioritizing recognition of housing as a basic requirement of personhood. Thus, the *Universal Declaration of Human Rights* lists housing as a feature of the entitlement to a standard of living adequate for health and well-being.¹⁶ Similarly, Article 11 of the United Nations

Canada: 2014 (Toronto: The Homeless Hub Press, 2014) [Gaetz et al, *Homelessness*]; Stephen Gaetz, *The Real Cost of Homelessness: Can we save money by doing the right thing?* (Toronto: Canadian Homelessness Research Network Press, 2012).

⁸ *Residents of Joe Slovo Community, Western Cape v. Thubelisha Homes and others* (CCT 22/08) [2009] ZACC 16 (10 June 2009), Sachs J at para 177, as cited in Jessie Hohmann, *The Right to Housing: Law, Concepts, Possibilities* (Oxford and Portland, Oregon: Hart Publishing, 2013) at 96.

⁹ Hohmann, *supra* note 8 at 176. Hohmann references for example, *Chameli Singh and other state of Uttar Pradesh and others* (1996) 2 SCC 549 (Supreme Court of India).

¹⁰ *Victoria (City) v Adams*, 2009 BCCA 563, 313 DLR (4th) 29 [Adams].

¹¹ Hohmann, *supra* note 8 at 174.

¹² See, for example, Hohmann, *supra* note 8 at 169-177; Lorna Fox, "The Meaning of Home: A Chimerical Concept Or A Legal Challenge?" (2002) 29 JL & Soc'y 580; Jerome Tognolic, "Residential Environments" in Daniel Stokols & Irwin Altman, eds, *Handbook of Environmental Psychology* (New York, John Wiley & Sons, 1987).

¹³ Fox O'Mahony, *supra* note 7 at 157.

¹⁴ Fox, *supra* note 12 at 590.

¹⁵ Hohmann, *supra* note 8 at 169.

¹⁶ This idea has been under development since the latter part of the twentieth century following the World Habitat conferences in Vancouver (1976) and Istanbul (1996). These two international gatherings demonstrated international political recognition that housing is a human right.

The full text of this section of the *Universal Declaration* reads:

- (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

International Covenant on Economic, Social and Cultural Rights is understood to guarantee adequate housing.¹⁷ Women's equal right to housing is also protected in Article 14(h) of the *Convention on the Elimination of All Forms of Discrimination against Women*.¹⁸

Considerable guidance is available from international and national commentary on what adequate housing entails. *General Comment No. 4* from the Committee on Economic, Social and Cultural Rights develops what is meant by "adequate" housing. In particular, seven features fill out the concept of adequacy: security of tenure for all forms of housing occupation; provision of basic services, materials and infrastructure; affordability as reflected in percentage of average income level; habitability such that housing provides protection and enough space; accessibility for those with barriers to access; location that is safe, and proximate; and, cultural adequacy reflecting cultural identities.¹⁹ This list is useful to thinking about the requirements of adequacy, indeed, it is necessary to taking seriously the subtleties of the shelter/home connection. But, the United Nations catalogue is a starting place only. As Westendorp points out, these criteria are phrased in a gender-neutral manner. Each, she argues, needs to be more nuanced to take account of the situations women face in procuring adequate housing. For example, Westendorp would expand the list, adding to it the aspects of safety and dignity at home, reflecting concerns about the widespread domestic abuse experienced by women.²⁰

The current housing situation in Canada is information that is neither new nor generally unknown. The argument that there is a made-in-Canada housing emergency has been repeatedly articulated by both domestic and international actors. Report after report documents from a domestic Canadian perspective the range and degree of housing inadequacy that faces too large a number of those resident in Canada.²¹ For example, a 2010 report from the Wellesley Institute states that: "Deep and persistent housing insecurity and homelessness are truly nationwide

the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

Universal Declaration of Human Rights, GA Res 217 (III), UN GAOR, 3d Sess, Supp No 13, UN Doc A/810 (10 December 1948) 71 at Article 25.

¹⁷ Article 11(1) states: "The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent." *United Nations International Covenant on Economic, Social, and Cultural Rights*, General Assembly Resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976, in accordance with article 27, online: <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>> [CESCR].

¹⁸ UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249. It is worth noting that this convention protects women's equality rights in the area of housing. It does not establish a free standing right to housing specific to women.

¹⁹ *CESCR General Comment No. 4: The Right to Adequate Housing*, Committee on Economic, Social and Cultural Rights, General Comment 4, The right to adequate housing (Sixth session, 1991), U.N. Doc. E/1992/23, annex III at 114 (1991), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 18 (2003).

²⁰ Ingrid Westendorp, "What is the Matter with the International Norm?" in Kam-Wah Chan & Patricia Kennett, eds, *Women and Housing: An International Analysis* (Oxon: Routledge, 2011) at 11.

²¹ See for example, CEDAW, Concluding observations, 7 November 2008, CEDAW/C/CAN/CO/7; ICCPR Human Rights Committee, Concluding observations 20 April 2006, CCPR/C/CAN/CO/5; CESCR, Concluding observations, 22 May 2006, E/C.12/CAN/CO/4 - E/C.12/CAN/CO/5; Michael Shapcott, "Homes For All: Social Housing In Toronto And Canada" (2014), online: Wellesley Institute <<http://www.wellesleyinstitute.com/housing/homes-for-all-social-housing-in-toronto-and-canada/>>.

issues—from Iqaluit in the north to St. John’s in the east to Victoria in the west.”²² At the international level, experts have weighed in. The recent report by the then United Nations Special Rapporteur for Adequate Housing referred to a “crisis of homelessness and inadequate housing” in Canada.²³ In a country as wealthy, and with such a high general standard of living as Canada, one is rightly appalled that our governments allow this degree of homelessness and housing insecurity to continue. We should feel a principled impatience for change.

Canada has no national, fixed definition of homelessness. The Canadian Mortgage and Housing Corporation (CMHC), Canada’s national housing agency, defines housing affordability as spending less than 30 percent of before-tax household income on housing costs.²⁴ This definition thus identifies households in “Core Housing Need” as households where more than 30 per cent of pre-tax income is spent on shelter costs.²⁵ In 2010 the incidence of Core Housing Need was 13.2 per cent for urban households, up from 12.3 per cent in 2007.²⁶ Over the six year period from 2005 – 2010, 17.5 per cent of urban individuals spent at least one year in Core Housing Need (one quarter of whom were in Core Housing Need for four out of those six years.)²⁷ Lone-parent households and one-person senior female households are the household types with the highest Core Housing Need. For these and other low income households, the private rental housing market typically requires considerably more than 30 per cent of income. There are too few private and public rental units that are affordable and adequate. The “dominos fall” such that those with the fewest resources scramble for a shrinking supply of affordable, cheap housing.²⁸

Individuals respond to housing insecurity in a range of ways. Many households react to the high and unreachable cost of housing by consuming bad housing.²⁹ Women, in particular, may be unable to leave abusive domestic situations.³⁰ Younger women will trade sex for shelter.³¹ Families live in spaces that are too small, with mould or infestations. Households in

²² Shapcott, *Precarious*, *supra* note 7.

²³ Miloon Kothari, Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Addendum, *Mission to Canada*, 9 to 22 October 2007, A/HRC/10/7/Add.3 17 February 2009 at para 32.

²⁴ For more information about the CMHC, see online: CMHC <<https://www03.cmhc-schl.gc.ca/catalog/productList.cfm?cat=123&lang=en&fr=1407434152545>>.

²⁵ This definition itself is subject to some critical discussion. The significance, or impact, of 30 per cent of household income spent on housing costs will vary given overall household income and specific needs certain households may have. For example, very high household incomes can accommodate proportionally high housing costs in ways low or medium incomes cannot. And, very low income households with other sorts of special needs expenses may find an output of, say, 20 per cent of household income on housing to be unaffordable.

²⁶ CMHC, “Executive Summary”, *Canadian Housing Observer 2013* at 1-10, online: CMHC <<https://www03.cmhc-schl.gc.ca/catalog/productDetail.cfm?cat=122&itm=25&lang=en&fr=1407464767702>> [*Canadian Housing Observer 2013*].

²⁷ *Canadian Housing Observer 2013*, *supra* note 26 at 6–4.

²⁸ Penny Gurstein & Margot Young, “Just Housing Provision: Contested Urban Space and Resource Distribution.” Draft paper on file with author.

²⁹ Strange, *supra* note 6 at 1.

³⁰ For a discussion of this in relation to residential tenancy law, see West Coast Legal Education and Action Fund, *Briefing Note: Amending the Residential Tenancy Act to Protect Victims of Domestic Violence*, online: LEAF <[http://www.westcoastleaf.org/userfiles/file/Amending%20the%20RTA%20to%20Protect%20Victims%20of%20Violence%20-%20Briefing%20Note%20\(Apr%202014\).pdf](http://www.westcoastleaf.org/userfiles/file/Amending%20the%20RTA%20to%20Protect%20Victims%20of%20Violence%20-%20Briefing%20Note%20(Apr%202014).pdf)>.

³¹ Shyanne Reid, Helene Berman & Cheryl Forchuk, “Living on the Streets in Canada: A Feminist Narrative Study of Girls and Young Women” (2005) 28:4 *Issues in Comprehensive Pediatric Nursing* 237.

core housing need are likely to compromise full and dignified involvement in Canadian society in exchange for maintaining some form of housing. And some, simply, go homeless.

Vancouver serves as a good example of the range of Canadian urban housing circumstances at its most extreme. Clearly, Vancouver has a homelessness problem. This is often discussed; in many neighbourhoods of Vancouver it is hard to miss. The latest Homelessness Count took place in the spring of 2014 and showed that Vancouver currently has the highest homeless population since records have been kept. A total of 1,803 people identified as homeless, with 536 living on the street and 1,267 in shelters.³² More generally in Vancouver, the incidence of Core Housing Need is 20.1 per cent, the highest in urban Canada.³³

Accompanying this situation as it plays out across Canada is a general absence of effective governmental strategy to reduce homelessness and housing insecurity at the federal and provincial levels.³⁴ In 2004, two Canadian housing scholars wrote that, “Canada’s housing system is now the most private-sector, market-based of any Western nation, including the United States.”³⁵ The Canadian policy profile that shapes this picture from a decade ago certainly has not changed. Indeed, the path forward has been even more so one of sustained federal government withdrawal from the business of housing provision.³⁶ In 2006, international human rights expert members of the United Nations Committee on Economic, Social and Cultural Rights called for Canada to,

implement a national strategy for reduction of homelessness that includes measurable goals and timetables, consultation and collaboration with affected communities, complaints procedures, and transparent accountability mechanisms, in keeping with ICESCR standards.³⁷

Efforts have been made to advance such a national strategy in Parliament, one that reflects the human rights focus of the Committee’s recommendation. Twice, a private member’s bill has been introduced into the House of Commons that would obligate the government to develop a national strategy. And, twice, the private member bill in question has been effectively vanquished.³⁸ In the current Conservative Party majority controlled Parliament, a third attempt would be equally futile. The “political willingness and boldness at all levels of government” to implement a fix to the failed system are nowhere in evidence.³⁹

³² Greater Vancouver Regional Committee on Homelessness (2014), “Results of the 2014 Homeless Count in the Metro Vancouver Region,” online: <<http://vancouver.ca/files/cov/Results-of-the-2014-Metro-Vancouver-Homeless-Count-July-31-2014.pdf>>.

³³ Toronto is 17.9 per cent and Halifax is 14.7 per cent. See *Canadian Housing Observer 2013*, *supra* note 26.

³⁴ One province, Alberta, has implemented a strategic plan called “A Plan for Alberta: Ending Homelessness in 10 Years”, online: <http://humanservices.alberta.ca/documents/PlanForAB_Secretariat_final.pdf>. For an overview of government action and inaction see the affidavit of Michael Shapcott, Director, Wellesley Institute, online: <<http://www.wellesleyinstitute.com/wp-content/uploads/2012/05/Afd.-of-MICHAEL-SHAPCOTT-Director-Affordable-Housing-and-Social-Innovation-Wellesley-Institute-FINAL.pdf>>.

³⁵ David Hulchanski & Michael Shapcott, *Finding Room: Options for a Canadian Rental Housing Strategy* (Toronto: Centre for Urban and Community Studies, 2004) at 6.

³⁶ Gaetz et al, *Homelessness*, *supra* note 7.

³⁷ CESCR, Concluding observations, 22 May 2006, E/C.12/CAN/CO/4 - E/C.12/CAN/CO/5, at para 62.

³⁸ The first attempt died on the order paper when a general election was called. The second attempt was defeated at second reading by the coordinated governmental member vote against it.

³⁹ Strange, *supra* note 6 at 1.

Government default cannot be justified by reference to the difficulty of the issue. Certainly, the affordability gap so many groups encounter does not permit easy resolution. Is housing too expensive or is income too low?⁴⁰ Solutions will not be cheap and simple. But, options abound as to policy choices that could address the housing crisis. For example, changes to either housing costs or to individual income and purchasing power generate two sets of different policies, each from different ends of the supply/demand model, aiming at the same outcome, increased housing affordability. Some argue for supply-based approaches of construction subsidies and social housing; others for more demand-based policies, such as shelter subsidies and income transfer programmes.⁴¹ A wide range of potential policy solutions beckons. And, while what is best and at what level of government—federal, provincial, or municipal or some combination of all three—it should be implemented, are complex and open questions,⁴² none of this difficulty justifies government inaction or neglect.

This observation about multiple policy options (and the earlier discussion of what “adequate” might mean in the context of housing) foreshadows my next point: desired housing outcomes must be appropriately and variously nuanced to the populations most vulnerable to housing insecurity. The groups experiencing housing inadequacy in Canada are diverse. Housing insecurity, and the forms it takes, vary. While street homelessness is a visible and stark reminder of this injustice, other experiences of housing insecurity—crowded shelter, insecurity of tenure, unhealthy housing, “couch-surfing”—are also concerning, deserving significant policy attention. Thus, homelessness counts give a picture of part of the problem. They not only undercount the sheltered and unsheltered homeless, but, by definition, ignore a fuller range of housing insecurity. And, variety is also reflected by the diversity of groups in Canadian society that disproportionately face housing and shelter crises. Housing insecurity as Indigenous peoples experience it on reserve needs specific analysis. Persons with disabilities, similarly, have particular, unique concerns. Youth, new immigrants, families, lone-parent families add to this list of socio-economically configured interface with Canada’s housing market and supply. It is clear that a minimum number of considerations may pertain to what constitutes adequate housing but these features will be achieved in different ways for different groups of individuals. Indeed, the list generated by CESCR, as already mentioned, may need expansion in reference to many groups’ specific socio-economic features. Ensuring effective and adequate housing provision requires a prismatic approach: “the general picture [must] be fractured into distinct images of housing as the various marginalized and disadvantaged groups in Canada experience it.”⁴³ The multiplicity of housing needs and of responses to housing insecurity requires a full, creative, and coordinated range of policy responses.

Capturing exactly how Canada’s housing crisis is compounded by the diversity of Canadian society goes beyond the scope of this paper. But, because this observation is critical to the argument of this paper, I do want to provide one example of how housing policy must be responsive to particular groups’ needs, experiences, and situations. The illustration I use looks to gender and how this identity feature configures housing analysis.

⁴⁰ See the discussion in Strange, *supra* note 6 at 4.

⁴¹ Strange, *supra* note 6 at 4.

⁴² Strange, *supra* note 6 at 7.

⁴³ Gurstein & Young, *supra* note 28 at 8.

Without doubt, the disadvantages and harms of inadequate housing are, like much else in society, gendered.⁴⁴ How women are affected and how they cope with inadequate housing reflect the options, limitations, and structures that inflect patriarchy in 21st century Canada. Two scholars recently wrote: “[h]ousing systems and opportunities are embedded within structured and institutionalised relations of power which are gendered.”⁴⁵ These gendered relations of power shape policy, standardize institutions, and configure social programmes. Thus, in 2009, the United Nations Special Rapporteur on Adequate Housing heard evidence from Canadian groups that: “The lack of adequate and secure housing particularly impacts women who are disproportionately affected by poverty, homelessness, housing affordability problems, violence and discrimination in the private rental market.”⁴⁶ More generally, feminist scholars detail “concerns about women’s place in the contemporary post-industrial city.”⁴⁷ The “gendered social geographies”⁴⁸ that shape and are shaped by housing options are critically essential to the effective setting and assessment of housing policy.

Statistics tell this gendered tale about housing. Some examples follow. Sexual abuse and domestic violence are major causes and consequences of homelessness among women.⁴⁹ One study found that one in five homeless women interviewed reported having been sexually assaulted while on the streets or homeless.⁵⁰ A recent Toronto study found that 37 per cent of the homeless women interviewed had been physically assaulted in the prior year and 21 per cent had been sexually assaulted or raped one or more times in the same time period. Homeless women were ten times more likely to be sexually assaulted than homeless men, more likely to have serious physical health problems, and twice as likely to have received a mental health diagnosis.⁵¹ Similarly, in her study of homeless women in Ottawa, Halifax and Vancouver, Neal found that a significant number had experienced violence while living on the street: “they have been clubbed, raped, molested, and taken advantage of while seeking protection from harm.”⁵² Women disproportionately experience discrimination in the rental market, discrimination based on poverty, receipt of social assistance, race, marital status, and intimate violence.

The affordability gap is a huge motor for housing insecurity. Here, again gender tells. Men earn more than women; women are disproportionately among the poorest of the poor. While women’s involvement in the paid labour force steadily rises, making a significant contribution to Canada’s economic growth, this involvement, nonetheless, is at lower wages than

⁴⁴ Ingrid Westendop, *Women and Housing: Gender Makes A Difference* (Cambridge: Intersentia Publishers, 2007).

⁴⁵ Kam-Wah Chan & Patricia Kennett, “Introduction: Women and Housing Systems” in Kam-Wah Chan & Patricia Kennett, eds, *Women and Housing: An International Analysis* (Oxon: Routledge, 2011) at 1 [Chan & Kennett, *Introduction*].

⁴⁶ Women’s Housing Equality Network, Submission for the Universal Periodic Review of Canada, September 2008.

⁴⁷ Leslie Kern, *Sex and the Revitalized City: Gender, Condominium Development, and Urban Citizenship* (Vancouver; University of British Columbia Press, 2010) at 1.

⁴⁸ *Ibid* at 5.

⁴⁹ Rusty Neal, “Voices: Women, Poverty and Homelessness in Canada” (2004) at 31, online: National Anti-Poverty Organization <http://ywccanada.ca/data/research_docs/00000275.pdf>.

⁵⁰ Erika Khandor & Kate Mason, “The Street Health Report 2007” (2007), online: Street Health <<http://www.streethealth.ca/downloads/the-street-health-report-2007.pdf>>.

⁵¹ The Street Health Report 2007, “Women & Homelessness, Research Bulletin #2” (2007) at 3, 5, online: Street Health <http://ywccanada.ca/data/research_docs/00000019.pdf>. See also Emily Paradis et al, *Better Off In A Shelter?: A Year of Homelessness & Housing Among Status Immigrant, Non-Status Migrant, & Canadian-Born Families* (Toronto: University of Toronto Centre for Urban and Community Studies, 2008).

⁵² Neal, *supra* note 49 at 10.

those paid men. Women are, as a recent study looking at employment in Canadian cities notes, three times as likely to work in part-time jobs, and nearly twice as likely to work for minimum wages compared to men.⁵³ Sole female parents and elderly women register in higher numbers in this group.⁵⁴ Not surprisingly, then, these groups also rank, as already noted, as in high Core Housing Need.⁵⁵

Other scholars, more conceptually, point to how women's gendered position in society has also meant that women, as disproportionately the "keepers of the hearth," have "long understood the meaning of housing beyond provision of shelter—that [housing] has unique economic, psychological, and symbolic significance with profound impacts on a family's well-being and quality of life."⁵⁶ And, because of women's social location, the concrete issues of safety, adequacy, proximity to work/child care, transportation, affordability all reflect social orders structured by gender and by women's unique placement ideologically in public and private orderings of space.

Kam-Wah Chan and Patricia Kennett, the two scholars referred to above, identify three dominant discourses about gender and housing. Each discourse captures an important element of the import of gender in this area and, consequently, each deserves a quick review. The first discourse comes out of the urban planning tradition where feminist planners, concerned how housing design and the lived environment impact women, have argued since the nineteenth century that improved housing and urban design could free women from many aspects of their daily subordination.⁵⁷ Today, this perspective has matured and now looks more complexly at the relationships between gender, space, and housing in important ways. Susan Fainstein and Lisa Servon, theorists cited by Chan and Kennett, look to social transformation in power relations from within "a planning/social policy context [to] lay the groundwork for the creation of 'non-sexist' cities."⁵⁸

The "housing welfare discourse," a second approach, is located by Chan and Kennett as an offshoot of the "welfare feminism" of the 1970s and the 1980s with its focus on social welfare as the "mechanism to achieve gender equality."⁵⁹ Availability of women-specific housing resources and increasing housing-related services for women are policy objectives of this strand. The literature from this perspective thus identifies a number of special housing needs for women. Representative proponent, Roberta Woods, argued in 1994 about the need for research about

⁵³ Kate McInturff, "The Best and Worst Place to be a Woman in Canada: An Index of Gender Equality in Canada's Twenty Largest Metropolitan Areas" (2014) at 7–8, online: Canadian Centre for Policy Alternatives <https://www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2014/04/the_best_and_worst_place_to_be_a_woman_in_canada.pdf>.

⁵⁴ Vancouver, in many ways, represents a useful snapshot of women's equality issues in a large Canadian city. Roughly equivalent to the national average, Vancouver's employment rates show 66 percent of men and 58 percent of women employed. Around 42 percent of working women hold full-time jobs. The wage gap between women and men, however, is among the biggest in Canada's urban centres: women earn 30 percent less than their male peers. Data taken from McInturff, *supra* note 53 at 43.

⁵⁵ See note 25.

⁵⁶ Elizabeth A Mulroy, "Women and Housing Affordability in the United States," in Chan & Kennett, *supra* note 20 at 52.

⁵⁷ Chan & Kennett, *Introduction*, *supra* note 45 at 2. Chan & Kennett tell of Melusina Peirce who, in 1870, proposed neighbourhood kitchens surrounded by kitchenless housing to facilitate housework cooperatives with the goal of reducing women's household burdens and confinement in the home.

⁵⁸ Susan S Fainstein & Lisa J Servon, "Introduction," in Susan S Fainstein & Lisa J Servon, eds, *Gender and Planning: A Reader* (New Jersey: Rutgers University Press, 2005) at 7.

⁵⁹ Chan & Kennett, *Introduction*, *supra* note 45 at 3.

women in relation to the delivery and management of housing services, ensuring a gender specific perspective on “housing provision, production and management.”⁶⁰

The last approach is the one favoured by Chan and Kennett: the social constructionist discourse. An offspring of neo-Marxism, critical theory and postmodernism, this approach looks at how gender inequality is constructed (a term deployed both metaphorically and practically) in the housing system.⁶¹ Critique focuses on gender-blind assumptions central to housing policies, making the basic theoretical observation that housing is never merely “bricks and mortar.”⁶² Homeless women or lone parent women, for example, are disadvantaged by and unreflected in policy as dominant conceptions of the problem remain gender blind at the centre. Marginal tinkering to add on to mainstream policy or projects some accommodation⁶³ for women’s “special needs” fails to undo the central gender hegemony of the housing system.⁶⁴ For an illustrative argument, Leslie Kern writes that,

[w]omen’s housing needs, whether as heads of households or members of a two-adult household, have been subsumed into what is largely a heteronormative family policy, wherein women’s housing needs were considered merely a corollary of the male breadwinner’s needs. Women’s concentration in low-end rental and other types of alternative tenure was viewed as a transitional phase in women’s housing careers rather than a genuine social and economic pattern that deserved policy consideration.⁶⁵

More generally, and not with gender specificity, housing scholar Jessie Hohmann writes that: “...the way identity is recognised, socially and legally, is often mediated through relationships with the house and home, both as a physical, material thing, and as an ideological construct.”⁶⁶ Hohmann reinforces this contention at another point of her argument when she argues that housing policies can be “tools of social reorganization, even social engineering.”⁶⁷

Hohmann’s book, *The Right to Housing: Law, Concepts, Possibilities*, has been a useful reference. The book contains an interesting discussion highlighting how adequate housing provision for women is complicated by the specific ideological framing of women as homemakers. She notes that, even when housed, women can be practically homeless. The household’s association with the nuclear family, and women’s role in that family form, accord women a version of “privacy...more akin to privation than refuge.”⁶⁸ Linked then to this observation are the reams of feminist research showing how our legal and social systems’ traditional understandings of the home as sanctuary, definitionally shielded from public scrutiny, have contributed to significant violence and deprivation for women within the home. Hohmann’s discussion thus illustrates just how complexly and profoundly gendered are our dominant notions

⁶⁰ Roberta Woods, “Introduction” in Rose Gilroy & Roberta Woods, eds, *Housing Women* (London: Routledge, 1994) at 7.

⁶¹ Chan & Kennett, *Introduction*, *supra* note 45 at 3.

⁶² *Ibid.*

⁶³ Pun intended.

⁶⁴ Chan & Kennett, *Introduction*, *supra* note 45 at 4.

⁶⁵ Kern, *supra* note 47 at 66.

⁶⁶ Hohmann, *supra* note 8 at 167.

⁶⁷ *Ibid* at 183.

⁶⁸ *Ibid* at 185.

of housing arrangements. This type of social constructionist argument casts critical light on traditional notions of adequacy. It also, Hohmann would argue, makes the case for framing women's housing issues in terms of a right to adequate housing: the individualistic frame of that entitlement claim pulls women's needs out from within the private reaches of the "family," thus, she argues, challenging the traditional and "cellular form" of society.⁶⁹ We can, through such a political claim, "interrogate" the linkage of "woman" and "home" and thus radically recast women's housing concerns from private demands to public obligations.⁷⁰ This is, she argues, part of a strategy for equal social citizenship for women.

Interestingly, this conversation has elements consonant with the notion of substantive equality, as that notion has been developed by feminist legal scholars in Canada.⁷¹ The housing analysis advocated here is sensitive to how difference and diversity are manifested and how each are or are not reflected and engrained in social policy and law. This conceptualization allows for greater diversity than gender alone can signify, recognizing that women are also identified by race, ability, culture, and class, for example. Chan and Kennett thus argue that the social constructionist approach can be sensitive not merely to cultural meaning but also to material deprivation and outcome: "housing design, access to housing resources, and housing ideology are all part and parcel of the social construction process."⁷² Urban theorist Leslie Kern in a marvelous book on marketing condominiums to women writes in a similar vein about neo-liberal urbanism's reinscription through a city's built spaces of "particular identities and subject positions."⁷³ Like Hohmann, Kern sees the ways in which housing provision, and the ideological assumptions underlying it, shape in particular ways women's opportunities for equal inclusion, or gendered exclusion, in the city.

The discussion about gender, and how it matters in relation to housing provision and policy, shows us that housing provision necessarily engages rights of gender equality as captured by both section 7 and section 15 of the *Charter*. One author, to this end, writes that "two decades of quantitative and qualitative research into women's position in the housing market have produced a picture of entrenched, systemic disadvantage."⁷⁴ And, we know that the specific vulnerabilities attached to being female in our society are amplified, exacerbated, and made more intransigent by the lack of adequate housing documented across the country. It also means that any remedial response to this problem must be sensitively and variously configured to take into account such evidence of intersectionality and diversity in vulnerability and need. Any plan or solution to women's housing insecurity must take into account the particularities of women's experiences across a wide range of diverse circumstances

⁶⁹ *Ibid* at 187, quoting Frederick Engels, "The Origin of the Family, Private Property, and the State" in Robert C. Tucker, ed, *The Marx-Engels Reader*, 2nd ed (New York: Norton and Company, 1978) at 744.

⁷⁰ Hohmann, *supra* note 8, at 188–89.

⁷¹ See, for example, Margot Young, "Social Justice and the *Charter*: Comparison and Choice" (2013) 50:3 Osgoode Hall LJ 669; Margot Young, "Unequal to the Task: 'Kapp'ing the Substantive Potential of Section 15" (2010) 50 Sup Ct L Rev (2d) 183; Margot Young, "Blissed Out: Section 15 at Twenty" (2006) 33 Sup Ct L Rev (2d) 45; Sheila McIntyre, "Deference and Dominance: Equality Without Substance" in Sheila McIntyre & Sanda Rodgers, eds, *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Markham, ON: LexisNexis Canada, 2006); Hester Lessard, "Mothers, Fathers, and Naming: Reflections on the Law Equality Framework and *Trociuk v British Columbia (Attorney General)*" (2004) 16 Can J Women & L 165.

⁷² Chan & Kennett, *Introduction*, *supra* note 45 at 5.

⁷³ Kern, *supra* note 47 at 4.

⁷⁴ Kern, *supra* note 47 at 65.

The simple conclusion for wider policy? Housing insecurity at large—its causes, manifestations, and potential solutions—is a necessarily “pixelated” picture. A general concern about and broad characterization of the housing issue are possible but these must rest on and devolve actively into recognition of complexity and diversity. No simple, single policy solution is desirable, or possible. Housing provision has long been cited as a “wicked problem.”⁷⁵ Solutions to the problem at large are necessarily multi-faceted and require nuanced calibration across a number of economic, social, and cultural fronts. Addressing housing concerns for one demographic may ignore, complicate, even frustrate, solutions required for other groups. And judicial orders, unless nuanced to this reality and reflective of a moving, shifting picture, rather than simple snapshots, will not fix the problems. Absent this sort of fractured, multiple, and inclusive lens, one risks the “decontextualized and abstract interpretations of the right [to housing] that currently exist in the majority of legal interpretations of the right.”⁷⁶ Or, as Hohmann puts it, housing provision too simply understood might provide a “floor...but [also] a ceiling” to equality and inclusive social citizenship.⁷⁷ This conclusion to the first half of the paper takes us nicely to consideration of the *Tanudjaja* case.

III. TANUDJAJA V ATTORNEY GENERAL (CANADA)

The first parts of this paper have touched on key points of the context out of which the constitutional challenge of the *Tanudjaja* case arose. More specifically, the argument has been made that housing policy that effectively addresses Canada’s housing crisis will necessarily be complex and complicated, orchestrated with different groups in mind, and involving a range of programmes, fiscal measures, and levels of governments. With this initial discussion in mind, I move now to discuss briefly the challenge the *Tanudjaja* applicants brought and the bases on which the preliminary motions to dismiss the challenge were successful at the Ontario Superior Court of Justice and, subsequently, at the Ontario Court of Appeal. This conversation sets up my final contention that the trial judgement, if left standing, leaves very little space for our most serious, and thus large and complex, social justice failures to have adequate constitutional register. My goal is not to canvas and critique fully the trial court judgment. Rather, the slice offered is one that focuses on the key dangers of the trial judgment, and the Court of Appeal’s support of that judgment’s conclusion on justiciability, to progressive *Charter* development in the area of social justice and rights.

The *Tanudjaja* case was brought by four individual applicants, all of whom are in circumstances of significant housing insecurity. Their experiences reflect the range of groups most vulnerable to housing inadequacy: sole female parents, the disabled, low-income families, and the very poor.⁷⁸ These individuals were joined in the application by an Ontario based non-

⁷⁵ Gurstein & Young, *supra* note 28, at 6.

⁷⁶ Hohmann, *supra* note 8 at 197. On the complexity of capturing fairness concerns in social justice resolution see, Natasha Affolder, “Transnational Conservation Contracts,” (2012) 25 *Leiden J of International L* 443 at 455.

⁷⁷ *Ibid* at 217.

⁷⁸ Interestingly, Justice Lederer felt compelled to comment that not all of the applicants were homeless, implying, one worries, that this fact somehow reduced the urgency or credence of their claims. It is an odd and uncomfortable start to the judgment. *Tanudjaja*, *supra* note 1 at para 13.

profit housing advocacy organization, the Centre for Equality Rights in Accommodation.⁷⁹ Several groups successfully sought intervener status for the hearing of the preliminary motion (and, subsequently, for the appeal to the Court of Appeal).⁸⁰ All argued in favour of the case proceeding and such extensive intervener activity at this preliminary stage signals the importance social justice rights groups across Canada have assigned the challenge.

The initiating application was issued 26 May 2010. The claim can be simply summarized: the *Canadian Charter of Rights and Freedoms*⁸¹ must be read to impose an obligation on the governments of Canada and Ontario each to have in place policies and strategies ensuring affordable, adequate, and accessible housing for all.⁸² Yet, the Applicants stated, the governments have created and sustained conditions that lead to, support, and sustain homelessness and inadequate housing. As such, these governments are in breach of section 7 and section 15 of the *Charter*.

Three important and interconnected components make up the rights claims. First, the Applicants argue that the governments have instituted changes to existing legislation, policies, programs, and services that have resulted in homelessness and inadequate housing. Second, it is claimed that new policies were implemented without adequate and constitutionally required efforts to address impacts on housing access and on vulnerable group's access, in particular, to adequate housing. Consequent negative effects on homelessness and housing insecurity have gone unaddressed or unameliorated. Third, and finally, the argument maintains that neither government has undertaken appropriate strategic coordination to ensure that government programmes protect the homeless or those most at risk of homelessness.⁸³ This mix of action and inaction imperils life, liberty, and security of the person for those without adequate housing in a fundamentally unjust manner, and, as well, infringes the right to substantive equality for these same individuals. The individual applicants' various circumstance and histories illustrate these negative, rights-infringing outcomes.

The remedial order requested reflects the tripartite nature of the constitutional wrongs claimed and itself has three distinct elements. First, and most direct, was the request that the court issue a series of declarations detailing how the governments are in breach of their constitutional obligations under sections 7 and 15, including by creating conditions of housing insecurity and failing to implement effective strategies aimed at reducing and eliminating housing insecurity. Second, the Applicants sought judicial orders that housing strategies be developed and implemented according to a range of conditions and policy parameters. These considerations involve such things as consultation with affected groups and various accountability measures⁸⁴ key to effective rights implementation. Third, the Applicants asked

⁷⁹ The Centre for Equality Rights in Accommodation (CERA) is a non-profit agency that advocates for housing rights and that provides services for low-income tenants and the homeless. For more information about this organization, see online: <<http://www.equalityrights.org/cera/>>.

⁸⁰ These groups were: Amnesty Canada, ESCR-Net Coalition, David Asper Centre for Constitutional Rights, Charter Committee on Poverty Issues, Pivot Legal Society, Income Security Advocacy Centre, and Justice for Girls.

⁸¹ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

⁸² This was also the opinion of international human rights experts with respect to Canada's international human rights commitments. *Ibid.*, text at XX.

⁸³ *Tanudjaja*, *supra* note 1 at para 16 [*Applicant's Amended Application*].

⁸⁴ Timetable, reporting and monitoring regimes, outcome measurements and complaints mechanisms.

that the court retain supervisory jurisdiction, that is, the court administer the judicial orders and oversee government compliance in light of declared constitutional obligations.⁸⁵

The response of the Attorneys General of Canada and Ontario was to bring motions to dismiss the application. Both governments argued that, among other things, it was “plain and obvious” that no reasonable cause of action was disclosed and the issues raised were not justiciable. On the basis of the motions, the court dismissed the application.⁸⁶

Justice Lederer wrote the decision on the preliminary motions, employing a number of recurring themes determinative of the dismissal: breadth of considerations relevant to the policies and strategies challenged by the Applicants; no precedent for rights to housing; radical change requested in *Charter* law; imposition on the public purse; and institutional boundaries. Two themes stand out: no protection for positive rights and the non-justiciability of the challenge. The motion judge’s handling of each shows a failure to appreciate the nature of rights—conceptually and jurisprudentially.⁸⁷ The judgment also ignores the wise caution that the approach to *Charter* rights must be a large and liberal one; it is presumptively problematic to foreclose discussion at a preliminary stage.⁸⁸ There is, by the way, some irony to this judgment. Dismissal requires that it is “plain and obvious” that there is no cause of action. The judgment is 56 pages long: a lengthy argument on the merits to show there is no argument on the merits.

IV. NEGATIVE AND POSITIVE RIGHTS

Lederer J’s judgment engages considerably with case law in reference to both section 7 and section 15. But, common across these two discussions is the insistence that under neither right are positive government obligations located: “No positive obligation has, in general, been recognized as having been imposed by the *Charter* requiring the state to act to protect the rights it provides for.”⁸⁹ That is, to paraphrase the Judge, to the extent that the Applicants are citing government failure to act as a *Charter* infringement, their arguments must be unsuccessful.

The distinction between positive and negative rights has been written about extensively and is a common referent in Canadian and American case law. Academic commentary notes that the distinction captures no clear division with respect to rights characterization.⁹⁰ Most rights,

⁸⁵ *Applicant’s Amended Application*, *supra* note 82 at 3–4.

⁸⁶ For the full text of each motion, and other relevant documentation in the litigation, see online: <<http://socialrightscura.ca/eng/legal-strategies-charter-challenge-homlessness.html>>.

⁸⁷ This point is explored in more detail in the text that follows.

⁸⁸ Also imperilled, as the appeal factum for the Women’s Legal Education and Action Fund’s intervention at the Court of Appeal level states, is the principle of constitutionalism as articulated by the Supreme Court in the *Secession Reference*. Every state action must accord with the Constitution and there must be reasonable opportunity for full assessment through judicial review. As Cromwell J wrote in *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 SCR 524 at para 31, on public interest standing: “state action should conform to the *Constitution* and statutory authority and that there must be practical and effective ways to challenge the legality of state action. This principle was central to the development of public interest standing in Canada.”

⁸⁹ *Tanudjaja*, *supra* note 1 at para 103.

⁹⁰ Stephen Holmes & Cass B Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* (New York: Norton & Company, 1999); Martha Jackman, “Charter Remedies for Socio-Economic Rights Violations: Sleeping under a Box?” in Justice Robert J Sharpe & Kent Roach, ed, *Taking Remedies Seriously* (Montreal: Les Editions Yvon Blais, 2009); *Vienna Declaration and Programme of Action*, UN Doc A/CONF 157/23 (12 July 1993); *Montreal*

even some of the most classical civil and political rights long enforced by our courts, require a mix of government forbearance and government action. The right to vote, say, requires not merely the absence of barriers to voting but proactive (and costly) establishment of electoral infrastructure—setting up electoral commissions, polling stations, hiring electoral officials, and so on. All of these have considerable impact on government resources, involving complex government programmes and legislation. So, while some analytical usefulness attaches to thinking about what type of government responses a particular right requires, it is a mistake to fail to acknowledge that most rights require a bundle of both government withdrawal and government provision. Thus, Louis Arbour, when United Nations High Commissioner of Human Rights, urged moving away from such “simplistic or categorical distinctions.”⁹¹

Too many Canadian judges (but not all⁹²) miss this point. Those who give too much credence to the distinction, using it to provide a rigid typology of rights that can or cannot be subject to judicial enforcement, miss important insights about rights protections. They “short sheet” *Charter* claimants without any sound analytic basis. This is because they fail to realize that so many rights that are standard fare for judicial enforcement are no less political or “positive” than those socio-economic rights currently under dispute. The older, more classic, rights have simply, through the accretion of tradition, been lifted above “the fray of contestation.”⁹³

Most critically for the applicants’ case and for this comment, Lederer J’s use of the distinction between positive and negative rights sets up an understanding of *Charter* rights protection that ensures little constitutional space for social justice struggles. Policy solutions for resolution of Canada’s housing emergency widely require government programmes and spending. No housing advocates call for more government pull-out in the area of housing provision. Absent judicial willingness to recognize positive *Charter* obligations, our *Charter* will be mostly mute on the injustices of widespread homelessness and inadequate housing.

V. JUSTICIABILITY

Justiciability issues focus on the institutional appropriateness of a claim for judicial review. With the advent of the *Charter*, and its increasing invocation by social activists frustrated by political blind alleys, the issue of justiciability has also been the focus of much judicial and academic commentary.⁹⁴ Lederer J raises his concerns about this issue in relation both to the substantive

Principles on Women’s Economic, Social and Cultural Rights (December 2002), online: International Federation for Human Rights <http://www.escr-net.org/sites/default/files/Montreal_Principles_-_ENGLISH_0.doc>.

⁹¹ Louise Arbour, “Freedom From Want: From Charity to Entitlement” (LaFontaine-Baldwin Lecture, delivered at the Capitoile de Québec, 4 March 2005), online: UN Office of the High Commissioner for Human Rights <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=3004&LangID=E>>.

⁹² See, for example, the following passage from the dissent of Justice Bastarache in *Gosselin v Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 SCR 429 at para 218: “The appellant and several of the interveners made forceful arguments regarding the distinction that is sometimes drawn between negative and positive rights, as well as that which is made between economic and civil rights, arguing that security of the person often requires the positive involvement of government in order for it to be realized. This is true. The right to be tried within a reasonable time, for instance, may require governments to spend more money in order to establish efficient judicial institutions.”

⁹³ Hohmann, *supra* note 8 at 237.

⁹⁴ See, e.g., Paul O’Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences* (Routledge: Oxford, 2012); David Wiseman, “Taking Competence Seriously” in Margot Young et al,

rights claims about section 7 and section 15 and to the character of remedy requested. His conclusion, in both regards, is that,

... the application is misconceived. There is an inherent tension between, [sic] the “institutional boundaries” that, on one hand, define the authority of the Legislature and, on the other hand, determine the responsibility of the courts to protect the substantive entitlements the *Charter* provides... .⁹⁵

The argument appears to have two components. First, Lederer J states that the *Charter* does not empower courts to “decide upon the appropriateness of policies underlying legislative enactments.”⁹⁶ What he means, exactly, by this is not clear. But Lederer J would have done well to attend to what the Supreme Court wrote in *Canada (Attorney General) v PHS Community Services Society*:

Finally, the issue of illegal drug use and addiction is a complex one which attracts a variety of social, political, scientific and moral reactions. While it is for the relevant governments to make criminal and health policy, when a policy is translated into law or state action, those laws and actions are subject to scrutiny under the *Charter*. The issue is not whether harm reduction or abstinence-based programmes are the best approach to resolving illegal drug use, but whether Canada has limited the rights of the claimants in a manner that does not comply with the *Charter*.⁹⁷

Policy decisions are not immune from Charter review. True, PHS had concrete state action at issue—the statute and the Minister’s refusal of exemption—but as the Court said in that case the question is the impact on claimant rights by the government. The concern in either case is not about challenging policy per se, in the abstract.

The second element of Lederer J’s argument is about the breadth and number of policies at issue under section 7 and section 15 and over which remedial supervision is requested. Lederer J seems confounded by the fact that no single government programme or law fronts the challenge. He concludes that the challenge points to so many programmes that what the Applicants require is, baldly, “consideration of how our society distributes and redistributes wealth.”⁹⁸ This is, he continues, an important set of questions “but the courtroom is not the place for their review.”⁹⁹

One might think that concerns about judicial activism and inappropriate judicial meddling with legislative prerogatives would be assuaged somewhat by the open ended and

eds, *Poverty: Rights, Social Citizenship and Legal Activism* (Vancouver: UBC Press, 2007) at 263; Holmes & Sunstein: *supra* note 90; Jill Cottrell & Yash Ghai, “The Role of Courts in the Protection of Economic, Social and Cultural Rights” in Yash Ghai & Jill Cottrell, eds, *Economic, Social and Cultural Rights in Practice: The Role of Judges in Implementing Economic, Social and Cultural Rights* (London: Interights, 2004) at 58; Margot Young, “Section 7 and the Politics of Social Justice” (2005) 38 UBC L Rev 539.

⁹⁵ *Tanudjaja, supra* note 1 at para 83.

⁹⁶ *Ibid* at para 84.

⁹⁷ *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44, 336 DLR (4th) 385, headnote [PHS].

⁹⁸ *Tanudjaja, supra* note 1 at para 120.

⁹⁹ *Ibid* at para 120.

indeterminate nature of the order requested. No specific concrete measures are requested, simply that the two governments put their institutional minds to the development and adoption of some strategy to reduce and eliminate housing insecurity, in a framework that prioritizes the needs of vulnerable groups. But the motions judge rejects an understanding of the remedial request as retaining significant government discretion, instead the remedial request is castigated as “the offering up of a Trojan horse.”¹⁰⁰

Lederer J is correct in the first assertion—rights are ultimately about wealth distribution. Rights are costly and require trade-offs.¹⁰¹ But, the decision to incur such costs was made with the *Charter*’s enactment, and the task of ensuring that these costs are engaged assigned to the judiciary. Two American academics make this point: “In practice, judges defer much less in fiscal matters than they appear to, simply because the rights that judges help protect have costs.”¹⁰² Moreover, complexity and gravity cannot be reasons for *Charter* immunity. Challenges that, like the Trojan horse (or a can of worms), are “packed” reflect the unavoidable complexity of the modern state. Breadth of problem here signifies depth of problem. And problems that significantly engage serious and numerous aspects of governance should not, thereby, be presumptively free of *Charter* oversight. That would be perverse. Lederer J is perceptive about the importance of housing rights and the scope of government action needed—he simply runs in the wrong direction with these observations. These points ought to make *Charter* applicability all the more compelling, not frightening.

General concerns about justiciability continue to stalk *Charter* litigation.¹⁰³ Other jurisdictions too grapple with the question.¹⁰⁴ The British scholar Hohmann notes: “Courts have made determination on the right to housing without bringing the economics of states to their knees or marginalising the elected branch of government to the point of pointlessness ... practical concerns can be overcome.”¹⁰⁵ Hohmann also notes quite rightly that the two arguments—negative versus positive rights and justiciability—are importantly connected. Recognition of the inevitable costs of even negative rights takes that sting away from so-called positive rights and from much of the justiciability concern: “the suggestion that the right to housing is uniquely problematic fades away.”

Two other jurisdictions have enshrined “high profile”¹⁰⁶ rights to housing, albeit through somewhat different pathways, in their respective constitutional law. This paper does not allow the opportunity to explore this in detail. But, it bears noting that both South Africa and India have seen considerable political struggle around adequate housing provision “leveraged” through constitutional litigation. While neither provides a resounding triumph for housing claims, both examples show that there is space in constitutionalism for a rights based argument about housing insecurity. This (too) brief mention is included to point out, more substantively, that denial of constitutional recognition of a right to housing ought not to be the foregone conclusion the

¹⁰⁰ *Ibid.*, at para 65.

¹⁰¹ Holmes & Sunstein, *supra* note 90 at 51–52.

¹⁰² *Ibid.* at 29.

¹⁰³ See Malcolm Langford, “The Justiciability of Social Rights, From Practice to Theory” in Malcolm Langford, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press, 2008).

¹⁰⁴ See, for example, the discussions that follow on South African and Indian case law. For more elaboration, generally, see Hohmann, *supra* note 8.

¹⁰⁵ Hohmann, *supra* note 8 at 234.

¹⁰⁶ *Ibid.* at 94.

motions judge appeared to assume. At least, that ought not to be a conclusion reached, at this stage of Canadian jurisprudence, in a preliminary motion to dismiss

Nonetheless, the motion judge's arguments withstood review at the Court of Appeal. Two of the three justices hearing the appeal, Pardu and Strathy JJA, upheld the decision of the motions judge to dismiss the action. The third Justice, Feldman JA, would have allowed the appeal, returning the application to the lower court for adjudication on the merits.

The reasons for the majority dismissal of the appeal focus on the question of justiciability. Pardu JA is author of these reasons and summarized this concern as involving: "a normative inquiry into the appropriateness as a matter of constitutional judicial policy of the courts deciding a given issue, or instead deferring to other decision making institutions of the polity."¹⁰⁷ That is, more simply put, the concern circles on whether or not this is a question purely of the political realm or one with sufficient legal aspect to engage judicial contemplation. Thus, at stake for these justices is the distinction between legal and political questions and the relevance of that distinction to determination of judicial institutional capacity.¹⁰⁸ Sufficient legal content is required for adequate judicial competency over the question.¹⁰⁹ The majority's conclusion is that there is insufficient legal content to this claim to engage a court's decision making capacity.

The majority reaches this outcome by re-framing the application as, in essence, the assertion "that Canada and Ontario have given insufficient priority to issues of homelessness and inadequate housing."¹¹⁰ This reduces the claim to a more simple and purely policy challenge, one that, to paraphrase the Supreme Court of Canada in *Canada (Attorney General) v PHS Community Services Society*, focuses on government policy that has not been translated into law or state action.¹¹¹ So understood, the challenge appears to ask the Court to engage in the kind of policy assessment and divination best left to the legislative branch. The sticking point for the majority at the Court of Appeal is that no specific law or government action is singled out by the challenge. A specific focus on one law is, the majority argues, "an archetypal feature of *Charter* challenges under section 7 and section 15."¹¹² Here, there is no such focus and the claim is dismissible, it is thus argued, on the grounds of non-justiciability.¹¹³

Two aspects of the majority argument bear critical examination. First, the recasting of the challenge as simply to policy alone is incorrect. The challenge is not to policy, hovering in some realm separate from government action and from practical effect (if that were possible). The pleadings establish that the applicants' claim is much more complex and faceted. Targeted, as already noted, is a broad range of government actions and inactions—all of which, the applicants claim, have significant rights-destructive effects in Canadian society. Second, justiciability as the majority understands and deploys the notion, connects to two issues the majority (incorrectly)

¹⁰⁷ *Tanudjaja*, ONCA, *supra* note 3 at para 19, quoting from *Canada (Auditor-General) v Canada (Minister of Energy, Mines & Resources)*, [1989] 2 SCR 49, 61 DLR (4th) 604 at paras 90–91.

¹⁰⁸ *Tanudjaja*, ONCA, *supra* note 3 at para 21.

¹⁰⁹ *Ibid* at para 35.

¹¹⁰ *Ibid* at para 19.

¹¹¹ *PHS*, *supra* note 97 at para 105.

¹¹² *Tanudjaja*, ONCA, *supra* note 3 at para 22.

¹¹³ This is also the avenue by which the Ontario Court of Appeal majority distinguished this case from the Supreme Court of Canada decisions in *PHS*, *supra* note 110, and in *Chaoulli v Quebec (Attorney General)*, 2005 SCC 85, [2005] 1 SCR 791. The majority attempted to keep alive the possibility of *Charter* scrutiny of a network of government programmes, but only where, it appears, there is more certainty of a specific rights infringement (*Tanudjaja*, ONCA, *supra* note 3 at para 32).

states it is leaving alone: the issues of positive versus negative obligations and of novel claim making under the *Constitution*. It is from the perspectives of these two issues that the dissenting judgment sets up its opposition to the majority opinion.

To repeat the first issue connected to the finding of non-justiciability, the key concern of the majority is really the question of whether both state action and inaction are subject to *Charter* scrutiny. The argument that policy, absent translation into government action, is immune from *Charter* standards relies upon the idea that unless the government positively acts, a policy decision to not act is untouchable. A claim asserting a general right to housing under section 7, is, thus, the majority asserts, a “doubtful proposition.”¹¹⁴ Yet, this contention about what is or isn't protected under the *Charter* is not certain law, as the majority choice of language itself indicates. At the stage of preliminary review on a motion to dismiss, best guesses as to legal outcomes as yet undecided are unsound reasons for dismissal. Such a question of constitutional rights interpretation, given that it is an open question to date, must be allowed to go to argument on the merits. To collapse it into a finding of non-justiciability is faulty elision of issues.¹¹⁵

The majority compounds this error in its additional reasoning about section 1 and remedial possibilities. There must also be, the Court asserts, an impugned law whose objective can be evaluated under the *Oakes* test of section 1 application.¹¹⁶ Such an opinion would condemn any and all sections of the *Charter* to assertion of negative obligations only. The argument is based on too literal a reading of the *Oakes* test¹¹⁷—the requirement that the features of a “law” be assessed.

Finally, the majority takes issue with the character of the remedial request, arguing that there is no judicially discoverable and manageable standard for assessment of the adequacy of any resulting housing strategy in relation to the conditions the remedial request seeks to impose (adequacy and priority to the most needy).¹¹⁸ But remedial selection can be varied and crafted to suit concerns of institutional competency and appropriateness independently of the terms of the claim on the merits. Justiciability concerns about requested remedy inappropriately determine justiciability on the substantive arguments about rights protection. Remedial requests have no place in the determination of whether or not the challenge can proceed to consideration on its merits. Should an infringement be found, then fuller engagement with the range of jurisprudence showcased, for example, in the intervenor factum of the Asper Centre on remedy, can then be better canvassed.¹¹⁹

The minority judgment, crafted by Feldman JA, would find that it was an error of law to strike this claim at the pleadings stage. Feldman JA's judgment begins with the reminder that the test for striking the application at this stage is whether it is “plain and obvious” that the claim is doomed.¹²⁰ This requires that, as the Supreme Court of Canada notes, the claim is “certain to

¹¹⁴ *Tanudjaja*, ONCA, *supra* note 3 at para 30.

¹¹⁵ This is what the majority does in its concluding claim that it has left unconsidered the question of positive obligations. *Ibid* at para 37.

¹¹⁶ *Tanudjaja*, ONCA, *supra* note 3 at para 32.

¹¹⁷ *R v Oakes*, [1986] 1 SCR 103, 53 OR (2d) 719.

¹¹⁸ *Tanudjaja*, ONCA, *supra* note 3 at para 33.

¹¹⁹ Factum of the Intervener, David Asper Centre for Constitutional Rights, Ontario Court of Appeal, online: <<http://www.aspercentre.ca/Assets/Asper+Digital+Assets/David+Asper+Centre/Asper+Digital+Assets/Asper+Case+Materials/TanudjajaCAFactum.pdf>>.

¹²⁰ *Tanudjaja*, ONCA, *supra* note 3 at para 43. The test is from *Hunt v Carey Canada Inc*, [1990] 2 SCR 959, 74 DLR (4th) 321 [*Hunt*].

fail.”¹²¹ Significantly, the Supreme Court has stated that neither length and complexity of the issue nor novelty alone is reason to strike a claim. Instead, the Supreme Court, through the pen of the Chief Justice, has cautioned that the decision to strike must be carefully deployed: new and novel (and lauded) developments in the law are standard and many result from actions initially deemed hopeless and initially challenged by preliminary motions to strike.¹²² Consequently, “[t]he approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial.”¹²³ The dissent by Feldman JA emphasizes these refinements of the test for dismissal, issuing the stricture that “[t]he motion to strike should not be used ... as a tool to frustrate potential developments in the law.”¹²⁴

The motions judge comes in for specific criticism in relation to this larger concern. Discussion of the applicants’ section 7 claim was flawed in four specific ways: misstatement of the appellants’ claim; misstatement of section 7 jurisprudence; definition of section 7 jurisprudence inappropriate to decision-making in a motion to strike; and, preventing consideration of the full evidentiary record.¹²⁵ Each of these charges is discussed at some length, with Feldman JA detailing, in particular, the motion judge’s extensive doctrinal interpretations and resolutions of law not yet settled that ill-fit the context of a preliminary motion to dismiss. Most damning, however, for Feldman JA is the result that the motion judge would leave the 16 volumes of evidentiary record submitted by the appellants unexaminable, particularly to the question of whether or not special circumstances exist for inclusion of positive obligations under section 7.¹²⁶ Equally, Feldman JA notes that the motions judge engaged in fact finding, doctrinal exegesis and resolution in his discussion of the applicants’ section 15 claim. In the absence of engagement with the full evidentiary record and in the context of a preliminary motion the motions judge’s conclusions about causal factors and analogous grounds are faulty. Such matters are “not open for decision when the application is not allowed to proceed.”¹²⁷

In her discussion of the justiciability concern, Feldman JA takes on her own Court of Appeal colleagues more directly. Citing a number of academic authorities, she argues that: “to strike a serious *Charter* application at the pleadings stage on the basis of justiciability is therefore inappropriate.”¹²⁸ More specifically, while the novel form of the claim raises some tricky procedural and conceptual difficulties for both the *Charter* argument and remedial stage, again Feldman JA reminds her colleagues that novelty alone is not a relevant reason for dismissal and that, as helpfully underlined by one of the intervenors, the question of remedy is distinct and subject to judicial crafting independent of argument pertaining to *Charter* breach.¹²⁹

Feldman JA concludes by reminding her audience that this application represents not only the claims of a broad range of disadvantaged individuals and groups, but is backed by a considerable number of credible intervening institutions with much expertise in *Charter*

¹²¹ *Hunt, ibid* at 980.

¹²² *R v Imperial Tobacco Canada Ltd*, [2011] 3 SCR 45, 2011 SCC 42 (CanLII) at para 21, McLachlin CJ [*Imperial Tobacco*].

¹²³ *Imperial Tobacco, ibid* at para 21.

¹²⁴ *Tanudjaja*, ONCA, *supra* note 3 at para 49, Feldman JA in dissent.

¹²⁵ *Ibid* at para 51, Feldman JA in dissent.

¹²⁶ *Ibid* at para 65, Feldman JA in dissent.

¹²⁷ *Tanudjaja*, ONCA, *supra* note 3 at para 74, Feldman JA in dissent.

¹²⁸ *Ibid* at para 81, Feldman JA in dissent.

¹²⁹ *Ibid* at para 85, Feldman JA in dissent.

jurisprudence and analysis. This larger frame adds weight to her opinion that the “housekeeping” measure of dismissal for lack of reasonable cause is improperly wielded by the motions judge.

So, why is such common and convincing conceptual parsing beyond the ken of many of our judges? Clearly, something more ideological is at play. Resort to stale platitudes about positive versus negative rights and “misconceived” challenges may signal an underlying general anxiety about the redistribution of resources, recognition, and participation¹³⁰ activists push through *Charter* litigation. More evocatively, these challenges threaten the “mythology of ... the majestic, enduring and self-sustaining neutrality”¹³¹ of constitutional law. Articulation of rights—of any sort—involves delineation of an imaginary line between public and private regulation and, thus, “to ask the purpose of human rights is always to ask a political question.”¹³² The liberatory potential of rights is the unavoidable flip side of coercive potential, that is, of rights’ power to impose the public values they enshrine on private and personal orderings. The right to housing engages specially with this classical tension between liberty and equality as the right to housing so centrally encompasses that most private sphere—the home.¹³³ Combatting this political reluctance, and its ideological roots, is beyond the reach of doctrinal correction and critique. But it is appropriately targeted by the charge that judges who assert its mythology unquestioningly must be held responsible for ensuring that social justice under the *Charter* will never amount to much.

It is not surprising that the Attorneys General have pushed motions to dismiss. It is a strategic move given the character of the Canadian judiciary. But it is a strategy that will work to consign Canada’s constitutional protection of human rights well behind the leaders of global human rights protection. The argument this paper seeks to advance is that the character of human rights infringements like denial of access to adequate housing does not fit the tidy boxes of traditionally framed legal challenges. This observation flows significantly in part from the early indication of just how complex housing needs across various groups are. If we want to be able to scrutinize the multiple and textured way in which the state is implicated in setting the conditions necessary for this crisis, and for the maintenance and intensification of the crisis, it is important to have within the purview of the court more than singular “snippets” of government action and inaction. Equally, orders that compel governments to coordinate across a range of programmes and actions may be the answer to providing reasonable remedial response to human rights crises of this fractured sort. This is the question the *Tanudjaja* case has handed the courts. It would be a shame if these arguments never get their day in court.

VI. CONCLUSION

So, the *Tanudjaja* application has foundered on the two traditional bogeymen repeatedly thrown up to block socio-economic rights: fears about positive rights and the spectre of non-

¹³⁰ For analysis of why each of these features can be part of rights claiming by marginalized groups, see Nancy Fraser, “Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation”, *The Tanner Lectures on Human Values*, online: <<http://www.intelligenceispower.com/Important%20E-mails%20Sent%20attachments/Social%20Justice%20in%20the%20Age%20of%20Identity%20Politics.pdf>>.

¹³¹ Michael Reisman, “On the Causes of Uncertainty and Volatility in International Law” in Tomer Broude & Yuval Shany, eds, *The Shifting Allocation of Authority in International Law: Essays in Honour of Professor Ruth Lapidoth* (Oxford: Hart Publishing, 2008), as quoted in Hohmann, *supra* note 8 at 235.

¹³² Hohmann, *supra* note 8 at 236.

¹³³ *Ibid.*

justiciability. That these hurdles would appear so powerfully in this application is not surprising—the applicants’ challenge is an extensive condemnation of current, regular government practice. It is a parry against “business as usual.” The claim makes visible and gives voice to the many among us whose basic needs go unmet, while calling the government to account for this dispossession. This is disruptive—as rights at their best are.¹³⁴ Private suffering is rendered public and collective response becomes obligatory.¹³⁵

Consequently, the repeated defeat of this application at the stage of a preliminary motion to dismiss is distressing. *Tanudjaja* raises such important issues. Governments duck and weave when confronted politically with the sight, and plight, of the poorly housed. The most so far that insistence on negative obligations under the Constitution has achieved are the temporary cardboard box overhead shelters of *Victoria (City) v Adams*.¹³⁶ If litigation under the *Charter* is not allowed to present more than narrow pieces of the problem of housing insecurity at any one time, if all the *Charter* can do is stay silent in the face of government inaction, and if courts continue to dodge acknowledgement that rights are always already about redistribution, then the homeless and other marginalized groups in Canadian society are truly constitutionally outside in the cold.

¹³⁴ Hohmann, *supra* note 8 at 244.

¹³⁵ *Ibid* at 7.

¹³⁶ *Adams*, *supra* note 10. For discussion of this case, see Margot Young, “Rights, the Homeless, and Social Change: Reflections on *Victoria (City) v Adams* (BCSC),” (2009) 80 BC Studies 164; Martha Jackman, “Charter Remedies for Socio-economic Rights Violations: Sleeping Under a Box?” in Sharpe & Roach, *supra* note 90 at 279.

40.	John H Currie, <i>Public International Law</i> , 2 nd ed (Toronto: Irwin Law, 2008) Chapter 4: Law of Treaties .
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THE LAW OF TREATIES

A. NATURE AND IMPORTANCE OF TREATIES

As described above,¹ treaties are express and usually formalized agreements between states or other subjects of international law—they set out the parties’ mutual legal rights and obligations, and are governed by international law. They may take the form of reciprocal undertakings between as few as two states (“bilateral” treaties), or more generalized agreements adhered to by several or even, on occasion, most states in the world (“multilateral” treaties). Their subject matter ranges from very specific undertaking-and-performance agreements between states—akin to domestic law contracts and therefore sometimes called “treaty-contracts”—to broad codifications or restatements of certain substantive areas of international law, designed to govern the ongoing conduct of all the parties to them in the relevant subject-area (sometimes called “law-making” or “codification” treaties).

Treaties are thus supplement legal tools in the hands of states, permitting them to enter into individual relationships with other states on very specific issues or projects, or to establish widely applicable norms intended to govern legal relationships with as many other states as will expressly agree to their terms. Indeed, in the twentieth and twenty-first centuries states have even made use of treaties to reshape and redefine the structure of the international legal system itself. For example, the

¹ See Chapter 3, Section C(2).

United Nations (UN), with its enormous institutional apparatus (including the International Court of Justice), is merely the product of one of the most successful and widely ratified multilateral treaties of all time, the *Charter of the United Nations* and its annexed *Statute of the International Court of Justice*.²

Thanks largely to such institutional innovations, treaties have had pride of place in developing and clarifying international law in the past century. Previously, customary international law was clearly the primary source of generally applicable international norms, early treaty practice being largely bilateral and situation-specific in nature. This began to change in the late nineteenth and early twentieth centuries with the elaboration of broader-based treaty regimes, mostly concerned with the conduct of war and humanitarian law.³ The last half of the twentieth century, however, witnessed explosive growth in the number of multilateral codification or law-making treaties in virtually all areas of the law.

As suggested above, this phenomenal growth can be attributed partly to the establishment of international institutions such as the United Nations and its agencies, which have provided permanent fora for the negotiation of such broad-based agreements.⁴ Of particular importance to this process has been the work of the International Law Commission (ILC), a panel of experts established by the General Assembly of the United Nations in 1947 in partial fulfilment of its mandate to “encourage the progressive development of international law and its codification.”⁵ The ILC has been at the forefront of the “codification” movement, steadily producing draft texts in a variety of fields, texts that have served as the starting point for state negotiations leading to the conclusion of some of the most successful multilateral treaties.⁶

The rise in the relative importance of treaties as a source of generally applicable international law can also in part be attributed to the

2 *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945 No. 7 (entered into force 24 October 1945) [*UN Charter*]; *Statute of the International Court of Justice*, 26 June 1945, Can. T.S. 1945 No. 7 (entered into force 24 October 1945) [*ICJ Statute*].

3 For example, *Convention for the Pacific Settlement of International Disputes (Hague I)*, 29 July 1899, reproduced in J.B. Scott, *The Hague Peace Conferences of 1899 and 1907*, vol. II (New York: Garland, 1972) at 80; and *Convention Respecting the Laws and Customs of War on Land (Hague IV)*, 18 October 1907, reproduced in *ibid.* at 368.

4 See O. Schachter, “United Nations Law” (1994) 88 A.J.I.L. 1 at 1–2.

5 *UN Charter*, above note 2, Article 13(1). See also Chapter 3, Section D(2).

6 For a more thorough overview of the mandate, procedure, and work of the ILC, see the International Law Commission’s homepage, online: www.un.org/law/ilc/.

peculiar advantages offered by treaties as law-making devices. These include the speed and clarity with which the law may be codified, created, or advanced, which has been important in accommodating the dramatically increased intensity and breadth of international discourse since the Second World War.

Given their requirement of express consent, moreover, treaties dovetail neatly with positivist notions of the source of binding obligation in international law. They represent the ultimate embodiment of the theory of consent and thus of the sovereignty of states.⁷ As such, states may feel they are “taking charge” of their own legal obligations by participating in multilateral treaty negotiations, thus providing yet more momentum to the multilateral treaty juggernaut.

Numerous terms have been coined to refer to treaties in one form or another, the most common of which include “conventions,” “charters,” “covenants,” “protocols,” “pacts,” “acts,” “statutes,” or, simply, “agreements.” While various factors will influence states in their choice of title for any particular treaty, the term used has no legal significance in itself. All treaties, whatever their designation, and as long as they represent the express will of the parties to be bound by their terms in accordance with international law, are equally binding upon the parties.

B. THE VIENNA CONVENTION ON THE LAW OF TREATIES

It is one of the ironies of international law that the legal rules governing the formation, legal effects, and dissolution of treaties have for the most part evolved as a matter of customary international law.⁸ Through the centuries states have, by their conduct and attitude, confirmed that an express agreement between them must be honoured in good faith. They

7 See Chapter 3. Even this most positivist of formal international legal sources has a natural law seam running through it, however. Although states are only bound by treaties to which they expressly consent, once that consent is unconditionally given it cannot unilaterally be withdrawn. The fundamental rule that treaties *must* be performed in good faith (see Section G(1), below in this chapter) is a clear derogation from the theory of consent: see above Chapter 3, Section C(2).

8 The role of domestic law is of course also important in the treaty formation process, but this chapter focuses on the *international* legal rules governing treaties. The significance of domestic constitutional orders on treaty formation and implementation will be discussed in Sections G(1) and I(2)(a), below in this chapter, as well as in Chapter 6.

have further confirmed that such an agreement is subject to a number of binding rules external to the agreement itself. These external rules—rules about rules, as it were—make up the “law of treaties.”

Given that treaties are one of the two principal sources of international law and that, once formed, they must be honoured, it is obvious that any set of rules governing how treaties come into existence, how they are applied, and so on will be of fundamental importance. It is especially important that such rules be clear and precise, given that treaties are increasingly resorted to in order to define or establish broad-based international legal obligations.

In this light, one of the most important and successful “codification and progressive development” projects ever undertaken by the ILC was the preparation of a draft text of a treaty about treaties. While at first blush it might seem odd (not to mention circular) to conclude a treaty setting out the law of treaties,⁹ the ILC nevertheless considered such a project “to be extremely desirable in order that the law of treaties may be placed upon the widest and most secure foundations.”¹⁰ The UN General Assembly concurred.¹¹ The text of a draft multilateral treaty was thus prepared by the ILC over the course of eighteen years and then submitted for further direct negotiations between states at the United Nations Conference on the Law of Treaties held in Vienna in 1968 and 1969.

The resulting *Vienna Convention on the Law of Treaties* (*Vienna Convention*) was adopted in 1969¹² and, having attained a sufficient number of ratifications, came into force in 1980.¹³ Currently, the *Vienna Convention* has 108 parties and 45 signatories.¹⁴ Moreover, most of its substantive provisions are widely considered either to reflect the pre-existing customary international law of treaties or to have become customary

9 An issue of which the ILC was acutely aware: see, for example, “Summary Records of the Eleventh Session” (UN Doc. A/CN.4/SER.A/1959) in *Yearbook of the International Law Commission 1959*, vol. I (New York: United Nations, 1959) at 93.

10 “Report of the International Law Commission on the Work of its Fourteenth Session” (UN Doc. A/5209) in *Yearbook of the International Law Commission 1962*, vol. II (New York: United Nations, 1962) at para. 17.

11 *International Conference of Plenipotentiaries on the Law of Treaties*, GA Res. 2166(XXI), UN GAOR, 21st Sess., Supp. No. 16, UN Doc. A/RES/2166(XXI).

12 *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331 [Vienna Convention].

13 27 January 1980.

14 As of 30 December 2007. As will be seen below, a party to a treaty has formally expressed its consent to be bound by it. A signatory, in contrast, has merely expressed its agreement with the text of the treaty and a future intent to become bound by it. Thus, a party is presently bound to perform a treaty in force whereas a signatory is not—though a signatory does have certain negative obligations vis-à-vis the treaty, as will be seen in Section F(2), below in this chapter.

international law since it came into force.¹⁵ The significance of this is that even non-parties to the *Vienna Convention* can be considered bound by the content of most of its provisions.¹⁶ Given the fundamental importance of its subject-matter to the modern international legal order, some have likened the *Vienna Convention* to a quasi-constitutional international legal document, second in importance only to the *UN Charter*.¹⁷

As intended by the ILC and the UN General Assembly, therefore, the *Vienna Convention* has become a convenient reference point for most of the law of treaties.¹⁸ In keeping with the usual practice in this area of the law, the *Vienna Convention* will therefore be referred to throughout this chapter as authority for various propositions of law even though such propositions may have identical or very similar analogues in the customary international law of treaties.

C. DEFINITION AND ESSENTIAL ELEMENTS OF INTERNATIONAL TREATIES

1) Defining Treaties

The *Vienna Convention* defines a treaty for its own purposes as:

an international agreement concluded between States in written form and governed by international law, whether embodied in a single in-

15 See, for example, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*, Advisory Opinion, [1971] I.C.J. Rep. 3 at 47 [South West Africa Case]; *Fisheries Jurisdiction Case (United Kingdom v. Iceland) (Jurisdiction of the Court)*, [1973] I.C.J. Rep. 3 at 18; *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, [1997] I.C.J. Rep. 7 [Gabčíkovo-Nagymaros Case] at 38 and 62; P. Reuter, *Introduction to the Law of Treaties*, 2d ed., trans. by J. Mico & P. Haggemacher (London: Kegan Paul International, 1995) at 15; A. Aust, *Modern Treaty Law and Practice* (Cambridge: Cambridge University Press, 2000) at 10–11; I. Brownlie, *Principles of Public International Law*, 6th ed. (Oxford: Oxford University Press, 2003) at 580. For discussion of the process by which treaty norms may become customary international law, see further Chapter 5, Section E(2).

16 Although not, technically, directly by the *Vienna Convention* itself.

17 J.A. Beesley & C.B. Bourne, eds., “Canadian Practice in International Law in 1970 As Reflected Mainly in Public Correspondence and Statements of the Department of Foreign Affairs” (1971) 9 Can. Y.B. Int’l L. 276 at 300.

18 See M.N. Shaw, *International Law*, 5th ed. (Cambridge: Cambridge University Press, 2003) at 811. It should be noted, however, that the *Vienna Convention* does not deal directly with such issues as general state responsibility or liability for breach of treaty terms (see further on this topic Chapter 12), or the law of treaties in times of war or hostilities, a topic currently being considered by the ILC.

strument or in two or more related instruments and whatever its particular designation.¹⁹

While this definition is in many ways a useful guide to the essential elements of treaties, it is narrower in several respects than it need be. For reasons peculiar to the process by which the *Vienna Convention* was drafted, its specific terms exclude certain agreements which are nevertheless considered full-fledged treaties as a matter of customary international law.²⁰ The *Vienna Convention* makes this clear in stating that its specific focus on certain types of treaties is without prejudice to the legal force of, or application of the general law of treaties to, other types of treaties.²¹ Thus caution is in order in relying exclusively on the definition of “treaty” furnished by the *Vienna Convention*.

With this in mind, a general working definition of an international treaty would include four principal elements. Adapting slightly the *Vienna Convention’s* definition in order to reflect customary international law on the subject, an international treaty could therefore be defined as:

- (a) an international agreement
- (b) between subjects of international law
- (c) formed with intent to create binding legal obligations, and
- (d) governed by international law.

2) Four Essential Treaty Elements

a) International Agreement

The first element, the requirement of an international agreement, flows from the basic premise that treaties are essentially participatory sources of international law. In other words, treaties “make” international law through the process of agreement between international legal subjects. Further, such international law is only applicable as between the subjects so agreeing. This can be contrasted with customary international law, which is produced through the unilateral, albeit cumulative, acts and attitudes of states, and which is, moreover, of presumptive universal application.²² Further, the “agreement” requirement appropriately underscores that a treaty requires a minimum of two parties.

19 *Vienna Convention*, above note 12, Article 2(1)(a).

20 For example, oral treaties.

21 *Vienna Convention*, above note 12, Article 3.

22 See further Chapter 5, Section A. Also distinguishable from binding agreements giving rise to legal obligations are unilateral declarations (see Chapter 3, Section D(1)) and other potential sources of obligation such as (in appropriate

b) Between International Legal Subjects

The second requirement is that the agreement be between international legal subjects. By far the most common participants in treaties are states;²³ indeed, until the twentieth century it was a well-received view that *only* states could conclude treaties. This is due to the very nature of international legal subjects, one of the attributes of which is the capacity to enter into legal relations with other international legal subjects.²⁴ Treaties are the principal such relations. Thus, corporations, individuals, and non-governmental organizations are generally ineligible to enter into treaty relations.²⁵ While such entities might well enter into agreements with states, such agreements would not be governed by the international law of treaties but rather (if at all) by the domestic law of one or more states.²⁶

The *Vienna Convention's* focus on treaties between states, but not between states and other international legal subjects such as international organizations, tells only part of the story. The recognition of permanent international organizations as potential subjects of international law²⁷ and the necessities surrounding their dealings with states have given rise to their frequent participation in treaties.²⁸ In fact, a companion convention dealing with the application of the law of treaties to conventions between states and international organizations, or simply between international organizations, has now been concluded.²⁹ Its provisions

circumstances) acquiescence, estoppel, preclusion, and the like (see Chapter 7, Section B(2)(a)(ii)).

23 Article 6 of the *Vienna Convention*, above note 12, confirms that “[e]very state possesses capacity to conclude treaties.”

24 See Chapter 2, Section B(2)(d).

25 See Aust, above note 15 at 15–16. But see Reuter, above note 15 at 32–33. On the lack of international legal personality of corporations, individuals, and non-governmental organizations, see above Chapter 2, Section E.

26 See, for example, *Anglo-Iranian Oil Co. Case (United Kingdom v. Iran) (Jurisdiction)*, [1952] I.C.J. Rep. 93 at 112 [*Anglo-Iranian Oil*].

27 On the international legal subject status of international organizations, see Chapter 2, Section D.

28 See, for example, *Convention on the Privileges and Immunities of the United Nations*, 13 February 1946, 1 U.N.T.S. 15, corrigendum in 90 U.N.T.S. 327 (entered into force 17 September 1946); or the *Agreement Between the United Nations and Sierra Leone on the Establishment of a Special Court for Sierra Leone*, 16 January 2002, appendix to the Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, 4 October 2000, U.N. Doc. S/2000/915.

29 *Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations*, 21 March 1986, (1986) 25 I.L.M. 543. Not yet in force, the Convention has attracted thirty-nine signatories and forty parties (as of 30 December 2007).

largely mirror, with minor adaptations, the substantive law of treaties applicable between states.³⁰

As seen above, the precise bounds of who or what might enjoy international legal personality, and for what purposes, has become more fluid in the past century. Accordingly, the general rule here is best expressed by observing that only international legal subjects may be parties to treaties. If it is determined that a party to an agreement does not possess the international legal personality necessary to conclude binding treaties, it will follow logically that the agreement under consideration is not in fact a treaty.

As they are by far the most common participants in treaties, “states” will be used throughout this chapter for convenience when referring to parties to treaties.

c) Intent to be Bound

The third element of a treaty, that it be concluded with an intent to create binding legal obligations, is crucial. States frequently enter into agreements, reach understandings, and even sign accords without any intent or expectation that such acts will produce legally binding obligations at international law. Given that there is no prescribed form for a binding international treaty,³¹ the only way a treaty can be distinguished from such a non-binding agreement is to search for the parties’ mutual intent on the matter.³² The ascertainment of such intent, in the absence of reliable formal indicators familiar in some domestic legal systems,³³ is often a difficult and uncertain process that relies upon all available evidence, circumstantial and otherwise, to shed light on the parties’ motivations.³⁴ In other words, formality in the creation of an international agreement alone is not sufficient to make that agreement a binding treaty, just as informality is not in itself determinative of the parties’ intent to conclude a non-binding agreement or no agreement at all.

30 See P.K. Menon, *The Law of Treaties Between States and International Organizations* (Lewiston, NY: Edwin Mellen Press, 1992).

31 See Section C(3), below in this chapter.

32 S. Rosenne, *Developments in the Law of Treaties, 1945–86* (Cambridge: Cambridge University Press, 1989) at 86; Shaw, above note 18 at 812–14; Brownlie, above note 15 at 581.

33 For example, the payment of consideration to evidence the binding character of a common law contract.

34 Brownlie, above note 15 at 581. See, for an illustration of the complexities of making such determinations, the *Aegean Sea Continental Shelf Case*, [1978] I.C.J. Rep. 3 at 39.

An example of a formally concluded multilateral agreement which is nevertheless not considered to have binding legal force as a treaty is the *Helsinki Final Act* (sometimes also called the “*Helsinki Accord*”) signed by 35 states from Europe and North America at the Conference on Security and Cooperation in Europe in 1975.³⁵ The *Final Act* set out ten basic principles bearing on peaceful relations between the participating states and on human rights issues. The terms of the *Final Act* made it clear, however, that the parties did not intend it to be a legally binding agreement and it would thus be inaccurate to characterize it as a treaty.³⁶ The clear evidence of the parties’ intent on the matter is conclusive.

Saying that treaty-making does not require observation of any particular formalities is not to say that such formalities are always irrelevant to the ascertainment of intent to enter into binding treaty relations. In ascertaining the intentions of the parties, particularly where one has to rely on their conduct rather than on their express statements, it is important to understand such conduct in its context. Part of that context will normally be circumstantial evidence of the usual meaning attributed (or not) to certain acts. Thus, the ordinary practice of the parties is a key circumstance against which purported evidence of the parties’ intent to become bound by an agreement is to be evaluated.³⁷ For example, in the *North Sea Continental Shelf Cases*,³⁸ Denmark and the Netherlands contended that Germany, while not formally a party to the 1958 *Geneva Convention on the Continental Shelf*,³⁹ had nevertheless become bound by its rules through various acts and statements. The Court reacted strongly to this submission:

As regards these contentions, it is clear that only a very definite, very consistent course of conduct on the part of a state ... could justify the Court in upholding them; and ... if there had been a real intention to manifest acceptance or recognition of the applicability of the conventional regime—then it must be asked why it was that the Federal Republic [of Germany] did not take the obvious step of giving expression to this readiness by simply ratifying the Convention. In

35 *Conference on Security and Co-operation in Europe: Final Act (1 August, 1975)* (1975), 14 I.L.M. 1292.

36 *Ibid.*, Preamble.

37 Reuter, above note 15 at 59.

38 *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. The Netherlands)*, [1969] I.C.J. Rep. 3 [*North Sea Continental Shelf Cases*].

39 *Convention on the Continental Shelf*, 29 April 1958, 499 U.N.T.S. 311 (entered into force 10 June 1964).

principle, when a number of States, including the one whose conduct is invoked, and those invoking it, have drawn up a convention specifically providing for a particular method by which the intention to become bound by the regime of the convention is to be manifested—namely by the carrying out of certain prescribed formalities (ratification, accession), it is not lightly to be presumed that a State which has not carried out these formalities, though at all times fully able and entitled to do so, has nevertheless somehow become bound in another way...⁴⁰

Thus, departure from the usual formalities may very well be taken as evidence of a lack of intent to be bound by a treaty.

Questions of form will be examined in greater detail below,⁴¹ but for the time being the important point is that whether or not a treaty exists depends above all on the mutual intent of the parties to enter into binding treaty relations, and only secondarily—as an evidential matter—on the form in which that intent is expressed.

d) Governed by International Law

The fourth and final element of a treaty, also of overriding importance, is that it be governed by international law. This means that the parties must intend that the agreement itself should be subject to the law of treaties with respect to such matters as its validity, application, interpretation, and enforceability. It also entails subjection of the treaty relationship to the general law of state responsibility should there be a failure by any party to fulfil its obligations under the treaty.⁴²

This requirement therefore distinguishes treaties from domestic law contracts, which are governed by the law of one or more domestic jurisdictions. States are free to enter into such domestic law contracts,⁴³ whether with other subjects of international law (including states) or with persons having no such status, such as corporations or individuals. The important point, however, is that “the mere participation of states or other international legal subjects in such an agreement (even if they are the only parties) will not in itself make it a treaty.”⁴⁴ Rather, whether the agreement is an international treaty governed by inter-

40 *North Sea Continental Shelf Cases*, above note 38 at para. 38.

41 Section C(3), below in this chapter.

42 Article 73 provides that the *Vienna Convention*, above note 12, is without prejudice to issues of state responsibility; see also the *Rainbow Warrior Arbitration (New Zealand v. France)* (1990), 82 I.L.R. 499. For further discussion of state responsibility for internationally wrongful acts, see Chapter 12.

43 Frequently referred to as “concession contracts.”

44 *Anglo-Iranian Oil*, above note 26 at 112.

national law or a concession contract governed by some system of domestic law depends on the parties' mutual intent on this issue.

3) Questions of Form

The scope of the *Vienna Convention* is confined to written treaties. Oral treaties are nevertheless permissible at customary international law and are governed by the same substantive rules.⁴⁵ In fact, as seen above,⁴⁶ the general law of treaties imposes virtually no restrictions of form whatsoever on treaties, as evidenced even by the *Vienna Convention's* permissive reference to all manner of agreements "whether embodied in a single instrument or in two or more related instruments and whatever [their] particular designation."⁴⁷ This flexibility of form extends even to the terminology used to describe such agreements; terms such as "treaty," "convention," "agreement," or "protocol" are all interchangeable in international law.⁴⁸

The extent of this flexibility is well illustrated in the decision of the International Court of Justice in the *Aegean Sea Continental Shelf Case*.⁴⁹ In that case, Greece contended that a joint communiqué issued directly to the press by the Prime Ministers of Greece and Turkey immediately following a meeting between them constituted a binding agreement to submit, either jointly or unilaterally, their maritime boundary dispute to the International Court of Justice. The communiqué bore neither signatures nor initials. The relevant text of the communiqué was as follows:

They [the two Prime Ministers] decided that those problems [between the two countries] should be resolved peacefully by means of negotiations and as regards the continental shelf of the Aegean Sea by the International Court at The Hague.

The Court observed that no rule of international law precluded a joint communiqué from constituting a binding international treaty. Whether it does depends not on its form, but "on the nature of the act or transaction to which [it] gives expression." The Court added:

45 See, for example, *Legal Status of Eastern Greenland (Denmark v. Norway)* (1933), P.C.I.J. Rep. Ser. A/B No. 53 at 71; Reuter, above note 15 at 30; Brownlie, above note 15 at 582.

46 Section C(2)(c), above in this chapter.

47 *Vienna Convention*, above note 12, Article 2(1)(a).

48 Reuter, above note 15 at 29.

49 *Aegean Sea Continental Shelf Case*, above note 34.

[I]n determining what was indeed the nature of the act or transaction embodied in the Brussels Communiqué, the Court must have regard above all to its actual terms and to the particular circumstances in which it was drawn up.⁵⁰

The Court noted that the actual terms of the communiqué contemplated ongoing discussions and meetings of experts on the issue of the Aegean Sea continental shelf. This did not appear consistent, in the Court's view, with an immediate and unqualified commitment to submit the dispute to the Court, as urged by Greece. The Court also found that negotiations prior to the date of the communiqué revealed that Turkey was at most willing to consider a joint submission of the dispute to the Court by way of special agreement. "When read in that context," the Court held, "the terms of the communiqué do not appear to the Court to evidence any change in the position of the Turkish Government ..."⁵¹ This suggests that where the terms and even the nature of the document are vague, the prior positions of the parties can shed light on the document's intent.

The Court also examined the subsequent conduct of the parties; it found that the Turkish position remained consistent. The Court added that it was "significant" that, in the negotiations between the parties subsequent to the joint communiqué, there had been no suggestion by Greece that the basis of the Court's jurisdiction had already been resolved by the communiqué itself. Further, in the course of those negotiations, Greece itself expressly acknowledged that a special agreement was necessary in order to submit the issue to the Court. In other words, Greece's subsequent conduct did not suggest that it itself considered the communiqué to constitute a binding agreement.⁵²

The Court therefore concluded that the communiqué "was not intended to ... constitute an immediate commitment" on the part of both parties to seize the Court of jurisdiction.⁵³

Thus, whether a particular document constitutes a treaty depends upon the "nature of the act or transaction to which it gives expression." That nature is determined by the terms of the document itself, as well as the positions of the parties in prior and subsequent negotiations. The ultimate test appears to be whether the document, its terms, and the behaviour of the parties both prior and subsequent to issuing the document, together evidence an intent by the parties to commit to its terms.

50 *Ibid.* at 39.

51 *Ibid.* at 43.

52 *Ibid.* at 44.

53 *Ibid.*

Another, more recent decision of the International Court of Justice illustrates the potentially far-reaching effects of an apparently informal arrangement between states. In the *Case Concerning Maritime Delimitation and Territorial Questions* between Qatar and Bahrain,⁵⁴ the minutes of a meeting held between state representatives and an exchange of letters between governments were each held to be sufficient evidence of the parties' intent to be bound by the contents of the minutes and the letters respectively. Each was thus held to constitute a treaty enforceable at international law.⁵⁵

In that case, both states had agreed in 1976 to third-party mediation of their dispute by the King of Saudi Arabia. No progress was made until 1987, when the Saudi King proposed a settlement by way of letters in identical terms to each party. The heads of state of both parties accepted the proposed settlement by way of return letters. A key proposal thus adopted was that “[a]ll the disputed matters shall be referred to the International Court of Justice, at The Hague, for a final ruling binding upon both parties, who shall have to execute its terms.”

These events were followed by two years of unsuccessful negotiations on a mutually acceptable formulation of the issues to be submitted to the Court. The matter was again discussed at a meeting in 1990, at which time Qatar accepted a proposed Bahraini formulation of the issues to be submitted to the Court. Following the meeting, the Foreign Ministers of Bahrain, Qatar, and Saudi Arabia signed minutes recording that they had reaffirmed their prior agreement, would continue to negotiate for a defined period and, failing agreement, “the parties may submit the matter to the International Court of Justice in accordance with the Bahraini formula, which has been accepted by Qatar.”

The parties agreed that the exchange of letters of 1987 constituted an international agreement with binding force. Bahrain, however, maintained that the minutes of the 1990 meeting were no more than a simple record of negotiations, not an international agreement seizing the Court of jurisdiction of the issues as described in the “Bahraini formula.”

The Court reaffirmed that questions of form do not govern whether a binding agreement has or has not come into existence. Rather, it recalled its *dicta* in the *Aegean Sea Continental Shelf Case* to the effect that the “actual terms” and “particular circumstances” in which the document was drawn up prevailed. Here, the Court emphasized that the

54 *Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Jurisdiction and Admissibility)*, [1994] I.C.J. Rep. 112 [Qatar v. Bahrain].

55 *Ibid.* at 120–22.

minutes referred to what had been “agreed” by the parties; that they included “a reaffirmation of obligations previously entered into”; and that they did “not merely give an account of discussions and summarize points of agreement and disagreement,” but “enumerate[d] the commitments to which the Parties have consented.” Thus, the Court concluded, the minutes “create[d] rights and obligations in international law for the Parties. They constitute[d] an international agreement.”⁵⁶

The Court further rejected Bahrain’s objection that its representative had no intention to enter into a legally binding obligation upon signing the minutes (and indeed that he could not have intended to do so given domestic Bahraini law limiting his powers). The Court found the subjective intentions of the individual representatives irrelevant:

The two Ministers signed a text recording commitments accepted by their Governments, some of which were to be given immediate application. Having signed such a text, the Foreign Minister of Bahrain is not in a position subsequently to say that he intended to subscribe only to a “statement recording a political understanding,” and not to an international agreement.⁵⁷

The case may therefore stand for the proposition that the individual intentions of the persons signing the minutes or issuing statements may not be relevant to the existence of a binding agreement, depending on the circumstances. Where such circumstances include agreement by the states themselves as to their mutual rights and obligations, such agreement (“commitments accepted by their Governments”) prevails over the individual intentions of the state representatives. An alternative interpretation may be that, while intent to enter into binding legal obligations is the key, such intention is to be gleaned from objective, outward manifestations and behaviours rather than from subjective, unexpressed motivations.

The cases thus clearly support the proposition that requirements of form do not govern the formation of treaties. This approach has the advantage of giving states maximum flexibility in concluding binding agreements. It is also sensible in that it privileges issues of substance over form, relying upon the actual intent of the parties, however it may be manifested, rather than on any conclusive presumptions based on the existence or absence of formalities.

As discovered by Bahrain in its dispute with Qatar, however, it also exacts a price insofar as it introduces an element of uncertainty and

56 *Ibid.* at 121.

57 *Ibid.* at 122.

unpredictability as to the full legal significance of a state's interactions with other states. Circumspection is required in one's behaviour *vis-à-vis* other states in order to avoid the creation of unexpected treaty relations with them.

For these reasons, states are hesitant to interpret the absence of any conduct at all as evidence of an intent to be bound. While the form in which such intent is manifested may vary widely, it nevertheless remains the case that such intent must, in fact, be manifested in *some* way. Thus, purely passive conduct is likely not to furnish the requisite evidence of intent to be bound by a proposed treaty.⁵⁸

D. TREATY-MAKING

1) Formalities Subject to Will of Parties

As with questions of form, the formalities of treaty-making are highly variable and depend ultimately on the will of the intended parties to the treaty.⁵⁹ Thus, treaty law prescribes no set procedure in order to bring a treaty into force. A treaty may be concluded by the simple expedient of an exchange of diplomatic notes between governments (often the practice in the case of bilateral agreements), or through much more formal machinery, particularly for a multilateral treaty concluded during the course of a diplomatic conference. In each case, the parties themselves set the formal procedures to be followed in negotiating and concluding the treaty. Of course, a number of formalities may be required by the parties' domestic legal or constitutional systems before the treaty will be considered to have domestic legal effect. However, these have no direct effect upon the *international* legal validity of the treaty or of the procedures adopted to bring it into force on the international plane.

There are nevertheless certain habitual formalities—the presentation of full powers during negotiations, adoption of a text, authentication of a text, formal expression of consent to be bound—that tend to be followed by states, particularly when participating in the elaboration of a multilateral treaty. As we will see below, Articles 7 through 17 of the *Vienna Convention* describe these formalities of treaty-making in generic terms, but it is important to remember that these are default

⁵⁸ Reuter, above note 15 at 30–31.

⁵⁹ “Form” relates to the means by which a treaty is manifested (written, oral, express, tacit, etc.), whereas “formalities” relate to the procedures by which the treaty is concluded and brought into force.

provisions and that their applicability is subject to the overriding will of the states involved in the treaty-making process.

2) Full Powers

Historically, state representatives purporting to negotiate on behalf of and bind their sovereign, government, or state were required to present “full powers,” meaning documents or other proof attesting to such authority.⁶⁰ In modern practice, however, such formalities are often dispensed with, particularly in the case of high-ranking or readily recognized state officials. Indeed, an expression of consent to be bound by certain state officials, such as a minister of foreign affairs, will usually suffice to bind the state without further formality.⁶¹

Thus, Article 7(1) of the *Vienna Convention* provides that full powers need not be produced during a treaty negotiation if circumstances show that such is not required by other participating states. Article 7(2) also provides that heads of state or government, foreign ministers, and in some cases diplomatic envoys need not produce full powers. Article 8 further provides that a state may subsequently confirm the acts of its representative if the latter’s authority is in doubt.

3) Adoption

Once the terms of a treaty have been successfully negotiated, a final text is adopted. In the case of a multilateral treaty, adoption has little legal significance of its own other than to signal the close of negotiations on the text. In particular, adoption of the text of a multilateral treaty does not, in itself, signal the parties’ consent to be bound by its terms, nor does it bring it into force for any of them.

On the other hand, particularly in cases of bilateral treaties, the stages of adoption, authentication, and final expression of consent to be bound may be collapsed into a single procedure, such as the exchange of signed letters of agreement. Whether or not a single procedure has such compound significance will depend on the intent of the parties. Assuming it does, the importance of adoption is eclipsed by the more fundamental significance of the parties’ expression of consent to be bound.

60 Article 2(1)(c) of the *Vienna Convention*, above note 12, defines such documents as “emanating from the competent authority of a State designating a person or persons to represent the State for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the State to be bound by a treaty, or for accomplishing any other act with respect to a treaty.”

61 See, for example, *Qatar v. Bahrain*, above note 54 at 122.

The text of a multilateral treaty is usually adopted by a vote of the states participating in the negotiations. Historically, such votes required unanimity before the text could be considered adopted. This is still frequently the case where the treaty, while multilateral, is drawn up by a relatively discrete number of states to govern their own particular relations. However, more modern practice in the case of general multilateral treaties, often negotiated at universal diplomatic conferences convened under UN auspices, is to consider a treaty text adopted if it secures the support of two-thirds of the conference delegates. On some occasions, the UN General Assembly or other international organizations themselves have directly adopted the text of a multilateral treaty either by simple majority vote or by consensus.⁶² These procedures have also sometimes been used by states negotiating the text of a multilateral treaty outside of the UN context.⁶³

All of this again illustrates that the method, requirements, and legal significance of adoption are fully dependent upon the will of the parties participating in the treaty-negotiation process. The parties are free to determine the voting requirements as they see fit. Article 9(1) of the *Vienna Convention* reflects this flexibility to a large extent in providing that adoption of the text of a treaty presumptively requires the consent of all participating states. In the case of adoption of the text of a treaty at an international conference, however, Article 9(2) requires the consent of only two-thirds of participating states, unless the same majority agrees to a different threshold.

4) Authentication

Closely related to adoption of the final text of a treaty is its authentication. Authentication is simply a procedure by which the negotiating parties signal their agreement that a given text is definitive and correct and that it corresponds to the treaty as adopted. It does not, in itself,

62 This of course does not give the treaty's terms any legal force. Only the subsequent expression of consent to be bound, given by individual states, combined with the coming into force of the treaty, can have this effect.

63 For example, during the "Ottawa Process" that led to the adoption of the *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction*, 3 December 1997, 2056 U.N.T.S. 211 (entered into force 1 March 1999) [*Landmines Convention*], the negotiating conference participants merely adopted the text of the treaty by consensus: see D. Chatsis, "The Ottawa Process" in *Lessons from the Past, Blueprints for the Future* (Proceedings of the XXVIth Annual Conference of the Canadian Council on International Law, 16–18 October 1997, Ottawa, Canada) 6 at 9.

signal final consent to be bound by the terms of the treaty, nor does it bring it into force.

A treaty text may be authenticated by any method agreed upon by the parties. The traditional method is by signature of the authenticated text, although initialling is also common. Again, the flexibility of the law of treaties on such questions of form is faithfully reflected in Article 10 of the *Vienna Convention*, which defers to agreement of the parties on this issue.

5) Consent to Binding Effect

By far the most significant stage in treaty-making is the parties' expression of their consent to be bound by the treaty. This is the ultimate act by which the state (or other international legal person) fetters its freedom of action and becomes bound as a matter of international law to perform the treaty's obligations in good faith once it comes into force.⁶⁴ In the case of multilateral treaties, this act normally does not coincide with earlier, less significant acts such as adoption and authentication, but usually requires some further, unequivocal step that clearly signals the parties' intent to assume the legal obligations described in the treaty.

Again, however, state practice evidences a surprising degree of variation in how states manifest their consent to be bound by a treaty. Among the most common methods are signature, ratification, and accession, as noted in Article 11 of the *Vienna Convention*.⁶⁵

a) Signature as Consent to be Bound

The first of these, signature, presents difficulties because signature is also commonly used as a method of authenticating the text of a treaty which, as we have seen, has a vastly different legal significance. States also frequently sign treaties subject to subsequent ratification, meaning that it is not their intent that the act of signature should itself signify consent to be bound. The possibility therefore arises that signature of a treaty can send the wrong message; namely, an expression of consent to be bound rather than authentication of the text. This potential situation is addressed in Article 12(1) of the *Vienna Convention*, which

64 On the delayed entry into force of certain treaties, see Section F, below in this chapter.

65 Other less significant methods referred to in Article 11 (some of which seem merely to be semantic equivalents) are: the exchange of instruments constituting a treaty, acceptance, approval, and "any other means if so agreed." See also *Vienna Convention*, above note 12, Articles 13 and 14(2). In short, virtually any act that can fairly be construed as an expression of consent to be bound will do.

provides that signature is only evidence of intent to be bound if the parties have agreed or the treaty itself provides that it is to have that effect. Alternatively, the signing state's conduct at the time of signature may indicate that it intended it to have such effect.⁶⁶

A state which has signed a treaty subject to ratification or some other subsequent act expressing consent to be bound is referred to as a "signatory," whereas a state which has expressed its consent to be bound, whether by signature or any other means, is referred to as a "party" to the treaty.

b) Ratification

Ratification refers to any number of procedures whereby a party which has participated in the negotiation, adoption, and authentication of the text of the treaty formally and finally expresses its consent to be bound by the treaty. This step often occurs after a hiatus during which the state takes any steps necessary under its domestic law to permit it either to give such final consent or to perform the treaty's obligations once undertaken. Whether or not consent to be bound may or must be expressed by way of ratification will depend on the intentions of the negotiating parties themselves.⁶⁷ Ratification is often effected by exchanging or depositing an "instrument of ratification" (usually a formal written declaration of final consent to the treaty's terms) with the other parties (or with a "depository" designated by the parties). Alternatively, ratification may take place simply by notifying the other parties of one's consent to be bound.⁶⁸ Again, the precise modalities of ratification are established by the parties themselves.

c) Accession

Accession is very similar to ratification except that it is the process by which a state which did not participate in the adoption or authentication of the treaty nevertheless indicates its consent to be bound by its terms. As a general rule of treaty law, treaties are not open to such unilateral, after-the-fact accession by non-participating states. This flows from the essentially contractual nature of treaties and the reciprocity of relations they entail. However, many, if not most, multilateral law-making or codification treaties often expressly provide that they are indeed open to accession by other states, either before or after the treaty comes into force. This more liberal approach is in keeping with the aim

66 See also Article 12(2), which provides that initialling a treaty can be considered a signature expressing consent to be bound in certain circumstances.

67 *Vienna Convention*, above note 12, Article 14(1).

68 *Ibid.*, Article 16.

of most such treaties, which is to secure as close to universal participation as possible.

Article 15 of the *Vienna Convention* thus provides that third party states may accede to a treaty if the treaty so provides, or if it can be established that the negotiating parties were or have subsequently agreed that after-the-fact accession is permitted. The precise modalities are, again, usually provided for in the treaty itself, and largely mirror their analogues in the case of ratification.⁶⁹

E. RESERVATIONS AND OBJECTIONS TO RESERVATIONS

1) The Dilemma of Reservations

With the rise of multilateral treaty-making as one of the principal ways in which modern international law is developed, there has arisen also the difficulty of securing universal or even widespread agreement on all of a treaty's terms. The fact that multilateral treaties are now frequently adopted either by two-thirds or even simple majority votes is not an answer to this problem. As we have seen above, adoption does not usually, in itself, bind the parties to the treaty or bring it into force.⁷⁰ A state that is dissatisfied with any particular provision that has been adopted as part of a treaty may simply opt not to ratify or accede to it. Thus, adoption of a treaty text by a simple or even two-thirds majority of negotiating parties can be a hollow victory if significant numbers of states choose in the end not to ratify or accede to the treaty and thus fail to become parties.

Treaty regimes seeking to attract universal or near-universal adherence can widen their appeal in a number of ways. One approach is to water down the terms of the treaty to the extent necessary to secure broad-based support. This avenue is of course not particularly desirable as it has the potential to undermine the ultimate utility of the treaty regime. Another course is to permit states to express their consent to be bound by certain provisions of the treaty, but not others. This possibility is contemplated in Article 17 of the *Vienna Convention*, but only where the terms of the treaty so permit or the other parties

⁶⁹ *Ibid.*

⁷⁰ Although it may arguably have legal significance as evidence either of state practice or *opinio juris* supporting the existence of corresponding customary international law: see further Chapter 5, Section E(2).

agree to such “partial” consent. Still another, closely related, approach is to permit a state to become a party to the treaty generally, while at the same time either excluding or modifying the effect on it of certain of the treaty’s provisions. This latter device, widely used in modern multilateral treaty practice, is known as a “reservation.”

A “reservation” is defined in Article 2(d) of the *Vienna Convention* as follows:

“[R]eservation” means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.

Reservations have the advantage of encouraging wide ratification of multilateral treaties, but they exact a price in return. When a state ratifies or accedes to a treaty subject to one or more reservations, it effectively creates an asymmetry in the treaty relationships between the parties. Assume for example that states A and B ratify a treaty without reservation. State C, however, ratifies subject to a reservation excluding, say, the application to it of Articles 20 and 21 of the treaty. The result is that, while all parties are bound by the same treaty, A’s treaty relationship with B is governed by a set of provisions (which includes Articles 20 and 21) that differs from that governing A’s treaty relationship with C (which excludes Articles 20 and 21).

This asymmetry of relationships under the same treaty is potentially problematic in at least two ways. First, it undermines the basic notion of mutuality of obligation which underlies the very idea of a treaty. It is difficult to claim that all parties to the treaty are *ad idem* as to their mutual rights and obligations if some of them have unilaterally modified the terms of the agreement for themselves. The second, and arguably much more serious, potential difficulty is that some reservations might essentially “gut” the treaty of its overall significance. This could occur if, say, the reservation purported to oust the operation of the central obligations imposed by the treaty but left the treaty’s benefits to the reserving party intact.

These concerns had a significant impact on historic treaty practice with respect to reservations. Until the late nineteenth century, treaty law barely admitted the possibility of making reservations. Under the so-called “classical theory” of treaties, the basic rule was essentially contractual, such that only states accepting exactly the same mutual rights and obligations as all other parties were considered parties to a treaty. If a state purported to reserve one of the treaty’s provisions, that

state would only be considered to be in treaty relations with the other parties if they *all* accepted the reservation.⁷¹ Later, during the League of Nations period, the rules were relaxed somewhat to admit the possibility of treaty relations between a reserving party and those other parties that did not object to the reservation, notwithstanding that not *all* parties accepted the reservation.⁷² Subsequent state practice has been more flexible still, as we will now see.

2) *The Reservations to the Genocide Convention Case*

Modern treaty law on the issue of reservations was partially clarified by the International Court of Justice in the *Reservations to the Genocide Convention Case*.⁷³ In that case, the UN General Assembly requested an Advisory Opinion from the Court on certain questions relating to the use of reservations. Controversy had arisen as to whether states should be permitted to lodge reservations and, if so, under what conditions, while ratifying or acceding to the *Genocide Convention*.⁷⁴ In the wake of the atrocities of the Second World War, one of the primary purposes of the *Genocide Convention* was to enshrine universal condemnation of acts of genocide. The prospect that certain states might reserve some provisions of such an elemental treaty was therefore repugnant to many.

Thus, two of the three questions put to the Court were:⁷⁵

- I. Can the reserving State be regarded as being a party to the Convention while still maintaining its reservation if the reservation is objected to by one or more of the parties to the Convention but not by others?
- II. If the answer to Question I is in the affirmative, what is the effect of the reservation as between the reserving State and:
 - (a) The parties which object to the reservation?
 - (b) Those which accept it?⁷⁶

71 See Brownlie, above note 15 at 584.

72 *Ibid.*

73 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion*, [1951] I.C.J. Rep. 15 [the *Reservations Case*].

74 *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 U.N.T.S. 277 (entered into force 12 January 1951) [*Genocide Convention*].

75 The third question concerned the significance of objections to reservations raised by non-parties to the treaty. Essentially, such objections are legally insignificant until the objector becomes a party to the treaty.

76 *Reservations Case*, above note 73 at 16.

In answering these questions, the Court noted the competing principles at stake. On the one hand, the theory of consent required that states not be bound by reservations to which they had not agreed.⁷⁷ In other words, states should not be forced into treaty relations with other states which unilaterally altered the applicable terms of the treaty when ratifying or acceding to it, most particularly where the reservations would have the effect of undermining the purposes of the treaty. On the other hand, the Court noted that widespread ratification, which was one of the principal objectives of treaties such as the *Genocide Convention*, would be virtually impossible to achieve in the absence of some system of reservations.⁷⁸ Accordingly:

The object and purpose of the Convention thus limit both the freedom of making reservations and that of objecting to them. It follows that *it is the compatibility of a reservation with the object and purpose of the Convention that must furnish the criterion* for the attitude of a State in making the reservation on accession as well as for the appraisal by a State in objecting to the reservation.⁷⁹ [Emphasis added]

The Court also emphasized that the permissibility or otherwise of any particular reservation would depend on its compatibility with the terms of the treaty itself. Thus, the answers given by the Court to the questions posed were:

- I. [A] state which has made and maintained a reservation which has been objected to by one or more of the parties to the Convention but not by others, can be regarded as being a party to the Convention if the reservation is compatible with the object and purpose of the Convention; otherwise, that State cannot be regarded as being a party to the Convention.
- II. (a) [I]f a party to the Convention objects to a reservation which it considers to be incompatible with the object and purpose of the Convention, it can in fact consider that the reserving State is not a party to the Convention;
- (b) [I]f, on the other hand, a party accepts the reservation as being compatible with the object and purpose of the Convention, it can in fact consider that the reserving State is a party to the Convention.⁸⁰

77 *Ibid.* at 21.

78 *Ibid.* at 23–24.

79 *Ibid.* at 24.

80 *Ibid.* at 29–30.

This compromise position facilitates widespread adherence to a multilateral treaty by permitting reservations (as long as they are compatible with the treaty's "object and purpose"), while at the same time allowing individual parties to object to reservations they consider repugnant to the treaty's object and purpose (and thus preclude treaty relationships between themselves and the reserving state). While the Court was careful to confine its answers to the specific case of the *Genocide Convention*, its reasoning—at least with respect to the requirement that reservations be compatible with the object and purpose of a treaty—has since been applied to multilateral treaty reservations in general.⁸¹

3) Reservations and the *Vienna Convention*

Given the controversial nature of reservations, the *Vienna Convention's* provisions on the topic are somewhat more detailed than the discrete rulings of the Court in the *Reservations Case*. They also go a little further in relaxing the contract-like rigidity of treaties.

The starting point in the *Vienna Convention* is that reservations are permissible unless prohibited by the treaty or incompatible with the treaty's object and purpose.⁸² Reservations not expressly objected to by other parties are deemed to have been accepted by them in most circumstances.⁸³ In these cases, the accepted reservation *mutually* modifies, as between the reserving and accepting states, the provisions of the treaty to which the reservation relates.⁸⁴ In this way, the reservation has reciprocal effect: the accepting party can take advantage of the reserving party's reservation *vis-à-vis* the reserving party to the same extent as can the reserving party *vis-à-vis* the accepting party. On the other hand, the accepting party's treaty relations with other (non-reserving) parties to the treaty remain unaffected by the reservation or its acceptance.⁸⁵ The net result is a "bilateralization" of the

81 In 1952, the UN General Assembly requested that the Secretary-General conform his practice to the Court's Advisory Opinion in the *Reservations Case* and that he continue to act as depositary of instruments, including reservations and objections to reservations. Rather than take a position on their legal effects, he was requested to communicate the deposit of such instruments to all states concerned so that they might draw their own conclusions as to validity in accordance with the Court's opinion in the *Reservations Case*, above note 73: see UNGA Resolution 598(VI), 12 January 1952.

82 *Vienna Convention*, above note 12, Article 19.

83 *Ibid.*, Article 20.

84 *Ibid.*, Article 21(1).

85 *Ibid.*, Article 21(2).

parties' treaty relations. In order to understand any two parties' mutual rights and obligations under a multilateral treaty where several parties may have formulated reservations or acceptances (or, for that matter, objections), it is necessary to take those reservations, acceptances, and objections into account in a bilateral, reciprocal sense.

It should be noted that the *Vienna Convention's* rules on objections to reservations depart significantly from the ruling in the *Reservations Case*. Perhaps most notable is that nothing in the *Vienna Convention* limits the grounds upon which a party may object to a reservation to incompatibility with the treaty's object and purpose. This is a failure to codify that part of the Court's judgment in the *Reservations Case* where it held that "[t]he object and purpose of the Convention thus limit both the freedom of making reservations *and that of objecting to them*."⁸⁶ This failure appears to have been a deliberate rejection of the Court's view of the limited grounds upon which objections to reservations, as distinct from reservations themselves, may be formulated. The view that prevailed in the drafting of the *Vienna Convention* on this point was that, while it is sensible to limit the scope of unilateral reservations to treaties, there is no corresponding rationale for constraining the ability of states parties to object to reservations which they find unpalatable, for whatever reason. In fact, the basic notion that states should not be forced into treaty relations to which they do not freely consent supports the view that states should be free to object to reservations whether or not such reservations are consistent with the object and purpose of the treaty. Moreover, the practice of states on this matter clearly shows that they do not consider their right to object to be confined in the manner suggested by the *Reservations Case*.⁸⁷

This position also seems consistent with the remainder of the *Vienna Convention's* rules applicable to objections to reservations. According to those rules, even an express objection to a reservation does not necessarily preclude the entry into force of the treaty as between the objecting and reserving state.⁸⁸ Rather, unless the objecting state ex-

86 *Reservations Case*, above note 73 at 24 [emphasis added].

87 For a succinct overview of the considerations that led to rejection, in the *Vienna Convention*, of the *Reservations Case's* limitations on the freedom of states to formulate objections, see Alain Pellet, Special Rapporteur, "Eleventh Report on Reservations to Treaties", International Law Commission, Fifty-eighth Session (2006), U.N. Doc. A/CN.4/574 (10 August 2006) at paras. 60–86. Pellet summarizes the legal position implicit in the *Vienna Convention* thus: "States and international organizations are free to object for any reason whatsoever and that reason may or may not have to do with the non-validity of the reservation": *ibid.* at para. 63.

88 *Vienna Convention*, above note 12, Article 20(4)(b).

pressly indicates that it objects to the entire treaty coming into force between it and the reserving state, an objection to a reservation merely ousts the application as between the two states of the provisions to which the reservation and objection relate, while allowing the remainder of the treaty to come into force between them.⁸⁹ It is difficult to see the utility or desirability of such an outcome if objections to reservations were necessarily premised on the incompatibility of the latter with the object and purpose of the treaty.

On the other hand, even the Court in the *Reservations Case* seemed to contemplate situations where, notwithstanding objections by some parties (presumably on the basis of incompatibility of the reservation with the treaty's object and purpose), a reserving state could be considered a party to the treaty on the basis that its reservation was compatible with the treaty's object and purpose.⁹⁰ What this seeming logical inconsistency underscores is a central shortcoming of the "object and purpose" compatibility criterion, whether applied to reservations or objections: in the absence of provisions to the contrary, the determination of compatibility with the object and purpose of a treaty is a subjective matter left to each party to the treaty. Thus, some parties may consider a reservation to be compatible with the treaty's object and purpose, whereas others may not. In the absence of some authoritative, third-party adjudication of the issue, a reservation may at once be permissible and impermissible—the object and purpose of a treaty being in the eye of the beholder. The result, notwithstanding the *Vienna Convention's* veneration of objective criteria, is a highly subjective and uncoordinated system of treaty reservations and objections thereto.⁹¹

The difficulties posed by this state of affairs are especially acute in the case of multilateral human rights treaties. Unlike most other treaties, which concern reciprocal rights and obligations of states, the primary beneficiaries of human rights treaties are individuals. As a result, states

89 *Ibid.*, Article 21(3). Thus, an objection to a reservation also has reciprocal effect: neither party can rely on the reserved elements of the provision at all. In the result, the principal difference between accepting and objecting to a reservation is that the former allows the treaty to come into force between the reserving and accepting states subject to mutual *modification* of the reserved provision to the extent of the reservation; whereas the latter (presumptively) allows the treaty to come into force between the reserving and objecting states subject to mutual *non-applicability* of the reserved provision to the extent of the reservation.

90 See the Court's answer to the first question posed to it in the *Reservations Case*, above note 73 at 29.

91 Recall the UN General Assembly's 1952 instruction to the Secretary-General to leave it to each state to formulate its own views as to the compatibility of a reservation or objection with a treaty's object and purpose: above note 81.

parties to human rights treaties tend to have fewer direct incentives to object to reservations that are incompatible with their object and purpose. Recognizing this fact, and reacting to the large number of reservations formulated by certain states upon becoming parties to fundamental human rights treaties such as the *International Covenant on Civil and Political Rights (ICCPR)*,⁹² the UN Human Rights Committee⁹³ has famously but controversially taken the view that reservations to certain provisions of the *ICCPR* are impermissible *per se*.⁹⁴ Even more controversially, it has opined that the determination of whether any particular reservation to the *ICCPR* is compatible with its object and purpose should be made by the Committee, rather than by states parties as contemplated in the *Vienna Convention*.⁹⁵ Further still, following the lead of the European Court of Human Rights,⁹⁶ the Committee has taken the view that incompatibility of a reservation with a provision of a human rights treaty does not result in non-applicability of the provision or the treaty to the reserving state; rather, it considers that the reservation is to be severed, leaving the full, unreserved provisions of the treaty applicable to the purportedly reserving state.⁹⁷ A number of states,⁹⁸ and even the ILC,⁹⁹ have objected to

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- 92 *International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976; Article 41 entered into force 28 March 1979) [*ICCPR*].
- 93 The body established under the *ICCPR* to monitor compliance by states with its obligations.
- 94 UN Human Rights Committee, *General Comment 24(52): General comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.6 (1994) at para. 8: "... [P]rovisions in the [*ICCPR*] that represent customary international law (and *a fortiori* when they have the character of peremptory norms) may not be the subject of reservations...."
- 95 *Ibid.* at para. 18: "It necessarily falls to the Committee to determine whether a specific reservation is compatible with the object and purpose of the [*ICCPR*]. This is in part because, as indicated above, it is an inappropriate task for States parties in relation to human rights treaties, and in part because it is a task that the Committee cannot avoid in the performance of its functions...."
- 96 See *Belilos v. Switzerland* (1988), E.C.H.R. Ser. A, No. 132 at para. 60; *Weber v. Switzerland* (1990), E.C.H.R. Ser. A, No. 177 at paras. 38–40. See also *Loizidou v. Turkey (Preliminary Objections)* (1995), E.C.H.R. Ser. A, No. 310 at paras. 90–98.
- 97 *General Comment 24(52)*, above note 94 at para. 17.
- 98 Most notably the United States, the United Kingdom, and France: see (1995) 16 Hum. Rts L.J. 422ff.
- 99 See *Report of the International Law Commission on the Work of its Forty-ninth Session*, UN GAOR, 52nd Sess., Supp. No. 10, UN Doc. A/52/10, (1997) c. V, "Reservations to Treaties" at paras. 124, 127, and 129–57.

most of these positions,¹⁰⁰ but the point is that the current framework (or lack thereof) for implementing the “object and purpose” compatibility criterion—whether in the context of human rights or other treaties—is deeply deficient.

This deficiency may explain why many modern multilateral treaties forestall controversy by either clearly spelling out their object and purpose, or expressly specifying which if any of their provisions may be reserved.¹⁰¹ A good example of this practice is the Ottawa *Landmines Convention*, which expressly provides that no reservation to its provisions whatsoever is permitted.¹⁰² To similar effect is the *Rome Statute of the International Criminal Court*.¹⁰³ Short of such absolute prohibitions on reservations, however, the problems associated with subjective determinations of their validity persist.

Acutely aware of some of these difficulties, the ILC has been preparing, since 1994, a set of “draft guidelines” which, rather than proposing reform of the reservations scheme of the *Vienna Convention*, is intended to “be of assistance for the [reservations] practice of states and international organizations.”¹⁰⁴ While these draft guidelines (also dubbed a “Guide to Practice” by the ILC) remain a work in progress, to date they concern themselves primarily with definitional and procedural issues, such as formalities of communication of reservations, acceptances and objections.¹⁰⁵ On issues of substance, such as the determination of validity of reservations, the draft guidelines provisionally adopted to date remain faithful to the provisions of the *Vienna*

100 See, generally, C.J. Redgwell, “Reservations to Treaties and Human Rights Committee General Comment No. 24(52)” (1997) 46 I.C.L.Q. 390; and S. Marks, “Reservations Unhinged: The *Belilos* Case Before the European Court of Human Rights” (1990) 39 I.C.L.Q. 300.

101 A practice that had been recommended to states by the UN General Assembly in 1952: see UNGA Resolution 598(VI), 12 January 1952.

102 *Landmines Convention*, above note 63, Article 19. Such a blanket prohibition has moreover not impeded the widespread and rapid ratification of the Convention. Opened for signature in Ottawa in December 1997, the Convention came into force on 1 March 1999 and, as of 30 December 2007, has 155 parties.

103 Article 120 of the *Rome Statute of the International Criminal Court*, July 17, 1998, 2187 U.N.T.S. 90 (entered into force 1 July 2002). As of 30 December 2007, the *Rome Statute* had 105 parties.

104 See *Report of the International Law Commission on the Work of its Fifty-Ninth Session*, UN GAOR, 62nd Sess., Supp. No. 10, UN Doc. A/62/10 (2007) c. IV, “Reservations to Treaties” at para. 37. The *Report* summarizes developments on the draft guidelines to date and sets out the text of those draft guidelines that have already been provisionally adopted by the ILC.

105 For the text of the draft guidelines provisionally adopted by the ILC to date, see *ibid.*, sections C.1 & C.2, paras. 153–54

Convention, apparently in deference to the wishes expressed on this issue by states when consulted by the ILC.¹⁰⁶ It therefore appears unlikely that the draft guidelines, even once complete, will significantly improve the current lack of coordination of the *Vienna Convention's* reservations regime.

F. ENTRY INTO FORCE OF TREATIES

1) Coming into Force

Treaties come into force in accordance with the intentions of the parties, either as expressed in the treaty itself or as otherwise manifested. Ratification or accession by a party does not always mean the treaty immediately has legal effect for that (or any other) party. Frequently, the coming into force of a treaty is deferred until some triggering event or date specified in the treaty text itself. The most common event in the case of multilateral treaties is the achievement of a threshold number of ratifications or accessions. Alternatively, a fixed date or, on occasion, a specified lapse of time following the achievement of a threshold number of ratifications or accessions determines the coming into force date of a treaty.

It is of course circular to have the text of a treaty determine the date of the treaty's own coming into force. The *Vienna Convention* addresses this logical impossibility by providing that provisions regulating a treaty's coming into force (as well as "other matters arising necessarily before the entry into force of the treaty") "apply" from the time of the adoption of its text.¹⁰⁷ This is theoretically possible if the negotiating parties to the treaty are assumed to have intended such provisions to have immediate effect pending the formal coming into force of the substance of the treaty.¹⁰⁸

In the event the treaty contains no "triggering" provisions, and in the absence of any agreement on the issue among the negotiating states, the treaty is deemed to come into force once *all* negotiating states have expressed their consent to be bound.¹⁰⁹

106 *Ibid.*, section A, para. 37.

107 *Vienna Convention*, above note 12, Article 24(4).

108 See also *ibid.*, Article 25 for the provisional application of other treaty provisions upon the consent of the negotiating states.

109 *Ibid.*, Article 24(2).

In the case of a party ratifying or acceding after the treaty has come into force, such party is immediately bound unless the instrument of ratification or accession, or the treaty, provide otherwise.¹¹⁰

2) Obligations Pending Entry Into Force

A question that frequently arises is whether a signatory that has not yet expressed its consent to be bound has any obligations under the treaty. A related question is whether a party that has expressed its intent to be bound has any obligations under the treaty pending its entry into force. From a policy perspective the answers to these questions are important, as holding that obligations arise before expression of consent to be bound or prior to the treaty's coming into force has the potential to obliterate the legal significance of both events.

It appears that no positive obligations of performance of the treaty's terms arise in either of these situations.¹¹¹ On the other hand, there is a general good faith obligation in such situations "to refrain from acts that would defeat the object and purpose" of the treaty.¹¹² While there is some ambiguity as to the precise extent of such an obligation or the consequences of its breach, it appears to be principally negative in nature. That is, it is aimed at prohibiting acts that would frustrate or impede either the coming into force of the treaty or its future performance (by parties) once it comes into force.¹¹³ It should be noted that there is some uncertainty as to the existence of a rule analogous to Article 18 of the *Vienna Convention* in customary international law.¹¹⁴

3) Registration

One formality following the entry into force of a treaty that is of considerable significance to its enforceability is its registration with, and subsequent publication by, the Secretariat of the United Nations. The obligation to register is set out both in the *Vienna Convention*¹¹⁵ and the *Charter of the United Nations*,¹¹⁶ and is said to be necessary to avoid se-

110 *Ibid.*, Article 24(3).

111 Subject, of course, to a contrary intention of the parties: see *ibid.*, Article 25.

112 *Ibid.*, Article 18.

113 *Case Concerning Certain German Interests in Polish Upper Silesia (Merits)*, P.C.I.J. (Ser. A) No. 7 at 30; A. McNair, *The Law of Treaties*, rev. ed. (Oxford: Clarendon Press, 1961) at 199 and 204.

114 See Aust, above note 15 at 94.

115 *Vienna Convention*, above note 12, Article 80(1).

116 *UN Charter*, above note 2, Article 102(1).

cret treaties which might undermine international stability and order.¹¹⁷ An alternative view is that such central registration is important merely as a matter of the “smooth administration of international relations.”¹¹⁸

The penalty for failing to register a treaty with the UN Secretariat is the inability of any of its parties to rely upon it before any UN organ, including the International Court of Justice.¹¹⁹ However, the Court has been at pains to observe that this provision does not undermine the essential validity of the treaty nor does it relieve the parties of their obligations under the treaty.¹²⁰

G. BINDING FORCE AND APPLICATION OF TREATIES

1) *Pacta Sunt Servanda*

The doctrine of *pacta sunt servanda* expresses one of the most basic tenets of international law, to the effect that legal undertakings by international legal subjects must be performed in good faith. In a legal system that depends largely upon freely given consent as the basis of legal obligation, it is axiomatic that fundamental legal consequences will follow upon such free expressions of consent. *Pacta sunt servanda* articulates the most elemental of such consequences in asserting that unconditional consent, even though unilaterally given, cannot unilaterally be withdrawn.

In the specific context of treaties, *pacta sunt servanda* simply means that, once an international legal subject has expressed its consent to be bound by a treaty and the treaty has come into force, the treaty is bind-

117 See Brownlie, above note 15 at 588; Rosenne, above note 32 at 89; Shaw, above note 18 at 832. The requirement of mandatory registration and publication can be traced to Article 18 of the *Covenant of the League of Nations*, which was a response to the perception that a web of secret treaties had helped precipitate the First World War: *Covenant of the League of Nations Adopted by the Peace Conference at Plenary Session, April 28, 1919* (1919) 13 A.J.I.L. Supp. 128. Indeed, American president Woodrow Wilson had insisted, in his “Fourteen Points” concerning the peace negotiations following the First World War, that “there shall be no private international understandings of any kind but diplomacy shall proceed always frankly and in the public view”: see Point 1 of “Woodrow Wilson’s Fourteen Points,” reproduced in M. MacMillan, *Paris 1919: Six Months That Changed the World* (New York: Random House, 2002) at 495–96 (Appendix).

118 See Rosenne, *ibid.* at 398–99; McNair, above note 113 at 185–86.

119 *UN Charter*, above note 2, Article 102(2).

120 See, for example, *Qatar v. Bahrain*, above note 54 at 122.

ing on that subject and must be performed by it in good faith. In other words, even a sovereign state cannot invoke its sovereignty to renege on its treaty obligations. Thus, Article 26 of the *Vienna Convention* sets out the most essential precept of treaty law:

Pacta Sunt Servanda

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

While enshrined as a matter of treaty law in the *Vienna Convention*, the *pacta sunt servanda* principle is (again, somewhat ironically) first and foremost a rule of customary international law. In fact, it is so well established and so essential to the whole architecture of the international legal order that it could be considered a pre-eminent example of a rule of *jus cogens*, or a customary rule from which no derogation is permissible.¹²¹

On its face, such an uncompromising rule is a serious derogation from the principle of consent and the sovereignty of states. If one of the attributes of sovereignty is the competence to create or modify binding obligations through the expression of consent, why should such competence come to an end once consent has been expressed at a particular point in time? In other words, how can a true sovereign fetter its own sovereignty to the point of relinquishing its ability to withdraw consent or even express a contrary or conflicting intention at some future point in time?

At least two answers to these questions can be suggested, the one theoretical and the other practical. Theoretically speaking, there would be no conflict between the principle of consent and *pacta sunt servanda* if consent were viewed as being given with foreknowledge that, once given, it is irrevocable. In other words, a sovereign state consents not only to the content of a treaty but also to its future binding effect.

More practically speaking, however, a treaty could only ever be considered a source of binding rules if the parties to it are in fact bound, that is, not free to release themselves from their obligations at will. In other words, displacing the seemingly rigid *pacta sunt servanda* principle would reduce international treaties to an ever-changing, never truly

121 But see J. Crawford, *The Creation of States in International Law*, 2d ed. (Oxford: Oxford University Press, 2006) at 100, where the author limits peremptory norms to substantive, as opposed to “structural,” rules, and excludes the *pacta sunt servanda* principle from the former. This view appears to turn on an exclusive distinction being drawn between *impermissibility* and *logical impossibility* of derogation: however, it is not clear to this author why a rule may not be non-derogable on either or both grounds.

binding set of contingent “obligations” that could hardly be considered a source of international law in any practical sense at all.

In any event, the seeming rigidity of the *pacta sunt servanda* principle must be understood in light of the fact that it is always open to states to provide, in their treaty, that the treaty will either come to an end, or that one or more of the parties may either terminate, suspend, or withdraw from it, at a certain future time or upon the occurrence of a certain event. Similarly, nothing prevents the parties to a treaty from subsequently agreeing in another treaty either to amend, terminate, or release one or more of the parties to the former treaty. Further, as we shall see below, certain occurrences can also give rise to a legal termination or suspension of treaty obligations by operation of law, regardless of whether the parties have so provided in the treaty itself or subsequently agreed to such effect.

Thus, *pacta sunt servanda* really means that a valid treaty in force continues to bind the parties to it and must be performed by them in good faith until it is either terminated or suspended in accordance with the treaty’s own terms, pursuant to the consent of the parties to it, or by operation of the law of treaties.

That a treaty must be performed in good faith usually entails executive or legislative action by each party to the treaty within its own domestic legal or constitutional system in order either to ensure that the party is able to perform the obligations assumed under the treaty or to give the treaty domestic legal effect.¹²² It is this threshold obligation of performance—domestic legal steps enabling further performance or execution of the treaty—that can frequently give rise to difficulties. For example, a duly authorized representative of a state may express the state’s consent to be bound by a treaty, but due to changes in government, policy, or domestic law, some essential element of the state’s domestic legal order either refuses or is unable to proceed with performance of the treaty. The question that arises is whether such domestic legal impediments have any effect on the state’s legal obligation to perform the treaty in good faith.

The answer to this question will obviously depend on one’s legal frame of reference. A state’s government will presumably be required to adhere to the dictates of its own domestic legal order, including but not necessarily limited to the requirements of its constitution. However, when viewed from the perspective of international treaty law and of the principle of *pacta sunt servanda*, such domestic legal impediments

122 See Chapter 6 for a description of the requirements imposed in this regard by Canadian constitutional law.

to implementation or performance provide no escape from the basic international legal obligation of good faith performance.¹²³ In other words, a failure to perform a binding treaty obligation, even due to a domestic constitutional obstacle, will constitute an international legal wrong potentially giving rise to an international claim for reparations by other parties to the treaty.

This basic and necessary corollary of the *pacta sunt servanda* principle has been codified in unconditional terms in Article 27 of the *Vien-na Convention*:

Internal Law and Observance of Treaties

A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to Article 46.¹²⁴

The necessity of such a rule can be readily understood by considering the likely results of its non-existence. If a state could invoke provisions of its internal law in justification of its failure to perform a treaty, this would be an open invitation to abuse. A state wishing to subtract itself from a treaty obligation could do so unilaterally merely by engineering, through its own domestic legal order (one over which it has sovereign control), a conflict with the treaty's requirements. If the objective of treaty law is to provide a stable basis upon which states can build reliable relationships of mutual obligation, subjecting these obligations to such a transparent avoidance mechanism would quickly undermine the entire treaty system. No state could rely upon any other state's expression of consent to be bound because it would always be subject to the overriding effect of that other state's evolving internal legal system. It would be the practical equivalent of allowing a state to withdraw from its treaty obligations at will.

123 *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, Advisory Opinion* (1932), P.C.I.J. (Ser. A/B) No. 44 at 24.

124 The operation and significance of Articles 27 and 46 should not be conflated. Article 27 provides that a treaty, *once validly concluded and in force*, must be performed in good faith notwithstanding a conflict with a party's domestic legal system. Article 46, by contrast, provides that a state may not assert that its consent to be bound by the treaty was expressed in violation of its domestic law as a means of invalidating that consent, unless the violation was fundamental and manifest. In other words, Article 27 expresses the supremacy of treaty law over domestic law in matters of *treaty performance*, whereas Article 46 expresses the supremacy of treaty law over domestic law (with a narrowly defined exception) in matters of *valid treaty-making*.

Thus, the law of treaties asserts that domestic law cannot dictate the existence or extent of international legal obligations undertaken in good faith by way of treaty. This is not the same thing as saying that states must violate their internal law in order to perform any conflicting treaty obligations they may have. International law rarely dictates how a state must behave within its domestic legal order. Rather, treaty law provides that a conflicting domestic legal rule provides no justification for a failure to perform treaty obligations, meaning that if a state chooses to respect its domestic law by breaching its treaty obligations, it will be internationally responsible to other parties to the treaty for its breach.¹²⁵

2) Temporal and Territorial Application

Given that states are sovereign entities, it is entirely possible for them to consent to be bound by a treaty which provides for its own retroactive effect. However, it is a general principle of law that agreements are presumed to apply prospectively and not to affect past relations or obligations.¹²⁶ Thus, if it is the intention of the parties to a treaty that it should have retroactive effect, it is incumbent upon them to make that intention plain. Without a clear indication of such intention in the treaty or in the circumstances of its conclusion, a treaty only affects the relations of the parties from the date of its entry into force.¹²⁷

Similarly, unless a contrary intention appears from the terms of a treaty or from the circumstances surrounding its conclusion, its terms are presumed to apply to the entire territory of each of the parties to it.¹²⁸ This is of particular importance in the case of federal states which are parties to treaties. In such cases and again absent any clear indications to the contrary, the treaty will apply to and bind the entire federal state—as a single international legal subject—and not merely some of its constituent federal units.

As for the possible extraterritorial scope of a treaty's obligations—that is, its legal effect beyond the national territory of the parties to the treaty—this may raise issues relating to impermissible exercises of extraterritorial jurisdiction. Whether this is the case or not will depend on the extent to which such purported extraterritorial

125 See Section J, below in this chapter, and see further Chapter 12.

126 See Reuter, above note 15 at 100.

127 *Vienna Convention*, above note 12, Article 28.

128 *Ibid.*, Article 29.

scope interferes with the sovereign independence of non-parties to the treaty within their own legitimate spheres of jurisdiction.¹²⁹

3) Successive Treaties

As a general rule, nothing prevents parties to one treaty from concluding a subsequent treaty dealing with similar or the same subject matter as the original treaty.¹³⁰ Indeed, as we have seen, it is through the recognition of this freedom that the principle of consent is reconciled with the principle of *pacta sunt servanda*.¹³¹

The effect of the conclusion of such a subsequent treaty depends upon:

- 1) the identity of the parties to it in relation to the identity of the parties to the original treaty;
- 2) the degree of overlap between the two treaties;
- 3) the compatibility or incompatibility of the overlapping provisions of the two treaties; and of course
- 4) any express or implied terms of the treaties addressing the potential for such overlap.

The clearest case is that of a subsequent treaty, between precisely the same set of parties, which expressly supplants or amends the terms of the prior treaty.¹³² Equally clear is the situation where the subsequent treaty, again between the same set of parties, expressly provides that it is subject to or not incompatible with the prior treaty. In each case it is the express terms of the subsequent treaty that prevail—in the former case, to displace the terms of the original treaty to the extent expressly provided; in the latter case, to preserve them.¹³³

However, many treaties address similar subject-matter as prior treaties without expressly specifying the effect of such overlap; and rarely are the parties to the subsequent treaty exactly the same as those to the original. It is in these cases that rules are required to clarify the legal effects of successive, incompatible treaties.

129 See further Chapter 8.

130 *Vienna Convention*, above note 12, Article 30.

131 See Section G(1), above in this chapter.

132 Article 39 of the *Vienna Convention*, above note 12, provides that a treaty may be amended by agreement between the parties to it. Similarly, Article 54 of the *Vienna Convention* provides that a treaty may be terminated by consent of all the parties.

133 *Ibid.*, Articles 30(2) & (3).

Again, the governing principle here is that the later treaty governs the earlier, but only with respect to relations between parties to the later treaty. Thus, if a subsequent treaty is silent as to the effect of any incompatibility between its provisions and those of a prior treaty, the subsequent treaty, as between the parties to it, impliedly abrogates any incompatible terms of the prior treaty.¹³⁴ However, non-parties to the subsequent treaty continue to be governed by the terms of the prior treaty. Similarly, as between one party to the prior treaty which has consented to be bound by the later treaty, and another party to the prior treaty which has not, the prior treaty's terms will continue to govern.¹³⁵

A common illustration of the sometimes complicated relationship between successive treaties governing the same subject matter between similar but not identical sets of parties is the interplay between the four 1958 *Geneva Conventions* on various aspects of the law of the sea,¹³⁶ and the 1982 *United Nations Convention on the Law of the Sea*.¹³⁷ Many but not all states parties to the latter are parties to some or all of the former. As we shall see further below,¹³⁸ the subject matter of the latter is also in many cases similar but not identical to that of the former. Understanding the mutual legal obligations of any two states in this context therefore requires careful consideration of their mutual membership in any of the relevant treaty regimes and of the degree of incompatibility between those regimes, in accordance with the rules set out in Article 30 of the *Vienna Convention*.

In considering the legal effects of successive treaties between overlapping but not identical sets of parties, it may be helpful to bear certain terminological distinctions in mind. It is only where all the parties to a treaty subsequently agree to bring it to an end that all of its provisions cease to have effect; it is then said that the treaty has been *terminated*.¹³⁹ Where all or, where permitted by the treaty, some of the parties to a treaty subsequently agree to change its terms for all parties, the treaty

134 *Ibid.*, Article 30(3).

135 *Ibid.*, Article 30(4).

136 *Convention on the Territorial Sea and the Contiguous Zone*, 29 April 1958, 516 U.N.T.S. 205 (entered into force 10 September 1964); *Convention on the High Seas*, 29 April 1958, 450 U.N.T.S. 11 (entered into force 30 September 1962); *Convention on Fishing and Conservation of the Living Resources of the High Seas*, 29 April 1958, 559 U.N.T.S. 285 (entered into force 20 March 1966); *Convention on the Continental Shelf*, above note 39.

137 *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 U.N.T.S. 3 (entered into force 16 November 1994).

138 See Chapter 7, Section C.

139 *Vienna Convention*, above note 12, Article 54.

is said to be *amended*.¹⁴⁰ Where only some parties to a multilateral treaty subsequently agree to change its terms as between themselves alone, it is said that the treaty has been *modified* as between those parties.¹⁴¹ In the latter case, much the same limitations are imposed on the ability of certain parties to mutually modify the terms of a multilateral treaty as are imposed on parties purporting to accede to or ratify a multilateral treaty subject to reservations.

4) Treaties and Non-Parties

Given their essentially consensual nature, it is a fundamental principle that treaties create neither rights nor obligations for non-parties. If it were otherwise, the entire apparatus for the giving and ascertainment of consent to be bound by treaty obligations would be largely superfluous. The principle of the sovereign equality of states would also be jeopardized as some states, by concluding treaties, could affect the legal positions of others without their consent. The *Vienna Convention* thus consecrates as a “general rule” the proposition that treaties do not apply to non-parties.¹⁴²

There remains some controversy over possible exceptions to this general principle.¹⁴³ For example, the situation where the substance of a treaty’s provisions enter the corpus of customary international law is sometimes characterized as an exception to the non-party rule. Of course, it is nothing of the kind as the legal obligation for the non-party flows from the customary status of the rule and not the existence of the treaty between other states.¹⁴⁴ The special case of Article 2(6) of the *UN Charter*, which appears to impose a duty on states members to ensure that non-members respect the principles of the UN insofar as necessary to maintain international peace and security, is also sometimes cited as an example of a treaty provision that imposes duties of compliance on non-parties.¹⁴⁵ However, again, any such effect is more likely the result

140 *Ibid.*, Article 40.

141 *Ibid.*, Article 41.

142 *Ibid.*, Article 34.

143 See, generally, Brownlie, above note 15 at 599–600; Reuter, above note 15 at 121–29.

144 See *Vienna Convention*, above note 12, Article 38, which foresees such a possibility. See further Chapter 5, Section E(2).

145 See, for example, H. Kelsen, *The Law of the United Nations: A Critical Analysis of its Fundamental Problems* (New York: F.A. Praeger, 1951) at 106–10.

of the passage of the UN principles into the body of universally applicable customary international law.¹⁴⁶

There is some authority, however, for the proposition that treaties may create enforceable rights, if not obligations, for non-parties. In the *Free Zones Case*,¹⁴⁷ the issue was a term of the *Treaty of Versailles* of 1919, to which France was a party but Switzerland was not. Article 435 of the *Treaty* provided that both states were to settle the status of certain “free zones” on their common border. When negotiations between the two states failed, France unilaterally abrogated the status of the free zones. One issue put before the Permanent Court of International Justice was whether the *Treaty of Versailles* could impose an obligation on Switzerland to concur in such abrogation. The Court confirmed that such could only be the case if Switzerland, a non-party to the *Treaty*, had accepted such an obligation. However, the Court went on to suggest that the same was not necessarily true in the case of the conferral of rights by treaty on a non-party:

It cannot be lightly presumed that stipulations favourable to a third State have been adopted with the object of creating an actual right in its favour. There is however nothing to prevent the will of sovereign States from having this object and this effect. The question of the existence of a right acquired under an instrument drawn between other States is therefore one to be decided in each particular case: it must be ascertained whether the States which have stipulated in favour of a third State meant to create for that State an actual right which the latter has accepted as such.¹⁴⁸

This statement seems to suggest, albeit ambiguously, that an enforceable right can be created unilaterally by parties to a treaty in favour of a non-party.¹⁴⁹ Such a proposition should not seem too startling given that international law has come to recognize that unilateral undertakings by states can give rise to obligations enforceable by recipients of such undertakings.¹⁵⁰ The difficulty, however, is whether such a result is a treaty right or obligation properly so-called.

As seen above, the *Vienna Convention* has adopted the conventional view that the creation of rights and obligations for non-parties requires,

146 Brownlie, above note 15 at 599.

147 *Case of the Free Zones of Upper Savoy and the District of Gex (France v. Switzerland)* (1932), P.C.I.J. (Ser. A/B) No. 46 [*Free Zones Case*].

148 *Ibid.* at 147–48.

149 The use of the expression “as such” seems to suggest that the right accepted already exists “as such”; see Brownlie, above note 15 at 600.

150 See Chapter 3, Section D(1).

at least on some level, their consent. Some practical accommodation of the view that the unilateral imposition of obligations is a substantially different matter than the unilateral conferral of benefits has been provided, however. Thus, the imposition of obligations on a non-party requires its express consent, whereas consent to the conferral of rights is presumed unless the contrary is established.¹⁵¹ Thereafter, revocability of unilaterally conferred rights depends on the intent of the conferring states,¹⁵² whereas obligations, once accepted, may only be altered by consent of the parties and the non-party.¹⁵³

H. INTERPRETATION OF TREATIES

1) General Principles: The “Ordinary Meaning” Rule and its Qualifications

This important area is the subject of considerable uncertainty and inconsistency in the practice of international and domestic tribunals called upon to interpret treaties. Based on an early review of the jurisprudence of the International Court of Justice, Fitzmaurice noted at least three dominant schools of thought on the correct approach to treaty interpretation:

- 1) the “intentions of the parties” approach, which seeks out the original intent of the parties by reference to any evidence of such intent, whether textual or extrinsic;
- 2) the “textual” or “ordinary meaning” approach, which focuses on the words used in the treaty itself and gives them their usual and natural interpretation; and
- 3) the “teleological” or “aims and objects” approach, which attempts to give effect to the court’s understanding of the overall or general purpose of the treaty by interpreting its various provisions in conformity with that understanding.¹⁵⁴

All have shortcomings, involve varying degrees of circular reasoning, and overlap to some extent. It appears, moreover, that international tribunals resort from time to time to all of these approaches, either singly

151 *Vienna Convention*, above note 12, Articles 35 & 36.

152 *Ibid.*, Article 37(2).

153 *Ibid.*, Article 37(1).

154 G. Fitzmaurice, “The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points” (1951) 28 *Brit. Y.B. Int’l L.* 1 at 1–2.

or in combination, with little sustained discussion of the appropriateness of doing so.

Notwithstanding this variable practice, the International Law Commission formed the opinion that the textual or ordinary meaning approach is predominant.¹⁵⁵ However, the uncertainty of the topic probably explains why the Commission chose to limit its treatment in the *Vienna Convention* to a statement of very general guiding principles contained in only three articles.¹⁵⁶

Thus, Article 31, the “general rule of interpretation,” refers in the first instance to the “ordinary meaning to be given to the terms of the treaty.” This is a clear reference to the textual approach which privileges, above all else, the natural meaning of the words used in the treaty itself.¹⁵⁷ However, that rule is immediately qualified by the requirement that the terms be interpreted “in good faith,” “in their context,” and in light of the treaty’s “object and purpose.”¹⁵⁸ The latter qualification is obviously reminiscent of the teleological approach described by Fitzmaurice, whereas “context” is defined to include such extrinsic materials as corollary agreements concluded between the same set of parties or other instruments made in connection with the conclusion of the treaty.¹⁵⁹ The reference to context, and arguably the requirement of good faith, therefore appear to point in the direction of the original intentions of the parties.

In addition, subsequent agreements or practices of the parties related to the treaty may be referred to as a guide to its interpretation.¹⁶⁰ This is justifiable in that a treaty ultimately derives its legal force from the consent of the parties to it. They are therefore presumably in the best position to determine, by express agreement or common conduct, the meaning of their own treaty obligations. The same cannot be said,

155 “Report of the International Law Commission on the Second Part of its Seventeenth Session (Monaco, 3–28 January 1966) and on its Eighteenth Session” (UN Doc. A/6309/Rev.1) in *Yearbook of the International Law Commission 1966*, vol. II (New York: United Nations, 1966) at 220 [ILC Report (1966)].

156 *Vienna Convention*, above note 12, Articles 31–33. The latter Article deals with issues of priority should a conflict arise between versions of a treaty that has been authenticated in two or more languages. Subject to contrary agreement between the parties, all official language versions rate equally and are to be reconciled.

157 However, if it is established that the parties intended to attribute a special meaning to a term, that meaning should prevail: *ibid.*, Article 31(4).

158 *Ibid.*, Article 31(1).

159 *Ibid.*, Article 31(2).

160 *Ibid.*, Article 31(3).

however, of the unilateral practice of only some parties to the treaty that is not concurred in by the others.¹⁶¹

Finally, resort may be had in cases of ambiguity or absurdity to other extrinsic materials such as the preparatory work of the treaty (often referred to by international lawyers as the *travaux préparatoires*).¹⁶² Such preparatory work might include drafts, comments of governments, and other evidence relating to the process of treaty-making. Resort to such inconclusive material is generally resisted, however, unless made necessary by the obscurity of the text finally adopted in the treaty.¹⁶³

It can thus be seen that the textual or ordinary meaning approach to treaty interpretation is merely a point of departure and that, in fact, elements of all three approaches described by Fitzmaurice are present in the *Vienna Convention's* rules of treaty interpretation. While the result may seem untidy at best and unprincipled at worst, it nevertheless reflects the fundamental lack of clarity in this evolving area of treaty law.¹⁶⁴

2) The Intertemporal Rule

One particular problem of treaty interpretation that frequently arises is whether and how a treaty's meaning may evolve over time. This is an important issue as treaties are, depending on their terms and surrounding circumstances, of potentially indefinite duration. Present rights and obligations of states are frequently affected by treaties concluded in the relatively distant past. It is in this context that the doctrine of intertemporal law plays an important role in treaty interpretation.

The doctrine of intertemporal law provides that a legal right or obligation (whether or not set out in a treaty) must be appreciated in light of the law applicable at the time it arose, and not of the law applicable at the time when a dispute in respect of such right or obligation arises.¹⁶⁵ The doctrine is broadly applicable to any situation where the determination of current rights or obligations depends on a legal

161 See, for example, the case of *Jesse Lewis (United States) v. Great Britain (David J. Adams)* (1921), 6 R.I.A.A. 85.

162 *Vienna Convention*, above note 12, Article 32.

163 This explains the description of this provision in the *Vienna Convention* as a "supplementary means of interpretation."

164 See, for example, the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Second Phase), Advisory Opinion*, [1950] I.C.J. Rep. 221, where the Court, while nominally applying the ordinary meaning rule, also refers to the general practice of states and the overall purpose of the treaty when read as a whole in interpreting it.

165 See, for example, G. Schwarzenberger, *International Law*, vol. 1, 3d ed. (London: Stevens & Sons, 1957) at 23; J.H.W. Verzijl, *International Law in Historical Perspec-*

assessment of past events or circumstances.¹⁶⁶ In the context of treaty law, such past events or circumstances include, of course, the entry into force of a treaty between the parties at a time when its terms may have borne a different legal meaning than today. The basic rationale of the rule has been explained thus:

... [I]t is not permissible to import into the legal evaluation of a previously existing situation, or of an old treaty, doctrines of modern law that did not exist or were not accepted at the time, and only resulted from the subsequent development or evolution of international law.¹⁶⁷

The *locus classicus* of the doctrine is generally considered to be the explanation for its application in the award of Judge Huber in the *Island of Palmas Case*.¹⁶⁸ The issue in that case was whether the Netherlands had established and maintained sovereignty over the Island of Palmas, to the exclusion of Spain, up to the date (1898) when Spain had purported to alienate the island by treaty to the United States. In assessing the argument that Spain had discovered, and thereby established its sovereignty over, the island in the early sixteenth century, Judge Huber applied the following rule:

[A] juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled. The effect of discovery by Spain [of the Island of Palmas] is therefore to be determined by the rules of international law in force in the first half of the sixteenth century....¹⁶⁹

Judge Huber was not specifically considering the application of the intertemporal rule to treaty interpretation; however, the International Court of Justice has widely endorsed the doctrine he expounded in the *Island of Palmas* case in a variety of contexts. For example, the International Court of Justice applied the doctrine in the treaty context in

tive, Modern International Law Series No. 12, vol. 8 (Leiden: A.W. Sijthoff, 1976) at 296; Brownlie, above note 15 at 124–25; and Shaw, above note 18 at 429–30.

166 G. Fitzmaurice, “The Law and Procedure of the International Court of Justice, 1951–54: General Principles and Sources of Law” (1953) 30 Brit. Y.B. Int’l L. 1 at 5–8.

167 *Ibid.* at 5 (footnote omitted from quotation).

168 *Island of Palmas Case (Netherlands v. United States of America)* (1928), 2 R.I.A.A. 829. See also the *Decision of the Permanent Court of Arbitration in the matter of the Maritime Boundary Dispute between Norway and Sweden (Grisbadarna Case)* (1909), (1910) 4 A.J.I.L. 226 at 231–32.

169 *Island of Palmas Case*, *ibid.* at 845.

the *Case Concerning Rights of Nationals of the United States of America in Morocco*.¹⁷⁰ There the Court had to assess the significance of a number of treaties concluded between the United States and Morocco. It did so in light of the intertemporal rule as follows:

The Treaty of 1836 replaced an earlier treaty between the United States and Morocco which was concluded in 1787. The two treaties were substantially identical in terms and Articles 20 and 21 are the same in both. Accordingly, in construing the provisions of Article 20 ... it is necessary to take into account the meaning of the word “dispute” at the times when the two treaties were concluded. For this purpose it is possible to look at the way in which the word “dispute” or its French counterpart was used in the different treaties concluded by Morocco. ... It is clear that in these instances the word was used to cover both civil and criminal disputes. ... It is also necessary to take into account that, at the times of these two treaties, the clear-cut distinction between civil and criminal matters had not yet been developed in Morocco.¹⁷¹

An important qualification to the doctrine’s application in the treaty context is set out in the Court’s judgment in the *Aegean Sea Continental Shelf Case*.¹⁷² As seen above, that case concerned a dispute between Greece and Turkey as to the maritime boundary dividing their respective continental shelves. The Court’s jurisdiction was said by Greece to be founded in part upon the 1928 *General Act for Pacific Settlement of International Disputes*, to which both Greece and Turkey were parties.

Turkey objected to the Court’s jurisdiction in part on the basis that Greece, in acceding to the *General Act*, had formulated a reservation excluding “disputes relating to the territorial status of Greece.” Turkey sought to rely upon this reservation, whereas Greece urged a restrictive reading of the reservation due to the “historical context in which that expression was incorporated into the reservation.”¹⁷³ In particular Greece urged that, since the concept of the continental shelf had yet not emerged in international law at the time of the formulation of the reservation, the reservation’s reference to “territorial status” could not be read to include disputes relating to the status of the continental shelf.

The Court rejected this argument on the following basis:

170 *Case Concerning Rights of Nationals of the United States of America in Morocco (France v. United States of America)*, [1952] I.C.J. Rep. 176 [*US Nationals in Morocco Case*].

171 *Ibid.* at 189.

172 *Aegean Sea Continental Shelf Case*, above note 34.

173 *Ibid.* at 28–29.

Once it is established that the expression “the territorial status of Greece” was used in Greece’s instrument of accession as a generic term denoting any matters comprised within the concept of territorial status under general international law, the presumption necessarily arises that its meaning was intended to follow the evolution of the law and to correspond with the meaning attached to the expression by the law in force at any given time. This presumption ... is even more compelling when it is recalled that the 1928 Act was a convention for the pacific settlement of disputes designed to be of the most general kind and of continuing duration, for it hardly seems conceivable that in such a convention terms like “domestic jurisdiction” and “territorial status” were intended to have a fixed content regardless of the subsequent evolution of international law.¹⁷⁴

Accordingly, the Court concluded that the intent of parties (including Greece) to the *General Act* was that it should have *continuing* effect and that its terms should therefore receive a *continuing* interpretation in the light of *evolving* international law. Greece’s argument that “territorial status” could not have referred to the concept of the continental shelf in 1928 was thus rejected as irrelevant.

This “continuing” aspect of the intertemporal rule simply flows from the fact that most treaties, at least those of a norm-creating character, continue to “speak” during their lifetime. Thus, the Court held in the *South West Africa Case*, for example, that the operation of the mandates and trust systems established under the *Covenant of the League of Nations* and under the *UN Charter* had to be interpreted and applied in the light of current developments in the general international legal framework, within which those instruments continued to operate.¹⁷⁵

Finally, note that the intertemporal doctrine also has implications for the very process of treaty formation itself, as illustrated in the Court’s judgment in the *Case Concerning Right of Passage over Indian Territory*.¹⁷⁶ In that case Portugal relied on a late eighteenth century treaty concluded between it and local Indian rulers in which the latter had conferred on Portugal sovereignty over certain enclaves as well as a right of passage to and from such enclaves. India objected to reliance on this treaty in part because it had not been validly concluded. The Court rejected this argument thus:

174 *Ibid.* at 32.

175 *South West Africa Case*, above note 15 at 31.

176 *Case Concerning Right of Passage over Indian Territory (Portugal v. India) (Merits)*, [1960] I.C.J. Rep. 6 [*Right of Passage Case*].

The Court does not consider it necessary to deal with these and other objections raised by India to the form of the Treaty and the procedure by means of which agreement upon its terms was reached. It is sufficient to state that the validity of a treaty concluded as long ago as the last quarter of the eighteenth century, in the conditions then prevailing in the Indian Peninsula, should not be judged upon the basis of practices and procedures which have since developed only gradually....¹⁷⁷

Thus, the validity of the conclusion of a treaty, and not only its interpretation, is to be judged not by reference to current treaty law but rather the legal circumstances prevailing at the time of that conclusion.

I. INVALIDITY OF TREATIES

1) Introduction

There may be instances in which all of the prescribed procedures and formalities for bringing a treaty into force have been complied with, and yet there remains some fundamental legal flaw that goes to the very root of the treaty's validity. As treaties are based on consent freely given by states in the exercise of their sovereign will, the most serious such flaws are those that in some way taint the validity of that consent. Thus, customary international law and the *Vienna Convention* provide for a number of bases of "invalidity of treaties."¹⁷⁸

Given their fundamental effects, to be reviewed below, the recognition of bases of invalidity could potentially undermine the entire treaty system. This would particularly be so if it were open to states to invoke too readily a basis of invalidity in order to evade treaty obligations duly undertaken. The reliability of treaty engagements would always be open to question and the *pacta sunt servanda* principle thus seriously jeopardized. It is for this reason that the recognized bases of invalidity of treaties are quite narrow in scope and subject to strict application. Furthermore, it is generally considered that the bases of invalidity enumerated in the *Vienna Convention* are exhaustive—there

¹⁷⁷ *Ibid.* at 37.

¹⁷⁸ *Vienna Convention*, above note 12, Articles 46–53. As for the customary status of these rules, it has been observed that there is very little state practice in this area. However, the rules set out in Articles 46–53 are merely elementary extensions or corollaries of fundamental international legal principles, such as the requirement of consent, that have a solid basis in customary international law: see Reuter, above note 15 at 173.

are no other circumstances in which a state may assert that its apparent consent to be bound should be set aside.¹⁷⁹

2) Bases of Invalidity

a) Domestic Legal Competence to Conclude Treaties

The first basis of invalidity is particularly narrow because it relies upon provisions of domestic law of the apparently consenting state to invalidate that consent. This comes perilously close to conflicting with the basic principle that domestic law provides no excuse for failing to perform a treaty obligation,¹⁸⁰ but in fact the two issues are quite distinct. The obligation to perform treaty obligations notwithstanding domestic legal impediments, codified in Article 27 of the *Vienna Convention*, relies upon the existence of a valid treaty in force for, and thus binding upon, the parties. Successful invocation of a domestic legal impediment to the validity of a state's expression of consent to be bound, however, goes to the very act of creation of a valid and enforceable treaty obligation. Technically, therefore, there is no conflict between a treaty obligation and a domestic legal obligation because the former has not truly come into existence.

Nevertheless, the general antipathy in international law towards subordinating international to domestic legal obligations, and the very real policy concerns underlying that antipathy,¹⁸¹ have resulted in very little scope for invalidating a treaty on this basis. In fact, Article 46 of the *Vienna Convention* states as the general rule that a state may *not* rely upon the fact that its consent to be bound by a treaty was expressed in violation of its domestic law, except in specific circumstances.

There are essentially two such circumstances. The first is where the domestic rule violated by the expression of consent was "manifest" and of "fundamental importance." A "manifest" violation of domestic law is defined as one that would be "objectively evident" to other states in the normal course of events.¹⁸² The chief difficulty with this definition lies in its indeterminacy. Moreover, what constitutes a domestic rule of "fundamental importance" remains undefined. The obvious intent is at least to exclude invocation by a state of technical breaches of its domestic law in order to escape treaty obligations. It also seems to be generally recognized that violations of a constitutional order would be fundamental although it is open to question whether all such violations

179 *Vienna Convention*, above note 12, Article 42(1).

180 *Ibid.*, Article 27; and see Section G(1), above in this chapter.

181 See, generally, *ibid.*

182 *Vienna Convention*, above note 12, Article 46(2).

would be plainly obvious to other states. An example of a fundamental violation that would presumably be manifest would be an attempt by a Canadian province, or clearer still, a Canadian municipality, to conclude a treaty with a foreign state.¹⁸³

However, it remains unclear just how “manifest” or “fundamental” a rule must be in order to qualify as an exception to the general rule that domestic law is irrelevant to the validity of treaty formation. In these circumstances it is probably necessary to refer for guidance to the underlying policy of the rule and its exceptions. In addition to the maintenance of stability in treaty relations, there is a clear need for predictability and reasonable reliance between states when concluding treaties. Thus, if a state reasonably appears to express its consent to be bound in the normal way, other states ought to be able to rely on that appearance in good faith. The good faith requirement means, however, that if such other states knew or ought to have known, because of its notorious character, of some domestic legal impediment to the state’s capacity to express its consent, their reliance is no longer reasonable. The International Law Commission, in preparing what has since become Article 46 of the *Vienna Convention*, took the view that such a principled approach, accommodating the legitimate and reasonable interests of all parties, was supported in state practice and the decisions of international tribunals.¹⁸⁴

The second exception, narrower still, concerns restrictions on a state representative’s authority to express consent on behalf of the state. In general, a failure by the state representative to observe such restrictions is not a basis for vitiating that consent.¹⁸⁵ For example, if a state representative is only authorized to ratify a treaty subject to the formulation of a reservation, but the treaty is ratified by the representative unconditionally, that ratification and the treaty will be valid. This flows from elementary principles of agency and the full powers of the state representative. However, if the restriction on the representative’s authority was previously notified to the other negotiating parties, his or her failure to observe it can then be invoked by the state to invalidate its consent. Again it will be seen that this approach seeks to preserve the stability of treaties to the fullest extent possible while recognizing

183 This would violate the basic constitutional position in Canada that only the federal government has the power to conclude treaties on behalf of Canada: see below Chapter 6, Section C(3)(c)(i).

184 ILC Report (1966), above note 155 at 240–42.

185 *Vienna Convention*, above note 12, Article 47.

that no unfairness would result to other states by holding them to a situation of which they had actual knowledge.¹⁸⁶

b) Mistake of Fact

Error is probably the most widely accepted basis for invalidating a state's consent to be bound by a treaty.¹⁸⁷ It is generally recognized in customary international law and is now expressly stated in Article 48 of the *Vienna Convention*. In particular, a state's mistaken belief in a fact or situation at the time of the conclusion of a treaty will invalidate its expression of consent to be bound by that treaty, but only where that fact or situation was an essential basis of its consent.¹⁸⁸

The basis of this rule is simply the requirement of genuine consent in treaty law. If a state's consent to the terms of a treaty was premised on a non-existent state of affairs, there has in fact been no true consent at all. The difficulty, of course, is in establishing the "essential" connection between the mistaken belief and the expression of consent, and this may be an area open to potential abuse. However, a certain rigidity is introduced to the rule in providing that a state cannot invoke its error if it contributed to it or if the state ought in the circumstances to have recognized its mistake.¹⁸⁹ Thus, permissible errors are errors of fact, not of law. Moreover, states will be held to an objective standard in relying upon their mistakes of fact, thereby reducing the likelihood of undue exploitation of the rule.

c) Fraud

Closely related to error but involving the added element of deceit by another state is the case of fraud. Article 49 of the *Vienna Convention* provides that where a state has been induced to enter into a treaty by the fraudulent conduct of another negotiating party, that state can invalidate its consent to be bound by the treaty. If the fraud relates to an essential fact, there will be almost complete overlap with the concept of error. It may thus be wondered whether there is any need for a separate basis of invalidity in the case of fraud.

186 ILC Report (1966), above note 155 at 243.

187 See Reuter, above note 15 at 176. See also Brownlie, above note 15 at 590.

188 *Vienna Convention*, above note 12, Article 48(1).

189 *Ibid.*, Article 48(2). For example, a state cannot escape its mistaken recognition of another state's sovereignty over territory if its mistake is attributable to its own poorly drawn map: see *Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)* (Merits), [1962] I.C.J. Rep. 6 at 57–58, Separate Opinion of Fitzmaurice J.

It has been noted, however, that the act of fraud itself furnishes virtually conclusive proof that the misrepresented fact is an “essential basis” of the defrauded state’s consent, thus easing the injured state’s burden of proof in this regard.¹⁹⁰ Otherwise, the defrauding state would have had little to gain from its deceit. Further, the act of fraud may itself be an internationally wrongful act that will entail consequences beyond the validity of the treaty.¹⁹¹ This may in part explain why there are few if any precedents disclosing fraud in the treaty-making context.¹⁹²

d) Bribery

Bribery or “corruption” of a state representative is also recognized in the *Vienna Convention* as a basis for invalidating a state’s consent to be bound by a treaty, as long as there is a causal relationship between the act of corruption and the representative’s act of expressing consent.¹⁹³ There was considerable debate in the International Law Commission as to whether this possibility was already adequately covered by other provisions, such as those addressing fraud. In the end it was considered prudent to address this rather particular form of deceit in a separate article.¹⁹⁴

Some authors consider this to have been justified due to the underlying differences between a direct act of fraud and the surreptitious corruption of a state representative’s loyalty: a corrupted representative ceases to be a representative at all in any real sense.¹⁹⁵ Any expression of consent given by such a “representative” ought, therefore, to be subject to withdrawal by the state on whose behalf it was purportedly given.

Article 50 stipulates that, to give rise to invalidity, the act of corruption can either be “directly or indirectly” that of another negotiating state. It is thus contemplated that acts of persons not officially connected to the offending state, but acting at its behest or in circumstances otherwise rendering it internationally responsible for such acts,¹⁹⁶ will suffice.

e) Coercion of State Representatives

Beyond acts of bribery or corruption, blackmail and other personal threats made against a state representative obviously call into question

190 See Reuter, above note 15 at 177.

191 See further Chapter 12.

192 See Brownlie, above note 15 at 590; Reuter, above note 15 at 177; ILC Report (1966), above note 155 at 244–45.

193 *Vienna Convention*, above note 12, Article 50.

194 ILC Report (1966), above note 155 at 245.

195 See, for example, Reuter, above note 15 at 178.

196 See further Chapter 12, Section A(4)(b).

his or her ability to give true expression to the will of the represented state. In effect, where a representative's expression of consent to a treaty is brought about by threats made against his or her person, family, property, or reputation, no true representation exists at all.¹⁹⁷ Accordingly, an expression of consent to be bound procured by threats against a representative has no legal effect in binding a state to a treaty.¹⁹⁸

Such acts of coercion are generally considered serious violations of international law. Given the agency relationship between state representatives and the states they represent, coercion is in many respects tantamount to threats directed at the represented state itself. This explains in part why the terms of Article 51 of the *Vienna Convention* are at once more permissive and severe than in the case of fraud (Article 49) and corruption (Article 50). They are more permissive in that there is no express requirement that the act of coercion be attributable to another negotiating party. Further, coercion leads to the automatic invalidity of the expression of consent to be bound, without the need for the offended state to invoke such invalidity. Thus, coercion of a state representative, regardless of its author, automatically vitiates expressions of consent to be bound given by that representative.¹⁹⁹

f) Coercion of State

A still more serious basis of invalidity recognized in the *Vienna Convention* is direct coercion of the state itself. Article 52 provides that a treaty brought about by the threat or use of force contrary to the *UN Charter* is void. This is a relatively straightforward proposition, as consent procured by an illegal threat or use of force can hardly be considered a free expression of a state's sovereign will. Note however that not all force, but only that contrary to the provisions of the *UN Charter*, automatically voids treaties thus brought about.²⁰⁰

It should be noted that, during the negotiation of the *Vienna Convention*, several states pushed for an expanded notion of coercion that would have included economic and political coercion in addition to armed coercion. As such a rule would likely have jeopardized virtually every treaty in existence and made the negotiation of future treaties

197 See, generally, Reuter, above note 15 at 179–80.

198 *Vienna Convention*, above note 12, Article 51.

199 See, generally, Reuter, above note 15 at 179–80.

200 For example, the *UN Charter* permits the use of force in self-defence: see *UN Charter*, above note 2, Article 51. It also permits the threat or use of force as a collective measure of enforcement sanctioned by the UN Security Council pursuant to its Chapter VII powers: see further Chapter 11. Thus, not all peace treaties procured by the threat or use of armed force are necessarily invalid.

a very delicate if not impossible matter, this initiative was rejected.²⁰¹ While economic or political coercion may, if sufficiently serious, violate important principles of international law and lead to state responsibility,²⁰² it therefore appears that only coercion involving the illegal threat or use of armed force, within the meaning of the *UN Charter*, will give rise to the invalidity of a treaty.²⁰³

The relative seriousness with which such acts of state coercion are viewed by the international community is reflected in the finality of the provisions of Article 52. In contrast to all prior bases of invalidity, which invalidate the offended state's consent to be bound, Article 52 automatically voids the treaty itself, in its entirety. What is at stake, therefore, is not merely the participation of the wronged party in a multilateral treaty, but the very existence of the treaty itself for all parties.

g) Conflict with *Jus Cogens*

Finally, the *Vienna Convention* provides that a treaty is void if at the time of its conclusion it conflicts with a "peremptory norm of general international law."²⁰⁴ Such norms, also known in international law as *jus cogens*, generally take the form of rules of customary international

201 Although the Vienna Conference adopted a declaration condemning the "threat or use of pressure in any form, whether military, political or economic ... in violation of the principles of the sovereign equality of States and freedom of consent": "Declaration on the Prohibition of the Threat or Use of Economic or Political Coercion in Concluding a Treaty," in *UN Conference on the Law of Treaties*, UN CLTOR, 1968-1969, UN Doc. A/CONF.39/1/Add.2 (1971). The difficulty with this condemnation, of course, is its ambiguity: its meaning turns critically on the degree of pressure or coercion required to violate the sovereign equality of another state or its freedom of consent, and states tend to take different views on that issue. In any event, note the significance of the adoption of this principle in a declaration rather than in the text of the *Vienna Convention* itself.

202 See, for example, "Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the *Charter of the United Nations*," UNGA Res. 2625, 25 U.N. GOAR Supp. (No. 28) at 121, U.N. Doc. A/8028 (1970) [*Friendly Relations Declaration*]. While not binding on states *per se*, the *Friendly Relations Declaration* restates fundamental principles of customary international law, including the prohibition on intervention by states in the domestic affairs of other states. In particular: "No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind."

203 See, generally, Brownlie, above note 15 at 590-91; Reuter, above note 15 at 180-84.

204 *Vienna Convention*, above note 12, Article 53.

law.²⁰⁵ Their distinguishing and defining feature is that they are universally recognized as so fundamental to the fabric of the international legal system that states may not, even by mutual consent, modify or derogate from their application.²⁰⁶ They thus represent a body of “higher law” binding upon all states notwithstanding agreements to the contrary.²⁰⁷ By definition, therefore, a treaty that purports to oust the application of a peremptory norm must be void.

There has been considerable controversy in the international community concerning the existence, character, and effects of peremptory norms or *jus cogens*. These difficulties clearly stem from the apparent incompatibility of the concept with the theory of consent.²⁰⁸ Such criticisms overlook the fact that peremptory norms are generally considered to emanate from a general or universal consensus among states as to their peremptory and fundamental character. In any event, the debate has shifted in recent years from the existence of such peremptory norms to their extent and content.²⁰⁹ Widely recognized examples of rules of *jus cogens* include the principle of *pacta sunt servanda*; the general prohibition on the unilateral use of force by states; the prohibition of international criminal acts such as genocide or of violations of fundamental human rights such as torture; and the illegality of colonial domination or alien subjugation.²¹⁰

205 Although, strictly speaking, nothing prevents a treaty provision from acquiring the status, or codifying a rule, of *jus cogens*.

206 Article 53 sets forth one of the first succinct and widely endorsed definitions of the concept: “... a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”

207 See, generally, G.M. Danilenko, *Law-Making in the International Community* (Dordrecht: Martinus Nijhoff, 1993) c. 8; J. Sztucki, *Jus Cogens and the Vienna Convention on the Law of Treaties: A Critical Appraisal* (Wien: Springer-Verlag, 1974); G.A. Christenson, “The World Court and *Jus Cogens*” (1987) 81 A.J.I.L. 93.

208 See further Chapter 3, Section B(2), and Chapter 5, Section E.

209 See, generally, J.G. Starke & I.A. Shearer, *Starke’s International Law*, 11th ed. (London: Butterworths, 1994) at 49. For example, the International Court of Justice recognized the general prohibition of the use of force by states as a principle of *jus cogens* in its judgment in *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, [1986] I.C.J. Rep. 14 at 100 [Nicaragua].

210 See, generally, International Law Commission, “Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts” in *Report of the International Law Commission on the Work of its Fifty-Third Session*, U.N. Doc. A/56/10 (2001) at 283–84.

Again, given the fundamental impermissibility of treaties that conflict with norms of *jus cogens*, their invalidity is general and not confined to the expression of any particular state's expression of consent to be bound. Thus a treaty containing a provision that is inconsistent with a peremptory norm will automatically be void in its entirety.

3) Consequences of Invalidity

A treaty or an expression of consent to be bound that is invalid pursuant to the bases reviewed above is generally considered void from the beginning.²¹¹ Articles 46 to 53 of the *Vienna Convention* all relate to situations which in one way or another vitiate the validity of a state's (or in the case of Article 53, all states') consent to be bound by the treaty, and thus undermine the very basis for treaty relations from the outset.

However, there is an important distinction between the less serious bases of invalidity (Articles 46 through 50), on the one hand, and the cases of coercion and conflict with peremptory norms (Articles 51 through 53) on the other. In the former category, the establishment of a basis of invalidity places the aggrieved state in a position either to invalidate or to affirm its consent to be bound by the treaty. Any obligations involved are thus said to be voidable, rather than void. In other words, the expression of consent remains valid and effective until some positive step is taken by the aggrieved state to exercise its option to invalidate that consent. A failure to do so within a reasonable period of becoming aware of the basis of invalidity may be construed as an implied election to affirm, and thus as a waiver of the right to invalidate, the state's consent.²¹² If the right to void one's expression of consent is exercised in a timely manner, however, consent is thereby voided *ab initio*. By contrast, the latter category of cases results in invalidity of either the treaty (Articles 52 and 53) or the aggrieved state's consent to be bound (Article 51) *automatically*, by operation of law. Any obligations involved are simply deemed to be void, again *ab initio*.

Whether a treaty or expression of consent to be bound is voided or void, the parties are to be returned as far as possible to the position they occupied prior to the purported conclusion of the treaty or expression of consent.²¹³ This is without prejudice to any potential legal

211 *Vienna Convention*, above note 12, Article 69.

212 *Ibid.*, Article 45.

213 *Ibid.*, Article 69(2).

ramifications for a state guilty of wrongdoing and thus responsible for the invalidity of the treaty or expression of consent to be bound.²¹⁴

A further distinction exists between invalidity pursuant to Articles 46 through 50 on the one hand and Articles 51 through 53 on the other. As a general rule, invalidity operates with respect to the whole treaty.²¹⁵ If, however, the basis of invalidity relates only to certain clauses, those clauses may in certain circumstances be severed from the treaty, leaving the rest of it in force for the aggrieved party. This is only possible where those clauses can be separated from the remainder of the treaty in their application; were not an essential basis of the other parties' participation in the treaty; and the result would not otherwise be unjust.²¹⁶ However, in the case of invalidity under Articles 51 through 53, such severance is not permissible and the entire treaty is affected.²¹⁷ In the cases of fraud and corruption, which may be considered of intermediate seriousness, the aggrieved state has the option of voiding the treaty in whole or in part (or not at all),²¹⁸ as long as the foregoing conditions of severability are respected.²¹⁹

J. TERMINATION AND SUSPENSION OF TREATY OBLIGATIONS

1) Introduction

It is implicit in the *pacta sunt servanda* principle that a validly constituted treaty is presumed to continue in force until it is either validly terminated or suspended. In the former case the obligation is brought to an end in its entirety,²²⁰ whereas in the latter, performance is merely held in abeyance for a period without affecting the continued existence of the underlying treaty obligations themselves.²²¹

As with the bases of invalidity reviewed above (which concern the validity of the creation rather than the termination of treaty obligations), the grounds for terminating or suspending treaty obligations

214 *Ibid.*, Article 69(3), with particular reference to acts of fraud, corruption, and coercion (Articles 49–52). See further Chapter 12.

215 *Vienna Convention*, above note 12, Article 44(2).

216 *Ibid.*, Article 44(3).

217 *Ibid.*, Article 44(5).

218 See above text accompanying note 212.

219 *Vienna Convention*, above note 12, Article 44(4).

220 *Ibid.*, Article 70.

221 *Ibid.*, Article 72.

are subject to strict constraints. In either case, the same policy concern for destabilizing the treaty system and undermining the reliability of treaty relations informs this strictness of approach. However, in cases of termination and suspension, the competing concern to give effect only to genuine expressions of consent is absent, given the starting assumption that the treaty to be terminated or suspended is valid. Thus, if anything, the scope for termination or suspension of treaty obligations is even more tightly circumscribed than it is for invalidation.

Nevertheless, respect for the sovereign will of states is never far from the core of treaty law. As we shall see, therefore, there are *some* circumstances in which states may avoid treaty obligations of indefinite duration while still respecting the principle of *pacta sunt servanda*. However, Article 42 of the *Vienna Convention* confirms that a treaty may only be terminated or suspended in accordance with its own terms or by application of one of the bases specifically set out in the *Vienna Convention*.²²²

A terminological issue should be addressed before examining the permissible bases for terminating or suspending treaties. The *Vienna Convention* uses the terms “denunciation” and “withdrawal” in connection with the termination of a treaty.²²³ These concepts are relevant in those cases where the termination of a treaty obligation depends on an act of repudiation by the terminating party. In the case of a bilateral treaty, such an act is referred to as “denunciation” and will, if effective, bring about not only the end of the denouncing party’s treaty obligations but also the treaty itself. In the case of a multilateral treaty, by contrast, the act of repudiation by a party is designated a “withdrawal.” If effective, this terminates the withdrawing party’s treaty obligations but potentially leaves the treaty itself intact for the remaining parties.

222 Note, however, that Article 73 provides that the *Vienna Convention*, above note 12, is without prejudice to the operation of other rules of law that may have an impact on a treaty, including the rules of state succession, state responsibility, or war. For example, we have seen that successor states do not as a general rule inherit the treaty obligations of a predecessor, which may bring about the termination of the treaty depending on the number of other parties to it and its subject matter: see further Chapter 2, Section B(5)(b). The outbreak of war does not necessarily lead to a termination of treaty obligations but in practice states may suspend performance until hostilities cease: see Brownlie, above note 15 at 593. Similarly, the severance of diplomatic relations between states does not entail termination or suspension of a mutual treaty unless the maintenance of such relations is indispensable to its performance: *Vienna Convention*, above note 12, Article 63.

223 See, for example, *Vienna Convention*, *ibid.*, Articles 42(2), 54, and 56.

2) Bases for Suspension and Termination

a) Consent of the Parties

In keeping with the theory of consent, it is perfectly possible to terminate or suspend the operation of a treaty with the consent of all the parties. This may occur in a number of ways.

One of the most common devices is to provide expressly, in the treaty itself, for the circumstances under which either a party may withdraw or the treaty may be terminated or suspended.²²⁴ This is, in effect, consent given before the fact of withdrawal, termination, or suspension. Such *a priori* consent can also be inferred from the circumstances surrounding the conclusion of the treaty or the subject matter of the treaty itself.²²⁵ There is however a presumption against such an implied term that must be rebutted by the party purporting to denounce or withdraw from the treaty.²²⁶ In the case of an implied term permitting denunciation or withdrawal, moreover, the *Vienna Convention* provides that twelve months' notice must be given of a party's intent to exercise such an option.²²⁷ This provision echoes notice periods commonly included in express treaty provisions permitting denunciation or withdrawal.

The other common device for securing the consent of all parties, of course, is the conclusion of a subsequent treaty providing for termination, withdrawal from, or suspension of the original treaty.²²⁸ This can occur at any time following the conclusion of the original treaty. While unanimous participation by the original parties is generally required, two or more parties to a multilateral treaty may suspend its operation as between themselves, but only as long as the rights of the other parties are not thereby prejudiced.²²⁹

As we have already seen, moreover, a subsequent treaty between (at least) the same parties that does not expressly provide for termination or suspension of the prior one may nevertheless implicitly do so.²³⁰ Whether it has this effect or not will depend on the extent to which the subsequent treaty deals with the same subject matter, and either its terms or the circumstances disclose such an implied intent by the parties.

224 *Ibid.*, Articles 54(a) and 57(a).

225 *Ibid.*, Article 56(1).

226 See Shaw, above note 18 at 851.

227 *Vienna Convention*, above note 12, Article 56(2).

228 *Ibid.*, Articles 54(b) and 57(b).

229 *Ibid.*, Article 58.

230 *Ibid.*, Article 59; and see Section G(3), above in this chapter.

b) Material Breach

A material breach of a treaty occurs where one or more parties either repudiate it (other than on one of the bases of invalidity, withdrawal, or renunciation recognized in the *Vienna Convention*), or violate one of its essential provisions.²³¹ It has long been recognized that one response available to an aggrieved party when faced with a material breach by another party is either termination or suspension of performance of the treaty.²³² Such a self-help remedy aims to encourage respect for treaty obligations but also recognizes the reciprocal interests of a party faced with substantial non-performance by another. It is of course a purely optional response to a material breach, and therefore leaves the aggrieved party with the choice either to invoke the breach and terminate or suspend the treaty, or to affirm the treaty and demand performance. In neither case are further potential legal consequences for the offending party, including those foreseen in the treaty itself,²³³ precluded.²³⁴

The difficulty with unilateral termination or suspension for material breach is that, notwithstanding its intended deterrent effect, its results can ultimately be destructive of the treaty relationship. This is obviously a more serious concern in the case of multilateral than bilateral treaties. Thus in the case of material breach of a bilateral treaty, the *Vienna Convention* merely provides that the treaty may be either terminated or suspended by the aggrieved party, either in whole or in part.²³⁵ In the case of a multilateral treaty, however, the *Vienna Convention's* provisions are quite complex. In general, the possibilities envisaged are that:

- 1) all other parties to the treaty may, by unanimous agreement, *terminate or suspend* the treaty in whole or in part, either *vis-à-vis* the breaching party or altogether;²³⁶
- 2) a party specially affected by the breach may *suspend* the treaty between itself and the breaching state;²³⁷ or
- 3) if the breach radically alters the obligations of every party to the treaty, any one of them may *suspend* the treaty in whole or in part with respect to itself.²³⁸

231 *Vienna Convention*, above note 12, Article 60(3).

232 See *Gabčíkovo-Nagymaros Case*, above note 15 at 65; *South West Africa Case*, above note 15 at 94–96.

233 *Vienna Convention*, above note 12, Article 60(4).

234 *Ibid.*, Article 73; and see further Chapter 12.

235 *Vienna Convention*, above note 12, Article 60(1).

236 *Ibid.*, Article 60(2)(a).

237 *Ibid.*, Article 60(2)(b).

238 *Ibid.*, Article 60(2)(c).

All of these provisions are subject, however, to the special importance attached to humanitarian treaties. In short, it is not permissible for one state, aggrieved by another state's breach of a humanitarian treaty, to jeopardize such humanitarian interests yet further by terminating or suspending such a treaty.²³⁹

c) Supervening Impossibility of Performance

If performance of treaty obligations is made impossible by some occurrence following its conclusion, this may furnish a ground for withdrawal from, terminating, or suspending the operation of the treaty. However, the conditions in which this rule may be invoked are extremely narrow. The impossibility likely must be physical, as indicated by the *Vienna Convention's* requirement that it result from the "disappearance or destruction of an object indispensable for the execution of the treaty."²⁴⁰ Typical situations where the rule is invoked are the disappearance of a geographical feature such as a river or an island, or some installation necessary to the performance of the agreement.²⁴¹ If the impossibility is permanent, termination is warranted; otherwise, only suspension during the period of impossibility is permissible.²⁴²

The International Court of Justice has commented on the stringency of the requirement of impossibility in the *Case Concerning the Gabčíkovo-Nagymaros Project*,²⁴³ the facts of which have been described above.²⁴⁴ Hungary argued, *inter alia*, that the "object" referred to in Article 61 of the *Vienna Convention* could include a legal regime, a relationship of a particular type, or perhaps even a more abstract concept such as the financial viability of a project. On the facts, Hungary argued that the essential "object" of the treaty between itself and Slovakia²⁴⁵ was "an economic joint investment which was consistent with environmental protection and which was operated by the two contracting parties jointly," and that this had "disappeared."²⁴⁶

The Court noted, however, that at the time the *Vienna Convention* was adopted, a proposal to expand the concept of impossibility to include such situations as impossibility to make payments because of serious financial difficulties was rejected. While the Court did not find

239 *Ibid.*, Article 60(5).

240 *Ibid.*, Article 61.

241 See Brownlie, above note 15 at 594; Shaw, above note 18 at 855.

242 *Vienna Convention*, above note 12, Article 61(1).

243 *Gabčíkovo-Nagymaros Case*, above note 15.

244 See Chapter 2, Section B(5)(b).

245 As successor to Czechoslovakia.

246 *Gabčíkovo-Nagymaros Case*, above note 15 at 63–64.

it necessary in the end to resolve the precise extent of the concept of “object,” as Hungary had brought about its own “impossibility” in any event, it is clear that the Court found the very expansive reading of the term urged by Hungary to be objectionable.²⁴⁷

Of course, if the party seeking to invoke impossibility has created the situation of impossibility by breaching the treaty or another obligation, this ground of termination or suspension will be unavailable.²⁴⁸

d) Fundamental Change of Circumstances

A more controversial basis for terminating or suspending treaty obligations is a so-called fundamental change of circumstances.²⁴⁹ What is contemplated here is something other than physical impossibility, but the required seriousness of the obstacles presented by the fundamental change appears to be no less stringent. The essential features of a qualifying fundamental change are that it relate to an “essential basis” of the party’s consent to the treaty and that it be so fundamental in effect as to radically transform the obligations still to be performed.²⁵⁰ In other words, the situation must have changed so dramatically from that which existed at the time the treaty was concluded that the nature of the obligations are radically different from those initially contemplated.

Given the inherent fluidity of such notions as “essential basis” and “radically transformed,” and the concomitant danger they pose to the stability of treaties, treaty law is particularly hostile to this ground of termination. The presumptive position in Article 62 of the *Vienna Convention* is therefore that a fundamental change of circumstances may *not* be invoked as a ground of termination or suspension unless the two foregoing elements are established. Further, a fundamental change may not be invoked if the possibility of such a change was foreseen at the time the treaty was concluded. For example, if a treaty provides for its own dispute resolution mechanism, this may evidence foresight of potential changes to the positions of the parties which would, in consequence, not qualify as grounds for termination under Article 62.²⁵¹

The International Court of Justice in the *Case Concerning the Gabčíkovo-Nagymaros Project*²⁵² also had occasion to comment on the

247 *Ibid.*

248 *Vienna Convention*, above note 12, Article 61(2).

249 Often referred to as the *rebus sic stantibus* doctrine.

250 *Vienna Convention*, above note 12, Article 62(1).

251 See, for example, *Fisheries Jurisdiction Case*, above note 15 at paras. 35–43 and Separate Opinion of Fitzmaurice J. at para. 17. See also *Gabčíkovo-Nagymaros Case*, above note 15 at 64.

252 *Gabčíkovo-Nagymaros Case*, *ibid.*

stringent requirements of Article 62. Hungary had argued that various changes in the economic, environmental, and political viability of its joint undertaking with Slovakia amounted cumulatively to a fundamental change of circumstances that warranted termination of the treaty. The Court rejected these submissions, noting that the possibility of such changes was neither unforeseen by the parties at the time they concluded their agreement nor of such a fundamental character as to radically transform the nature of that treaty. The Court captured the rarity with which Article 62 may be validly invoked thus:

The negative and conditional wording of Article 62 of the Vienna Convention on the Law of Treaties is a clear indication moreover that the stability of treaty relations requires that the plea of fundamental change of circumstances be applied only in exceptional cases.²⁵³

Finally, note that, in the interests of the stability of international borders and the maintenance of international peace and security, a fundamental change of circumstances may not be invoked to terminate or withdraw from a treaty that establishes such a boundary.²⁵⁴

e) Conflict with New Norm of *Jus Cogens*

Just as a treaty incompatible with a pre-existing norm of *jus cogens* is by definition invalid *ab initio*,²⁵⁵ so too is a treaty inconsistent with a new norm of *jus cogens* automatically terminated, by operation of law, from the moment of emergence of that new *jus cogens* norm. This follows from the very nature of a norm of *jus cogens*, which is not subject to derogation by any rule of international law other than one having the same *jus cogens* character.

3) Consequences of Suspension or Termination

Unlike a situation of invalidity, the suspension or termination of treaty obligations presupposes that there are valid treaty obligations to be suspended or terminated in the first place. There is thus no basis for denying the legal effects of those treaty relations prior to the moment of suspension or termination. Article 70 of the *Vienna Convention* therefore takes the logical position that, absent agreement between the parties to the contrary, the termination of treaty relations releases parties from further performance of the treaty but does not otherwise affect

253 *Ibid.* at 64–65.

254 *Vienna Convention*, above note 12, Article 62(2)(a).

255 See Section I(2)(g), above in this chapter.

the positions of the parties resulting from prior performance of the treaty.²⁵⁶ In effect this means there is no obligation for any party to return any other party to the position it occupied prior to the coming into force of the treaty.

In the case of suspension, the release from the obligation of further performance is, naturally, limited to the period of suspension, during which time the parties are to refrain from acts that would inhibit resumption of the operation of the treaty.²⁵⁷

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256 Assuming, of course, that those positions do not themselves conflict with a newly-emerged *jus cogens* norm: *Vienna Convention*, above note 12, Article 71(2)(b).

257 *Ibid.*, Article 72.

41.

Mark W. Janis, "[Nature of Jus Cogens](#)," 3 Conn J Int'l L 359 (1988).

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The Nature of Jus Cogens

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COLLOQUY

THE NATURE OF *JUS COGENS**

by Mark W. Janis**

Jus cogens, compelling law, is the modern concept of international law that posits norms so fundamental to the public order of the international community that they are potent enough to invalidate contrary rules which might otherwise be consensually established by states. The most notable appearance of *jus cogens* is, of course, in article 53 of the Vienna Convention on the Law of Treaties,¹ where the term is rendered in English as “peremptory norm”:

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.²

The Vienna Convention further provides that: “If a new peremptory norm of general international law emerges, any existing treaty which is

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1. May 23, 1969, U.N. Doc. A/Conf. 39/27, U.N. Sales No. E.70.V.6 (1970), reprinted in 63 AM. J. INT'L L. 875 (1969).

2. *Id.* art. 53.

in conflict with that norm becomes void and terminates.”³

Looking at the Vienna Convention, it is sometimes (but I think wrongly) presumed that *jus cogens* must be a form of customary international law, the law developed by state practice in international relations and by implicit state consent. For example, the Restatement of the Foreign Relations Law of the United States (Revised) opines that *jus cogens* “is now widely accepted . . . as a principle of customary law (albeit of higher status).”⁴ To base this conclusion on the definition of “peremptory norm” in the Vienna Convention, one must make a number of assumptions: 1) that despite the limitation “[f]or the purposes of the present Convention,” the provision can be generally applied to international law; 2) that there is an equivalence between the term “peremptory norm” and the term “*jus cogens*”; and 3) that there is a further equivalence between the term “general international law” and the term “customary international law.” Putting aside the first two assumptions (I have no problem at all with the second) it strikes me that the third is insupportable.

The central problem with equating “general international law” and “customary international law” is, I think, that customary international law is by its very nature not an apt instrument for the development of non-derogable rules, norms with a potency superior even to treaty rules. As usually conceived customary international law is the weak sister of conventional international law. Both are based on state practice, but treaties show the practice explicitly in the form of written rules, while the rules of custom must be drawn awkwardly from the various evidences of state diplomacy or pronouncements. Both treaty and custom are grounded on the idea of agreement. Here again, treaties are stronger, since consent is shown by a ratification process, while the consensual foundations of custom must be demonstrated more uncertainly by expressions of the law-like character of the rules, the vague notion of *opinio juris*. That any form of customary international law can be said to be so firmly rooted that it can be employed to prospectively repudiate subsequent treaty rules is, I think, a proposition that makes nonsense of the usual theory of customary and conventional international law.⁵

3. *Id.* art. 64.

4. RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (Revised) § 102 reporter's note 6 (Tent. Draft No. 6, 1985).

5. I more fully explore the nature of customary international law in M.W. JANIS, INTERNATIONAL LAW 35-46 (1988).

It is more reasonable, I think, to understand the Vienna Convention's term "general international law" to signify not customary international law, but rather, and more precisely, those non-derogable rules described in the text of the Vienna Convention itself. We are thus saved the improbable task of elaborating two sorts of customary international law: the one making ordinary consensual rules, the other creating rules with a permanence which even treaties cannot supersede. The term "customary international law" could have been employed in article 53, but was not. The special definition of *jus cogens* as a peremptory norm in the Vienna Convention takes the concept out from the bounds of customary international law and gives it its own character and essence.

The distinctive character essence of *jus cogens* is such, I submit, as to blend the concept into traditional notions of natural law. Such a blending makes sense both historically and functionally. Historically, it is significant that the proponents of the idea of peremptory norms invalidating treaty rules were, in no small measure, reacting to the abuses of Nazism during the Second World War.⁶ They rejected the positivist proposition that state acts, even the making of treaties, should be always thought capable of making binding law. Verdross, one of *jus cogens*' earliest advocates,⁷ explained that the concept of *jus cogens* was quite alien to legal positivists, but "[t]he situation was quite different in the natural law school of international law."⁸ Natural lawyers were ready to accept "the idea of a necessary law which all states are obliged to observe . . . , [that is, an] ethics of the world."⁹

When the first drafts of what were to become the Vienna Convention's peremptory norm provisions were introduced in the International Law Commission by Lauterpacht in 1953, he made a clear distinction between the new notion, as yet untermmed, and customary international law: "the test was not inconsistency with customary international law pure and simple but inconsistency with such overriding principles of international law which may be regarded as constituting principles of international public policy."¹⁰ And as Schwelb noted, though the term *jus cogens* may be new, "the concept of an international *ordre public*

6. See E. JIMÉNEZ DE ARECHAGA, *EL DERECHO INTERNACIONAL CONTEMPORANEO* 79 (1980).

7. See Verdross, *Forbidden Treaties in International Law*, 31 AM. J. INT'L L. 571 (1937).

8. Verdross, *Jus Dispositivum and Jus Cogens in International Law*, 60 AM. J. INT'L L. 55, 56 (1966).

9. *Id.*

10. Schwelb, *Some Aspects of International Jus Cogens As Formulated by the International Law Commission*, 61 AM. J. INT'L L. 946, 949 (1967).

has been advocated for a very long time."¹¹ *Jus Cogens* is a legal emanation which grew out of the naturalist school, from those who were uncomfortable with the positivists' elevation of the state as the sole source of international law.

Functionally, a rule of *jus cogens* is, by its nature and utility, a rule so fundamental to the international community of states as a whole that the rule constitutes a basis for the community's legal system. Perforce and per article 53, a rule of *jus cogens* is ordinarily non-derogable and invalidates subsequent norms generated by treaty or by custom, that is, by the ordinary consensual forms of international legislation. Thus it is a sort of international law that, once ensconced, cannot be displaced by states, either in their treaties or in their practice. *Jus cogens* therefore functions like a natural law that is so fundamental that states, at least for the time being, cannot avoid its force.

Partly because of its perceived potency, a peremptory norm is even more difficult to prove and establish than a usually controversial rule of customary international law. In the *North Sea Continental Shelf* cases, the International Court of Justice explicitly put itself on record as not "attempting to enter into, still less pronounce upon any question of *jus cogens*."¹² There seems to be no example in modern international practice of a treaty being voided by a peremptory norm.¹³

Nonetheless, there have been frequent assertions by states and others that certain principles of law are so fundamental as to be considered *jus cogens*. For example, there are the principles of articles 1 and 2 of the Charter of the United Nations, which guarantee the sovereignty of states. Some human rights, too, are claimed to be protected by rules of *jus cogens*.¹⁴

Probably no rule better fits the definition of a norm of *jus cogens* than *pacta sunt servanda*, for it is essential to the theory of both conventional and customary international law that contracts between states be legally binding. However, it is difficult to understand how the obligatory force of agreements can be attributed to either treaty or custom without making a circular argument. If either a treaty or a customary rule be said to impose the rule *pacta sunt servanda*, why should that

11. *Id.*

12. *North Sea Continental Shelf Cases* (W. Ger. v. Den.; W. Ger. v. Neth.), 1969 I.C.J. 4, 42 (Judgment of Feb. 20).

13. See Gaja, *Jus Cogens Beyond the Vienna Convention*, 172 HAGUE RECUEIL 271, 286-89 (1981).

14. See Robledo, *Le jus cogens international: sa g nese, sa nature, ses fonctions*, 172 HAGUE RECUEIL 9, 167-87 (1981).

treaty or customary rule be valid unless it relied upon that very rule of legal obligation that is itself at issue?

It makes much better sense to argue that the *pacta sunt servanda* rule is neither a rule of conventional or customary international law, but rather a norm fundamental to the legal system from which both treaty and customary rules derive. Indeed, it might do to conceive of the *pacta sunt servanda* norm as just the kind of non-derogable rule described as a peremptory norm in the Vienna Convention. In effect, this compelling law, *jus cogens*, is not a form of customary international law, but a form of international constitutional law, a norm which sets the very foundations of the international legal system.

In a sense, *pacta sunt servanda* rules may be seen to be a form of natural law if we take an organic view of the term "natural." A rule such as *pacta sunt servanda* is natural to the international community of states because there would be no such community without such a rule. The norm is intrinsic to the very existence of the given community. This does not mean that the rule is one prescribed by nature to every community or every legal system or to any given community's legal system at any given time. Rather, the word "natural" has to do with the organic or constitutional aspect of the rule: that it concerns the fundamental order of the community and its legal system.

43.	Robert Kolb, <i>Good Faith in International Law</i> (Oxford: Hart Publishing, 2017) Chapter 4 .
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Kolb, Robert. "The Delimitation of Good Faith with Respect to Other Principles of International Law." *Good Faith in International Law*. Oxford: Hart Publishing, 2017. 33–38. *Bloomsbury Collections*. Web. 9 Jan. 2022. <<http://dx.doi.org/10.5040/9781509914081.ch-004>>.

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4

The Delimitation of Good Faith with Respect to Other Principles of International Law

I. Good Faith and *Pacta Sunt Servanda*

It is broadly agreed that *pacta sunt servanda* is the rule on the binding force of contractual or conventional bonds.¹ What is its exact relation to the principle of good faith? For some authors, *pacta sunt servanda* flows from the principle of good faith; the latter underlies the former and founds it.² This conception has historical roots. In classical Roman law there was no general rule of *pacta sunt servanda*; rather the rule was *ex nudo pacto actio non oritur*.³ Only named contracts with varying degrees of formalism were considered legally binding. In the evolution of civil law at the end of the middle Ages, under the powerful impulsion of canon law, it was considered that the word pledged should per se bind the promisor. The development of modern commerce buttressed this evolution. Thus, the trust in the word deliberately given was seen as the root of the *pacta* rule. In other words, good faith was considered the reason why the compact should be legally and morally binding. This development of the law found a particular resonance in nascent international law. There, the contractual formalism of Roman law had no place; it was held that sovereigns should bind themselves by the simple pledge given, not by being subjected to civil law formalisms.⁴

For some other authors, good faith does not add anything to the *pacta sunt servanda* rule. Either the obligation is executed and *pacta* satisfied, whence good

¹ On the historical roots of that rule, see Kolb, *Bonne* 86ff.

² TO Elias, *The Modern Law of Treaties* (New York, 1974) 41; JF O'Connor, *Good Faith in International Law* (Aldershot, 1991) 107, 117, 119. Other authors are quoted in Kolb, *Bonne* 93.

³ 'No action arises from a mere pact.' See G Diosdi, *Contract in Roman Law From the XII Tables to the Glossators* (Budapest, 1981); H Dilcher, 'Der Typenzwang im römischen Vertragsrecht', (1960) 77 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung* 272ff; B Schmidlin, 'Zum Gegensatz zwischen römischer und moderner Vertragsauffassung: Typengebundenheit und Gestaltungsfreiheit', in *Essays in Commemoration of the Sixth Lustrum of the Institute for Legal History of the University of Utrecht* (Assen, 1979) 111ff.

⁴ This is eg the sense of a phrase such as 'all international treaties are covenants bonae fidei'. See R Phillimore, *Commentaries Upon International Law*, 3rd edn, vol II (London, 1882) 94.

faith is superfluous; or the obligation is not executed and *pacta* violated, whence again good faith does not make any valuable contribution. In short, it is not possible to execute an obligation in bad faith—since that would be tantamount to not executing it at all.⁵

Both conceptions are too narrow. As to the first, good faith may well be the founding principle, and *pacta* an expression of it. But there does not follow an identity of the two rules. There still remains the necessity to consider the legal-operational differences between both. As to the second conception, it is manifestly based on an error. *Pacta* is nothing more than a formal injunction to execute an obligation. But it does not determine what must be substantively done in order to satisfy the obligation, a problem which it supposes to be already solved. Thus, other rules and principles—among which good faith—must still apply so as to determine what exactly is the extent of the obligation incurred, e.g. by the device of bona fide interpretation, and the like. Thus, for example, to accept that there is a contractual obligation not to construct fortifications at the port of Dunkirk (as was the case following the Treaty of Utrecht, in 1713), while starting to erect such fortifications one mile of distant at Mardyck, is not fulfilling the obligation of disarmament⁶—this is determined not by the mere text of the treaty but by considerations of its spirit and by good faith. Once this operation is achieved, *pacta* comes into play so as to ensure the binding force of the obligation as it has been determined.

What, then, are the differences, between both principles? The following ones appear to be the most important:

- (i) Good faith is not limited to the law of treaties or to the execution of obligations. It has a series of other applications centered mainly on the legitimate expectation limb, such as acquiescence and estoppel, the prohibition of perfidy, etc.
- (ii) As already mentioned, within the law of treaties, good faith goes beyond *pacta*. The latter is but a formal injunction to execute the due, a sort of blanket⁷ to be filled by concrete content. Good faith is one of the rules for filling that blanket. Further, good faith can also limit the principle *pacta* by providing for exceptions to the duty to honour a contractual obligation, for example through the doctrine *rebus sic stantibus*⁸
- (iii) Good faith applies also to the creation of obligations, and here precedes chronologically and logically the principle *pacta*. Thus, some obligations are created with regard to soft law instruments and unilateral acts (hence, the term *pactum* is here enlarged); or with regard to legitimate expectations

⁵ H Kelsen, *The Law of the United Nations* (London, 1951) 89.

⁶ See R Phillimore, *Commentaries Upon International Law*, 3rd edn, vol II (London, 1882) 102–03; Zoller, *Bonne* 81.

⁷ G Dahm, *Völkerrecht*, vol I (Stuttgart, 1958) 13.

⁸ The latter is seen by some authors as a concretisation of good faith considerations: see, eg A Verdross, *Die Quellen des universellen Völkerrechts* (Freiburg, 1973) 133–34; P De Visscher, 'Cours général de droit international public' (1972-II) 136 *RCADI* 87.

created (see the cases mentioned above, from *Portendick* to *Schufeldt*); or still, good faith may command not to attach importance to formal clerical errors in the context of the creation of an obligation.⁹

Thus, however close the two principles may be, they have distinctive features and operate in different ways within the international legal order.

II. Good Faith and Equity

This is not the place to develop at length the interesting concept of equity.¹⁰ We may summarise its complexion and function within the legal system as follows. There are two main functions of equity: the correction of excessively rigid rules (corrective equity); and the balancing of all relevant circumstances in an area deprived of detailed legal rules (autonomous equity).

First, equity is a fact-related concept: distinct from strict or formal justice, and strict or formal application of the legal rules, it offers the sensitivity of a spontaneous feeling of fairness, especially in atypical cases where the strict application of formal justice or of relevant rules might cause hardship. Thus, a legal rule may provide for the confiscation of any car engaged in drug trafficking. It may occur in a single case that a car was thus used by the grandchild of an elderly lady, without the knowledge of the latter, and is confiscated for transportation of a very small amount of drugs for personal use. The car may here be vitally important for the elderly lady, since it allows her to drive regularly to the hospital where she receives vital treatment. If the law makes no equitable exceptions but commands in all cases the confiscation of the car, we would probably all have a spontaneous feeling of injustice and inequity. But not all situations are as harsh as this one. ‘Corrective equity’, as we termed it, which could soften the excessively hard contours of the formal law, can be used by the legal operator at different stages of the application of the law. It can pour into the interpretation of a rule, so as to take account of equitable factors and to choose the most equitable construction of the rule within the four corners of what the text allows (equity *intra legem*). Thus, if a delimitation line has to be drawn in the desert, and the course of the *uti possidetis* line is not entirely clear in a relevant area, so that there is a certain leeway in the interpretation of the title, the judge will probably avoid drawing the line in such a way as to leave all five oases in the possession of one state; rather a line will be chosen which distributes these points 4-1 or 3-2.¹¹ Similarly, equitable considerations may be

⁹ *Bank of Brussels v Discount Company and Bank of Dresden* arbitration: ‘It would be contrary to the principle of good faith, which should govern the relations between the Offices, to attach a judicial consequence to such a clerical error’; (1929) 5 *Annual Digest of Public International Law Cases* 428.

¹⁰ See Kolb, *Bonne* 99ff.

¹¹ See the considerations of Judge G Abi-Saab (Separate Opinion), *Territorial Dispute (Burkina Faso v Mali)* (1986) *ICJ Reports* 662–63.

used to fill gaps within the law (equity *praeter legem*). Thus, if the two parties require the judge to delimit all the relevant areas between them, but in a certain sector there is no applicable title, this gap may be filled by the judge through equitable considerations.¹² Finally, the extent to which equity can be used to correct a formally applicable but excessively strict piece of legislation (as in our example with the car, above) depends on a series of considerations, such as the mandate and general position of the judge, the applicable principles of the legal order, and the like. For elementary reasons of legal security, it is rare that a judge or legal operator is allowed to discard a formally applicable rule under equitable considerations. But he or she might smuggle into the law some equitable exception, by some dynamic or otherwise courageous interpretation. One possibility which may be open is to declare that the law did not intend to cover such atypical cases, which then creates a gap to be filled by equity.

Second, equity may operate free-standing, ie not in relation to an extant (and possibly too strict) rule. There are some areas of the law which are not yet permeated by too many or by too directive legal rules. In such areas, the law commands the legal operator to balance up all the relevant circumstances and to shape a legal rule in context. To do so, the operator will have recourse to considerations which seem fair and equitable in context. It is in this way that a law of maritime delimitation was progressively shaped under the polar star of 'equitable principles'.¹³ This type of equity is sometimes called 'autonomous equity', for the reason that it is not defined in opposition to or in relation to an applicable rule of (strict) law.

What are the relations between the principles of good faith and equity? In many cases, authors affirm that both principles are intimately linked.¹⁴ Good faith and equity are often mentioned together as principles softening excessive formalisms within the legal rules.¹⁵ It also occurs that good faith and equity are mentioned vaguely to cover the same 'equitable' ground, especially in concession contracts.¹⁶ Comparison of the two principles is rendered difficult by the many layers which both manifest: subjective good faith, good faith as legal standard, principle of good faith, corrective and autonomous equity. However, the gist of the difference lies between the two objective principles. Equity designates the conditions for deriving the 'justice of the particular case'. Its focus is always individualising and fact-intensive. Good faith, on its part, is centred on the softening of the socially unwelcome consequences of an excessive preponderance given to the (possibly undisclosed) will of one subject, by protecting the legitimate expectations of the

¹² See eg the *Land, Island and Maritime Frontier Dispute (El Salvador v Honduras)* (1992) *ICJ Reports* 514–15, where the Court had recourse to a line set out in a non-ratified treaty to fill such a gap.

¹³ See R Kolb, *Case Law on Equitable Maritime Delimitation, Digest and Commentaries/Jurisprudence sur les délimitations maritimes selon l'équité, Répertoire et commentaires* (La Haye, 2003); P Weil, *Perspectives du droit de la délimitation maritime* (Paris, 1988).

¹⁴ L Delbez, *Les principes généraux du contentieux international* (Paris, 1962) 98; Zoller, *Bonne* 14.

¹⁵ *Cayuga Indians arbitration* (1926) VI RIAA 180.

¹⁶ E Paasivirta, *Participation of States in International Contracts* (Helsinki, 1990) 59ff.

other subjects. Good faith also tempers the exercise of rights when done in a way which gravely contravenes the collective interest. Often, good faith operates itself as strict law. Thus, for example, an acquiescence or estoppel protecting legitimate expectations may in a particular case work some inequity for third world states not enjoying the developed legal services necessary to react so as to protect their own rights.¹⁷ In short, equity has as its core an individualisation or smoothing of abstract or strict norms, while good faith tempers individualistic voluntarism.

There are a series of further differences between both concepts. For example, equity is more totalising in perspective, since it takes account of an unlimited number of considerations drawn from the relevant context.¹⁸ Good faith, on its part, is centered on legitimate expectations, trust created, avoidance of abuse and harm to the collectivity, immoral conduct. It however also occurs that both concepts converge. For example, it is true that in the interpretation, equity tends to seek justice and good faith the prevalence of the spirit over excessive literality; but to some extent both notions converge in what has been called 'considerations of fairness, reasonableness and policy'.¹⁹ Thus, there is overall a complex relationship between the two principles, even if each one has and retains its own distinctive features.

¹⁷ See eg the arguments in Dissenting Opinion Wellington Koo, *Preah Vihear* (1962) *ICJ Reports* 89ff; Dissenting Opinion Spender, *ibid*, 128–29. See also MS McDougal, HD Lasswell and JC Miller, *The Interpretation of International Agreements and World Public Order* (Dordrecht, 1994) 345–48; S Ratner, *The Thin Justice of International Law* (Oxford, 2015) 193; P Jessup, *The Price of International Justice* (New York, 1971) 15–16.

¹⁸ See the impressive list of considerations on which the arbitrator relied in the *Region of Brcko* arbitration (1997). According to Annex II of the Dayton Agreements of 1995, a line of demarcation had to be established in the zones controlled by the parties, Serbia and Bosnia. To say the least, their relations were strained. The parties did not manage to find an agreement. The issue was thus brought to arbitration according to the mentioned Annex V of the Dayton Agreement. The region of Brcko, where the disagreement had manifested itself, was considered vital by both sides. The procedure of the tribunal was punctuated by incidents and ill-will. The two 'national arbitrators' refused to sign the award; it therefore emanates only from its President, Sir Robert Owens. The tribunal refused to apply merely the law. It had recourse to equity, which its constitutive instrument allowed it to apply. It therefore took into account a series of circumstantial factors of extra-legal nature, such as: the tension reigning in the area; the allegiances of the population; economic interests; the psychological value of the region for the parties; the importance of the lines of communication for those parties; and the interests of the international community to a lasting a peaceful settlement. In view of these factors, the tribunal decided that a partition of the area, as envisaged in the Dayton Agreement, was still premature. The arbitrator opted rather for a temporary solution of joint administration under international control. He added: 'not being required to proceed solely on the basis of legal rules, the Tribunal is authorized to render an award that, in its view, best reflects and protects the overall interests of the parties and that has the strongest likelihood of promoting a long-term peaceful solution'. See (1997) 36 *ILM* 428ff, quote at *ibid* 431, § 97.

¹⁹ I Brownlie, *Principles of Public International Law*, 4th edn (Oxford, 1990) 26 (5th edn 1998, p 25).

41.	Martin Scheinin, " The Work of the Human Rights Committee " in Raija Hanski & Martin Scheinin, Leading Cases of the Human Rights Committee , 2nd ed (Turku: Abo Akademi University, 2007)
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THE WORK OF THE HUMAN RIGHTS COMMITTEE UNDER THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS AND ITS OPTIONAL PROTOCOL

Martin Scheinin

The International Covenant on Civil and Political Rights (CCPR) was adopted by the United Nations General Assembly in 1966, and after the required number of ratifications, it entered into force 23 March 1976.¹ To a large extent the Covenant, together with the simultaneously adopted International Covenant on Economic, Social and Cultural Rights,² codifies in the form of a legally binding international treaty the human rights enshrined in the Universal Declaration of Human Rights of 1948.³

Article 28 of the Covenant on Civil and Political Rights establishes the Human Rights Committee to monitor the implementation of the Covenant. The Committee is composed of 18 independent experts who are nominated by the States Parties to the Covenant and elected in a meeting of States Parties but who serve in their individual capacity. Before taking up his or her duties an elected Committee member makes a solemn declaration of performing his or her functions 'impartially and conscientiously' (Article 38).

The Human Rights Committee performs a number of functions related to the monitoring of the effective implementation of the Covenant by the States Parties. In practice, the most important of these functions are the consideration of periodic reports submitted by the States Parties,⁴ the adoption of General Comments that systematize the Committee's interpretation of specific provisions or aspects of the Covenant,⁵ and the consideration of individual communications on alleged violations of the Covenant.⁶

THE RIGHTS COVERED

The rights protected under the Covenant on Civil and Political Rights range from the right to life (Article 6) to right to public participation (Article 25), from the

¹ 999 UNTS 171. As of 1 November 2006, there are 160 States Parties to the Covenant.

² 993 UNTS 3.

³ UN General Assembly resolution 217 A (III) of 10 December 1948.

⁴ See Article 40.

⁵ See Article 40, para. 4.

⁶ See Optional Protocol to the International Covenant on Civil and Political Rights, concluded 16 December 1966, entry into force 23 March 1976. 999 UNTS 171. As of 1 November 2006, there are 108 parties to the Optional Protocol.

right of all peoples to self-determination (Article 1) to rights of members of minorities (Article 27). Despite its name the Covenant is not restricted to 'civil and political rights' in the narrow sense. The already mentioned provisions on self-determination and minority rights include important dimensions related to economic resources. The prohibition against discrimination (Article 26) is overarching in nature, hence extending to, for instance, social, economic and cultural spheres. The provision on the right to freedom of association (Article 22) explicitly covers also trade union rights. The right of all persons deprived of their liberty to humane treatment (Article 10) addresses also the practical conditions of detention and hence the obligation of the state to allocate economic resources to secure that its prison conditions meet international standards.

Most of the substantive provisions on human rights protected by the Covenant are to be found in Part III of the instrument (Articles 6 to 27). In addition to the rights already mentioned above they relate to the prohibition against torture and cruel, inhuman or degrading treatment or punishment (Article 7), the prohibition against slavery, servitude and forced labour (Article 8), the right to liberty and security of the person (Article 9), the prohibition against imprisonment for inability to fulfil a contractual obligation (Article 11), freedom of movement (Article 12), procedural guarantees against expulsion (Article 13), the right to a fair trial (Article 14), the principle of legality in criminal law, including the prohibition against its retroactive application (Article 15), the right to recognition as a person before the law (Article 16), the protection of privacy, family, home and correspondence (Article 17), the freedom of thought, conscience and religion (Article 18), the freedom of opinion and expression (Article 19),⁷ the right of peaceful assembly (Article 21), the protection of the family and the equality of spouses (Article 23) and the rights of the child (Article 24).

Although the provision on the right to life (Article 6) includes several conditions and restrictions for the application of the death penalty, it does not on its own prohibit capital punishment. Such a prohibition is established by the Second Optional Protocol to the Covenant.⁸

Another substantive human rights provision outside Part III of the Covenant is the right of all peoples to self-determination (Article 1). As a right of 'all peoples' it is a human right of truly collective nature and, according to the interpretation by the Human Rights Committee, not subject to the procedure for

⁷ This provision is accompanied by Article 20 which establishes an obligation to prohibit propaganda for war as well as advocacy of national, racial or religious hatred.

⁸ Concluded 15 December 1989, entry into force 11 July 1991. UN doc. A/RES/44/128. As of 1 November 2006, there are 59 parties to the Second Optional Protocol.

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individual complaints under the Optional Protocol.⁹ In contrast, the Covenant's unique provision on minority rights (Article 27)¹⁰ which is formulated as an individual right with collective dimensions, has given rise to a number of important cases under the Optional Protocol.

Article 2 is a provision on the general state obligations under the Covenant, including a general duty to 'respect and ensure' the rights enshrined in the Covenant without discrimination and an obligation to ensure an effective and enforceable remedy for any violation of the Covenant.¹¹ Article 3, in turn, supplements the Covenant's other provisions on equality and non-discrimination with an undertaking to ensure the equal enjoyment of all Covenant rights by men and women.¹²

DEROGATIONS, RESTRICTIONS, RESERVATIONS

Very few human rights are absolute in the sense that they can never be subjected to modifications in order to protect the rights of other persons or another pressing social need. The Covenant allows for several distinct mechanisms for adjustments in the enjoyment of rights enshrined in its text.

Some of the provisions include a specific clause on lawful *restrictions* to a right enshrined in the Covenant. For instance, Article 12, paragraph 3, allows for such restrictions into the freedom of movement that (a) are provided by law, (b) protect one of enumerated legitimate aims, namely national security, public order (*ordre public*), public health or morals, or the rights and freedoms of others, (c) are necessary for such protection, and (d) are consistent with the other rights recognized in the Covenant. Comparable restriction clauses can be found in Articles 18, 19, 21 and 22. Some other provisions include a more condensed version of a restriction clause, for instance by prohibiting 'arbitrary or unlawful interference' (Article 17) or 'unreasonable restrictions' (Article 25).

⁹ *Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada* (Communication No. 167/1984), Views adopted 26 March 1990, Report of the Human Rights Committee, Vol. II, GAOR, Forty-fifth Session, Suppl. No. 40 (A/45/40), pp. 1-30.

¹⁰ 'In those States in which ethnic, religious or linguistic minorities exist, *persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.*' (Emphasis added).

¹¹ General Comment No. 31 (80), adopted in 2004. UN doc. HRI/GEN/1/Rev.8, pp. 233-238.

¹² General Comment No. 28 (68), adopted in 2000. UN doc. HRI/GEN/1/Rev.8, pp. 218-225.

The most elaborate expression of the Committee's approach in respect of restriction clauses can be found in General Comment No. 27 (67) on freedom of movement (Article 12).¹³ The general comment has relevance beyond Article 12 itself, as it illustrates the general principles applicable in the interpretation of restriction clauses. In the general comment, the elements of the restriction clause are analysed as follows.

(a) 'are provided by law': As pointed out in paragraph 12 of the general comment, the law itself has to establish the conditions under which the rights may be limited. Furthermore, the Committee requires certain qualifications before a law becomes a proper instrument for the purpose of restricting a human right: 'In adopting laws providing for restrictions permitted by article 12, paragraph 3, States should always be guided by the principle that the restrictions must not impair the essence of the right (cf. art. 5, para. 1); the relation between right and restriction, between norm and exception, must not be reversed. The laws authorizing the application of restrictions should use precise criteria and may not confer unfettered discretion on those charged with their execution' (paragraph 13).

(b) and (c) 'legitimate aim' and 'necessary' to that end: In paragraph 14 of its general comment the Committee points out that it is not sufficient that a restriction serves a permissible purpose; it must also be necessary to that end. 'Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected'. And further: 'States should ensure that any proceedings relating to the exercise or restriction of these rights are expeditious and that reasons for the application of restrictive measures are provided' (paragraph 15).

(d) consistency with other Covenant rights: In paragraph 18 of the general comment the Committee puts particular emphasis on the fundamental principles of equality and non-discrimination whenever restrictions are made.

Besides specific restriction clauses the Covenant also includes a provision that allows for *derogation* from certain state obligations during an officially proclaimed state of emergency that threatens the life of the nation (Article 4). This clause lists certain provisions of the Covenant as rights from which no derogation whatsoever can be made during a state of emergency (paragraph 2). Other rights are in principle subject to such derogation but only 'to the extent strictly required by the exigencies of the situation' and only through measures that 'are not inconsistent with . . . other obligations under international law' and 'do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin' (paragraph 2).

¹³ Adopted in 1999, reproduced in UN doc. HRI/GEN/1/Rev.8, pp. 213-218.

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In its General Comment No. 29 (72) on states of emergency the Human Rights Committee has clarified its interpretation of Article 4 by, *inter alia*, pointing out such elements or dimensions in rights other than those mentioned in Article 4, paragraph 2, that are non-derogable, for instance by virtue of peremptory norms of international law.¹⁴

In paragraph 3 of the general comment the Committee gives a restrictive interpretation of situations that amount to a state of emergency, emphasizes the parallel application of the Covenant and international humanitarian law in times of an armed conflict and makes the point that no further derogations than those permissible during armed conflict can be justified during a less serious situation:

Not every disturbance or catastrophe qualifies as a public emergency which threatens the life of the nation, as required by article 4, paragraph 1. During armed conflict, whether international or non-international, rules of international humanitarian law become applicable and help, in addition to the provisions in article 4 and article 5, paragraph 1, of the Covenant, to prevent the abuse of a State's emergency powers. The Covenant requires that even during an armed conflict measures derogating from the Covenant are allowed only if and to the extent that the situation constitutes a threat to the life of the nation. If States parties consider invoking article 4 in other situations than an armed conflict, they should carefully consider the justification and why such a measure is necessary and legitimate in the circumstances.

As to the requirement that any measures derogating from the Covenant must be limited to the extent strictly required by the exigencies of the situation, the Committee points out in paragraph 4 of its general comment that this requirement 'relates to the duration, geographical coverage and material scope of the state of emergency and any measures of derogation resorted to because of the emergency'. Although making a clear distinction between derogations permissible during a state of emergency and restrictions allowed even in normal times, the Committee emphasizes that 'the principle of proportionality . . . is common to derogation and limitation powers'. Another important point made by the Committee is that derogation can never mean that a Covenant right *per se* becomes inapplicable: 'The mere fact that a permissible derogation from a specific provision may, of itself, be justified by the exigencies of the situation does not obviate the requirement that specific measures taken pursuant to the derogation

¹⁴ 'States parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence'. Para. 11 of General Comment No. 29 (72), adopted in 2001 and reproduced in UN doc. HRI/GEN/1/Rev.8, pp. 225-232.

must also be shown to be required by the exigencies of the situation'. Further light is given to these principles in paragraph 5:

If States purport to invoke the right to derogate from the Covenant during, for instance, a natural catastrophe, a mass demonstration including instances of violence, or a major industrial accident, they must be able to justify not only that such a situation constitutes a threat to the life of the nation, but also that all their measures derogating from the Covenant are strictly required by the exigencies of the situation. In the opinion of the Committee, the possibility of restricting certain Covenant rights under the terms of, for instance, freedom of movement (article 12) or freedom of assembly (article 21) is generally sufficient during such situations and no derogation from the provisions in question would be justified by the exigencies of the situation.

Another mechanism through which a state can unilaterally modify its obligations under the Covenant is by way of a *reservation* entered upon ratification or accession. As the Covenant does not include a clause on the permissibility of reservations, the general rules of the law of treaties¹⁵ apply, though with certain modifications that result from the nature of the Covenant as a human rights treaty made to the benefit of third parties (individuals), compared to international treaties of contractual nature that govern reciprocal rights and obligations of states in respect of each other. The Human Rights Committee has taken the view that it is competent to address the question whether a reservation is contrary to the object and purpose of the Covenant and, under certain conditions, without legal effect. This position is elaborated in the Committee's General Comment No. 24 (52) on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under Article 41 of the Covenant, adopted in 1994. Two central paragraphs of the general comment read as follows:¹⁶

6. The absence of a prohibition on reservations does not mean that any reservation is permitted. The matter of reservations under the Covenant and the first Optional Protocol is governed by international law. Article 19 (3) of the Vienna Convention on the Law of Treaties provides relevant guidance. It stipulates that where a reservation is not prohibited by the treaty or falls within the specified permitted categories, a State may make a reservation provided it is not incompatible with the object and purpose of the treaty. Even though, unlike some other human rights treaties, the Covenant does not incorporate a specific reference to the object and purpose test, that test governs the matter of interpretation and acceptability of reservations.

¹⁵ See Vienna Convention on the Law of Treaties (1969), 1155 UNTS 331.

¹⁶ Footnotes omitted. The general comment is reproduced in UN doc. HRI/GEN/1/Rev.8, pp. 200-207.

18. It necessarily falls to the Committee to determine whether a specific reservation is compatible with the object and purpose of the Covenant. This is in part because, as indicated above, it is an inappropriate task for States parties in relation to human rights treaties, and in part because it is a task that the Committee cannot avoid in the performance of its functions. In order to know the scope of its duty to examine a State's compliance under article 40 or a communication under the first Optional Protocol, the Committee has necessarily to take a view on the compatibility of a reservation with the object and purpose of the Covenant and with general international law. Because of the special character of a human rights treaty, the compatibility of a reservation with the object and purpose of the Covenant must be established objectively, by reference to legal principles, and the Committee is particularly well placed to perform this task. The normal consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party. Rather, such a reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation.

The approach of impermissible reservations being severable has subsequently been applied by the Committee in the case of *Rawle Kennedy v. Trinidad and Tobago* (Communication No. 845/1998) where the Committee concluded that the State Party's reservation barring access to the Optional Protocol procedure by individuals subject to the sentence of death was without legal effect and did not preclude the Committee's competence to receive and consider a communication by such an individual.¹⁷

Article 5 of the Covenant includes two important principles of interpretation. Firstly, it prohibits the abuse of the provisions of the Covenant for the purpose of nullifying or limiting Covenant rights any further than is allowed by the Covenant itself (paragraph 2). Secondly, it also prohibits the abuse of the Covenant for the purpose of restricting any fundamental right established by national or international law to a higher extent than under the Covenant itself.

¹⁷ Four Committee members submitted a joint dissenting opinion according to which the reservation was not incompatible with the object and purpose of the Optional Protocol. *Rawle Kennedy v. Trinidad and Tobago* (Communication No. 845/1998), Decision on admissibility adopted 2 November 1999, Report of the Human Rights Committee, Vol. II, GAOR, Fifty-fifth Session, Suppl. No. 40 (A/55/40), pp. 258–272. See also, M. Scheinin, 'Reservations by States under the International Covenant on Civil and Political Rights and Its Optional Protocols, and the Practice of the Human Rights Committee', pp. 41–58, in I. Ziemele (ed.), *Reservations to Human Rights Treaties and the Vienna Convention Regime: Conflict, Harmony or Reconciliation* (Leiden: Martinus Nijhoff, 2004).

CONTINUITY OF OBLIGATIONS

As of 1 November 2006, there are 160 States Parties to the Covenant. One of the latest additions to the list, Kazakhstan, means the closing of a certain chapter. For a long time, the UN Office of Legal Affairs in New York did not treat Kazakhstan as a State Party, whereas the Human Rights Committee maintained the view that the application of the Covenant extended to Kazakhstan. The Committee continues to take the same approach in respect of two other territories that are under the sovereignty of a state that is not a party to the Covenant (Hong Kong and Macau).¹⁸ The difference results from the doctrine of continuity of obligations developed and applied by the Committee, compared to the criterion of formal deposit of an instrument of ratification, accession or succession, applied by the Legal Office. During the process of dissolution of the Soviet Union and former Yugoslavia the Human Rights Committee developed a doctrine according to which human rights obligations under the Covenant devolve with territory. Because of the nature of the Covenant as an instrument that affords protection to the members of the population in a state that has become a party to the Covenant, that protection cannot be denied for the simple reason that the authority exercising jurisdiction over the territory in question changes. Hence, the population in question remains protected by the Covenant and the corresponding obligations are attributed to the new state or entity which exercises sovereignty over the territory.

By and large states have accepted the Committee's position. Most of the states that have emerged from within the territories of the Soviet Union or former Yugoslavia have deposited an instrument of accession or succession in order to recognize the continued application of the Covenant. While in some cases such recognition has taken place only some time after the country in question gained independence, states have not challenged the position of the Human Rights Committee that the Covenant is applicable from the day of independence. As mentioned, for a long time no instrument of accession or succession was deposited by Kazakhstan. Nevertheless, the Human Rights Committee treated the country as a party to the Covenant and remained prepared to consider a report by Kazakhstan. Finally, also Kazakhstan formally acceded the Covenant, in January 2006.

Another special case is the situation of Hong Kong and Macau which previously fell under the sovereignty of states that were parties to the Covenant (the United Kingdom and Portugal, respectively) but which today are under the jurisdiction of the People's Republic of China, a country that has not yet ratified

¹⁸ Report of the Human Rights Committee, Vol. I, GAOR, Sixtieth Session, Suppl. No. 40 (A/60/40 (Vol. I)), pp. 147-151.

the Covenant. The Committee's position is that the Covenant continues to apply to the benefit of the inhabitants of Hong Kong and Macau and that the Committee should receive periodic reports on the implementation of the Covenant in those territories. In the year 1999, the People's Republic of China facilitated the submission and consideration of a report prepared by the regional authorities of Hong Kong, hence affording further support to the Committee's position on continuity of obligations.¹⁹ Another report was submitted in 2005 and considered by the Committee in March 2006. So far, no report has been submitted in respect of Macau after the territory was returned to the sovereignty of China.

A different challenge to the doctrine of continuity of obligations has resulted from Security Council resolution 1244 (1999), transferring Kosovo under interim international administration. When considering, in 2004, a report by Serbia and Montenegro, the Committee emphasized that the Covenant continues to apply in Kosovo and encouraged the United Nations Interim Mission in Kosovo (UNMIK), together with the Provisional Institutions of Self-Government (PISG) to produce a report concerning Kosovo.²⁰ Such a report was submitted and considered in 2006.²¹ The Human Rights Committee emphasized that 'UNMIK, as well as PISG, or any future administration in Kosovo, are bound to respect and to ensure to all individuals within the territory of Kosovo and subject to their jurisdiction the rights recognized in the Covenant'.

A further dimension of the doctrine of continuity of obligations is reflected in the Committee's General Comment No. 26 (61), adopted in 1997 after the purported denunciation of the Covenant by the Democratic People's Republic of Korea. Basing itself on the absence of a specific clause on denunciation or withdrawal in the Covenant and the close relationship between the Covenant and the Universal Declaration of Human Rights, indicating that the Covenant is not the type of treaty which, by its nature, implies a right of denunciation, the Committee concluded:

4. The rights enshrined in the Covenant belong to the people living in the territory of the State party. The Human Rights Committee has consistently taken

¹⁹ See Concluding Observations by the Human Rights Committee on Hong Kong (UN doc. CCPR/C/79/Add.117), para. 3: 'The Committee thanks the People's Republic of China for its willingness to participate in the reporting procedure under article 40 of the Covenant by submitting the report prepared by the HKSAR authorities and by introducing the HKSAR delegation to the Committee. The Committee affirms its earlier pronouncements on the continuity of the reporting obligations in relation to Hong Kong'.

²⁰ Concluding Observations on Serbia and Montenegro, UN doc. CCPR/CO/81/SEMO, para. 3.

²¹ See UN docs. CCPR/C/UNK/1 (report) and CCPR/C/UNK/CO/1 (concluding observations).

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the view, as evidenced by its long-standing practice, that once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them, notwithstanding change in government of the State party, including dismemberment in more than one State or State succession or any subsequent action of the State party designed to divest them of the rights guaranteed by the Covenant.

5. The Committee is therefore firmly of the view that international law does not permit a State which has ratified or acceded or succeeded to the Covenant to denounce it or withdraw from it.²²

Relatively soon after the issuing of this general comment, the Democratic People's Republic of Korea submitted its long overdue report²³ under Article 40 of the Covenant and sent a delegation to appear before the Committee, hence recognizing that it is to be regarded as a State Party to the Covenant.

THE REPORTING PROCEDURE

The main function of the Human Rights Committee is to consider periodic reports by the States Parties. The reporting obligation prescribed in Article 40 of the Covenant is the main procedural obligation of states that have ratified the Covenant. Under the terms of Article 40, an initial report is to be submitted within one year of the entry into force of the Covenant in respect of the state in question. Thereafter, periodic reports are due 'whenever the Committee so requires'. For a long time the Committee applied a uniform periodicity of five years between the submission of two consecutive reports. In July 2001, however, the Committee adopted a new approach of specifying separately for each state the due date of its next periodic report.²⁴ In addition, the Committee may request a so-called special report irrespective of the decided due date, for instance, if the human rights situation appears to deteriorate rapidly.²⁵

In the terms of Article 40, a periodic report shall consist of information on the measures adopted by a State Party to give effect to the rights recognized in the Covenant and the progress made in the enjoyment of those rights (paragraph 1). Reports shall also indicate the factors and difficulties, if any, affecting the implementation of the Covenant (paragraph 2).

²² General Comment No. 26 (61), UN doc. HRI/GEN/1/Rev.8, pp. 212-213.

²³ UN docs. CCPR/C/PRK/2000/2 and CCPR/CO/72/PRK.

²⁴ See Consolidated guidelines for State reports under the ICCPR, UN doc. CCPR/C/66/GUI/Rev.2, para. B.2.

²⁵ See *ibid.*, para. A.1.

The modalities of the consideration of a report are not spelled out in the Covenant. In practice, the system of periodic reporting operates as a continuous cycle in which the consideration of a report in a public hearing before the Committee forms a high point, followed by the Committee's concluding observations. Usually the Committee allocates two meetings (six hours) to each report, during which time a delegation sent by the reporting state answers to written and oral questions posed by the Committee and its individual members. The Committee prepares the consideration by hearing non-governmental and intergovernmental organizations, by studying written information from these and other sources and by drawing up a written list of issues which is sent to the State Party three to four months before the oral hearings. Since 2002, the Committee appoints from among its members, a so-called task force of four to six members to handle the consideration of a report.

The concluding observations adopted by the Committee give recognition to positive aspects in the implementation of the Covenant but the main part of them is devoted to expressions of concern and recommendations. The State Party is expected to publicize the concluding observations and to use them as a starting-point for the next reporting cycle. The reporting guidelines adopted by the Human Rights Committee recommend so-called focused reports which are based on the Committee's concluding observations from the previous round and any new developments that emanate from the national human rights discussion. The due date of the next periodic report is set at the end of the Committee's concluding observations.

In 2002, two further reforms were introduced by the Human Rights Committee. Firstly, the Committee has started to tackle the problem of long overdue reports by scheduling a country to be considered by the Committee even in the absence of a report. By November 2006, this procedure had been applied six times. Contrary to its normal practice under Article 40, the Committee does not issue public concluding observations in respect of non-reporting states but adopts provisional observations that are transmitted to the State Party concerned in order to assist it in performing its reporting obligations. In most cases resorting to this new procedure has had the positive effect of encouraging the State Party in question (Suriname, Central African Republic, Barbados, and Saint-Vincent and the Grenadines) to send a delegation to answer the Committee's questions and to resume its reporting obligations. On two occasions (Gambia and Equatorial Guinea), this has not happened and the Committee has then proceeded to making public its observations on the country concerned, despite not receiving a report or a delegation.²⁶

²⁶ In respect of Gambia, the Committee considered the situation in the absence of a long overdue report in July 2002, requesting the State Party to provide its responses by 31 December 2002. As no replies or report was received, the Committee made its observations public in July

Secondly, the Committee instituted a follow-up procedure to its concluding observations. At the end of the concluding observations, a follow-up submission is requested within 12 months on some of the concerns identified by the Committee. One member of the Committee was appointed Special Rapporteur on follow-up under Article 40. On the basis of follow-up submissions received the Special Rapporteur recommends to the Committee what further measures should be taken in respect of a State Party. These may include the adjustment of the due date of the next periodic report.

THE POSSIBILITY OF INTER-STATE COMPLAINTS

Article 41 of the Covenant allows for inter-state complaints by those States Parties to the Covenant that have made a separate declaration recognizing the Committee's competence to receive inter-state complaints against the state in question. So far, 48 states have given such a declaration but not even a single inter-state complaint has been submitted.²⁷ Potentially, the Article 41 procedure is an important mechanism for the collective responsibility of the States Parties over the effective implementation of the Covenant. The procedure for inter-state complaints could be resorted to, for instance, when a particular state is not a party to the Optional Protocol or when certain individuals whose rights are being violated are not able to submit a communication under the Optional Protocol.

One possible reason for the unwillingness of states to resort to the Article 41 procedure is the fact that the procedure is remarkably 'soft' and bears strong characteristics of arbitration. For an initial period of six months, the states in question shall seek to settle the matter between themselves, and only thereafter the Committee comes into the picture. It shall make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of respect for the rights recognized in the Covenant. If a friendly solution is not reached within 12 months, the Committee will issue a report which is confined to a brief statement of the facts.

2004. See UN doc. CCPR/CO/75/GMB. The Committee considered the situation in Equatorial Guinea in October 2003, adopting its provisional observations and requesting a report by 1 August 2004. As no report was received, the observations were then issued as concluding observations. See UN doc. CCPR/CO/79/GNQ.

²⁷ Report of the Human Rights Committee, Vol. I, GAOR, Sixtieth Session, Suppl. No. 40 (A/60/40 (Vol. I)), pp. 156-158. The number of declarations under Article 41 remains the same as of 1 November 2006.

THE OPTIONAL PROTOCOL

Contrary to the doctrinary position of continuity applied under the Covenant, the Optional Protocol is subject to denunciation. This follows from the optional nature of the procedure for individual complaints and is confirmed by an explicit provision in the Optional Protocol itself, according to which a state may denounce the Protocol at any time, such denunciation taking effect three months later and not affecting the competence of the Human Rights Committee to consider communications submitted prior to the effective date of denunciation (Article 12 of the Optional Protocol). Two states, Jamaica and Trinidad-Tobago, have denounced the Optional Protocol, and a third one, Guyana, denounced it and thereafter re-acceded with a questionable reservation.

REGISTRATION OF CASES AND INTERIM MEASURES OF PROTECTION

Correspondence addressed to the Human Rights Committee is handled by the Office of the UN High Commissioner for Human Rights in Geneva, where a Petitions Team specializes on dealing with individual communications to the various treaty bodies. Communications submitted under the Optional Protocol to the CCPR form the bulk of their work. Although communications can in principle be submitted in any language, in order to avoid delays in the practical handling of the correspondence by the Secretariat, it is advisable to use, for the time being, English, French, Spanish or Russian (in this order of preference). If needed, the secretariat seeks clarifications from the author of a communication before it prepares a case summary. This summary is presented to one member of the Human Rights Committee who acts as the Committee's Special Rapporteur on New Communications and decides on the registration of communications and their transmittal to the State Party for observations. Because of understaffing, there have at times been long delays in the registration of cases.

Particularly in cases involving the death penalty the Special Rapporteur also decides, on behalf of the Committee, whether to request interim measures of protection from the State Party. According to Rule 92 of the Committee's Rules of Procedure such measures may be requested 'to avoid irreparable damage to the victim of the alleged violation'. In addition to death penalty cases this rule is applied also in some deportation cases, usually because of a risk of treatment incompatible with Article 7, and cases where the environmental consequences of economic activities threaten the way of life of a minority or indigenous community (Article 27).

In 2000, the Committee for the first time addressed the issue of the legal consequences of a State Party's non-compliance with a request for interim measures of protection. In the case of *Dante Piandiong et al. v. The Philippines* (Communication No. 869/1999), the Committee concluded that by ratifying the

Optional Protocol on the procedure for individual communications a state undertakes to cooperate with the Committee in good faith so as to permit and enable it to consider the communication and that a State Party commits a 'grave breach' of its obligations under the Optional Protocol if it acts to prevent or frustrate consideration by the Committee of a communication. Specifically, a State Party breaches its obligations under the Protocol if it, having been notified of the communication, proceeds to execute the alleged victim.²⁸

It is to be noted that the Committee bases itself directly on state obligations under the Optional Protocol and not on its own Rules of Procedure, which instrument, although based on a provision in the Covenant (Article 39, paragraph 2), is not an international treaty binding on states.

LATER STAGES IN THE COMMITTEE'S PROCEEDINGS

After the registration of a communication and its transmittal to the State Party concerned, the state can either separately contest the admissibility of the communication within two months or present within six months its observations on both the admissibility and the merits of the case.²⁹ The main rule nowadays is that the plenary Committee deals only once with a communication, addressing at the same time its admissibility and, if appropriate, the merits of the case. If a State Party has separately addressed questions of admissibility, the Special Rapporteur on New Communications may decide on a so-called 'split', whereafter the plenary Committee will decide on admissibility prior to seeking the State Party's observations on the merits.

Any submission received from either the individual (author) or from the state is always transmitted to the other party which then has an opportunity to comment. Usually, the individual has the last word in the sense that the state refrains from further comments after the individual has given his or her comments on the State Party's observations on admissibility and merits. The Optional Protocol procedure is, hence, based on the principles of equality of arms and *audiatur et altera pars*. However, contrary to what is customary in full judicial proceedings the Committee has no oral hearings but restricts itself to 'written information made available to it by the individual and the State Party

²⁸ *Dante Piandiong et al. v. The Philippines* (Communication No. 869/1999), Views adopted 19 October 2000, Report of the Human Rights Committee, Vol. II, UN doc. A/56/40 (Vol. II), pp. 181-190, paras. 5.1 and 5.2. See also *Glenn Ashby v. Trinidad and Tobago* (Communication No. 580/1994), Views adopted 21 March 2002, Report of the Human Rights Committee, Vol. II, GAOR, Fifty-seventh Session, Suppl. No. 40 (A/57/40 (Vol. II)), pp. 12-23, para. 10.10.

²⁹ See Article 4, para. 2, of the Optional Protocol and Rule 97 of the Committee's Rules of Procedure (UN doc. CCPR/C/3/Rev.8).

concerned'.³⁰ The Optional Protocol also specifies that the Committee 'shall hold closed meetings when examining communications'.³¹ While these provisions do not legally exclude the possibility of having oral hearings as a preliminary phase before the submission of written final briefs by the parties and their examination in a closed meeting, the resource constraints on the work of the Committee and the backlog of communications have so far prevented the taking of this step.

ADMISSIBILITY CONDITIONS

The Human Rights Committee can deal with the merits (substance) of an individual complaint only if the case is first declared admissible. Although the admissibility decision is nowadays usually taken at the same time as the (possible) decision on the merits, it represents an unavoidable requirement for the Committee's competence to determine whether there was a violation of the Covenant.

Although the admissibility conditions are fewer and some of the remaining ones are interpreted less rigidly than in some regional human rights mechanisms,³² anybody who plans to bring a case before the Committee must pay due attention to meeting them.

The structure of the Optional Protocol is not perfectly logical in spelling out the various admissibility conditions.³³ Based on the Committee's practice the conditions (or obstacles) for admissibility can be grouped as follows.

³⁰ Optional Protocol, Article 5, para. 1. Another consequence of this provision is that the Committee does not accept third-party submissions in Optional Protocol cases. Observations from interested third parties, including human rights organizations, are only taken into account if submitted by one of the actual parties in a case. This was the position of the Committee during the author's time as a Committee member (1997–2004). See, however, para. 4.3 in the case of *Jouni E. Lämsmäki et al. v. Finland* (Communication No. 671/1995), Views adopted 30 October 1996, Report of the Human Rights Committee, Vol. II, GAOR, Fifty-second Session, Suppl. No. 40 (A/52/40), pp. 191–204.

³¹ Article 5, para. 3.

³² For instance, the Optional Protocol does not include a 'six-months' rule' according to which an international complaint must be submitted within six months after exhausting domestic remedies (see Article 35 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), as amended by Protocol No. 11, ETS No. 155). The interpretation of the requirement of exhausting domestic remedies, in turn, is interpreted flexibly unless the State Party specifically invokes it (compare Article 35 of the ECHR).

³³ The admissibility conditions are clarified in the Rules of Procedure of the Human Rights Committee, an instrument which, of course, is not binding on the States Parties of the Optional Protocol. See UN doc. CCPR/C/3/Rev.8, in particular Rule 96.

Article 1 of the Optional Protocol: *Incompatibility ratione personae, ratione loci or ratione temporis*. A communication must be submitted by an individual subject to the jurisdiction of a State Party to the Protocol who claims to be a victim of a violation by that State Party of any of the rights set forth in the Covenant. Article 1 of the Optional Protocol is the basis for the following admissibility conditions:³⁴

The Committee must have jurisdiction *ratione personae* to deal with the communication. This means, firstly, that it must be submitted in respect of a state that is a party to the Optional Protocol. The alleged violation must be committed by the authorities of the state in question, or it must at least be imputable to the state.³⁵

Secondly, a communication must be submitted by one or more individuals that are personally affected by an alleged violation of the Covenant. Anonymous communications are inadmissible. Juridical persons cannot submit communications as alleged victims.³⁶ However, particularly under Article 27 of the Covenant minorities or even peoples can submit complaints as a group of individuals and represented by one or more individuals.³⁷ Nevertheless, because of the requirement of Article 1 of the Optional Protocol that a communication must relate to individual victims of a violation of the Covenant, the truly collective right in Article 1 of the Covenant is not subject to the Optional Protocol procedure.³⁸

³⁴ Nowak makes a distinction between submission requirements (Articles 1 and 2 of the Optional Protocol), admissibility requirements (Article 3) and examination requirements (Article 5, para. 2). Consequently, he deals with inadmissibility *ratione personae, ratione loci* and *ratione temporis* under Article 3 of the Optional Protocol, however, clearly indicating the close connection of these conditions with Article 1 as well. M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, 2nd rev. ed. (Kehl: N.P. Engel Publisher, 2005), p. 838.

³⁵ In the case of *William Eduardo Delgado Páez v. Colombia* (Communication No. 195/1985, Views adopted 12 July 1990) it was established that a state may be held responsible for death threats and other forms of harassment by unidentified actors even when it cannot be proven that those actors operated under the effective control of state authorities but the state fails to afford effective protection against such acts. For the case, see Report of the Human Rights Committee, Vol. II, GAOR, Forty-fifth Session, Suppl. No. 40 (A/45/40), pp. 43–49.

³⁶ See, e.g., *A publication and a printing company v. Trinidad and Tobago* (Communication No. 361/1989), Decision on admissibility 14 July 1989, Report of the Human Rights Committee, GAOR, Forty-fourth Session, Suppl. No. 40 (A/44/40), pp. 309–310. Compare, e.g., with Article 34 of the ECHR which explicitly allows for complaints submitted by a 'group of individuals' or 'non-governmental organisation' (read: a juridical persons that is not a public authority), provided that the applicant is an affected victim of the alleged violation of the ECHR.

³⁷ See, e.g., the case of *Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada* (Communication 167/1984) (*supra*, note 9) where the Committee treated Mr Ominayak as the author of the communication and the Lubicon Lake Band as the victim.

³⁸ *Ibid.*, para. 32.1. The Committee, however, has been quite inconsistent in its reasoning why Article 1 of the Covenant cannot be subject to the Optional Protocol procedure. For instance

Alleged victims can submit complaints either directly or through an authorized representative, for instance a lawyer. Either one of the parents is presumed to have authorization to represent an under-aged child. Even in other cases a close relative may submit a communication without authorization, particularly if the alleged victim is detained, disappeared or dead.

Usually the mere existence of a law that is allegedly incompatible with the Covenant is not sufficient to make a person a victim of a violation of the Covenant. However, as is indicated by the case of *Toonen v. Australia* (Communication 488/1992), there are exceptions to this rule.³⁹ Communications that have the nature of *actio popularis*, that is, raise an abstract issue of the law without the author being personally affected, are declared inadmissible.

Thirdly, the Committee must also have territorial jurisdiction in respect of the alleged violation of the Covenant. This condition of admissibility *ratione loci* is actually covered by the admissibility *ratione personae*: The communication must relate to events within the territory of a State Party to the Optional Protocol, or that are otherwise within the jurisdiction (under the effective control) of the state in question.⁴⁰

in the case in question the Committee stated that only Articles 6 to 27 of the Covenant could be subject to the Optional Protocol procedure (para. 32.1). In the view of the current author the right of self-determination (Article 1) is a special case, and the reason for inadmissibility is the absence of any individual victim (Article 1 of the Optional Protocol) of a violation of that right.

³⁹The case concerned a homosexual person who under the laws of Tasmania was subject to criminal prosecution and punishment for his preferred sexual practices. The Committee found a violation of Article 17 in conjunction with Article 2, even though Mr Toonen had not (yet) been subject to the application of the law: 'In so far as article 17 is concerned, it is undisputed that adult consensual sexual activity in private is covered by the concept of "privacy", and that Mr. Toonen is actually and currently affected by the continued existence of the Tasmanian laws. The Committee considers that sections 122 (a), (c) and 123 of the Tasmanian Criminal Code "interfere" with the author's privacy, even if these provisions have not been enforced for a decade. In this context, it notes that the policy of the Department of Public Prosecutions not to initiate criminal proceedings in respect of private homosexual conduct does not amount to a guarantee that no actions will be brought against homosexuals in the future, particularly in the light of undisputed statements of the Director of Public Prosecutions of Tasmania in 1988 and those of members of the Tasmanian Parliament. The continued existence of the challenged provisions therefore continuously and directly "interferes" with the author's privacy.' *Nicholas Toonen v. Australia* (Communication No. 488/1992), Views adopted 31 March 1994, Report of the Human Rights Committee, Vol. II, GAOR, Forty-ninth Session, Suppl. No. 40 (A/49/40), pp. 226-237, at para. 8.2.

⁴⁰On the scope of states' extraterritorial obligations under the Covenant, see M. Scheinin, 'Extraterritorial Effect of the International Covenant on Civil and Political Rights', pp. 73-81, in F. Coomans and M. Kamminga (eds.), *Extraterritorial Application of Human Rights Treaties* (Antwerp: Intersentia, 2004).

Finally, the Committee must have jurisdiction *ratione temporis* to examine the alleged violation of the Covenant under the Optional Protocol procedure. In principle, the words in Article 1 of the Optional Protocol referring to a violation of the Covenant could have been taken as resulting in the retroactive application of the Optional Protocol from the moment the Covenant entered into force in respect of the state in question, in cases where the Optional Protocol was ratified only later.⁴¹ The Committee, however, basing itself on the optional nature of the complaints procedure, has taken the view that only violations of the Covenant that occur after the entry into force of the Optional Protocol in respect of a state are within the jurisdiction of the Committee. This interpretation has been confirmed by stating it in one of the Committee's general comments.⁴² However, in certain cases a violation that as such is *ratione temporis* outside the competence of the Committee may have continuing effects that themselves amount to a violation of the Covenant.⁴³ Such events may give rise to a communication under the Optional Protocol.

The admissibility conditions grouped above under Article 1 of the Optional Protocol relate to the jurisdiction of the Committee and are of an objective nature.

⁴¹ In support of this interpretation see, e.g., Nowak (*supra*, note 34), p. 854.

⁴² General Comment No. 24 (52) (*supra*, note 16), para. 14. Many states have, when ratifying the Optional Protocol, entered a reservation or declaration aiming to limit the competence of the Committee to acts and events occurring after entry into force for the state concerned of the Optional Protocol. According to the general comment, such declarations are unnecessary: 'In the view of the Committee this is not a reservation but, most usually, a statement consistent with its normal competence *ratione temporis*'.

⁴³ In the first case ever decided by the Committee, *José Luis Massera et al. v. Uruguay* (Communication No. 5/1977), it was held that detention without trial constituted a 'continuing effect' that should be examined on the merits despite the fact that the detention had begun prior to the entry into force of the Covenant and the Optional Protocol. Views adopted 15 August 1979, Report of the Human Rights Committee, GAOR, Thirty-fourth Session, Suppl. No. 40 (A/34/40), Annex VII. In one of its more recent cases, *Alexander Baulin v. The Russian Federation* (Communication No. 771/1997; Decision on admissibility adopted 31 October 2002, Report of the Human Rights Committee, Vol. II, GAOR, Fifty-eighth Session, Suppl. No. 40 (A/58/40), pp. 405-409), the Committee did not consider imprisonment on the basis of an allegedly unfair trial to constitute, in itself, such a continuing effect of an alleged violation of the Covenant that it should be examined despite the fact that the trial had taken place prior to the entry into force of the Optional Protocol in respect of the State Party concerned. See also *Sandra Lovelace v. Canada* (Communication No. 24/1977), Views adopted 30 July 1981, Report of the Human Rights Committee, GAOR, Thirty-sixth Session, Suppl. No. 40 (A/36/40), pp. 166-175, para. 13.1; *Vladimir Kulomin v. Hungary* (Communication No. 521/1992), Views adopted 22 March 1996, Report of the Human Rights Committee, Vol. II, GAOR, Fifty-first Session, Suppl. No. 40 (A/51/40), pp. 73-83, para. 11.2; *María Otilia Vargas Vargas v. Chile* (Communication No. 718/1996), Views adopted 26 July 1999, Report of the Human Rights Committee, Vol. II, GAOR, Fifty-fourth Session, Suppl. No. 40 (A/54/40), pp. 322-329, paras. 6.4 to 6.6.

This means that the Committee will examine them *ex officio* and a state cannot waive an admissibility requirement belonging to this group.

Article 2: Non-substantiation or 'no claim'. Although it is included already in the text of Article 1 that the individual must claim to be a victim of a violation of the Covenant, the Committee's practice is to use Article 2 for declaring cases inadmissible due to non-substantiation of a claim. For instance, in cases where the author does not provide sufficient factual information and legal arguments to support his allegations, the Committee will declare the communication inadmissible under Article 2. One situation where this approach is applied is when the author's allegations are in their essence related to the assessment of facts, evidence and issues of domestic law by the courts, and the author does not provide facts and arguments to demonstrate why the assessment by the domestic courts entailed a violation of the Covenant, usually the right to a fair trial (Article 14). Basing itself on the idea that an international body cannot act as 'a fourth instance' applying domestic law, the Committee may conclude:

The Committee notes that the author's remaining claims under article 14 of the Covenant essentially relate to the evaluation of facts and evidence as well as to the implementation of domestic law. The Committee recalls that it is in general for the courts of State parties, and not for the Committee, to evaluate the facts in a particular case and to interpret domestic legislation. The information before the Committee and the arguments advanced by the author do not show that the Courts' evaluation of the facts and their interpretation of the law were manifestly arbitrary or amounted to a denial of justice. These claims are therefore inadmissible under articles 2 and 3 of the Optional Protocol.⁴⁴

In order to avoid the declaration of a case as inadmissible under this kind of reasoning, any author should, before submitting a communication under the Optional Protocol, pay careful attention to addressing his or her misgivings of the trial from the perspective of the Covenant, instead of repeating issues of fact, evidence or domestic law that were presented in the actual trial. However, in order to avoid inadmissibility for another reason, non-exhaustion of domestic remedies, an author should make the arguments derived from the Covenant already a part of the trial or appeal proceedings.

Another situation where Article 2 of the Optional Protocol becomes the ground for inadmissibility is when the author has already obtained a remedy for

⁴⁴ *Moti Singh v. New Zealand* (Communication No. 791/1997), Decision on admissibility adopted 12 July 2001, Report of the Human Rights Committee, Vol. II, UN doc. A/56/40 (Vol. II), pp. 228-240, para. 6.11. As is demonstrated by this example, the Committee is not consistent in placing this type of non-substantiation under Article 2 of the Optional Protocol but may refer to Article 3 as well.

the alleged violation of the Covenant. In such cases the Committee may state that the author does not have a remaining claim under the Optional Protocol.⁴⁵

Article 3: According to this provision, also communications that constitute an abuse of the right of submission or are incompatible with the provisions of the Covenant, shall be considered inadmissible.

Abuse: This ground for inadmissibility has been relied upon quite rarely by the Committee. One example is *Fillacier v. France* (Communication No. 1434/2005) where the long delay before submitting the case to the Committee was taken as 'abuse' in the absence of convincing explanations by the author.⁴⁶

Incompatibility ratione materiae: This admissibility condition relates to claims that are based on a right that is not at all covered by the Covenant on Civil and Political Rights, or to such dimensions of the rights enshrined in the Covenant that are beyond the scope of the provision in question.⁴⁷

Reservations: A specific case of incompatibility *ratione materiae* is created by a State Party's reservation to the Covenant, with the purpose of modifying its treaty obligations. While in certain cases the Committee may hold that a reservation is contrary to the object and purpose of the Covenant or the Optional Protocol and, hence, without legal effect, the main rule is that a communication covered by a reservation is declared inadmissible under Article 3 of the Optional Protocol.⁴⁸ Because a reservation does not affect the Committee's jurisdiction but protects a State Party's sovereignty in relation to the exercise of that jurisdiction, a state may waive its reservation as a ground for inadmissibility, either explicitly or tacitly.

⁴⁵ *H.H. v. Austria* (Communication No. 427/1990), Decision on admissibility adopted 22 October 1992, Report of the Human Rights Committee, Vol. II, GAOR, Forty-eighth Session, Suppl. No. 40 (A/48/40), pp. 195-197, para. 6.2.

⁴⁶ *Claude Fillacier v. France* (Communication No. 1434/2005), Decision on admissibility adopted 27 March 2006, Report of the Human Rights Committee, Vol. II, GAOR, Sixty-first Session, Suppl. No. 40 (A/61/40), pp. 611-614.

⁴⁷ See, e.g., *Leonardus J. de Groot v. The Netherlands* (Communication No. 578/1994), Decision on admissibility adopted 14 July 1995, Report of the Human Rights Committee, Vol. II, GAOR, Fiftieth Session, Suppl. No. 40 (A/50/40), pp. 179-182; and *Jacob and Jantina Hendrika van Oord v. The Netherlands* (Communication No. 658/1995), Decision on admissibility adopted 23 July 1997, Report of the Human Rights Committee, Vol. II, GAOR, Fifty-second Session, Suppl. No. 40 (A/52/40), pp. 311-316.

⁴⁸ See *Barry Stephen Harward v. Norway* (Communication No. 451/1991), Views adopted 15 July 1994, Report of the Human Rights Committee, Vol. II, GAOR, Forty-ninth Session, Suppl. No. 40 (A/49/40), pp. 146-154, para. 6.1.

Article 5, paragraph 2: According to this provision, the Committee 'shall not consider' a communication 'unless' two additional conditions are met. The careful wording of the provision indicates that these admissibility conditions are recoverable (or suspensive) in the sense that they can be met even after the original submission of a case.

Same matter: A communication will be declared inadmissible if it is 'being examined under another procedure of international investigation or settlement'. This ground for inadmissibility relates to complaints brought before two international bodies by or upon authorization by the same individual, on the basis of the same facts and under the same legal claims.⁴⁹ Procedures relevant for the application of this admissibility condition are, at least, the individual communication procedures under the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention against Torture and under regional human rights treaties. It is to be noted that the clause only refers to cases that are *simultaneously* under consideration by another human rights treaty body or court. The Optional Protocol sets no obstacle for the consecutive consideration of the same matter first under another international procedure and then, after its termination, before the Committee. However, many states that are subject to the jurisdiction of a regional human rights court have made a reservation to the effect that also cases that 'have been' examined or considered by, for instance, the European Court of Human Rights, are inadmissible under the Optional Protocol. The Committee has treated these reservations as legitimate ones but has interpreted them in a restrictive way. Hence, the dismissal of a case as inadmissible under the European Convention due to not submitting it within six months after exhausting domestic remedies, is not taken as 'examination' or 'consideration' by the Committee and, therefore, not as an obstacle for the Committee's jurisdiction.⁵⁰

Exhaustion of domestic remedies: It is a well-established principle of international law that before resorting to international mechanisms one must first seek justice at home. This principle is reflected also in the Optional Protocol which

⁴⁹ For instance, the case of *Lauri Peltonen v. Finland* (Communication No. 492/1992) was in substance identical to a case taken simultaneously to the European Commission of Human Rights by the brother of Mr Peltonen. The 'same matter' rule was not considered an obstacle for admissibility by either one of the organs. Views adopted 21 July 1994, Report of the Human Rights Committee, Vol. II, GAOR, Forty-ninth Session, Suppl. No. 40 (A/49/40), pp. 238-245.

⁵⁰ It is to be noted that the Spanish text of Article 5 (2) (a) of the Optional Protocol differs, due to an error in the drafting process, from the other language versions. This, in turn, has resulted in a difference between the reservation by Spain to this clause, compared to the reservations by many other European states. It is not possible to go into the consequences of these differences here.

enables the Committee's determination of alleged violation of the Covenant only in cases where the author has exhausted available and effective domestic remedies. Usually, this requires that a case is litigated up to the highest judicial instance on the basis of the same claims that are later brought to the Committee. If, for instance, the Supreme Court denies leave of appeal without looking into the substance of the case, this is sufficient for exhausting domestic remedies provided that leave of appeal was sought on the same grounds that are invoked before the Committee. Although it is not necessary, for purposes of exhausting domestic remedies, to invoke the provisions of the Covenant in the domestic courts, in particular in countries where the Covenant does not form part of domestic law, the author should have relied on comparable provisions in domestic law. Usually, it is not necessary after pursuing one line of judicial remedies to seek extraordinary judicial remedies, turn to an Ombudsman or Human Rights Commissioner, or to apply for an administrative remedy. However, the application of the rule of exhausting remedies ultimately depends on the circumstances of each case and, in particular, the arguments of the parties as to which remedies were available and effective.

The last sentence of Article 5, paragraph 2, includes a clause according to which the two causes for inadmissibility covered by the provision are not applicable when the other international procedure or the domestic remedies are 'unreasonably prolonged'.⁵¹

The fact that the admissibility conditions in Article 5, paragraph 2 (a), are recoverable, is reflected in Rule 98.2 of the Committee's Rules of Procedure: 'If the Committee has declared a communication inadmissible under article 5, paragraph 2, of the Protocol, this decision may be reviewed at a later date by the Committee upon a written request by or on behalf of the individual concerned containing information to the effect that the reasons for inadmissibility referred to in article 5, paragraph 2, no longer apply'.

A state may also waive non-exhaustion as a ground for inadmissibility, either by explicitly stating that it does not object to the admissibility of a communication or simply by not invoking the requirement of exhausting domestic remedies.

⁵¹ The English version of the Optional Protocol includes a typographical error, because of which the clause on unreasonable prolongation appears to relate only to the requirement of exhausting domestic remedies but not other international procedures.

THE OUTCOME OF THE OPTIONAL PROTOCOL PROCEEDINGS

In cases declared admissible and decided on the merits, the end result of the Optional Protocol procedure is called 'Views' of the Human Rights Committee.⁵² This expression reflects the absence of a treaty provision on the legally binding nature of the Committee's decision.⁵³ However, it would be wrong to categorize the Committee's views as mere 'recommendations'. They are the end result of a quasi-judicial adversarial international body established and elected by the States Parties for the purpose of interpreting the provisions of the Covenant and monitoring compliance with them. It would be incompatible with these preconditions of the procedure if a state that voluntarily has subjected itself to such a procedure would, after first being one of the two parties in a case, then after receiving the Committee's views, simply replace the Committee's position with its own interpretation as to whether there has been a violation of the Covenant or not. If a state wishes to question the correctness of a legal interpretation by the Committee, it should at least resort to some other procedure before an international court or independent expert body. As this is not likely to happen in practice, the presumption should be that the Committee's views in Optional Protocol cases are treated as the authoritative interpretation of the Covenant under international law.

In cases where the Committee finds one or more violations of the Covenant, it also expresses the question of an effective remedy to be afforded. Basing itself on Article 2, paragraph 3, of the Covenant, the Committee declares that the victim of a violation has a *right* to an effective remedy and the state responsible for the violation a corresponding legal *obligation* under international law to provide the remedy. Thereafter, the Committee proceeds to express its own view on what, in the circumstances of the case, would constitute an effective remedy. The Committee's pronouncements of an effective remedy range from, for instance, the commutation of a death sentence or release to compensation or a new trial.⁵⁴ Although the Committee has so far not quantified the pecuniary amount of compensation it has, in some recent cases, expressed its view on how the

⁵² Article 5, para. 4.

⁵³ Compare, *e.g.*, to Article 46 of the ECHR.

⁵⁴ See, *e.g.*, E. Klein, 'Individual Reparation Claims under the International Covenant on Civil and Political Rights: The Practice of the Human Rights Committee', pp. 27-41, in A. Randelzhofer and C. Tomuschat (eds.), *State Responsibility and the Individual: Reparation in Instances of Grave Violations of Human Rights* (The Hague: Kluwer, 1999), at pp. 30-31; M. Scheinin, 'The Human Rights Committee's Pronouncements on the Right to an Effective Remedy: An Illustration of the Legal Nature of the Committee's Work under the Optional Protocol', pp. 101-115, in N. Ando (ed.), *Towards Implementing Universal Human Rights: Festschrift for the Twenty-Fifth Anniversary of the Human Rights Committee* (Leiden: Martinus Nijhoff, 2004).

compensation should be calculated. In the first of such cases Under article 2, paragraph 3(a), of the Covenant, the State party is under an obligation to provide Mr. Laptsevich with an effective remedy, including compensation amounting to a sum not less than the present value of the fine and any legal costs paid by the author.⁵⁵

After pronouncing on the remedy, the Committee moves to a standard formulation related to follow-up:

Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to these Views. The State party is also requested to publish the Committee's Views.⁵⁶

Not every registered communication submitted under the Optional Protocol leads to the adoption of views. In cases declared inadmissible the final outcome is the Committee's decision on inadmissibility. A third possibility is that the Committee decides to discontinue a case, for instance, when it has lost contact with the author and there is no public interest in finalizing the procedures even in the absence of an input by the author.

THE COVENANT IN DOMESTIC LAW

In many countries the Covenant is part of domestic law and its provisions can, consequently, be applied by courts and other authorities as an integral part of the law of the land. This may be due either to constitutional provisions that make international treaties generally or with some conditions applicable as domestic law (monism), or to a separate decision to incorporate the Covenant through an

⁵⁵ *Vladimir Petrovich Laptsevich v. Belarus* (Communication No. 780/1997), Views adopted 20 March 2000, Report of the Human Rights Committee, Vol. II, GAOR, Fifty-fifth Session, Suppl. No. 40 (A/55/40), pp. 178-182, para. 10. For another case in which the Committee has moved towards specifying the amount of compensation, see *Anni Äärelä and Jouni Näkkäläjärvi v. Finland* (Communication No. 779/1997), Views adopted 24 October 2001, Report of the Human Rights Committee, Vol. II, GAOR, Fifty-seventh Session, Suppl. No. 40 (A/57/40 (Vol. II)), pp. 117-130, para. 8.2.

⁵⁶ This example is from para. 11 of the Committee's Views in the case of *Alexander Zheludkov v. Ukraine* (Communication No. 726/1996), Views adopted 29 October 2002, Report of the Human Rights Committee, Vol. II, GAOR, Fifty-eighth Session, Suppl. No. 40 (A/58/40), pp. 12-24.

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Act of Parliament. In some countries, international treaties or some of them have been given priority in relation to domestic legislation, either on the same level as the constitution or immediately above or below it. Furthermore, some countries give constitutional recognition to the Covenant by transforming its substance into comparable constitutional provisions or by making direct references to the Covenant or to human rights treaties.

Despite the fact that there is a clear trend towards official recognition of the provisions of the Covenant as part of domestic law, there are still countries that follow a strict version of the dualist tradition by denying the direct applicability of international treaties within their own legal system. Even in these countries the Covenant can often be relied upon in the interpretation of the constitution or other laws.

In General Comment No. 3 (13), adopted in 1981, the Human Rights Committee recognized that Article 2 of the Covenant generally leaves it to the States Parties concerned to choose their method of domestic implementation.⁵⁷ Although the Covenant, hence, does not mandate the formal incorporation of its provisions into the national legal system, it does include an obligation for each State Party 'to respect and ensure' the rights recognized in the Covenant (Article 2, paragraph 1). Furthermore, Article 2, paragraph 3, requires that any person whose rights under the Covenant have been violated has an effective and enforceable remedy under domestic law. In its later General Comment No. 31 (80) on Article 2, adopted in 2004 and replacing General Comment No. 3 (13), the Committee expressed a clear preference for the formal incorporation of the Covenant:

Article 2 allows a State party to pursue this in accordance with its own domestic constitutional structure and accordingly does not require that the Covenant be directly applicable in the courts, by incorporation of the Covenant into national law. The Committee takes the view, however, that Covenant guarantees may receive enhanced protection in those States where the Covenant is automatically or through specific incorporation part of the domestic legal order. The Committee invites those States parties in which the Covenant does not form part of the domestic legal order to consider incorporation of the Covenant to render it part of domestic law to facilitate full realization of Covenant rights as required by article 2.⁵⁸

⁵⁷ General Comment No. 3 (13), reproduced in UN doc. HRI/GEN/1/Rev.8, pp. 164–165.

⁵⁸ General Comment No. 31 (80) (*supra*, note 11), para. 13.

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Part I Introduction, 1 Introduction

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[1.01] The International Covenant on Civil and Political Rights (ICCPR) was adopted by the United Nations (UN) in 1966, and came into force upon receiving the requisite number of ratifications in 1976. It is probably the most important human rights treaty in the world, given that it has universal coverage (unlike eg the European Convention on Human Rights 1951 (ECHR)), it contains a large number of rights (unlike single-issue treaties such as the Convention against Torture and other Cruel Inhuman or Degrading Treatment or Punishment 1984 (CAT)), (p. 4) and it purports to apply to all classes of person (unlike eg the Convention on the Rights of the Child 1989 (CRC)). Furthermore, a large body of jurisprudence has emerged under the ICCPR, unlike its sister treaty, the International Covenant on

Economic Social and Cultural Rights (ICESCR). It has also been incorporated into the domestic law of many States Parties.¹

References

[1.02] The ICCPR is designed to protect civil and political rights, such as the right to life, freedom from arbitrary detention, and freedom of expression. As such, it contains a list of substantive human rights guarantees in its Part III. Part II provides supporting guarantees, such as the necessary obligation upon States Parties to provide domestic remedies for abuses of ICCPR rights. Part IV establishes a monitoring and supervisory system, under which records of States Parties implementing the ICCPR can be tracked. Essentially, Part IV establishes the Human Rights Committee (HRC), the treaty-monitoring body for the ICCPR, and outlines some of its functions. Furthermore, under the First Optional Protocol (OP), a subsidiary treaty to the ICCPR, the HRC can consider communications from individuals alleging violations of their ICCPR rights by States Parties to the OP. A Second Optional Protocol provides further substantive civil rights guarantees by prohibiting the application of the death penalty.

Civil and Political Rights—The Philosophical Background

Natural Rights

[1.03] The notion of civil and political rights essentially stems from the Western liberal philosophies of the seventeenth and eighteenth centuries. In particular, Locke's 'Second Treatise of Government' held that men in a 'state of nature' were born in a state of equality and inherently possessed 'natural rights', such as rights to life, liberty, and property.² Similar ideas informed the French philosophers of the Age of Enlightenment in the eighteenth century, such as Rousseau, Montesquieu, and Voltaire, who argued that such rights stemmed from the inherent rationality and virtue of man, championed over the 'irrational' scientific and religious dogma which had predominated in the middle ages.³

[1.04] Natural rights theories were highly influential in Western political thought in the late eighteenth century, particularly in the revolutionary fervour of the United (p. 5) States and France. For example, the United States Declaration of Independence in 1776 declared 'that all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are life, liberty, and the pursuit of happiness'. A similar 'natural rights' influence can be seen in the French Declaration of the Rights of Man and of the Citizen of 1789.

[1.05] In classical natural rights theory, societies were artificial yet convenient constructs formed by a 'social contract', under which men maintained their freedoms subject to the qualification that they were not to threaten or harm the freedoms of others. For their part, governments were to respect these pre-existing natural rights of men, intervening only in so far as necessary to enforce this social contract. Thus, early natural law theorists propounded a philosophy of limited or 'small' government, with an emphasis on *freedoms from* government interference, rather than *rights to* government-provided entitlements. Traditional civil and political rights, the subject matter of both the US Bill of Rights and the French Declaration, are largely concerned with the liberty to act in accordance with one's own wishes. Enjoyment of civil and political rights was not understood to require State assistance, so civil and political rights conform to the libertarian nature of early Western capitalist societies.

[1.06] Whereas early natural rights attached to life, liberty, and property, they did not attach to economic or social entitlements, such as rights to work and to a reasonable standard of living. Enjoyment of such 'rights' was perceived to require positive intervention on the part of the government⁴ which, it was feared, might permit a government to impose oppressive market restrictions on the spurious justification of enhancing rights. Thus, a *laissez-faire* approach to economic relationships was applied in the Western capitalist societies of the eighteenth and early nineteenth centuries; economic relations and freedom of contract were generally unconstrained by governmental regulation.⁵

[1.07] Since the late eighteenth century, natural rights theories have been attacked on numerous bases, such as their egoistic and arguably anti-social premise (ie the social contract is put in place to protect men from one another),⁶ or as 'anarchical fallacies' which challenged the stability of society⁷ and the sovereignty of representative parliaments.⁸ The existence of severe human rights abuse in the United States in the form of slavery, and in post-revolutionary France in the form of the 'The Reign of Terror', in

spite of their constitutional guarantees of rights, (p. 6) lent credence to Bentham's famous characterization of natural rights as 'nonsense upon stilts'.⁹

[1.08] Despite criticisms, natural rights theories endured and matured, expanding their scope to encompass the rights of women, slaves, and workers.¹⁰ For example, notions of workers' entitlements, which tempered the excesses of early capitalism, began to emerge in Western societies in the nineteenth century.¹¹ Indeed, modern Western liberalism has evolved from its excessively libertarian origins to accommodate economic entitlements in the form of the 'safety net' of a welfare State;¹² while the welfare State bestows economic rights on the most needy, it extracts an economic price from the less needy in the form of taxation.¹³

The Universal Declaration of Human Rights

[1.09] After the atrocities of the Second World War demonstrated the horrendous consequences of an utter disregard for the rights of the human person, natural rights metamorphosed into internationally recognized 'human rights' principles in 1948 with the adoption by the UN of the Universal Declaration of Human Rights (UDHR).¹⁴ Article 1 UDHR is reminiscent of the early Western Bills of Rights in its proclamation that '[a]ll human beings are born free and equal in dignity and rights'.¹⁵ Furthermore, the document was again dominated by civil and political standards in articles 2 to 21. While it is true that notions of human rights and dignity may be found in the philosophical origins of many civilizations outside the Western world,¹⁶ it is equally true that the large majority of States involved in drafting the UDHR were informed in their thinking by natural rights theory.¹⁷ Nevertheless, the UDHR also includes a number of economic social and cultural rights in articles 22 to 27, indicating a partial departure from orthodox natural rights concepts.¹⁸

References

(p. 7) Two Covenants

[1.10] Most of the rights within the UDHR found their way into treaty form in the two International Covenants, the ICCPR and the ICESCR.¹⁹ The natural rights language of the UDHR is again reflected in the preambles to the two Covenants, with both proclaiming 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family', and the contention that 'rights derive from the inherent dignity of the human person'.

References

[1.11] It has always been part of UN rhetoric that civil and political rights, on the one hand, and economic social and cultural rights on the other, are interdependent and indivisible. However, strict adherence by some governments to orthodox natural rights theory may have contributed to the decision to split the UDHR rights into two Covenants. In particular, Western governments argued that the two sets of rights were fundamentally different, and that this dichotomy should be reflected in two different treaties. In particular, it was argued that only civil and political rights were justiciable;²⁰ only the 'liberal [civil and political] rights directed against undue State interference' were felt to be 'directly enforceable before courts'.²¹ The Eastern bloc on the other hand argued against the division of rights into two treaties, as it potentially implied a hierarchy between the two sets of rights.²² The eventual triumph of the Western view led to the creation of two very different Covenants. Despite the rhetoric of interdependence and indivisibility in the Covenants' preambles, there is no doubt that the ICCPR is the stronger of the two. The ICCPR contains the 'classical' human rights, that is civil and political rights, which are immediately binding upon States Parties under article 2(1), and which are justiciable at international level under the OP.²³ The ICESCR rights are, in contrast, to be implemented progressively according to a State's available resources, and are not as yet internationally justiciable. An Optional Protocol to ICESCR was adopted by the UN in 2008, which will enable individual complaints under that treaty. It came into force in May 2013 upon the ratification of ten States parties. Largely as a consequence of the vague parameters and lack of interpretation of States' obligations thereunder, the ICESCR guarantees have remained normatively and jurisprudentially underdeveloped compared to the modern-day 'natural rights' in the ICCPR.

(p. 8) The International Covenant on Civil and Political Rights

[1.12] The ICCPR is the most comprehensive and well-established UN treaty on civil and political rights; it has yielded the lion's share of UN jurisprudence in this area. This book is therefore largely concerned with the ICCPR, and jurisprudence thereunder. Other UN human rights treaties have generated important material on specific civil and political rights, some of which will be referred to in the relevant chapters. In particular, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (CAT) has produced important material on the right to be free from torture, inhuman or degrading treatment, or punishment. The two non-discrimination treaties, the International Convention on the Elimination of All Forms of Racial Discrimination 1966 (ICERD) and the Convention on the Elimination of All Forms of Discrimination Against Women 1979 (CEDAW), have generated substantial material on the right to be free from discrimination, and are referenced briefly in this book.

Ratification

[1.13] The ICCPR was adopted by the UN General Assembly in 1966, and came into force in 1976 once it had 35 ratifications.²⁴ As of October 2012, there were 167 States Parties to the ICCPR, 114 parties to the First Optional Protocol, and 75 parties to the Second Optional Protocol.²⁵ The number of parties to both the ICCPR and the First Optional Protocol has increased markedly since the end of the Cold War, when human rights became a less politicized discipline within the United Nations. For example, the United States, a notable long-term absentee from the international human rights system, ratified the ICCPR in 1992. In the same year, the First Optional Protocol entered into force for the Russian Federation.

Substantive Rights

[1.14] The substantive guarantees of the ICCPR are contained in Part III, though article 1 is contained anomalously in Part I.²⁶ The substantive rights are:

Article 1:	Right of Self-determination
Article 6:	Right to Life
Article 7:	Freedom from Torture, Inhuman and Degrading Treatment, and Punishment
Article 8:	Freedom from Slavery, Servitude, and Forced Labour
Article 9:	Rights to Liberty and Security of the Person
Article 10:	Right of Detained Persons to Humane Treatment
(p. 9) Article 11:	Freedom from Imprisonment for Inability to Fulfil a Contract
Article 12:	Freedom of Movement
Article 13:	Right of Aliens to Due Process facing Expulsion
Article 14:	Right to a Fair Trial
Article 15:	Freedom from Retroactive Criminal Law
Article 16:	Right to Recognition as a Person before the Law
Article 17:	Rights of Privacy
Article 18:	Freedom of Thought, Conscience, and Religion

Article 19:	Freedom of Opinion and Expression
Article 20:	Freedom from War Propaganda, and Freedom from Incitement to Racial, Religious, or National Hatred
Article 21:	Freedom of Assembly
Article 22:	Freedom of Association
Article 23:	Rights of Protection of the Family and the Right to Marry
Article 24:	Rights of Protection for the Child
Article 25:	Right of Participation in Public Life
Article 26:	Right to Equality before the Law and Rights of Non-Discrimination
Article 27:	Rights of Minorities

Supporting Guarantees

[1.15] Part II of the Covenant contains supporting guarantees in articles 2 to 5.

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[1.16]

¶5. The article 2, paragraph 1, obligation to respect and ensure the rights recognized by in the Covenant has immediate effect for all States parties. Article 2, paragraph 2, provides the overarching framework within which the rights specified in the Covenant are to be promoted and protected. The Committee has as a consequence previously indicated in its General Comment 24 that reservations to article 2, would be incompatible with the Covenant when considered in the light of its objects and purposes.²⁷

References

[1.17] Article 2(1) is fundamental; it is the ‘obligation’ provision that directs States immediately to implement the substantive ICCPR guarantees at the municipal level. In particular, article 2(1) obliges States to ‘respect and ensure enjoyment by all individuals within its territory, and subject to its jurisdiction’ the substantive ICCPR rights ‘without distinction of any kind’. The immediacy of the obligation facilitates the justiciability and definition of a State’s ICCPR duties. A State is either fulfilling its obligations or it is not; article 2(1) seems to allow no exceptions. The importance of this immediate obligation becomes apparent when one contrasts the progressive obligation in article 2(1) of the ICESCR. A State, under article 2(1) ICESCR, is required ‘to take steps...to the maximum of its available resources, with a view to achieving progressively the full realisation’ of ICESCR (p. 10) rights. It is not easy to define the content of a progressive duty, as it is difficult to establish when a breach of this duty arises. The word ‘available’ leaves too much ‘wobble room for the State’.²⁸ The progressive nature of ICESCR duties has definitely hampered the development of ICESCR norms.

References

[1.18] Article 2(1) also defines the personal and territorial scope of the ICCPR; the beneficiaries of the ICCPR are ‘individuals’, while a State Party is responsible only for persons and events ‘within its territory and subject to its jurisdiction’.²⁹

[1.19] Finally, article 2(1) also contains an important guarantee of non-discrimination. Article 3 supplements this non-discrimination guarantee by specifically guaranteeing equality between men and women in the enjoyment of Covenant rights, and is arguably superfluous. Both articles 2(1) and 3 bolster the free-standing prohibition on discrimination in article 26.³⁰

[1.20] Paragraphs 2 and 3 of article 2 supplement paragraph 1 by requiring specific measures of national protection of ICCPR rights. Article 2(2) obliges States to ‘adopt legislative or other measures as may be necessary to give effect to’ ICCPR rights. Thus, States must change their laws so as to conform to their ICCPR obligations. In a number of recent separate opinions, Mr Salvioli has explicitly found breaches of article 2(2) entailed in legislation which has generated an ICCPR breach.³¹ Such a violation is of course implicit whenever such a situation arises.³²

References

[1.21] Article 2(3)(a) obliges States Parties to provide effective domestic remedies for persons whose ICCPR rights are violated. Article 2(3)(b) specifies that these remedies should be determined by a competent government body, ideally the judiciary, while article 2(3)(c) directs that such remedies must be enforced.

[1.22] Article 4 confers rights on States Parties to derogate from their ICCPR obligations ‘in time of public emergency’. However, this right of derogation is strictly limited by internal provisions of article 4, so there are in-built guarantees against its abuse by the State.

[1.23] Article 5 provides that ICCPR rights must not be abused by States, groups, or persons so as to undermine the enjoyment of ICCPR rights by others. For example, individuals must not abuse their rights to promote fascist policies which call for the destruction of the rights of others.³³ Article 5(2) provides that the ICCPR must not be used as a pretext to lower the level of protection provided for civil and political (p. 11) rights under other international treaties, or under municipal law or custom. Article 5(2) is a ‘savings’ provision, which preserves the sanctity of any laws that provide a higher level of human rights protection than is required by the ICCPR.³⁴

References

[1.24] The supporting guarantees in articles 2 to 5 cannot be autonomously violated by a State Party. For example, one cannot claim a breach of one’s right to a remedy under article 2(3) without first establishing that one has a well-founded and arguable claim with regard to a substantive right in Part III [25.09].

The ICCPR and Domestic Law

[1.25] Though the ICCPR imposes duties upon States in the international plane of law, the implementation of the rights therein is primarily a domestic matter.³⁵ Indeed, article 2, the general obligation provision, requires States Parties to protect the ICCPR rights at the municipal level. International enforcement measures, such as the supervisory mechanisms of the HRC, are designed to be a secondary source of ICCPR rights protection. For example, individuals cannot utilize the individual complaints mechanism until they have exhausted domestic remedies.³⁶ The primacy conferred on national enforcement manifests a concession to State sovereignty, as well as a recognition of the superior efficiency, expediency, and effectiveness of municipal enforcement systems.³⁷

References

[1.26] Thus, States Parties have an international duty to translate the ICCPR guarantees into domestic rights for individuals.³⁸ The actual domestic protection afforded to ICCPR rights depends on the legal and political system of the relevant State Party. For example, it is not necessary for a State to adopt a constitutional or even a statutory bill of rights which incorporates the ICCPR rights, so long as the various ICCPR rights are *somehow* protected.³⁹ However, a constitutional bill of rights is probably the most efficient means of protecting ICCPR rights, and the HRC has certainly recommended in numerous Concluding Observations that such constitutional protection be adopted.

References

(p. 12) General Comment 31

[1.27]

¶13. Article 2, paragraph 2, requires that States Parties take the necessary steps to give effect to the Covenant rights in the domestic order. It follows that, unless Covenant rights are already protected by their domestic laws or practices, States Parties are required on ratification to make such changes to domestic laws and practices as are necessary to ensure their conformity with the Covenant. Where there are inconsistencies between domestic law and the Covenant, article 2 requires that the domestic law or practice be changed to meet the standards imposed by the Covenant's substantive guarantees. Article 2 allows a State Party to pursue this in accordance with its own domestic constitutional structure and accordingly does not require that the Covenant be directly applicable in the courts, by incorporation of the Covenant into national law. The Committee takes the view, however, that Covenant guarantees may receive enhanced protection in those States where the Covenant is automatically or through specific incorporation part of the domestic legal order. The Committee invites those States Parties in which the Covenant does not form part of the domestic legal order to consider incorporation of the Covenant to render it part of domestic law to facilitate full realization of Covenant rights as required by article 2.⁴⁰

References

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[1.28] Of course, a State cannot plead, in mitigation of its ICCPR responsibilities, that its own municipal laws prohibit it from fulfilling its ICCPR obligations.

¶4. ...The executive branch that usually represents the State Party internationally, including before the Committee, may not point to the fact that an action incompatible with the provisions of the Covenant was carried out by another branch of government as a means of seeking to relieve the State Party from responsibility for the action and consequent incompatibility. This understanding flows directly from the principle contained in article 27 of the Vienna Convention on the Law of Treaties, according to which a State Party 'may not invoke the provisions of its internal law as justification for its failure to perform a treaty'. Although article 2, paragraph 2, allows States Parties to give effect to Covenant rights in accordance with domestic constitutional processes, the same principle operates so as to prevent States Parties from invoking provisions of the constitutional law or other aspects of domestic law to justify a failure to perform or give effect to obligations under the treaty. In this respect, the Committee reminds States Parties with a federal structure of the terms of article 50, according to which the Covenant's provisions 'shall extend to all parts of federal states without any limitations or exceptions'.

References

[1.29] Article 50 of the ICCPR stipulates that the Covenant's guarantees 'extend to all parts of federal States without any limitations or exceptions'. Thus, central governments in federations, such as the United States, Canada, Australia, Brazil, Germany,⁴¹ Switzerland,⁴² Mexico,⁴³ Argentina,⁴⁴ and the Russian Federation, are required to guarantee that the laws and activities of their provincial counterparts (p. 13) conform to the Covenant's norms. Indeed, violations of the Covenant have been found in a number of cases where the impugned law was a provincial law rather than a federal law.⁴⁵ The violation is nevertheless attributed to the central government, as it is the government that is vested with international legal personality, and the actual treaty party. Of course, differences amongst the federal units of a State are permitted;⁴⁶ regional differences are one of the characteristics of a federal system of government. Such differences nevertheless must be 'reasonable and objective' or else they will breach the Covenant's non-discrimination provisions.⁴⁷ Article 50 is an important guarantor of ICCPR rights; the effect of the ICCPR would be considerably diminished in federations if the provincial legal realm was excluded from the Covenant's reach.⁴⁸ It must be conceded that article 50 can create internal legal problems for central governments where they lack constitutional power to override or 'correct' provincial laws that breach the Covenant.⁴⁹

References

[1.30] The actual domestic protection afforded to ICCPR rights depends on the legal and political system of the relevant State Party. In certain States, such as the Netherlands, the ICCPR has direct effect, and is therefore part of a State Party's domestic law. Alleged breaches can be litigated in domestic courts. In other States, the ICCPR is not self-executing, and so is not automatically part of municipal law. For example, in the UK and Australia, treaties must be specifically incorporated into domestic law before their provisions are enforceable by domestic courts. In neither State has the ICCPR been so incorporated.⁵⁰ However, discrete ICCPR rights are protected by miscellaneous statutes in both States, such as statutes regulating the exercise of police power, and anti-discrimination statutes. Furthermore, in both States, the ICCPR has an indirect effect in that its norms are used by the judiciary to construe ambiguous statutes and to fill lacunae in the common law.⁵¹

The Human Rights Committee

[1.31] The HRC is created under article 28 of the ICCPR. It is a panel of 18 human rights experts. HRC members are nominated by the State Party of which they (p. 14) are nationals,⁵² and are elected by a ballot of all States Parties to serve four-year terms.⁵³ Half of the HRC is elected every two years.⁵⁴ It convenes three times a year for three-week meetings, though smaller working groups meet for a week prior to plenary meetings.

[1.32] Article 31(2) ICCPR specifies that consideration be given to the 'equitable distribution of membership and to the representation of the different forms of civilisation and of the principal legal systems'. Thus, States Parties should endeavour to elect a fair number of HRC members from Western Europe and Other States, Eastern Europe, Latin America and the Caribbean, Africa, and Asia.

[1.33] Of particular importance is that HRC members act in their *personal* capacity.⁵⁵ Though they are nominated by their own State, they do not sit as government representatives. Thus, HRC meetings are not overtly politicized unlike, for example, meetings of the United Nations Human Rights Council.⁵⁶ Certain safeguards are taken to ensure political impartiality. For example, an HRC member does not participate in decisions which directly concern his/her State. However, States are of course unlikely to nominate members who are outspokenly opposed to their policies.⁵⁷ HRC members have undoubtedly been influenced, perhaps unconsciously, by the politics and culture of their respective home States.⁵⁸ Indeed, a conspicuous clash of political persuasions occurred between east and west throughout the Cold War, causing a degree of institutional paralysis.⁵⁹ A growth in HRC initiatives has been evident in the 1990s, and has been facilitated by the greater degree of internal consensus since the end of the Cold War.

References

[1.34] A survey of the *curricula vitae* of the 18 current members (as at October 2012) reveals that almost all members have no direct connections with their governments, and expert human rights qualifications. Thus, the current Committee seems to fulfil the requisite criteria of independence and expertise. This was not perhaps the case with early Committees, which had too many diplomats as members, who may have been inclined to push the 'official' view of their home States.⁶⁰

(p. 15) **[1.35]** Though its Rules of Procedure provide for majority opinions, the HRC endeavours to make decisions by consensus.⁶¹ Such decisions of course carry more weight than majority opinions.⁶² However, consensus occasionally necessitates unsatisfactory compromises, which unfortunately dilute certain decisions.⁶³ Though consensus remains the norm, more individual opinions have emerged from the HRC in recent years.

[1.36] The HRC performs four essential functions in monitoring the ICCPR: it (1) conducts dialogues and draws conclusions from States' reports; (2) issues General Comments which explain the meaning of ICCPR provisions; (3) hears inter-State complaints under article 41; and (4) makes decisions under the First Optional Protocol. These functions are largely replicated by the other treaty bodies, or will be once certain Optional Protocols come into force.

Reporting System and Concluding Observations

[1.37] The HRC examines and comments upon State Party reports under article 40 of the ICCPR. This is the only compulsory monitoring mechanism under the ICCPR: States Parties are required to submit periodic reports on their implementation of the Covenant. States must submit an initial report within a

year of the entry into force of the ICCPR, and periodic reports whenever the HRC so requests, normally every five years.⁶⁴ Since 1999, with the most recent revision in 2010, the HRC has issued consolidated guidelines for State reports,⁶⁵ which give important guidance to States on how to prepare adequate reports for the purposes of article 40.

[1.38] It is now expected that States will liaise with local civil society organizations in preparing its report, and often such organization will submit their own ‘shadow report’ to the HRC, and will brief the HRC on the State in question.⁶⁶ For example, the HRC has expressed concern to the Republic of Moldova over its exclusion of civil society organizations from the reporting process:⁶⁷

¶28 The Committee notes the State party’s acknowledgment that civil society organizations were not invited to consult during the preparation of its report and reiterates its view that civil society organizations can be an important support for the realization of human rights, including the rights set out in the Covenant.

(p. 16) The State party should facilitate the participation, through an appropriate consultative process, of civil society organizations in the preparation of future reports under the Covenant.

[1.39] In 1992, the HRC initiated a practice of calling for emergency reports from States suffering from acute human rights crises, such as Bosnia-Herzegovina, Croatia, and the former Republic of Yugoslavia (Serbia-Montenegro) in that year. Since then, the HRC has rarely used the emergency report procedure. Its existence does however ensure that the HRC and the other treaty bodies, which have also adopted the practice, can maintain their relevance in situations of extreme human rights abuse. On the other hand, the emergency report procedure can be problematic, as it would compromise the quasi-judicial role of the HRC if it was perceived to ‘target’ the States that it wishes to scrutinize, rather than examine each States Party according to when its respective reports are due.⁶⁸ The UN Human Rights Council is perhaps better suited to making decisions which will inevitably be viewed as political, focusing its spotlight on particular ‘human rights hot spots’.

[1.40] State Party reports are normally examined by the HRC in a public dialogue with State Party representatives. At the conclusion of the process, the HRC issues a set of Concluding Observations, which are adopted by consensus, and which act as a ‘report card’ for the State under the ICCPR. The HRC began adopting Concluding Observations only in 1992, despite the reporting system having been in operation since 1977. A State should use the concerns enunciated in its most recent set of Concluding Observations as a foundation for preparing its periodic reports, and each report should contain information on how the State will ensure it follows up on the Concluding Observations.⁶⁹ The State’s response is followed up by the Special Rapporteur for the follow-up on Concluding Observations, a person appointed from within the Committee.

[1.41] In October 2009, the HRC adopted a new reporting procedure based on lists of issues to be transmitted to States prior to the submission of each periodic report. A State’s replies to this list of issues now serve as its report under article 40, unless it opts out of the new procedure.⁷⁰

[1.42] The reporting system has been plagued by instances of State non- cooperation [1.141]. For example, many States are late in submitting their reports.⁷¹ In 2002 in General Comment 30, the HRC explicitly introduced a tougher line on the non-submission of reports, and/or the non-appearance of State delegations to defend the report. The HRC is now prepared to examine State reports in the absence of a State Party delegation if no delegation should present on the scheduled date,⁷²(p. 17) and is even prepared to examine a State’s ICCPR implementation record in the absence of a report after notifying the relevant State of the date of such examination.⁷³ If reports or, in the absence of reports, ICCPR records are examined without State delegations, a Special Rapporteur will be appointed to attempt to establish or restore a dialogue with the relevant State.⁷⁴

References

General Comments

[1.43] The HRC initially refused to interpret its article 40 mandate as authorizing the issue of a consensus evaluation on a particular State’s report and subsequent dialogue. Some early HRC members, particularly those from the Eastern bloc, felt that such a practice would unduly interfere with a State’s

internal affairs.⁷⁵ In order to achieve consensus, the HRC initially interpreted article 40(4) as an authorization for the issue of comments addressed generally to all States Parties.

[1.44] Hence, the HRC has issued numerous ‘General Comments’, which address matters of relevance to all States Parties. Most of these General Comments have expanded on the meaning of specific Covenant rights. Some Comments, such as General Comment 15 on ‘The Position of Aliens under the Covenant’ and General Comment 28 on ‘Equality of Rights between Men and Women’ have addressed a broader range of rights under a specific theme. A few Comments have addressed miscellaneous issues such as reservations, denunciations, and advice to States on how to prepare reports. Generally, the older Comments, such as that on article 1 (General Comment 12 on the right of peoples to self-determination) are less detailed and consequently less useful than the more elaborate later Comments (see eg General Comment 34 on freedom of expression). Despite their inception as an arguably weak compromise interpretation of article 40, the HRC’s General Comments have proven to be a valuable jurisprudential resource. They are extensively excerpted where relevant in the following chapters.

References

Inter-State Complaints

[1.45] Under article 41 ICCPR, States Parties may submit complaints about violations of the ICCPR by another State if both States have made declarations that the HRC is competent to hear such complaints. Thus the procedure is optional. Although 48 States had made article 41 declarations as of October 2012, the inter-State complaints mechanism has never been utilized. Presumably this is (p. 18) because of the diplomatic and political implications of such an action; States fear retaliatory attacks on their own human rights records.

General Comment 31

[1.46] In General Comment 31, the HRC reminded States Parties of the inter-State obligations in the ICCPR:

¶2.2. While article 2 is couched in terms of the obligations of State Parties towards individuals as the right-holders under the Covenant, every State Party has a legal interest in the performance by every other State Party of its obligations. This follows from the fact that the ‘rules concerning the basic rights of the human person’ are erga omnes obligations and that, as indicated in the fourth preambular paragraph of the Covenant, there is a United Nations Charter obligation to promote universal respect for, and observance of, human rights and fundamental freedoms. Furthermore, the contractual dimension of the treaty involves any State Party to a treaty being obligated to every other State Party to comply with its undertakings under the treaty. In this connection, the Committee reminds States Parties of the desirability of making the declaration contemplated in article 41. It further reminds those States Parties already having made the declaration of the potential value of availing themselves of the procedure under that article. However, the mere fact that a formal interstate mechanism for complaints to the Human Rights Committee exists in respect of States Parties that have made the declaration under article 41 does not mean that this procedure is the only method by which States Parties can assert their interest in the performance of other States Parties. On the contrary, the article 41 procedure should be seen as supplementary to, not diminishing of, States Parties’ interest in each others’ discharge of their obligations. Accordingly, the Committee commends to States Parties the view that violations of Covenant rights by any State Party deserve their attention. To draw attention to possible breaches of Covenant obligations by other States Parties and to call on them to comply with their Covenant obligations should, far from being regarded as an unfriendly act, be considered as a reflection of legitimate community interest.

Accordingly, the Committee reminds States Parties that article 2 clearly enjoins them to view violations of the Covenant guarantees by any State Party as deserving their attention. To draw attention to possible breaches of Covenant obligations by other States Parties should not be regarded as an unfriendly act but as a reflection of legitimate community interest. The Committee reminds States Parties of the desirability of making the declaration contemplated in article 41. It

also reminds those States Parties already having made the declaration of the potential value of availing themselves of the procedure under that article.

References

[1.47] In *Dumont de Chassart v Italy* (1229/03), the author tried to argue that Italy had not done enough to help him regain custody of his children, who lived with their mother in Austria in defiance of Italian court orders. For example, he argued that Italy should bring an article 41 claim against Austria. In its inadmissibility decision, the HRC confirmed that individuals have no rights under article 41.

References

Individual Communications Under the Optional Protocol

[1.48] The First Optional Protocol is a separate treaty from the ICCPR. If a State ratifies the Optional Protocol, individuals may submit complaints, or ‘communications’ about alleged violations of their ICCPR rights by that State to the HRC.

(p. 19) General Comment 33

[1.49]

¶4. Article 1 of the Optional Protocol provides that a State party to it recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State party of any of the rights set forth in the Covenant. It follows that States parties are obliged not to hinder access to the Committee and to prevent any retaliatory measures against any person who has addressed a communication to the Committee.⁷⁶

References

[1.50] Occasionally, the HRC will join complaints from different authors together as they may arise from the same set of facts.⁷⁷ Unusually, the HRC joined two complaints by the same author against two different States in *Soltes v Czech Republic and Slovakia* (1034–5/01).

References

[1.51] All evidence is presented to the HRC in writing. Oral evidence is not permitted.⁷⁸ In *Howard v Canada* (879/99), a case concerning indigenous rights [24.34], the following observation was made:

¶4. In his original communication of 9 October 1998, the author, referring to the oral tradition of the Mississauga First Nations, requested the Committee to take into account, in addition to written materials submitted by the parties, oral evidence reproduced in the form of a videotape containing an interview with the author and two other members of the Mississauga First Nations on the importance of fishing for their identity, culture and way of life. On 12 January 2000 the Committee, acting through its Special Rapporteur on New Communications, decided not to accept videotape evidence, with reference to the Optional Protocol’s provision for a written procedure only (article 5, paragraph 1, of the Optional Protocol). By letter dated 7 February 2000, the author furnished the Committee with a transcript of the videotaped testimony in question. The Committee expresses its appreciation for the author’s willingness to assist the Committee by submitting the transcript.

References

[1.52] The HRC must first consider whether the communication is admissible. The admissibility criteria are set out in articles 1 to 3 and 5 of the Optional Protocol. There are several jurisdictional admissibility criteria. First, there must be an individual victim (personal jurisdiction); ICCPR violations may not be

claimed in the abstract.⁷⁹ Secondly, the communication must relate to a matter within the relevant State's jurisdiction.⁸⁰ Thirdly, the communication must relate to an event which occurred after the relevant State ratified the Optional Protocol (temporal jurisdiction).⁸¹ Procedural admissibility requirements are found in article 5 of the Optional Protocol: the communication must not be simultaneously before another international tribunal,⁸² and the complainant ('the author') must exhaust domestic remedies before submitting the communication to the HRC.⁸³ The author must (p. 20) also submit sufficient evidence to substantiate the communication before the HRC will proceed. The main substantive hurdle is that the communication must relate to a matter which arises under the ICCPR. This admissibility hurdle is construed from article 2 of the Optional Protocol, which prescribes that victims must have a claim under an enumerated ICCPR right, and article 3, which prohibits the admissibility of 'incompatible' communications. For example, communications alleging breach of a right to property⁸⁴ and a right to asylum⁸⁵ have been ruled inadmissible *ratione materiae*, as they failed to raise a claim under any particular provision of the Covenant.

References

[1.53] Another common reason for inadmissibility arises independently of the terms of the OP. The HRC, being an international supervisory body, does not operate as an appellate court to which appeals may be taken from a State's highest domestic court. That is, it does not operate as a 'fourth instance court' [14.63]. This means that the HRC will rarely uphold complaints that have been found to be unsubstantiated by municipal courts, so long as those domestic proceedings addressed the substance of the relevant OP complaint.⁸⁶ This is because the HRC, being a quasi-judicial body which receives only written evidence, is in a worse position to assess findings, especially findings of fact, than a domestic court. The HRC will 'overrule' the findings of a domestic court only when it is apparent that the court has operated in a manifestly arbitrary manner, or has objectively failed to operate under fair procedures. Nevertheless, the HRC has been prepared to overrule local courts in some cases, even in the sensitive and contentious area of family law, as noted below [1.75].

[1.54] An example of the operation of this 'fourth instance' doctrine is in *Jonassen et al v Norway* (942/00). In that case, the authors claimed that the failure by the State to recognize certain indigenous Sami land rights and consequent entitlements breached article 27 [24.42]. Determination of Sami land rights entailed findings of fact by Norwegian courts regarding the existence, or non-existence, of a strong historical connection between an indigenous group and the land in question. In one of the local court decisions, the 'Aursunden Case 1997', the Norwegian Supreme Court relied heavily on the factual findings in an earlier Supreme Court decision of 1897. One of the complaints under the OP concerned the Norwegian court's failure to protect the authors from discrimination, by basing 'its establishment of facts on those made by the Supreme Court in 1897, at a time where the general opinion of the Sami was discriminatory';⁸⁷ the authors argued that the 1897 decision was tainted by institutional prejudice against indigenous peoples and their culture.⁸⁸ The HRC, applying its 'fourth instance court' doctrine, found the complaint inadmissible in this regard; it was 'not for the Committee to re-evaluate' the Supreme Court's conclusion that the 1897 decision was not biased, and was therefore a reasonable platform upon which to base its conclusions regarding Sami land rights.⁸⁹ This decision shows the strength of the (p. 21) HRC's 'fourth instance' doctrine. The HRC refused to look behind the Supreme Court's decision that an earlier 1897 decision was discriminatory against Samis, despite the submission of considerable evidence of the disparaging attitudes of the Finnish governmental organs to the Sami during the late nineteenth century.

References

[1.55] There are no strict time limits for submission of a complaint under the Optional Protocol.

Gobin v Mauritius (787/97)

[1.56]

¶6.3. The State party claims that because of the delay in submission of the communication the Committee should consider it as inadmissible as an abuse of the right of submission under article 3 of the Optional Protocol. The Committee notes that there are no fixed time limits for submission of communications under the Optional Protocol and that mere delay in submission does not of itself involve abuse of the rights of communication. However, in certain

circumstances, the Committee expects a reasonable explanation justifying a delay. In the present case, the alleged violation took place at periodic elections held five years before the communication was submitted on behalf of the alleged victim to the Committee with no convincing explanation in justification of this delay. In the absence of such explanation the Committee is of the opinion that submitting the communication after such a time lapse should be regarded as an abuse of the right of submission, which renders the communication inadmissible under article 3 of the Optional Protocol.

References

[1.57] Though *Gobin* was controversial when it was first adopted,⁹⁰ it has now been followed in a number of cases, including *SL v Czech Republic* (1850/08), *Jahelka v Czech Republic* (1583/07), *Kudrna v Czech Republic* (1582/07), *Brown v Namibia* (1591/07), and *Fillacier v France* (1434/05). This potential ground of admissibility has now been formalized in rule 96(5), which expressly permits the HRC to rule a complaint inadmissible as an abuse of process if it is submitted more than five years after the exhaustion of the final domestic remedy by the relevant author, or more than three years after conclusion of consideration of the matter by another procedure of international settlement. It is not clear that the new rule will make much difference to the HRC's practice in this regard, apart from providing a more formal basis for such decisions.

References

[1.58] The second stage of the individual communications procedure is for the HRC to consider the merits of the complaint. Ultimately, the HRC issues its 'views' on the merits under article 5(4) of the Optional Protocol, in which it pronounces on whether violations of the ICCPR had eventuated.

[1.59] Until 1997, Optional Protocol communications were considered in two stages: admissibility followed, if necessary, by merits consideration. In mid-1997, the HRC adopted new rules of procedure to streamline the Optional Protocol process. This was a response to the escalation in the number of submitted communications caused by a rapid growth in Optional Protocol ratifications and increasing public awareness of the procedure.⁹¹ Rule 97(2) now dictates that the HRC will (p. 22) consider issues of merits and admissibility together, unless it decides on a split consideration. The rules regarding admissibility however remain the same.⁹² If the case is blatantly inadmissible, such as when the communication is inadmissible *ratione temporis*, it is dismissed. Otherwise, States are generally given six months to respond to the allegations of violation.⁹³

References

General Comment 33

[1.60] HRC views are not legally binding, as the HRC is not a judicial body.

¶11. While the function of the Human Rights Committee in considering individual communications is not, as such, that of a judicial body, the views issued by the Committee under the Optional Protocol exhibit some important characteristics of a judicial decision. They are arrived at in a judicial spirit, including the impartiality and independence of Committee members, the considered interpretation of the language of the Covenant, and the determinative character of the decisions....

¶13. The views of the Committee under the Optional Protocol represent an authoritative determination by the organ established under the Covenant itself charged with the interpretation of that instrument. These views derive their character, and the importance which attaches to them, from the integral role of the Committee under both the Covenant and the Optional Protocol....

¶15. The character of the views of the Committee is further determined by the obligation of States parties to act in good faith, both in their participation in the procedures under the Optional Protocol and in relation to the Covenant itself. A duty to cooperate with the Committee arises from an application of the principle of good faith to the observance of all treaty obligations.

References

[1.61] The HRC is the pre-eminent interpreter of the ICCPR which is itself legally binding. The HRC's decisions are therefore strong indicators of legal obligations, so rejection of those decisions is good evidence of a State's bad faith attitude towards its ICCPR obligations.⁹⁴ Indeed, HRC decisions are issued 'in a judicial spirit'.⁹⁵ Merits decisions resemble definitive findings of breach, or non-breach, by the State concerned. The HRC will also recommend an appropriate remedy, such as the amendment of impugned legislation,⁹⁶ the payment of damages,⁹⁷ the (p. 23) making of representations to a State Party to which an author has been deported in violation of the Covenant,⁹⁸ and/or the release of persons unfairly detained.⁹⁹ Furthermore, the HRC has instituted a 'follow-up' procedure that publicizes the ultimate fate of its Optional Protocol recommendations.¹⁰⁰ Hence, a State's failure to implement HRC views is on public record, which can potentially prompt censure and criticism. The familiar international legal sanction of bad publicity is therefore available when States are found in breach under the Optional Protocol, and when they fail to redress those breaches. Fear of public condemnation arising from international scrutiny can often provide sufficient incentive to States to improve their human rights record.¹⁰¹ HRC decisions have directly caused States to alter their laws and/or practices so as to conform to the ICCPR.¹⁰² Nevertheless, there is an unsatisfactory rate of non-compliance with Optional Protocol decisions. This phenomenon is discussed below [1.141].

References

General Comment 33

[1.62] The HRC has commented on the occasional non-cooperation of States during the Optional Protocol process in General Comment 33.

¶10. In the experience of the Committee, States do not always respect their obligation. In failing to respond to a communication, or responding incompletely, a State which is the object of a communication puts itself at a disadvantage, because the Committee is then compelled to consider the communication in the absence of full information relating to the communication. In such circumstances, the Committee may conclude that the allegations contained in the communication are true, if they appear from all the circumstances to be substantiated.

Therefore, the HRC will often accept detailed allegations as fact if they are not specifically denied or justified by the State party.¹⁰³

References

[1.63] The HRC has rebuked Australia for its failure to comply with its Optional Protocol views:¹⁰⁴

...[T]he Committee expresses once again its concern at the State party's restrictive interpretation of, and failure to fulfil its obligations under the Optional Protocol and the Covenant, (p. 24) and at the fact that victims have not received reparation. The Committee further recalls that, by acceding to the Optional Protocol the State party has recognized its competence to receive and examine complaints from individuals under the State party's jurisdiction, and that a failure to give effect to its Views would call into question the State party's commitment to the Optional Protocol (art. 2).

Requests for interim measures

General Comment 33

[1.64]

¶19. Measures may be requested by an author, or decided by the Committee on its own initiative, when an action taken or threatened by the State party would appear likely to cause irreparable harm to the author or the victim unless withdrawn or suspended pending full consideration of the communication by the Committee. Examples include the imposition of the death penalty and violation of the duty of non-refoulement. In order to be in a position to meet

these needs under the Optional Protocol, the Committee established, under its rules of procedure, a procedure to request interim or provisional measures of protection in appropriate cases. Failure to implement such interim or provisional measures is incompatible with the obligation to respect in good faith the procedure of individual communication established under the Optional Protocol.

References

[1.65] The HRC has established a practice of issuing a request for the taking by a State of interim measures to preserve the status quo in certain Optional Protocol cases. Such requests are issued under rule 92 (formerly rule 86) of the Committee's Rules of Procedure where the performance by the State of certain actions would cause irreparable damage to the Optional Protocol author.¹⁰⁵ For example, rule 92 requests are issued in cases where an author has alleged that a death sentence has been improperly imposed; the State Party is naturally requested to refrain from executing an author while the Optional Protocol communication is being considered. The other situation where rule 92 requests are commonly issued is in the context of requesting that a State refrain from carrying out a deportation when the conformity of that deportation with the Covenant is at issue in a communication. More unusual situations in which such requests have arisen have been to request a cessation to a logging in an area of cultural importance to indigenous peoples,¹⁰⁶ protection for a detainee's life, health and safety,¹⁰⁷ protection for an author and his family from harassment,¹⁰⁸ and for a State to take all measures within its power to ensure that a person was not executed in another State while his complaint was being considered.¹⁰⁹ The latter four examples demonstrate that requests for interim measures can include both requests that a State refrain from certain conduct (eg refrain from executing a person) and that it also perform certain actions (eg take steps to protect a person).

References

(p. 25) **[1.66]** Normally a State complies with the rule 92 request though such compliance has not been absolute.

References

Piandiong v Philippines (869/99)

The Philippines executed the three authors just over a fortnight after having received the HRC's request to refrain from such executions. The HRC issued a vigorous condemnation of the Philippine government's actions:¹¹⁰

¶5.1. By adhering to the Optional Protocol, a State party to the Covenant recognizes the competence of the Human Rights Committee to receive and consider communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant (Preamble and Article 1). Implicit in a State's adherence to the Protocol is an undertaking to cooperate with the Committee in good faith so as to permit and enable it to consider such communications, and after examination to forward its views to the State party and to the individual (Article 5 (1), (4)). It is incompatible with these obligations for a State party to take any action that would prevent or frustrate the Committee in its consideration and examination of the communication, and in the expression of its Views.

¶5.2. Quite apart, then, from any violation of the Covenant charged to a State party in a communication, a State party commits grave breaches of its obligations under the Optional Protocol if it acts to prevent or frustrate consideration by the Committee of a communication alleging a violation of the Covenant, or to render examination by the Committee moot and the expression of its Views nugatory and futile. In respect of the present communication, the authors allege that the alleged victims were denied rights under Articles 6 and 14 of the Covenant. Having been notified of the communication, the State party breaches its obligations under the Protocol, if it proceeds to execute the alleged victims before the Committee concludes its consideration and examination, and the formulation and communication of its Views. It is particularly inexcusable

for the State to do so after the Committee has acted under its rule 86 to request that the State party refrain from doing so....

¶15.4. Interim measures pursuant to rule 86 of the Committee's rules adopted in conformity with article 39 of the Covenant, are essential to the Committee's role under the Protocol. Flouting of the Rule, especially by irreversible measures such as the execution of the alleged victim or his/her deportation from the country, undermines the protection of Covenant rights through the Optional Protocol.

Hence, a failure to comply with requests for interim measures is deemed to be a grave breach of the Optional Protocol.¹¹¹ *Piandiong* has now been followed in numerous cases such as *Nazriev v Uzbekistan* (1044/02), *Weiss v Austria* (1086/02), *Tolipkhuzhaev v Uzbekistan* (1280/04), *Uteev v Uzbekistan* (1150/03), and *Saidov v Tajikistan* (964/01).¹¹²

(p. 26) *Alzery v Sweden* (1416/05)

[1.67] This case involved a notorious instance of extraordinary rendition [9.104]. The HRC extended its *Piandiong* reasoning. While the author was not expelled after the issuance of a request for interim measures, he was expelled quickly and deliberately before he had a chance to utilize international remedies such as that under the Optional Protocol to attempt to forestall his deportation:

¶11.11. ... In the present case, the Committee notes that the author's (then) counsel had expressly advised the State party in advance of the Government's decision of his intention to pursue international remedies in the event of an adverse decision [...] Counsel was incorrectly advised after the decision had been taken that none had been reached, and the State party executed the expulsion in the full knowledge that advice of its decision would reach counsel after the event. In the Committee's view, these circumstances disclose a manifest breach by the State party, of its obligations under article 1 of the Optional Protocol.

References

Interpretation and Development of ICCPR Norms

[1.68] This book is concerned with the jurisprudence of the HRC, with some limited references to the other UN treaty bodies. As the excerption and analysis of that jurisprudence are arranged in separate chapters according to the relevant substantive right, it is necessary in this introductory chapter to comment on some broad unifying themes within that jurisprudence.

General Overview

[1.69] The essential sources of HRC jurisprudence are its decisions under the Optional Protocol, its General Comments, and its Concluding Observations. Its Optional Protocol decisions apply the ICCPR in concrete situations, so they deliver the most specific interpretations of the Covenant. As is noted below, the broad brush approach of Concluding and General Comments has its advantages when dealing with systemic violations of ICCPR rights [1.116].

[1.70] By October 2012, the HRC had completed its consideration of approximately 2,000 communications. It must be noted, however, that a disproportionate number of communications have concerned a handful of States and a narrow range of subject matters. From 1976 to about 1985, most communications concerned gross abuses of human rights, including allegations of torture, disappearance, and extended arbitrary detention, by the military government in Uruguay. From the mid-1980s to the early 2000s, a very large number of cases have been submitted by death row prisoners in the Caribbean, particularly Jamaica. These cases have generally concerned the fairness of trials resulting in capital sentences, though a number of these cases have also addressed the length of detention and conditions on death row. This unevenness in 'complaint rate' has caused the HRC's Optional Protocol jurisprudence to be disproportionately concerned with matters pertaining to articles 7, 9, 10, and 14. In contrast, there is relatively little jurisprudence on (p. 27) certain rights, such as those rights enunciated in articles 21 and 22, though that jurisprudence is now growing.

[1.71] Despite the disproportionate number of communications of an essentially similar nature, the Optional Protocol has nevertheless yielded a large body of jurisprudence touching on important aspects of most ICCPR rights. The HRC has dealt with a large number of complicated issues, which have necessitated genuine findings of law rather than mere establishment of facts. For example, Optional Protocol decisions have addressed the ICCPR compatibility of laws, administrative decisions, or practices of the following type: a law that prohibited Holocaust denial [18.90], the deportation or extradition of persons in various contexts,¹¹³ passport controls on persons who have failed to perform compulsory military service [12.25], detention for reasons of military discipline [11.89], detention of unauthorized arrivals seeking asylum,¹¹⁴ prohibitions on gay sex [16.50], amnesty laws [9.185], extended detention on death row [9.81], language requirements designed to promote a certain linguistic culture [18.39], commercial ventures into indigenous lands,¹¹⁵ restrictions on media access to report parliamentary proceedings [18.61], prohibitions on same-sex marriage [20.42], special terrorist courts [23.124], legislative settlement of outstanding indigenous claims [24.20], mandatory death sentences [8.57], the extent to which ICCPR and OP obligations are deemed to extend to dependent territories [4.06], abortion,¹¹⁶ freedom of information,¹¹⁷ incursions into lawyer/client privileges [16.37], preventive detention [11.35], conscientious objection,¹¹⁸ and the implementation by States of obligations under UN Security Council Resolutions.¹¹⁹

[1.72] Some of the most rigorous Optional Protocol decisions have concerned article 26, the free-standing guarantee of non-discrimination.¹²⁰ In landmark decisions in 1987, *Broeks v Netherlands* (172/84) [23.14] and *Zwaan-de-Vries v Netherlands* (182/84), the HRC found that article 26 guaranteed non-discrimination in relation to all rights, including economic, social, and cultural rights. In numerous subsequent communications, the HRC has had to consider the compatibility of numerous allegedly discriminatory measures in national social welfare policies. The decisions were particularly significant, given that the corresponding non-discrimination guarantee in the European Convention, article 14, only prohibited discrimination in relation to other Convention rights [23.17].¹²¹

[1.73] The HRC can be criticized for occasional inconsistency in its methodology. For example, in *Nicholas v Australia* (1080/02), the claims concerned article 15 (p. 28) [15.05]. In finding no violation of that provision, the HRC suggested that article 14 matters may have been at issue, but that it could not consider those matters as they had not been raised by the parties.¹²² Yet a violation of article 14(3)(c) was found in *Kankanamge v Sri Lanka* (909/00) without it being invoked by the author.

References

[1.74] Another methodological inconsistency arises with regard to the treatment by the HRC of laws which are, on their face, in breach of the ICCPR. Sometimes the HRC will find that the law breaches the ICCPR, as in *Yevdokimov and Rezanov v Russian Federation* (1410/05) (concerning a blanket ban on prisoners voting) [22.27] and *Young v Australia* (941/00) (concerning the denial of certain social security benefits on the grounds of sexuality) [23.54].¹²³ However, sometimes the HRC will find that no violation has arisen because the *application* of the law in the particular instance before them is permissible under the Covenant, as in *Faurisson v France* (550/93) concerning Holocaust denial [18.90], and *Aster v Czech Republic* (1575/07), concerning the application of restitution legislation which discriminated on the basis of nationality. Indeed, a minority in *Yevdokimov* (Messrs Thelin and O’Flaherty) found no violation as the application of the law to the authors, who had been convicted of serious organized crime, was not unreasonable in their view [22.28].¹²⁴

References

[1.75] Finally, regarding methodology, it does seem that the HRC varies in the level of deference it pays to local court findings under its ‘fourth instance’ court doctrine [1.54]. While it has been traditionally deferential, for example in the area of family law [20.62], in cases such as *Hendriks v Netherlands* (201/85), it may nevertheless ‘overrule’ such decisions as seen in *NT v Canada* (1052/02) [20.39]. A case in which the HRC’s lack of deference was controversial was *Haraldsson and Sveinsson v Iceland* (1306/04) concerning the regulation of Iceland’s fishing industry [23.71]. While the majority found a violation, the minority of Sir Nigel Rodley, Mr Iwosawa, and Mrs Wedgwood did not, and felt that the HRC should have deferred to Iceland’s authorities over a matter of great economic and environmental importance.¹²⁵

References

[1.76] Optional Protocol jurisprudence is of course supplemented by the General Comments and the Concluding Observations, which have addressed numerous issues outside the scope of submitted communications. Finally, important additional matters have been addressed by the other UN treaty bodies, such as matters concerning torture before the CAT Committee.

[1.77] It is generally recognized that human rights texts should be interpreted liberally, so corresponding limitations are to be construed narrowly.¹²⁶ Nevertheless, (p. 29) it is difficult to identify any consistent trend of liberalism, radicalism, or conservatism in the HRC's interpretations compared to other human rights bodies. For example, the HRC's extension in 1988 of article 26 into the realm of economic, social, and cultural rights was perceived as radical.¹²⁷ However, it has arguably been quite conservative in its subsequent consideration of communications about discrimination in the allocation of social and economic rights. The HRC has displayed a more conservative response to 'the death row phenomenon' than the European Court of Human Rights in *Soering v UK*.¹²⁸ However, the HRC has been more radical than the European bodies in its rejection of the cautious doctrine of the margin of appreciation.¹²⁹ The absence of a consistent HRC interpretative 'philosophy' may be due to the fact that new personnel join the HRC every two years.¹³⁰

References

The Role of Precedent

[1.78] The HRC is not expressly bound by any doctrine of precedent. In *Thomas v Jamaica* (532/1993), Messrs Pocar and Lallah stated:

any...views of the Committee based on legal grounds...can be reversed or modified at any time, in the light of further arguments raised by Committee members during the consideration of another case.

In *Thompson v Saint Vincent and the Grenadines* (806/98), Messrs Kretzmer, Amor, Yalden, and Zakhia stated:

The Committee is not bound by its previous jurisprudence. It is free to depart from such jurisprudence and should do so if it is convinced that its approach in the past was mistaken. It seems to me, however, that if the Committee wishes States parties to take its jurisprudence seriously and to be guided by it in implementing the Covenant, when it changes course it owes the States parties and all other interested persons an explanation of why it chose to do so....

References

[1.79] The HRC has expressly followed its own decisions on numerous occasions.¹³¹ The HRC has sporadically expressed inconsistent opinions. For example, the case of *Foin v France* (666/95) [23.58] appears to overrule the previous decision in *Järvinen v Finland* (295/88) [23.57]. *Judge v Canada* (829/98) [8.69] explicitly overrules *Kindler v Canada* (470/91) [8.67]. *Nystrom v Australia* (1557/07) [12.40] (p. 30) and *Warsame v Canada* (1959/10) [12.41] clearly depart from *Stewart v Canada* (538/93) on the interpretation of article 12(4) [12.39]. *Yoon and Choi v Republic of Korea* (1321-2/04) departs from *LTK v Finland* (184/84) on the issue of conscientious objection [17.43]. Concluding Observations have indicated that the ICCPR may indeed protect the right to strike, contrary to its early decision in *JB v Canada* (118/82) [19.24]. The HRC's divergences from its own jurisprudence, though infrequent, are a sign that the ICCPR is a living instrument capable of dynamic development.

References

[1.80] Certainly, the HRC's jurisprudence normally develops in favour of a more expansive interpretation of a human right. That is, its decisions are more likely to become more liberal than more conservative.

Kodirov v Uzbekistan (1284/04)

The HRC arguably took a more conservative approach than in its previous case law by refusing to examine a claim over the death penalty as the relevant death sentence had been commuted. In dissenting on this point, Mrs Chanet, Ms Majodina, and Mr Salvioli argued that the refusal to consider the article 6 claim was ‘a step backwards’ from previous cases.¹³² They then stated:

¶6. In the interpretation of human rights law, and in the name of progress, an international body may amend a view it previously held and replace it with an interpretation that provides greater protection for the rights contained in an international instrument: this constitutes appropriate and necessary development of international human rights law.

¶7. The reverse procedure is not acceptable, however: it is not appropriate to interpret human rights provisions more restrictively than before. The victim of a violation of the Covenant deserves at least the same approach to protection as that provided in cases considered previously by the same body.

[1.81] The HRC has rarely taken the opportunity to refer to and follow the decisions of its fellow UN treaty bodies. Nor has it often referred to regional human rights bodies, which have produced an extensive amount of relevant jurisprudence. The relationship between the ICCPR and other human rights treaties is discussed below [1.96].

Limitations to ICCPR Rights

[1.82] Some ICCPR rights are absolute. Examples of these absolute rights are article 7, which prohibits torture, inhuman and degrading treatment, or punishment; and article 8(1), which prohibits slavery. A State cannot impose any limits on an absolute right, unless it has entered a valid derogation under article 4¹³³ or has entered a valid reservation.¹³⁴

(p. 31) [1.83] Where limitations are permitted to ICCPR rights, they must be prescribed by national law.¹³⁵ This means that the circumstances in which the limitation will be imposed are clearly delineated in an accessible law, whether that be statute law or common law.¹³⁶ The law should not be so vague as to permit too much discretion and unpredictability in its implementation.¹³⁷

[1.84] Some ICCPR rights (ie articles 12(1) and (2), 13, part of 14(1), 18(1), 19(2), 21, and 22) contain express limitation clauses, which list permissible limitations, such as public order, national security, and protection of the rights of others.¹³⁸ Most enumerated limitations must be ‘necessary in a democratic society’, which imports a notion of proportionality in determining the permissibility of a particular limitation.¹³⁹ Other ICCPR rights (ie articles 6(1), 9(1), 12(4), and 17) permit ‘non-arbitrary’ limits. The notion of ‘arbitrariness’ also incorporates proportionality into the determination of the extent of such limits.¹⁴⁰ Article 25 rights, which may expressly be limited by ‘reasonable’ measures,¹⁴¹ and article 26 rights of non-discrimination, which may be limited, according to HRC jurisprudence,¹⁴² by ‘reasonable and objective’ measures, are similarly limited by the notion of proportionality. It is unlikely that a limitation provision will be deemed non-arbitrary, reasonable, and/or proportionate unless it is designed to meet one of the legitimate ends identified in the express limitation clauses. Therefore, despite the differently worded permissible limitations, most ICCPR rights may be limited by proportionate laws designed to protect a countervailing community benefit, such as public order, or to protect the conflicting right of another person.¹⁴³

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[1.85] The HRC itself has affirmed the centrality of the notion of proportionality in determining the legitimacy of limitations to ICCPR rights.

¶6. ...[A]ny restrictions on any of those rights must be permissible under the relevant provisions of the Covenant. Where such restrictions are made, States must demonstrate their (p. 32) necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights. In no case may the restrictions be applied or invoked in a manner that would impair the essence of a Covenant right.

References

[1.86] The dividing line between an ICCPR right and its limitations is by no means clear, especially at the 'edges' of a right. The edges of a right may be characterized as the area between blatant conformity with the right and blatant non-conformity.¹⁴⁴ The human rights compatibility of a law impacting on the periphery of a human right is generally worked out on a case-by-case basis, unless there exists a highly relevant precedent. This uncertainty confirms that the abstract ICCPR rights have not been totally concretized. The process of concretization occurs over time through the growth of HRC jurisprudence, and is facilitated by municipal decisions on ICCPR rights and academic writings.

The ICCPR Amid International Law

Sayadi and Vinck v Belgium (1472/06)

[1.87] The authors in this case were members of a non-government organization, FSI, which was allegedly the European arm of the Global Relief Fund (GRF). The GRF was 'listed' in October 2002 on the UN Security Council's list of organizations and persons associated with terrorism. Under Security Council resolutions, States had a duty to impose certain sanctions on entities or persons on the list, including travel restrictions and freezes on assets. In November 2002, Belgium transmitted the names of the authors to the Security Council, stating that they were key members of FSI: they were duly placed on the list by the Sanctions Committee of the Security Council. As a consequence, Belgium came under an obligation, under Security Council resolutions, to freeze their bank accounts and impose travel limitations upon them. The authors initiated actions against the government over its transmittal of their names. In February 2005, the Brussels Court found in the authors' favour. The government duly lobbied for the removal of their names from the Security Council list, without success. Domestic criminal investigations against them regarding alleged terrorist links also ceased due to a lack of evidence. The authors claimed that the restrictions on their movement and assets, and harm to their reputation, breached their rights under Articles 12 [12.23] and 17 [16.46]. Belgium issued the following defence of its actions:

¶4.6. ...[T]he State party contends, firstly, that, in accordance with the Security Council resolutions, it was obliged to furnish information on the authors. The State party notes that the Sanctions Committee has confirmed that when a charitable organization is listed, the main persons connected to such bodies must also be listed....

(p. 33) ¶6. 1 On 17 January 2007, the State party submitted that the authors are not entitled to challenge United Nations regulations on the fight against terrorism before the Committee. Article 1 of the Optional Protocol precludes the authors from disputing measures taken by the State party to implement its Charter obligations. In the circumstances, the authors are not subject to the jurisdiction of the State party and the Committee is not entitled to consider their complaints. The authors do not dispute that the action of a State falls beyond the State's jurisdiction if it is dictated by an international obligation. The authors' argument wrongly implies that the Committee can pass judgement on the validity of Security Council resolutions. It also suggests that States Members of the United Nations are in a position to scrutinize the legitimacy of Security Council resolutions in terms of the Charter and to consider them alongside provisions of the Covenant. Even if Member States did have such discretion, at most it would imply marginal oversight restricted to manifest abuses by the Security Council. The Security Council emphasized only recently 'the obligations placed upon all Member States to implement, in full, the mandatory measures adopted by the Security Council'. In this case, the authors have not identified any manifest violation of the Charter. Regarding the alleged action ultra vires on the part of the Security Council, the Security Council did not act ultra vires and it is well established that terrorism constitutes a threat to international peace and security.

The HRC majority found that the communication was admissible:

¶7.2 While the Committee could not consider alleged violations of other instruments such as the Charter of the United Nations, or allegations that challenged United Nations rules concerning the fight against terrorism, the Committee was competent to admit a communication alleging that a State party had violated rights set forth in the Covenant, regardless of the source of the obligations implemented by the State party. The Committee concluded that the provisions of article 1 of the Optional Protocol did not preclude the consideration of the communication.

References

[1.88] Sir Nigel Rodley, Mr Shearer, and Ms Antoanella Motoc disagreed and ruled that the complaint was inadmissible:

Although it failed to make the argument explicitly, it is evident that the State party has done what it could to secure the authors' de-listing. In so doing it has provided the only remedy within its power. Accordingly, unless the Committee believes that the State party's mere compliance with the Security Council listing procedure (in the absence of bad faith by the State party or of manifest abuse or overstepping of the Security Council's powers) is capable of itself of violating the Covenant, it is not clear how the authors can still be considered victims, under article 1 of the Optional Protocol, of violations of the State party's obligations under the Covenant.

Mrs Wedgwood also dissented on admissibility:

...The authors are complaining about the actions and decisions of the United Nations Security Council, not the acts of Belgium. Security Council resolutions have established administrative measures to prevent the financing and facilitation of international terrorism....

...As the Committee acknowledges, it has no appellate jurisdiction to review decisions of the Security Council. Neither can it penalize a State for complying with those decisions. It would be inconsistent with the constitutional structure of the United Nations Charter, and its own responsibilities under the Covenant.

(p. 34) Under Article 103 of the UN Charter, which binds all UN members and all parties to the ICCPR, Charter obligations prevail over other international law obligations. One of those obligations is in article 25, the obligation to comply with Security Council decisions. The minority felt that Belgium's hands were essentially tied by the Security Council resolutions, so the complaint against it could not be admissible.

References

[1.89] The majority proceeded to discuss the merits of the case:

¶10.3 Although the parties have not invoked article 46 of the Covenant, in view of the particular circumstances of the case the Committee decided to consider the relevance of article 46. The Committee recalls that article 46 states that nothing in the Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations. However, it considers that there is nothing in this case that involves interpreting a provision of the Covenant as impairing the provisions of the Charter of the United Nations. The case concerns the compatibility with the Covenant of national measures taken by the State party in implementation of a Security Council resolution. Consequently, the Committee finds that article 46 is not relevant in this case.

¶10.4 The facts set before the Committee indicate that the State party froze the assets of the authors after their names were placed on the Consolidated List of the United Nations Sanctions Committee, which was subsequently appended to a European Community regulation and a ministerial order issued in the State party. The placement of the authors' names on the sanctions list prevents them from travelling freely. The authors allege violations of their right to an effective remedy, their right to travel freely, their right not to be subject to unlawful attacks on their honour and reputation, the principle of legality of penalties, respect for the presumption of innocence and their right to proceedings that afford procedural and structural guarantees....

¶10.6 In the present case, the Committee recalls that the travel ban for persons on the sanctions list, particularly the authors, is provided by Security Council resolutions to which the State party

considers itself bound under the Charter of the United Nations. Nevertheless, the Committee considers that, whatever the argument, it is competent to consider the compatibility with the Covenant of the national measures taken to implement a resolution of the United Nations Security Council. It is the duty of the Committee, as guarantor of the rights protected by the Covenant, to consider to what extent the obligations imposed on the State party by the Security Council resolutions may justify the infringement of the right to liberty of movement, which is protected by article 12 of the Covenant.

¶10.7 The Committee notes that the obligation to comply with the Security Council decisions adopted under Chapter VII of the Charter may constitute a ‘restriction’ covered by article 12, paragraph 3, which is necessary to protect national security or public order. It recalls, however, that the travel ban results from the fact that the State party first transmitted the authors’ names to the Sanctions Committee. The proposal for the listing, made by the State party on 19 November 2002, came only a few weeks after the opening of the investigation on 3 September 2002. According to the authors, this listing appears to have been premature and unjustified. On this point, the Committee notes the State party’s argument that the authors’ association is the European branch of the Global Relief Foundation, which was placed on the sanctions list on 22 October 2002, and the listing mentions the links of the Foundation with its European branches, including the authors’ association. The State party has furthermore argued that, when a charitable organization is (p. 35) mentioned in the list, the main persons connected with that body must also be listed, and this has been confirmed by the Sanctions Committee. The Committee finds that the State party’s arguments are not determinative, particularly in view of the fact that other States have not transmitted the names of other employees of the same charitable organization to the Sanctions Committee.... It also notes that the authors’ names were transmitted to the Sanctions Committee even before the authors could be heard. In the present case, the Committee finds that, even though the State party is not competent to remove the authors’ names from the United Nations and European lists, it is responsible for the presence of the authors’ names on those lists and for the resulting travel ban.

[1.90] The HRC went on to find breaches of articles 12 [12.23] and 17 [16.46]. The majority decision manages to sidestep the issue of inconsistency between ICCPR obligations and UN Charter obligations, as it essentially finds that Belgium was not *required* under Security Council resolutions to transmit the names, and therefore it was responsible under the ICCPR for the consequences which ensued from its errant decision to do so. Also interesting is the majority’s proposed remedy:

¶12. ...Although the State party is itself not competent to remove the authors’ names from the Sanctions Committee’s list, the Committee is nevertheless of the view that the State party has the duty to do all it can to have their names removed from the list as soon as possible, to provide the authors with some form of compensation and to make public the requests for removal. The State party is also obliged to ensure that similar violations do not occur in the future.

Hence, the majority did not order the State to lift the asset freeze and the travel ban, which would undoubtedly breach Security Council resolutions, as such measures are required for people who are listed, regardless of whether that listing is justified. Therefore, the majority does in fact exhibit deference towards UN Charter obligations in this case.

[1.91] Mr Shearer dissented on the merits as he had on admissibility as ‘the State party acted in good faith to discharge its obligations under a superior law’. In contrast Mr Iwosawa concurred on the merits, agreeing with the majority that ‘the State party could have acted otherwise while in compliance with the resolutions of the Security Council of the United Nations’. In a further concurring opinion on the merits, Sir Nigel Rodley discussed the perplexing issue of how to resolve conflicts between UN Security Council resolutions and human rights obligations. He concluded thus:

...[I]t could be that the Security Council, in its first response to the need to combat the uniquely virulent terrorism of Al-Qaida that culminated in the atrocities of 11 September 2001, might take measures involving derogation from rights susceptible of derogation (freedom of movement; privacy; property too, albeit not a right protected by the Covenant). Certainly, the listing procedure could be and was understood to contain such elements. Necessity and proportionality, however, do not vouchsafe permanent answers. On the contrary, the answers vary according to the conditions being faced. It is not easy to see why nearly a decade after the first resolution 1267

(1999) and seven years after 9/11 the Council could not have evolved procedures more consistent with the human rights values of transparency, accountability and impartial, independent assessment of facts. It may be hoped that it will not too much longer delay adjusting the procedures in line with these values. (p. 36) This would avoid putting States, including States party to the Covenant or other international human rights treaties, when determining the legislative or executive action to be taken, in the unenviable position of having to engage in difficult exercises in interpretation of or even challenges to the validity of provisions of Security Council resolutions.

[1.92] In Concluding Observations on New Zealand, the HRC stated:¹⁴⁵

¶13 While noting the obligations imposed under Security Council resolution 1373 (2001), the Committee expresses concern at the compatibility of some provisions of the Terrorism Suppression Amendment Act 2007 with the Covenant. It is particularly concerned at the designation procedures of groups or individuals as terrorist entities and at the lack of a provision in the Act to challenge these designations, which are incompatible with article 14 of the Covenant. The Committee is also concerned about the introduction of a new section allowing courts to receive or hear classified security information against groups or individuals designated as terrorist entities in their absence (arts. 2, 14 and 26).

The State party should ensure that its counter-terrorism legislation is in full conformity with the Covenant. In particular, it should take steps to ensure that the measures taken to implement Security Council resolution 1267 (1999) as well as the national designation procedures for terrorist groups fully comply with all the legal safeguards enshrined in article 14 of the Covenant.

Sechremelis v Greece (1507/06)

[1.93] The authors were the descendants of the victims of a massacre by the Nazis in Greece in 1944 during the Second World War. In 1995, they sued Germany over the incident and won in a Greek court. Subsequently, they brought enforcement proceedings against Germany. However, under Greek law, the consent of the Greek Minister of Justice was a prerequisite to enforcement. He did not authorize enforcement and Germany refused to pay. The authors alleged a breach of article 14(1) [14.83] in conjunction with article 2(3) [25.18], given Greece's failure to authorize its own court's judgment. Greece defended its actions as being compatible with the international law of State immunity. While the HRC found the case admissible, it found no violation:

¶10.2 At the origin of the present communication is Decision No. 137/1997, by which the Livadia Court of First Instance ordered Germany to pay compensation to the relatives of the victims of the massacre perpetrated by the German occupation forces in Distomo on 10 June 1944. On 4 May 2000, the Court of Cassation rejected an application for judicial review and, therefore, the Decision became final. On 26 May 2000, the authors initiated proceedings under the Code of Civil Procedure to execute the Decision. On 17 July 2000, Germany filed a complaint with the Athens Court of First Instance alleging that, under article 923 of the Code of Civil Procedure, the prior consent of the Minister of Justice is a precondition for enforcing a decision against a foreign State and that such consent had not been given. The Court dismissed the complaint on the grounds that article 923 was incompatible with article 6 of the European Convention on Human Rights and article 2, paragraph 3 of the Covenant. However, on appeal, the Athens Court of Appeal found that article 923 was not in breach of the European Convention or the Covenant. The Court held (p. 37) that the limitation imposed by this provision did not provide for an outright prohibition on the enforcement of decisions against a foreign State; that it pursued an aim that was in the public interest, namely to avoid disturbances in relations between States; that it did not affect the right to effective legal protection; and that the right to enforcement could be exercised at a later date or in another country. On 28 June 2002, the Court of Cassation upheld the decision of the Athens Court of Appeal, following which Germany refused the payment and the Minister of Justice refused to authorize enforcement.

¶10.3 The issue before the Committee is whether the refusal of the Minister of Justice to authorize enforcement of Decision 137/1997, on the basis of article 923 of the Code of Civil Procedure, constitutes a breach of the right to effective remedy as provided under article 2,

paragraph 3, with reference to the right to a fair hearing enshrined in article 14, paragraph 1 of the Covenant.

¶10.4 The Committee considers that the protection guaranteed by article 2, paragraph 3 and article 14, paragraph 1 of the Covenant would not be complete if it did not extend to the enforcement of decisions adopted by courts in full respect of the conditions set up in article 14. In the instant case, the Committee notes that article 923 of the Code of Civil Procedure, by requiring the prior consent of the Minister of Justice for the Greek authorities to enforce Decision 137/1997, imposes a limitation to the rights to a fair hearing and to effective remedy. The question is whether this limitation is justified.

¶10.5 The Committee notes the State party's reference to relevant international law on State immunity as well as the Vienna Convention of 1969 on the Law of Treaties. It also notes the State party's statement that the limitation does not impair the very essence of the authors' right to an effective judicial protection; that it cannot be ruled out that the national court's decision may be enforced at a later date, for example if the foreign State enjoying immunity from execution gave its consent to the taking of measures of constraint by the Greek authorities, thereby voluntarily waiving the application of the international provisions in its favour; and that this is a possibility expressly provided for by the relevant provisions of international law. The Committee also notes the authors' contention that Germany is not covered by immunity from legal proceedings. In the particular circumstances of the present case, without prejudice to future developments of international law as well as those developments that may have occurred since the massacre perpetrated on 10 June 1944, the Committee considers that the refusal of the Minister of Justice to give consent to enforcement measures, based on article 923 of the Code of Civil Procedure, does not constitute a breach of article 2, paragraph 3 read together with article 14, paragraph 1 of the Covenant.

This case concerned a potential clash of international law norms, that is between the customary international rules of state immunity and articles 2(3) and 14 of the ICCPR. The majority basically implied that the rules of state immunity constituted a justifiable limitation to the relevant ICCPR rights. Mr Shearer's dissent went further in finding the case inadmissible on the basis that Greece could not have acted any other way in light of clear rules of State immunity.

References

[1.94] Messrs Lallah, Bouzid, and Salvioli dissented, and found that the majority's reasoning negated the relevant ICCPR rights. They noted that harmony could in fact be achieved between the respective rules of international law, as nothing prevented the Greek government from satisfying the judgment itself, and then itself seeking reparations from Germany [25.19].

References

(p. 38) [1.95] Therefore, the HRC was deferential to the law of State immunity in *Sechremelis* as well as the UN Charter in *Sayadi and Vinck*. In contrast, the HRC did not concede that the Hague Convention on the Civil Aspects of Child Abduction 1980 would in any way modify ICCPR obligations in *Laing v Australia* (901/99) [21.31]. Nor was there any deference evident towards a bilateral extradition treaty between Estonia and Russia in *Borzov v Estonia* (1136/02).¹⁴⁶ It may also be noted that the HRC's General Comment 24 on Reservations seems to contradict other sources of international law on the matter.¹⁴⁷

References

[1.96] The HRC is irregular in its references to other human rights treaties. References to, for example, decisions of the European Court of Human Rights are sparse, and are normally prompted by the arguments of the parties. An example arose, regarding article 7 and the death penalty, in *Larrañaga v Philippines* (1421/05).¹⁴⁸ More consistent reference to comparable international bodies might be preferable, in order to facilitate the development of consistent international human rights principles.¹⁴⁹

References

[1.97] Certainly, there are a number of cases where the HRC has diverged from the case law of the European Court of Human Rights, for example regarding the right to represent one's self in criminal proceedings,¹⁵⁰ appellate rights in criminal proceedings,¹⁵¹ and the 'death row phenomenon'.¹⁵²

References

[1.98] In a number of cases involving forced disappearance, the HRC has explicitly utilized the definition of a 'disappearance' from article 7(2)(i) of the Rome Statute of the International Criminal Court. In *Yurich v Chile* (1078/02), a substantial minority of the HRC criticized this practice. Ms Chanet, Ms Palm, and Messrs Lallah, O'Flaherty, and Solari-Yrigoyen stated:

By endorsing these criteria, which pertain to another international treaty, the Committee overlooks the fact that it must apply the Covenant, the whole Covenant and nothing but the Covenant.

In a similar case of *Cifuentes v Chile* (1536/06) [2.12], Ms Chanet, Ms Majodina, and Mr Lallah criticized the majority's use of the definition of 'disappearance' from 'article 2 of the International Convention for the Protection of All Persons from Enforced Disappearances of 20 December 2006, with additional support in footnotes referring to the Rome Statute of the International Criminal Court, the Inter-American Convention on Forced Disappearance of Persons and the Declaration on the Protection of All Persons from Enforced Disappearance'.¹⁵³ They went on:

...An 'enforced disappearance' is not a term or concept used in the Covenant, though it clearly has a negative impact on a number of rights consecrated by the Covenant.

(p. 39) In basing the thrust of their reasoning on the constituent elements of a definition which is the creation of other international instruments, the majority in the Committee unfortunately failed to appreciate the fact that it is the provisions of the Covenant and its Optional Protocol which the Committee has the mandate to apply. In this regard, the majority consequently failed to appreciate that the Committee must determine whether the State party has or has not failed in fulfilling the obligations it has undertaken under the Covenant in relation to the violation of a number of the Covenant rights of the alleged victim.

Therefore, these minority opinions warn against the use of other treaties to elaborate upon human rights violations for the purposes of making decisions under the ICCPR.

References

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[1.99]

¶11. ... [T]he Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.

The General Comment confirms that the ICCPR applies alongside international humanitarian law in times of war.¹⁵⁴

References

Positive Obligations

[1.100] Civil and political rights are classically perceived as freedoms from the arbitrary interference of the State.¹⁵⁵ Therefore, they are generally conceptualized as 'negative' rights that States refrain from certain actions. This traditional conception of civil and political rights has largely contributed to the

perception that these rights are cost-free, in that it does not ‘cost’ a State to refrain from doing something. Cost-free rights may also more fairly be imposed immediately, which in turn renders them justiciable. These ‘characteristics’ of civil and political rights may be contrasted with those commonly associated with economic, social, and cultural rights. The latter rights are traditionally perceived as ‘positive’, in that States are required to take action to provide them (eg States are required to provide for adequate health care and standards of education). Positive rights are consequently perceived as costly, progressive, and non-justiciable. Indeed, this sharply perceived divide between civil and political rights and economic social and cultural rights largely contributed to the decision to split the two sets of rights into two Covenants.¹⁵⁶ (p. 40) **[1.101]** However, it is a divide that has proven simplistic and flawed. Indeed, intuition suffices to identify positive aspects within numerous ICCPR articles. For example, the article 10(1) guarantee of humane treatment in detention necessitates the construction of a sufficient number of detention centres to prevent overcrowding. The article 14(1) right to a fair trial obviously necessitates provision of independent organs of justice. The article 25(b) right to vote fundamentally involves provision of the necessary apparatus to ensure fair elections. The express duties to protect families in article 23 and children in article 24 overtly require positive measures.

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[1.102]

¶6. The legal obligation under article 2, paragraph 1, is both negative and positive in nature. States Parties must refrain from violation of the rights recognized by the Covenant, and any restrictions on any of those rights must be permissible under the relevant provisions of the Covenant....

¶7. Article 2 requires that States Parties adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligations. The Committee believes that it is important to raise levels of awareness about the Covenant not only among public officials and State agents but also among the population at large.

References

[1.103] The HRC has expressly found numerous positive duties imposed on States by the various substantive ICCPR rights. It has stated that States have duties to investigate allegations of ICCPR breach,¹⁵⁷ and duties to provide procedures and mechanisms to prevent the occurrence of ICCPR breaches.¹⁵⁸ Relevant personnel should be appropriately trained so as to instil in them knowledge of how to behave in conformity with the Covenant.¹⁵⁹ A duty to educate the general population to imbue society with a human rights culture is mentioned in numerous Concluding Observations.¹⁶⁰ As a final example, the HRC expressly incorporated positive obligations into its interpretation of article 27, the minority rights guarantee, in General Comment 23.¹⁶¹

References

[1.104] Linked to the HRC’s uncovering of positive aspects to civil and political rights has been its willingness to ‘permeate’ ICCPR rights with significant economic, social, and cultural elements.¹⁶² As mentioned above, article 26 has been interpreted to extend to non-discrimination in the arena of economic, social, and cultural rights [1.72]. Article 6, the right to life, has been interpreted to incorporate a duty upon States to tackle infant mortality, epidemics, and to take measures to (p. 41) increase life expectancy.¹⁶³ Thus, States are required to provide a certain minimum standard of health care, which is traditionally perceived as a social right.

[1.105] HRC jurisprudence has gone some way towards undermining the traditional divide between civil and political rights and economic, social, and cultural rights. The HRC has confirmed that all ICCPR rights impose negative duties of forbearance and positive duties of performance on States Parties.¹⁶⁴

State Responsibility: Vertical and Horizontal Obligations

[1.106] Most obviously, ICCPR rights should be enforceable, and remedies should be available against the State within its municipal jurisdiction; this is sometimes called the *vertical* implementation of the

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[1.107]

¶4. The obligations of the Covenant in general and article 2 in particular are binding on every State Party as a whole. All branches of government (executive, legislative and judicial¹⁶⁵), and other public or governmental authorities, at whatever level—national, regional or local—are in a position to engage the responsibility of the State Party....

Therefore, the State is directly responsible for the actions of its own authorities, such as its police, prison officers, army, civil servants, legislators, and judicial officers. General Comment 31 mirrors the approach of the International Law Commission's Articles on Responsibility of States for internationally wrongful acts. Article 7 states:¹⁶⁶

The conduct of an organ of a State or of a person or entity empowered to exercise elements of governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.

References

Jegatheeswara Sarma v Sri Lanka (950/00)

[1.108] This complaint concerned the disappearance of the author's son. The State Party admitted that responsibility for the disappearance lay with one Corporal Sarath, an officer within the Sri Lankan army. The State Party argued that, by abducting the son, Corporal Sarath was operating outside his authority without the knowledge of the State Party. The author argued that the disappearance was part of a systemic army policy. The HRC declined to decide between the two factual arguments, as it stated:

¶9.2. With regard to the author's claim in respect of the disappearance of his son, the Committee notes that the State party has not denied that the author's son was abducted by (p. 42) an officer of the Sri Lankan Army on 23 June 1990 and has remained unaccounted for since then. The Committee considers that, for purposes of establishing State responsibility, it is irrelevant in the present case that the officer to whom the disappearance is attributed acted *ultra vires* or that superior officers were unaware of the actions taken by that officer. The Committee therefore concludes that, in the circumstances, the State party is responsible for the disappearance of the author's son.

References

Lecraft v Spain (1493/06)

[1.109] This case concerned a complaint about racial profiling [23.50]. A police officer had singled out the author for an identity check due to the colour of her skin. On the issue of Spain's responsibility for the police officer's actions, the HRC stated:

¶7.3 A State's international responsibility for violating the International Covenant on Civil and Political Rights is to be judged objectively and may arise from actions or omissions by any of its organs of authority. In the present case, although there does not appear to have been any written order in Spain expressly requiring identity checks to be carried out by police officers based on the criterion of skin colour, it appears that the police officer considered himself to be acting in accordance with that criterion, a criterion considered justified by the courts which heard the case. The responsibility of the State party is evidently engaged. It is therefore for the Committee to decide whether that action is contrary to one or more of the provisions of the Covenant.

References

[1.110] The State, in fulfilling its duty to protect and ensure the enjoyment of ICCPR rights, also has a positive duty to impose obligations on non-governmental entities not to breach the rights of others; this is known as the *horizontal* implementation of the Covenant. Thus the ratification of the ICCPR means that the State must restrict some of the liberties of individuals, which may seem counterintuitive to the ICCPR's Western liberal roots.¹⁶⁷ The extent of a State's 'horizontal' obligations under the ICCPR is however a much greyer area than the extent of a State's 'vertical' obligations, as horizontality is a relatively underdeveloped area of international human rights law. A State's horizontal obligations cannot be as strict as its vertical obligations; a State cannot be expected to exercise the same degree of control over private persons as it does over its own servants, lest it encroach the rights of the former persons.

References

[1.111] In the *Velasquez-Rodriguez Case*, the Inter-American Court said of a State's horizontal obligations under the American Convention on Human Rights:¹⁶⁸

¶172. An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the *lack of due diligence to prevent the violation or to respond to it* as required by the Convention [emphasis added].

(p. 43) **[1.112]** In *Osman v UK*, the State Party was accused of failing to take sufficient steps to protect the life of one Ali Osman from his murderer, one Paul Paget-Lewis. In coming to its conclusion that article 2 of the ECHR (the guarantee of the right to life) had not been violated, the European Court of Human Rights stated:¹⁶⁹

¶116. For the Court, and having regard to the nature of the right protected by article 2, a right fundamental in the scheme of the Convention, it is sufficient for an applicant to show that the authorities *did not do all that could be reasonably expected of them to avoid a real and immediate risk to life* of which they have or ought to have knowledge. This is a question which can only be answered in the light of all the circumstances of any particular case [emphasis added].

References

[1.113] The *Velasquez* and *Osman* cases indicate that States Parties to human rights treaties are required to take reasonable steps and exercise due diligence, in preventing, deterring, investigating, and punishing violations of human rights by private entities. In contrast, a State has strict liabilities either to prevent or remedy human rights abuses perpetrated by its own agents.

[1.114] Some ICCPR rights have an express horizontal effect. Article 20 requires States to prohibit war propaganda, and the advocacy of national, racial, or religious hatred.¹⁷⁰ Articles 6(1) and 17(2) state that the rights to life and privacy, respectively, must be protected by law. Therefore, States must provide legal protection from homicides and intrusions into privacy by non-government entities.¹⁷¹ The other UN treaties also provide that rights therein have a horizontal effect. For example, both anti-discrimination treaties require that measures be taken to combat, respectively, race and sex discrimination in the private sphere,¹⁷² as has been reflected in the case law thereunder.¹⁷³ The International Convention as the Protection of the Rights of all Migrant Workers and Members of their Families 1990 explicitly obliges States Parties in article 16(2) to provide effective protection for migrant workers 'against violence, physical injury, threats and intimidation...by public officials or by private individuals, groups or institutions'. Finally, the HRC has frequently alluded to the horizontal effects of ICCPR rights in its General Comments. For example, in General Comments regarding articles 7 and 26, the HRC has stressed that States Parties should take measures to combat private acts of, respectively, torture, inhuman and degrading treatment, and discrimination.¹⁷⁴ The horizontal application of the ICCPR is discussed in Chapter 4.

References

(p. 44) [1.115] The ability to enjoy most ICCPR human rights would be totally undermined if States had no duties to control human rights abuse in the private sector. Therefore, the general duty in article 2(1) on States to ‘ensure’ ICCPR rights entails a duty to protect individuals from abuse of all ICCPR rights by others.

Systemic Human Rights Abuse

[1.116] Although ICCPR rights are essentially bestowed on individuals, certain civil and political rights abuses are so endemic that they cannot realistically be addressed at an individual level. For example, systemic inequality may arise where certain groups have been oppressed in a certain society for centuries. Yet it is hard to prove that one is an individual victim of ‘systemic inequality’.¹⁷⁵ Such systemic abuses of civil and political rights are not so easily identifiable or rectifiable under the individualistic Optional Protocol procedure.

[1.117] The prevalence of systemic human rights abuse demonstrates the fallacy in conceiving of all human rights in terms of individual rights. Some of the more ‘systemic’ human rights duties of States are better viewed conceptually as group rights. For example, the right of self-determination in article 1 expressly belongs to peoples, and cannot in fact be enforced under the individual communications mechanism.¹⁷⁶ In this respect, the General Comments and Concluding Observations provide important consensus interpretations of ICCPR rights, particularly in regard to complex issues at a macro level.

References

General Comment 31

[1.118] In General Comment 31, the HRC noted the variety of extra-legal ways in which systemic civil and political rights abuse can be tackled.

¶7. Article 2 requires that States Parties adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligations. The Committee believes that it is important to raise levels of awareness about the Covenant not only among public officials and State agents but also among the population at large.

References

Cultural Relativism and Civil and Political Rights

[1.119] Given their apparent Western origins, it is not surprising that the authority of the notion of ‘international’ civil and political rights has been questioned by non-Western nations. Perhaps it is culturally imperialistic for Western nations to insist that other nations comply with civil and political standards. An initial response to the ‘cultural imperialist’ argument against civil and political rights is to note the large percentage of States, representing all types of cultures and religions, that have freely ratified the ICCPR, indicating a reasonable degree of international consensus over the validity of the broad principles therein expressed. Nevertheless, (p. 45) there are significant absentees, including States which have strongly advocated the notion of cultural relativism in relation to civil and political rights, such as the People’s Republic of China,¹⁷⁷ Malaysia, and Saudi Arabia. Furthermore, there is a vast difference between States with regard to the interpretation of ICCPR rights. Therefore, it is important to examine some of the arguments which suggest that civil and political rights are essentially Western constructs of little relevance to the non-Western world.

Individual and Collective Rights

[1.120] The strongly individualistic flavour of civil and political rights, including those in the ICCPR, does not conform to the more collectivist notions of rights in some non-Western States.¹⁷⁸ However, one may note that article 1 of the ICCPR recognizes an important collective right, the right of peoples to self-determination. Moreover, some ICCPR rights necessarily envisage enjoyment by groups of people, such as the article 22 right of freedom of association and the minority rights guarantee in article 27.¹⁷⁹ Furthermore, the rights enunciated in the ICCPR temper the individualism found in some of the early

Western Bills of Rights. For example, the First Amendment in the US Bill of Rights declares in absolutist language that ‘Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech ...’. In contrast, the guarantee of freedom of expression in article 19 ICCPR may be limited by measures ‘as are provided by law and are necessary’ to protect the rights or reputations of others, national security, public order, public health, or public morals. The ICCPR, by prescribing numerous permissible limitations to its rights, authorizes many instances where the collective rights and probably the cultural needs of society can trump individual freedoms.¹⁸⁰

References

Rights and Duties

[1.121] The focus on the ‘rights’ of individuals contrasts sharply with non-Western traditional focuses on the ‘duties’ owed by individuals to their communities. However, in his influential analysis of rights, Hohfeld persuasively argues that rights are the jural correlative of duties.¹⁸¹ That is, when a person is vested with rights, another is vested with duties to respect those rights. Therefore, duties generate rights and vice versa, and can be seen as two sides of the same coin. (p. 46) Thus, the rights/duties cultural dichotomy may be one of mere nomenclature.¹⁸² Of course, the classical conception of civil and political rights in Western liberal theory is that they impose duties upon governments, rather than other individuals. However, as described above [1.114], the ICCPR has been interpreted so as to require States to impose duties upon individuals and other private entities within the jurisdiction to respect the rights of others.¹⁸³ In this respect, one may again note article 19 of the ICCPR, which explicitly states that exercise of the right to freedom of expression ‘carries with it special duties and responsibilities’.

Predominance of Civil and Political Rights Over Economic, Social, and Cultural Rights

[1.122] A further criticism of civil and political rights relates to their undoubted predominance in the modern human rights system over economic, social, and cultural rights, which are perceived to be of greater concern to the less developed non-Western world.¹⁸⁴ Indeed, there is little doubt that certain Western nations, particularly the United States, have been hostile to the notion of economic, social, and cultural ‘rights’.¹⁸⁵ On the other hand, significant economic and social rights are guaranteed within the framework of the European Union and the Council of Europe. Ultimately, this ‘predominance’ argument essentially advocates the recognition of the two sets of rights as truly ‘indivisible and interdependent and inter-related’,¹⁸⁶ entailing the strengthening of economic, social, and cultural rights, rather than the necessary weakening of civil and political rights.

Economic Relativism

[1.123] A related argument is that protection of civil and political rights is antipathetic to the protection of economic, social, and cultural arguments. This argument holds that the classical political rights, such as rights to vote and of political participation, and freedoms of expression, assembly, and association¹⁸⁷ are inappropriate in States with vulnerable, developing economies. Enforcement of such rights is said to distract and divide a State when strong leadership, most contentiously in the form of one-party political systems, is said to be needed to ensure strong economic direction. In such States, the priority for the nation is said to be economic development: ‘full’ protection of civil and political rights should therefore be postponed until a satisfactory rate of economic development has been achieved.¹⁸⁸ This argument therefore (p. 47) suggests that civil and political rights are economically relative, in the sense that their protection should vary according to a State’s economic capacities.

[1.124] In response, it is observed that respect for civil and political rights ensures a high degree of government accountability, and therefore acts as an essential barrier against the development of endemic corruption: official corruption is one of the worst dangers to orderly economic development. Even in the absence of corruption, civil and political freedoms can ensure that the government and the people are exposed to a wide range of views, and are not therefore denied access to ‘good’ ideas.¹⁸⁹ Furthermore, compelling arguments have been made that development cannot be viewed purely as an economic matter, lest the most vulnerable and even the majority in society get left behind. Truly beneficial development within a society entails civil, political, and social development rather than only economic development.¹⁹⁰

Finally, underdeveloped States Parties to the ICCPR have freely consented to the obligation in article 2(1) immediately to guarantee the rights therein, rather than postpone them pending transition to a satisfactory development condition.

The ICCPR and Cultural/Economic Relativism

[1.125] The ICCPR is generally enunciated in universalist language. For example, the preamble cites the ‘inherent dignity’ and the ‘equal and inalienable rights of all members of the human family’. Such words do not import notions of different rights for members of different cultures. Furthermore, States Parties have freely ratified the treaty. After such consensual ratification, it perhaps seems unconvincing for a State to claim cultural exemption from certain rights. Finally, the immediacy of the article 2(1) obligation, especially when compared to the progressiveness of the ICESCR obligation, seems to confirm that ICCPR implementation cannot be ‘delayed’ until economic circumstances improve.¹⁹¹

General Comment 31

[1.126]

¶14. The requirement under article 2, paragraph 2, to take steps to give effect to the Covenant rights is unqualified and of immediate effect. A failure to comply with this obligation cannot be justified by reference to political, social, cultural or economic considerations within the State.

References

[1.127] However, the ICCPR does cater to some extent for cultural differences. First, States can enter relevant reservations if they refuse to implement certain rights.¹⁹² The HRC has, however, purported severely to limit State rights of (p. 48) reservation in its General Comment 24. The HRC listed a number of rights to which no reservation could be allowed, including some rights at the crossroads of cultural argument, such as freedom of thought, conscience, and religion (article 18(1)). Indeed, General Comment 24 has proven to be quite controversial, though ‘cultural’ objections to it have not been specifically raised.¹⁹³

References

[1.128] Secondly, the existence of numerous limitations to certain ICCPR rights allows some room for cultural diversity in their interpretation. For example, a number of rights may be expressly limited by proportionate measures designed to protect ‘public morals’, which is an inherently relativist concept inevitably varying in its application from State to State.¹⁹⁴ Indeed, the uncertainty entailed in ICCPR limitations introduces flexibility to human rights interpretation, and generates ideological and cultural debate over the content of human rights guarantees.¹⁹⁵

References

[1.129] As the HRC has a multinational membership, representing the ‘different forms of civilization and...the principal legal systems’,¹⁹⁶ and has jurisdiction over States from all parts of the world, its interpretation of the ICCPR provides fertile ground for identifying and perhaps resolving cultural clashes over human rights.

[1.130] In *Toonen v Australia* (488/92), the HRC found that anti-sodomy laws in Tasmania were a breach of article 17 of the ICCPR, the right to privacy. In its unanimous decision, the HRC was clearly influenced by the fact that all other Australian states had repealed such laws, and that there was ‘no consensus’ regarding the appropriateness of the laws in Tasmania.¹⁹⁷ This decision indicated that the ICCPR could potentially be interpreted in a relativist manner—perhaps similar laws in a different State with no comparable record of tolerance and acceptance of homosexuality would survive a similar challenge.¹⁹⁸ In addition, in *Aumeeruddy-Cziffra et al v Mauritius* (35/78) (the *Mauritian Women’s Case*), the HRC stated, with regard to article 23 of the ICCPR, which guarantees rights of protection for the family:

¶9.2(b)2(ii)1. The Committee is of the opinion that the legal protection or measures a society or a State can afford to the family may vary from country to country and depend on different social, economic, political and cultural conditions and traditions.

Thus, there have been some indications that the HRC is prepared to adopt a relativist interpretation of the ICCPR rights.

References

[1.131] However, since the *Toonen* decision in 1994, the HRC has clearly exhibited disapproval of culturally relativist arguments. For example, there is no indication (p. 49) of relativism in *Young v Australia* (941/00) and *X v Colombia* (1361/05), where the HRC found that social security laws which discriminated against same-sex couples breached article 26 [23.54], apart from a homophobic minority opinion by Messrs Amor and Khalil in *X*. Otherwise, the HRC has consistently criticized anti-gay laws in a large number of States Parties with populations that are traditionally more homophobic than that of Australia [16.52]. It has also taken the opportunity to condemn numerous practices that could possibly be defended as cultural traditions such as female genital mutilation [9.62] and polygamy in Africa [20.52], Islamic laws regarding apostasy [17.12], and prohibitions on abortion.¹⁹⁹

References

General Comment 28

[1.132] In General Comment 28 on the Equality of Rights Between Men and Women, the HRC noted the following:

¶5. Inequality in the enjoyment of rights by women throughout the world is deeply embedded in tradition, history and culture, including religious attitudes.... States parties should ensure that traditional, historical, religious or cultural attitudes are not used to justify violations of women's right to equality before the law and to equal enjoyment of all Covenant rights. States parties should furnish appropriate information on those aspects of tradition, history, cultural practices and religious attitudes which jeopardise, or may jeopardise, compliance with article 3, and indicate what measures they have taken or intend to take to overcome such factors.

It is not surprising that the HRC's strongest rejection of cultural relativism should appear in a consensus comment on the rights of women, an issue which gives rise to acute cultural divergences.²⁰⁰

References

[1.133] Similarly, the HRC has not generally accepted economic relativist arguments. For example, in *Lubuto v Zambia* (390/90), economic hardship could not justify the delay in the author's appeal of his conviction [14.140].²⁰¹ In *Mukong v Cameroon* (458/91), it refused to accept that economic hardship and budgetary considerations could excuse the State from liability for the atrocious prison conditions suffered by the author [9.46] or the suppression of free speech [18.60]. In *Giri v Nepal* (1761/08), the State Party had tried to justify poor prison conditions on the basis of general standards of living in the country: the HRC disagreed [9.203]. Indeed, in its General Comment 21 on article 10, the HRC noted that the obligation to treat detainees with respect for their dignity 'cannot be dependent on the material resources available in the State party'.²⁰² Underdevelopment cannot therefore justify overcrowding in prisons, or the failure to provide adequate resources to detainees. On the other hand, in *Aumeeruddy-Cziffra et al v Mauritius* (35/78), the HRC did state that the level of protection required for families under article 23 may vary (p. 50) according to 'different social, economic, political and cultural conditions and traditions'.²⁰³ This may indicate that economic relativism does apply, perhaps uniquely within the ICCPR, to the level of entitlement entailed in article 23 rights. However, economic relativism does not generally apply to ICCPR rights, unlike the rights in the ICESCR.²⁰⁴

References

[1.134] Thus, it appears that the HRC rarely views ‘culture’ and/or a vulnerable economy as an excuse to alleviate liability under the ICCPR. Indeed, the HRC stated in General Comment 31:

¶14. The requirement under article 2, paragraph 2, to take steps to give effect to the Covenant rights is unqualified and of immediate effect. A failure to comply with this obligation cannot be justified by reference to political, social, cultural or economic considerations within the State.

References

[1.135] However, the HRC has also recognized that the reversal of traditional attitudes cannot realistically occur overnight even though the obligations in the Covenant are expressly immediate in article 2(1). For example, regarding Cameroon, the HRC has stated in relation to systemic sex discrimination:²⁰⁵

¶25. The Committee invites the Government to improve the situation of women with a view to achieving the effective application of article 3 of the Covenant, in particular by adopting the necessary educational and other measures to overcome the weight of certain customs and traditions....

Regarding Senegal, the HRC stated the following:²⁰⁶

¶12. ...The Committee encourages the State party to launch a systematic campaign to promote popular awareness of persistent negative attitudes towards women....

Therefore, it is sensibly recognized that States cannot produce instant changes in cultural attitudes, but must make sincere efforts in that regard when such attitudes threaten enjoyment of civil and political rights. The HRC’s occasional emphasis on educational rather than coercive measures may signal some sort of exemption from the normal immediacy of ICCPR obligations in culturally sensitive areas. It is also possible that the HRC gives more leeway to a State when the ‘cultural’ threat to civil and political rights arises from the attitudes of its people, rather than directly from the laws of the State in question.²⁰⁷

[1.136] The above commentary should not be interpreted as implying that Western nations have a perfect record under the ICCPR. Western nations have been found in violation of the ICCPR on many occasions. Indeed, the function of the ICCPR (and the UDHR before it) is not only to universalize certain Western values but (p. 51) also universally to forbid some of them, such as racism, anti-Semitism, colonization, and slavery.²⁰⁸

References

[1.137] Does the HRC ever defer to the State’s authorities for political reasons? That is, are rights occasionally *politically* relative? One would think that such deference would entirely undermine the HRC’s role as a guardian of human rights. Yet there are few other explanations for the next case.

References

O’Neill and Quinn v Ireland (1314/04)

The authors were convicted of killing Garda McCabe, an Irish police officer (*garda*), in Ireland in 1996 during an attempted robbery carried out by the terrorist group, the Provisional Irish Republic Army (IRA). In 1998, the UK and Irish governments concluded ‘the Good Friday Agreements’ (GFA) which effectively ended the long-standing conflict in Northern Ireland. One GFA chapter dealt with the release of prisoners, including convicted terrorists on both sides of the conflict. Ireland implemented this release scheme under the Criminal Justice, Release of Prisoners Act 1998 (Ireland) under which ‘qualifying prisoners’ could be released. The definition of a qualifying prisoner was left to the discretion of the Justice Minister. The authors obtained documents under freedom of information legislation which confirmed that they had been excluded from classification as ‘qualifying prisoners’. It seemed that persons who committed offences on behalf of the IRA prior to the conclusion of the GFA were qualifying prisoners. So too were many convicted of murdering Irish *gardai*. Finally, persons convicted for offences committed on behalf of the IRA after the GFA were also qualifying prisoners, but the authors were explicitly excluded, apparently due to the need to ensure public support for the release plan and the GFA. The authors claimed that Ireland’s failure to

release them under the GFA release scheme was discriminatory contrary to articles 2(1) and 26, as others convicted of comparable or even graver offences had been released. They claimed that the discrimination was arbitrary as their exclusion from the release scheme was due to political considerations. Ireland confirmed that the two were excluded from the release scheme because it 'considered that their release would not be tolerated by the People of Ireland'.²⁰⁹ The HRC found no breach of the ICCPR [23.128]:

¶8.4. The Committee observes that it was pursuant to the Multi-party Agreement—a political agreement—that the Release of Prisoners' Scheme was enacted, and considers that it cannot examine this case outside its political context. It notes that the early release scheme did not create any entitlement to early release but left it to the discretion of the relevant authorities to decide, in the individual case, whether the person concerned should benefit from the scheme. It considers that this discretion is very wide and that, therefore, the mere fact that other prisoners in similar circumstances were released does not automatically amount to a violation of article 26. The Committee notes that the State party justifies the exclusion of the authors (p. 52) (and others involved in the incident in which Garda McCabe was murdered) from the scheme, by reason of the combined circumstances of the incident in question, its timing (in the context of a breach of a cease-fire), its brutality, and the need to ensure public support for the GFA. In 1996 when the incident occurred, the government assessed the impact of the incident as exceptional. For this reason, it considered that all those involved would be excluded from any subsequent agreement on the release of prisoners. This decision was taken after the incident in question but before the conviction of those responsible, and thus, focused on the impact of the incident itself rather than on the individuals involved. All those responsible were made aware, from the outset, that if they were convicted of having had any involvement in the incident, they would be excluded from the scheme. The Committee also notes that, apparently, others convicted of killing Gardai who benefited from the early release scheme had already served long sentences...The Committee considers that it is not in a position to substitute the State party's assessment of facts with its own views, particularly with respect to a decision that was made nearly ten years ago, in a political context, and leading up to a peace agreement. It finds that the material in front of it does not disclose arbitrariness and concludes that the authors' rights under article 26 to equality before the law and to the equal protection of the law have not been violated.

This case threw up a perplexing question: to what extent, if ever, should human rights be sacrificed for the purposes of political necessity? The decision served a utilitarian purpose by permitting the singling out of the authors (and their accomplices) for non-release, perhaps unfairly, to ensure ongoing public support for a process that has brought peace to a long-standing bloody conflict. Whilst human rights are not inherently utilitarian, utilitarianism is an occasional factor in determining whether a human right has been permissibly limited in order to facilitate a broad public interest such as public order or national security. Nevertheless, acceptance of 'political necessities' as a legitimate reason for the limited application of human rights sets a dangerous precedent which has the capacity to sacrifice the rights of unpopular minorities to satisfy the whimsical political preferences of the majority. It is therefore hoped that this case is treated as an anomaly, dictated by unique circumstances.²¹⁰

The Human Rights Committee—an Appraisal

[1.138] This book is concerned with the content of the jurisprudence arising from the UN Human Rights Committee on the meaning of the rights in the ICCPR, and the admissibility requirements under the Optional Protocol. It is not generally concerned with the workings and functionality of the Committee, and the broader UN treaty body system.

[1.139] There is no doubt that there are pressures on that system as acknowledged in a recent report prepared by the UN High Commissioner for Human Rights.²¹¹ All UN treaty bodies are part-time, unsurprising given the members are unpaid (though expenses during meetings are paid). Each Committee faces a substantial backlog in its consideration of State Reports and, where relevant, individual communications. (p. 53) Only 16 per cent of States report on time, but the backlogs would be even worse if there was greater compliance in this respect. In 2010, the International Service for Human Rights, a non-governmental organization, reported that the average wait for the resolution of an Optional Protocol case on the merits was 47 months.²¹²

[1.140] The treaty body system has doubled in size since 2000, with the number of treaty body experts expanding from 74 to nearly 200. Part of the increase is due to the creation of new treaty bodies as new treaties, such as the Convention on the Rights of Persons with Disabilities 2006, have come into force. Yet funding for the system has not come close to coping with this expansion in the system.

[1.141] Also worrying is the apparent lack of respect for the HRC and the other treaty bodies evinced by the States Parties. As noted above, State Reports are frequently late. Furthermore, the quality of reports can be poor in terms of substance and veracity. Finally, States often fail to implement the recommendations of the HRC in both Concluding Observations and OP views. This disrespect cannot be blamed simply on the HRC's lack of judicial status, or the lack of rigorous follow-up mechanisms.²¹³ The unsatisfactory response of States may be largely caused by the 'unyielding attitudes of the recalcitrant States'.²¹⁴ Indeed, one may note that non-compliance is a general problem with the international legal system. For example, States have occasionally ignored findings of the International Court of Justice, the world's premier international court.²¹⁵ Therefore, it is unfair to judge the HRC harshly due to the poor compliance rates of some States.

[1.142] It must also be remembered that the sole concern of the HRC is to monitor implementation of the ICCPR; external politically or economically expedient considerations that commonly influence governments are normally irrelevant to the HRC's decision regarding violation or non-violation of its treaty.²¹⁶ Therefore, it is inevitable that the HRC will make decisions which do not sit comfortably with governments. Furthermore, HRC rulings can have a substantial impact in the absence of immediate State obedience. They can inject ICCPR issues into domestic debate, and provide arguments for domestic lobby groups and monitoring bodies to pressure governments. They can also provide pointers for future reform. Finally, they provide guidance for the interpretation of the Covenant, which is relevant not only for the target State but for all States Parties, particularly in those States where domestic courts regularly refer to HRC cases.

References

(p. 54) **[1.143]** Of more relevance to this book are criticisms relating to the substantive worth of the HRC's work as a guide to interpretation of the ICCPR. OP decisions are of varying quality. While they commonly outline the various arguments of the petitioner and the impugned State, the final views of the HRC can often be very brief, with few clues as to how the decision was reached.²¹⁷ Yet there are many outstanding decisions which have shed light on very important human rights issues, such as holocaust denial [18.90], abortion [8.xx], the death row phenomenon [9.81], and preventive detention [11.35]. Furthermore, the greater frequency of individual opinions, both dissenting and concurring, is a welcome development, as these opinions are often better reasoned than the plenary decision [1.35]. General Comments and Concluding Observations also provide important guidance to the interpretation of the ICCPR. General Comments have long been excellent elaborations upon their respective subject matters, while the quality of Concluding Observations has improved markedly over the last decade.

References

Conclusion

[1.144] Despite the obvious problems, the treaty-monitoring bodies, exemplified by the HRC, 'have come a very long way in a short period of time'.²¹⁸ The treaty-monitoring system is an important quasi-judicial adjunct to the more political UN human rights bodies, such as the Human Rights Council and the General Assembly. The treaty-monitoring system ensures some measure of human rights accountability before expert bodies for all States, as all States have now ratified at least two of the core UN human rights treaties. Unlike the arguably superior regional human rights systems, the UN system has to cope with a large number of varied State Parties, in terms of culture, economics, and politics, many of whom are reluctant to create a truly effective universal human rights monitoring regime.²¹⁹ In that context, the HRC's achievement in developing over 35 years a substantial jurisprudence under the OP and through its Concluding Observations and General Comments, and a functioning if imperfect State reporting system, is indeed significant.

[1.145] Despite its deficiencies, the civil and political rights norms developed under the ICCPR and other UN treaties are of obvious relevance to the interpretation of these rights by judges, lawyers, government officials, and human rights advocates in all municipal jurisdictions due to their universal applicability. Those norms, as well as the strengths and shortcomings of the jurisprudence of the HRC and the other treaty bodies, are explored in excerpts and accompanying commentaries in the following chapters.

Footnotes:

- ¹ For example, the ICCPR has been directly incorporated into the law of numerous States Parties such as Finland, the Netherlands, the Russian Federation, and the Republic of Korea (South Korea). It has also provided the template for a number of municipal Bills of Rights, such as those of Hong Kong, New Zealand, Victoria (Australia), and the Australian Capital Territory.
- ² J Locke, *The Second Treatise of Government*, reprinted in P Laslett (ed), *Locke, Two Treatises of Government* (2nd edn, Cambridge University Press, 1988), 265ff.
- ³ BH Weston, 'Human Rights' (1984) 3 *Human Rights Quarterly* 257 at 259. Sexist language is deliberately used here, as it does not seem that the natural rights theories of the seventeenth and eighteenth centuries applied equally to women. See H Lauterpacht, *International Law and Human Rights* (Garland Publishing, 1973), 104–5.
- ⁴ Weston, 'Human Rights', 264. However, as indicated below, the equation of civil and political rights/economic, social, and cultural rights with negative/positive rights is simplistic.
- ⁵ Lauterpacht, *International Law and Human Rights*, 105.
- ⁶ For example, Karl Marx, 'On the Jewish Question', reprinted in D McLellan (ed), *Marx: Selected Writings* (Oxford University Press, 1977), 51–7.
- ⁷ Jeremy Bentham, 'Anarchical Fallacies', reprinted in J Waldron (ed), *Nonsense Upon Stilts: Bentham, Burke and Marx on the Rights of Man* (Methuen, 1987) 46ff.
- ⁸ AV Dicey, *Introduction to the Study of the Law of the Constitution* (10th edn, Macmillan, 1964), 199ff.
- ⁹ Bentham, 'Anarchical Fallacies', 53.
- ¹⁰ Weston, 'Human Rights', 261.
- ¹¹ Weston, 'Human Rights', 265.
- ¹² H Steiner, P Alston, and R Goodman, *International Human Rights in Context* (3rd edn, Oxford University Press, 2008), 512–16.
- ¹³ D Kelley, *Life of One's Own: Individual Rights and the Welfare State* (Cato Institute, 1998), quoted in Steiner, Alston, and Goodman, *International Human Rights in Context*, 286–7.
- ¹⁴ See also M Ignatieff, *Human Rights as Politics and Idolatry* (Princeton University Press, 2001), 65–6.
- ¹⁵ J Morsink, 'The Philosophy of the Universal Declaration' (1984) 3 *Human Rights Quarterly* 309 at 310–11.
- ¹⁶ See eg PG Lauren, *The Evolution of International Human Rights* (University of Pennsylvania Press, 1998), Ch 1.
- ¹⁷ Morsink, 'The Philosophy of the Universal Declaration', 310–16.
- ¹⁸ Morsink, 'The Philosophy of the Universal Declaration', 325–32 on the inclusion of these 'new rights' in the UDHR. Arguments have arisen that the inclusion of these new rights was in keeping with modern liberal theory, a descendant of the natural rights tradition: see Steiner, Alston, and Goodman, *International Human Rights in Context*, 269–72.
- ¹⁹ A notable exclusion concerns the right to property in art 17(1) UDHR, which would not have conformed to the socialist theories prevailing in the Eastern Bloc while the Covenants were being drafted.
- ²⁰ D McGoldrick, *The Human Rights Committee* (Oxford University Press, 1994), para 1.16.
- ²¹ M Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd edn, NP Engel, Kehl, 2005), xxii–xxiii.
- ²² McGoldrick, *The Human Rights Committee*, para 1.25.

- ²³ It must be noted that some non-classical rights appear in the ICCPR, such as the art 1 right of self-determination, the rights of protection to families and children in arts 23 and 24, and the cultural rights provision in art 27.
- ²⁴ Article 49.
- ²⁵ *United National Treaties Database*, (<http://untreaty.un.org.ezproxy.library.yorku.ca>) (accessed October 2012). Some States have succeeded to these obligations. See generally on succession, [26.45]ff.
- ²⁶ This may reflect its anomalous status as a non-individual right: see [7.24].
- ²⁷ See, on reservations, Ch 26.
- ²⁸ R Robertson, 'Measuring State Compliance with the Obligation to Devote the "Maximum Available Resources" to Realising Economic, Social and Cultural Rights' (1994) 16 *Human Rights Quarterly* 693, 694.
- ²⁹ See generally Ch 4.
- ³⁰ See, on the non-discrimination guarantees, Ch 23.
- ³¹ See eg *Weerawansa v Sri Lanka* (1406/05).
- ³² See also separate opinion of Mr Lallah in *Adonis v Philippines* (1815/08).
- ³³ *MA v Italy* (117/81), excerpted at [18.53].
- ³⁴ See the dissenting opinion of Mr Lallah in *Kindler v Canada* (470/91) for an example of the invocation of art 5(2).
- ³⁵ See Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, 28.
- ³⁶ See generally Ch 6.
- ³⁷ See DL Donoho, 'Relativism versus Universalism in Human Rights: The Search for Meaningful Standards' (1991) 27 *Stanford Journal of International Law* 345, 372–3; see also D Harris, 'The International Covenant on Civil and Political Rights and the United Kingdom: An Introduction', in D Harris and S Joseph, *The International Covenant on Civil and Political Rights and United Kingdom Law* (Clarendon Press, 1995), 6.
- ³⁸ This interplay between rights/duties in international law and rights/duties in domestic law is comprehensively analysed in S Joseph, 'A Rights Analysis of the Covenant on Civil and Political Rights' (1999) 5 *Journal of International Legal Studies* 57.
- ³⁹ See, however, the decision in *Faure v Australia* (1036/01), where the only way for Australia to implement the decision is to adopt a constitutional bill of rights to enable challenges to the validity of legislation on human rights grounds [25.09].
- ⁴⁰ In numerous Concluding Observations (see [1.40] on Concluding Observations), the HRC has recommended the incorporation of the ICCPR into domestic law. However, incorporation is not an ICCPR obligation.
- ⁴¹ Concluding Observations on Germany (2004) UN doc CCPR/CO/80/DEU, para 12.
- ⁴² Concluding Observations on Switzerland (2009) UN doc CCPR/C/CHE/CO/3, para 6.
- ⁴³ Concluding Observations on Mexico (2010) UN doc CCPR/C/MEX/CO/5, para 5.
- ⁴⁴ Concluding Observations on Argentina (2010) UN doc CCPR/C/ARG/CO/4, para 8.
- ⁴⁵ See eg *Ballantyne et al v Canada* (359, 385/89) [18.39]; *Waldman v Canada* (694/96) [23.60]; *Toonen v Australia* (488/92) [16.50]; and *Coleman v Australia* (1157/03) [18.58].
- ⁴⁶ *Cheban et al v Russia* (790/97), para 7.4.
- ⁴⁷ See generally Ch 23, on discrimination. See *Lindgren et al v Sweden* (298–9/88) and *Hesse v Australia* (1087/02), where complaints about alleged discrimination between different localities in one nation were unsuccessful (and inadmissible in *Hesse*).
- ⁴⁸ See also Concluding Observations on Australia (2000) UN doc A/55/40, paras 516–17.
- ⁴⁹ For example, the Canadian federal government does not necessarily have power over matters arising under international treaties, including the ICCPR; see eg *Attorney-General (Canada) v Attorney-General (Ontario)* [1937] AC 326. Therefore, the federal government may have to negotiate with provincial

governments in order to correct ICCPR abuses. In contrast, the Australian federal government may override State laws that contradict Australia's obligations under international treaties: see eg *Commonwealth v Tasmania* (1983) 158 CLR 1.

⁵⁰ The Human Rights Act 1998 incorporates the European Convention on Human Rights into UK law.

⁵¹ See Justice M Kirby, 'The Australian Use of International Human Rights Norms: From Bangalore to Balliol—a View from the Antipodes' (1993) 16 *University of New South Wales Law Journal* 363.

⁵² Article 29 ICCPR.

⁵³ Article 32 ICCPR.

⁵⁴ This rule is necessarily implied by art 32(1) ICCPR.

⁵⁵ Article 28(3) ICCPR.

⁵⁶ The Human Rights Council is a body within the United Nations made up of 47 State government representatives. Proceedings within the Council are more politicized, as the Council members speak for their governments, rather than as independent human rights experts.

⁵⁷ In this respect, note the failure in 1994 of the Federal Republic of Yugoslavia (Serbia-Montenegro) to renominate Mr Vojin Dimitrijevic as an HRC member. Mr Dimitrijevic was originally nominated by the government of the former Yugoslavia in 1982.

⁵⁸ Harris, 'The International Covenant on Civil and Political Rights', 21.

⁵⁹ S Joseph, 'New Procedures Concerning the Human Rights Committee's Examination of State Reports' (1995) 13 *Netherlands Quarterly of Human Rights* 5, 5–6. See also L Heffernan, 'A Comparative View of Individual Petition Procedures under the European Convention on Human Rights and the International Covenant on Civil and Political Rights' (1997) 19 *Human Rights Quarterly* 78, 85.

⁶⁰ A Bayefsky, *The UN Human Rights Treaty System: Universality at the Crossroads* (Kluwer Law International, 2001).

⁶¹ Rules of Procedure of the Human Rights Committee, UN doc CCPR/C/3/Rev.10, 11 January 2012, rule 51. Rule 51 permits majority voting, but notes 1 and 2 to rule 51 prescribe a preference for consensus votes.

⁶² Joseph, 'New Procedures Concerning the Human Rights', 6.

⁶³ M Schmidt, 'Individual Human Rights Complaint Procedures based on United Nations Treaties and the Need for Reform' (1992) 43 *International and Comparative Law Quarterly* 645, 656–8.

⁶⁴ See Rules of Procedure of the Human Rights Committee, rule 66(2).

⁶⁵ UN doc CCPR/C/2009/1, 22 November 2010.

⁶⁶ See generally CCPR Centre, *UN Human Rights Committee: Participation in the Reporting Process—Guidelines for Non-Governmental Organisations (NGOs)*, available at http://ccprcentre.org/doc/CCPR/Handbook/CCPR_Guidelines%20for%20NGOs_en.pdf (accessed 11 February 2013).

⁶⁷ Concluding Observations on Moldova (2009) UN doc CCPR/C/MDA/CO/2.

⁶⁸ Bayefsky, *The UN Human Rights Treaty System*, 23–4.

⁶⁹ *Guidelines for the treaty-specific document to be submitted by States parties under article 40 of the International Covenant on Civil and Political Rights* (2010) CCPR/C/2009/1, paras 19–20.

⁷⁰ *Guidelines for the treaty-specific document*, paras 14–15. This new procedure does not apply to initial reports, or reports which were already under consideration as of October 2009.

⁷¹ See eg Concluding Observations on the Philippines (2003) UN doc CCPR/CO/79/PHL, para 2.

⁷² General Comment 30, paras 3 and 4(a). See eg Concluding Observations on Gambia (2002) UN doc CCPR/CO/75/GMB, para 2.

⁷³ General Comment 30, para 4(b); See also Rules of Procedure, UN doc CCPR/C/3/Rev.10, rule 70, 11 January 2012. See eg Concluding Observations on Equatorial Guinea, (2004) UN doc CCPR/CO/79/GNQ, para 2; Grenada (2009) UN doc CCPR/C/GRD/CO/1, para 2. The CERD Committee adopts a similar procedure (see its Concluding Observations on Malawi (2003) UN doc CCPR/C/63/CO/14).

⁷⁴ General Comment 30, para 5.

⁷⁵ See eg Mr Graefrath of the German Democratic Republic, at UN doc CCPR/C/SR 231, para 10.

⁷⁶ See also *Hanafi v Algeria* (CAT 341/08), where a breach of the right of submission in art 22 of CAT was found when State authorities attempted to dissuade a person from submitting a complaint on behalf of his brother (see para 9.8).

⁷⁷ See eg *Pratt and Morgan v Jamaica* (210/86 and 225/87).

⁷⁸ Oral evidence is permitted under the rules of the CAT Committee: see *Abdussamatov et al v Kazakhstan* (CAT 444/10), paras 9.1–10.9.

⁷⁹ On the ‘victim’ requirement, see Ch 3.

⁸⁰ See generally Ch 4.

⁸¹ On inadmissibility *ratione temporis*, see Ch 2.

⁸² See generally Ch 5.

⁸³ See generally Ch 6.

⁸⁴ *OJ v Finland* (419/90).

⁸⁵ *VMRB v Canada* (236/87).

⁸⁶ See also, eg, [14.65] and [17.24].

⁸⁷ At para 3.15.

⁸⁸ See *Jonassen et al v Norway* (942/00), paras 2.14–2.17 for evidence of such bias.

⁸⁹ At para 8.3.

⁹⁰ Six HRC members dissented in *Gobin*.

⁹¹ *Annual Report of the Human Rights Committee* (1998), A/53/40, i, 61.

⁹² If consideration of admissibility and merits is split, it is possible for the HRC to reverse a decision that a case is admissible upon the receipt of new information from the State: Rules of Procedure, rule 99(4). See eg *Pingault-Parkinson v France* (1768/08).

⁹³ See Rules of Procedure of the Human Rights Committee, rule 97(3).

⁹⁴ S Joseph, ‘Toonen v Australia: Gay Rights under the ICCPR’ (1994) 13 *University of Tasmania Law Review* 392, 401; see also JS Davidson, ‘The Procedure and Practice of the Human Rights Committee under the First Optional Protocol to the International Covenant on Civil and Political Rights’ (1991) 4 *Canterbury Law Review* 337 at 353; and Heffernan, ‘A Comparative View of Individual Petition Procedures’, 102–3.

⁹⁵ *Selected Decisions of the Human Rights Committee under the Optional Protocol*, CCPR/C/OP/2 (1988), 1.

⁹⁶ See eg *Toonen v Australia* (488/92).

⁹⁷ See eg *A v Australia* (560/93). In separate opinions in *McLeod v Jamaica* (734/97) and *McTaggart v Jamaica* (749/97), Mr Scheinin has lamented the HRC’s failure to prescribe more specific remedies, such as specified amounts of compensation.

⁹⁸ *Ng v Canada* (469/91), para 18; *Weiss v Austria* (1086/02), para 11.1.

⁹⁹ In numerous Jamaican death penalty cases, the HRC has found violations of art 14 entailed in the relevant trial procedures. Its recommendations in such cases that the victims be released have been controversial, as the State Party fears releasing potentially dangerous criminals.

¹⁰⁰ See eg ‘Follow-Up Activities under the Optional Protocol’, in *Annual Report of the Human Rights Committee* (1998), A/53/40, i, 70–7; General Comment 33, paras 16–18. See also Concluding Observations on Zambia (2007) UN doc CCPR/C/ZMB/CO/3, para 11.

¹⁰¹ R Higgins, ‘Some Thoughts on the Implementation of Human Rights’ (1990) *Interights Bulletin*, vol 5, 52.

¹⁰² For example, the decision in *Toonen v Australia* (488/92) led to the enactment of federal legislation which provided a remedy, and, ultimately, the repeal of the impugned Tasmanian law; see also C 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.

¹⁰³ See eg of many examples, *Butovenko v Ukraine* (1412/05).

¹⁰⁴ Concluding Observations (2009) UN doc CCPR/C/AUS/CO/5, para 10.

¹⁰⁵ See generally on interim measures, J Harrington, 'Punting Terrorists, Assassins, and Other Undesirables: Canada, the Human Rights Committee, and Requests for Interim Measures of Protections' (2003) 48 *McGill Law Journal* 2.

¹⁰⁶ *Jouni Länsman et al v Finland* (671/95); *Länsman et al v Finland* (1023/01).

¹⁰⁷ *Umarov v Russian Federation* (1449/06).

¹⁰⁸ *Gunaratna v Sri Lanka* (1432/05). See also *VK v Bulgaria* (CEDAW 20/08), paras 5.1–5.4.

¹⁰⁹ *Munaf v Romania* (1539/06) [4.34].

¹¹⁰ See also *Mansaraj et al v Sierra Leone* (839–841/98).

¹¹¹ The CAT Committee has found similar violations with regard to State failures to comply with its requests for interim measures: see eg *Pelit v Azerbaijan* (CAT 281/05), *Tebourski v France* (CAT 300/06), *Brada v France* (CAT 195/02), *Sogi v Canada* (CAT 297/06), and *Dar v Norway* (CAT 249/04).

¹¹² See also Concluding Observations on Uzbekistan (2005) UN doc CCPR/CO/83/UZB, para 6; Canada (2006) UN doc CCPR/C/CAN/CO/5, para 7.

¹¹³ See, eg, [9.98]–[9.126], and generally, Ch 13.

¹¹⁴ See, eg, [11.24]–[11.27].

¹¹⁵ See [24.27]ff.

¹¹⁶ See [8.90]ff.

¹¹⁷ See [18.22]ff.

¹¹⁸ See [17.41]ff.

¹¹⁹ See [1.87] and [4.28].

¹²⁰ Harris, 'The International Covenant on Civil and Political Rights', 17; see generally Ch 23.

¹²¹ A free-standing right within the European Convention system is now found in art 1 of Protocol 12 to the Convention.

¹²² At para 7.4.

¹²³ In this case, Australia had argued that the author was not eligible for the benefit anyway, regardless of his sexuality.

¹²⁴ See also majority and minority in *Correia de Matos v Portugal* (1123/02).

¹²⁵ See also, for differences in opinion brought about by differing levels of deference between majority and minority, *Jazairi v Canada* (958/00).

¹²⁶ 'Siracusa Principles on Limitations and Derogations to the ICCPR' (1985) 7 *Human Rights Quarterly* 3, 4; Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, XXVII. See also majority opinion in *Alberta Unions Case* (118/82), para 5.

¹²⁷ See T Opsahl, 'Equality in Human Rights Law with Particular Reference to Article 26 of the International Covenant of Civil and Political Rights', in M Nowak, D Steurer, and H Tretter (eds), *Festschrift für Felix Ermacora* (Engel, 1988), 52, describing the adverse Dutch reaction to the findings in *Broeks and Zwaan-de-Vries*; see also Harris, 'The International Covenant on Civil and Political Rights', 18, note 92.

¹²⁸ See *Soering v UK*, No 161 (1989) 11 EHRR 439. See eg *Johnson v Jamaica* (588/94), rejecting the *Soering* reasoning [9.81].

¹²⁹ See [18.68]–[18.69], [24.29]–[24.30].

¹³⁰ Most sitting members are usually re-elected. However, there are always a few vacancies caused by retirements, deaths, or the occasional failure to be renominated or re-elected.

- ¹³¹ For example, the reasoning regarding the death row phenomenon in *Johnson v Jamaica* (588/94) has been followed in numerous majority decisions, such as *Hylton v Jamaica* (600/1994), *Lewis v Jamaica* (527/1993), and *Spence v Jamaica* (59/1994) [9.81].
- ¹³² At para 5. The HRC's case law on this point has not been consistent [8.54].
- ¹³³ However, most absolute rights are non-derogable. Article 10(1) is a derogable right, despite being drafted in absolute language.
- ¹³⁴ See Ch 26 on a State Party's rights of reservation.
- ¹³⁵ This requirement is expressed in different ways throughout the different ICCPR guarantees.
- ¹³⁶ See Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, 224. See also *Sunday Times v UK* (1979–80) 2 EHRR 245, para 49, confirming that judge-made laws may constitute sufficiently prescribed 'laws' for the purposes of limitation to rights under the European Convention.
- ¹³⁷ See eg *Pinkney v Canada* (27/78) [16.08]. See also General Comment 27, para 13 [12.28].
- ¹³⁸ These limitations have not been interpreted in the context of every relevant right. However, it seems that the terms would be interpreted in a similar manner in all contexts.
- ¹³⁹ *Pietrarroia v Uruguay* (44/79), para 16, and separate opinion of Evatt, Kretzmer, and Klein in *Faurisson v France* (550/93), para 8 of their separate opinion [18.91].
- ¹⁴⁰ *Toonen v Australia* (488/92), para 8.3 [16.10].
- ¹⁴¹ *Gillot v France* (932/00), para 13.2, confirming the relevance of proportionality to determination of limitations to art 25 rights [7.07]
- ¹⁴² See [23.48]ff.
- ¹⁴³ P Hassan, 'International Covenant on Civil and Political Rights: Background Perspectives on Article 9(1)' (1973) 3 *Denver Journal of International Law and Policy* 153, detailing the drafting history of the inclusion of the word 'arbitrary' in art 9(1), in place of an enumerated list of limitations to one's right to liberty. Hassan concludes that the prohibition of 'arbitrary' restrictions on liberty 'could provide better safeguards against governmental oppression of its peoples than any article with a detailed list of limitations' (at 183).
- ¹⁴⁴ See M Delmas-Marty, 'The Richness of Underlying Legal Reasoning', in M Delmas-Marty (ed), *The European Convention for the Protection of Human Rights* (Martinus Nijhoff, 1992), 332.
- ¹⁴⁵ (2010) UN doc CCPR/C/NZL/CO/5.
- ¹⁴⁶ See also *Maksudov et al v Kyrgyzstan* (1461–2, 1476–7/06).
- ¹⁴⁷ See generally, [26.05] and [26.17]ff.
- ¹⁴⁸ At para 7.11. See also dissent of Mrs Wedgwood.
- ¹⁴⁹ Harris, 'The International Covenant on Civil and Political Rights', 15.
- ¹⁵⁰ *Correia de Matos v Portugal* (1123/02) [14.151].
- ¹⁵¹ *Gomariz Valera v Spain* (1095/02) [14.198]; *Uclés v Spain* (1364/05).
- ¹⁵² *Johnson v Jamaica* (588/94) [9.81].
- ¹⁵³ See para 8.4 as well as dissenting opinion.
- ¹⁵⁴ See also Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion, ICJ Reports 2004 at 46–8).
- ¹⁵⁵ McGoldrick, *The Human Rights Committee*, 11.
- ¹⁵⁶ McGoldrick, *The Human Rights Committee*, 11. See also C Scott, 'The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights' (1989) 27 *Osgoode Hall Law Journal* 769, 832.
- ¹⁵⁷ See eg General Comment 20, para 14, on the duty to investigate allegations of breaches of art 7 [9.161].
- ¹⁵⁸ See eg General Comment 20, para 11 [9.151].
- ¹⁵⁹ See eg General Comment 20, para 10 [9.150].

¹⁶⁰ See eg Concluding Observations on Hungary (1994) UN doc CCPR/C/79/Add.22, para 11; Concluding Observations on Ecuador (1998) UN doc CCPR/C/79/Add.92, para 21.

¹⁶¹ See [24.53].

¹⁶² See generally Scott, 'The Interdependence and Permeability of Human Rights Norms'.

¹⁶³ See General Comment 6 on art 6, para 5 [8.75].

¹⁶⁴ Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, XXI.

¹⁶⁵ An example of violation perpetrated by the judicial branch of a State was in *Fernando v Sri Lanka* (1189/03), para 9.2, in a case concerning draconian penalties imposed for contempt of court [11.41].

¹⁶⁶ See UN General Assembly Resolution A/RES/56/83, 28 January 2002.

¹⁶⁷ Joseph, 'A Rights Analysis of the Covenant on Civil and Political Rights', 74–5. Note, however, that early natural rights theories envisaged the curtailment of freedoms in order to prevent harm to others [1.05].

¹⁶⁸ Reported at (1988) 9 *Human Rights Law Journal* 212, emphasis added.

¹⁶⁹ Judgment of 28 October 1998, reported in (2000) 29 *European Human Rights Review* 245 at 306, emphasis added.

¹⁷⁰ See generally Ch 18.

¹⁷¹ See, on private homicides, [8.41]ff, and on non-government invasions of privacy, [16.15]ff. See eg regarding the State's treatment of instances of domestic violence and rape, Concluding Observations on Cameroon (2010) UN doc CCPR/C/CMR/CO/4, para 11, and Kuwait (2011) UN doc CCPR/C/KWT/CO/2, para 15.

¹⁷² See eg art 2(d) ICERD and art 2(e) CEDAW.

¹⁷³ See eg the CEDAW decisions on domestic violence in *AT v Hungary* (CEDAW 2/03), *Goekce v Austria* (CEDAW 5/05), *Yildirim v Austria* (CEDAW 6/05), *Kell v Canada* (CEDAW 19/08), and *VK v Bulgaria* (CEDAW 20/08). See also, concerning discrimination and women's maternal health, *Teixiera v Brazil* (CEDAW 17/08).

¹⁷⁴ See [9.28] and [23.96].

¹⁷⁵ See [23.104]ff.

¹⁷⁶ See eg *Kitok v Sweden* (197/85), [7.24].

¹⁷⁷ The PRC has succeeded to the United Kingdom's ICCPR obligations in respect of Hong Kong, and Portugal's ICCPR obligations in respect of Macao: see [26.47]. China signed the ICCPR in 1998.

¹⁷⁸ F Jhabvala, 'The International Covenant on Civil and Political Rights as a Vehicle for the Global Promotion and Protection of Human Rights' (1985) 15 *Israel Yearbook on Human Rights* 184, 198.

¹⁷⁹ General Comment 31, para 9.

¹⁸⁰ Donoho, 'Relativism versus Universalism in Human Rights', 378. See also Joseph, 'A Rights Analysis of the Covenant on Civil and Political Rights', 68.

¹⁸¹ WN Hohfeld, 'Some Fundamental Legal Conceptions as Applied to Judicial Reasoning' (1913) 23 *Yale LJ* 16.

¹⁸² See also M Perry, *The Idea of Human Rights* (Oxford University Press, 1998), 51.

¹⁸³ See also Lauren, *The Evolution of International Human Rights*, Ch 1.

¹⁸⁴ See O Yasuaki, 'Toward an Inter-Civilizational Approach to Human Rights', in J Bauer and D Bell (eds), *The East Asian Challenge for Human Rights* (Cambridge University Press, 1999), 112–18.

¹⁸⁵ Steiner, Alston, and Goodman, *International Human Rights in Context*, 528–31.

¹⁸⁶ See Vienna Declaration and Programme of Action 1993, para 5.

¹⁸⁷ Of course, the rights to freedom of expression, assembly, and association also apply in non-political contexts.

¹⁸⁸ See eg A Sen, 'Critical Perspectives on the "Asian Values" Debate', in Bauer and Bell (eds), *The East Asian Challenge for Human Rights*, describing the debate at 90–1.

- ¹⁸⁹ For example, Sen notes that the ‘Great Leap Forward’ policy in China was not reversed for three years, while millions died. ‘No democratic country with opposition parties and a free press would have allowed that to happen’: Sen, ‘Critical Perspectives on the “Asian Values” Debate’, 93.
- ¹⁹⁰ See generally A Sen, *Development as Freedom* (Oxford University Press, 2001). See also Declaration on the Right to Development 1986.
- ¹⁹¹ Note, however, the apparent progressive obligation in art 23(4): see [20.55].
- ¹⁹² Donoho, ‘Relativism versus Universalism in Human Rights’, 364.
- ¹⁹³ See generally Ch 26.
- ¹⁹⁴ See eg *Delgado Páez v Colombia* (195/85), [18.70], and *Hertzberg et al v Finland* (61/79), [18.68]. See also *Handyside v UK*, judgment of the European Court of Human Rights of 7 December 1976, reported in (1979) 1 EHRR 737, at para 48.
- ¹⁹⁵ See Donoho, ‘Relativism versus Universalism in Human Rights’, 370 and 382–4.
- ¹⁹⁶ Article 31 ICCPR.
- ¹⁹⁷ At para 8.6 [16.50].
- ¹⁹⁸ Joseph, ‘Toonen v Australia: Gay Rights under the ICCPR’, 407–8.
- ¹⁹⁹ See [8.90]ff.
- ²⁰⁰ See also Concluding Observations on Zambia (2007) UN doc CCPR/C/ZMB/CO/3, para 13; Cameroon (2010) UN doc CCPR/C/CMR/CO/4, para 8.
- ²⁰¹ See also HRC decision in *Fillastre and Bizouarn v Bolivia* (336/88) [11.63].
- ²⁰² See General Comment 21, para 4 [9.200].
- ²⁰³ At para 9.2(b) 2 (ii) 1: see [20.05].
- ²⁰⁴ The ICESCR implicitly recognizes that poorer States cannot guarantee ICESCR rights to the same extent as richer States in its progressive obligation provision, art 2(1).
- ²⁰⁵ Concluding Observations on Cameroon (1994) UN doc CCPR/C/79/Add.33, para 25.
- ²⁰⁶ (1997) UN doc CCPR/C/79/Add.82.
- ²⁰⁷ This approach may mirror the comparison (in terms of stringency) between a State’s vertical and horizontal obligations: see [1.110].
- ²⁰⁸ See Ignatieff, *Human Rights as Politics and Idolatry*, 92; J Donnelly, ‘Human Rights and Asian Values: A Defence of “Western” Universalism’, in Bauer and Bell (eds), *The East Asian Challenge for Human Rights*, 68.
- ²⁰⁹ At para 4.6.
- ²¹⁰ See also dissent of Mrs Wedgwood in *Czernin v Czech Republic* (823/98).
- ²¹¹ *Strengthening the United Nations human rights treaty body system: A report by the United Nations High Commissioner for Human Rights Navanethem Pillay, June 2012*, available at <http://www2.ohchr.org/english/bodies/HRTD> (accessed December 2012).
- ²¹² International Service for Human Rights, ‘The Treaty Body Complaint System’, *Human Rights Monitor Quarterly*, October 2010, 1.
- ²¹³ See generally M Schmidt, ‘Follow-up of Treaty Body Conclusions’, in A Bayefsky (ed), *The UN Human Rights System in the 21st Century* (Kluwer Law International, 2000), 233–49.
- ²¹⁴ H Steiner, ‘Individual Claims in a World of Massive Violation: What Role for the Human Rights Committee’, in P Alston and J Crawford (eds), *The Future of the UN Human Rights Treaty Monitoring System* (Cambridge University Press, 2000), 30.
- ²¹⁵ For example, the United States breached a provisional measures order of the International Court of Justice (ICJ) in *Germany v USA (LaGrand)*, Order of 3 March 1999, [1999] ICJ Rep 9, requesting that the United States refrain from executing a German citizen, LeGrand, who had been denied consular access upon arrest in breach of international law. The ICJ later found that its provisional measures order was legally binding in [2001] ICJ Rep 104, decision of 27 June 2001.

²¹⁶ Alston and Crawford (eds), *The Future of the UN Human Rights Treaty Monitoring System*, 10–11. See, however, [1.137].

²¹⁷ Steiner, ‘Individual Claims in a World of Massive Violation’, 38–42. See also A Byrnes, ‘An Effective Individual Complaints Mechanism’, in Bayefsky (ed), *The UN Human Rights System in the 21st Century*, 149–51. The decisions of *Ominayak v Canada* (167/84) [24.27] and *Kivenmaa v Finland* (412/90) [19.08] are examples of such poor quality decisions.

²¹⁸ P Alston, ‘Beyond “Them” and “Us”: Putting Treaty Body Reform into Perspective’, in Alston and Crawford (eds), *The Future of the UN Human Rights Treaty Monitoring System*, 522.

²¹⁹ Alston, ‘Beyond “Them” and “Us”’, 522.

45.	Donald Galloway, " Immigration, Xenophobia and Equality Rights " Dalhousie Law Journal 42:1 (2019)
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Immigration, Xenophobia and Equality Rights

Donald Galloway

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In two leading decisions, the Supreme Court of Canada has held that immigration laws that impose negative treatment on non-citizens but not on citizens are not, for that reason alone, discriminatory. Barring exceptional circumstances, or additional independent factors, such laws are considered to be insulated from constitutional challenge under section 15 of the Canadian Charter of Rights and Freedoms. This article identifies and unpacks deficiencies in these judicial decisions, and argues that they do not sit comfortably with the Court's more general jurisprudence on section 15. In addition, by failing to acknowledge xenophobia as a form of discrimination that has long been prevalent in our society and is analogous to the grounds listed in section 15, the Court exposes non-citizens to unwarranted risks of oppressive treatment motivated by animus against them.

Dans deux décisions phares, la Cour suprême du Canada a statué que les lois sur l'immigration qui imposent un traitement négatif aux non-citoyens mais non aux citoyens ne sont pas, pour cette seule raison, discriminatoires. Sauf circonstances exceptionnelles ou autres facteurs indépendants, ces lois sont considérées comme étant à l'abri d'une contestation constitutionnelle en vertu de l'article 15 de la Charte canadienne des droits et libertés. Le présent article relève et comble les lacunes de ces décisions judiciaires et soutient qu'elles ne cadrent pas avec la jurisprudence plus générale de la Cour sur l'article 15. De plus, en ne reconnaissant pas la xénophobie comme une forme de discrimination qui prévaut depuis longtemps dans notre société et qui est analogue aux motifs énumérés à l'article 15, la Cour expose les non-citoyens à des risques injustifiés de traitement oppressif motivés par l'animosité à leur égard.

* Professor Emeritus, University of Victoria. This paper benefited immensely from comments from two anonymous reviewers and perceptive observations and suggestions from Colin Grey and Sarah Marsden. In addition, Hester Lessard drew my attention to some constitutional cases and ideas that I would otherwise have overlooked. I appreciate all the assistance.

Introduction

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Introduction

One can readily identify a number of factors that, over the last ten years or so, have combined to reduce and destabilize the legal status and social standing of non-citizens who are seeking to enter or remain in Canada. Particularly conspicuous are the amendments to our refugee and citizenship laws that were introduced by the government that held power from the 2006 election until 2015, especially those harsh measures that were introduced after the government obtained a majority in the legislature in 2011.¹ The changes in question were extensive and far-reaching. A shortlist of well-known examples indicates the scope. Prompted by concerns about fraud, families have been kept apart by provisions that, for example, redefined who could sponsor.² Prompted by economic reasons, older children were removed from the list of dependants who could be sponsored, even in circumstances where they were clearly dependent on their parent.³ Various

1. The major legislative changes were introduced by *Protecting Canada's Immigration System Act*, SC 2012, c 17; a useful summary and critique of which is found in Amnesty International, *Unbalanced Reforms: Recommendations with respect to Bill C-31* (Brief to the House of Commons Standing Committee on Citizenship and Immigration) (17 April 2012), online: <www.amnesty.ca/sites/immigration/files/ai_brief_bill_c_31_to_parliamentary_committee_0.pdf>. In addition, the *Strengthening Canadian Citizenship Act*, SC 2014, c 22 rendered Canadian citizenship more inaccessible by imposing both substantive and procedural impediments.

2. See *Immigration and Refugee Protection Regulations*, SOR/2002-227, s 130(3) [*IRPA Regs*], originally introduced in 2012, which requires a person who has been sponsored as a spouse to be a permanent resident or citizen for five years before they can themselves sponsor a person as their spouse.

3. The government lowered the cut-off age from 22 to 19 in 2014 (SOR/2014-140, s 2(F)). This age was selected for the reason that children who came to Canada at an early age were likely to become wealthier than those who came later. While this age has since been increased once again to a cut-off of 22 (*Regulations Amending the Immigration and Refugee Protection Regulations (Age of Dependent Children)*, SOR/2017-60, s 1); the regulation nevertheless continues to deny the dependence of older children during post-secondary education.

individuals seeking to remain in Canada have been barred from access to an independent tribunal in a number of contexts: for instance, those seeking to avoid deportation who have committed minor offences⁴ and asylum seekers who on various grounds cannot appeal denials of their refugee claims.⁵ Detention has become a more frequent response to irregular entry, and in some cases is a mandatory response applying even to children.⁶ Health care benefits have been denied to many individuals with precarious status.⁷ The list goes on much further. As has been widely noted, citizenship, permanent residence, temporary residence and refugee status have all become more difficult to obtain and easier to lose.⁸

The changes in question were not only far-reaching in substance, they also took a number of forms, including legislative amendments,⁹ regulatory changes,¹⁰ and a slew of ministerial instructions,¹¹ reviewed by neither cabinet nor legislature. They were also accompanied by explanatory backgrounders,¹² and government statements that presented the measures as a response to what was characterized as serious threats to the integrity of our immigration and refugee regime from queue jumpers, bogus refugees, fraudsters, as well as from immigrants who brought “non-Canadian values” with them.¹³ Innuendo and insinuation also magnified

4. See *Immigration and Refugee Protection Act*, SC 2001, c 27, s 64(2) [*IRPA*], appeals to Immigration Appeal Division unavailable to individuals sentenced to 6 months imprisonment.

5. *Ibid*, s 110(2). Some rights of appeals have been restored through litigation: see, *YZ v Canada (Citizenship and Immigration)*, 2015 FC 892 [YZ].

6. *Ibid*, s 55(3.1), mandatory detention for children aged 16 and over who are designated as “irregular arrivals” under *IRPA* s 20.1.

7. Although also restored as a result of litigation. See, *Canadian Doctors for Refugee Care v Canada (Attorney General)*, 2014 FC 651 [*Canadian Doctors*].

8. See, for example, Brief of the Canadian Association of Refugee Lawyers (Brief to the Citizenship and Immigration Committee of the House of Commons) (5 May 2014), online: <carl-acaadr.ca/sites/default/files/CARL%20C-24%20Brief%20to%20CIMM.pdf>.

9. *Supra* note 1.

10. The various regulations are noted in the relevant Annual Reports to Parliament, online: <www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals.html>.

11. A list of ministerial instructions is available online: <www.canada.ca/en/immigration-refugees-citizenship/corporate/mandate/policies-operational-instructions-agreements/ministerial-instructions.html>.

12. Backgrounders are archived online: <www.canada.ca/en/immigration-refugees-citizenship/news/archives.html>.

13. Such statements were widely reported. For example, Sarah Boesveld, “Efforts to keep bogus Roma refugees out have failed: Jason Kenney,” *National Post* (22 April 2012), online: <nationalpost.com/news/canada/efforts-to-keep-bogus-roma-refugees-out-have-failed-jason-kenney>. See generally, the *Zero Tolerance for Barbaric Cultural Practices Act*, SC 2015, c 29 and accompanying widely reported government comments. In addition, in her caustic judgment in *Canadian Doctors*, *supra* note 7, MacTavish J makes several references to remarks from the Minister’s office prejudging refugee claims as “bogus.”

links between immigrants and organized crime and terrorism.¹⁴ In addition, front-line officials, unreviewed by superiors within their organization, were given a strong mandate to protect national security, and have adopted more aggressive, less facilitative approaches to those attempting to negotiate their way through the system.¹⁵

Simultaneously, we have witnessed an increase in public expressions of anti-immigrant sentiment.¹⁶ Mainstream political debate has become infected and influenced in alarming ways by xenophobic invective as newcomers and temporary workers are misidentified as a primary source of various past and present social ills and as a likely source of potential future harms. Individual non-citizens are attacked because of characteristics they are deemed falsely to have, or because of characteristics they do have but that are deemed wrongly to be pernicious. Antagonism to newcomers may also focus variably and not necessarily consistently on race, religion, cultural practices, place of origin, language skills and other factors.

It is not unreasonable to talk about the rise of xenophobia and to suspect that the government's package of immigration and citizenship reforms has helped stoke the irrational fears of those who feel threatened by newcomers and has increased the confidence and strength of anti-immigrant groups and organizations. Moreover, it is not unreasonable to suspect that xenophobes' irrational fears may have reciprocally influenced the government's decision to develop and implement the relevant measures. It would not be outlandish to conclude that, although each measure of harsh treatment is directed at a discrete and narrowly defined category of non-citizen, each measure operates like a single pixel that, only in combination with many others, presents the viewer with a comprehensible image. In this case, the cumulative message from the government could be interpreted as the message that in our immigration processes the interests of the existing citizenry always come first and extreme measures may

14. See, for example, Canadian Press, "Kenney blasted for linking Toronto gun violence to 'foreign gangsters,'" *Vancouver Sun* (20 July 2012), online: <www.vancouversun.com/Kenney+blasted+linking+Toronto+violence+foreign+gangsters/6966596/story.html>.

15. See Tony Keller, "Canada Has Its Own Ways of Keeping Out Unwanted Immigrants," *The Atlantic* (12 July 2018), online: <www.theatlantic.com/international/archive/2018/07/canada-immigration-success/564944/>. See also Geoffrey York & Michelle Zilio, "Access Denied: Canada's Refusal Rate for Visitor Visas Soars," *Globe & Mail* (8 July 2018), online: <www.theglobeandmail.com/world/article-access-denied-canadas-refusal-rate-for-visitor-visas-soars/>; and Nicholas Keung, "Audit of immigration detention review system reveals culture that favours incarceration," *Toronto Star* (20 July 2018), online: <www.thestar.com/news/gta/2018/07/21/audit-of-immigration-detention-review-system-reveals-culture-that-favours-incarceration.html>.

16. See, for example, Craig S Smith & Dan Levin, "As Canada Transforms, an Anti-Immigrant Fringe Stirs," *New York Times* (21 January 2017), online: <www.nytimes.com/2017/01/31/world/americas/canada-quebec-nationalists.html>.

be imposed where these interests might be in jeopardy. Each prominent example of oppressive treatment may be interpreted as aiming to assuage the general fears of anxious insiders and to respond to their demands.¹⁷ A quick glance at the history of Canadian immigration law¹⁸ reveals that this recent experience is hardly novel. Through the years, nativism, jingoism and xenophobia have emerged and re-emerged in the public sphere leading to harsher immigration laws.

In general terms, the recent package of reforms has raised four major concerns. First, are they gratuitously harsh? Is their serious impact on various groups necessary to achieve the purposes for which they were said to be introduced? Do they show adequate concern for the interests of those directly affected? Second, are they over-inclusive? Are they tailored sufficiently to target only those individuals whose behaviour is considered problematic, or do they have a negative impact on others who are caught innocently within the same net? Third, do they impose serious hardship on some individuals who have merely exercised their rights or who have failed to meet demanding conditions, solely to deter large numbers of others from engaging in similar conduct? In other words, are they imposing unreasonably high burdens on some individuals for reasons of the public good? Fourth, are they prompted by antagonism towards outsiders, or to pander to groups within the polity who bear such resentment? There is also an ancillary concern: whether there is adequate legal redress if a positive answer can be given to any of these questions.

In response to the package of reforms and the concerns they have raised, immigration lawyers have not been inactive. They have devised and maintained important, well-conceived challenges against various legal provisions. In doing so, they have relied on a familiar set of legal sources in their attempts to challenge the validity of the measures in question or to minimize their impact. They have placed significant reliance both on established administrative law doctrines and on section 7 of the *Canadian*

17. It should be acknowledged that since 2015, a significant number of the reforms have been annulled, both by the courts and by a new government that is more temperate in its rhetoric. However, while inflammatory language from officials may have subsided, many of the above-noted changes have been maintained.

18. The classic source is Ninette Kelley & Michael Trebilcock, *The Making of the Mosaic*, 2nd ed (Toronto: University of Toronto Press, 2010): "...narrow (nativist) conceptions of community...and ideological hostility to collectivism in the organization of the economy seem largely to explain the exclusion of Asian and black immigrants, ...the refusal to admit Jewish refugees before and during the Second World War, the internment of Japanese Canadians during the second World War, the screening out of alleged Communist sympathizers on national security grounds during the 1950's and 1960s..." at 464.

Charter of Rights and Freedoms,¹⁹ which guarantees “the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”²⁰

However, lawyers have only rarely relied on other sections of the *Charter* when challenging the legal validity of government measures. Specifically, they have tended to shy away from relying on section 15, which provides that “every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.” Thus, *Charter* challenges have not been based on the claim that our laws or their application have been tainted by xenophobic impulses. The reluctance of lawyers to rely on this section is not at all mysterious. Authoritative decisions from the Supreme Court of Canada have, in no uncertain terms, asserted that laws governing the admission and removal of non-citizens are virtually immune from section 15 challenge,²¹ except in the special case where they single out sub-groups of non-citizens for negative treatment on pernicious grounds, such as national origin.²²

In the following pages, I argue that we should now reconsider these judicial decisions and promote the view that section 15 should play a more prominent role in litigation that challenges punitive or excessively repressive provisions in our regime of immigration laws. Only if we develop an egalitarian legal doctrine that is rooted in section 15, will we address all four of the general concerns noted above. Rather than disallow equality-based challenges to our immigration laws, we should welcome litigation that seeks to prove the suspicions that our immigration laws may have been shaped by the influence of xenophobic ideologies which may, in turn, have been fertilized autopoetically by government laws and policies. Even where oppressive immigration laws are applicable to all non-citizens and differentiate them as a class from citizens, we should welcome a forum for review in which we scrutinize their full impact

19. *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

20. It is interesting to note that on occasion, lawyers also continue to rely on the *Canadian Bill of Rights*, SC 1960, c 44. See, *Hassouna v Canada (Minister of Citizenship and Immigration)*, 2017 FC 473.

21. The leading cases, discussed below, are *Charkaoui v Canada (Immigration and Citizenship)*, 2007 SCC 9 [*Charkaoui*] and *Canada (Minister of Employment and Immigration) v Chiarelli*, [1992] 1 SCR 711, 1 RCS 711 [*Chiarelli*]. See the text accompanying notes 28 and 29, below.

22. See, for example, *Canadian Doctors*, *supra* note 7; discussed *infra* note 75; *YZ*, *supra* note 5, discussed *infra* note 79; and *Tabingo v Canada (Citizenship and Immigration)*, 2013 FC 377, (FCTD) [*Tabingo*]; discussed *infra* at note 72, *aff'd* 2014 FCA 191 [*Tabingo Appeal*] discussed *infra* at note 74.

on non-citizens so that we can appraise accurately the actual harms and benefits and consider government reasons for imposing such rules under section 1 of the *Charter*.²³

I do not argue that any specific legal provisions violate section 15. Such an argument would require more detailed attention to the wider social, historical and political milieu than space permits. Instead, I operate at a more general level, arguing that the reasons and premises underlying the decisions to immunize immigration law from equality challenges are deeply problematic. Not only are those reasons and premises insufficient to ground a comprehensive immunity, they are also inconsistent both with general doctrines of equality that were accepted at the time the decisions were made and those that have gained currency today. More specifically, they conflict with approaches to equality that demand a consideration of contextual factors, including an appraisal of historical experience, rather than mere formalistic categorization; they conflict with decisions that demand that we examine the actual impact that laws have rather than their purpose; they conflict with approaches that look beyond differential treatment to emphasize that a principle of equal concern and respect should be regarded as the fundamental principle of analysis; and they conflict with approaches that adopt the concept of substantive equality as the basic fulcrum for analysis.

In addition, recognition of the corrosive effects of xenophobia has developed and become more widespread since many of these decisions were made.²⁴ Our experience of anti-immigrant and anti-immigration polemic within mainstream political discourse and the wide-ranging ways in which xenophobia reveals itself should alert us to the dangers of immunization of particular areas of law from egalitarian challenge.²⁵ When nativist views gain currency, it is likelier that xenophobic laws will be enacted, particularly in the contentious field of immigration. It should also be noted that section 7 of the *Charter* has, in many ways, proved to be an ineffective and unreliable tool to challenge the constitutionality of

23. *Charter*, *supra* note 19, s 1; Where there is a heavy onus is on the government to show that any infringement of a right is demonstrably justifiable in a free and democratic society.

24. See, for example, recently signed *Global Compact for Safe, Orderly and Regular Migration*, 13 July 2018, online: <www.un.org/pga/72/wp-content/uploads/sites/51/2018/07/migration.pdf>; which makes multiple references to xenophobia and reveals high levels of concern about its rise.

25. As reported by Statistics Canada, "After steady but relatively small increases since 2014, police-reported hate crime in Canada rose sharply in 2017, up 47% over the previous year, and largely the result of an increase in hate-related property crimes, such as graffiti and vandalism. For the year, police reported 2,073 hate crimes, 664 more than in 2016. Higher numbers were seen across most types of hate crime, with incidents targeting the Muslim, Jewish, and Black populations accounting for most of the national increase." See, Statistics Canada, "Police-reported hate crime, 2017," *The Daily* (28 November 2018), online: <www150.statcan.gc.ca/n1/daily-quotidien/181129/dq181129a-eng.htm>.

immigration laws.²⁶ It is therefore appropriate to look for other devices that may offer additional legal protection.

In order to develop these points, I proceed as follows: First, I outline and analyse critically the decisive passages in the two leading Supreme Court cases that considered the interplay between section 15 and immigration law, and effectively closed off avenues for section 15 advocacy within the field. A major problem with these cases is that they make no helpful reference to leading equality decisions beyond the sphere of immigration. They also promote a concept of discrimination that is less nuanced than that found in these leading cases. While it is sometimes difficult to fathom how their terse analysis actually aligns with the decisions in which broader principles are articulated, it seems clear that the immigration cases are based on the weak premise that differential treatment between citizens and non-citizens in the realm of immigration law should not be characterized as discriminatory on a ground analogous to those enumerated in section 15 and should, as a result, be immune from section 15 challenge. I attempt to expose the weaknesses of this claim. I then examine other equality decisions from the same era. These decisions introduced some important doctrinal claims about the values that should underpin our concept of discrimination. I argue that these principles are still relevant and I use these cases to expose further the disingenuous artifice on which the immigration cases are based. Subsequently, I examine more recent decisions on equality in which the Supreme Court of Canada has raised doubts about the mandatory use of comparator groups when determining whether a person has been treated unequally and has promoted the pursuit of substantive equality. I suggest that these ideas clash with the approach taken in the decisions that immunize immigration law from section 15 challenges. I also examine some early decisions in which the Supreme Court suggests that a broad range of laws are insulated from *Charter* review and suggest that these cases have a narrow ambit that should not be extended to embrace immigration laws. Finally, I turn to some recent immigration cases in which current equality principles have been adopted—cases in which the question is whether differentiation between groups of non-citizens is discriminatory—to show how they too have failed to take seriously some key ideas that must be confronted if xenophobia is to be addressed adequately.

26. See Catherine Dauvergne, “How The Charter has Failed Non-Citizens in Canada: Reviewing Thirty Years of Jurisprudence” (2013) 58:3 McGill LJ 663; arguing that the principles of fundamental justice, having been analysed through a lens that places more importance on national security rather than on basic rights, have been unduly diluted.

I. *Immunitizing immigration decisions from section 15: Interpreting Charkaoui*

A helpful point of entry is the Supreme Court's decision in *Charkaoui*,²⁷ a decision that followed closely on the 2006 election and one that dashed hopes that section 15 of the *Charter* would provide a set of tools to protect the interests of non-citizens as they negotiate the immigration process. In unequivocal terms, the Court denied that the distinction between non-citizen and citizen as found in our immigration and citizenship laws can ground a section 15 challenge, barring very exceptional circumstances. The relevant passages should be parsed carefully.

McLachlin C.J. introduces the issue thus:

The appellant Mr. Charkaoui argues that the *IRPA* certificate scheme [which can lead to deportation on security grounds] discriminates against noncitizens, contrary to s. 15(1) of the *Charter*. However, s. 6 of the *Charter* specifically allows for differential treatment of citizens and noncitizens in deportation matters: only citizens are accorded the right to enter, remain in and leave Canada (s. 6(1)). A deportation scheme that applies to noncitizens, but not to citizens, does not, for that reason alone, violate s. 15 of the *Charter*: *Chiarelli*.²⁸

On first sight, this is an accurate statement of the law. Section 6 does indeed allow for differential treatment²⁹ and indeed, it ensures it by guaranteeing a package of rights to citizens that is not granted to others. The fact that non-citizens are denied these rights by virtue of their status

27. *Charkaoui*, *supra* note 21.

28. *Ibid* at para. 129. As explained below, the reference to *Chiarelli* is significant. See below, the text accompanying note 31.

29. Section 6 of the *Charter*, *supra* note 19, reads as follows:

6. (1) Every citizen of Canada has the right to enter, remain in and leave Canada.

(2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right

a) to move to and take up residence in any province; and
b) to pursue the gaining of a livelihood in any province.

(3) The rights specified in subsection (2) are subject to

a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and
b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.

(4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

is, thus, not a matter that can be challenged constitutionally.³⁰ However, McLachlin C.J.'s words do seem to provide non-citizens with the possibility of a successful challenge in some circumstances. The inclusion of the phrase "for that reason alone" should give us pause. We should note its various possible meanings and from these, select one that fits best.

On the one hand, the phrase suggests that if non-citizens can identify an offensive aspect of the deportation scheme that has a profound impact on their interests then they might be able to successfully mount a challenge that the differential treatment that they are accorded, compared to that accorded to citizens, can amount to a violation of section 15. Under this reading, the Court would not be seeking to immunize the field from challenge. Instead, it would merely be adding a further demand to litigants: show us that there is something going on here that is more than the mere creation of a set of rules defining who has access to the country. In other words, a claimant who, for example, showed that rules about entry and residence imposed oppressive or unfair conditions, or who revealed that the rules were created by a political party that regularly engaged in the vilification of non-citizens might succeed. Within a specific context, the oppressiveness of a condition attached to a law that does not apply to citizens might provide the required additional reason that would permit a court to find that the scheme in question violated section 15.

However, a closer reading of the whole text reveals that this is not what is intended here. Ultimately, it becomes clear that, with one very small exception, non-citizens are always to be denied the opportunity to challenge immigration schemes if their claim pivots on differential treatment between non-citizens and citizens. The court is stating that, in such cases, there is sufficient reason to bar an equality challenge. For a non-citizen to successfully challenge a deportation scheme as discriminatory, that scheme would also have to differentiate on other grounds. For example, it would need to differentiate among non-citizens on grounds such as ethnic origin or religion or other analogous or enumerated grounds.

The reference to *Chiarelli* is the first indicator that this latter interpretation is the correct one. The relevant passage in Sopinka J.'s judgment reads as follows:

30. I do not consider here the argument that the Constitution, by guaranteeing rights to citizens, is not guaranteeing them exclusively to citizens. According to this argument, in special circumstances, various non-citizens may have a constitutional right to enter or remain in the country. Such an argument has not fared well in the courts. See *Solis v Canada (Citizenship and Immigration)*, [2000] FCJ No 407, 186 DLR (4th) 512. Nevertheless, I believe that its full merit has been underappreciated.

While permanent residents are given various mobility rights in s. 6(2), only citizens are accorded the right to enter, remain in and leave Canada in s. 6(1). *There is therefore no discrimination* contrary to s. 15 in a deportation scheme that applies to permanent residents, but not to citizens.³¹ [emphasis added]

Sopinka J.'s categorical conclusion that there is no discrimination is based on the understanding that a differentiation will be discriminatory only if it is made on one of the grounds listed in section 15 or an analogous ground. He is not here cataloguing all the factors that are required to show that a distinction *is* discriminatory. Instead, he is identifying a preliminary finding that must be made before the inquiry can continue. He is asserting that one can decide that differentiation is *not* discriminatory merely by finding that the distinction is neither enumerated nor analogous. Because he is attempting to show that a deportation scheme is *not* discriminatory, Sopinka J. does not pursue an inquiry into any additional factors, presumably because he thinks that it is unnecessary to do so. Because the distinction between citizen and non-citizen is authorized in a specific context, the differentiation is not based on a proscribed ground. Citizenship status, if it relates to the immigration process, is neither enumerated nor analogous. This terminates the section 15 inquiry at an early point.

Not only does McLachlin C.J. adopt Sopinka J.'s explanation of discrimination, she also adds flesh to the skeleton by adding extra caveats:

....there are two ways in which the *IRPA* could, in some circumstances, result in discrimination. First, detention may become indefinite as deportation is put off or becomes impossible, for example because there is no country to which the person can be deported. Second, the government could conceivably use the *IRPA* not for the purpose of deportation, but to detain the person on security grounds. In both situations, the source of the problem is that the detention is no longer related, in effect or purpose, to the goal of deportation.

In *Re A*, the legislation considered by the House of Lords expressly provided for indefinite detention; this was an important factor leading to the majority's holding that the legislation went beyond the concerns of immigration legislation and thus wrongfully discriminated between nationals and non-nationals... Even though the detention of some of the appellants has been long—indeed, Mr. Almrei's continues—the *record on which we must rely does not establish that the detentions at issue have become unhinged from the state's purpose of deportation*.... [emphasis added]³²

31. *Chiarelli*, *supra* note 21 at para 32.

32. *Charkaoui*, *supra* note 21 at paras 130, 131. The Reference to *Re A* is a reference to *A v Secretary of State for the Home Department*, [2005] 3 All ER 169, [2004] UKHL 56.

The two points found in this excerpt should be considered in reverse order. In both cases, McLachlin C.J. is claiming that when we have left the realm of immigration, the possibility for a finding of discrimination re-emerges. In the second point, she is claiming that that where a court rules that a measure has not been introduced to achieve a purpose related to immigration but to achieve a quite different goal, it may then consider whether it is discriminatory. Where a person has been detained solely for national security reasons, we will not have entered the realm of deportation. Generally speaking, only where the government is pursuing a purpose that is related to immigration, will a disadvantage that is imposed only on a non-citizen be found not to be discriminatory. On the other hand, where treatment accorded to an individual is *unrelated* to the purposes of deportation, the immunization provided by the subject matter of the legislation will no longer apply and it may be found to be discriminatory.³³

We should pause to note the full meaning of this analysis. Where the legislative purpose underlying a measure is that of regulating immigration, this will be sufficient to short circuit any further inquiry. In particular, it will circumvent the need to make inquiries into the actual effects that the measure has had or is likely to have on specific immigrants. This is problematic, because, as is noted below,³⁴ equality jurisprudence has placed increasing levels of emphasis on the need to conduct such effects-based inquiries. The general thrust of that jurisprudence is that we should look beyond formal distinctions to discover what the substantive impact of law is.

Now, turning to the first point made in the paragraph quoted above, it should be conceded that there is an attempt here to include an effects-based analysis of discrimination as part of the inquiry but it is, at most, half-hearted and does not provide a solid foundation for the conception of discrimination that is being promoted. When it becomes *impossible* for the government to achieve its stated immigration purpose through the measures in question, that purpose ceases to provide the required immunization from section 15 challenge. The measures in question, whatever their stated

33. The idea that the discriminatory nature of a law should depend on whether its purpose relates to the field of immigration raises a host of problems. Determining a law's purpose is of course notoriously difficult. But more important, deciding that a matter "relates to immigration" will be contentious. Does the imposition of a work permit relate to immigration or employment? Does denial of access to a profession to permanent residents relate to immigration. Even if the field of immigration is defined to embrace only the rights to enter into, remain in and depart from Canada, the imposition of restriction on work, housing, health, education may be seen as one that is defining the ambit to the right to remain. These are thorny problems that are noted but not discussed further.

34. *Law v Canada (Minister of Employment & Immigration)*, [1999] 1 SCR 497, 170 DLR (4th) 1 at para 57 [Law].

purpose, cease to create the immunization because a court is justified in finding that they do not relate to deportation because of the absence of any effective way for it to contribute to that end.

The important point to note is that McLachlin C.J. is claiming that when an underlying immigration purpose may still be achieved, the seriousness of its impact on the individual is totally irrelevant to the determination that it is not discriminatory. Thus, while the impact of lengthy detention on Mr. Almrei was recognized to be severe, achieving the government's purpose of deportation was still characterized as within the realm of the possible. Since deportation has not become impossible, the detention could be characterized as part and parcel of the process of removal and therefore could not be considered to be discriminatory, no matter how repressive.

Although she does not cite it, it is likely that the Chief Justice had in mind the general approach to discrimination cases that had been developed by Iacobucci J. speaking for the Court in the case of *Law v. Canada (Minister of Employment & Immigration)*³⁵ a few years previously. Iacobucci J. summarized the approach as follows:

Accordingly, a court that is called upon to determine a discrimination claim under s. 15(1) should make the following three broad inquiries:

(A) Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics?

(B) Is the claimant subject to differential treatment based on one or more enumerated and analogous grounds?

and

(C) Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?³⁶

The decision in *Charkaoui* is reached by addressing the second of these points. The deportation scheme in question imposes substantively differential treatment between the claimant and others, but the treatment

35. *Law, ibid.*

36. *Ibid* at para 88.

is not “based on one or more enumerated and analogous grounds.” One’s status as a non-citizen cannot count as an analogous ground when the differentiation in question relates to the immigration or removal process. The fact that the *Charter* itself permits such differentiation provides foundational support for this conclusion. In essence, the underlying argument seems to be that, if we were to recognize lack of citizenship status as a ground of discrimination, we would be unable to produce a body of immigration law. Indeed, we would be unable to develop a regime that treated citizens and non-citizens differently.³⁷

II. *The Tension between Charkaoui and Andrews*³⁸

On their face, the views expressed by McLachlin C.J. and Sopinka J. are perplexing. One should remember that in *Andrews v. Law Society of British Columbia*, the leading precedent at the time *Chiarelli* was decided, the Supreme Court had held that non-citizens fall into a category analogous to those specifically enumerated in s. 15. To distinguish between citizens and non-citizens is to differentiate on a prohibited ground. Wilson J. memorably offers the following explanation:

Relative to citizens, non-citizens are a group lacking in political power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated. They are among “those groups in society to whose needs and wishes elected officials have no apparent interest in attending”: see J. H. Ely, *Democracy and Distrust* (1980), at p. 151. Non-citizens, to take only the most obvious example, do not have the right to vote....I would conclude therefore that non-citizens fall into an analogous category to those specifically enumerated in s. 15. *I emphasize, moreover, that this is a determination which is not to be made only in the context of the law which is subject to challenge but rather in the context of the place of the group in the entire social, political and legal fabric of our society. While legislatures must inevitably draw distinctions among the governed, such distinctions should not bring about or reinforce the disadvantage of certain groups and individuals by denying them the rights freely accorded to others.*³⁹ [emphasis added]

The emphasized passage suggests that you cannot pick and choose contexts in which to make the determination that non-citizens are particularly vulnerable, lack political power and are therefore at risk of

37. In *Lavoie v Canada*, [2002] 1 SCR 769 [*Lavoie*], it was argued unsuccessfully that recognizing immigration status as a ground analogous to those listed in section 15 *in any field* would “negate or abolish the concept of citizenship.” The majority noted at para 39, “As [the respondents] put it, “[b]y universal definition and by constitutional fiat, ...citizens and non-citizens are *unequal* in status.” This case is discussed *infra* in the text accompanying note 46.

38. *Andrews v Law Society of British Columbia*, [1989]1 SCR 143, 56 DLR (4th) 1 [*Andrews*].

39. *Ibid* at para 5.

suffering abuse. It is this general vulnerability in every social context (including the realm of immigration and deportation) that leads to the conclusion that non-citizen status is analogous to the grounds enumerated in section 15. The determination that non-citizens fall into an analogous category is not context dependent. If it is non-citizens' vulnerability that exposes them to the risk of abusive treatment and that therefore justifies a close scrutiny of their treatment comparative to how citizens are treated, then the field of immigration law should not be considered exceptional.

In response to this powerful explanation, the reasoning of McLachlin C.J. and Sopinka J. appears to be syllogistic in nature:

(1) Deportation schemes that differentiate only between citizens and non-citizens⁴⁰ are authorized by the Constitution.

(2) This is a deportation scheme that differentiates only between citizens and non-citizens.

(3) This scheme is authorized by the Constitution.

The fallacy in this logic can be exposed by noting that the guarantees found in section 6 of the *Charter* do not provide any logical answer to the question whether the distinction between citizens and non-citizens in this context is discriminatory. If, when considering the constitutional provision, one keeps in mind the three-part schema adopted in *Law*, one can readily identify that different interpretations of section 6 are possible. One option is, indeed, the one that is selected by McLachlin C.J.: it is not unconstitutional to provide different packages or rights to citizens and non-citizens in the immigration context because in that context it is not discriminatory to make such a differentiation.

However, a second option is to hold that, while sets of rules defining entry and removal that distinguish between citizen and non-citizen are not for that reason alone invidious, it is open to a litigant to show that the particular instance in question does discriminate. This option would bring into play the factors identified in the third part of the schema outlined in *Law*: since the burden placed upon non-citizens by deportation schemes, considered in the abstract, does not *per se* have the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition they are not presumptively discriminatory. However, it would be open to a non-citizen to show that any particular deportation scheme would have that effect. Such proof could rebut any presumption. A non-citizen could claim with justification that while they do not have a right not to be deported, they do have a right that the deportation process be conducted according to high standards of treatment and in a respectful

40. As opposed to schemes that distinguish among different categories of non-citizen.

manner. Under this interpretation, an abusive or needlessly oppressive immigration law that fails to give adequate weight to the interests of the non-citizen could be identified as discriminatory. While the distinction between citizen and non-citizen in a law that is part of an immigration scheme may not be suspect on its face, further inquiry may show that it is indeed so. The non-citizen litigant would note that the law in question is not merely a harsh law that applies to everyone. It is a harsh law that does not apply to citizens. It is the combination of the harshness and the recognized historical prejudice suffered by non-citizens that would permit us to label it discriminatory.⁴¹

Thus, if one reduces the reasoning to a syllogism the conclusion should not be the one attributed above to McLachlin C.J. and Sopinka J. Instead, it should be:

(4) This scheme is authorized *unless it is shown to be discriminatory*.

Syllogism alone cannot ground the immunization of an immigration scheme from a section 15 challenge.

One can tie these points directly to the excerpts from *Charkaoui* cited above. McLachlin C.J. connects the immunization within the sphere of immigration to the government's purpose. She omits to consider a case where there are multiple aims, one to establish an immigration regime as well as others that are more nefarious. For example, where there are two underlying purposes, the first of which is to define a deportation scheme and the second of which could be to ensure that the scheme will satisfy xenophobic zealots by showing high levels of disdain for non-citizens, an equality challenge will presumably not succeed. In McLachlin C.J.'s estimation because such a regime would not be "unhinged from the state's purpose of deportation," such ulterior purposes would not negate the immunization but they could reveal an unjustifiably negative attitude to non-citizens and have an undue impact on them.

Furthermore, where there is an immigration purpose behind a government regime but there are serious collateral and unintended impacts on the individual, McLachlin C.J.'s analysis posits that this should have

41. This point is made in *Quebec (Attorney General) v A*, 2013 SCC 5, [2013] 1 SCR 61 [*AG v A*] at para 347, where it is stated, "where the discriminatory effect is said to be the perpetuation of disadvantage or prejudice, evidence that goes to establishing a claimant's historical position of disadvantage or to demonstrating existing prejudice against the claimant group, as well as the nature of the interest that is affected, will be considered": This analysis is explored in detail in *Canadian Doctors*, *supra* note 7 at paras 721-728.

no bearing on the conclusion that the regime is not discriminatory.⁴² Assuming that the government can achieve its purpose, it is that purpose rather than its impacts that determines that we are in the zone of immunity. Thus, as will be shown in further detail below, the approach is antithetical to approaches that advocate that inquiries into discrimination should be effects-based rather than merely purpose-based.⁴³

In the remaining pages of this paper, I present three major reasons for rejecting the *Charkaoui/Chiarelli* approach.

First, the approach does not easily co-exist either with the general jurisprudence on equality that was current at the time *Charkaoui* was decided, or with the judicial doctrine that has developed since then. Second, it fails to recognize and address the full impact of xenophobia as a significant social problem. And third, it has had a negative impact on judicial reasoning in those few immigration cases where judges have concluded that the section 15 rights of various groups of noncitizens have been infringed.

I address each of these in turn.

III. *The tension between Charkaoui and early equality jurisprudence*

The oddness of the decisions in *Charkaoui* and *Chiarelli* becomes noticeable when one looks first at analyses of discrimination found in other cases of the same vintage. I can make my point by adverting to two such cases—*Law* and *Lavoie*.

In *Law*, the Court had insisted vigorously that equality analysis “is to be undertaken in a purposive and contextualized manner.” Moreover, it revealed and traced out the basic purpose underlying section 15 as follows:

It may be said that the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as

42. As Colin Grey pointed out to me, it is fruitful to distinguish McLachlin CJ’s views on section 15 with those that she expresses on section 7. Here, she is making the claim that an immigration law is immunized from section 15 challenge no matter how serious the harm incurred. In relation to section 7, she notes, “*Medovarski* thus does not stand for the proposition that proceedings related to deportation in the immigration context are immune from s. 7 scrutiny. While the deportation of a non-citizen in the immigration context may not in itself engage s. 7 of the *Charter*, some features associated with deportation, such as detention in the course of the certificate process or the prospect of deportation to torture, may do so.” *Charkaoui*, *supra* note 21 at para 17.

43. In *Withler v Canada (Attorney General)*, 2011 SCC 12 at para 39 [*Withler*]. This point is made clearly: “The focus of the inquiry is on the actual impact of the impugned law, taking full account of social, political, economic and historical factors concerning the group.” Also in *AG v A*, *supra* note 41 at para 319, Abella J. quotes McIntyre J. in *Andrews*: “[T]he main consideration must be the impact of the law on the individual or the group concerned.”

human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.⁴⁴

The *Charkaoui/Chiarelli* approach, by maintaining that any rational connection between the treatment and immigration goals is sufficient to halt a s. 15 challenge in its tracks before considering whether essential human dignity has been violated adopts a return to formalistic tendencies that are inconsistent with the general contextualizing approach advocated in *Law* and further emphasized in later cases. No matter how oppressive our immigration laws, no matter how much disdain they reveal for those seeking to enter and remain in Canada, they are immune from being considered discriminatory, on the ground that the distinction between citizen and non-citizen is a pre-requisite for any immigration process to get off the ground. These contextual factors are seemingly irrelevant when determining whether an immigration measure is discriminatory. While it may be accepted for the purpose of argument that drawing a distinction between citizen and non-citizen may not in itself interfere with the promotion of “a society in which all persons enjoy equal recognition at law as human beings” any specific iteration of that distinction even in the realm of immigration law may do so. A clear example would be where immigrants are mandatorily separated from their children at the border and deported without them (as they have recently been in the United States).

Also, in *Law*, the Court discusses how comparator groups should be selected;

To locate the appropriate comparator, we must consider a variety of factors, including the subject-matter of the legislation. The object of a s. 15(1) analysis is not to determine equality in the abstract; it is to determine whether the impugned legislation creates differential treatment between the claimant and others on the basis of enumerated or analogous grounds, which results in discrimination. Both the purpose and the effect of the legislation must be considered in determining the appropriate comparison group or groups. Other contextual factors may also be relevant. The biological, historical, and sociological similarities or dissimilarities may be relevant in establishing the relevant comparator in particular, and whether the legislation effects discrimination in a substantive sense more generally....⁴⁵

The decision to proscribe using citizens as a comparator group when immigration laws are at issue *without looking at the effects of a particular*

44. *Law*, *supra* note 34 at para 51.

45. *Ibid* at para 57.

law is incompatible with this analysis which emphasizes examining the effect of legislation when determining the relevant group.

In *Lavoie*, Bastarache J., for the majority, adverts to a tension between *Chiarelli* and *Andrews*:

This case has much in common with both *Andrews* and *Chiarelli*. Like *Andrews*, it involves differential treatment in employment that is not explicitly authorized by the *Charter*; like *Chiarelli*, it involves a federal law that is part of a recognized package of privileges conferred on Canadian citizens. This combination of factors makes it difficult to decide whether, at the end of the day, the law conflicts with the purpose of s. 15(1) of the *Charter*. Based on this Court's recent s. 15(1) jurisprudence, I conclude that it does.⁴⁶

Bastarache J. begins his analysis by noting that the case looks as if it is straightforward and calls for an uncontroversial application of *Andrews*:

the impugned law draws a clear distinction between citizens and non-citizens, and the latter constitutes an analogous ground of discrimination under s. 15(1): see *Andrews*...⁴⁷

However, an argument from the respondents gives him pause:

Nevertheless, the respondents argue that the whole point of federal citizenship legislation is to treat citizens and non-citizens differently, and therefore that the two groups cannot validly be compared for s. 15(1) purposes. As they put it, “[b]y universal definition and by constitutional fiat, ...citizens and non-citizens are *unequal* in status. To treat them equally would be to negate or abolish the concept of citizenship”....In their view, however, such a comparison is not appropriate in the case of “a citizenship defining law that draws a constitutionally permitted distinction between citizens and non-citizens.” In such a case, the s. 15(1) analysis would undermine the fundamental difference between citizens and non-citizens...⁴⁸

To address this concern, Bastarache J. focuses first on the use of citizenship as a comparator group and on the proper stage in the analysis that this should occur:

Whether citizens are an appropriate comparator in this case is, in my view, better *dealt with as a contextual factor under the third branch of the Law analysis* than as a bar to recognizing a legislative distinction. Although Iacobucci J. stressed the importance of identifying an appropriate comparator group, there is nothing in *Law* to indicate that the

46. *Lavoie*, *supra* note 37 at para 37.

47. *Ibid* at para 39.

48. *Ibid*.

first inquiry is anything but a threshold test. On the contrary, the precise inquiry at the first stage is whether the law draws a formal distinction “between the claimant and *others*.”⁴⁹ [emphasis added]

He then proceeds to cast doubt on the ideas underpinning the respondents’ claim:

As citizenship was recognized as an analogous ground in *Andrews*, I can find no authority for qualifying this finding according to the context of a given case. The point of the analogous grounds, according to *Law* and subsequent cases, is that they are “suspect markers” of discrimination: the groups occupying them are vulnerable to having their interests overlooked no matter what the legislative context.⁵⁰

In this paragraph, Bastarache J. shows clearly his unwillingness to recognize areas of immunity where the grounds of discrimination do not apply. While he does not explicitly overrule the decision in *Chiarelli*, he nevertheless casts grave doubts on the continuing authority of the reasoning on which it is based. McLachlin C.J.’s somewhat casual reference to *Chiarelli* and her development of the approach found therein ignores this. She does not even cite the *Lavoie* decision in her judgment.

It should be added that in *Charkaoui*, McLachlin C.J. also ignores her own words in her dissenting opinion in *Lavoie* where she states:

Parliament need not choose between legislating with respect to citizenship and discrimination. Rather, it is Parliament’s task to draft laws in relation to citizenship that comply with s. 15(1). This leaves ample scope for the exercise of the citizenship power, so long as Parliament does not make distinctions that unjustifiably violate human dignity: *Law, supra*. We cannot agree that defining Canadian citizenship requires that Parliament be allowed to discriminate against non-citizens.⁵¹

Here, McLachlin C.J. offers no reasons why we should distinguish between laws that define how citizenship may be obtained and laws that define the rights that attach to citizenship. Her demand that Parliament draft citizenship laws that comply with section 15 should be regarded as categorical.

III. *The Tension between Charkaoui and later equality jurisprudence*

It should also be emphasized that the *Charkaoui/Chiarelli* approach does not fit smoothly with equality doctrine found in more recent cases. Post-*Charkaoui* decisions place weight on the factors that I have noted in

49. *Ibid* at para 40.

50. *Ibid* at para 41.

51. *Ibid* at para 3.

my analysis of *Law* and *Lavoie*. While the court has dispensed with the tripartite schema developed in *Law* and has condensed it into a two-part test, this change does nothing to reduce the friction.⁵² Emphasis on the centrality of a conception of substantive, as opposed to formal, equality has increased the difficulty of continuing to maintain a preliminary filter that permits laws dealing with immigration to be immune from section 15 challenge.

For example, in *Withler*⁵³ the court attempts to simplify the jurisprudence by stating:

At the end of the day there is only one question: Does the challenged law violate the norm of substantive equality in s. 15(1) of the *Charter*?⁵⁴

The court offers an analysis of substantive equality that suggests that it would be quite appropriate to inquire whether xenophobic antipathy is reflected in our laws, including our immigration laws, and their impacts:

The analysis at the second step is an inquiry into whether the law works substantive inequality, by perpetuating disadvantage or prejudice, or by stereotyping in a way that does not correspond to actual characteristics or circumstances.⁵⁵

In *Quebec (Attorney General) v. A*,⁵⁶ the Court goes on to unpack the concept of substantive equality as follows:

substantive equality is not denied solely because a disadvantage is imposed. Rather, it is denied by the imposition of a disadvantage that is unfair or objectionable, which is most often the case if the disadvantage perpetuates prejudice or stereotypes.⁵⁷

The Court then quotes Sophia Moreau:

We think of discrimination not just as any sort of differential treatment but as a particular kind of differential treatment: to be discriminated against is not just to be denied something that others have but to be *denied it in a way that is objectionable or unfair*.⁵⁸ [emphasis added]

52. The jurisprudence establishes a two-part test for assessing a s 15(1) claim: (1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping? See *R v Kapp*, 2008 SCC 41 at para 17.

53. *Withler*, *supra* note 43.

54. *Ibid* at para 2.

55. *Ibid* at para 65.

56. *AG v A*, *supra* note 41.

57. *Ibid* at para 180.

58. *Ibid*.

Transposing these remarks into a deportation context would allow us to say that removal itself may not be discriminatory but particular forms of removal may be objectionable or unfair. The inquiry into substantive equality cannot be pursued if inquiries into unfairness or objectionableness are proscribed in particular fields of law, which is the outcome of adopting the *Charkaoui* analysis. Moreover, where a disadvantage is placed on non-citizens in an “objectionable or unfair way” such as by penalizing all refugees on the basis of a stereotyping and generalized assumption that their claims are fraudulent, the laws in question can fairly be regarded as discriminatory under this account.

Moreover, in *Withler*, the Court also offers a strong explanation why the filtering process in the first part of the test should not be too rigid. It says:

The role of comparison at the first step is to establish a “distinction.” Inherent in the word “distinction” is the idea that the claimant is treated differently than others. Comparison is thus engaged, in that the claimant asserts that he or she is denied a benefit that others are granted or carries a burden that others do not, by reason of a personal characteristic that falls within the enumerated or analogous grounds of s. 15(1).

It is unnecessary to pinpoint a particular group that precisely corresponds to the claimant group except for the personal characteristic or characteristics alleged to ground the discrimination....⁵⁹ [emphasis added]

The Court then picks up on the idea suggested in *Lavoie* that comparison between groups should occur at the second stage of the inquiry (which had been the third stage, under the *Law* framework) and should be highly context-dependent:

The analysis at the second step is an inquiry into whether the law works substantive inequality, by perpetuating disadvantage or prejudice, or by stereotyping in a way that does not correspond to actual characteristics or circumstances. *At this step*, comparison may bolster the contextual understanding of a claimant’s place within a legislative scheme and society at large, and thus help to determine whether the impugned law or decision perpetuates disadvantage or stereotyping. The probative value of comparative evidence, viewed in this contextual sense, will depend on the circumstances.⁶⁰ [emphasis added]

59. *Withler*, *supra* note 43 at paras 62-63.

60. *Ibid* at para 65.

In the immigration context, this might involve considering the differences between citizens and non-citizens when deciding that a particular part of the regime is substantively unjust.

IV. *Jurisprudence that supports Charkaoui*

Despite the friction between *Charkaoui* and *Chiarelli* on the one hand, and leading jurisprudence on the other, it must be noted and conceded that there is a strain of jurisprudence with which they are more compatible. The jurisprudence includes a case in which McLachlin J. (as she then was) dissents vigorously. The cases in question deal with the provincial funding of separate schools and decide that a particular sphere of legislation is insulated from *Charter* review. It should be noted at the outset that in these cases, unlike *Chiarelli* and *Charkaoui*, it is not held that the laws withstand *Charter* challenge because they are not discriminatory. The reasons for the decision are more basic. Nevertheless, these cases should remind us that *Charkaoui* and *Chiarelli* are not unique or extraordinary in their attempts to immunize laws from *Charter* review.

The first case is *Reference Re Bill C-30*⁶¹ in which Wilson J. introduced the idea that a wide range of legislative measures may be insulated from *Charter* challenge. The case concerned legislation in Ontario that was to extend provincial funding to Roman Catholic Separate Schools. The Ontario Government argued that the Bill was a justifiable exercise of power under s. 93 of the *Constitution Act*.⁶²

Amongst the arguments mounted against the legislation was the argument that, by providing Roman Catholic schools with financial benefits not made equally available to other taxpayers and other religious schools, Bill 30 violated the equality guarantee in s. 15(1) of the *Charter*. In response, the Ontario Government argued that such law was insulated from *Charter* challenge by section 29 of the *Charter*.⁶³

61. [1987] 1 SCR 1148, 40 DLR (4th) 18 [*Bill C-30*].

62. Section 93 reads: "In and for each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following Provisions:

(1) Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union....

(3) Where in any Province a System of Separate or Dissident Schools exists by Law at the Union or is thereafter established by the Legislature of the Province, an Appeal shall lie to the Governor General in Council from any Act or Decision of any Provincial Authority affecting any Right or Privilege of the Protestant or Roman Catholic Minority of the Queen's Subjects in relation to Education..." *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

63. Section 29 provides, "Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools." *Charter, supra*, note 19, s 29.

In her majority opinion, Wilson J. gave an extended account of how a law may be immune from *Charter* challenge. It includes the extraordinary claim that a provincial law that is created under a plenary Constitutional power is immune from *Charter* challenge because it is an exercise of a power granted to the province as a result of a constitutional compromise.⁶⁴ One could justifiably extrapolate from this analysis to the position that any immigration law enacted by the Federal legislature would also be immune on the ground that it too is a legitimate exercise of a constitutionally granted power gained by constitutional compromise.

Wilson J.'s analysis was quoted *verbatim* in *Adler v. Ontario*⁶⁵ where a declaration was sought that the non-funding of Jewish schools in Ontario was unconstitutional. One argument that was made was that by funding Roman Catholic separate schools while denying funding to independent religious schools, the province discriminated against the latter on the basis of religion contrary to s. 15(1). Iacobucci J. for the majority in *Adler* noted that Wilson J. had found that the proposed legislation

was nonetheless “immune” from Charter review because it was “legislation enacted pursuant to the plenary power in relation to education granted to the provincial legislatures as part of the Confederation compromise.” See *Reference Re Bill 30*, at p. 1198. This was true regardless of the fact that this unequal funding might, as I mentioned above, “sit uncomfortably with the concept of equality embodied in the Charter.”⁶⁶

Iacobucci J. concluded:

Following the same line of reasoning used by Wilson J. in the *Reference Re Bill 30*, I find that public funding for the province’s separate schools cannot form the basis for the appellants’ *Charter* claim.⁶⁷

McLachlin J. (as she then was) in her partial dissent rejected this analysis:

Before considering the *Charter* issues, it is necessary to determine whether s. 93 of the *Constitution Act, 1867* constitutes a code which ousts the operation of the *Charter*. I agree with Sopinka J. that it does not. Section 93 requires Ontario to fund schools for the Roman Catholic minority in Ontario and requires Quebec to fund schools for the Protestant minority in Quebec. Neither its language nor its purpose suggests that it was intended to do more than guarantee school support for the Roman Catholic or Protestant minorities in the two provinces respectively.

64. *Bill C-30, supra*, note 61 at paras 63-64.

65. *Adler v Ontario*, [1996] 3 SCR 609 [*Adler*].

66. *Ibid* at para 38.

67. *Ibid* at para 39.

Provinces exercising their plenary powers to provide education services must, subject to this restriction, comply with the *Charter*.⁶⁸

There is good reason to believe that Wilson J.'s analysis is no longer good law although it has never been formally repudiated. First, in *Lavoie*, Bastarache J. explicitly rejected an argument that jurisdictional considerations are relevant when determining whether the *Charter* applies.⁶⁹ Moreover, in *EGALE Canada v. Canada*,⁷⁰ the British Columbia Court of Appeal refused to apply Wilson J.'s analysis in a context other than the funding of separate schools, and emphasized the unique position that that issue held in constitutional history.⁷¹

The school funding cases are helpful because they indicate that there may be laws that are insulated from *Charter* review because they are merely recognizing rights, as the Constitution demands. A challenge that demanded that citizens should not enjoy rights—like the right to enter or stay in Canada—that non-citizens do not enjoy would likewise fail. But in *Adler*, McLachlin J. makes a strong case that this does not entail that we should establish excessively broad areas of immunity where the *Charter* would not apply. Nevertheless, this seems to be the upshot of the decision in *Charkaoui*. In *Adler*, McLachlin J. proposes that claimants be permitted to make arguments in accord with the criteria set out in the equality jurisprudence. Their permitted challenge would nevertheless fail both where it is found that the law does not discriminate against them but also where the government shows that the discrimination is demonstrably justifiable in a free and democratic society. In *Adler*, McLachlin J. found that Ontario had done just that.

V. *Xenophobia and immigration law*

My critique of the *Charkaoui/Chiarelli* analysis goes beyond the mere existence of friction created when one tries to fit it within the more general doctrines of equality established elsewhere. By denying a section 15 challenge to non-citizens where the law imposes an unfair disadvantage on them that is not imposed on citizens, the *Charkaoui/Chiarelli* doctrine

68. *Ibid* at para 194.

69. *Lavoie*, *supra* note 37 at para 40.

70. 2003 BCCA 251.

71. *Ibid*. The Court stated, at para 109: “What is apparent from these passages, and from the judgment of Wilson J. as a whole, is that the reason s. 93 was immune from Charter review was because of a pre-confederation compromise (“bargain”) designed to protect the Roman Catholic minority in Ontario and the Protestant minority in Quebec. This compromise, which carried with it certain built-in rights (and inequalities), was entrenched in the Constitution Act, 1867. Section 29 of the Charter did not grant the right to immunity from Charter review under s. 15 or otherwise; it simply recognized and preserved the rights conferred by s. 93 in their historical context.”

leaves few other options to the claimants. One option is to attempt to subsume the claim under another section of the *Charter*. However, there will be many cases of comparative disadvantage that will not meet the tight requirements of other sections. For example, the strict criteria that define cruel and unusual treatment will exclude many forms of abusive behaviour that reveal that the individual is not considered as an equal. In addition, as noted above, non-citizens have had only limited success in getting courts to recognize that the immigration process engages the right to life liberty and security of the person and even where they have been successful in this regard the challenge of showing that the principles of fundamental justice have been infringed has been a difficult one. Moreover, the harm recognized by section 15—that it is an assault on one's personality or identity to suffer the ignominy of treatment that indicates that one is less worthy as a human being as others who are under the law's authority—is quite different from those recognized in the other sections.

A second option is to argue one's case as an equality case but to compare one's treatment with that accorded to other groups of non-citizen. This option is premised on the idea that the law lives up to our equality principles within the realm of immigration by allowing a successful claim only when different rules are applied to different groups who must also negotiate their way through them. It is only where one can show that one is treated as a less valuable human being than other non-citizens that one's equality rights will have been infringed. This idea should be met head on. By accepting it, one is implicitly denying that xenophobia is and throughout our history has been a social problem that surfaces regularly and that demands legal recognition. My primary critique of *Charkaoui* hinges on the idea is that it fails to acknowledge the existence of xenophobia and its possible influence on our laws and misrepresents the nature of the harm suffered. The proposition that our laws have treated some non-citizens unequally because it has failed to accord them the same benefits accorded to other non-citizens is quite different from the proposition that the law has treated some non-citizens unequally because it has treated them as less worthy of respect than the citizenry.

The important point to note is that xenophobic measures need not uniformly oppress all non-citizens in the same way. Although some groups of non-citizen may be able to escape the application of a particular rule, this does not show that the rule is not an instantiation of a xenophobic body of law. As is emphasized in judicial statements about substantive equality, the discovery of formal differences in treatment amongst subgroups need not lead to the conclusion that the measure should not be identified as an instantiation of a more general assault on the whole group. It is for this

reason that is both misleading and unsatisfactory to require non-citizens within the immigration regime to show that differential treatment is being imposed on different groups of non-citizen in specific situations. Their complaint is not that some other non-citizens have escaped the unfair disadvantage. Excessively harsh rules and over-inclusive rules may be created and implemented *haphazardly* with little concern about the effect. Laws that impose hardship on only one subgroup of non-citizens may be passed by a populist government anxious to curry favour with xenophobic groups. By ill-treating non-citizens in such a fragmented and possibly arbitrary way the government may be able to show its disdain for non-citizens as a whole. Where a legal regime variably imposes burdens on non-citizens from different countries, it does not engage in multiple acts of discrimination against different subgroups. It engages in a more profound act of discrimination against the whole.

Once we have entered a realm in which the distinction between citizen and non-citizen has been made, and once we acknowledge that non-citizens are subject to intermittent, sporadic forms of ill treatment, our inquiry should cease to focus on finding comparator groups. The primary issue is *whether the individual has been treated more harshly than he or she should have been*. We can use the criteria of substantive equality and the criteria from section 1 when making this inquiry. We should not impose any further comparative element. We distort the nature of the claim when we require litigants to show that they are worse off than other non-citizens.

The case of *Tabingo*⁷² may cast light on the idea that requiring non-citizens to show that they are treated differently from other non-citizens ignores an important egalitarian concern. This case focused on discrimination *among* immigrants. It concerned a statutory measure which provided that applications for permanent residence as a member of the federal skilled worker class made before 27 February 2008 were to be terminated unless an officer had made a selection decision before 29 March 2012. The applicants had applied for permanent resident visas before 27 February 2008. They had been waiting many years for their applications to be processed but they were in fact cancelled, and noted that the processing was slower in some visa offices. They argued that the measure in question violated their s.15 rights. A large part of the decision focused on the issue whether *Charter* rights vest in non-citizens outside Canada, but this should not concern us here (although it should concern us).

In the Federal Court, the applicants framed their challenge in terms that alleged that the measure discriminated against them on grounds of either

72. *Tabingo*, *supra* note 22.

country of residence or national origin. Thus, the court was not asked to consider whether the measure in question is a manifestation of a general xenophobic antipathy that surfaces from time to time. While Rennie J. is happy to concede that national origin is an analogous ground for the claim, he finds that country of residence is not. He sums up his reasons thus:

When determining whether grounds of discrimination are analogous to those listed in section 15, courts should consider whether the characteristics at issue have historically served as “illegitimate and demeaning proxies for merit-based decision making” and whether the distinction being drawn affects a “discrete and insular minority or a group that has been historically discriminated against”....

It is doubtful that country of residence could be an analogous ground. Country of residence is not an immutable characteristic, nor is it vital to identity, given the applicants’ willingness to immigrate. Nor are the applicants a discrete and insular minority, and certainly not such a group within Canadian society. Country of residence, in contrast to race and religion, does not have the same historical antecedence of being a basis for discrimination, nor is there sufficient evidence that would establish that residence is an illegitimate or demeaning proxy for merit-based decision making. Accordingly, I find that country of residence is not an analogous ground of discrimination under section 15 of the *Charter* and turn to the applicants’ argument based on national origin.⁷³

The passages reveal the difficulty that non-citizens face if we remove the opportunity to rely on their mere status of non-citizens. Any ground that they may select as analogous will likely be based on a distinction found in the law or created by the application of the law, in this case, country of residence. But such a distinction may lack the historical pedigree to convince the judge that it can give rise to a discrimination claim. When we have no historical experience with this type of distinction we do not even reach the stage of determining the substance of the claim.

Ultimately Rennie J. found that the measure in question did not discriminate on the basis of national origin. This decision was upheld in the Federal Court of Appeal⁷⁴ which dealt with the equality issue quite cursorily noting that there was a rational explanation for slow processing in some visa offices that had nothing to do with discrimination. At neither level of court was the obvious question addressed: *Given that waiting times are different in different parts of the world (for valid reasons), does it show equal concern and respect to all applicants when one uniformly uses the same cut-off date for cancellation?*

73. *Ibid* at paras 112-114.

74. *Ibid*.

It is also useful to examine a second recent case, *Canadian Doctors*,⁷⁵ where MacTavish J offers a perceptive account of recent section 15 jurisprudence. The case concerned the constitutional validity of two Orders in Council that denied basic health care coverage to refugee claimants from designated countries. MacTavish J.'s careful analysis leads her to conclude that the orders discriminated on the grounds of national origin. However, she balks at finding that the laws are discriminatory on more general grounds. She considers the argument that the laws discriminate on the basis of "immigration status" and concludes that she is bound by an earlier Federal Court of Appeal decision that immigration status is not analogous to the grounds identified in section 15.⁷⁶ In *Toussaint v Canada*⁷⁷ Stratas J.A. had stated:

In my view, the appellant has failed to demonstrate that the Order in Council makes a distinction based on any enumerated or analogous ground that is relevant to her situation. ... The primary distinction is said to be between foreign nationals possessing certain immigration status who are covered under the Order in Council, and other foreign nationals who possess another immigration status who are not covered. ... Further, I do not accept that "immigration status" qualifies as an analogous ground under section 15 of the Charter, for many of the reasons set out in *Corbière v. Canada (Minister of Indian and Northern Affairs)*, 1999 CanLII 687 (SCC), [1999] 2 S.C.R. 203 at paragraph 13, recently approved by the Supreme Court in *Withler, supra* at paragraph 33. "Immigration status" is not a "[characteristic] that we cannot change." It is not "immutable or changeable only at unacceptable cost to personal identity." Finally "immigration status"—in this case, presence in Canada illegally—is a characteristic that the government has a "legitimate interest in expecting [the person] to change." Indeed, the government has a real, valid and justified interest in expecting those present in Canada to have a legal right to be in Canada.⁷⁸

While it is beyond the scope of this paper to consider the merits of the conclusion that differentiations among foreign nationals cannot be discriminatory, the more general conclusion that "immigration status" is not an analogous ground because it is not immutable must be questioned. It should first be noted that neither *Corbière* nor *Withler* addresses the question of immigration status. They merely re-iterate the need to show that the relevant characteristic is "immutable or changeable only at unacceptable cost to personal identity." Stratas J.A.'s account of

75. *Canadian Doctors, supra* note 7.

76. *Ibid* at para 870.

77. *Toussaint v Canada (Attorney General)*, 2011 FCA 213.

78. *Ibid* at para 99.

immigration status as mutable runs counter to common experience—it is notoriously difficult for the bulk of the world’s population to change its immigration status. It also runs counter to the more lax analysis of immutability found in *Andrews*, where status as a non-citizen is identified as an analogous ground. It is unfortunate that MacTavish J.’s location in the judicial hierarchy precluded her from addressing this point or from extrapolating further from her analysis of the more general jurisprudence.

Yet another recent decision reveals some negative effects of requiring non-citizens to use more specific grounds of discrimination than their non-citizen status. In *YZ*,⁷⁹ the applicants alleged that denying an appeal to the Refugee Appeal Division of the IRB to refugee claimants from designated countries of origin (DCOs) violated section 15. Refugee claimants from other countries had access to the appeal process.

Referring to the first part of the *Withler* two-part test, Boswell J. decided that a differentiation had been made on the ground of national origin. Turning to the second part of the test, he argued:

The distinction drawn between the procedural advantage now accorded to non-DCO refugee claimants and the disadvantage suffered by DCO refugee claimants under paragraph 110(2)(d.1) of the *IRPA* is discriminatory on its face. It also serves to further marginalize, prejudice, and stereotype refugee claimants from DCO countries which are generally considered safe and “non-refugee producing.” *Moreover, it perpetuates a stereotype that refugee claimants from DCO countries are somehow queue-jumpers or “bogus” claimants who only come here to take advantage of Canada’s refugee system and its generosity...*

The introduction of paragraph 110(2)(d.1) of the *IRPA* has deprived refugee claimants from DCO countries of substantive equality vis-à-vis those from non-DCO countries. Expressly imposing a disadvantage on the basis of national origin alone constitutes discrimination (*Andrews* at 174; *Withler* at paragraph 29), and this distinction perpetuates the historical disadvantage of undesirable refugee claimants and the stereotype that their fears of persecution or discrimination are less worthy of attention.⁸⁰ [emphasis added]

In order to find that there has been discrimination in this case, Boswell J. is forced to maintain that claimants from a DCO alone are subject to the stereotype of being queue jumpers. But in actuality, this stereotype was being launched more generally at all arrivals who were not waiting overseas to be resettled. When the measures designating countries of origin were introduced, other over-inclusive measures to discourage

79. *YZ*, *supra* note 5.

80. *Ibid* at para 124.

fraudulent refugees were also introduced. These measures had an impact on *all* refugee claimants, reducing the times to prepare for hearing and access to humanitarian and compassionate process and the Pre-Removal Risk Assessment. The justification offered by Boswell J. while laudable in effect, offers a partial account of the contextual evidence and wrongly implies that refugee claimants from non-designated countries were not being slighted nor subject to the same abusive stereotypes.

This artificial analysis could have been avoided had Boswell J. conceded that the imposition of restrictive conditions on refugees from DCOs was but one assault amongst many that were targeting refugee claimants in general. We should not look for distinctions amongst the victims who have been violated by different attacks. We should instead recognize that it because they were part of the larger group of non-citizens that they were treated with disdain and disrespect.⁸¹

Conclusion

Cases such as *Tabingo* and *YZ* should not be read in isolation. Their direct precursors are *Charkaoui* and *Chiarelli*—cases that refuse to acknowledge that a vein of poison may have penetrated our immigration laws and may continue to do so in the future. This failure ensures that harsh and oppressive forms of treatment will likely be viewed as unique or isolated and directed towards discrete groups of non-citizens rather than as indicative of a more general and entrenched antagonism towards non-citizens as a whole. The requirement that non-citizens first show that they are treated unfavourably in comparison with other non-citizens, and then show that the ground of differentiation is analogous to those listed in section 15, and *then* show that the difference reveals that they are being presented as less valuable persons than those others is a requirement that is not only difficult to meet but also one that fails to address the underlying problem—that we live in a culture in which currently there is large-scale distrust of newcomers, and anxiety about the changes that non-members will bring. As a consequence, demands are made that the government treat these anxieties seriously. In various ways and at various times, governments have revealed their willingness to comply to such demands and in doing so, have shown insufficient concern about the collateral impacts of our immigration laws on the individuals whose lives they shape. Since *Andrews*, we have recognized this may surface as a problem outside the field of immigration

81. It should be noted that, on 17 May 2019, the Government removed all countries from the list of those designated as safe. See Government of Canada, “Canada Ends the Designated Country of Origin Practice,” (News Release, 17 May 2019), online: <<https://www.canada.ca/en/immigration-refugees-citizenship/news/2019/05/canada-ends-the-designated-country-of-origin-practice.html>>.

and have addressed the issue. It is but a small step to recognize it within that field as well.

46.	Y.Y. Brandon Chen, " The Future of Precarious Status Migrants' Right to Health Care in Canada " (2017) Alta L Rev 649.
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THE FUTURE OF PRECARIOUS STATUS MIGRANTS' RIGHT TO HEALTH CARE IN CANADA

Y.Y. BRANDON CHEN*

This article examines how health care services in Canada are denied to precarious status migrants, either through outright exclusion based on immigration status, or due to the realities in migrants' lives that make it difficult for them to access health care services. The author argues that this situation is unfair, given the contribution made by precarious status migrants to Canada's sociocultural and economic fabric, and exhorts the courts and policy-makers to do more to make health care services available to these migrants.

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I. INTRODUCTION

With perhaps the exception of the staunchest supporters of libertarianism, it is generally agreed today that governments ought to play a role in facilitating the pursuit of health care for all.¹ In Canada, this public responsibility was acknowledged as early as half a century ago by then federal health minister A.J. MacEachen, who described the government's push for a universal medical care system as grounded in a "fundamental principle that health is not a privilege tied to the state of one's bank account, but rather a basic right which should be open to all."² Such commitment to universal health care, depending on one's philosophical bent, has been hailed as a critical step toward the achievement of either equality of opportunity or equal human capability, as well as an important mechanism that fosters and strengthens the bonds between members of a community.³

In this article, I adopt the view from the outset that the normative underpinnings of universal health care apply equally to citizens and foreign residents in a given society. This stance echoes that of Norman Daniels and Keren Ladin. They, writing in the context of

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¹ But see Paul Menzel & Donald W Light, "A Conservative Case for Universal Access to Health Care" (2006) 36:4 Hastings Center Report 36.

² *House of Commons Debates*, 72nd Parl, 1st Sess, Vol 7 (12 July 1966) at 7545.

³ See e.g. Norman Daniels, "Justice, Health, and Healthcare" (2001) 1:2 *American J Bioethics* 2 at 3-6; JP Ruger, "The Moral Foundation of Health Insurance" (2007) 100:1 *QJM* 53; "Universal Access to Health Care" (1995) 108:6 *Harv L Rev* 1323.

undocumented migration in the United States, argue that migrants should constitute cooperating members of the receiving society insofar as they contribute to its economy and social fabric. And to ensure the fairness of their social cooperation, migrants' equality of opportunity must be safeguarded in part by their being extended health care coverage.⁴ Michael Walzer has arrived at a similar position from a communitarian line of thought. Relying on guest workers in Europe as his point of reference, he insists that migrants who "do socially necessary work, and ... are deeply enmeshed in the legal system of the country to which they have come"⁵ must be accepted as members of said political community. This membership bestowed on migrants both the responsibility and the right to partake in the collective provision of security and welfare such as health care, and this arrangement of mutual aid in turn reinforces the special links between migrants and their fellow community members.⁶

Prevailing international human rights norms also stipulate for the equal incorporation of citizens and migrants in governmental actions that aim at achieving health care for all. Foremost, the *International Covenant on Economic, Social and Cultural Rights* guarantees "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health,"⁷ and prohibits discriminatory enforcement thereof.⁸ This right has been interpreted as encompassing a right to timely and appropriate health care, which requires governments to, among other things, refrain "from denying or limiting equal access for all persons, including ... asylum-seekers and illegal immigrants, to preventive, curative and palliative health services."⁹ Such a principle of non-discrimination has been reiterated by multiple international human rights actors. For example, the United Nations Special Rapporteur on the right to health notes in his report concerning migrant workers that, as a part of their legal obligations, governments of receiving countries must "ensure availability and accessibility of quality health facilities, goods and services, including existing health insurance schemes, to migrant workers, on the basis of equality with other nationals."¹⁰ Likewise, the UN Committee on the Elimination of Discrimination Against Women has called on receiving states to "take all appropriate measures to ensure non-discrimination and the equal rights of women migrant workers,"¹¹ including securing their access to linguistically and culturally appropriate, gender sensitive health services.¹²

When compared with these international standards, the degree of health care protection enjoyed by migrants in Canada often falls short. This unfortunate fact will serve as my starting point in this essay as I seek to appraise the future prospects of migrants' continued

⁴ Norman Daniels & Keren Ladin, "Immigration and Access to Health Care" in John D Arras, Elizabeth Fenton & Rebecca Kukla, eds, *The Routledge Companion to Bioethics* (New York: Routledge, 2015) 56.

⁵ Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1983) at 60.

⁶ *Ibid* at 64–65.

⁷ 16 December 1966, 993 UNTS 3, art 12(1) (entered into force 3 January 1976).

⁸ *Ibid*, art 2(2).

⁹ *General Comment No. 14: The Right to the Highest Attainable Standard of Health*, UNESCROR, 22nd Sess, UN Doc E/C.12/2000/4 (2000) at para 34.

¹⁰ Anand Grover, *Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, UNHRCOR, 23d Sess, UN Doc. A/HRC/23/41 (2013) at para 11.

¹¹ *General Recommendation No. 26 on Women Migrant Workers*, UNCEDAWOR, 42nd Sess, UN Doc CEDAW/C/2009/WP.1/R (2008) at para 26.

¹² *Ibid* at para 26(i).

struggle to realize their right to health care in this country. More precisely, my attention will be directed to the legal and policy realities facing migrants with precarious immigration status in Canada as they encounter some of the greatest disadvantages when accessing health care. Among these migrants are temporary foreign workers, international students, undocumented migrants, and relatives of Canadians that are on visitor visas while awaiting sponsorship. My central thesis is that, over the last several decades, Canadian laws and public policies on immigration and health care have coalesced to manufacture a migrant underclass who, because of their *temporarized* or *illegalized* presence in the country, are either rendered undeserving of public health care coverage or deprived of any meaningful access to the health care that they are entitled to on paper. It follows that, to actualize these migrants' right to health care, the machinations of Canada's contemporary immigration system that condemn migrants to a state of perpetual precariousness must be exposed and rejected by decision-makers.

To make my case, I will first untangle the web of immigration laws and policies in Canada that have precipitated, often in a racialized and gendered fashion, the precarious presence of a rising number of migrants. Then, I will take stock of how these migrants' precarious legal status has impaired their health care entitlement and access. I will conclude by looking ahead and offering some suggestions for legal and policy reform with an eye to promote better alignment between migrants' right to health care in Canada and international human rights law.

Before proceeding, I must make one caveat regarding the scope of this article. While cognizant of the precariousness that typifies refugee claimants' lives in Canada,¹³ my discussions here will mostly skirt migrants who are in, or have gone through, the asylum seeking process. This decision is primarily motivated by the fact that refugee claimants' health care in Canada is administered by a program separate from the general public health insurance scheme, and therefore warrants its own analysis that I unfortunately cannot do justice to within the confines of this article. All I wish to note on the subject is that, after experiencing significant cuts in 2012, public health care coverage for refugee claimants in Canada was restored in April 2016 to a level on par with citizens' entitlement, owing largely to the well-coordinated and determined advocacy led by health care professionals which included a successful constitutional challenge.¹⁴ Although much work remains to ensure refugee claimants' reinstated health care entitlement actually translates into improved access on the ground, the success of this advocacy reveals what is possible when key actors work in concert and commit to advancing the agenda of health care for all.

¹³ See e.g. Samantha Jackson, "'Citizenship Theatre': Refugee Claimants, Security, and Performing Citizenship at the Immigration and Refugee Board" (2014) 4:4 *Queen's Policy Rev* 1, online: <www.queensu.ca/sps/qpr/sites/webpublish.queensu.ca.qprwww/files/files/5%20citizenship%20theatre.pdf>; Priya Kissoon, "Precarious Immigration Status and Precarious Housing Pathways: Refugee Claimant Homelessness in Toronto and Vancouver" in Luin Goldring & Patricia Landolt, eds, *Producing and Negotiating Non-Citizenship: Precarious Legal Status in Canada* (Toronto: University of Toronto Press, 2013) 195.

¹⁴ Nicholas Keung, "Ottawa to Restore Refugee Benefits," *Toronto Star* (19 February 2016) A1, online: <<https://www.thestar.com/news/immigration/2016/02/18/ottawa-to-restore-and-expand-health-care-for-refugees.html>>.

II. LEGAL AND POLICY CONSTRUCTION OF PRECARIOUS STATUS MIGRANTS

Immigration laws and policies operationalize the borders of a political community by defining who may be let in and under what conditions. This immigration control apparatus employs a constellation of oversimplified binaries — namely, citizens/aliens, legal/illegal migrants, permanent/temporary residents, and so on — to privilege certain newcomers by affording them the right to permanent residency and citizen-like entitlements, while marginalizing others by ascribing them less-than-full legal statuses that are “designed to hold people in a particular relationship of exploitation and social/political subordination in the country.”¹⁵ Specifically, migrants with less-than-full statuses are not always authorized to work, their lawful presence is sometimes contingent on the ongoing sponsorship of a third party, and, they are frequently denied the socioeconomic protection offered by the state.¹⁶ In this section, I intend to make two claims. First, I suggest that in recent decades, a growing number of migrants have been admitted to Canada under entrant categories that are less secure, and this trend is expected to persist in the near future. Second, I contend that such funnelling of migrants through precarious migratory pathways is a deliberate policy choice that aims at achieving the twin objectives of maximizing the potential of migrants as flexible labourers and minimizing government’s social expenditure.

Although Canada’s immigration program is historically billed as one that embraces permanent settlement, of late, it has exhibited an increasing penchant for temporary migration. In the last two decades, whereas the number of individuals granted permanent residency each year rose modestly from about 213,000 to 260,000, the amount of migrants issued temporary permits annually more than doubled, jumping from roughly 253,000 to 600,000.¹⁷ Among these temporary foreign residents, the number of those granted a student permit ballooned from approximately 31,000 per year during the early 1990s to 96,000 twenty years later.¹⁸ The ranks of temporary foreign workers have shown a similar surge, particularly since the 2000s. Between 2006 and 2010, the number of temporary employment authorizations issued to foreign workers grew by an average of 9 percent yearly, which was almost twice the rate observed during the second half of the 1990s.¹⁹ This proliferation of short-term migrant workers is underscored by the expansion of Canada’s Temporary Foreign Worker Program (TFWP) into “lower-skilled” occupations. As ever more migrant workers take up jobs as cooks, wait staff, cleaners, construction labourers, and so forth, today’s TFWP is marked by a pool of predominantly racialized participants from the Global South, with an increasing proportion of females.²⁰ While some restrictions to the TFWP were introduced in 2015 by the Canadian government to quell public outcry over the influx of

¹⁵ Nandita Sharma, “Immigration Status and the Legalization of Inequality” in Harald Bauder & John Shields, eds, *Immigrant Experiences in North America: Understanding Settlement and Integration* (Toronto: Canadian Scholars’ Press, 2015) 204 at 208.

¹⁶ Luin Goldring, Carolina Berinstein & Judith K Bernhard, “Institutionalizing Precarious Migratory Status in Canada” (2009) 13:3 *Citizenship Studies* 239 at 240–41.

¹⁷ Calculation performed by author using statistics provided by “Facts and Figures 2014 – Immigration Overview: Permanent and Temporary Residents,” online: <www.cic.gc.ca/english/resources/statistics/facts2014/> [“Facts and Figures 2014”].

¹⁸ Statistics Canada, *International Students Who Become Permanent Residents in Canada*, by Yuqian Lu & Feng Hou, Catalogue No 75-006-x (Ottawa: Minister of Industry, 2015) at Table 1.

¹⁹ “Facts and Figures 2014,” *supra* note 17.

²⁰ Jason Foster, “Making Temporary Permanent: The Silent Transformation of the Temporary Foreign Worker Program” (2012) 19 *Just Labour* 22 at 27–29.

migrant workers amid rising unemployment in the country, notable exemptions have been granted to certain regions and sectors, thus ensuring temporary foreign workers will remain a fixture in Canada's immigration system for the time being.²¹

Undoubtedly, a good portion of the temporary migrant population consists of individuals that are truly looking to pursue time limited projects in receiving countries. However, for many others, their designation as temporary foreign residents fails to capture the nuances of their lived realities. For a growing number of foreign nationals in Canada, particularly those deemed "high-skilled," temporary migration represents only an initial stage of their years-long path toward permanent residency. By way of example, between 2005 and 2014, the number of temporary foreign workers who transitioned to permanent residents in Canada more than quintupled, rising from 8,500 to 49,400 annually.²² A contributing factor to this boom was the launch of the Canadian Experience Class in 2008, which allows select international students who have acquired Canadian work experience upon graduation to qualify for permanent residency.²³ Some of these migrant workers have the intention all along to immigrate to Canada on a permanent basis, and they see temporary migration as a steppingstone to their eventual goal as they are unable to meet the stringent immigration requirements straightaway.²⁴ For other temporary migrants, the decision to stay is only made once they are in the country. As studies on various guest worker programs around the world show, people commonly adjust their plans when they progress through different phases of life, when they develop relationships and become integrated with local communities, or when the socioeconomic conditions change back home.²⁵

The distinction between temporary and permanent migration can be equally blurry for many "lower-skilled" migrants with time-limited permits that lack the option of transitioning to permanent residents. For instance, three-quarters of the Mexican migrant farm labourers that work in Canada seasonally have returned on an annual basis for over four years, and 22 percent of them over ten years.²⁶ Such extended presence, often accompanied by the development of close ties with the local population, challenges the appropriateness of classifying these migrants as temporary residents. In a similar manner, the migration of many lower-skilled, non-agricultural workers to Canada via the TFWP also used to defy the label of temporariness. For over a decade, lower-skilled migrants whose work authorizations had expired were generally able to apply for a new permit or to renew their existing permit for as many times as they desired, thus opening the door to their establishment of relatively prolonged residence in Canada.²⁷

²¹ "More Foreign Workers Welcomed," *The Chronicle Herald* (18 March 2016) B4.

²² "Facts and Figures 2014," *supra* note 17.

²³ Ana M Ferrer, Garnett Picot & William Craig Riddell, "New Directions in Immigration Policy: Canada's Evolving Approach to the Selection of Economic Immigrants" (2014) 48:3 *Intl Migration Rev* 846 at 857.

²⁴ Delphine Nakache & Leanne Dixon-Perera, "Temporary or Transitional? Migrant Workers' Experience with Permanent Residence in Canada" (2015) 55 *IRPP Study* 1 at 12–13 [Nakache & Dixon Perera, "Temporary or Transitional?"].

²⁵ See e.g. Stephen Castles, "Guestworkers in Europe: A Resurrection?" (2006) 40:4 *Intl Migration Rev* 741; Siew-Ean Khoo, Graeme Hugo & Peter McDonald, "Which Skilled Temporary Migrants Become Permanent Residents and Why?" (2008) 42:1 *Intl Migration Rev* 193.

²⁶ Jenna Hennebray, "Permanently Temporary? Agricultural Migrant Workers and Their Integration in Canada" (2012) 26 *IRPP Study* at 13.

²⁷ Delphine Nakache & Paula J Kinoshita, "The Canadian Temporary Foreign Worker Program: Do Short-Term Economic Needs Prevail Over Human Rights Concerns?" (2010) 5 *IRPP Study* 1 at 34.

However, in an attempt to emphasize the supposedly temporary nature of migrants' participation in the TFWP, a policy that took effect on 1 April 2015, now bars lower-skilled foreign workers who have been in Canada for over four years from being issued a new work permit until they spend at least four years outside the country.²⁸ It is widely believed that, of the many migrants who are caught by this rule and lack the ability to secure alternative legal statuses in Canada, a sizable segment would end up remaining in the country without permission rather than departing at the end of four years. Some of them may do so because their families back home rely on their remittances; others may be pressured to continue working in Canada in order to repay the money they owe to recruiters; still others may find it difficult to leave because they have put down roots here.²⁹ If this forecast comes to pass, the "four-in, four-out" policy would arguably do little to prevent the long-term presence of migrant workers and would simply drive it underground.

Given the extent of the mismatch between migrants' temporary designation and their real life circumstances, the expanding pool of foreign nationals admitted to Canada with less-than-full legal statuses is better understood as the product of a conscious policy decision. On one level, as instability associated with individuals' immigration process frequently carries over into their employment, the policy shift from permanent to temporary migration helps Canada "deliver a workforce more willing to accept the industry's working and living conditions and one less able to contest them."³⁰ That is, because many precarious status migrants depend on the goodwill of their employers to keep returning to, or residing in, Canada or to successfully transition into permanent residents, they are vulnerable to exploitation at work and are often unwilling or unable to seek recourse in the event of maltreatment.³¹ The barriers to speaking out are even greater if migrant workers are issued a "closed" work permit that largely prohibits them from switching jobs.³² Thus, by virtue of the conditionality associated with their precarious legal statuses, migrants are transformed into "flexible" workers coveted in the market economy who can be fully taken advantage of by employers when the demand for labour is high while remaining readily disposable when the demand sags.

On another level, the imposition of less-than-full legal statuses on migrants who for all intents and purposes have established protracted residence in Canada can be seen as part and parcel of the neo-liberal downward pressure on social citizenship rights.³³ In other words, by casting migrants that are ordinarily present as merely visitors or guests, the government insidiously excludes them from full membership and the attendant entitlements despite their ongoing contributions to society that arguably help sustain such communal provisions. One

²⁸ Nakache & Dixon-Perera, "Temporary or Transitional?" *supra* note 24 at 18.

²⁹ Audrey Macklin, "Manufactured Illegality," *Nationals Post* (20 March 2015) A10.

³⁰ Kerry Preibisch, "Pick-Your-Own Labor: Migrant Workers and Flexibility in Canadian Agriculture" (2010) 44:2 *Intl Migration Rev* 404 at 413 [emphasis omitted].

³¹ See e.g. Fay Faraday, *Made in Canada: How the Law Constructs Migrant Workers' Insecurity* (Toronto: Metcalf Foundation, 2012), online: <metcalfoundation.com/wp-content/uploads/2012/09/Maac-In-Canada-Full-Report.pdf>; Lilian Magalhaes, Christine Carrasco & Denise Gastaldo, "Undocumented Migrants in Canada: A Scope Literature Review on Health, Access to Services, and Working Conditions" (2010) 12:1 *J Immigrant & Minority Health* 132; Salimah Valiani, "The Shifting Landscape of Contemporary Canadian Immigration Policy: The Rise of Temporary Migration and Employer-Driven Immigration" in Goldring & Landolt, *supra* note 13, 55.

³² Faraday, *ibid* at 76–77.

³³ See generally Janine Brodie, "The Social in Social Citizenship" in Engin F Isin, ed, *Recasting the Social in Citizenship* (Toronto: University of Toronto Press, 2008) 20.

of the clearest examples of this rights curtailment by way of “status temporarization” concerns elderly migrants. Traditionally, the primary method for Canadians to bring their non-citizen parents and grandparents to the country for reunification was through family sponsorship, which, if successful, affords permanent residency to these elderly newcomers. Since late 2011, the Canadian government has consciously diverted elderly migrants away from this usual route of permanent settlement to a newly created “super visa” program. The super visa, which enables holders multiple entries into Canada over a period of up to ten years and a maximum stay of twenty-four months on each visit, gives parents and grandparents of Canadians the possibility of remaining in the country on a relatively long-term basis. But it provides them neither the right of permanent residency nor any associated socioeconomic benefits, including public health care coverage.³⁴ In effect, by fictitiously turning ordinary residents into temporary visitors, the government conveniently carves out a policy space for itself in which it enjoys enhanced freedom to offload the responsibility of health and social care onto migrants and their families.

In the upcoming section, I will pick up on this last point. In particular, I wish to elaborate on the ways that the rights reducing policy space gets generated and maintained in the domain of migrant health care, focusing especially on the role that the Canadian judiciary has played in this process.

III. EFFECTS OF PRECARIOUS MIGRATORY STATUS ON THE RIGHT TO HEALTH CARE

Generally speaking, migrants who have been granted permanent residency in Canada enjoy more or less the same publicly funded health care as Canadian citizens.³⁵ In contrast, many precarious status migrants lack either health care entitlement outright or the ability to exercise whatever right to health care they supposedly have. I will now address these two gaps in precarious status migrants' health care in turn.

A. DENIAL OF PUBLIC HEALTH CARE COVERAGE

Precarious status migrants' entitlement to publicly funded health care in Canada is best described as patchy. Among temporary foreign workers, those lacking an employment authorization that is at least six months long, or a year long in some provinces, are usually disqualified from coverage.³⁶ In Quebec, ironically, many migrants that hold an “open” work permit, which allows them to switch jobs and should in theory better protect them from exploitation, are left medically uninsured.³⁷ As for international students, they are completely

³⁴ Xiaobei Chen & Sherry Xiaohan Thorpe, “Temporary Families? The Parent and Grandparent Sponsorship Program and the Neoliberal Regime of Immigration Governance in Canada” (2015) 1:1 *Migration, Mobility & Displacement* 81, online: <<https://journals.uvic.ca/index.php/mmd/article/download/13308/4418>>.

³⁵ However, several provinces require new residents to undergo a waiting period before they are eligible for public health care coverage, and this policy has disproportionately adverse effects on migrants, including permanent residents. See Ritika Goel, Gary Bloch & Paul Caulford, “Waiting for Care: Effects of Ontario’s 3-Month Waiting Period for OHIP on Landed Immigrants” (2013) 59:6 *Can Family Physician* e269.

³⁶ YY Brandon Chen, “Extending Health Care Entitlement to Lawful Non-Transient International Migrants: Untapped Potential of the Universality Principle in the *Canada Health Act*” (2015) 48:1 *UBC L Rev* 79 at 111–12 [Chen, “Extending Health Care Entitlement”].

³⁷ *Ibid* at 113–14.

excluded from public health care plans in Ontario, New Brunswick, and Prince Edward Island. And most other Canadian jurisdictions restrict health care entitlement to only foreign students that meet certain criteria, including being issued a permit that is for twelve months or longer.³⁸ Non-citizen family members of Canadians that are in the country on visitor visas while waiting for the approval of their sponsorship applications are not eligible for health care benefits, nor are parents and grandparents on super visas.³⁹ The same is true of undocumented migrants.⁴⁰ Although some provinces do provide primary health care to medically uninsured migrants through community health centres and the like, such services are far from comprehensive, and access thereto is often impeded by long waiting lists and catchment area restrictions.⁴¹

The inequality between the health care entitlement of precarious status migrants and that of citizens and permanent residents is routinely justified by provincial governments as necessary prioritization in a context of limited public resources. As a case in point, when Ontario decided to restrict temporary migrants' access to its health insurance plan in 1994, the health minister defended the decision on the basis that the province needed "tighter controls on health care spending ... to preserve the system for Ontario *residents*."⁴² The government's stance displayed little appreciation for the contributions that precarious status migrants make to the public coffers through both direct and indirect taxations. Neither did it give proper weight to the extended presence of many precarious status migrants in the province that ought to qualify them as ordinary "residents" in virtually every sense of the word.

In an attempt to improve their health care security, precarious status migrants have repeatedly challenged their incomplete public health care coverage in court, but largely to no avail.⁴³ Most commonly, they have framed their lesser health care entitlement relative to that of citizens and permanent residents as a contravention of the equality rights guarantee under the *Canadian Charter of Rights and Freedoms*.⁴⁴ To date, however, courts in Canada have consistently dismissed this line of argument by finding that disparities in health care benefits arising from migratory status differences do not come within the purview of the *Charter* equality rights protection.

It is well-established in the *Charter* jurisprudence that the equality rights provision is not engaged unless a government action creates a discriminatory distinction based on one of the grounds enumerated in section 15 or one that is analogous thereto.⁴⁵ But according to a

³⁸ *Ibid* at 114–15.

³⁹ *Ibid* at 117.

⁴⁰ Magalhaes, Carrasco & Gastaldo, *supra* note 31.

⁴¹ Sandra Elgersma, *Immigration Status and Legal Entitlement to Insured Health Services*, Library of Parliament PRB 08-28E (Ottawa: Parliamentary Research and Information Service, 28 October 2008) at 7.

⁴² Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 35th Leg, 3rd Sess, No 106 (31 March 1994) at 5322 (Hon Ruth Grier) [emphasis added].

⁴³ To the best of the author's knowledge, the only court challenge in Canada that has hitherto succeeded in expanding precarious status migrants' health care entitlement is the case against the federal government's cuts to refugee health care: *Canadian Doctors for Refugee Care v Canada (Attorney General)*, 2014 FC 651, 28 Imm LR (4th) 1.

⁴⁴ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [*Charter*].

⁴⁵ *Andrews v Law Society British Columbia*, [1989] 1 SCR 143.

growing number of courts that have examined this issue, unequal health care entitlements between precarious status migrants and their more privileged counterparts rests on neither an enumerated nor an analogous ground. In reaching this conclusion, courts have often relied on unrealistic assumptions about how precarious status migrants came to their predicament and what they can do to escape it. For example, in *Clarken et al. v. Ontario Health Insurance Plan*, Ontario's Divisional Court dismissed a section 15 *Charter* challenge launched by a group of foreign students whose entitlement to provincial health insurance was stripped following the above-mentioned policy change in 1994.⁴⁶ The Court ruled against recognizing immigration status as an analogous ground for *Charter* equality rights protection because it apparently lacked the requisite immutability. Justice Chilcott noted that international students were not prohibited from qualifying for public health care coverage per se, and all they had to do to become eligible was to acquire another immigration status.⁴⁷ The Court was technically correct in its observation. However, the degree of liberty that it assumed foreign students to boast when it came to changing their legal classification to one that was more permanent and embellished with greater entitlements was troublingly fanciful, especially considering that the case predated the introduction of the Canadian Experience Class. Scant attention was paid by the Court to the systemic forces within the Canadian immigration system mentioned earlier that were beginning, and have continued to this day, to narrow migrants' lawful access to permanent settlement in favour of temporary entry. Given the substantial political advantage that the government stands to gain by keeping migrants in a state of precariousness, suggestions that migrants can freely improve their health care situations by adopting a securer migratory status are arguably unreasonable.

Similar shortcomings also afflict the Ontario Court of Appeal decision in *Irshad (Litigation guardian of) v. Ontario (Ministry of Health)*, which concerned another unsuccessful section 15 *Charter* challenge against the same benefit-cutting policy examined in *Clarken*.⁴⁸ The claimants in this case consisted of precarious status migrants whose legal standing in Canada ranged from having no status at all to being medically inadmissible dependent children of landed immigrants who were allowed entry on special permits. As in *Clarken*, the Court found that immigration status, particularly the distinction between permanent and non-permanent residents, could not constitute an analogous ground under section 15 because it was not immutable. As support for its ruling, the Court noted that four of the five applicants in this case transitioned into permanent residents in the course of the litigation, while options existed for the fifth to do the same in theory.⁴⁹ Effectively, by restricting its field of vision to the handful of claimants in this case, the Court cast out of sight many other precarious status migrants in Canada, particularly those labelled "lower-skilled," for whom the likelihood of acquiring permanent resident status is practically nonexistent by policy design.⁵⁰ Compounding the problem, the Court went on to observe that immigration status, instead of constituting a suspicious ground of discrimination, was in fact a relevant policy consideration in this case given the government's desire to limit health care

⁴⁶ (1998), 109 OAC 363 [*Clarken*].

⁴⁷ *Ibid* at para 50.

⁴⁸ (2001), 55 OR (3d) 43 (CA) [*Irshad*].

⁴⁹ *Ibid* at para 136.

⁵⁰ Deepa Rajkumar et al, "At the Temporary-Permanent Divide: How Canada Produces Temporariness and Makes Citizens Through its Security, Work, and Settlement Policies" (2012) 16:3 & 4 Citizenship Studies 483 at 486.

coverage to only those who intended to make Ontario their permanent home.⁵¹ The upshot of the Court's holding was that migrants' legal characterization as either permanent or non-permanent was an adequate proxy for the true nature of their residence in the province. But as I explained earlier, this is far from the reality. Despite the temporariness and conditionality associated with their legal status, many precarious status migrants not only intend to remain in Canada on a long-term basis but also do so as a matter of fact owing to their tremendous resilience. To discount migrants' ordinary residency solely because of their non-permanent legal designation therefore belies people's real life experiences.

The blindness of the Canadian judiciary to the plight of precarious status migrants and the purposive policy design that fuels such hardship reared its head again in *Toussaint v. Canada (Attorney General)*, in which the Federal Court of Appeal was tasked with determining the constitutionality of the federal government's denial of public health care benefits to an undocumented migrant woman.⁵² In disposing of the applicant's *Charter* equality rights claim, the Court cited *Irshad* as authority and affirmed that immigration status did not meet the requirements of an analogous ground as it could not be characterized as "immutable or changeable only at unacceptable cost to personal identity."⁵³ This finding painted an overly rosy picture of undocumented migrants' legal quandary by implying that they were free to regularize their presence in the country without incurring much personal sacrifice. It trivialized the real possibility of deportation that undocumented migrants would face when presenting themselves to government officials. And to the extent that their lives had become intertwined with the sociocultural and economic fabric of the Canadian society, attempts by undocumented migrants to re-engage with the immigration system to change their legal status would run great risk of their losing these social attachments, and could hardly be said to cause no "unacceptable cost to personal identity."⁵⁴

Notably, in *Toussaint*, the Court was also called upon to decide whether the exclusion of undocumented migrants from public health care violated the applicant's rights to life and personal security as enshrined in section 7 of the *Charter*. Once more, the Court was unsympathetic toward the applicant's claim, and its analysis exhibited stubborn ignorance of the systemic forces that shape and perpetuate precarious status migrants' realities. According to the Court, section 7 *Charter* protection was not triggered in this case because the government could not be held responsible for the harm suffered by the applicant. It reasoned that "the [applicant] by her own conduct ... [had] endangered her life and health. [She] entered Canada as a visitor. She remained in Canada for many years, illegally. Had she acted legally and obtained legal immigration status in Canada, she would have been entitled to coverage under the [provincial health insurance plan]."⁵⁵ There was no acknowledgment by the Court of the increasing reliance of the Canadian immigration regime on temporary migration, which aggravated migrants' vulnerability to falling out of status, as expected in the aftermath of the coming into effect of the "four-in, four-out" policy. Accordingly, the Court's analysis situated migrants within a fictional world in which they were presumed to

⁵¹ *Irshad*, *supra* note 48 at para 133.

⁵² 2011 FCA 213, [2013] 1 FCR 374 [*Toussaint*].

⁵³ *Ibid* at para 99, citing *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at para 13.

⁵⁴ *Toussaint*, *ibid*.

⁵⁵ *Ibid* at para 72.

exercise unencumbered choice. Undocumented migrants were viewed as *illegal* rather than *illegalized*, and their precariousness was considered purely a result of their failure to make the proper decisions during their migratory process. This single-minded focus on “choice,” as Sheila McIntyre observes in the *Charter* equality rights context, “individuates a collective and systemic problem and operates much as crude forms of stereotyping do, by making difference — *i.e.*, individual inequality — an individual or group deficit, reasonably stigmatized or subject to moral blame.”⁵⁶

These legal precedents are unfortunate. Not only do they add to the hurdles that precarious status migrants must cross in the future when seeking to assert their right to health care in Canada, but they also legitimize a version of the anti-migrant narrative that portrays migrants who are excluded from public health care as rightly undeserving. Conveniently disappeared from the judicial discussion is the policymakers' deliberate efforts, on the one hand, to restrict certain migrants' access to permanent residency and force them to stay in the country by perpetually resorting to temporary or irregular immigration channels, and, on the other hand, use migrants' less-than-full status as justification for their health care exclusion. Such resistance to probe into the interworking between the immigration and the health care systems insulates migrant health care retrenchment from fulsome scrutiny, and renders the Canadian judiciary complicit in the government's neo-liberal agenda.

B. IMPEDIMENTS TO HEALTH CARE ACCESS

Even for the precarious status migrants that are afforded health care coverage in Canada, their ability to convert this legal entitlement into *de facto* access may be hampered by their insecure presence in the country. To be sure, studies have shown that newcomers to Canada as a group, and not just those without permanent resident status, experience considerably greater difficulties in obtaining health care services than their native-born counterparts do.⁵⁷ Factors that contribute to this disparity include, *inter alia*, the absence or geographical inaccessibility of culturally appropriate care, language barriers, migrants' unfamiliarity with the Canadian health care system or unawareness of the services available, and the worry that service utilization would jeopardize the outcome of one's immigration or refugee applications.⁵⁸ However, beyond these general barriers, precarious status migrants encounter additional challenges with health care access that uniquely stem from the conditional and uncertain nature of their legal standing. By way of illustration, I will now turn my attention to the problematic health care access that seasonal agricultural migrants face in Canada.

⁵⁶ Sheila McIntyre, “The Equality Jurisprudence of the McLachlin Court: Back to the 70s” in Sanda Rodgers & Sheila McIntyre, eds, *The Supreme Court of Canada and Social Justice: Commitment, Retrenchment or Retreat* (Markham: LexisNexis Canada, 2010) 129 at 177.

⁵⁷ See e.g. Claudia Sanmartin & Nancy Ross, “Experiencing Difficulties Accessing First-Contact Health Services in Canada” (2006) 1:2 *Healthcare Policy* 103.

⁵⁸ See e.g. Anita J Gagnon, “The Responsiveness of the Canadian Health Care Systems Towards Newcomers” in Pierre-Gerlier Forest, Gregory P Marchildon & Tom McIntosh, eds, *Changing Health Care in Canada: Romanow Papers, Vol. 2* (Toronto: University of Toronto Press, 2004) 349 at 356–57; Jennifer Asanin & Kathi Wilson, “‘I Spent Nine Years Looking for a Doctor’: Exploring Access to Health Care Among Immigrants in Mississauga, Ontario, Canada” (2008) 66:6 *Social Science & Medicine* 1271.

The vast majority of migrants that come to Canada through the Seasonal Agricultural Worker Program (SAWP) are employed in Ontario, Quebec, British Columbia, and Alberta.⁵⁹ Whereas all migrant farm workers in Ontario and Quebec are furnished with public health care coverage, those in British Columbia and Alberta are only entitled to public health care benefits if they possess a work permit that is for longer than six months.⁶⁰ SAWP participants in British Columbia must also undergo a three-month waiting period before their health care eligibility takes effect.⁶¹ Irrespective of these differences, health care entitlement of seasonal agricultural migrants in Canada has been found to be largely illusory. Research indicates that SAWP participants usually must rely on their employers to get registered with the provincial health insurance plans, to obtain their health care cards (as some employers would hold onto the cards for “safekeeping”), and to arrange transportation to health care providers.⁶² Such dependency on employers as facilitators of service utilization, from a logistical perspective, unnecessarily complicates migrants’ timely access to health care. Moreover, it deters migrants from health care access for fear that doing so may vitiate employers’ impression of them as “strong, healthy and resilient workers,”⁶³ which could in turn cause them to be repatriated before their work permit expires or negatively affect their chances of being invited back for work next year.⁶⁴ In Ontario alone, between 2001 and 2011, nearly 800 migrant farm workers had their employment terminated prematurely and were sent home against their will when they became ill, injured, or pregnant.⁶⁵ Such a practice not only denies migrant farm workers proper access to health care that they are legally entitled to, but also gives other similarly situated migrants pause for thought before seeking medical attention.

In sum, as the Canadian immigration and health care laws and policies interweave, they deprive migrants of their security in life while simultaneously stymieing the full realization of migrants’ right to health care. For medically uninsured migrants looking to change their fortune, their “temporarized” or illegalized status is used by decision-makers to excuse their health care disenfranchisement. And for precarious status migrants that are supposedly covered by public health insurance, their conditional presence in Canada ensures that such legal entitlements would for the most part remain theoretical as their actual service utilization is kept in check by the threat of removal from the country. If this status quo persists, the future arguably does not bode well for the right to health care of the growing number of precarious-status migrants.

⁵⁹ Michael Pysklywec et al, “Doctors Within Borders: Meeting the Health Care Needs of Migrant Farm Workers in Canada” (2011) 183:9 CMAJ 1039 at 1039.

⁶⁰ Chen, “Extending Health Care Entitlement,” *supra* note 36 at 111–12. For information on migrant workers’ health care coverage in Alberta, see Alberta Health, “Temporary Residents and AHCIP,” online: <<http://www.health.alberta.ca/AHCIP/temporary-residents.html>>.

⁶¹ Gerardo Otero & Kerry Preibisch, *Citizenship and Precarious Labour in Canadian Agriculture* (Vancouver: Canadian Centre for Policy Alternatives, 2015) at 22, online: <www.policyalternatives.ca/publications/reports/citizenship-and-precarious-labour-canadian-agriculture>.

⁶² Janet McLaughlin, *Trouble in Our Fields: Health and Human Rights Among Mexican and Caribbean Migrant Farm Workers in Canada* (PhD Thesis, University of Toronto Department of Anthropology, 2009) [unpublished] at 430–33.

⁶³ *Ibid* at 433.

⁶⁴ Jenna L Hennebry & Kerry Preibisch, “A Model for Managed Migration? Re-Examining Best Practices in Canada’s Seasonal Agricultural Worker Program” (2012) 50:S1 Intl Migration e19 at e26, online: <onlinelibrary.wiley.com/doi/10.1111/j.1468-2435.2009.00598.x/epdf>.

⁶⁵ Aaron M Orkin et al, “Medical Repatriation of Migrant Farm Workers in Ontario: A Descriptive Analysis” (2014) 2:3 Can Medical Assoc J Open E192.

IV. SUGGESTIONS FOR LEGAL AND POLICY REFORM

In my view, the key to improving precarious status migrants' health care security in Canada lies in unmasking and contesting the legal and policy forces that contribute to migrants' precarious presence in the first place. Whatever the original intention might have been when it was first conceived, Canada's temporary migration scheme has now clearly evolved into a policy stratagem that allows the government to roll back the rights and freedoms of non-citizen ordinary residents for its own economic and political gains. As illustrated, the designation of migrants as temporary or irregular despite their lived realities not only compromises these individuals' exercise of the right to health care, but also legitimizes this rights violation and shields it from proper judicial scrutiny. Therefore, to truly fulfill migrants' right to health care, the operating philosophy of Canada's contemporary immigration system must be revamped. The purposive channelling of immigration through programs that are designed to amplify and exploit migrants' precariousness must be stopped, and all migrants that have established ordinary residence in the country must be provided a genuine pathway to acquire legal permanent status.

Admittedly, this prescription puts me somewhat at odds with a popular strand of migrant rights advocacy that insists on separating questions about migrants' entitlement within the country from concerns over migrants' treatment at the borders. Supporters of this bifurcation often take the position that migrants' access to timely and appropriate health care can be effected by legislative and policy changes within the health care field alone, without any reforms being made to the immigration system.⁶⁶ A similar logic appears to undergird international legal instruments that aim at advancing migrants' human rights, with the *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families* being a perfect case in point.⁶⁷ On the one hand, the Convention requires countries to treat migrant workers and citizens equally in relation to health service access.⁶⁸ But on the other hand, it assures states that their right to control migrant workers' border entry will not be undermined by any of its provisions.⁶⁹ The problem with this bifurcated approach, as I have sought to demonstrate in this article, is that it underappreciates how insecurity underlying migrants' residency can hinder the actualization of their right to health care. Any attempts to advance migrants' rights without adequately policing how sovereign states exercise their authority over immigration control will, to borrow the words of Laurie Berg, risk having the latter "[infiltrate] the domain of [precarious status] migrants' substantive protections in other areas of domestic law, thus effectively defeating their enforceability."⁷⁰

Against the backdrop of this proposed immigration reform, the Canadian public health care system must strive to extend coverage to all migrants who are de facto ordinarily resident in the country, irrespective of their legal classifications. In the event that such policy change is stalled by legislative inertia, the Canadian judiciary must be ready to serve as a

⁶⁶ See e.g. Andrew J Pollard & Julian Savulescu, "Ethics in Practice: Eligibility of Overseas Visitors and People of Uncertain Residential Status for NHS Treatment" (2004) 329:7461 *British Medical J* 346.

⁶⁷ 18 December 1990, 2220 UNTS 3 (entered into forces 1 July 2003).

⁶⁸ *Ibid*, art 43(1)(e).

⁶⁹ *Ibid*, art 79.

⁷⁰ Laurie Berg, "At the Border and Between the Cracks: The Precarious Position of Irregular Migrant Workers Under International Human Rights Law" (2007) 8:1 *Melbourne J Intl L* 1 at 19.

catalyst for reform by engaging in a “*Charter* dialogue” with the legislature. This means that when another opportunity arises for courts to consider the government’s constitutional duty toward medically uninsured migrants, they must be ready to pierce the veil of immigration statuses and consider the discriminatory effect of health care disentanglement based on migrants’ real life circumstances. And they must also recognize the legal and policy architecture that constrains migrants’ decision-making, and hold the government to account for the role that it plays in engendering the plight of medically indigent migrants. To hold the judiciary to such expectations is not unreasonable. In fact, courts in some other countries have expressed the willingness to engage in these very lines of analysis.

In *Larbi-Odam v. MEC for Education (North-West Province)*, for instance, the South African Constitutional Court was asked to assess whether a provincial regulation that prohibited non-citizen teachers from obtaining permanent employment contracts breached the anti-discrimination clause of the interim constitution.⁷¹ In answering the question affirmatively, the Court rejected a request from the government to find only a partial constitutional infringement insofar as the impugned regulation offended the rights of permanent foreign residents. The Court held that the exclusion of temporary foreign residents from tenured teaching positions was just as discriminatory, considering that all the temporary migrants in this case had been in South Africa for a prolonged period of time by way of renewing their immigration permits annually.⁷² In other words, by allowing itself to look beyond the legal categorization of individuals, the Court was able to lay bare the injustice of differential treatment of citizens, permanent residents and regularly returning temporary residents, whose residency in the country all shared a quality of endurance.

Likewise, in *Plyler v. Doe*, the US Supreme Court exhibited a certain degree of openness to confront a state government’s inferior treatment of migrants that was motivated by considerations detached from migrants’ lived realities.⁷³ The case dealt with the constitutionality of a Texan law that disallowed the enrolment of undocumented migrant children in public schools. Ruling against the government, the Court reasoned that whereas “[p]ersuasive arguments support the view that a State may withhold its beneficence from those whose very presence within the United States is the product of their own unlawful conduct,”⁷⁴ such claims “do not apply with the same force to classifications imposing disabilities on the minor *children* of such illegal entrants.”⁷⁵ That is, as much as policy-makers might have had valid reasons to distinguish undocumented migrants from their lawful counterparts, to generalize this distinction to undocumented migrant children was unjust according to the Court, because children usually had little control over their immigration status. While the Court’s conception of migrants’ illegalized status as primarily a matter of personal choice, as in *Toussaint*, was disappointing, the exception that the Court made with respect to migrant children illustrated just how fragile this rhetoric of choice could be when migrants’ real life experiences were properly accounted. Thus, this decision ought to give the Canadian judiciary some food for thought when the issue concerning the mutability of immigration status returns for another deliberation.

⁷¹ [1997] ZACC 16, [1997] 12 BCLR 1655 (S Afr Const Ct).

⁷² *Ibid* at para 41.

⁷³ 457 US 202 (1982).

⁷⁴ *Ibid* at 219.

⁷⁵ *Ibid* at 219–20 [emphasis in original].

As this foreign jurisprudence shows, when judicial inquiries are able to move past the abstract legal categorizations imposed on migrants and become alive to people's factual circumstances, court challenges can serve as an important vehicle for the expansion of migrants' entitlements, including health care. However, as I have noted, even when migrants are granted public health care coverage, their access to timely and appropriate services can still be difficult in practice. To remedy this, commentators have put forth a range of recommendations for health care reform, including more routine usage of interpreters, enhancement of clinical cultural competence, employment of ethnocultural liaisons to help migrants navigate the health care system, and development of readily accessible information on migrants' health care eligibility as well as services available, among others.⁷⁶ These initiatives must also be complemented by measures to remove the unnecessary access barriers foisted upon migrants by those who exercise power over them. For example, pertinent rules must be put in place and vigorously enforced to prohibit employers from withholding migrant workers' health care cards or repatriating migrant workers for medical reasons absent their informed consent. Without such multi-pronged reform, the future of precarious status migrants' right to health care in Canada will likely be grim.

V. CONCLUSION

In an article titled "History and the Future of International Migration," Göran Rystad remarks that "[h]istory is the only key we have to understanding the present and to making at least tentative predictions concerning the future and regarding the possible effects of decisions and policies."⁷⁷ In this article, I adopted a similar approach to examining the past and future trajectory of precarious status migrants' right to health care in Canada. I began with a description of the growing preference of the Canadian immigration system for temporary migration over permanent settlement. I next showed how this shift in immigration policy resulted in migrants' precarious presence, and how this insecurity in turn constrained migrants' ability to fully realize their right to health care as guaranteed in international law. I highlighted the complicity of the Canadian judiciary in limiting migrants' health care entitlement, and I observed that even when migrants were made eligible for public health care, their access thereto could still be thwarted by the conditionality associated with their legal status. Looking toward the future, I suggested that the seemingly unrelenting appetite of Canada's immigration system for temporary migrants will continue to exert downward pressure on migrants' right to health care. If we are to hope for a more positive future, the immigration control assemblage that destabilizes foreign residents' ordinary presence in the country must be unravelled. Migrant rights advocates must resist the temptation to separate concerns about migrants' health care entitlement and access from those about their border entry and exclusion. The two fields are intimately connected. So long as migrants' lives remain precarious, whatever gains that may be made on paper regarding their right to health care will prove to be more symbolic than real.

⁷⁶ See e.g. Gagnon, *supra* note 58 at 366–68.

⁷⁷ Göran Rystad, "History and the Future of International Migration" (1992) 26 *Intl Migration Rev* 1168 at 1168–69.

47.	Kerri Froc, " A Prayer for Original Meaning: A History of Section 15 and What It Should Mean for Equality ", National Journal of Constitutional Law Vol. 38, Iss. 1, (Mar 2018): 35-88
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A Prayer for Original Meaning: A History of Section 15 and What It Should Mean for Equality

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This article challenges the notion that incorporating original meaning into the interpretation of Charter provisions invariably results in “frozen rights” that risk the Charter becoming increasingly irrelevant to contemporary civil rights struggles of Canadians. The author outlines how the Supreme Court’s “purposive approach” to s. 15 has led to a narrowing of equality rights that is not justified by its text or history, belying conventional wisdom that limitations which have caused such difficulty for equality claimants in recent years follow from the nature of the rights themselves. Historical research on the origins of s. 15 in fact reveals that its original meaning is supportive of including positive rights, as well as social and economic rights; is inconsistent with a doctrine imposing internal limitations based on the rationality of legislative distinctions or the relevance of the distinction to the government’s purpose; and supports an expansion of s. 15’s underlying principle beyond human dignity towards equality of power or anti-subordination. The article concludes with a description of some transformative changes to s. 15 doctrine that interpreters would need to make if it is to be consistent with this underlying purpose.

Dans cet article, l’auteure remet en question l’idée selon laquelle l’intégration du sens original des termes utilisés dans l’interprétation des dispositions de la Charte entraîne invariablement des « droits figés » qui risquent de faire en sorte que la Charte devienne de plus en plus superflue aux luttes pour les droits civiques contemporains des Canadiens. L’auteure décrit comment l’« approche téléologique » de la Cour suprême à l’article 15 a conduit à une réduction des droits à l’égalité qui ne se justifie pas par son texte ou son histoire, démentant la sagesse conventionnelle que les limitations qui ont causé tant de difficultés aux parties visant à se prévaloir du droit à l’égalité au cours des dernières années découlent de la nature des droits eux-mêmes. La recherche historique sur les origines de l’article 15, en fait, révèle que le sens original de son libellé est favorable à l’inclusion de droits positifs et de droits sociaux et économiques, qu’il est incompatible avec une doctrine imposant des limitations internes fondées sur la rationalité des distinctions législatives ou la pertinence de distinguer l’objectif poursuivi par le gouvernement, et qu’il promeut un élargissement du principe sous-jacent de l’article 15 au-delà de la dignité humaine afin d’inclure l’égalité de pouvoir ou l’anti-subordination. L’auteure termine par une description de certains changements en profondeur que les interprètes auraient

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besoin de faire pour que la doctrine de l'article 15 soit compatible avec cet objectif sous-jacent.

INTRODUCTION

Something special happened when citizen groups became involved with the making of the *Canadian Charter of Rights and Freedoms*.¹ The *Charter* began as a tentative document that was created by civil servants over the course of internecine struggles between the federal and provincial governments over national unity and provincial concerns over resources and distributions of power.² Shortly after introduction of the constitutional package, Parliament followed the federal government's recommendation and created the Special Joint Committee of the House of Commons and the Senate (the Hays-Joyal Committee) to hold televised hearings. The Joint Committee process transformed the draft *Charter* "by passing [it] through the refiner's fire of the testimony of Canadians."³ The amount of public participation in relation to the hearings was truly remarkable. Over 900 groups and individuals made submissions, and the Joint Committee heard from 100 witnesses in over 50 days of testimony, which included those from organizations representing women, minority language speakers, persons with disabilities, labour organizations, Indigenous organizations, sexual minorities, anti-poverty organizations, and some that traversed these identifiers (such as Native Women's Association of Canada and Indian Rights for Indian Women).⁴

Because of their input, the government agreed to dozens of changes based on citizens' own experiences of rights and their own conceptions of what they needed to live more freely and equally.⁵ Even after these initial amendments instigated by the Joint Committee hearings, citizen groups capitalized on their momentum and continued their advocacy for constitutional transformation

¹ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11.

² Edward McWhinney, "The Canadian Charter of Rights and Freedoms: The Lessons of Comparative Jurisprudence" (1983) 61 CBR 55 at 57-58 (describing the *Charter* as a "civil servants' text" developed "by way of a sort of federal government anticipatory self-restraint in regard to expected provincial objections" and noting particularly that Prime Minister Trudeau was "never directly involved" in the drafting to "depersonalize the whole project").

³ Liberal MP Roland De Corneille, *House of Commons Debates*, 32nd Parl., 1st Sess. No. 9 (April 23, 1981) at 9448-49.

⁴ Research Branch, Library of Parliament, *Statistical Account of Written Submissions* (Ottawa: Library of Parliament, 1981).

⁵ Canada, Ministry of Justice and the Attorney General of Canada, "Government Response to the Representations for Change to the Proposed Resolution" (January 12, 1981) ("Government Response") (on file with author from Tamra Thomson's files) (listing approximately 45 citizen groups that had influenced the various amendments to the draft *Charter*).

through media campaigns and grassroots advocacy efforts. For instance, the Ad Hoc Committee of Canadian Women on the Constitution held a February 1981 Conference attracting 1300 women from across Canada and launched a successful lobbying campaign that ultimately resulted in a late amendment to the *Charter* to ensure women's equal rights, s. 28.⁶

This transformation is also exemplified by the evolution of equality rights under s. 15 of the *Charter*. By all accounts, s. 15 started its life as a rather perfunctory and workmanlike draft text (gendered adjective intended). Given the staunch provincial opposition to *any* guarantee against discrimination, it was meant to improve only marginally upon the anti-discrimination guarantee of "equality before the law and the protection of the law"⁷ in s. 1(b) of the *Canadian Bill of Rights* by "tinkering" with its wording.⁸ The Patriators' lack of desire for wholesale change was despite judicial interpretation rendering the *Bill of Rights* provision nearly otiose.⁹

The poster children for this dysfunction were two Supreme Court of Canada cases concerning women's rights: *Bliss v. Canada (Attorney General)*¹⁰ and *Canada (Attorney General) v. Lavell*.¹¹ The former upheld provisions that denied unemployment benefits to women who became unemployed while pregnant. In addition to its notorious finding that discrimination against pregnant people was not sex discrimination, the Court based its ruling on the fact that the legislation was created for a "valid federal object"¹² and pertained to the provision of benefits, not penalties (which the Court found was outside the purview of the anti-discrimination guarantee).¹³ In *Lavell*, "equality before the law" was interpreted to guarantee only equality in the law's administration. Therefore, the

⁶ Section 28 reads, "Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons."

⁷ S.C. 1960, c. 44, s.1.

⁸ B.L. Strayer, "In the Beginning... The Origins of Section 15 of the *Charter*," (2006) 5 JL & Equal 13 at 18 ("In the Beginning").

⁹ The draft tabled before Parliament read, "Everyone has the right to equality before the law and to the equal protection of the law without discrimination because of race, national or ethnic origin, colour, religion, age or sex" ("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), as reproduced in Bayefsky, Anne F. *Canada's Constitution Act 1982 & Amendments: A Documentary History* (Toronto: McGraw-Hill Ryerson Limited, 1989) 743 at 748 (*Canada's Constitution Act*).

¹⁰ 1978 CarswellNat 147, 1978 CarswellNat 566, [1979] 1 S.C.R. 183 (S.C.C.) (*Bliss*). After the enactment of the *Charter*, in *Brooks v. Canada Safeway Ltd.*, 1989 CarswellMan 160, 1989 CarswellMan 327, [1989] 1 S.C.R. 1219 (S.C.C.) at para. 40, the Court pronounced that *Bliss* had been wrongly decided "or, in any event, that *Bliss* would not be decided now as it was decided then."

¹¹ 1973 CarswellOnt 1361, 1973 CarswellOnt 1362, [1974] S.C.R. 1349 (S.C.C.) (*Lavell*).

¹² *Bliss*, *supra* note 10 at 1993.

¹³ Sheila McIntyre, "The Equality Jurisprudence of the McLachlin Court: Back to the 70s" in Sanda Rodgers and Sheila McIntyre: *The Supreme Court of Canada and Social Justice*:

Court upheld the racist and sexist “marrying out” provisions of s. 12(1)(b) of the *Indian Act* that stripped Indian status from women who married non-status men (but conferred status on the spouses of status Indian men). The Court justified its ruling on the basis, essentially, that all status Indian women were treated equally poorly.¹⁴

Nevertheless, in the October 6, 1980 draft *Charter* tabled before Parliament, the government returned to the *Canadian Bill of Rights* wording, with two modest additions. It maintained the *Bill of Rights*’ exhaustive list of grounds, “except for [the inclusion of] ethnic origin and age which are new,” and amended the substantive guarantee to include “equal” protection of the law.¹⁵ Whatever meaning the textual choices in the initial s. 15 draft were to communicate, the text changed substantively with the inclusion of input from Joint Committee hearings (especially that of the Canadian Human Rights Commission, women’s groups, advocacy groups for persons with disabilities, and civil liberties groups). As a consequence, s. 15 now includes a non-exhaustive list of grounds of discrimination (including, notably, “mental or physical disability”) and four separate equality guarantees: equality “before *and* under the law,” and the “right to equal protection *and* equal benefit of the law.”

The Supreme Court has acknowledged that this history is significant. In the first s. 15 case, *Andrews v. Law Society (British Columbia)*, the Court stated it was “readily apparent that the language of s. 15 was deliberately chosen in order to remedy some of the perceived defects under the Canadian Bill of Rights. The antecedent statute is part of the ‘linguistic, philosophic and historical context’ of s. 15 of the Charter” under the purposive interpretive approach.¹⁶ Yet, the Court has also professed that constitution-making history should be accorded minimal (if any) weight in *Charter* interpretation under “living tree” constitutional doctrine, lest “the rights, freedoms and values embodied in the Charter in effect becoming frozen in time to the moment of adoption with little or no possibility of growth, development and adjustment to changing societal needs.”¹⁷

Skepticism towards historical context under the “living tree” doctrine and the ambiguities in purposive methodology surrounding whether and if the court is required to consider historical context, what it includes, and what weight it is to be given, have contributed to an unstable s. 15 framework.¹⁸ At each stage of

Commitment, Retrenchment or Retreat (Markham, Ont.: LexisNexis Canada, 2010) 129 at 135 (*Supreme Court and Social Justice*).

¹⁴ *Supra* note 11.

¹⁵ *Supra* note 9.

¹⁶ *Andrews v. Law Society (British Columbia)*, 1989 CarswellBC 16, 1989 CarswellBC 701, [1989] 1 S.C.R. 143 (S.C.C.) at para. 33 (*Andrews*).

¹⁷ *Reference re s. 94(2) of Motor Vehicle Act (British Columbia)*, 1985 CarswellBC 398, 1985 CarswellBC 816, [1985] 2 S.C.R. 486 (S.C.C.) at para. 53 (*BC Motor Vehicles*).

¹⁸ See Kerri A. Froc, “The Untapped Power of Section 28 of the *Canadian Charter of Rights and Freedoms*,” (Ph.D. Thesis, Faculty of Law, Queen’s University, 2015) [unpublished] at 47-54 (“Untapped Power”).

the Court's working and reworking of the s. 15 test, it attempted explicitly to legitimize the variation as a fulfilment of s. 15's purpose.

Of the cases that foundered because of claimants' inability to satisfy the ever-changing requirements of the s. 15 test, many of these were women's cases that had gendered impacts (particularly in relation to women's economic inequality).¹⁹ This is a bitter irony, given what women's cases were impetus for and women advocates were amongst the chief architects behind the changes to s. 15's text so that it ensured "equality in the substance of the law."²⁰ I have searched in vain for women's cases at the Supreme Court of Canada in which "living tree doctrine" was employed to expand an interpretation of a *Charter* right towards more gender inclusive understandings. Equally, I have not found an appreciable, positive impact of "purposive interpretation" on women's *Charter* rights beyond two, non-section 15 cases.²¹

Section 15 is perhaps the most vivid example demonstrating that the Court's unprincipled approach to history fails to give due respect to the original constitutional commitment in the text and the extraordinary investment that ordinary Canadians made in the constitution-making process to improve the *Charter*.²² What is more, it fails to fulfil the aspirations of the *Charter* remaining effective against the harms of oppression for future generations. These criteria are most relevant to assess the legitimacy of any interpretive approach in the Canadian context.²³ Accordingly, based on Jack Balkin's concept of "framework

¹⁹ Froc, "Untapped Power," *ibid* at 54, citing *Symes v. R.*, 1993 CarswellNat 1387, 1993 CarswellNat 1178, (*sub nom.* *Symes v. Canada*) [1993] 4 S.C.R. 695 (S.C.C.); *Gosselin c. Québec (Procureur général)*, 2002 CarswellQue 2706, 2002 CarswellQue 2707, (*sub nom.* *Gosselin v. Quebec (Attorney General)*) [2002] 4 S.C.R. 429 (S.C.C.); *Law v. Canada (Minister of Employment & Immigration)*, 1999 CarswellNat 359, 1999 CarswellNat 360, [1999] 1 S.C.R. 497 (S.C.C.) (*Law v. Canada*); *Hodge v. Canada (Minister of Human Resources Development)*, 2004 CarswellNat 3695, 2004 CarswellNat 3696, [2004] 3 S.C.R. 357 (S.C.C.).

²⁰ See, for instance NDP MP Pauline Jewett's reference to women's demand for "equality in the substance of the law" in her House of Commons speech, *House of Commons Debates*, 32nd Parl., 1st Sess., No. 7 (March 4, 1981) at 7898. The desire for "equality in the substance of the law," was however, a common refrain amongst groups appearing before the Joint Committee.

²¹ *R. v. Morgentaler*, 1988 CarswellOnt 954, 1988 CarswellOnt 45, (*sub nom.* *R. v. Morgentaler (No. 2)*) [1988] 1 S.C.R. 30 (S.C.C.) (concerning the constitutionality of abortion prohibitions in the *Criminal Code*); *Health Services & Support-Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 CarswellBC 1289, 2007 CarswellBC 1290, [2007] 2 S.C.R. 391 (S.C.C.) (concerning interference with collective agreements negotiated between the British Columbia government and labour organizations representing health sectors occupationally segregated by sex).

²² Adam Dodek, "Where Did (Section) I Come From? The Debates Over the Limitations Clause at the Special Joint Committee of the Senate and the House of Commons on the Constitution, 1980-81" (2010), 27 N.J.C.L. 77 at 91.

²³ See Froc, "Untapped Power," *supra* note 18 at 25 *et seq* concerning this basis for a Canada-specific standard, which I call "constitution-as-promise."

originalism,”²⁴ I developed a new, Canadian interpretive methodology for constitutional interpretation called “hybrid originalism” or “new purposivism.”²⁵ Below, I provide a brief primer on originalism, its surprising role in Canada, and my adaptation of Balkin’s theories into the Canadian interpretative landscape.

Rather than debating interpretive methodologies, however, my main goal in this article is to challenge the notion that incorporating original meaning into the interpretation of *Charter* provisions invariably results in “frozen rights” that risk the *Charter* becoming increasingly irrelevant to contemporary civil rights struggles of Canadians and conventional wisdom about the nature of equality rights under s. 15.²⁶ I undertake a targeted approach that considers some of the areas that have caused difficulty for equality claimants in recent years, namely the exclusion of (most) positive rights, the discomfort with social and economic rights, *de facto* internal limitations to s. 15 and the associated recognition of s. 15’s underlying principle as human dignity.

In what follows, I outline the Court’s “purposive approach” to s. 15 in relation to these issues. I then show what the original meaning of s. 15’s text reveals, namely that the original meaning of s. 15 text is supportive of including positive rights, as well as social and economic rights; is inconsistent with a doctrine imposing internal limitations based on the rationality of legislative distinctions or the relevance of the distinction to the government’s purpose; and supports an expansion of s. 15’s underlying principle beyond human dignity towards equality of power or anti-subordination. Last, I will provide a few thoughts on required changes to s. 15 doctrine in light of the recognition of this new, underlying purpose, which could lead to a transformed doctrine.

MY AMERICAN COUSIN — ORIGINALISM AND CANADIAN CONSTITUTIONAL INTERPRETATION

Canada does not have a robust tradition of originalist scholarship, though that is changing.²⁷ Accordingly, much of the theorizing about originalism comes

²⁴ *Living Originalism* (Cambridge, MA: The Belknap Press of Harvard University Press, 2011).

²⁵ Froc, “Untapped Power,” *supra* note 18 at 83 *et seq.*

²⁶ It is true that Constitutional drafters had, as one of their objectives, avoidance of the “frozen rights” problem that had occurred under the *Canadian Bill of Rights*: Strayer, “In the Beginning,” *supra* note 8 at 19. However, the issue related to the explicit phrase in the *Canadian Bill of Rights*, “it is hereby recognized and declared that in Canada there have existed and shall continue to exist” certain rights and freedoms (*supra* note 7). These words “make it almost impossible to argue successfully that a law that existed in 1960 could contravene the bill of rights” as well as what Walter Tarnopolsky described as the “increasingly difficult” evidentiary issues to discover “what the concept of any particular right or freedom was in 1960” (“Only Change to Rights Bill Will be to Make it Better” *Toronto Star* (August 11, 1980) A8).

²⁷ Before recently, the only two Canadian academics of which I am aware who would

from US academics and must be adapted to the Canadian context. However, the two fundamental tenets of any theory of interpretation (Canadian or American) that could be classified as “originalist” are that the meaning of a constitution provision is fixed at the date of its framing and/or ratification, and that this original meaning is legally binding.²⁸ While originalism is popularly understood as being grounded in the authority of “framers intent” (including by our own Supreme Court of Canada), the majority of those who count themselves amongst originalists today do not ascribe to this notion.²⁹ “Framers” in the American context has meant the formal political actors who had a hand in creating the text. In the 1982 Canadian context, we would need to recognize the significant citizen involvement in the drafting of the *Charter*, by recognizing framers as including those groups and individuals successfully proposing amendments.³⁰ As well, from a feminist perspective, limiting framers to formal actors would devalue the value of women’s constitution-making work.³¹

describe themselves as originalist are Grant Huscroft and Bradley Miller, now both Ontario judges. In addition to me, Benjamin Oliphant and Leonid Sirota also regularly incorporate discussions of originalism in their writing: see, for instance, “Has the Supreme Court of Canada Rejected ‘Originalism?’” (2016) 42:1 *Queen’s L.J.* 107; “Originalist Reasoning in Canadian Constitutional Jurisprudence” (2017) 50:2 *U.B.C. L. Rev.* 505. See also J. Gareth Morley, “Dead Hands, Living Trees, Historic Compromises: The Senate Reform and Supreme Court Act References Bring the Originalism Debate to Canada,” (2016) 53(3) *Osgoode Hall Law Journal* 745-798 (“Dead Hands, Living Trees”).

²⁸ Lawrence B. Solum, “Originalism, Hermeneutics, and the Fixation Thesis,” in Brian G. Slocum ed, *The Nature of Legal Interpretation: What Jurists Can Learn About Legal Interpretation from Linguistics and Philosophy* (Chicago: University of Chicago Press 2017) 130 at 132. Most of my summary of originalism and the description of my theory of “hybrid originalism” or “new purposivism” is taken from my previous work on the subject: Kerri A. Froc, *Is Originalism Bad for Women? The Curious Case of Canada’s ‘Equal Rights Amendment’*” (2015) 19:2 *Rev. Const’l Stud.* 237; and Froc, “Untapped Power,” *supra* note 18.

²⁹ Various members of the Court have criticized originalism based on this understanding, e.g. *Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters*, 2009 CarswellAlta 1891, 2009 CarswellAlta 1892, [2009] 3 S.C.R. 407 (S.C.C.) at para. 89, per Binnie J, dissenting; *Québec (Procureur général) c. Canada (Procureur général)*, 2005 SCC 56, 2005 CarswellQue 9127, 2005 CarswellQue 9128, [2005] 2 S.C.R. 669 (S.C.C.) at para. 9; *R. v. Tessling*, 2004 CarswellOnt 4351, 2004 CarswellOnt 4352, [2004] 3 S.C.R. 432 (S.C.C.) at paras. 60 and 61; and *Osborne v. Canada (Treasury Board)*, 1991 CarswellNat 830, 1991 CarswellNat 348, [1991] 2 S.C.R. 69 (S.C.C.) at 89-90 (S.C.R.). One contemporary intentionalist is Richard Kay (see, e.g., “Construction, Originalist Interpretation and the Complete Constitution,” (Feb 2017) 19 *Journal of Constitutional Law* 1.)

³⁰ Adam Dodek, “The Dutiful Conscript: An Originalist View of Justice Wilson’s Conception of Charter Rights and Their Limits” (2008) 41 *Sup. Ct. L. Rev.* (2d) 331 at 340; Helen Irving, *Gender and the Constitution: Equity and Agency in Comparative Constitutional Design* (Cambridge: Cambridge University Press, 2008) at 58 and 60; James B. Kelly, *Governing with the Charter: Legislative and Judicial Activism and Framers’ Intent* (Vancouver: University of British Columbia Press, 2005) at 87.

Recognizing the “multiplicity of intent” critique that has dogged originalism, namely that intent purportedly cannot be ascertained when there are a multiplicity of framers and ratifiers of the text,³² most (but not all) contemporary originalists rely instead upon “original public meaning.” Rather than the borderline psychological inquiry of original or “framers” intent, “original meaning” is a linguistic one: how the words in the text were understood and used by the “ratifying” or “founding generation,” namely those alive at the time the constitutional text was created.³³ Because framers and ratifiers wanted to be understood by the wide array of constitutional readers, they employed commonly understood semantic meanings within the “publicly available communicative context.”³⁴

Thus, interpreters may ascertain original meaning through writings or other communications of the framers. What the framers thought they were conveying through their textual choices is important evidence of original meaning, particularly as those “familiar and careful with language” and invested in ensuring meaning was conveyed accurately.³⁵ “However, to ascertain original meaning, interpreters may also consult any available public documents written at the time (such as newspapers or dictionaries) that would show common usage of constitutional words and phrases, writings of contemporary experts to understand legal terms of art, and the surrounding context in which the words were communicated, as well as relying on their own competence in the language (particularly for more recent texts).³⁶

Another point is also worthy of note. Many contemporary originalists recognize that the interpretation of constitutional text to ascertain its “original meaning,” will only take us so far in the ordinary course of developing a framework by which we understand and apply constitutional provisions in a given case. The interpretive exercise is an empirical (and a rather limited) one, based upon the supposition that interpreters must be aware “of the possibility

³¹ Canadian feminist critique of the state’s reliance on women’s unpaid or underpaid labour, while at the same time devaluing such labour or rendering it invisible are legion. Concerning women’s financial and other sacrifices made to engage in this constitution-making work, see *The Struggle for Democracy: The Last Citizens* (Democracy Films, 1989) (documentary written by Ted Remerowsky and Patrick Watson), quoting Linda Palmer Nye.

³² Justice Lamer leans heavily on this critique when he rules that elements of s. 7’s legislative history are to be given “minimal weight”: *BC Motor Vehicles*, *supra* note 17, at para. 51.

³³ Lawrence B. Solum, “Originalist Methodology” (2017) 84 U. Chi. L. Rev. 269.

³⁴ Randy Barnett, “The Gravitational Force of Originalism” (2013) 82 Fordham L. Rev. 412 at 414. Balkin, in *Living Originalism*, *supra* note 24 at 47 also discusses the continued relevance of intention in relation to textual choices of “freedom and constraint. . . [that] help us understand the nature of the written plan that we, in the present, have accepted as our own.” I discuss this further below.

³⁵ Keith Whittington, “Originalism: A Critical Introduction” (2013) 82 Fordham L. Rev. 375.

³⁶ Solum, “Originalist Methodology,” *supra* note 33, particularly at 281-284.

that [the constitutional text] uses language somewhat differently than we do now.”³⁷ It does not, for instance, consider how a court would have interpreted the provision in 1982; while some originalists advocate for the “original methods” approach, their strain of originalism remains an outlier.³⁸

It also does not regard the framers and ratifiers’ perspectives on the doctrine they thought the courts would develop or how they thought courts would apply provisions to particular controversies, called “original intended/expected applications,” as definitive. For instance, our understanding of “civil rights” has changed, particularly since the 1960s American civil rights movement. The fact that the fathers of Confederation took the phrase “property and civil rights” in our Constitution from the *Quebec Act, 1774* and that “civil rights” in that context meant those granted under systems of private law (and specifically the civil law system in Québec) is important information for interpretation. However, whether they thought this head of power would apply to assisted human reproduction (which was in its infancy as a medical practice at the time of Confederation)³⁹ might be relevant but ultimately not determinative. As Balkin describes, “statements of purpose and principle contemporaneous with the adoption of the text” are nevertheless valuable resources, because they “offer us evidence about *permissible constructions*. . . likely to be consistent with the text” and may assist in “resolv[ing] ambiguities about original meaning.”⁴⁰

Ceding authority to original expected applications not only veers into original intent, but disregards an important reason why they provide only some evidence of original meaning. Framers and ratifiers are not “infallible authorities when it comes to interpreting and applying their own laws”; many were non-experts and none could be expected to know all of the legal ramifications of the text they were enacting.⁴¹ What was enshrined was not their hopes, wishes or expectations as to how they thought the courts would apply the provision that they enshrined, but the text;⁴² if they wanted to assure their hopes translated into a likely outcome, they had the option of directing how the court applied the

³⁷ Solum, “Originalism, Hermeneutics, and the Fixation Thesis,” *supra* note 28 at 136.

³⁸ John O. McGinnis & Michael B. Rappaport, “Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction,” (2009) 103 N.W. U. L. Rev. 751.

³⁹ *Québec (Procureur général) c. Canada (Procureur général)*, 2010 CarswellQue 13213, 2010 CarswellQue 13214, (*sub nom.* Reference re Assisted Human Reproduction Act) [2010] 3 S.C.R. 457 (S.C.C.); Willem Ombelet and Johan Van Robays, “History of Human Artificial Insemination: Hurdles and Milestones,” (2015) 7(2) Facts Views Vis ObGyn 137.

⁴⁰ *Living Originalism*, *supra* note 24 at 258.

⁴¹ Jeffrey Goldsworthy, “The Case for Originalism,” in Grant Huscroft and Bradley W. Miller, eds, *The Challenge of Originalism: Theories of Constitutional Interpretation* (New York: Cambridge University Press, 2011) 42 at 51.

⁴² Jack Balkin, “Must We Be Faithful to Original Meaning?” (2013) 7:1 Jerusalem Review of Legal Studies 57 at 64.

provision with greater specificity through interpretive clauses (as was the case in *Charter* ss. 25 and 27).⁴³

Thus, in the case of vague constitutional provisions, interpretation (ascertaining the abstract, linguistic or “semantic” meaning of a term) will likely be exhausted without full answers as to how the text ought to be implemented. While still bound by original meaning, interpreters then engage in “constitutional construction,” which “involves coming up with doctrines and tests to solve problems created by the text, or. . . applying these existing doctrines, tests, and solutions to new problems that arise”.⁴⁴ In the construction phase, history is still considered an important resource but interpreters may consider freely “other forms of constitutional argumentation” and adaptations to the contemporary context as long as they are not inconsistent with the provision’s original meaning.⁴⁵

The Supreme Court of Canada has disavowed originalism in principle, and declined to allow constitution-making history a greater role in interpretation for two primary reasons: that “original intent” of the framers would be “nearly impossible of proof” given the “multiplicity of individuals who played major roles in the negotiating, drafting and adoption of the Charter”⁴⁶ and second, that it would result in “frozen rights” and the *Charter* being unable to adapt to social changes.⁴⁷ Assigning legislative history more significance therefore risked embroiling the Charter in potential crises of relevance and legitimacy in the future. The Court’s disavowal of originalism rings a bit hollow in light of its decisions ascribing a role for constitution-making history (albeit in the federalism context).⁴⁸ Nevertheless, these two criticisms arise because the Court

⁴³ Keith E Whittington, “Originalism: A Critical Introduction” (2013) 82 *Fordham L. Rev.* 375 at 395-396 (in relation to the general point outside the Canadian context).

⁴⁴ Jack M. Balkin, “Constitutional Interpretation and Change in the United States: The Official and the Unofficial” (2015), online: SSRN, < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2594925 > at 14 (“Constitutional Interpretation and Change”). See also, Lawrence B. Solum, “Originalism and Constitutional Construction,” (2013) 82 *Fordham L. Rev.* 453; Lawrence B. Solum, “The Interpretation—Construction Distinction,” (2010) 27 *Const. Commentary* 95; Randy E. Barnett, “Interpretation and Construction,” (2011) 34 *Harv. J. L. & Pub. Pol’y* 65.

⁴⁵ Whittington, “On Pluralism within Originalism,” in Grant Huscroft and Bradley W. Miller, eds, *The Challenge of Originalism: Theories of Constitutional Interpretation* (New York: Cambridge University Press, 2011) 72 at 82; Randy E. Barnett, “An Originalism for Nonoriginalists” (1999) 45 *Loy. L. Rev.* 611 at 645; Balkin, *Living Originalism*, *supra* note 24 at 270. Solum indicates, however, that construction is always employed in the technical sense that deciding a case is always an implementation of the text, and therefore, is always in the realm of construction even when semantic meaning affords a clear rule: “The Interpretation—Construction Distinction,” *supra* note 44 at 107-108.

⁴⁶ *BC Motor Vehicles*, *supra* note 17 at paras. 51 and 52.

⁴⁷ *Ibid.*, at para. 53; *Reference re Same-Sex Marriage*, 2004 CarswellNat 4422, 2004 CarswellNat 4423, [2004] 3 S.C.R. 698 (S.C.C.) at paras. 22-23.

⁴⁸ Morley, *supra* note 27; Oliphant and Sirota, “Originalist Reasoning in Canadian Constitutional Jurisprudence,” *supra* note 27.

homogenized the array of theories in the originalist family tree. It does not engage with more recent branches where these criticisms would be substantially mitigated, especially if adapted to the Canadian context in a principled fashion.⁴⁹

My approach of hybrid originalism (or new purposivism, for those who have a visceral reaction to “originalism”) adapts Jack Balkin’s contemporary theory of “framework originalism,” because it is most conducive to the Canadian context. It permits both fidelity to the original constitutional plan, created through and with the extraordinary contributions of Canadians and with which Canadians continue to identify, and also permits the *Charter* to be effective to combat oppression into the future, which, as I have mentioned, are the appropriate criteria in relation to our constitutional history.

Balkin argues that a constitution “creates an economy of delegation and constraint”⁵⁰ to channel interpretive discretion according to the degree of precision in the language and the authoritativeness of each provision. This economy comprises the constitutional plan that we have committed to follow. Where language is more precise and directive, usually the original meaning of the words will be conclusive and therefore constitution-making history more prescriptive and authoritative. For instance, a common example amongst originalists is that if our use of the Gregorian calendar were to change over time, the original meaning of “year” would be determinative for time-based rules (such as *Charter* s. 4(1) limiting sittings of Parliaments and legislative assemblies to “no . . . longer than five years from the date fixed as the return of the writs at a general election of its members”). Where language is broader, requiring more “practical or evaluative judgment” to apply or a provision is not as authoritative because it may be balanced against other considerations, there is a greater degree of delegation to future generations to decide upon their own constructions of the provision.⁵¹

In construction, historical materials are considered “mere resources, not binding commands.”⁵² History’s use as a resource is most apparent in the beginning phases of construction, through what Balkin calls the formulation of “underlying principles.” As a first step in the construction phase, an interpreter can consider whether it is possible to ascertain “underlying principles” from a constitutional provision, “aids or heuristics that help explain or flesh out the textual commitment. . . [but] do not exhaust either its meaning or effect.”⁵³ In essence, underlying principles help interpreters understand how the provision is supposed to function, acting as the “building blocks” for constitutional construction.⁵⁴ Underlying principles may also change over time as our

⁴⁹ Oliphant and Sirota, “Has the Supreme Court of Canada Rejected ‘Originalism?’”, *supra* note 27.

⁵⁰ “Constitutional Interpretation and Change,” *supra* note 44 at 21.

⁵¹ *Living Originalism*, *supra* note 24 at 349, note 12.

⁵² *Ibid.*, at 258.

⁵³ Balkin, *Living Originalism*, *ibid.*, at 260.

understanding of history changes: “we always articulate these principles from the present, and our perspective is always changing beneath our feet. History always looks different to us, and even the same historical materials look different as we move through history.”⁵⁵

In my theory of hybrid originalism, I adopt Balkin’s framework of considering first the original meaning of the words in the text, then developing underlying principles consistent with this meaning, which are used to “make sense of the constitutional text.”⁵⁶ Historical context is an important resource for both parts of this enterprise, original meaning and underlying principles. When interpreters move on to the construction of constitutional doctrine that gives life to these principles through doctrine, purposes may be considered, along with pre- and post-adoption history, legal precedent, and the other elements that are conventionally considered in the course of the ordinary Canadian approach to purposive interpretation.⁵⁷ Accordingly, the use of constitutional-making history and original meaning is structured and consistent, but nothing is displaced from the conventional purposive analysis that invites courts to analyze constitutional provisions in their proper “proper linguistic, philosophic and historical contexts” (hence, my use of the alternate term for my approach, “new purposivism”).⁵⁸

Elsewhere, I have explained in greater detail what this structuring of history would look like under a hybrid originalist approach.⁵⁹ For the most part, I will not revisit these arguments except where necessary to orient the reader in relation to the significance of the historical evidence for constitutional interpretation. The topic to which I move next focuses on my main goal — to show that an interpretation of s. 15 that incorporates original meaning need not result in “frozen rights.” As well, I will show that the Court’s interpretation(s) of s. 15 are not a neutral reflection of equality’s inherent nature but result from particular interpretive choices that pay insufficient attention to the provision’s text and history.⁶⁰

⁵⁴ Jack Balkin, “Nine Perspectives on Living Originalism” (2012) U. Ill. L. Rev. 815 at 852 (“Nine Perspectives”).

⁵⁵ Balkin, “Nine Perspectives,” *supra* note 54 at 853.

⁵⁶ Balkin, *Living Originalism*, *supra* note 24 at 351.

⁵⁷ *Ibid.*, at 258.

⁵⁸ *R. v. Big M Drug Mart Ltd.*, 1985 CarswellAlta 316, 1985 CarswellAlta 609, [1985] 1 S.C.R. 295 (S.C.C.) at para. 117 (*Big M Drug Mart Ltd.*); Oliphant and Sirota, “Has the Supreme Court of Canada Rejected ‘Originalism?’”, *supra* note 27; Bradley W. Miller, “Beguiled by Metaphors: The ‘Living Tree’ and Originalist Constitutional Interpretation in Canada,” (2009) 22 Can. J.L. & Juris. 331.

⁵⁹ See note 28.

⁶⁰ Tarnopolsky, *supra*, note 26.

SECTION 15 AS EXCLUDING (MOST) POSITIVE OBLIGATIONS

What the Supreme Court of Canada has Said

The *Eldridge* and *Vriend* cases have almost become apocryphal for the Court's pronouncement that the equality guarantee in s. 15 contains a "positive duty" for the government to act to alleviate disadvantage, by providing sign language translation to permit deaf patients to access medical services and by adding "sexual orientation" to Alberta's human rights legislation so that sexual minorities would be protected. The Supreme Court did so in both cases based on its interpretation of s. 15's purpose, namely, "not only to prevent discrimination by the attribution of stereotypical characteristics to individuals, but also to ameliorate the position of groups within Canadian society."⁶¹

However, the Court has never expanded the nature of this "positive duty" in the ensuing 20 years. Rather, the potential reach of these cases has been limited to the somewhat-banal observation that discriminatory underinclusion from already-existing government benefit regimes will violate s. 15. Koshan and Hamilton point out that the Court recognized this principle five years earlier in the *Schachter* decision.⁶² And even "underinclusion" itself will be read narrowly: in *Auton*, the Court found that the failure to include a particularly successful form of autism therapy as one of the "medically necessary" treatments that received government funding, was in fact a claim for inclusion in "non-existent" benefits — not ones provided by law, not ones that receive s.15 scrutiny. Notably, it again justified its decision based on s. 15's purpose, which McLachlin C.J. (writing for the court) described much more narrowly, to "prevent the perpetuation of pre-existing disadvantage through unequal treatment."⁶³

Of the number of lower court judgments that have dismissed s. 15 claims because they were based on "positive rights," many were refused leave to appeal to the Supreme Court. These include *Ferrell v. Ontario (Attorney General)*,⁶⁴

⁶¹ *Vriend v. Alberta*, 1998 CarswellAlta 210, 1998 CarswellAlta 211, [1998] 1 S.C.R. 493 (S.C.C.) at para. 72 and *Eldridge v. British Columbia (Attorney General)*, 1997 CarswellBC 1939, 1997 CarswellBC 1940, [1997] 3 S.C.R. 624 (S.C.C.) at para. 65, citing *Eaton v. Brant (County) Board of Education*, 1996 CarswellOnt 5035, 1996 CarswellOnt 5036, [1997] 1 S.C.R. 241 (S.C.C.) at paras. 66 and 67.

⁶² Jennifer Koshan and Jonnette Watson Hamilton, "The Continual Reinvention of Section 15 of the Charter" (2013) 64 U.N.B.L.J. 19 at 26.

⁶³ *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, 2004 CarswellBC 2675, 2004 CarswellBC 2676, [2004] 3 S.C.R. 657 (S.C.C.) at para. 25.

⁶⁴ 1998 CarswellOnt 4754, 42 O.R. (3d) 97, 168 D.L.R. (4th) 1 (Ont. C.A.), leave to appeal refused (1999), 252 N.R. 197 (note) (S.C.C.) (*Ferrel*). See also, for instance, *Masse v. Ontario (Ministry of Community & Social Services)*, 1996 CarswellOnt 338, 134 D.L.R. (4th) 20, (*sub nom.* *Masse v. Ontario (Minister of Community & Social Services)*) 89 O.A.C. 81 (Ont. Div. Ct.) at para. 357, leave to appeal refused 1996 CarswellOnt 1453 (Ont. C.A.), leave to appeal refused (1996), 40 Admin. L.R. (2d) 87 (note) (S.C.C.) (drastic reductions to welfare not violating s.7 or s.15, *Charter* "does not impose positive obligations on the government"); *Tanudjaja v. Canada (Attorney General)*, 2013 ONSC

dismissing a challenge to the Ontario government's repeal of the *Employment Equity Act* on the basis that the s. 15 "right is not a generalized one to have equality interests advanced."⁶⁵ Essentially, if a failure to act was subject to review under s. 15, there would be nothing to "invalidate" under s. 52. As well, because the s. 15(2) "affirmative action" provision empowers governments to enact ameliorative legislation, rather than oblige it, it would be inconsistent to read s. 15(1) any differently to require such programs.⁶⁶ The Supreme Court, in its recent line of cases, interpreted s. 15(2) to create a substantive governmental defence to s.15(1) claims where it could show that the ameliorative program in question was "genuine." In reinvigorating s. 15(2) (that it once treated as an interpretive aid to s. 15(1)), the Court seemed to entrench a dichotomy between positive government action to ameliorate discrimination, which resides in s.15(2), and a negative right to protection against discrimination in s. 15(1).⁶⁷ It remains to be seen, however, whether and how courts will apply this dicta in future cases.

Positive Rights and Section 15's Original Meaning

Department of Justice lawyer and constitutional drafter, Barry Strayer, denies that those involved in the initial drafting of the *Charter* contemplated that it would contain positive rights "requir[ing] the state to act in favour of particular individuals or groups."⁶⁸ However, despite what might have been the subjective states of mind of the drafters, there is reason to question whether the "founding generation" (and particularly those with legal knowledge) would have commonly understood s. 15's initial text guaranteeing "equality before the law and equal protection of the law" as confined to restraint against discriminatory state actions, much less that the expanded text of s. 15 would have been so limited.⁶⁹

5410, 2013 CarswellOnt 12551 (Ont. S.C.J.) at para. 103, affirmed 2014 CarswellOnt 16752, 123 O.R. (3d) 161 (Ont. C.A.), leave to appeal refused 2015 CarswellOnt 9613, 2015 CarswellOnt 9614 (S.C.C.) ("No positive obligation has, in general, been recognized as having been imposed by the *Charter* requiring the state to act to protect the rights it provides for").

⁶⁵ *Ferrel*, *ibid* at para. 47.

⁶⁶ *Ibid*.

⁶⁷ *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, 2011 SCC 37, 2011 CarswellAlta 1210, 2011 CarswellAlta 1211, [2011] 2 S.C.R. 670 (S.C.C.) at paras. 39-40 ("First, s. 15(1) is aimed at preventing discrimination on grounds such as race, age and sex. . . Second, s. 15(2) is aimed at permitting governments to improve the situation of members of disadvantaged groups that have suffered discrimination in the past, in order to enhance substantive equality"). Compare to *Lovelace v. Ontario*, 2000 CarswellOnt 2460, 2000 CarswellOnt 2461, [2000] 1 S.C.R. 950 (S.C.C.).

⁶⁸ Barry Strayer, *Canada's Constitutional Revolution* (Edmonton: University of Alberta Press, 2013) at 261-262.

⁶⁹ The below builds upon and has benefitted from the arguments in Bruce Porter, "Twenty Years of Equality Rights: Reclaiming Expectation" (2005) 23:1 Windsor YB Access Just

In a well-regarded 1980 article concerning the interpretation of “equality before the law” in the *Canadian Bill of Rights*, Marc Gold wrote that there had been a profound reconceptualization of the meaning of rights with the shift from “the ideal of government. . .from that of the ‘minimal [liberal] state’ to that of the ‘positive [social welfare] state’.”⁷⁰ The “essential thrust” of the liberal conception of equality before the law was “negative. . .directed at minimizing the governmental coercion of individuals to the greatest extent possible”; nevertheless, the “modern era” expanded equality before the law to incorporate the insight that, “Government has a positive duty to redress the inequalities of the marketplace, to ensure not merely negative liberty” but to facilitate the equal enjoyment of liberty.⁷¹ Therefore, he argued that “no conception of equality before the law will be adequate if it does not take account of the fact that the government is expected to act positively.”⁷²

Further, as Gold noted, American judges had previously applied the “equal protection” guarantee under the Fourteenth Amendment of the US *Bill of Rights* to impose positive obligations upon government, which included requiring racial integration of public education, redrawing electoral boundaries, requiring states to conduct elections in particular ways, and obliging states to supply transcripts and legal counsel to indigent defendants (though, as Gold remarks, the US Supreme Court had refused to declare distinctions between the rich and poor themselves as “invidious”).⁷³ Logically, the “imposition of such duties implies the existence of affirmative rights.”⁷⁴

145, and Anne Bayefsky, “Defining Equality Rights” in Anne Bayefsky and Mary Eberts, eds., *Equality Rights and the Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1985) 1 (*Equality Rights and the Canadian Charter*).

⁷⁰ “Equality Before the Law in the Supreme Court of Canada: A Case Study” [1980] 18:3 Osgoode Hall L.J. 336 at 339. Gold’s article was cited over a dozen times in various other scholarly publications.

⁷¹ *Ibid.*, at 367 at 369.

⁷² *Ibid.*, at 370.

⁷³ *Ibid.*, at 381 and 393, citing Archibald Cox, “Foreword: Constitutional Adjudication and Human Rights,” (1966-67) 80 Harv. L. Rev. 91, who discusses these cases at 92-93. On this point, see also Bayefsky, “Defining Equality Rights,” *supra* note 69 at 18, citing Owen Fiss, “The Fate of An Idea Whose Time Has Come: Antidiscrimination Law in the Second Decade after *Brown v Board of Education*” (1973-74), 41 U. Chicago L. Rev. 742 at 764, and the work of another US scholar Gold cited, Frank I. Michelman (*e.g.* “Welfare Rights in a Constitutional Democracy,” 1979 Wash. U. L. Q. 659, expounding on his previous work, “Foreword: On Protecting the Poor through the Fourteenth Amendment” (1969) 83 Harv. L. Rev. 7).

⁷⁴ “Cox, *ibid.*, at 110. Another article cited by Gold, Gerald E. Frug, “The Judicial Power of the Purse” (1978) U. Pa. L. Rev. 715 discusses the affirmative duties imposed by the courts in “institutional contexts” under equal protection but notes the potential impact of the recent Supreme Court decision, *Maher v. Roe*, 97 S. Ct. 2376 (1977) (denying that the equal protection clause is engaged by failure to fund abortion services).

With s. 15's "equal protection before the law" being such an obvious, intentional borrowing from the US Bill of Rights,⁷⁵ it seems safe to surmise that the meaning of equal protection does not omit such affirmative rights from its scope. This is not to say that the textual choice of "equal protection" was meant to import American equality doctrine *holus bolus* into Canada. The draft's protection of affirmative action programs in s.15(2) for instance, was a direct reaction against US jurisprudence. Rather, the borrowing was meant to introduce an "egalitarian concept" that the Supreme Court had indicated was absent from the *Bill of Rights* guarantee.⁷⁶ In the absence of additional refinements, though, NDP MP Pauline Jewett (along with women's groups and others) disparaged the draft as an unthoughtful "copying of American terminology" that would not be helpful, particularly as the US Supreme Court under the Fourteenth Amendment had applied lower levels of scrutiny to grounds such as sex.⁷⁷ This evidence points to a desire for *greater* protection than the Fourteenth Amendment in s. 15's text, not less. The intentional borrowing of the phrase "equal protection" lends credence that there was not in use at the time any "special" Canadian meaning to the term that was exclusively negative in scope.

In a paper analyzing the draft *Charter* widely circulated in the fall of 1980, Beverley Baines similarly stated that the reference to equality in the *Canadian Bill of Rights* reflected a "positive value sought" versus the negative rights connotation to "non-discrimination."⁷⁸ Accordingly, the "logical consequence" of entrenching an equality right was the "unprecedented" situation where government "legally . . . could be forced to enact legislation" through its own actions.⁷⁹ Driving home her point, she emphasized that there was "specific obligatory content to the right to equality," namely "'evening-up' the legal positions of disadvantaged groups relative to advantaged groups."⁸⁰ Anne Bayefsky writes that equality and non-discrimination are "positive and negative statements of the same principle," recognized in the language of three international treaties Canada ratified before patriation.⁸¹

⁷⁵ The Honourable Pierre Elliott Trudeau, *A Canadian Charter of Human Rights* (January 1968), as reprinted in Bayefsky, *Canada's Constitution Act*, *supra* note 9, 51 at 56-57.

⁷⁶ *Lavell*, *supra* note 11 at 1365; *A Canadian Charter of Human Rights*, *ibid.*

⁷⁷ *House of Commons Debates*, 32nd Parliament, 1st Session, No. 4 (October 23, 1980) at 4019. After these deficits were exposed, MPs almost never averred to American Fourteenth Amendment doctrine in either supporting or opposing the *Charter*.

⁷⁸ Beverley Baines, "Women, Human Rights and the Constitution," in Audrey Doerr and Michelle Carrier, eds., *Women and the Constitution* (Ottawa: Canadian Advisory Council on the Status of Women, 1981) 31 at 54 (*Women and the Constitution*). The paper was written in the fall of 1980 for a cancelled CACSW conference, circulated to women's organizations and cited in their Joint Committee Briefs, and was also referenced in House of Commons debates on the *Charter*.

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*, at 55.

Even if one could still argue that the status of positive rights within the original meaning of s. 15's draft text was ambiguous, it was proceeded by several changes and additions before it was finalized. Most significant were the replacement of the heading, "Non-discrimination Rights" with "Equality Rights," the addition of "equal benefit" and embedding "without discrimination" within the text to introduce the non-exhaustive list of prohibited grounds. These textual choices and the accompanying public explanations show what those involved in creating the final text were "trying to do,"⁸² namely create a comprehensive, positive statement of Canadians' entitlement to equality. All point to the erroneous nature of a "purposive" s. 15 doctrine that would marginalize positive rights according to a dichotomized conception of equality rights (positive/negative; nonjusticiable/non- or exceptionally justiciable).

As mentioned, the federal government explicitly acknowledged that one change was influenced by the Joint Committee testimony of national women's organizations: amending the title of s. 15 from "Non-discrimination Rights" to "Equality Rights." The National Association of Women and the Law asserted that such a change was required because non-discrimination was a "negative term," that "conveys only what should be avoided," rather than the "standard to which we aspire in Section 15";⁸³ the Canadian Advisory Council on the Status of Women (CACSW) (the government funded, ostensibly arm's length advisory body) concurred that such a change would signal "the positive, symbolic content of its introductory words."⁸⁴ The National Action Committee on the Status of Women (NAC) recommended generally that the text specify "that equality is a positive objective, and require[s] an evening-out process towards its achievement," echoing Baines.⁸⁵ It elaborated upon what it meant by a

⁸¹ Anne Bayefsky, "The Principle of Equality or Non-discrimination in International Law," (1990) 11 Hum. Rts. Q. 1 at 5. *International Convention on the Elimination of All Forms of Racial Discrimination*, December 21, 1965, 660 U.N.T.S. 195, article 1 (ratified by Canada November 13, 1970); *I.L.O. Convention Concerning Discrimination in Respect of Employment and Occupation (No. 111)*, June 25, 1958, 362 U.N.T.S. 31, article 1(a) (ratified by Canada November 26, 1965); *Convention on the Elimination of All Forms of Discrimination against Women*, December 18, 1979, G.A. Res. 34/180, U.N. GAOR 34th Sess., Supp. No. 46, at 193 (ratified on December 10, 1981).

⁸² Balkin, *Living Originalism*, *supra* note 24 at 265.

⁸³ Submission of the National Association of Women and the Law to the Special Joint Committee on the Constitution entitled, "Women's Human Right to Equality: A Promise Unfulfilled" (Ottawa: National Association of Women and the Law, 1980), online: Canada's Human Rights History, <<http://historyofrights.ca>> at 8-9 (NAWL Submission).

⁸⁴ CACSW, "Women, Human Rights, and the Constitution," (Submission to the Special Joint Committee on the Constitution, November 18, 1980), online: Canada's Human Rights History, <<http://www.historyofrights.com/committee/cacsw.pdf>> (CACSW Submission).

⁸⁵ NAC, "Presentation to the Senate House of Commons Special Joint Committee on the Constitution" (November 20, 1980) at 4, online: Canada's Human Rights History,

“positive objective” in its testimony, namely, similar to that which was contained in *CEDAW*.⁸⁶ According to NAC, this meant that the *Charter* should incorporate:

. . . economic equality, at least some measure of reproductive freedom, equal rights and responsibilities in marriage and for child care, a commitment to positive measures, legislation, establishment of courts, administrative measures and national machinery to pursue the objective of equality.⁸⁷

In questioning women’s representatives, Pauline Jewett also referred to the contribution of a clause concerning equal rights between men and women (ultimately taking form as s. 28) to this “positive thrust.”⁸⁸

Other members of the Committee commented that changing s. 15 to a statement of positive rights was an “excellent suggestion.”⁸⁹ In his January 12 statement outlining the changes to the *Charter* the government was prepared to accept, Minister of Justice Jean Chrétien began his comments on s. 15 as follows:

First, I want to state that I agree with the proposal made by the Advisory Council on the Status of Women and the National Association of Women and the Law that the section be entitled equality rights so as to stress the positive nature of this important part of the Charter of Rights.⁹⁰

Another change bearing upon the “positive” meaning of s. 15, is the inclusion of “equal benefit” as one of the equality rights. The original meaning of this phrase has a dual aspect. At one level, it was meant to negate one of the alternate reasons for dismissal of the sex discrimination claim in *Bliss*.⁹¹ As mentioned, in addition to denying that pregnancy discrimination was sex discrimination, the Court also upheld the law because it was for a “valid federal object”⁹² and because it pertained to the provision of benefits (not penalties).

< <http://historyofrights.ca/wp-content/uploads/committee/NAC.pdf> > (NAC Submission).

⁸⁶ *Supra* note 85.

⁸⁷ Testimony of Lynn MacDonald, President (November 20, 1980), Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, *Minutes of Proceedings and Evidence* (Ottawa, Supply and Services, 1980) at 9:59 (*Special Joint Committee Evidence*).

⁸⁸ Testimony of Lynn MacDonald, President (November 20, 1980), *Special Joint Committee Evidence*, *ibid* at 9:70 and Testimony of Mary Eberts, CACSW Legal Counsel (November 20, 1980), *Special Joint Committee Evidence*, *ibid* at 9:137.

⁸⁹ PC MP Flora MacDonald (November 20, 1980), *Special Joint Committee Evidence*, *ibid* at 9:125. See also the comments of NDP MP Pauline Jewett (November 20, 1980), *Special Joint Committee Evidence*, *ibid* at 9:67.

⁹⁰ (January 12, 1981), *Special Joint Committee Evidence*, *ibid* at 36:13.

⁹¹ *Supra* note 10.

⁹² See Mary Eberts, “Women and Constitutional Renewal,” in *Women and the Constitu-*

Consequently, the Court found it was outside the purview of the *Canadian Bill of Rights*' anti-discrimination guarantee.⁹³

Yet, "equal benefit" was to have a much more transformative impact on s. 15 rights beyond reversing this case, and contained a positive meaning that was well-understood to the federal government. In Committee hearings reviewing draft legislation that was to become the *Canadian Bill of Rights*, the government rebuffed attempts by the Canadian Bar Association to include a reference to "the 'benefits' of non-discrimination."⁹⁴ Legislative drafter Elmer Driedger advised against the change on the basis that it would "point inevitably to a different type of Bill of Rights to that which the present one purports to be. . .there was no intention [when the bill was first drafted] to get into the social welfare aspect of the modern concept of Bill of Rights."⁹⁵ Strayer comments that equal benefit "amounted to the entrenchment of a positive right. After all, the idea of equality of benefit had, in effect (if not this precise context) been examined and rejected throughout the federal-provincial dialogue on the *Charter* over the course of 12 years."⁹⁶

The change to include "equal benefit," once again, was advocated by women's groups who appeared before the Joint Committee in 1980. NAWL indicated that this was to help "guarantee to every person their human right to equality in the fullest sense," and ensure "equal rights to the benefits which governments provide,"⁹⁷ including "social welfare benefits programs."⁹⁸ CACSW maintained that "equal benefit" would ensure that courts understood that more than "protective laws" were subject to the equality guarantee.⁹⁹ The nature of these comments indicate the breadth that the term "equal benefit" was meant to convey. Again, Minister Chrétien in his statement to the Joint Committee commented favourably on these submissions and stated:

A provision on "equality rights" must demonstrate that there is a positive principle of equality in the general sense and, in addition, a right to laws which assure equal protection and equal benefits without

tion, supra note 78 at 11 for a contemporary critique of this aspect, which seemed to shield legislation passed for benign motives from scrutiny.

⁹³ McIntyre, *supra* note 13 at 135.

⁹⁴ Christopher MacLennan, *Towards the Charter: Canadians and the Demand for a National Bill of Rights 1929-1960* (Montreal: McGill-Queen's University Press, 2003) at 140.

⁹⁵ *Ibid.*

⁹⁶ *Canada's Constitutional Revolution, supra* note 68 at 265.

⁹⁷ NAWL Submission, *supra* note 83 at 10, emphasis in the original.

⁹⁸ Testimony of Pamela Medjuck, Member, National Steering Committee (December 9, 1980), *Special Joint Committee Evidence, supra* note 87 at 22:59. See also Mary Janigan, "What the Charter of Rights Means to You" *Toronto Star* (April 26, 1981) B1 at B4 (reprinted from the Montreal Gazette) (possible s. 15 claim for abortion access in remote communities).

⁹⁹ *Ibid.*

discrimination. To ensure the foregoing and that equality relates to the substance as well as the administration of the law, I would be prepared to accept an amendment to Section 15(l). . .¹⁰⁰

Subsequently in the House, Ray Chenier, Parliamentary Secretary to the Minister of Indian Affairs and Northern Development indicated that “the protections extended will indeed require action by the legislatures and courts in order to catch up with the principles Canadians share. This Charter has the dual purpose of correcting past injustices and establishing new standards for our treatment of special groups of Canadians, such as the handicapped and disabled.”¹⁰¹ This statement provides additional evidence of the government’s understanding of s. 15 as being more than an obligation of mere restraint.

The revised version of s. 15 derived from the Joint Committee’s recommendations (and what is in the *Charter* today) refers to discrimination only to introduce the grounds: “in particular, without discrimination on the basis of”. According to Bayefsky, s. 15’s legislative history explains the significance of the placement of “discrimination” in this subordinate clause. In the *Canadian Bill of Rights*, there were two separate rights, “equality before the law and protection of the law,” and the right to non-discrimination on the basis of proscribed grounds in the enjoyment of certain rights. This separation continued in subsequent federal proposals to the provinces until quite late in the process, when they were merged in a July 1980 draft. The title change to “Equality Rights” simply “confirmed the shift in emphasis,” that “without discrimination” remained in s. 15 “for the purpose of permitting a grammatical ‘because of’” linking the equality guarantee to the enumerated grounds of race, national or ethnic origin, colour, religion, age and sex. It would “therefore be a mistake to try to put the weight of the substance of ‘equality rights’ on the shoulders of the words ‘without discrimination.’”¹⁰² The emphasis, accordingly, was on equality as a positive entitlement. Shifting the emphasis to the negative right of non-discrimination does not therefore accord with the overall original meaning of the provision.

SECTION 15 — NOT AN ECONOMIC RIGHT?

What the Supreme Court has said about Socioeconomic Rights within S. 15

The Supreme Court of Canada has deflected the question about the extent to which socioeconomic rights are included in the *Charter*, such as rights to an adequate standard of living, housing, education, and health care. On the one hand, many, if not most of the s. 15 claims it has accepted have a socioeconomic component: the right to work in one’s given profession,¹⁰³ survivor’s pension

¹⁰⁰ (January 12, 1981), *Special Joint Committee Evidence*, *supra* note 87 at 36:14.

¹⁰¹ *House of Commons Debates*, 32nd Parl., 1st Sess., No. 7 (March 10, 1981) at 8102.

¹⁰² Bayefsky, “Defining Equality Rights,” *supra* note 69 at 27.

benefits,¹⁰⁴ unemployment insurance benefits,¹⁰⁵ health care,¹⁰⁶ spousal support,¹⁰⁷ and workers' compensation,¹⁰⁸ among others. Yet, one Supreme Court of Canada judge has said in relation to a s. 15 claim, that "the *Charter* is not a document of economic rights and freedoms," though "the nature, quantum and context of an economic prejudice or denial of such a benefit are important factors in determining whether the distinction... is discriminatory."¹⁰⁹

The Court's seemingly conflicted posture resulted in its focus (somewhat counter-intuitively) on intangible harm to one's dignity or sense of worth to constitute a violation of the right to equality, even in relation to claims rooted in concrete deprivation: manifest economic injustice, as in the *NAPE* case.¹¹⁰ There, the Newfoundland government reneged on its pay equity obligations relating to a case of long-standing unequal pay costing female workers millions. The Court found the government's actions to be discriminatory, though it upheld them under s. 1 based on an extremely thin evidentiary record regarding the province's economic crisis and purported lack of alternatives. Such ambivalence also facilitated a determination that material, economic deprivations could be "dignity affirming" (and therefore constitutional) in the "workfare" case of *Gosselin*,¹¹¹ or at least not dignity infringing, as in the survivor pension

¹⁰³ *Andrews*, *supra* note 16.

¹⁰⁴ *Hislop v. Canada (Attorney General)*, 2007 SCC 10, 2007 CarswellOnt 1049, 2007 CarswellOnt 1050, [2007] 1 S.C.R. 429 (S.C.C.).

¹⁰⁵ *Tétreault-Gadoury v. Canada (Employment & Immigration Commission)*, 1991 CarswellNat 829, 1991 CarswellNat 346, [1991] 2 S.C.R. 22 (S.C.C.); *Schachter v. Canada*, 1992 CarswellNat 658, 1992 CarswellNat 1006, [1992] 2 S.C.R. 679 (S.C.C.).

¹⁰⁶ *Eldridge v. British Columbia (Attorney General)*, 1997 CarswellBC 1939, 1997 CarswellBC 1940, [1997] 3 S.C.R. 624 (S.C.C.).

¹⁰⁷ *M. v. H.*, (1999), 1999 CarswellOnt 1348, 1999 CarswellOnt 1349, [1999] 2 S.C.R. 3, 43 O.R. (3d) 254 (note), 171 D.L.R. (4th) 577, 46 R.F.L. (4th) 32, 62 C.R.R. (2d) 1, 238 N.R. 179, 121 O.A.C. 1, [1999] S.C.J. No. 23 (S.C.C.). *Droit de la famille - 091768*, 2013 SCC 5, 2013 CarswellQue 113, 2013 CarswellQue 114, (*sub nom.* Quebec (Attorney General) v. A.) [2013] 1 S.C.R. 61 (S.C.C.).

¹⁰⁸ *Martin v. Nova Scotia (Workers' Compensation Board)*, 2003 CarswellNS 360, 2003 CarswellNS 361, [2003] 2 S.C.R. 504 (S.C.C.).

¹⁰⁹ *Egan v. Canada*, 1995 CarswellNat 6, 1995 CarswellNat 703, [1995] 2 S.C.R. 513 (S.C.C.) (*Egan*), per L'Heureux-Dubé J. (dissenting).

¹¹⁰ *Newfoundland (Treasury Board) v. N.A.P.E.*, 2004 SCC 66, 2004 CarswellNfld 322, 2004 CarswellNfld 323, [2004] 3 S.C.R. 381 (S.C.C.) (*NAPE*); Judy Fudge, "Conceptualizing Collective Bargaining under the Charter: The Enduring Problem of Substantive Equality" (2008), 42 Sup. Ct. L. Rev. (2d) 213 at para. 38.

¹¹¹ *Gosselin c. Québec (Procureur général)*, 2002 CarswellQue 2706, 2002 CarswellQue 2707, (*sub nom.* Gosselin v. Quebec (Attorney General)) [2002] 4 S.C.R. 429 (S.C.C.) (*Gosselin*). The thin line claimants must walk between their claim being "too economic" and "not economic enough" is best illustrated by contrasting *Gosselin* with *Symes v. R.*, 1993 CarswellNat 1387, 1993 CarswellNat 1178, (*sub nom.* Symes v. Canada) [1993] 4 S.C.R. 695 (S.C.C.) at para. 131, concerning the non-deductibility of child care expenses under the *Income Tax Act*. There, the Court stated that women's disproportionate *social*

reductions affecting young and old widows, respectively, in *Law*¹¹² and *Withler*.¹¹³ Shifting focus to intangible harms in cases of material deprivation also helps obscure governmental interests in cost containment for benefits programs.¹¹⁴

Additionally, while the Court has not definitively pronounced upon whether economic grounds are analogous, it has consistently refused to recognize grounds (or declined to answer the question) in relation to various occupational groups, such as agricultural workers.¹¹⁵ In determining whether grounds should be recognized as analogous to those enumerated in s. 15's open-ended list, the Court does not refer to the history of s. 15 concerning the origins of the non-exhaustive list of grounds but rather its own jurisprudence. Initially, the Supreme Court provided a flexible test for grounds to be determined "analogous" based social relations of privilege and subordination. However, the doctrine soon calcified into a requirement that grounds encapsulate characteristics that are "immutability" or "constructive immutability" (those that are only changeable at "unacceptable cost to personal identity," which the government has no "legitimate interest in expecting us to change to receive equal treatment").¹¹⁶ Notably, this "immutability" test was premised on the need to ensure recognition of a ground as analogous would "further the purposes of section 15." Such purposes, the Court professed, were focused on inherent human dignity.¹¹⁷ While the Court itself has not pronounced on the subject, a number of lower courts have interpreted the immutability requirement narrowly to reject "economic" analogous grounds that relate to poverty, ordinarily on the basis that poor people as a group have amorphous personal (inherent) characteristics, that they

costs of child care were not sufficient to ground the claim, as what Symes needed to show is that they bear a disproportionate *economic* burden.

¹¹² *Law v. Canada*, *supra* note 19.

¹¹³ *Withler v. Canada (Attorney General)*, 2011 CarswellBC 379, 2011 CarswellBC 380, [2011] 1 S.C.R. 396 (S.C.C.) (*Withler*).

¹¹⁴ Hester Lessard, "'Dollars Versus [Equality] Rights' Money and the Limits on Distributive Justice" (2012), 58 Sup. Ct. L. Rev. (2d) 299 at 325 (discussing the Court "frontloading the proportionality analysis" in distributive justice cases).

¹¹⁵ *Dunmore v. Ontario (Attorney General)*, 2001 CarswellOnt 4434, 2001 CarswellOnt 4435, [2001] 3 S.C.R. 1016 (S.C.C.); *Fraser v. Ontario (Attorney General)*, 2011 CarswellOnt 2695, 2011 CarswellOnt 2696, [2011] 2 S.C.R. 3 (S.C.C.). Jennifer Koshan summarizes the Court's six cases concerning occupational status as an analogous ground in "Inequality and Identity at Work" (2015) 38 Dalhousie L.J. 473.

¹¹⁶ *Corbiere v. Canada (Minister of Indian & Northern Affairs)*, 1999 CarswellNat 663, 1999 CarswellNat 664, [1999] 2 S.C.R. 203 (S.C.C.), reconsideration / rehearing refused 2000 CarswellNat 2393, 2000 CarswellNat 2394 (S.C.C.) (*Corbiere*) at paras. 13 and 14; Kerri A. Froc, "Immutability Hauntings: Socioeconomic Status and Women's Right to Just Conditions of Work under section 15 of the Charter," in Bruce Porter and Martha Jackman, eds., *Advancing Social Rights in Canada* (Toronto: Irwin Law, 2014) 187 at 196.

¹¹⁷ *Corbiere ibid.*, at para. 58.

could theoretically exit their straitened circumstances in the future or that government has a legitimate interest in having them do so.¹¹⁸

Legislative History Concerning Equality and Socioeconomic Rights

Under a hybrid originalist approach, whether and to what extent the framers and ratifiers of s. 15 contemplated that distributive claims and economic grounds would be included or excluded are not determinative in developing equality doctrine. These matters are not ones of original meaning, but rather original intended (or expected) applications — how framers and ratifiers thought doctrine would develop and how the provision would be applied. As noted above, interpreters should consider original expected applications as evidence that helps discern whether they are on the right track in ascertaining original meaning and the underlying principles guiding interpretation of a provision,¹¹⁹ but they are not definitive. If courts construe vague constitutional language in a way that conflicts with these original expected applications, it does not necessarily mean that our understanding of the original meaning is wrong; the very nature of the interpretive project is that it may result in “unexpected legal [e]ffects.”¹²⁰

¹¹⁸ *Tanudjaja v Attorney General (Canada) (Application)*, *supra* note 64; *Toussaint v. Canada (Minister of Citizenship & Immigration)*, 2009 FC 873, 2009 CarswellNat 2595, 2009 CarswellNat 5173 (F.C.), reversed 2011 FCA 146, 2011 CarswellNat 1943, 2011 CarswellNat 1446 (F.C.A.), leave to appeal refused 2011 CarswellNat 4397, 2011 CarswellNat 4398 (S.C.C.); *Affordable Energy Coalition, Re*, 2009 CarswellNS 79, (*sub nom.* Boulter v. Nova Scotia Power Incorporated) 2009 NSCA 17 (N.S. C.A.), leave to appeal refused 2009 CarswellNS 485, 2009 CarswellNS 486 (S.C.C.) (*Boulter*); *R. v. Banks*, 2007 ONCA 19, 2007 CarswellOnt 111, 275 D.L.R. (4th) 640 (Ont. C.A.), leave to appeal refused 2007 CarswellOnt 5670, 2007 CarswellOnt 5671 (S.C.C.); *Polewsky v. Home Hardware Stores Ltd.*, 1999 CarswellOnt 3500, 40 C.P.C. (4th) 330 (Ont. S.C.J.), reversed on other grounds 2003 CarswellOnt 2755, 66 O.R. (3d) 600 (Ont. Div. Ct.), leave to appeal allowed 2004 CarswellOnt 763 (Ont. C.A.); *Falkiner v. Ontario (Director of Income Maintenance, Ministry of Community & Social Services)*, 2002 CarswellOnt 1558, 59 O.R. (3d) 481 (Ont. C.A.), leave to appeal allowed 2003 CarswellOnt 1025, 2003 CarswellOnt 1026 (S.C.C.) (*Falkiner*) (receipt of social assistance analogous but “economic disadvantage” alone does not justify s.15 protection); and *Masse v. Ontario (Ministry of Community & Social Services)*, 1996 CarswellOnt 338, 134 D.L.R. (4th) 20 (Ont. Div. Ct.), leave to appeal refused 1996 CarswellOnt 1453 (Ont. C.A.), leave to appeal refused (1996), 40 Admin. L.R. (2d) 87 (note) (S.C.C.). See, however, the pre-*Corbiere* cases of *Schaff v. R.* 1993 CarswellNat 1070, (*sub nom.* Schaff v. Canada) 18 C.R.R. (2d) 143 (T.C.C.), leave to appeal refused (1994), 24 C.R.R. (2d) 376n (S.C.C.); *Dartmouth/Halifax (County) Regional Housing Authority v. Sparks*, 1993 CarswellNS 89, 101 D.L.R. (4th) 224 (N.S. C.A.) (*Sparks*); *R. v. Rehberg*, 1994 CarswellNS 410, 127 N.S.R. (2d) 331 (N.S. S.C.) (*Rehberg*), and *Federated Anti-Poverty Groups of British Columbia v. British Columbia (Attorney General)*, 1991 CarswellBC 349, 70 B.C.L.R. (2d) 325 (B.C. S.C.). Jessica Eisen critiques the flaws both with the Court’s immutability doctrine and the lower courts’ (mis)interpretations of it in, “On Shaky Grounds: Poverty and Analogous Grounds under the Charter” (December 2013) 2:2 Canadian Journal of Poverty Law 1.

¹¹⁹ This is essentially Balkin’s point, as I elaborate upon below (*Living Originalism*, *supra* note 24).

What assistance does history provide with respect to the inclusion of socioeconomic rights in s. 15, then? Some citizen groups made recommendations for explicit inclusion of socioeconomic rights in the draft *Charter*,¹²¹ which were not adopted. However, the lack of specific mention of such rights does not support the supposition that the framers and ratifiers meant to exclude their recognition in the existing *Charter* text. Rather than evincing an antipathy to such rights in the *Charter*, history shows that redistributive justice was part of Canadians' rights consciousness and that of their political representatives at the time of patriation. Further, this history also helps explain the meaning to be attributed to the inclusion of "equal benefit," a reference to social benefits provided by government.

Citizens and labour groups unsuccessfully (but emphatically) pressed government to include explicit references to socioeconomic rights first in the 1960 *Canadian Bill of Rights*.¹²² A 1968 paper, *A Canadian Charter of Human Rights*, drafted for the purposes of discussion with the provinces and published in the name of then-Minister of Justice Pierre Trudeau, was the first government publication setting out in detail the substance of the proposed *Charter*. He listed "equal protection of the law" as one of the rights to be included, and commented favourably on economic rights "which seek to ensure some advantage to the individual and which require positive action by the state," such as the rights to social security and an adequate standard of living.¹²³

¹²⁰ Randy E Barnett, "The Misconceived Assumption about Constitutional Assumptions," (2009) 103 Nw. U. L. Rev. 615 at 641.

¹²¹ See, for instance, Canadian Council on Social Development. "Social Policy and the Constitution of Canada," (3 December 1980), online: Canada's Human Rights History, <http://historyofrights.ca> (submission to the Joint Committee); the testimony of Nick Schultz, Associate General Council, Public Interest Advocacy Centre (December 18, 1980) *Special Joint Committee Evidence, supra* note 87, at 29:19 - 29:22 (on behalf of PIAC and National Anti-Poverty Organization); and the testimony of Diane Davidson, President, the Vancouver People's Law School Society (January 6, 1981), *Special Joint Committee Evidence, ibid.*, at 32:13. See, also Janice J. Tait, "Share and Share Alike" *Maclean's* (October 27, 1980) (advocating explicit constitutional recognition of "political, economic and social rights"). At the February 1981 Ad Hoc Conference, delegates also passed a resolution that the draft *Charter* should explicitly guarantee equality of economic opportunity in s. 7 (or that the guarantee be incorporated by reference through an "equal rights" purpose clause): "Summary of those *Resolutions Passed* at the Ad Hoc Conference on Women and the Constitution which deal with required amendments to the proposed Charter of Rights and Freedoms, together with commentary on the significance of the amendments for women and the *proposed wording* of the Charter, as amended," in *Equality Rights and the Canadian Charter of Rights and Freedoms, supra* note 69, 635 at 639 ("Summary of the Resolutions"). See, however, "The Women's Conference" *Winnipeg Free Press* (February 17, 1981) 6 (editorial doubting the feasibility of entrenching equality of economic opportunity).

¹²² Christopher MacLennan, *Toward the Charter: Canadians and the Demand for a National Bill of Rights 1929-1960* (Montreal: McGill-Queen's University Press, 2003) at 133.

¹²³ *Supra* note 75 at 60.

The paper maintained recognition of economic rights was “desirable and should be an ultimate objective in Canada.”¹²⁴ In fact, in another 1968 paper authored by Trudeau entitled, *The Constitution and the People of Canada*, the government proposed that a “third objective for Confederation,” embracing “the general welfare and equality of opportunity for all Canadians in whatever region they may live, including the opportunity for gainful work, for just conditions of employment, for an adequate standard of living,” be reflected in the Constitution and find its realization through institutions provided for in the Constitution.¹²⁵

However, the government maintained that there were “good reasons for putting aside this issue [of explicitly recognizing economic rights] at this stage,” including the “considerable time” it might take to reach an agreement on the other rights and “the feasibility of implementation.”¹²⁶ As the “third objective” reflects, this did not mean economic rights were to be excised from the constitutional text the government *was* prepared to advance. For instance, the government referred to the possibility of the “egalitarian rights” specifying “areas of activity where discrimination might be forbidden,” including employment; admission to professions; education; use of public accommodation, facilities and services; contracting with public agencies and “acquiring of property and interests in property.” However, it noted that these “might be considered to be embodied in the ‘equality before the law’ clause...But just as it has been found desirable to detail certain aspects of ‘due process,’ it may also be useful to detail aspects of ‘equality.’”¹²⁷

Before the 1970 Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada (the Molgat-MacGuigan Committee), a number of anti-poverty groups, professors, the government of Manitoba, and others argued for socioeconomic rights to be explicitly included, such as the right to shelter and a minimum standard of living.¹²⁸ The National Council of

¹²⁴ *Ibid.*

¹²⁵ *The Constitution and the People of Canada: An Approach to the Objectives of Confederation, the Rights of People and the Institutions of Government*, as reproduced in Bayefsky, *Canada’s Constitution Act*, *supra* note 9, 78 at 80.

¹²⁶ *A Canadian Charter of Human Rights*, *supra* note 75 at 60.

¹²⁷ *Ibid.*, at 59.

¹²⁸ Cynthia Williams, in “The Changing Nature of Citizen Rights,” in Alan Cairns and Cynthia Williams, *Constitutionalism, Citizenship and Society in Canada* (Toronto: University of Toronto Press, 1985) 99 at 114 refers specifically to anti-poverty groups, but the transcripts reveal some professors and other citizens advocating for these rights as well, from a Xavier College professor (Testimony of Gregory MacLeod, (October 21, 1970), *Special Joint Committee of the Senate and House of Commons on the Constitution of Canada: Minutes of Proceedings and Evidence* (Ottawa: Queen’s Printer, 1970) (*Special Joint Committee Evidence* (1970)) at 3:21), a Prince George labour council representative (Testimony of Howard Webb (January 11, 1971), *Special Joint Committee Evidence* (1970), *ibid* at 30:49-50) to the President of the Lethbridge Chamber of Commerce (Testimony of Morley Tanner (January 13, 1971), *Special Joint Committee Evidence* (1970), *ibid* at 33:46). Dominique Clément highlights the representations of the

Women, advocating a strong guarantee of sex equality, squarely focussed on equal opportunity and the economic aspects of sex discrimination, including the sexist provisions of the *Canada Pension Act* affecting the beneficiaries of female pensioners, the inadequate protection of equality of opportunity in the *Public Service Employment Act*, and the failure to guarantee equal opportunity or conditions of work in the *Canada Labour (Standards) Code*.¹²⁹ The presentation by the disability rights group, Action League for the Physically Handicapped Advancement (ALPHA), also was framed in socioeconomic terms, asking for constitutional entrenchment of the right to accessibility, including in transportation, housing and public institutions.¹³⁰

Cynthia Williams argues that two authorities loomed large at the hearings, countering their presentations: a 1959 paper written by Bora Laskin (later Justice Laskin of the Supreme Court of Canada) that prioritized negative, political and legal liberties because they stood on a more “exalted plane” and testimony by Walter Tarnopolsky questioning the enforceability of socioeconomic rights.¹³¹ Tarnopolsky in fact took issue with the enforceability of *three* types of rights: economic, “egalitarian” and linguistic rights. He testified that he was not opposed to entrenching economic rights “as such,” but that these types of rights, as well as linguistic and equality rights, required “positive action” to implement and a “bill of rights of itself cannot do it.”¹³² Some on the Joint Committee challenged him on the basis that even political rights require a mechanism of enforcement apart from the rights themselves. Nevertheless, he maintained that principles concerning economic rights would be best in a “preamble or separately in another part of the Constitution,” potentially to be used by courts in cases of conflict, such as that which arose in the United States in relation to social welfare

Government of Manitoba as the only government supporting explicit inclusion of such rights: *Human Rights in Canada: A History* (Waterloo: Wilfred Laurier Press, 2016) at 81, citing *Special Joint Committee Evidence (1970)*, *ibid* at 3:112 (volume containing testimony from June 11, 1970). The analysis below benefitted from Clément’s presentation of the evidence before the Molgat-MacGuigan Committee, though we part ways on its significance.

¹²⁹ Testimony of S.F. Steadman and Ann Booth, (May 4, 1971), *Special Joint Committee Evidence (1970)*, *ibid* at 74:33 *et seq.*, especially at 74:35-37. The National Council also contested equality of opportunity being discussed only in relation to regional disparities rather than “under the basic fundamental human rights which we would like to see entrenched in the constitution itself” (*ibid* at 74:38).

¹³⁰ Testimony of William Owen, Chairman (April 1, 1971), *Special Joint Committee Evidence (1970)*, *ibid* at 62:32.

¹³¹ Williams, *supra* note 128 at 115, citing Bora Laskin, “An Inquiry into the Diefenbaker Bill of Rights” (1959) *Can. Bar. Rev.* 77 at 82.

¹³² Testimony of Walter Tarnopolsky (November 5, 1970), *Special Joint Committee Evidence (1970)*, *supra* note 128 at 8:14-15 and 8:25-26. Tarnopolsky maintained his position regarding economic rights during patriation, though he thought a bill of rights could “indicate guidelines for government policy,” and that government ought to enact “positive legislation in this field [economic rights]” and be a “protector and provider” (*supra* note 26).

measures and substantive due process.¹³³ Co-chair Mark MacGuigan also raised questions concerning enforceability in relation to ALPHA's proposal to entrench a right to accessibility. He stated that accessibility would go beyond the negative right against discrimination, and be "so broad that it is difficult for a court to say the government must do this or the government must do that, because our courts are not in the habit of compelling governments to do things".¹³⁴

The Committee ultimately recommended that a reference to the "promotion of economic, social and cultural equality" be included in a preamble to the Constitution;¹³⁵ similarly, the 1978 Lamontagne-MacGuigan Report on Bill C-60 (the precursor to the draft *Charter*) recommended that the *Charter* preamble include "recognition of economic rights as illustrated by the principles set out in the Universal Declaration of Human Rights."¹³⁶ Between the two reports, Canada ratified the *International Covenant on Economic, Social and Cultural Rights*,¹³⁷ but its influence had not yet permeated Canada's constitutional drafting. Subsequent history shows that it was most significant for countries that adopted constitutions several years (if not decades) after ratification.¹³⁸

During the 1980-81 patriation process, labour organizations, who played a major role in protesting the lack of inclusion of socioeconomic rights in the *Canadian Bill of Rights*, were sidelined from the debate over the draft *Charter* due to internal divisions over patriation.¹³⁹ At the Joint Committee examining the draft *Charter*, the NDP led the charge to advance amendments that would

¹³³ Testimony of Walter Tarnopolsky (November 5, 1970), *Special Joint Committee Evidence (1970)*, *ibid* at 8:14 and 8:16. Professor Ronald Atkey from the Faculty of Law, University of Western Ontario favoured referring to economic rights in a preamble, pointing to an example of the German Supreme Court where enshrined economic rights were used to strike down zoning principles because of interference with an individual's business interest ((November 10, 1970), *ibid* at 9:19). New Brunswick Human Rights Commission Chair and Professor Noel Kinsella (now Senator) favoured social and economic rights being included (somewhat implausibly) in a federal-provincial "convention" like the European system (May 18, 1971), *Special Joint Committee Evidence (1970)*, *ibid* at 78:20-23.

¹³⁴ (January 4, 1971), *Special Joint Committee Evidence (1970)*, *ibid* at 62:33.

¹³⁵ The Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada, *Final Report* (Ottawa, Queen's Printer for Canada, 1972) at 11.

¹³⁶ Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, "Second Report to Parliament, October 10, 1978," as reproduced in Bayefsky, *Canada's Constitution Act*, *supra* note 9, 417 at 421. The rights in the Universal Declaration include the right to work, protection against unemployment, equal pay, an adequate standard of living, "including food, clothing, housing and medical care and necessary social services" (Article 25).

¹³⁷ December 16, 1966, 999 U.N.T.S. 171 (ratified by Canada on May 19, 1976).

¹³⁸ Christof Heynes and Frans Viljoen, *The Impact of United Nations Human Rights Treaties on the Domestic Level* (The Hague, Netherlands: Kluwer Law International, 2002) at 16.

¹³⁹ Ed Finn, "Labor Criticized for 'Self-Censorship' on Constitution" *Toronto Star* (October 4, 1981) C2.

expressly reference socioeconomic rights, and even blocked Liberal and Conservative attempts to amend the text of s. 7 to refer to property rights while the issue of explicit inclusion in the *Charter* such rights remained to be considered.¹⁴⁰ The NDP signalled its intent to advance an amendment to include “lack of means” as a ground of discrimination under s. 15,¹⁴¹ however, events conspired to prevent the Committee from entertaining such an amendment.

The NDP caucus decided as a strategic matter to proceed with its amendments one at a time rather than a package.¹⁴² Seemingly in keeping with this strategy, when time came to deliberate on the s. 15 amendment, NDP Committee members opted instead to proceed with an amendment addressing economic rights under the s. 31 equalization clause.¹⁴³ Nevertheless, NDP MP Svend Robinson later in the hearing questioned Department of Justice drafter, Fred Jordan, about whether the s. 15 guarantee “should not be extended to the fundamental areas of employment, the right to a job, to housing and to public services.”¹⁴⁴ Jordan confined the substance of the government’s objection to jurisdictional complexity, namely that such inclusions would move beyond “relations between the state and individuals and. . .into the area of relationships between individuals themselves.¹⁴⁵ Similarly, when questioned by the NDP about its (ultimately unsuccessful) proposal to amend s. 31 to include right to a clean environment and a safe workplace, Minister Chrétien rebuffed it with some exasperation, equating it to “an amendment to inscribe in the constitution the

¹⁴⁰ Dwight Newman and Lorelle Binnion, “The Exclusion of Property Rights in the *Charter*: Correcting the Historical Record” (2015) 52 *Alta. L. Rev.* 543 at 554, referring to statements by NDP members at the Joint Committee meeting of January 23, 1981. Newman/Binnion (*ibid* at 555 and 558-59) and Martha Jackman (“Poor Rights: Using the *Charter* to Support Social Welfare Claims” (1993) 19 *Queen’s L.J.* 65 at 76) acknowledge the influence of provincial concerns (particularly from Saskatchewan) that a property rights clause would pose problems for regulation of land ownership and use (i.e. expropriation, zoning and environmental regulation) and nationalization of industries. Ultimately, by January 26, the federal NDP informed the government they would not support the constitutional package with a property amendment, and the Liberal government withdrew its support in the face of federal NDP and Saskatchewan NDP government opposition (Newman and Binnion, *ibid* at 555).

¹⁴¹ “God, Family Dignity, Values Enter Act’s Debate” *Winnipeg Free Press* (January 22, 1981) 18 (NDP MP Lorne Nystrom mentioning the amendment protecting the poor from discrimination as one that was to come).

¹⁴² *Ibid.*

¹⁴³ Comments by NDP MP Svend Robinson, (January 29, 1981), *Special Joint Committee Evidence, supra* note 87 at 48:17. The final version of the clause is contained in s.36 of the *Constitution Act, 1982* and expresses governments’ commitment to “promoting equal opportunities for the well-being of Canadians,” “furthering economic development to reduce disparity in opportunities,” and “providing essential public services of reasonable quality to all Canadians.”

¹⁴⁴ (January 29, 1981), *Special Joint Committee Evidence, supra* note 87 at 48:33.

¹⁴⁵ *Ibid.*

apple pie and the recipe of ma tante Berthe,”¹⁴⁶ rather than expressing any substantive concerns about inclusion of socioeconomic rights.

In House of Commons debates over the draft *Charter*, MPs commonly made speeches that touched upon protection of the poor in the *Charter* and distributive justice. Progressive Conservative MP Vince Danzer indicated that the *Charter* should commit to “equality under the Rule of Law for rich and poor alike. . .and equal protection against discrimination of all kinds, including discrimination because of sex, age, and economic means,”¹⁴⁷ echoed by his colleague Bob Corbett who sought protection for the “elderly poor.”¹⁴⁸ PC MP Thomas Siddon, spoke against the provision in the draft permitting constitutional amendment by referendum, stating that it might be used to “discriminate against a very significant and important minority group which receives a very important service from the government, such as welfare.”¹⁴⁹ NDP MP David Orklow quoted from Professor Frank Scott, who described the purpose of a bill of rights as “designed to shield the individual from abuses of government power, while at the same time a more positive role for the state in securing the economic basis for personal freedoms is also being stressed.”¹⁵⁰

Members of the government party also expressed these sentiments. Liberal MP David Weatherhead, echoing the comments of many others concerning the commitment to “equal opportunities for the well-being of Canadians” and equalization amongst the regions contained in draft s. 31. He indicated that, “[a]mong the rights we seek to enshrine in the Constitution are the rights of Canadians to share in the boundless wealth and opportunity”;¹⁵¹ Minister of Regional Economic Expansion, Pierre De Bané, indicated that “fundamental rights and equal opportunities” were “closely entangled.”¹⁵² Liberal MP Jean Lapierre hoped that “this constitutional resolution will bring about true equality,” particularly for women and their struggle for equal pay that “is not provided for in our constitution but I do hope our policy will go along those lines.”¹⁵³

Popular media reports on equality rights also confirm that the government and the “founding generation” very much considered the *Charter* a “document of economic rights and freedoms,” and that s. 15 in particular would assist in protecting people’s livelihoods.¹⁵⁴ One media outlet reporting on federal-

¹⁴⁶ (January 30, 1981), *Special Joint Committee Evidence, ibid* at 49:70.

¹⁴⁷ *House of Commons Debates*, 32nd Parl., 1st Sess., No. 7 (March 2, 1981) at 7800.

¹⁴⁸ *House of Commons Debates*, 32nd Parl., 1st Sess., No. 8 (March 18, 1981) at 8391.

¹⁴⁹ *House of Commons Debates*, 32nd Parl., 1st Sess., No. 7 (March 5, 1981) at 7953.

¹⁵⁰ *House of Commons Debates*, 32nd Parl., 1st Sess., No. (March 11, 1981) at 8134.

¹⁵¹ *House of Commons Debates*, 32nd Parl., 1st Sess., No. 7 (March 5, 1981) at 7931.

¹⁵² *House of Commons Debates*, 32nd Parl., 1st Sess., No. 3 (October 7, 1980) at 3341.

¹⁵³ *House of Commons Debates*, 32nd Parl., 1st Sess., No. 3 (October 7, 1980) at 3335.

¹⁵⁴ Canada is a notoriously difficult jurisdiction in which to conduct archival media research due to a lack of comprehensive digitized and searchable databases of pre-1985 news

provision negotiations on entrenchment, pointed to problems with the “checkerboard” protections from discrimination in employment under the *Bill of Rights* as part of the federal government’s motivation.¹⁵⁵ In the article, Prime Minister Trudeau is quoted from the May 1980 campaign trail: “[the] constitution will provide for Canadians, wherever they live, equal rights and equal opportunities.”¹⁵⁶ Government advertising and speeches touted the draft Constitution as allowing Canadians “equal opportunity” and protection against discrimination, to “move freely to any part of Canada, to seek a job, to buy a home, to raise a family in his or her traditions.”¹⁵⁷

“Equal opportunity” has a strong association with employment even on its own; the government’s use of the phrase in the aforementioned context implies that the *Charter* would help Canadians’ employment prospects.¹⁵⁸ A number of commentators at the time also made this connection, maintaining that the *Charter* could ensure “better rights for those being denied jobs, living accommodation or services,” invalidate labour laws excluding women from employment in mines due to “wishy-washy paternalism,” or protect persons with disabilities from economic exploitation through their exclusion from minimum wage legislation.¹⁵⁹ The “fight for economic equality” and the economic

articles. Accordingly, I have incorporated relevant media articles from 1980-81 referencing equality and discrimination through the available databases of some Western Canadian newspapers (from newspaperarchive.com), the *Globe and Mail*, the *Toronto Star*, and the *Maclean’s* archival database. I do not claim to have conducted a comprehensive search for all such articles throughout Canada. In relation to smaller presses, I focussed on syndicated columns and Canadian Press articles to avoid the possibility of idiosyncratic, regional meanings (and have so indicated in parentheses after the citation).

¹⁵⁵ Stephen Handelman, “Bill of Rights: A Moment of Glory Then Little for More than a Decade” *Toronto Star* (August 11, 1980) A8.

¹⁵⁶ *Ibid.*

¹⁵⁷ “Our Duty is Clear, Trudeau Says,” *Toronto Star* (October 3, 1980) A10; Government of Canada advertisement entitled, “At Last, A Charter of Rights for Canadians,” appearing in many Canadian dailies on March 21, 1981, including the *Toronto Star* at D15 (in particular, comments under the subheading, “It’s time to Write Women’s Rights”). Federal Labour Minister Gerald Regan was reported as criticizing employers’ reluctance to train women in non-traditional occupations rather than relying on foreign workers, stating the “entrenchment of a charter of rights. . . should provide sexual equality” (“Copp’s Says Remarks Helped” *Globe and Mail* (January 8, 1981) 4. Employment Minister, Lloyd Axworthy criticized preferential treatment of local workers by some provinces and Alberta’s human rights legislation precluding affirmative action, stating that “discrimination and barriers to worker mobility would be reduced if a charter of rights is enshrined in the constitution” (Marlene Orton, “Ottawa May Sue Alberta” (December 9, 1980) *Medicine Hat News* 1 (Canada Press)).

¹⁵⁸ *The Oxford English Dictionary Online* (June 2016), *sub verbo* “equal” (at 4(d), “equal opportunity,” with referenced examples from 1925, 1963, 1972-79 and 1984), online: Oxford University Press, < <http://www.oed.com> > .

¹⁵⁹ Susan Pigg, “Charter Could Bring Court Battles,” *Toronto Star* (November 7, 1981) A9 (quoting lawyer, Clayton Ruby); David Vienneau, “Native Rights to be Defined”

implications of discrimination, while not linked directly to the Constitution, was a theme at the time in the national women's magazine *Chatelaine* (whose former editor, Doris Anderson, played a pivotal role in *Charter* advocacy for women's rights).¹⁶⁰

Turning to the enumerated grounds, the federal government, in a draft *Charter* circulated to the provinces in July 1980, had omitted grounds entirely from the "Non-discrimination Rights." It reasoned that it was "very difficult to reach an agreement on a complete enumeration of these grounds," but its proposal was nonetheless designed to ensure that "all Canadians, regardless of race, national or ethnic origin, language, color, religion, age, sex, or any other similar grounds" receive equal protection of the law.¹⁶¹ In point of fact, this section was one of the most contentious of the government's draft amongst the provinces. Deputy Minister of Justice, Roger Tassé indicates that he sought the Prime Minister's counsel about the draft text. Tassé thought the proposal "problematic" because "the concept of non-discrimination was evolving quickly." At the same time, not specifying grounds of discrimination "would confer too great a discretion on the courts in the very definition of the basic grounds of the right to non-discrimination."¹⁶² For the October 6, 1980 draft *Charter* tabled before Parliament, the government took a conservative route: it went back to the *Canadian Bill of Rights* wording with an exhaustive list of grounds, "except for [the inclusion of] ethnic origin and age which are new."¹⁶³

However, the government was persuaded in the course of the Joint Committee hearings to change the list to a non-exhaustive one in light of submissions from organizations like CACSW, NAWL, the Canadian Human Rights Commission, the British Columbia Civil Liberties Association, and the Canadian Bar Association.¹⁶⁴ The latter pointed out that the exhaustive list of

Toronto Star (November 24, 1981) A12 (quoting lawyer, Mary Eberts); "Rights for Disabled in Charter Advocated" *Winnipeg Free Press* (November 26, 1980) 5 (Canadian Press).

¹⁶⁰ Suzanne Zwarun, "70s Gains, 80s Goals: Women's Rights", *Chatelaine* (January 1980) 31 at 54. The following multi-page articles are the other most significant examples: Eleanor Wachtel, "5 Clear Cases of Sex Discrimination (Women & Money 1980)", *Chatelaine* (March 1980) 44; Charlotte Grey, "What Will Unions Do for Women in the 80s?" *Chatelaine* (May 1981) 55; Myrna Kostash, "Women's Wages: A National Disgrace" *Chatelaine* (January 1982) 45.

¹⁶¹ "Charter of Rights and Freedoms, Background Notes, Tabled by the Delegation of the Government of Canada, July 5, 1980," as reproduced in Bayefsky, *Canada's Constitution Act*, *supra* note 9, 605 at 605.

¹⁶² Roger Tassé. *A Life in the Law — The Constitution and Much More: Memoirs of a Federal Deputy Minister of Justice* (Toronto: Carswell, 2013) at 203.

¹⁶³ "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," *ibid* at 748-749.

¹⁶⁴ These are amongst the small list of groups that the government acknowledged had influenced changes to s. 15's text: "Government Response," *supra* note 5 at 4. The

grounds conflicted with Canada's obligations under the *International Covenant on Civil and Political Rights*, which included a variety of additional grounds: language, political or other opinion, social origin, property, birth or other status.¹⁶⁵ Minister Chrétien explained the change in his statement to the Joint Committee:

I want to make clear that the listing of specific grounds where discrimination is most prohibited does not mean that there are not other grounds where discrimination is prohibited. Indeed, as society evolves, values change and new grounds of discrimination become apparent. . . . Because of the difficulty in identifying legitimate new grounds of discrimination in a rapidly evolving area of the law, I prefer to be open-ended rather than adding some new categories with the risk of excluding others.¹⁶⁶

In this, he echoed his previous comments to the Joint Committee after the government tabled the draft *Charter*. He spoke of rights that “will evolve in the society, will mature in the society and will be capable of precise definition,” so that perhaps they may first find expression in human rights legislation and be enforced through human rights commissions before “find[ing] their place in a Charter of Rights.”¹⁶⁷ Amongst the “evolving grounds” that would have been within the realm of contemplation at the time were ones related to socioeconomic status, which provinces began increasingly to include in their human rights legislation beginning with Newfoundland, who added “social origin” in 1970.¹⁶⁸

There is nothing in the legislative history to support the underlying, organizing principle behind the selection of the non-exhaustive list of grounds as

Canadian Bar Association did, however, question the enforceability of economic rights *per se*, such as a “right to a basic standard of living or a right to work”: Submission of the Canadian Bar Association to the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada” (November 28, 1980) (CBA Submission), at 13 (copy obtained from the files of the Canadian Bar Association); Canadian Bar Association, *Towards a New Canada* (Ottawa: Canadian Bar Association, 1978) at 16.

¹⁶⁵ *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171; CBA Submission, *ibid* at 4 of the addendum, “Study on the Charter and the Covenant”.

¹⁶⁶ (January 12, 1981), *Special Joint Committee Evidence*, *supra* note 87 at 36:15.

¹⁶⁷ (November 12, 1980), *Special Joint Committee Evidence*, *supra* note 87 at 3:60.

¹⁶⁸ *Newfoundland Human Rights Code*, R.S.N. 1970, c. 262, s. 7(1). Manitoba added “source of income” in 1974 (*Manitoba Human Rights Act*, S.M., C. 65); Québec added “social condition in 1975 (*Charter of Human Rights and Freedoms*, S.Q. 1975, c. 6); Ontario added “receipt of public assistance” in 1981 (*The Human Rights Code, 1981*, S.O. 1981, c. 53); and Nova Scotia added “source of income” in 1982 (*Human Rights Act*, R.S.N.S. 1969, c. 11 as amended).

While a polemic against such grounds, Thomas Flanagan provides a helpful chronology of their development: “The Manufacture of Minorities” in Neil Nevitte and Allan Kornberg, *Minorities and the Canadian State* (Oakville: Mosaic Press, 1985) 107 at 110-116.

immutability, much less that new grounds would be limited to those reflecting some degree of immutability (actual or constructive). Few used this term to describe the grounds. Of those who did, it was in relation to a proposal by some women's groups, and supported by NDP MP Pauline Jewett,¹⁶⁹ to have sex, race and other grounds subject to the highest level of scrutiny should the courts adopt the US tiered approach to scrutiny under equal protection jurisprudence.¹⁷⁰ In other words, when speakers addressed immutability it was done under the tacit assumption that not all grounds potentially recognized would be "immutable," though they discussed whether certain "immutable" grounds (like sex) should be explicitly subject to the highest "compelling reason" standard.¹⁷¹ This understanding was further reflected in the initial NDP proposal to include "lack of means" as a ground; the Canadian Human Rights Commission, NAC and NAWL's recommended inclusion of political belief, and many of the additional grounds identified by the CBA from the *International Covenant on Civil and Political Rights*.

Rather, the enumerated grounds reflected those that in the government's estimation had reached a certain stage of development in Canada's human rights culture and therefore were capable of definition and delegated discretion to the courts for the recognition of new grounds when they had evolved to this state.¹⁷² When addressing the proposed addition of political belief to the list of grounds, government representatives resisted on the basis that it lacked precision in definition.¹⁷³ Similarly, when asked about marital status and sexual orientation, Chrétien commented:

¹⁶⁹ Jewett proposed that s. 15 be revised to read, in part, "Race, sex, or other immutable characteristic shall never constitute a reasonable basis for distinction except as provided in subsection 3" (which would address affirmative action programs) (*House of Commons Debates*, 32nd Parl., 1st Sess., No. 4 (October 23, 1980) at 4020).

¹⁷⁰ Testimony of Pamela Medjuck, Member, National Steering Committee (December 9, 1980), *Special Joint Committee Evidence*, *supra* note 87 at 22:57-58, and the exchange between Svend Robinson and NAWL representative Deborah Acheson, *Special Joint Committee Evidence*, *ibid* at 22:66.

¹⁷¹ Testimony of NAC President Lynn MacDonald (November 20, 1980), *Special Joint Committee Evidence*, *ibid* at 9:69 ("I think the important point [in relation to the applicable level of scrutiny] is that some characteristics are immutable, sex is and race is, and we do go through different ages. Questions of income and social class, these are changeable things, people's occupations, their abilities and so forth").

¹⁷² Here, I rely upon James Kelly's analysis of the historical evolution of the treatment of grounds in the *Charter* and Joint Committee testimony to the same effect in dismissing the argument that inclusion of the ground of sexual orientation was contrary to "framers' intent" (*Governing with the Charter: Legislative and Judicial Activism and Framers' Intent* (Vancouver: University of British Columbia Press, 2005) at 97-102).

¹⁷³ Testimony of Minister Jean Chrétien and Department of Justice counsel and government constitutional drafter, Fred Jordan (January 29, 1981) at 48:23 and 48:30, respectively.

I do not intend to give you the definitions of this and that. I have explained earlier that we are writing a Charter of Rights. We do not want to include everything in that. This is exactly the type of problem. You put 50 words there, 100 words there, and I have to give you a definition that I do not want to give you because I do not want to accept the amendment. . . I am not here as a judge to determine what marital status means, what sexual orientation means.¹⁷⁴

Again, while not determinative under the type of originalist framework I am proposing, the fact that there is so little evidence to support an immutability requirement being what framers and ratifiers were “trying to do”¹⁷⁵ in setting out the non-exhaustive list of similar grounds is evidence of a problem in the Court’s approach. It suggests that the Court has misunderstood the underlying principles behind s. 15.¹⁷⁶ Its exaltation of inherent human dignity as the exclusive underlying principle for s. 15 is misplaced, and it has improperly excluded another viable underlying principle, namely “equality of power”¹⁷⁷ (or framed negatively, “anti-subordination”) as I will elaborate upon shortly.¹⁷⁸ Groups are subordinated for a variety of reasons, and unjust treatment based on immutable characteristics is only one (albeit important) facet. Recognition of an underlying principle of anti-subordination suggests that the Court should go back to its earlier, more flexible jurisprudence to determine analogous grounds and abandon immutability as the definitive factor.

¹⁷⁴ *Ibid.*, at 48:31

¹⁷⁵ Balkin, *Living Originalism*, *supra* note 24 at 265.

¹⁷⁶ *Ibid.*, at 227 (“If we treat too many of their explanations and expected applications as mistakes, we have probably misunderstood these [underlying] principles”).

¹⁷⁷ Davina Cooper explains the concept of “equality of power” as that which relates to “the way organising principles such as gender, age, class and race. . .skew people’s ability to exercise power. . .it centres the social and institutional support required for people to participate politically, economically, culturally and socially” (*Challenging Diversity: Rethinking Equality and the Value of Difference* (Cambridge: Cambridge University Press, 2004) at 80). Canadian theorists have similarly considered inclusion and equal participation as an underlying principle of the equality rights: Colleen Sheppard, *Inclusive Equality: The Relational Dimensions of Systemic Discrimination in Canada* (Montréal and Kingston: McGill-Queen’s University Press, 2010); or conversely, that exclusion that “causes or contributed to prejudice, stereotyping or disadvantage” should be the focus of s. 15: Hart Schwartz, “Making Sense of Section 15 of the Charter” (2011) 29:2 N.J.C.L. 201. The “opportunity for equal power” as part of an equality guarantee was even mentioned at the 1970 Molgat-MacGuigan Committee (Testimony of Professor Gregory MacLeod, (October 21, 1970), *Special Joint Committee Evidence (1970)*, *supra* note 128 at 3:21.

¹⁷⁸ This term is taken from US theorists, Reva Siegel and Jack Balkin in reference to the underlying principles of the Fourteenth Amendment “equal protection” guarantee. See Reva B. Siegel, “Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over *Brown*” (2004) 117 Harv. L. Rev. 1470; Jack M. Balkin and Reva B. Siegel, “The American Civil Rights Tradition: Anticlassification or Antisubordination?” (2004) 58 U. Miami L. Rev. 9.

Potentially, therefore, it would no longer be open to courts to reject out of hand analogous grounds with socioeconomic dimensions, such as poverty or homelessness, which has placed unnecessary barriers in the place of claimants. Groups have, on occasion, attempted to overcome this barrier by claiming multiplicity of grounds, for instance by including gender, race, disability, age or other grounds (on the basis that more women, racialized persons, persons with disabilities, seniors and young people are poor) or by claiming one ground only. In a few cases, poor people have successfully advanced s. 15 claims by combining socioeconomic grounds with enumerated ones.¹⁷⁹ In others, courts used multiple grounds against claimants to illustrate that poor people could not constitute a claimant group in and of themselves and/or to analyze each constituent groups in isolation to rule that there was no discernable of discriminatory impact (*e.g.* “women” versus “men”). The court did both in evaluating the lack of means-based electricity rates in *Boulter*,¹⁸⁰ and did the former by implication in *Tanudjaja*, concerning federal and provincial homelessness strategies (or more specifically, the lack thereof).¹⁸¹ In yet others, courts used the fact that the s.15 challenge was made on a single (non-poverty) ground to analyze the claimant’s poverty out of existence. This was the case in *Gosselin*, where Chief Justice McLachlin (for the majority) referred to the relative advantage referred to the relative advantage of “young people.”¹⁸²

INTERNAL LIMITATIONS AND UNDERLYING PRINCIPLE(S) OF SECTION 15

The Supreme Court’s Analysis of Section 15’s “Purpose”

In *Andrews*, the Court characterized the purpose of s. 15 in broad (and somewhat tautological) terms, “to ensure equality in the formulation and application of the law. The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration.”¹⁸³ It did so based upon a moderate regard for s. 15’s legislative history, the *Charter*’s structure, as well as the broader context human rights legislation in Canada, the

¹⁷⁹ *Falkiner*, *supra* note 118 (sex, marital status and social assistance); *Sparks*, *supra* note 118 (poverty combined with sex); *Rehberg*, *supra* note 118 (“single mothers on family benefits”).

¹⁸⁰ *Boulter*, *supra* note 118.

¹⁸¹ *Tanudjaja v Attorney General (Canada)*, *supra* note 64. The ground claimed was homelessness/poverty, but the court used the claimants’ list of groups that were disproportionately impacted by homelessness to the same effect.

¹⁸² *Gosselin c. Québec (Procureur général)*, 2002 CarswellQue 2706, 2002 CarswellQue 2707, (*sub nom.* Gosselin v. Quebec (Attorney General)) [2002] 4 S.C.R. 429 (S.C.C.).

¹⁸³ *Supra* note 16 at para. 16. My summary of s. 15 jurisprudence is derived in large part from Froc, “Untapped Power,” *supra* note 18.

scholarly and philosophical works on the nature of equality, and domestic and international jurisprudence from the Court.

Justice McIntyre, speaking for the majority on this point, accepted that to read s. 15 as prohibiting all legislative distinctions would “trivialize” the rights guaranteed by the *Charter* and deprive discrimination analysis of content; on the other hand, requiring that distinctions be unreasonable or unjustifiable would not respect the analytic distinction between s. 1 justification and s. 15.¹⁸⁴ Instead, he proposed an “enumerated or analogous grounds” approach that contained a two-part test for discrimination, namely the claimant must show the law violated one of the equality rights and second, that the distinction, “whether intentional or not but based on grounds relating to personal characteristics of the individual or group . . . has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or withholds or limits access to opportunities, benefits, and advantages available to other members of society.”¹⁸⁵

McIntyre J. went on to acknowledge that discrimination required something more than distinction on a ground, in that, “the effect of the impugned distinction or classification on the complainant must be considered”: differential treatment would not necessarily amount to discrimination in all cases, and “identical treatment may frequently produce serious inequality”.¹⁸⁶ He was vague in providing further details on how to identify discrimination, though it was clear that the enumerated and analogous grounds under s. 15 were chiefly to function as the sorting mechanism, as distinctions based on “irrelevant personal differences,” would “rarely escape the charge of discrimination.”¹⁸⁷ Justice Wilson’s concurring reasons used a somewhat different lens, pointing to the framers’ intent in “enumerating the specific grounds in section 15” as suggesting that the purpose of equality required a focus on the vulnerability of disadvantaged groups, “discrete and insular minorities.”¹⁸⁸

The ambiguities over purpose and original meaning in *Andrews* haunted its subsequent jurisprudence. The Court soon fragmented into minority camps each with their own version of the *Andrews* test and all purporting to be justified based on s. 15’s purpose: one advanced by Gonthier J. based on McIntyre J.’s dicta was focused on whether the characteristic was “relevant” in light of the overall objectives of the legislation;¹⁸⁹ Justice L’Heureux-Dubé’s approach, premised on s. 15’s purpose as promoting human dignity, focused on whether a legislative distinction discriminated against a *group*, considering the group’s vulnerability

¹⁸⁴ *Ibid.*, at para. 44.

¹⁸⁵ *Ibid.*, at para. 19.

¹⁸⁶ *Ibid.*, at paras. 8 and 28.

¹⁸⁷ *Ibid.*, at paras. 8 and 19.

¹⁸⁸ *Ibid.*, at paras. 51-52.

¹⁸⁹ See for instance, *Thibaudeau v. R.*, 1995 CarswellNat 704, 1995 CarswellNat 281, (*sub nom.* *Thibaudeau v. Canada*) [1995] 2 S.C.R. 627 (S.C.C.) at 681-682 (S.C.R.).

and the importance of the interest adversely affected by the distinction;¹⁹⁰ and one led by McLachlin J. (and others) was based upon s. 15's purpose, which she characterized as preventing "the violation of human dignity and freedom by imposing limitations, disadvantages or burdens through the stereotypical application of presumed group characteristics rather than on the basis of individual merit, capacity, or circumstance." The latter implemented a straightforward reading of *Andrews* in which negative distinctions based on a ground would ordinarily constitute discrimination subject to exceptions if the law did not have the "effect of imposing a real disadvantage in the social and political context of the claim."¹⁹¹

Ten years after *Andrews*, the disparate jurisprudence and approaches led the Court in *Law v. Canada* to institute a new, additional requirement in the discrimination analysis that a claimant prove that the impugned law violated her "human dignity."¹⁹² Again ostensibly on the basis of a purposive interpretation of s. 15, the Court took as its starting reference point not the legislative context behind s. 15's entrenchment (which it never considered), but "the beginning of its s. 15(1) jurisprudence," and attempted to synthesize the disparate strands of the equality doctrine through the imposition of this new requirement.¹⁹³ It found that there had been "great continuity" in the jurisprudence on the purpose of s. 15, summarized as "assuring human dignity by the remedying of discriminatory treatment."¹⁹⁴

The Court, in *R. v. Kapp*,¹⁹⁵ later disavowed the "human dignity" approach under an avalanche of academic criticism (some of which was cited in the case), admitting that human dignity was "an abstract and subjective notion that. . . cannot only become confusing and difficult to apply; it has also proven to be an additional burden on equality claimants."¹⁹⁶ It decided instead, that the test

¹⁹⁰ *Egan*, *supra* note 109 at 543-544.

¹⁹¹ *Miron v. Trudel*, 1995 CarswellOnt 93, 1995 CarswellOnt 526, [1995] 2 S.C.R. 418 (S.C.C.) at para. 52.

¹⁹² *Supra* note 19 at para. 3.

¹⁹³ *Ibid.*, at para. 41. The *Law* test was based on three inquiries: (1) whether there is a differential treatment; (2) whether this treatment was based on enumerated or analogous ground; and (3) whether the differential treatment violated the claimant's human dignity. It considered four contextual factors: (1) whether the claimant suffered from pre-existing disadvantage; (2) whether there was "correspondence" between the legislative distinction and "the actual need, capacity, or circumstances of the claimant or others" (3) the "ameliorative purpose or effects of the impugned law upon a more disadvantaged person or group in society"; and (4) the "nature and scope of the interest affected by the impugned law." For scholarship disputing this supposed synthesis, see, for instance, *June Ross*, "A Flawed Synthesis of the Law" (2000) 11:3 Constitutional Forum 74.

¹⁹⁴ *Law*, *ibid* at paras. 42, 47, and 52.

¹⁹⁵ *R. v. Kapp*, 2008 CarswellBC 1312, 2008 CarswellBC 1313, [2008] 2 S.C.R. 483 (S.C.C.) (*Kapp*).

¹⁹⁶ *Ibid.*, at para. 22. For the impact of the human dignity requirement on equality cases, see Bruce Ryder, Cuidalia C. Faria & Emily Lawrence, "What's Law Good for? An

should be whether: “(1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?”¹⁹⁷ Once again, the Court labelled its approach purposive. In a later case applying *Kapp, Droit de la famille - 091768; Quebec (Attorney General) v. A*, the Court fragmented again on the question of whether a purposive interpretation of s. 15 meant that prejudice or stereotyping is required to find discrimination,¹⁹⁸ or whether a court may find discrimination based on disadvantage alone, when state action “widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it.”¹⁹⁹ Most recently, the Court appears to have accepted that a claimant may demonstrate discrimination by showing stand-alone disadvantage (unconnected to prejudice or stereotype) but has qualified it by referring to it as “arbitrary disadvantage.”²⁰⁰

Section 15’s Underlying Principles

I mentioned earlier that “underlying principles” function as building blocks for constitutional doctrine: they help us “make sense of the plan.”²⁰¹ According to Balkin, there are two types of underlying principles: “structural principles related to the functioning of the constitutional system” and “explanatory or implementing principles.”²⁰² In relation to the former, these are implied by the text and are part of original meaning; with respect to the latter, these are proto-constructions “on which other constructions build” to form constitutional doctrine.²⁰³ For “implementing” underlying principles, history acts as a resource; however, as Jack Balkin states, such principles “do not have to be stated in precisely the way that the adopting generation would have stated them”²⁰⁴ and may be informed by subsequent developments in the way that we understand rights. It is important to acknowledge, however, that underlying principles do not function to replace the text — unlike what has often occurred under a living

Empirical Overview of Charter Equality Rights Decisions” (2004) 24 Sup. Ct. L. Rev. (2d) 103; Bruce Ryder, “The Strange Double Life of Canadian Equality Rights” (2013), 63 Sup. Ct. L. Rev. (2d) 261 at para. 20.

¹⁹⁷ *Kapp, ibid.*, at para. 17.

¹⁹⁸ *Supra* note 107, at paras. 136-138, 149-150 and 162 (per LeBel J., dissenting on this point, but in the majority on upholding the legislation, due to Chief Justice McLachlin’s finding that the s. 15 violation was justified under s. 1).

¹⁹⁹ *Ibid.*, at para. 332, per Abella J. (for the majority on this point).

²⁰⁰ Jennifer Koshan and Jonnette Watson Hamilton, “The Supreme Court’s Latest Equality Rights Decision: An Emphasis on Arbitrariness” (May 29, 2015) (reviewing *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, 2015 CarswellNat 1585, 2015 CarswellNat 1586, [2015] 2 S.C.R. 548 (S.C.C.) (*Taypotat*)), online < ablawg.ca > .

²⁰¹ Balkin, “Nine Perspectives on Living Originalism” (2012) U. Ill. L. Rev. 815 at 851.

²⁰² *Ibid.*

²⁰³ Balkin, *Living Originalism*, *supra* note 24 at 260.

²⁰⁴ Balkin, “Nine Perspectives” *supra* note 201 at 852.

tree/purposivist approach in which the foundation of doctrine is previous precedents. Instead, here, “any resort to underlying principles must. . .re-emerge through the text.”²⁰⁵ This means that underlying principles must be at the same level of generality as the text (so that they do not impermissibly broaden or narrow the meaning), and they must be those that the text can reasonably bear.²⁰⁶

Section 15 contains at least two underlying principles. The first is a structural underlying principle, namely, that equality rights are not subject to internal limitations. By “internal limitation,” I mean the inclusion of justificatory criteria for curtailing a right within the right itself; the *Charter*’s text in a few places very clearly communicates internal limitations — for instance, s. 7’s “except in accordance with fundamental justice” and s. 13’s “except in a prosecution for perjury or for the giving of contradictory evidence.” In the case of s. 15(1), the underlying principle that emerges from its history is that s. 15(1) is a right subject only to explicit limitations contained in other parts of the *Charter* text.

Federal proposals for a charter of rights in the summer of 1980 contained a non-discrimination clause guaranteeing the “right to equality before the law and equal protection of the law without distinction or restriction other than any distinction or restriction provided by law that is fair and reasonable having regard to the object of the law,” and added a declaration that the section did not “preclude. . .any programme or activity authorized or pursuant to law that has as its object the amelioration of conditions of disadvantaged persons or groups” in order to overcome issues that were developing in American jurisprudence that deemed “affirmative action” programs using racial classifications unconstitutional.²⁰⁷

The internal limitation on equality rights in this draft, “other than any distinction or restriction provided by law that is fair and reasonable,” was an “early attempt at a general limitations concept” and dropped due to the fact that “not even this was a sufficient attenuation of egalitarian rights to attract provincial support, and. . .attracted much [public] criticism.”²⁰⁸ As well, the inclusion of the external limitation in the new s. 1 that would “permit limitations on non-discrimination rights that were necessary.”²⁰⁹

²⁰⁵ Randy Barnett, “Welcome to the New Originalism: A Comment on Jack Balkin’s Living Originalism” (2013) *Jerusalem Rev. of Legal Stud.* 1 at 7.

²⁰⁶ Balkin, *Living Originalism*, *supra* note 24 at 267.

²⁰⁷ “Rights and Freedoms within the Canadian Federation, Discussion Draft Tabled by the Delegation of the Government of Canada, July 4, 1980” at the Continuing Committee of Ministers on the Constitution, Montréal, Québec, July 8-11, 1980, as reproduced in Bayefsky, *Canada’s Constitution Act*, *supra* note 9, 599 at 601, Strayer, “In the Beginning,” *supra* note 8 at 19 citing *Regents of University of California v. Bakke*, 438 U.S. 265 (1978). This draft was a carry-over from drafts provided earlier in 1978 and 1979, though these contained slightly different wording of the subsection concerning affirmative action programs.

²⁰⁸ Strayer, *Canada’s Constitutional Revolution*, *supra* note 68 at 263.

The breadth of the draft s. 1 (“reasonable limits as are generally accepted in a free and democratic society with a parliamentary system of government”) was subject to trenchant criticism before the Joint Committee, the most of any of the draft constitutional provisions. Roger Tassé explains that Cabinet therefore entertained the idea of not including any limitations on the rights guaranteed by the *Charter*. However:

[T]he US Supreme Court had recognized that rights did not have an absolute character and that inherent limitations existed. The American constitution contained no rules concerning how such limits could be established, or spelling out conditions for such limits. These issues were left to the American courts to determine. . . Cabinet decided that it would *be preferable to define such rules, and to stipulate principles to guide the courts* in their decisions on the issue of whether limits imposed by Parliament or a provincial legislature were justifiable or not.²¹⁰

Experts also opined that some explicit limitations were *necessary* to encourage judges to interpret rights and freedoms expansively, and adopt a critical stance towards their restriction.²¹¹ Minister Chrétien reiterated before the Joint Committee that *the text* specified the limitations to the rights in the *Charter*. He said, in relation to s. 1, “this text is a limit; it is an indication to the court how to interpret the Charter. . . if you do not put those words there it could lead to all sorts of change by the courts that will not give them any limits of interpretation . . . we have to make sure that the courts do not destroy all the previous work of the evolution of our society. I do think the Charter of Rights has its own limits, as you will find out when you are studying it, section by section.”²¹² Thus, the limitation clause in particular was a signal that in determining limitations on rights courts were to follow the explicit rules and principles in the text, rather than delegating the power to the judiciary to “read in” limits.

There were several proposals that s. 15 contain explicit, internal limitations. The Joint Committee heard a proposal by the Canadian Human Rights Commission to exempt s. 15 from s. 1 and include its own justificatory requirement in a separate subclause (negative legislative distinctions would need to be “justifiably necessary for reasons of compelling state interest”).²¹³ CACSW

²⁰⁹ Barry L. Strayer, “The Evolution of the Charter,” in Lois Harder and Steve Patten, eds., *Patriation and Its Consequences: Constitution Making in Canada* (Vancouver: UBC Press, 2015) 72 at 87.

²¹⁰ Tassé, *supra* note 162 at 255, emphasis added.

²¹¹ Tarnopolsky, *supra* note 26; See also Canadian Human Rights Commission, “Presentation by the Canadian Human Rights Commission to the Special Joint Committee on the Constitution of Canada” (November 1980) (Canadian Human Rights Commission Submission) at points 1.4 and 1.5, online: Canada’s Human Rights History, <http://historyofrights.ca>.

²¹² Testimony of Jean Chrétien (November 2, 1980), *Special Joint Committee Evidence*, *supra* note 87 at 3:15.

²¹³ Canadian Human Rights Commission, “Presentation by the Canadian Human Rights

recommended that s. 1 be eliminated (and replaced with a much more restrictive clause). In their view, the only appropriate limitation to equality rights would be a separate s. 15 subclause, which would state that they could be abridged only on the basis of a “reasonable distinction” and that “sex, race, national or ethnic origin, and religion will never constitute a reasonable distinction” except pursuant to affirmative action programs.²¹⁴ Similarly, NAWL recommended that s. 15 specifically provide that a “compelling reason” be provided for distinctions made on any of these aforementioned grounds.²¹⁵ These national women’s groups expressed deep concern about the courts potentially adopting a “reasonableness” standard for sex-based legislative distinctions under the “equal protection” guarantee pursuant to a US-style tiered, “levels of scrutiny” approach.²¹⁶

Neither the government nor the Joint Committee accepted any recommendation for embedded justificatory requirements within s. 15, despite the influence these groups had over other amendments to the *Charter*. Department of Justice lawyer, Fred Jordan, later explained in negotiations with women advocates in March 1981 that one of the reasons that the government rejected including a specific reference to a “compelling reason” requirement for sex-based distinctions, was that this was achieved by the revision to s. 1 requiring limitations to be “demonstrably justified.”²¹⁷

Section 15(2), concerning programs for “amelioration of the conditions of disadvantaged persons,” also was described in terms that strongly suggested it was to act as an explicit limitation on s. 15(1), should such a limitation be required to preserve such programs from being declared unconstitutional. In January 1981, the government recommended to the Joint Committee that the previous draft of the affirmative action provision be amended to relate back to the grounds of discrimination in s. 15(1), otherwise it “makes no sense in the context of Section 15.”²¹⁸ Chrétien indicated that s. 15(2) was to “permit

Commission to the Special Joint Committee on the Constitution of Canada” (November 1980) (Canadian Human Rights Commission Submission) at 3, online: Canada’s Human Rights History, <http://historyofrights.ca>.

²¹⁴ CACSW Submission, *supra* note 84 at 13.

²¹⁵ NAWL Submission, *supra* note 83 at 11.

²¹⁶ Their concerns were based on Baines’ analysis of the Canadian jurisprudence, *supra* note 78 at 52. On occasion, the media, too, referred to the possibility of Canadian courts drawing upon US jurisprudence to permit governments to “make choices between competing values” under s. 15: Janigan, *supra* note 98 at B4.

²¹⁷ Personal Notes of Marilou McPhedran dated March 18, 1981, “Ad Hoc Committee of Canadian Women Round II, 5 March 1981 — 22 March 1981,” at 61, 62, and 68, Marilou McPhedran Fonds, Toronto: York University Archives and Special Collections, (2007-020/005 File 4).

²¹⁸ Minister of Justice and Attorney General of Canada, Statement by the Honourable Jean Chrétien, Minister of Justice to the Special Joint Committee on the Constitution” (January 12, 1981) (copy on file from Tamra Thomson’s personal files). This portion of

programs designed to achieve equality which *might otherwise be precluded* by the rules against discrimination in subsection 15(1). . . simply an assurance that an affirmative action program on a recognized ground of non-discrimination will not be struck down *only because* it authorizes reverse discrimination for the purpose of achieving equality.”²¹⁹ The words “might otherwise” and “only because” suggest the qualified basis upon which s. 15(2) could be invoked by governments to act as an exemption: *if* s. 15 was interpreted such that the government’s ameliorative programs would violate it, and *if* reverse discrimination was the exclusive basis for the claim. This is contrary to the Court’s recent jurisprudence reading s. 15(2) as a complete defence/exemption to a s. 15 claim for “genuine” ameliorative programs.²²⁰ For our purposes, however, the salient point is that the textual choices surrounding s. 15(2) show that equality rights were structured to make limitations explicit and exclude “read in” limitations.

Accordingly, limitations “read in”²²¹ to s. 15 by the Supreme Court are inconsistent with this underlying, structural principle. This includes *de facto* limitations it imposed by way of two contextual factors courts were to consider under the *Law*²²² test to determine whether legislation violated a claimant’s human dignity, namely the law’s “correspondence” with the actual needs and circumstances of the claimant and whether the legislation has an “ameliorative purpose” relating to a less-disadvantaged group. The Court applied these factors in a manner that permitted justificatory assessments of the reasonableness or relevance of the distinctions in light of governmental purposes.²²³ Despite the waning influence of “human dignity” as a legal test for discrimination²²⁴ and

his statement does not appear to have been included in the official transcript of his testimony.

²¹⁹ Testimony of Jean Chrétien (January 12, 1981), *Special Joint Committee Evidence, supra* note 87 at 36:15, emphasis added.

²²⁰ Jena McGill also supports such a reading of s. 15(2) insofar as she believes the Court was wrong to extend the “exemptive reading of section 15(2)” beyond claims of “reverse discrimination” to those of underinclusion by historically subordinated groups.” Her analysis is based in part on framer’s intent: “Section 15(2), Ameliorative Programs and Proportionality Review” (2013), 63 Sup. Ct. L. Rev. (2d) 521 at 539.

²²¹ Sujit Choudhry and Claire E. Hunter, “Measuring Judicial Activism on the Supreme Court of Canada: A Comment on *Newfoundland (Treasury Board) v. NAPE*” (2003) 48 McGill L.J. 525 at 544, citing *Law v. Canada, supra* note 19, and the controversy in *Lavoie v. Canada*, 2002 SCC 23, 2002 CarswellNat 406, 2002 CarswellNat 407, [2002] 1 S.C.R. 769 (S.C.C.), as to whether s. 15 could be considered to contain internal limitations similar to s. 7.

²²² *Law v. Canada, ibid.*

²²³ Sheila McIntyre, “Deference and Dominance: Equality Without Substance” in Sheila McIntyre & Sanda Rodgers, eds, *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Markham, Ont.: LexisNexis Canada Inc., 2006) 95 at 102 *et seq.*

²²⁴ *Kapp, supra* note 195.

McLachlin C.J.'s recent reiteration of the importance of the "analytic distinction" between s. 15 and s. 1,²²⁵ these *de facto* limitations still exist in an altered form in current s. 15 doctrine. The more recent incarnations of such limitations include the requirement that claimants had to demonstrate the perpetuation of prejudice and stereotype, with the latter aligning to the "correspondence" factor;²²⁶ the "new" contextual factor relating to ameliorative benefits programs,²²⁷ and potentially by the recent emphasis on "arbitrary disadvantage" which suggests an internal limitation based on the "rationality" of the distinction.²²⁸

History supports another underlying purpose to assist interpreters in implementing the equality guarantees. Section 15 was meant to be more than a mere "anti-classification" provision that made certain distinctions impermissible. The Canadian Civil Liberties Association pressed the government to refer to "unreasonable distinctions," as it was concerned about past interpretations of "discrimination" to mean exclusively negative distinctions (such that legislation having beneficial effects on others would not be found to be discriminatory).²²⁹ CACSW also felt that "distinction" was preferable to discrimination because the latter implied "adversity," whereas the former could "also apply to a so-called beneficial distinction or beneficial discrimination" created for paternalistic reasons.²³⁰

At the Joint Committee, Progressive Conservative MP Flora MacDonald expressed "some hesitation" about replacing discrimination with "distinction" because discrimination "is what it is...no matter how you dress it up."²³¹ MP Svend Robinson proposed the NDP amendment that would have seen s. 15 introduce the grounds with the words, "without unreasonable distinction" rather than "without discrimination" to "mak[e] it very clear that we intend that we are not just dealing with a more narrow concept of discrimination which could be

²²⁵ *Quebec (Attorney General) v. A*, *supra* note 107 at para. 421 (concurring in the result).

²²⁶ Jennifer Koshan and Jonnette Watson Hamilton, "The Continual Reinvention of Section 15 of the Charter" (2013) 64 U.N.B. L.J. 19 at 39 citing *Withler*, *supra* note 113 at para. 36 ("The second way that substantive inequality may be established is by showing that the disadvantage imposed by the law is based on a stereotype that does not correspond to the actual circumstances and characteristics of the claimant or claimant group").

²²⁷ Koshan and Hamilton, *ibid.*

²²⁸ Jennifer Koshan and Jonnette Watson Hamilton, "The Supreme Court's Latest Equality Rights Decision: An Emphasis on Arbitrariness," *supra* note 200.

²²⁹ Testimony of Alan Borovoy, General Counsel (November 18, 1980), *Special Joint Committee Evidence*, *supra* note 87 at 7:14.

²³⁰ Testimony of Beverley Baines, legal counsel (November 20, 1980), *Special Joint Committee Evidence*, *ibid.* at 9:135. See also Denise Réaume, "Women and the Law: Equality Claims Before Courts and Tribunals" (1979) 5 Queen's L.J. 3 at 33 and 44 to similar effect (noting the presumption of discrimination where there was differential treatment on the basis of sex before Ontario human rights tribunals).

²³¹ *Ibid.*

interpreted in a somewhat restrictive way.”²³² The amendment received very little support from other Joint Committee members, and was voted down with no discussion on the point.

The historical record demonstrates that those involved in altering the text to include “equality before and under the law” as well as “equal protection and equal benefit of the law,” did so to ensure equality rights guaranteed “equality in the substance of the law” and went beyond notions of equal treatment in administration of the law and the distributions of penalties. While it would likely be a “bridge too far” to suggest that those involved in forming s. 15’s text had an idea of “substantive equality” comparable to contemporary conceptualizations, there is evidence of some nascent understandings that the *Charter* should guarantee more than formally equal treatment, but rather “true”²³³ or “genuine”²³⁴ equality, and to aim to “create a society in which there is real equality.”²³⁵ There was also an understanding of how equality was not simply a matter of the same treatment, but included effects-based considerations.²³⁶ The reaction to the odious finding in the *Bliss* case can be considered, at least in part, due to the Court’s wilful blindness to the fact that only women were adversely affected by pregnancy discrimination.²³⁷ In addition, working its way to the Canadian Human Rights Tribunal at the time of patriation was *Canadian National Railway v. Canada (Human Rights Commission)* (better known as the *Action Travails des Femmes* case), based on a complaint of systemic discrimination against women in “unskilled blue collar positions” at CN. The CHRT accepted the claim, and the Supreme Court of Canada ultimately upheld its order mandating an affirmative action program.²³⁸

²³² (January 29, 1981), *Special Joint Committee Evidence*, *ibid* at 48:20.

²³³ See the statement by MP Jean Lapierre, *supra* note 153.

²³⁴ Testimony of Doris Anderson, President of CACSW (November 20, 1980), *Special Joint Committee Evidence*, *supra* note 87 at 9:124.

²³⁵ National Association of Women and the Law, *The Costs of Being a Woman: 4th Biennial Conference, Halifax, February 1981* (Ottawa: National Association of Women and the Law, 1981) at 71 (Box 1149, File X10-36, NAWL Fonds, University of Ottawa, Archives and Special Collections).

²³⁶ In the Ad Hoc Conference of Women and the Constitution in which 1300 Canadian women from across the country debated and passed resolutions concerning required amendments to the *Charter*, they discussed adverse effects discrimination (University of Ottawa Archives and Special Collections, Ottawa, File No CD-X-10-38, “Cassette #7, Track 2”). In their advocacy, they also recognized that differential treatment may be “necessary. . . to attain the goal of equality” (Telex to Allan Blakeney from Ad Hoc Committee on Women and the Constitution and National Association of Women and the Law (undated, copy on file with the author from Tamra Thomson’s personal file) at 1-2).

²³⁷ Baines, *supra* note 78 at 49; Lynn Smith, “The Effect of the Charter on Sex Discrimination,” (February 19, 1983), in *The Charter of Rights Educational Fund, The Study Day Papers* (Toronto: Charter of Rights Educational Fund, 1985), 9.1 at note 30.

Consequently, Parliamentarians and citizen groups alike had the same entreaty: that the new equality rights were to reveal discrimination for “what it is” in the real world, rather than what judges had artificially construed it to mean through paternalistic or technical interpretation. The original meaning of discrimination was that it would be more than a distinction (unreasonable or otherwise, as McIntyre J. found in *Andrews*),²³⁹ though there was to be a close relationship between distinctions or exclusions connected to grounds and the meaning of discrimination.²⁴⁰ Its meaning and that of equality undoubtedly leaves much space for judges to construe constitutional doctrine. I therefore turn

²³⁸ 1987 CarswellNat 831, 1987 CarswellNat 905, [1987] 1 S.C.R. 1114 (S.C.C.). See also Eleanor Wachtel, “The True North Semi-Free” *Maclean’s* (February 11, 1980) 41 at 42 (regarding the rise of strong affirmative action legislation and growing recognition of “systemic discrimination”).

²³⁹ In a 1980 academic article concerning the meaning of discrimination under provincial human rights legislation, John Laskin wrote that, “Just as discrimination arguably means more than treating differently, nondiscrimination may mean more than merely treating identically” (J. I. Laskin, “Proceedings Under the Ontario Human Rights Code” (1979-81) 2 *Adv Q* 280 (1979-81), 283. See also A. Anne McLellan, “Equality Rights” (1981-82) 6 *Resource News* 9 at 10; Robert A Samek, “Untrenching Fundamental Rights” (1981-82) 27 *McGill L.J.* 755 at 767 (“absurd” that “equal before and under the law” means identical treatment).

²⁴⁰ The myriad number of laws that the popular press thought to be potentially vulnerable to s. 15 provides some additional evidence of this meaning in common usage: variations in minimum age laws for drinking, marriage, and voting; exclusion of women from combat training in the military or as prison guards; compulsory retirement age; minimum wage laws that differ by age; exclusion of the persons with mental disabilities from universities and those with physical disabilities from public transit, the armed forces or RCMP; gendered prostitution offences; gendered survivor or welfare benefits; and age-based pension benefits, among others. Nevertheless, legal commentators tempered such claims, indicating that discrimination did not mean “any distinction whatever,” even if based on an enumerated ground: “Attack on Charter over Age is Misdirected, Reader Claims” *Globe and Mail* (October 21, 1981) 7 (letter from lawyer, R.N. McLachlin). See, e.g., Janigan, *supra* note 98; Geoffrey Stevens, “Unfair to Bartenders,” *Globe and Mail* (October 17, 1980) 6; Leonard Shiflin, “Marital-Status Bias Survives,” *Toronto Star* (October 27, 1980) A8; Geoffrey Stevens, “Sexual Double Standard” *Globe and Mail* (November 18, 1980) 6; Geoffrey Stevens, “Various Discriminations” *Globe and Mail* (November 19, 1980) 6; Robert Sheppard, “Analysis: PM’s Proposed Charter of Rights Could Have Far-Reaching Effects” *Globe and Mail* (February 14, 1981) 13; W.A. Wilson, “Ottawa Playing Russian Roulette” *Lethbridge Herald* (March 26, 1981) A4 (syndicated column); Ian Urquhart, “What the Charter of Rights Means To You” *Toronto Star* (March 28, 1981) B1; Bill Fox, “Charter of Rights All But Sealed Up” *Toronto Star* (April 24, 1981) A10; Richard Gwyn, “Charter of Rights Could Do Some Surprising Things,” *Toronto Star* (April 25, 1981) B1; McKenzie, “Quebec Moves to End Forced Retirement” *Toronto Star* (May 29, 1981) A6; “Retirement Age May Go Up: Minister” *Toronto Star* (June 2, 1981) D19; “PM’s Charter Would Cancel 50 Quebec Laws” *Medicine Hat News* (June 18, 1981) 8 (Canadian Press); “The Proposal Before the Court: A Constitution Made in Canada” *Toronto Star* (September 29, 1981) D9; “Rights and Wrongs” *Globe and Mail* (October 14, 1981) 6; “Charter Gives Canadians ‘Paper’ to Fight for Rights” *Winnipeg Free Press* (November 6, 1981) 7 (Canadian Press); Robert Lewis, “An Act of Pride” *Maclean’s* (December 14, 1981) 26.

to the next of s. 15's underlying principles that interpreters could use to help make sense of it to build a more meaningful guarantee.

The Supreme Court has said that “substantive equality” is the “animating norm” of s. 15,²⁴¹ but has provided little that would assist in understanding exactly what it means by this term. C Lynn Smith and William Black recently attempted a synthesis of the Court’s dicta on substantive equality and described it as “going beyond the formal principle of equality,” “taking account of the outcomes of a challenged law or action, and the social and economic context in which a claim of inequality arises,” and “[h]arm in the substantive world can be caused just as much by neglecting to consider the needs of a group as by singling the group out for disadvantageous treatment.”²⁴² Its doctrine implementing this animating norm has varied dramatically in relation to fundamental elements, leading to jurisprudential ambivalence over such issues as the role of comparison, historical disadvantage, and intangible (“dignity”) harms versus material harms.

Should courts consider “human dignity” as *the* underlying principle for the implementation of s. 15? The Supreme Court continues to maintain that “human dignity” is the “essential value underlying the s.15 equality guarantee,” if not a legal test.²⁴³ It has even claimed that that the framers actually *intended* the centrality of human dignity in the s. 15 analysis, citing as its evidence, inexplicably, writings from Pierre Trudeau published in 1990, some 8 years after patriation.²⁴⁴

The historical record suggests a somewhat different orientation: human dignity was not particularly associated with equality rights and was simply one principle amongst many others in relation to the *Charter* as a whole. Government MPs would occasionally refer to the fact that the *Charter* was meant to express or affirm the dignity of human beings.²⁴⁵ However, these

²⁴¹ *Withler*, *supra* note 113 at para. 2.

²⁴² “The Equality Rights” (2013), 62 Sup. Ct. L. Rev. (2d) 301 at paras. 13-14.

²⁴³ *Kapp*, *supra* note 195 at para. 21.

²⁴⁴ *Granovsky v. Canada (Minister of Employment & Immigration)*, 2000 CarswellNat 760, 2000 CarswellNat 761, [2000] 1 S.C.R. 703 (S.C.C.) at para. 56 (quoting the following passage: “The very adoption of a constitutional charter is in keeping with the purest liberalism, according to which all members of a civil society enjoy certain fundamental, inalienable rights. . .they are beings of a moral order – that is, free and equal among themselves, each having absolute dignity and infinite value” (emphasis added by the Supreme Court)). The quotation is from a 1990 article, “The Values of a Just Society,” in Thomas S. Axworthy and Pierre Elliott Trudeau, eds., *Towards a Just Society: The Trudeau Years* (Markham: Viking, 1990) 357 at 363, republished in the book cited by Binnie J. (for the Court), *The Essential Trudeau*, Ron Graham, ed. (Toronto: M & S, 1998).

²⁴⁵ See, e.g., the following statements by: MP Yvon Pinard, *House of Commons Debates*, 32nd Parl., 1st Sess., No. 4 (October 15, 1980) at 3705; John Roberts, Minister of State for Science and Technology and Minister of the Environment, *House of Commons Debates*, 32nd Parl., 1st Sess., No. 7 (February 18, 1981) at 7439; MP David Berger, *House of Commons Debates*, 32nd Parl., 1st Sess., No. 7 (February 20, 1981) at 7528; Celine Hervieux-Payette, Parliamentary Secretary to the Solicitor-General, *House of*

comments must be contextualized in terms of the pitched battle that was waged, and ultimately lost at the Joint Committee, by Progressive Conservatives, who attempted to import the preamble from the *Canadian Bill of Rights* into the *Charter*.²⁴⁶ The preamble reads, in part, that Canada “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.”²⁴⁷ The government wished to reassure Canadians that it, too, respected human dignity along with all of the other values underlying the *Charter*, despite its lack of support for the preamble’s entrenchment.

Conservative members commonly connected the reference to God and to dignity during Joint Committee hearings and Commons debates: the preamble was meant to “emphasize that rights do not come from government but other sources . . . that there are powers beyond the government and people.”²⁴⁸ According to Bob Kaplan, Solicitor General, appearing before the Joint Committee and speaking for the government on this issue, the preamble’s contents were “controversial,” due to the lack of agreement with the provinces on suitable subject-matter for a preamble.²⁴⁹ Thus, the government did not have “any difficulty with the concepts contained in the Diefenbaker Bill of Rights,” however, the question was why the concepts in the *Bill of Rights* should take priority over the multitude of other constitutional values.²⁵⁰ Consequently, the “preamble needs to be amplified and to include other national values, and that this is not an exercise which can be engaged in in the course of constitutional patriation.”²⁵¹ NDP MP Svend Robinson concurred, stating that the preamble

Commons Debates, 32nd Parl., 1st Sess., No. 7 (February 23, 1981) at 7565; MP David Weatherhead, *House of Commons Debates*, 32nd Parl., 1st Sess., No. 7 (March 5, 1981) at 7931; MP Roland De Corneille, *House of Commons Debates*, 32nd Parl., 1st Sess., No. 9 (April 23, 1981) at 9447; Ron Irwin, Parliamentary Secretary to the Minister of Justice and Minister of State for Social Development, *House of Commons Debates*, 32nd Parl., 1st Sess., No. 8 (April 21, 1981) at 9354.

²⁴⁶ See, e.g., Progressive Conservative MP (and member of the Joint Committee), Jake Epp, taking the government to task because the Liberals voted against inclusion of the preamble: *House of Commons Debates*, 32nd Parl., 1st Sess., No. 7 (February 23, 1981) at 7386-7387; Progressive Conservative MP Walter MacLean, *House of Commons Debates*, 32nd Parl., 1st Sess., No. 7 (February 20, 1981) at 7523; and Progressive Conservative MP Girve Fritz, *House of Commons Debates*, 32nd Parl., 1st Sess., No. (March 19, 1981).

²⁴⁷ *Supra* note 7.

²⁴⁸ Progressive Conservative MP David Crombie before the Joint Committee (January 22, 1981), *Special Joint Committee Evidence*, *supra* note 87 at 43:17. In addition to the Members’ statements in the House of Commons cited above, see also, for instance, Jake Epp’s comments before the Joint Committee (January 20, 1981), *Special Joint Committee Evidence*, *supra* note 87 at 41:97.

²⁴⁹ (January 19, 1981), *Special Joint Committee Evidence*, *ibid* at 40:32. “Report on the Preamble/Principles of a Constitution, July 24, 1980” in Bayefsky, *Canada’s Constitution Act*, *supra* note 9, 635.

²⁵⁰ Testimony of Bob Kaplan (January 20, 1981), *Special Joint Committee Evidence*, *ibid* at 41:12.

did not “do justice to some of the other concerns which should be contained in a preamble.”²⁵²

What emerges instead from the historical record is anti-subordination or equality of power as the *Charter*’s underlying principle, one which includes dignity injuries but is not limited to them.²⁵³ Instead, it concerns also the structuring of hierarchy, laws that “aggravate” or “perpetuate” the “subordinate status of a specially disadvantaged group,” which some have called the “group disadvantaging principle.”²⁵⁴ Minister Chrétien, speaking to his motion to establish a Joint Committee to study the *Charter* draft, emphasized the *Charter*’s significance as constitutionalizing universal human rights for Canadians, in light of Canada as a nation of immigrants “who fled oppression to seek freedom and opportunity in Canada.”²⁵⁵ Other politicians also specifically mentioned oppression experienced by immigrants in their home countries an impetus towards the enactment of the *Charter* in Canada.²⁵⁶ In perhaps the most poignant statement, Liberal MP (and chair of the Joint Committee), Serge Joyal described Canada as:

... a dream: a dream of equality, a dream of liberty, a dream in which the right to be different is guaranteed in the basic law, in which the rights of Canadians as Canadians, because they belong to this country ... whether they are men or women, native or from mother countries, or whether they are immigrants full of hope who have just arrived dreaming of liberty and justice.²⁵⁷

In his statement to the House of Commons, Jim Fleming, the Minister of State for Multiculturalism, also demonstrated the focus on protection of minority groups in arguing for the need of a written Bill of Rights. Fleming referred to “victims of discrimination” in Canada’s history, including Jehovah’s witnesses in Quebec being jailed and prohibited from worshipping, Hutterites in Alberta facing restrictions from purchase of land, women receiving unequal pay, persons of colour denied accommodations and work, and status Indians suffering as “victims of a gap” in jurisdiction between federal and provincial governments.²⁵⁸ It was therefore the “tyranny of the majority that minorities

²⁵¹ Testimony of Bob Kaplan (January 21, 1981) *Special Joint Committee Evidence*, *ibid* at 42:40.

²⁵² (January 21, 1981), *Special Joint Committee Evidence*, *ibid* at 42:42.

²⁵³ Siegel and Balkin refer to “dignitary and distributive injuries”: *supra* note 178 at 16.

²⁵⁴ *Ibid* at 10, citing Owen M. Fiss, *Groups and the Equal Protection Clause* (1976) 5 Phil. & Pub. Aff. 107.

²⁵⁵ *House of Commons Debates*, 32nd Parl., 1st Sess., No. 3 (October 6, 1980) at 3284. *House of Commons Debates*, 32nd Parl., 1st Sess., No. 11 (November 9, 1981) at 12635.

²⁵⁶ See, for instance, the statements by Liberal MP David Weatherhead, *House of Commons Debates*, 32nd Parl., 1st Sess., No. 7 (March 5, 1981) at 7931; and Progressive Conservative MP Bill Vankoughnet, *House of Commons Debates*, 32nd Parl., 1st Sess., No. 7 (March 3, 1981) at 7864-65.

²⁵⁷ *House of Commons Debates*, 32nd Parl., 1st Sess., No. 7 (February 19, 1981) at 7476.

have to fear, not the tyranny of the judiciary. The constitutional bill would place minority and individual rights beyond the reach of political expediency.”²⁵⁹

At the Joint Committee, Minister Chrétien stated that the Charter was there for “*one reason*,” namely to “protect minorities against the abuses by the majority,” and affirmed that this was the “cardinal principle.”²⁶⁰ He was supported a few days later by Gordon Fairweather, Chair of the Canadian Human Rights Commission, testifying before the Joint Committee:

Our thesis is that the Charter of Rights and Freedoms are there to protect the weak against the strong, to protect those who have no power from those who have. . . and after three years’ experience we know that there are many in Canadian society who have no power.²⁶¹

Liberal MPs on the Committee expressed agreement with Fairweather’s perspective: Bryce Mackasey said after Fairweather’s presentation that his views were “quite compatible with my own,” and Ron Irwin indicated that, “there is nothing in your evidence that I substantially disagree with.”²⁶²

Time and again, other politicians averred to “tyranny of the majority” theme and referenced the same groups as Fleming, as well as Japanese Canadians interned in World War II and persons with disabilities, in describing the *raison d’être* behind entrenched rights guarantees in their House of Commons speeches.²⁶³ Prime Minister Pierre Trudeau, describing the efforts to have Québec sign on to the *Charter* later in the patriation process, stated, “[W]e have a duty to protect minorities, and we are trying to convince the government of Quebec to share in that duty of protecting minorities.” He went on in the same speech to draw links between these efforts and those to secure unanimous provincial agreement for removal of the s. 33 “notwithstanding” override from the gender equality clause, s. 28, to “protect these people.”²⁶⁴

²⁵⁸ *House of Commons Debates*, 32nd Parl., 1st Sess., No. 3 (October 6, 1980) at 3405.

²⁵⁹ *Ibid* at 3407.

²⁶⁰ (November 12, 1980), *Special Joint Committee Evidence*, *supra* note 87 at 3:27 and 3:29.

²⁶¹ Testimony of Gordon Fairweather (November 14, 1980), *Special Joint Committee Evidence*, *ibid* at 5:6.

²⁶² *Ibid* at 5:18 and 5:25.

²⁶³ See the following as representative statements: NDP MP David Orkilow, quoting Joint Committee testimony of human rights professor, Walter Tarnopolsky, *House of Commons Debates*, 32nd Parl., 1st Sess., No. 7 (March 11, 1981) at 8136; Liberal MP Roland De Corneille, *House of Commons Debates*, 32nd Parl., 1st Sess., No. 9 (April 23, 1981) at 9447; Minister of Justice, Jean Chrétien, *House of Commons Debates*, 32nd Parl., 1st Sess., No. 7 (February 17, 1981) at 7377 and 7379; Liberal MP David Berger, *House of Commons Debates*, 32nd Parl., 1st Sess., No. 7 (February 20, 1981) at 7528; Liberal MP Celine Hervieux-Payette, Parliamentary Secretary to the Solicitor-General, *House of Commons Debates*, 32nd Parl., 1st Sess., No. 7 (February 23, 1981) at 7564; Liberal MP Brian Tobin *House of Commons Debates*, 32nd Parl., 1st Sess., No. (March 11, 1981) at 8142, and Liberal MP Bob Rae, *House of Commons Debates*, 32nd Parl., 1st Sess., No. 9 (April 22, 1981) at 9403.

The inclusion of women and gender equality in their comments is particularly noteworthy, signifying that speakers had in mind more than mere numbers when speaking about “minorities,” but instead a lack of social and political power. Section 28 of the *Charter*, which guarantees “the rights and freedoms referred to in it” equally to “male and female persons,” contains the same underlying principle of anti-subordination that is applicable also to s. 15. Section 28’s requirement that *Charter* provisions be interpreted through a “gender equality lens,” using the conceptual frame of anti-subordination, means that courts must examine seemingly neutral constitutional concepts to determine whether they enforce gender hierarchy.²⁶⁵ Notwithstanding the fact that s. 15 and s. 28 were entrenched separately to perform different functions,²⁶⁶ the sections were meant to work together and employ the similar language of “equality”; therefore, they “ought to be read consistently in relation to core principles.”²⁶⁷ While not consciously grounded in a historical analysis, a number of constitutional scholars have conceptualized the equality guarantee as grounded in relations of power.²⁶⁸

CONCLUSION: A NEW SECTION 15 DOCTRINE BASED ON EQUALITY OF POWER / ANTI-SUBORDINATION?

Recognition of anti-subordination as s. 15’s underlying principle may require the Court to adjust its doctrine in relation to whether it is a necessary precondition to successful claims that claimants be from historically subordinated groups, for example. The Court first broached this issue in *R. v. Turpin*,²⁶⁹ concerning a distinction in the *Criminal Code* that permitted those in Alberta, but not those in the rest of Canada, from electing a judge alone trial over a jury trial when charged with murder. Justice Wilson, for the Court, transferred her dicta in *Andrews* employing the criteria of “discrete and insular minorities” as a manner of identifying analogous grounds of discrimination,²⁷⁰ to the finding of discrimination itself. In dismissing the claim, she indicated that,

²⁶⁴ *House of Commons Debates*, 32nd Parl., 1st Sess., No. 11 (November 9, 1981) at 12635.

²⁶⁵ Froc, “Untapped Power,” *supra* note 18 at 411, citing Siegel, *supra* note 178 at 1472-1473.

²⁶⁶ Froc, “Untapped Power,” *ibid* at 418; Katherine De Jong, “Sexual Equality: Interpreting Section 28,” in *Equality Rights and the Canadian Charter*, *supra* note 69, 493 at 526.

²⁶⁷ Froc, “Untapped Power,” *ibid* at 420.

²⁶⁸ See, for instance, Bruce Ryder, *supra* note 196 at para. 69; Margot Young, “Unequal to the Task: ‘Kapp’ing the Substantial Potential of Section 15” in *Supreme Court and Social Justice*, *supra* note 13, 182; Beverley Baines, “Is Substantive Equality a Constitutional Doctrine?” in Ysolde Gendreau, ed, *La doctrine et le développement du droit/Developing Law with Doctrine* (Montreal: Les Editions Thémis, 2005) 59 at 79. Notably, Baines acted as legal advisor to the Ad Hoc Committee on Canadian Women and the Constitution, whose members were the chief architects behind s. 28.

²⁶⁹ 1989 CarswellOnt 76, 1989 CarswellOnt 957, [1989] 1 S.C.R. 1296 (S.C.C.) (*Turpin*)

²⁷⁰ *Andrews*, *supra* note 16 at paras. 4-5, per Wilson J. concurring (non-citizens, as “discrete

“a finding that there is discrimination will, I think, in most but perhaps not all cases, entail a search for disadvantage that exists apart from and independent of the particular legal distinction being challenged.”²⁷¹ Justice Wilson’s reasons were, to some extent based on the fact that non-Alberta persons accused of murder composed a wholly artificial group that bore none of the “discrimination markers,” such as “stereotyping, historical disadvantage, or vulnerability to political and social prejudice”.²⁷² However, its potential application to exclude members of existing dominant social groups was directly challenged by Madam Justice McLachlin (as she then was) in *R. v. Nguyen; R. v. Hess*.²⁷³

In *Hess*, at issue was a section of the *Criminal Code* that criminalized sexual intercourse between men and young girls, which the accused men challenged as sex discrimination. McLachlin J. dissented from the majority’s rejection of the s. 15 claim. She protested the idea that men should be unable to challenge sex-based distinctions under s. 15 due to their lack of disadvantage, relying on men’s entitlement to s. 28 as a “universal” right. She stated that there was “no suggestion in that language [in *Turpin*] that men should be excluded from protection under s. 15 because they do not constitute a ‘discrete and insular minority’ disadvantaged independently of the legislation under consideration” and that the Court there “must be taken to have had in mind s. 28 of the Charter,” guaranteeing equal rights to men and women.²⁷⁴ Wilson J., for the majority, did not directly address this reading of *Turpin* in *Hess*. She instead characterized *Turpin* as requiring a “contextual analysis” beyond the legislative distinction. She decided the s. 15 claim against the two accused men on the basis that the equality guarantee does not invalidate legislation that, “as a matter of biological fact can only be committed by males.”²⁷⁵

By the time the Supreme Court heard the case of *Trociuk*,²⁷⁶ pre-existing disadvantage was a mere “contextual factor” to be considered along with many others, pursuant to the “human dignity” based analysis in *Law*. *Trociuk* was a “formal equality” case in which a man successfully challenged British Columbia legislation that permitted unmarried mothers to give their surnames to their newborn children without allowing input from “unacknowledged” fathers. There, the Court declared unanimously that the absence of historical disadvantage was not dispositive. Despite the lack of historical disadvantage,

and insular minorities. . . fall into an analogous category to those specifically enumerated in s. 15”).

²⁷¹ *Turpin*, *supra* note 269 at para. 45.

²⁷² Martha McCarthy & Joanna Radbord. “Foundations for 15 (1): Equality Rights in Canada” (1999) 6 Mich. J. Gender & L. 261 at 297.

²⁷³ 1990 CarswellMan 223, 1990 CarswellMan 437, [1990] 2 S.C.R. 906 (S.C.C.) (*Hess*).

²⁷⁴ *Ibid.*, at para. 79.

²⁷⁵ *Ibid.*, at paras. 37 and 41.

²⁷⁶ *Trociuk v. British Columbia (Attorney General)*, 2003 SCC 34, 2003 CarswellBC 1350, 2003 CarswellBC 1351, [2003] 1 S.C.R. 835 (S.C.C.).

Madam Justice Deschamps found the legislative distinction impugned the claimant's dignity by conveying the message that fathers' relationships with their children were less worthy of respect.²⁷⁷ The case has been criticized as "context stripping" and as enforcing traditional familial ideologies around biological parenthood that subordinate women.²⁷⁸

More recent cases have again emphasized the perpetuation of disadvantage as indicative of discrimination in the s. 15 analysis.²⁷⁹ However, while the Court has said that perpetuation of disadvantage "typically" occurs "when the law treats a historically disadvantaged group in a way that exacerbates the situation of the group,"²⁸⁰ it is not entirely clear whether it means to limit considerations of disadvantage to historically subordinated groups.²⁸¹ Further, the use of "arbitrary disadvantage" further obscures the issue of how relations of dominance and oppression are to be considered. And the Court is quick to note that dominant groups may still demonstrate that they have suffered discrimination based on stereotype.²⁸² Therefore, the answer remains that s. 15 claimants need not demonstrate historical disadvantage to be successful in their cases.²⁸³

The original meaning of "every individual" in s. 15 was to permit all persons to have access to the guarantee of equality.²⁸⁴ Yet, as I have explained, the

²⁷⁷ *Ibid.*, at paras. 20 and 21.

²⁷⁸ Hester Lessard, "Mothers, Fathers, and Naming: Reflections on the Law Equality Framework and Trociuk v British Columbia (Attorney General)" (2004) 16:1 C.J.W.L. 165. See also Beverley Baines, "Equality, Comparison, Discrimination, Status," in Fay Faraday, Margaret Denike, and M. Kate Stephenson, eds., *Making Equality Rights Real: Securing Substantive Equality under the Charter* (Toronto: Irwin Law, 2006) (*Making Equality Rights Real*) 73 at 92.

²⁷⁹ *Quebec v. A.*, *supra* note 107 at para. 332. Prejudice and stereotype were not mentioned at all in the context of the s. 15 analysis in *R. v. Kokopenace*, 2015 SCC 28, 2015 CarswellOnt 7168, 2015 CarswellOnt 7169, [2015] 2 S.C.R. 398 (S.C.C.); and *Taypotat*, *supra* note 200.

²⁸⁰ *Withler*, *supra* note 113 at para. 35.

²⁸¹ Abella J. in *Quebec v. A.*, *supra* note 107 stated that one may demonstrate discrimination in the absence of prejudice or stereotype by showing the state perpetuated "arbitrary disadvantage," which she defines as "state conduct [that] widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it" (at para. 332). She was in the majority on the s. 15 analysis, but only by virtue of McLachlin C.J.'s concurring decision. Seemingly consistent with her views in *Hess*, the Chief Justice simply stated that while prejudice and stereotyping are "useful guides," what constitutes discrimination is a contextual analysis and "pre-existing disadvantage of the claimant group" is one factor to be considered (at para. 418).

²⁸² *Withler*, *supra* note 113 at para. 36.

²⁸³ Koshan and Hamilton, "Continual Reinvention," *supra* note 226 at 42.

²⁸⁴ The original draft read "everyone," and faced criticism at the Joint Committee for being too ambiguous and potentially including corporations. The historical record has numerous references to the *Charter* providing protection to all individuals against government and transient majorities that might oppress them. See, for instance, the

“cardinal principle” of s. 15 is protection of oppressed groups. How do we reconcile the two? The acceptance of anti-subordination as s. 15’s underlying principle would require claimants to show, if not pre-existing disadvantage, then a connection between their circumstances and the manner in which dominant groups perpetuate social hierarchies, namely through rigid and stratified constructions of difference between privileged and subordinated groups, denigration of traits associated with marginalized groups, and the employment of subordinating stereotypes (rather than mere inaccurate generalizations).²⁸⁵

Obviously, this reduces the potential for dominant groups to successfully claim a s. 15 violation; however, this is entirely consistent with s. 15’s underlying principle. It does not preclude their access to s. 15. Men subject to negative economic and social consequences because of their caregiving or their employment in female-dominated fields would be obvious cases in which such a connection would be found. One may rationalize the result in *Benner*,²⁸⁶ in which the Court invalidated legislation that disadvantaged the male claimant in his citizenship status because he was born abroad to a Canadian mother rather than a Canadian father, on the basis that the claimant’s circumstances were connected to the patriarchal configuration of families with men as the social and legal “heads of household.” As critical theorists have long realized, patriarchy and other systems of subordination (of which law is a part) are not simplistic, totalizing systems which individuals from privileged groups are invariably rewarded and those from subordinate groups disadvantaged.

Such an approach, in my view, is more consistent with the anti-subordination principle than returning to a *Turpin*-like requirement of claimants demonstrating they suffer pre-existing disadvantage apart from the legislation. That kind of requirement potentially misses the law’s influence in constructing the denigrated status of subordinated groups, risks becoming mired in the complexities of privilege and disadvantage in subordination, and may obscure the discriminatory effects of laws that reinforce new forms of subordination.

This is, of course, one example. Other, related questions that would need to be addressed under s. 15 doctrine upon acceptance of anti-subordination as its underlying principle would include fundamental ones such as whether a test permitting claimants to show the existence of discrimination only through the perpetuation of “arbitrary” disadvantage, prejudice, and stereotype is adequate to encapsulate this principle and whether instead it should be expanded to allow

comments of Ron Irwin, Parliamentary Secretary to the Minister of Justice and Minister of State for Social Development: “I suggest that this *Charter of Rights* will . . . be a shield to protect the ordinary man on the street from legislative oppression and discrimination” (*House of Commons Debates*, 32nd Parl., 1st Sess., No. 8 (April 21, 1981) at 9352).

²⁸⁵ Froc, “Untapped Power,” *supra* note 18; *Quebec v. A.*, *supra* note 107 at 224 and 225 (discussing “stereotype”).

²⁸⁶ *Benner v. Canada (Secretary of State)*, 1997 CarswellNat 190, 1997 CarswellNat 191, [1997] 1 S.C.R. 358 (S.C.C.), additional reasons 1997 CarswellNat 3126, 1997 CarswellNat 3127, [1997] 3 S.C.R. 389 (S.C.C.).

a more robust consideration of the “perpetuation of oppressive power relations, denial of access to basic goods, and diminishment of self-worth,” as a number of scholars have suggested.²⁸⁷ It may even perhaps include the question of whether equality should be considered truly “comparative,”²⁸⁸ at least in the way comparison is conventionally understood. As Catherine MacKinnon points out, comparison itself is not a neutral mechanism but instead implicitly establishes the dominant as the norm to which subordinate groups must align themselves.²⁸⁹ Instead, anti-subordination would push us to think about inequality as a *relation*,²⁹⁰ which requires inquiry instead into how law is implicated in structuring hierarchical relationships of power.²⁹¹

Those who participated in making s. 15’s final text did not expect to be able to provide future generations with all of the answers as to what equality would or should look like in the 21st century and beyond. But these men and women, and indeed the entire “founding generation,” provided us with important resources to take up the challenge. They should not be squandered.

²⁸⁷ Koshan and Hamilton, “Continual Reinvention,” *supra* note 226 at 50, citing Sophia Moreau, “The Wrongs of Unequal Treatment” (2004) 54 U.T.L.J. 291. See also Sheila McIntyre, “Answering the Siren Call of Abstract Formalism with the Subject and Verbs of Domination,” in *Making Equality Rights Real*, *supra* note 278, 99; and Denise Réaume, “Discrimination and Dignity” (2003) Louisiana L. Rev. 1.

²⁸⁸ *Andrews*, *supra* note 16 at para. 26.

²⁸⁹ *Women’s Lives — Men’s Laws* (Cambridge, Mass: The Belknap Press of Harvard University Press, 2005) at 145.

²⁹⁰ McIntyre, *supra* note 287.

²⁹¹ Jennifer Nedelsky, *Law’s Relations: A Relational Theory of Self, Autonomy and the Law* (Oxford: Oxford University Press, 2011) at 236-37.