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CONSTITUTIONAL
FORUM
CONSTITUTIONNEL

Centre for Constitutional Studies/Centre d'études constitutionnelles

Volume 11, Number 4 Summer 2000/2001 Edmonton, Alberta

RIGHTS BROUGHT HOME: THE UNITED KINGDOM ADOPTS A "CHARTER OF RIGHTS"

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INTRODUCTION

On 2 October 2000, the United Kingdom brought into full force and effect its *Human Rights Act 1998*,[1] bringing forth a new era in the protection of civil and political rights in the UK. Although the *HRA* received Royal Assent on 9 November 1998, the government in Westminster deliberately delayed its full implementation in order to allow for a period of training and preparation in light of the legislation's significance and application to all areas of UK law.[2] The Act has, however, been in force in Scotland, Wales and Northern Ireland in relation to the activities of the new Scottish Parliament and the new Welsh and Northern Irish Assemblies, since the Acts[3] creating these bodies make it legally impossible for their legislatures and executives to act in contravention of *Convention* rights as defined in the *HRA*.[4] Already, in Scotland, this has led to a significant number of cases invoking the *HRA*.[5] The courts, as well as commentators, appear to be developing a heady interest in the comparative value of the jurisprudence of the *Canadian Charter of Rights and Freedoms*.[6] Given the similarities between *Convention* rights and *Charter* rights, and the test of proportionality used in both documents, it may not be long before *HRA* jurisprudence is of similar interest to judges, lawyers and academics on this side of the Atlantic. As a result, this article aims to provide an overview of the key provisions of the *HRA*, indicating its scope for comparative constitutional analysis.

Since this article is intended for a Canadian audience, I must note at the outset that the *HRA* is *not* the British equivalent of the *Canadian Human Rights Act*,[7] nor its provincial equivalents. Viewed from a European perspective, such statutes, while important, are not human rights acts. They are equality acts or anti-discrimination statutes, aimed at protecting an important but specific human right, namely the right to be free from discrimination. Like Canada, the UK has several anti-discrimination statutes in place,[8] although the extension of this legislation to grounds other than sex and race admittedly has been slow,[9] and not of uniform application throughout the kingdom.[10]

While the enactment of the *HRA* may well instigate change in the area of UK equality law,[11] the *HRA* itself is a far broader measure. It extends protection to a much wider range of rights and freedoms, including the

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1 (U.K.), 1998, c. 42 [hereinafter *HRA*].

2 Extensive training programs have been held throughout the country for the civil service, the judiciary and the legal profession. For details, see A. Finlay, "The Human Rights Act: The Lord Chancellor's Preparations for Implementation" [1999] 5 E.H.R.L.R. 512.

3 See further the *Scotland Act 1998* (U.K.), 1998, c. 46; the *Government of Wales Act 1998* (U.K.), 1998, c. 38; and the *Northern Ireland Act 1998* (U.K.), 1998, c. 47.

4 *HRA*, s. 1. *Convention* rights refers to rights enshrined in the Council of Europe's *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 221, Eur.T.S. 5. See *infra* text accompanying notes 14-31.

5 See, for example, *Starrs and Chalmers* v. *Procurator Fiscal, Linlithgow*, [1999] Scot. H.C. 241 and *Clancy* v. *Claird*, [1999] Scot. C.S. 266 concerning the independence of temporary and part-time judges, where reference was made to s. 11(d) of the *Charter* and *Valente* v. *The Queen*, [1985] 2 S.C.R. 673. The Scottish *HRA* cases are available online: <http://www.scotcourts.gov.uk> (last accessed: 1 October 2000).

6 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

7 R.S.C. 1985, c. H-6.

8 See the *Sex Discrimination Act 1975* (U.K.), 1975, c. 65 (augmented by European Community law) and the *Race Relations Act 1976* (U.K.), 1976, c. 74 (also augmented by European Community law).

9 It was not until 1995 that a third ground was added with the passage of the *Disability Discrimination Act 1995* (U.K.), 1995, c. 50.

10 Only Northern Ireland has legislation extending the prohibitions to the grounds of religion, political opinion and sexual orientation: *Fair Employment and Treatment (Northern Ireland) Order 1998*, S.I. 1998 (N.I. 21).

11 See further, B. Hepple, M. Coussey & T. Choudhury, *Equality: A New Framework - Report of the Independent Review of UK Anti-Discrimination Legislation* (Oxford: Hart Publishing, 2000) at 9.

right to life, the right to be free from torture, the right to liberty and security, the right to a fair trial, the right to freedom of expression, religion and assembly, and the right to respect for private and family life.[12] It also includes a right to the protection of property, a right to education, and a right to free elections,[13] and as such, is clearly more than an equality act. In short, the *HRA* is best viewed as a modern "Charter of Rights" for the UK.

"Rights Brought Home": The European Convention on Human Rights

Since the landslide election of the Labour Government in May 1997, the UK has embarked on an unprecedented package of constitutional reforms. These reforms have included the creation of new governments in Scotland, Wales and Northern Ireland; the abolition of hereditary peers and the election of a London mayor; and the introduction of a *Freedom of Information Act*.[14] The *HRA* however, in the words of the Lord Chancellor, "occupies a special place in the programme of reform,"[15] and within six months of Labour's election, a *Human Rights Bill* was placed before Parliament as part of its manifesto commitment to "Bring Rights Home."[16]

The rights to be "brought home" were those enshrined in the *Convention for the Protection of Human Rights and Fundamental Freedoms* (known as the *European Convention on Human Rights*),[17] the leading international human rights treaty,[18] and one to which the UK has pledged compliance since 1953.[19] Drafted in 1950 under the auspices of the Council of Europe,[20] and with the instrumental assistance of British officials,[21] the *Convention* enables both states and individuals to complain to an effective international tribunal (the European Court of Human Rights in Strasbourg, France) about alleged violations of certain fundamental rights. This has generated a significant body of case law[22] on the interpretation and application of what are called "*Convention* rights"[23] in the *HRA*. Since 1966, when the UK accepted the right of individual petition,[24] the *Convention* has also provided an important route for individuals (as opposed to states) to bring forth their complaints against the UK at the international level, many of which have been successful.[25] Taking a case to Strasbourg, however, is both costly and time-consuming, and the inability to litigate such rights effectively in British courts seemed contradictory in light of Britain's long-standing support for the *Convention* at the international level.

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12 These rights, derived from the substantive Articles of the *European Convention on Human Rights*, are reproduced in Part I of Schedule 1 of the *HRA*.

13 These rights, derived from the substantive Articles of the First Protocol to the *European Convention on Human Rights*, are reproduced in Part II of Schedule 1 of the *HRA*.

14 (U.K.), 2000, c. 36. See further, R. Blackburn and R. Plant, eds., *Constitutional Reform: The Labour Government's Constitutional Reform Agenda* (London: Longman, 1999).

15 Lord Irvine of Lairg, "Britain's Programme of Constitutional Change" (a speech to the University of Leiden, 22 October 1999), online: <http://www.open.gov.uk/lcd/speeches/1999/1999fr.htm> (last accessed: 1 October 2000).

16 In December 1996, a consultation paper entitled "Bringing Rights Home: Labour's Plans to Incorporate the European *Convention* into UK Law" was published by Labour MPs Jack Straw and Paul Boateng, and subsequently published in [1997] E.H.R.L.R. 71. On 23 October 1997, the *Human Rights Bill* received First Reading in the House of Lords, accompanied by the publication of a White Paper entitled *Rights Brought Home: The Human Rights Bill*, Cm 3782 (October 1997).

17 *Supra*, note 4.

18 Having attracted ratifications from 41 signatory states, the *Convention* grants a right of individual petition to roughly 800 million people in Europe. For general commentary, see D.J. Harris, M. O'Boyle & C. Warbrick, *Law of the European Convention on Human Rights* (London: Butterworths, 1995) and P. van Dijk & G.J.H. van Hoof, 3rd ed., *Theory and Practice of the European Convention on Human Rights* (The Hague: Kluwer Law International, 1998).

19 The Treaty Office of the Legal Affairs Directorate of the Council of Europe maintains a useful web-based record of all *Convention* ratifications at <http://conventions.coe.int> (last accessed: 1 October 2000).

20 The Council of Europe is an inter-governmental organisation devoted to the promotion of democracy, the rule of law and the protection of fundamental rights. Its seat is located in Strasbourg, France. Although often confused with the 15-member European Union, which also has facilities in Strasbourg, the Council is a separate and distinct organisation. Further information on the Council of Europe can be found on its website at <http://www.coe.fr> (last accessed: 1 October 2000).

21 See G. Marston, "The United Kingdom's Part in the Preparation of the European Convention on Human Rights 1950" (1993) 42 I.C.L.Q. 796.

22 Available online at <http://www.echr.coe.int/> (last accessed: 1 October 2000).

23 *HRA*, s. 1.

24 Cabinet memoranda, available to the public after the passage of 30 years, clearly show that the UK delayed its acceptance of the right of individual petition so as to ensure the passage of a limitation period which would prevent the Burmah Oil company from challenging the *War Damage Act, 1965* (U.K.), 1965, c.18 on *Convention* grounds. See further, Lord Lester of Herne Hill QC, "UK Acceptance of the Strasbourg Jurisdiction: What Really Happened in Whitehall in 1965" [1998] P.L. 237.

25 At the time of the introduction of the *Human Rights Bill*, it was widely known that the UK was second only to Italy in the number of cases it had lost before the European Court of Human Rights.

THE BRITISH MODEL OF INCORPORATION

The *HRA* was enacted to end this anomaly,[26] although it offers more than a one-line provision saying that from here on, *Convention* rights are British rights which can be litigated in British courts. A specific model of incorporation was adopted, giving the incorporation of the *Convention* into UK law a uniquely British structure. This structure was chosen after much consideration of various options, including the Canadian model of an entrenched bill of rights with a notwithstanding clause. The Labour government was, however, wary of adopting such a model, having no written constitution into which a new Bill of Rights could be easily inserted, and being reluctant to give judges the power to strike down Acts of Parliament given the respect afforded to the doctrine of parliamentary sovereignty. It also had to contend with the traditional hostility of some elements of the British Left to giving further power to what they see as an insulated and unrepresentative judiciary.[27] In the end, a "distinctive and original English form of incorporation"[28] was adopted, bearing some resemblance to the *New Zealand Bill of Rights of 1990*,[29] but with its own innovations.

In essence, the British model is one that allows the courts as much space as possible to protect fundamental rights and freedoms, but falls short of allowing a court to strike down or set aside Acts of Parliament. This ensures a degree of coherence within British law, reconciling the desire for the improved accessibility of the *Convention* with the traditions of the common law and in particular the doctrine of parliamentary sovereignty. It is also a model that works both with and through the common law since many of the rights guaranteed by the *Convention*, and now by the *HRA*, have their origins in the common law.[30]

This use of a particularly British model of incorporation also means that as comparative scholars we cannot simply look to the *Convention* and its jurisprudence to determine the law of the UK. We must also take into account the specific provisions of the *HRA*, the stated purpose of which is to "give further effect" to the rights and freedoms guaranteed by the *Convention*.[31] This purpose is accomplished through three main mechanisms, to be discussed below. Briefly, these mechanisms are a new rule of statutory interpretation, a new means of pressuring Parliament for change, and a new cause of action for a statutory duty now imposed on all public authorities.

i) The Interpretative Obligation

With respect to the new rule of statutory interpretation, the key provision is section 3 of the *HRA* and in particular the opening words. Section 3(1) provides that, "[s]o far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the *Convention* rights." This is a strong provision, the importance of which can best be understood by considering what would have been required had the opening words been "so far as it is reasonable" or "so far as it is necessary" to comply with Parliament's intentions. The use of "so far as it is possible" is in essence an exhortation from Parliament to "strive"[32] to

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26 As explained by Prime Minister Tony Blair in the preface to the White Paper *Rights Brought Home*, *supra* note 16 at 1.

27 K.D. Ewing and C.A. Gearty, *Freedom Under Thatcher: Civil Liberties in Modern Britain* (Oxford: Clarendon Press, 1990) at 262-275.

28 S. Kentridge QC, "Lessons from South Africa" in B. S. Markesinis, ed., *The Impact of the Human Rights Bill on English Law* (Oxford: Oxford University Press, 1998) at 25.

29 (N.Z.), 1990, No. 109. Section 6 of the *New Zealand Bill of Rights* requires that: "Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in (the) Bill of Rights, that meaning shall be preferred to any other meaning." This requirement does not, however, extend to statutory provisions which contain clear limitations of fundamental rights, since these are viewed as enactments which can not be given a meaning that is consistent with the protected rights.

30 The right to a fair trial in Article 6 of the *Convention*, the right to personal liberty in Article 5, and the right to freedom of expression in Article 10 are but three examples now set out in Schedule 1 of the *HRA*. Moreover, section 11 of the *HRA* makes it clear that the common law system for the protection of rights remains intact, and that the right to bring *HRA* proceedings is additional to any pre-existing proceedings under common law.

31 See the Long Title of the *HRA*, *supra* note 1. Note, however, that not all of the substantive Articles of the *Convention* have been incorporated into the *HRA*. Article 1 (concerning a state's obligation to secure *Convention* rights to everyone within its jurisdiction) and Article 13 (concerning the right to an effective national remedy) have been deliberately omitted, a fact which caused much consternation during the parliamentary debates. However, when pressed on the issue, the Lord Chancellor made a parliamentary statement to the effect that courts could, through section 2 of the *HRA*, "take into account" the Strasbourg jurisprudence on Articles 1 and 13, thereby acknowledging that a British court was not foreclosed from giving these Articles some degree of domestic effect: see U.K., H.L., *Parliamentary Debates*, vol. 583, col. 477 (18 November 1997).

32 This is the verb used by the Lord Chancellor: U.K., H.L., *Parliamentary Debates*, vol. 583, col. 535 (18 November 1997).

find a meaning which is compatible with *Convention* rights, even if this involves giving a meaning which the words of the statute would not ordinarily bear.[33]

This rule of statutory construction is a significant departure from the past, where the British courts could only take international treaties into account to resolve statutory ambiguities.[34] This rule operates like an over-arching *Interpretation Act*, requiring lawyers and courts alike to interpret all legislation, whether it be past, present or future legislation, and whether it be an Act, Regulation or Order, so as to give effect "so far as it is possible" to *Convention* rights. This is not only a significant change to British law, but one with major implications for the doctrine of precedent. Post-October 2, there may well be statutes requiring a fresh interpretation, and there may well be cases where a court or tribunal cannot be bound by a previous interpretation, even of a higher court, if the *Convention* was not used in the interpretation of that statute before the *HRA*'s coming into force. As stated in the Government's own guidance material to its departments, "[t]he fact that a court may have interpreted a law in a certain way before, does *not* mean that after the coming into force of the *Human Rights Act*, it will interpret the provision in that same way."[35]

In carrying out its obligation under section 3, UK courts may well make use of various interpretative techniques, many of which will be familiar to Canadian lawyers and academics. First and foremost, the *HRA* must be considered a constitutional instrument and as such, it should receive a generous and purposive interpretation, as was suggested recently by Lord Hope of Craighead in *R.* v. *Director of Public Prosecutions ex parte Kebeline*, albeit in *obiter*.[36] This in essence will require the courts to look at the substance of what is involved, avoiding what has been termed the "austerity of tabulated legalism."[37] The courts will also be required by section 2 of the *HRA* to "take into account" the decisions of the Strasbourg institutions, including the decisions of the now-abolished European Commission on Human Rights.[38] However, more recent Strasbourg decisions will likely have greater weight since it is a key tenet of Strasbourg jurisprudence that the *Convention* is a "living instrument" whose interpretation may change over time to reflect present day conditions.[39] This may also mean that the outcome of a past Strasbourg case in which a British government department was involved is not an infallible guide as to what may happen under the *HRA*.[40] Nevertheless, because British courts need only "take into account" the Strasbourg jurisprudence, which remains non-binding under domestic law, an independent and possibly influential alternative analysis may emerge.[41] We may also see greater interest in other Commonwealth and Privy Council decisions, particularly if such cases provide, in the words of Lord Bingham of Cornhill, now the senior Law Lord, "helpful answers to analogous questions."[42]

With respect to the interpretation of new legislation, section 19 of the *HRA*[43] requires the Minister in charge of a Bill to make a statement in Parliament about the Bill's compatibility with *Convention* rights and these "statements of compatibility" are reproduced on the face of every new British Act of Parliament. The current practice is for the Minister to make a statement of compatibility if legal advice indicates that it is "more likely than not" that the

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33 See further, Lord Lester of Herne Hill QC, "The Art of the Possible: Interpreting Statutes under the Human Rights Act" [1998] 6 E.H.R.L.R. 665. But see also, G. Marshall, "Interpreting Interpretation in the Human Rights Bill" [1998] P.L. 167.

34 *R.* v. *Secretary of State for the Home Department ex parte Brind*, [1991] 1 A.C. 696 (H.L.).

35 Home Office, "Core guidance for public authorities: a new era of rights and responsibilities" at para. 35, online: <http://www.homeoffice.gov.uk/HRAct/coregd.htm> (last accessed: 1 October 2000).

36 [1999] 4 All E.R. 801 (H.L.). See also, D. Pannick, "Principles of Interpretation of Convention Rights under the Human Rights Act and the Discretionary Area of Judgment" [1998] P.L. 545, relying to some extent on *R.* v. *Big M Drug Mart*, [1985] 1 S.C.R. 295, 18 D.L.R. (4th) 321. But see R.A. Edwards, "Generosity and the Human Rights Act: the right interpretation?" [1999] P.L. 400, relying on P. W. Hogg, "Interpreting the Charter of Rights: Generosity and Justification" (1990) 28 Osgoode Hall L.J. 817.

37 *Minister of Home Affairs* v. *Fisher*, [1980] A.C. 319 at 328G-H (per Lord Wilberforce).

38 Since the *Convention* was first drafted, it has been amplified by a number of Protocols, the most recent of which was Protocol No. 11 (Eur.T.S. No. 155), which came into force in November 1998. This Protocol provided for a significant restructuring of the Strasbourg organs, essentially replacing the previous two-tier structure of a part-time Commission and Court with a single, permanent, full-time Court. Under the old structure, the Commission had been primarily responsible for determining the admissibility of complaints, and section 2 of the *HRA* makes it clear that these decisions can be "taken into account" by the British courts.

39 Amongst the many examples of the application of the "living instrument" principle, see *Tyrer* v. *United Kingdom*, [1978] 2 E.H.R.R. 1 at para. 31 (E.Ct.H.R.) concerning the judicial imposition of corporal punishment and *Marckx* v. *Belgium*, [1979] 2 E.H.R.R. 330 at para. 41 (E.Ct.H.R.) concerning the rights of illegitimate children.

40 This is, in fact, the advice being given to government departments: see "Core guidance," *supra*, note 35 at para. 31.

41 See, for example, *Procurator Fiscal, Dunfermline* v. *Brown* (5 December 2000), D.R.A. No. 3 of 2000 (P.C.).

42 U.K., H.L., *Parliamentary Debates*, vol. 582, col. 1247 (3 November 1997).

43 This provision came into force on November 24, 1998: *Human Rights Act 1998 (Commencement) Order 1998*, S.I. 1998/2882.

provisions of the legislation will stand up to challenge on *Convention* grounds.[44] While these statements do not determine, as a matter of law, an Act's compatibility, they do suggest a legislative intention to comply with the *Convention*, which could be of subsequent interpretative value before the courts. The work of the proposed Parliamentary Committee on Human Rights may also offer further interpretative assistance since one of its tasks will likely be to examine and report on the compatibility of questionable draft legislation.

Two final techniques worth noting are the techniques of "reading down" and "reading in"—techniques which may appear to contradict a commitment to parliamentary supremacy but which are not unheard of in the common law.[45] By "reading down" a broadly phrased statute in order to comply with the *Convention*, the UK courts will be in the position of choosing between two interpretations of a statutory provision, and opting for the narrower interpretation in order to comply with the *HRA*. By "reading in," the courts will insert words into a statute so as to make its provisions compatible with the *Convention*, even though Parliament never intended such words to be enacted. Given that the scope for these techniques is very broad, their future use could well determine the true impact of the *HRA*.

ii) Putting Pressure on Parliament for Change

As for the second mechanism, the key provision is section 4 concerning the unique innovation known as the "declaration of incompatibility." Where it is not possible to construe primary legislation as being compatible with the *Convention*, the higher courts in the UK[46] may make a declaration of that incompatibility pursuant to section 4 of the *HRA*. Such a declaration does not strike down the legislation, nor does it affect the validity, continuing operation or enforcement of the incompatibility.[47] It does, however, provide a clear signal from the courts that the impugned legislation is not *Convention*-proof and should, in theory, put pressure on Parliament (and more precisely, the Government) to take remedial action. The possibility of a subsequent adverse decision from Strasbourg may also increase the pressure.[48] Although there are no guarantees, the current Government has stated that a declaration of incompatibility will "almost certainly" prompt legislative change[49] and in such cases, the *HRA* provides a fast-track procedure in Parliament for remedying the incompatibility.[50]

Lower courts and tribunals, however, do not have the power to make declarations of incompatibility. When faced with legislation which they cannot construe to be compatible with *Convention* rights, they must simply apply the legislation, incompatibility and all. It is, however, implied that all courts and tribunals can quash subordinate legislation that is not compatible with *Convention* rights, unless the subordinate provision has to say what it does because of a provision of primary legislation.[51] This refers to what has been described by those attending the *HRA* training sessions as the "inevitable incompatibility," and it would appear to be the one circumstance where a court or tribunal may not set aside incompatible subordinate legislation.

iii) The New Cause of Action Concerning Public Authorities

The third mechanism worthy of special attention is the new statutory duty created by section 6 of the *HRA* which requires all "public authorities" in the UK to comply with *Convention* rights, with even a failure to act to be construed as non-compliance pursuant to section 6(6). This provision vastly expands the scope for judicial review of the actions of both central and local governments, while also requiring public authorities to take human rights principles into account in their day-to-day decision-making. Litigants may also rely on their *Convention* rights in any court proceeding involving a public authority,[52] and a breach of the

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44 See Home Office, "The Human Rights Act 1998 Guidance for Departments" at para. 36, online: <http://www.homeoffice.gov.uk/HRAct/guidance.htm> (last accessed: 6 February 2000).

45 For a pre-*HRA* example of "reading down," see *R.* v. *Secretary of State for the Home Department ex parte Simms and O'Brien*, [1999] 3 W.L.R. 328, where the House of Lords held that on a true construction, the Prison Rules did not authorise a total ban on journalistic interviews with prisoners. For a pre-*HRA* example of "reading in," see *Lister* v. *Forth Dry Dock and Engineering Co. Ltd.*, [1989] 1 All E.R. 1134, where the House of Lords read in certain words to ensure the compliance of a UK measure with a European Community directive.

46 *HRA*, s. 4(5) defines "court" for the purposes of s. 4 to include the House of Lords, the Judicial Committee of the Privy Council and the Court of Appeal, among others.

47 *HRA*, *ibid.*, s. 4(6)(a).

48 The UK remains bound to abide by its *Convention* obligations at the international level and so incorporation has not foreclosed the possibility of litigants taking their cases to Strasbourg once they have exhausted all possible domestic remedies.

49 *Rights Brought Home*, *supra* note 16 at para. 2.10.

50 See *HRA*, s. 10 and Schedule 2.

51 See *HRA*, ss. 4(3) and (4).

52 See *HRA*, s. 7 which provides for two kinds of proceedings. The first is a "free standing case" under section 7(1)(a), where a litigant takes a public authority directly to court for acting in

section 6 duty may be remedied by such relief as the court considers "just and appropriate" including an award of damages.[53] There is, however, one important qualification. Public authorities do not act unlawfully if they are acting so as to give effect to incompatible primary legislation, or inevitably incompatible subordinate legislation, since to allow otherwise would effectively nullify an Act of Parliament and so destroy the clear intention of the *HRA* to preserve parliamentary sovereignty.

As for who is a "public authority" for the purposes of the new statutory duty, the scope for application is very wide since the term is not exhaustively defined in the *HRA*. According to section 6(3)(b), any person "whose functions are functions of a public nature," other than the Houses of Parliament,[54] must act in a way which is compatible with *Convention* rights. This imposes a function-based test which is a practical necessity given the extent of privatisation in the UK. It may also result in certain hybrid-bodies being both public and private depending on the nature of the particular activity under scrutiny. Take Railtrack for example. It is a private company that, in relation to its work as a railway safety regulator, is a public authority and must abide by the *Convention*, but which falls outside the *Convention* when acting as a commercial property developer. Group 4 is another example, since it acts as a public authority when transporting prisoners, but not when offering its services to a supermarket or entering into a contract for the purchase of land. At this stage, however, it is not clear as to what is a "public authority," a point well illustrated by the story circulating among British lawyers about the BBC, which apparently sought two legal opinions as to whether it is a public authority or not, and naturally received two different answers.

One proposition that is certain, however, is that all courts and tribunals will be considered "public authorities" under the *HRA*, since section 6(3)(a) expressly defines them as such. This has led to an interesting debate, reminiscent of the early days before *Dolphin Delivery*,[55] about the *Act*'s true scope and, in particular, the extent of its application to disputes between private parties. The shorthand used for this debate is whether the *HRA* has "horizontal" as well as "vertical" effect.[56] Since a court is itself a public authority, it is under a statutory duty to abide by the *Convention* and so the argument is made that it will therefore be acting unlawfully if it fails to develop the law (both statute law and common law) in a way which is compatible with *Convention* rights. This would appear to apply even when the litigation before the court is taking place between private individuals. In an annual lecture given to senior members of the judiciary, one of Britain's leading public lawyers, Professor Sir William Wade QC, took the position that this meant that the *HRA* had full horizontal effect.[57] However, despite his personal stature and the forum in which he announced his view, Wade's position has not been broadly accepted,[58] and it remains to be seen just how far the *HRA* will apply between private parties.

THE FLAWS IN THE MODEL

As with any constitutional compromise, the *HRA* does contain weaknesses and ambiguities, the seriousness of which depend on one's perspective. The *Act* is not entrenched and so could be repealed by a subsequent statute, although at great political cost given the apparent public support for its coming into force. Some may also argue that the *Convention* itself is out of date, drafted as it was to reflect the concerns of a post-World War II Europe, and what is needed is a tailor-made or home-grown British Bill of Rights. This argument has some appeal, particularly in light of the gaps in the *Convention*, such as the lack of a search and seizure provision, the absence of any employee rights, and the weakness of the current equality provision, which does not provide a freestanding guarantee.[59] However, once the *HRA* takes hold, many feel that the

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way that is incompatible with Convention rights. The second is a "piggyback" procedure under section 7(1)(b), where the litigant invokes his or her *Convention* rights in the course of other proceedings involving the public authority, such as in the course of a criminal trial or in judicial review proceedings.

53 See *HRA*, s. 8 and M. Amos, "Damages for breach of the Human Rights Act 1998" [1999] 2 E.H.R.L.R. 178.

54 The only clear exemption: *HRA*, s. 6(3).

55 *Retail Wholesale and Department Store Union, Local 580* v. *Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573.

56 See further, M. Hunt, " The 'Horizontal Effect' of the Human Rights Act" (1998) P.L. 423; I. Leigh, "Horizontal Rights, the Human Rights Act and Privacy: Lessons from the Commonwealth?" (1999) 48 I.C.L.Q. 57 and G. Phillipson, "The Human Rights Act, 'Horizontal Effect' and the Common Law: A Bang or a Whimper?" (1999) 62 Modern L.R. 824.

57 H. W .R. Wade, "Human Rights and the Judiciary" (1998) 5 E.H.R.L.R. 520 and H. W. R. Wade, "Horizons of Horizontality" (2000) 116 L.Q.R. 217.

58 See for example, the views of Lord Justice Buxton of the Court of Appeal in "The Human Rights Act and Private Law" (2000) 116 L.Q.R. 48.

59 The opening words of Article 14 reveal its dependent character: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground ..." A Protocol No. 12, which would provide an independent right not to be discriminated against by a public authority in respect of "any right set forth by law," is currently being considered by the member states of the Council of Europe to address this weakness: Hepple *et al*, *supra* note 11 at 9.

embedding of a human rights culture in Britain will eventually lead to an improved (and British) Bill of Rights, either by interpretation or enactment.

Changing the Culture

This embedding of a human rights culture is, in my view, the key consequence of the *HRA*. Its provisions, taken together, are intended to ensure a new human rights dialogue between the executive, the legislature and the courts, and it is hoped that human rights values will begin to permeate British public life. The invention of a "declaration of incompatibility" has wisely, within the British context, preserved the doctrine of parliamentary sovereignty while at the same time ensured that the debate concerning the remedying of incompatible legislation, and the consequent balancing of rights which that usually entails, will occur within the public rather than judicial arena. This enables both the media and interest groups to contribute to the debate through the ordinary political process, and may well be of interest to a Canadian audience long familiar with debates about the politicisation of the judiciary.

Canadian courts and lawyers will also find many fruitful comparisons between the guarantees of the Convention and those of the *Charter*, and the UK's incorporation of the former will hopefully lead to a greater appreciation of the value of international human rights law as a source of guidance in the domestic arena. The *HRA*'s coming into force may also lead to some interesting jurisprudential developments on what is public and what is private. In a world where private bodies, such as the mass media and multinational companies, may pose as significant a risk to the protection of human rights as various emanations of the state, a broader conception of public responsibility may be the *HRA*'s most lasting contribution. For now, however, we can only wait and see.❑

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TEMPTED BY RIGHTS: THE EUROPEAN UNION AND ITS NEW CHARTER OF FUNDAMENTAL RIGHTS

Ian Ward

In June 1999, the Cologne European Council resolved that "at the present stage of development of the European Union, the fundamental rights applicable at Union level should be consolidated in a charter and thereby made more evident."[1] This charter, the Council continued, "should contain the fundamental rights and freedoms as well as the basic procedural rights guaranteed by the *European Convention for the Human Rights and Fundamental Freedoms*[2] and derived from the constitutional traditions common to the Member States, as general principles of Community law."[3] The charter should "also include the fundamental rights that pertain only to the Union's citizens," and also those "economic and social rights" to be found in Article 136 of the *Community Treaty*.[4]

There is an immediate past history to this resolution. Article F2 of the *Maastricht Treaty on European Union* attempted to legitimate the proclaimed "new stage in the process of creating an ever closer union among the peoples of Europe" with the assertion that the "Union shall respect fundamental rights, as guaranteed by the *European Convention for the Protection of Human Rights and Fundamental Freedoms* ... [and] ... as they result from the constitutional traditions common to the member states."[5] Such rights would be respected "as general principles of Community law."[6] The fact that Article F2 was entirely non-justiciable, however, rather detracted from its impact.[7]

Debate about the status of Article F2 was further intensified in the context of the European Court of Justice's Opinion [ECJ] that the Council did not have the authority to accede to the *European Convention*.[8] Spotting the potential hazards which attached to the idea of incorporating the *Convention* into an established body of 'general' principles of law, the Court affirmed that whilst "[r]espect for human rights is therefore a precondition of the lawfulness of Community acts," as indeed Article F2 implied, accession to the *Convention* entailed "the entry of the Community into a distinct international institutional system."[9] Only a *Union Treaty* amendment, the Court concluded, could facilitate an act of such "constitutional significance."[10]

The Court's ruling, however, only seemed to intensify the Union's longing for rights. The *Amsterdam Treaty* proclaimed a redrafted Article F (now 6)[11], the first section of which added that "[t]he Union is founded on principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law,

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1 Presidency Conclusions, para. 45, Annex IV. The Conclusions can be found at <http://www.europa.eu.int/en/record/cologne.html>

2 *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, Eur. T.S. 5, 213 U.N.T.S. 221 [hereinafter the *European Convention*].

3 *Ibid.*

4 *Ibid.* at para. 46. This paper refers to various European treaties. It will be useful to briefly explain the content of those treaties and how they relate to each other. *Treaty on European Union*, signed at Maastricht and commonly known as the *Maastricht Treaty*, inheres the existing *European Community Treaty*, commonly known as the *Rome Treaty*, together with two new "pillars," on Justice and Home Affairs, and Common Foreign and Security Policy. The *Union* and *Community* treaties were consolidated further following the Amsterdam Council in 1997. The consolidated version is commonly known as the *Amsterdam Treaty*. The consolidated *Amsterdam Treaty*, including the *Union* and *Community* treaties can, be found at EC *Consolidated Version of the Treaty on European Union*, (1997) O.J.C. 340/145.

5 *Ibid.*

6 *Ibid.*

7 See D. Curtin, "The Constitutional Structure of the Union: A Europe of Bits and Pieces" (1993) 30 C.M.L. Rev. 17 at 20–1, 62–3 and 66–9, commenting at the time on the conceptual absurdity of trying to proclaim non-justiciable 'fundamental' rights.

8 Opinion 2/94 [1996] ECR I–1759. For a discussion of the implications of Opinion 2.94, see D. McGoldrick, "The European Union after Amsterdam: An Organisation with General Human Rights Competence?" in D. O'Keeffe & P. Twomey, eds., *Legal Issues of the Amsterdam Treaty* (Oxford: Hart Publications, 1999) 249 at 255–6.

9 Opinion 2/94, *supra* note 8 at 1787.

10 *Ibid.* at 1789.

11 The *Amsterdam Treaty* renumbered all Articles of the *Union* and *Community* Treaties.

principles which are common to the Member States."[12] The yearning for some kind of discernible Union public philosophy was further evidenced by the new Article 13 of the *Community Treaty* which pronounced that the Council "may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation."[13]

The charter that was finally adopted, with declaratory force, at the Nice Council in December 2000, contains fifty-four rights presented in seven "chapters."[14] We will take a closer look at certain aspects of the *Union Charter* in the final part of this article. But first we will consider two particular and suggestive contexts; that of the Community's own rather fraught experience of 'rights' jurisprudence, and that of the *Canadian Charter of Rights and Freedoms*.[15]

BEEN HERE, DONE THAT?

The European Community was tempted by rights from its very inception. Articles 9–36 and 48–56 of the *Rome Treaty*, relating to the free movement of goods and person, services and capital, were couched in terms of rights. Indeed, Article 48 expressly referred to a "right" of free movement for workers. Of course, it was a 'right' that was hedged by various "limitations justified on grounds of public policy, public security or public health," and cases such as *Van Duyn*,[16] and more recently *Rutili*[17] and *Konstantinidis*,[18] have graphically described the extent to which the 'right', as a gift of the member-states, falls somewhere short of being 'fundamental'.

The argument that a 'right' of free movement can only really make sense if it is couched as a 'human', rather than merely an 'economic' right has been voiced for some time.[19] Time and again, case law relating to the free movement of persons or services has revealed the difficulty in demarcating rights. In *Grogan*, it was plainly apparent that market 'rights' could not be distinguished from the infinitely more difficult 'human' variety.[20] Similarly, the definition of who actually qualifies as a 'worker', or a member of a worker's 'family', and is thus in possession of a 'right' to free movement, has proved to be a jurisprudential minefield.[21]

Unsurprisingly, the kind of problems encountered in the clash between 'market' and 'human' rights have been encountered in the equally vexed areas of social, legal and civil rights. Various agonies have been experienced in trying to make sense of mooted fundamental rights to "fair labour conditions," to fish, or to hear the reasons for decisions made by administrative bodies.[22] All kinds of rights have been tossed around as 'fundamental': some as fundamental human rights, some as fundamental social rights, some as fundamental legal rights.[23] But precisely what 'fundamental' actually means is anybody's guess.

Some of the most compelling examples of the inherent conceptual confusion which attaches to such

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12 The new Article 7 carries a collateral threat, for if the Council should "determine the existence of a serious and persistent breach by a Member State of the principles mentioned in Article 6.1," then it can, acting by qualified majority, "decide to suspend certain rights deriving from this Treaty to the Member State in question." For a discussion of Articles 6 and 7, see I. Ward, "Europe and the Principles of Article 6" (2000) 11 Kings College L.J. 105.

13 For commentaries on Article 13, see T. Hervey, "Putting Europe's House in Order: Racism, Race Discrimination and Xenophobia after the Treaty of Amsterdam" in O'Keeffe & Twomey, *supra* note 8 at 329; and C. Barnard, "Article 13: Through the Looking Glass of Union Citizenship 2" in O'Keeffe and Twomey, *supra* note 8 at 375.

14 Full text of the charter can be found online: Council of European Union, <http://db.consilium.eu.int> (last modified: 27 April 2001) [hereinafter the *Union Charter*].

15 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Canadian Charter*].

16 *Van Duyn* v. *Home Office*, 41/74 [1974] ECR 1337.

17 *Rutili* v. *Minister for the Interior*, 36/75 [1975] ECR 1219.

18 *Konstantinidis*, C–168/91, [1993] ECR I–1191.

19 For the suggestion that free movement rights should be seen to be human rights, see R. Dallen, "An Overview of European Community Protection of Human Rights, with some special reference to the UK" (1990) 27 C.M.L. Rev. 761 at 777–9, and more recently, C. Lyons, "The Politics of Alterity and Exclusion in the European Union" in P. Fitzpatrick & J. Bergeron, eds., *Europe's Other: European Law Between Modernity and Postmodernity* (London: Ashgate, 1998) 157 at 160–3.

20 *Grogan*, C–159/90 [1991] ECR I–4685. For a critical commentary, see D. Phelan, "Right to Life of the Unborn v. Promotion of Trade in Services: The European Court of Justice and the Normative Shaping of the European Union" (1992) 55 Mod. L. Rev. 670 at 684.

21 See e.g. *Netherlands* v. *Reed*, [1986] ECR 1296; *Diatta* v. *Land Berlin*, 267/83 [1985] ECR 567. For interesting discussions of this kind of problem, see L. Ackers, "Women, Citizenship and European Community Law: The Gender Implications of the Free Movement Provisions" (1994) J. Soc. Welfare & Fam. L. 391; and T. Hervey, "Migrant Workers and their Families in the European Union: The Pervasive Market Ideology of the Community law" in J. Shaw & G. More, eds., *New Legal Dynamics of European Union* (Oxford: Oxford University Press, 1995) 91.

22 The latter idea was considered by the ECJ in *UNCETEF* v. *Heylens*, 222/86 [1987] ECR4097. For a commentary on *Heylens* and similar cases which venture the idea that certain legal rights might be better understood to be human rights, see J. Schwarze, "Tendencies Towards a Common Administrative Law in Europe" (1991) 16 Eur. L. Rev. 3. For a discussion of a "right to fair labour conditions" see H. Schermers, "Is there a Fundamental Right to Strike?" (1989) 9 Y.B. Eur. L. 1225. For the thought that there might be a 'human right' to fish, see R. Churchill & N. Foster, "Double Standards in Human Rights?: The Treatment of Spanish Fishermen by the European Community" (1987) 12 Eur. L. Rev. 430.

23 See G. deBurca, "Fundamental Human Rights and the Reach of EC Law" (1993) 13 Oxford J. Leg. Stud. 283 at 316.

attempts to rationalise 'fundamental' or 'human' from other kinds of social or legal rights relate to gender equality. For example, it has been argued that formal equality rights, being derived from *Community Treaty* articles, such as 141 (formerly 119), are in essence economic rights, dependent upon policies of market-levelling for their legitimacy. Such rights fail to take into account deeper questions of substantive inequality, and actually enhance these inequalities, casting outside the parameters of European law an overwhelming majority of women who are not deemed to be doing 'work' as it is defined by the ECJ.[24]

Given the innate, and seemingly irreducible problems thrown up by trying to work out just what a free movement 'right' is, or a 'right' to equal treatment, it is perhaps unsurprising that the ECJ's more immediate attempt to work out what 'human rights' might be has been riven with inconsistency and ambiguity. In the heady days of 1970, the ECJ seemed happy to accept the proposition that 'fundamental' rights could be found in the "philosophical, political and legal substratum common to the member states."[25] But by the late 1980s the plot had thickened. In *Wachauf*, in 1989, the ECJ was careful to deny the thought that any 'fundamental' rights might be 'absolute'. Community rights, it affirmed, are always balanced by their "social function" and the overriding "objectives" of market.[26]

As we shall see, the need to limit 'fundamental' rights with other 'objectives' of the Union finds explicit reference in the new *Union Charter*. Moreover, as we shall also see, there is a comparable statement in section 1 of the *Canadian Charter*. Fundamental rights are always limited by juridical perceptions of the proper relation between individual and political community.

The ECJ has clearly preferred an idea of rights that attaches to the liberal ideal of the rational economic actor, an attraction which is endemic to the liberal legal paradigm.[27] A political community that establishes 'rights' necessarily affirms for itself the authority to establish who benefits from these rights, and under what circumstances. Rights are granted to idealised 'subjects,' in the case of the European Community, to rational economic actors. The list of those who fall outside this category is considerable. It includes most people who are not employed, or at least do not do 'work' as this is recognised by the ECJ, and thus includes a vastly disproportionate number of women and members of ethnic minorities, as well as a considerable number of those who have entered the community as migrant workers, or who seek to enter the Community as asylum seekers.[28] In other words, it excludes precisely those most in need of protection against discrimination, disadvantage and inequality.

Unsurprisingly, there has been much critical commentary on the Community's approach to 'rights'.[29] Some have tried valiantly to make sense out of the Community's rights-talk. In an influential article, K. Lenaerts suggested that there might be a "concentric circles" model of rights, with "fundamental" rights in the inner circle, and then "general principles," citizenship rights and "aspirational" rights occupying the outer reaches.[30] Once again, however, much depends upon trying to distinguish cleanly between the inner and outer rings of 'rights'.

Ultimately someone, somewhere (and this means some judge in some court) has to decide for him or herself what is a 'right' in European law and what is not, and when alternative rights are vying with each other, which matters more, and to whom and why? Working out what rights are is a tricky business, and the history of the ECJ's attempts to do so does not suggest any particular affinity with either the concept or its practical resolution.

Europe, however, is captivated by rights-talk. One of the more immediate reasons for this enthusiasm is the perceived need to address the Union's "crisis of legitimacy."[31] It is the attempt to resolve, or at least ameliorate, this 'crisis' which led to Article 6 of the *Union Treaty*, as well as the much-vaunted, and much-criticised, invocation of political citizenship in Article 8

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24 Amongst a considerable literature, see G. More, "Equal Treatment of the Sexes in European Community Law: What Does Equal Mean?" (1993) 1 Feminist Leg. Stud. 45 at 64–74; K. Scheiwe, "EC Law's Unequal Treatment of the Family: The Case Law of the European Court of Justice on Rules Prohibiting Discrimination on Grounds of Sex and Nationality" (1994) 3 Soc. & Leg. Stud. 243 at 248–51, 255, 261; and H. Fenwick & T. Hervey, "Sex Equality in the Single Market: New Directions for the European Court of Justice" (1995) 32 C. M. L. Rev. 443 at 443, 449.

25 *International Handelsgesellschaft* v. *Einfuhr - uno Vorraatsstelle Getreide*, 11/70 [1970] ECR 1125 at 1135.

26 *Wachauf* v. *Bundesomt für Ernahrung und ForStwirtschaft*, 5/88 [1989] ECR 2609.

27 For an influential critique of the ECJ's instrumental application of 'rights,' see J. Coppel & A. O'Neill, "The European Court of Justice: Taking Rights Seriously?" (1992) 12 Oxford J. Leg. Stud. 227.

28 See J. Weiler, "Thou Shalt Not Oppress a Stranger: On the Judicial Protection of the Human Rights of Non-EC Nationals – A Critique" (1992) 3 Eur. J. Int'l. L. 65.

29 See, for example, P. Twomey, "The European Union: three Pillars without a Human Rights Foundation" in O'Keeffe and Twomey, *supra* note 8 at 121.

30 "Fundamental Rights to be included in a Community Catalogue" (1991) 16 Eur. L. Rev. 367.

31 See G. de Burca, "The Quest for Legitimacy in the European Union" (1996) 59 Mod. L. Rev. 349.

(now 17–19) of the *Community Treaty*.[32] The crisis of legitimacy is attached to deeper cultural questions of identity. Moreover, by articulating an overtly political aspiration during the 1990s, to complete some form of deeper political 'union,' the 'new' Europe has dramatically raised the stakes. If there is going to be a political 'union,' complete with a charter of 'fundamental' rights, then the need to address the legitimacy deficit becomes ever more pressing.

J. Weiler has placed the issue of legitimacy at the heart of his critique of European legal and political integration, charting a critical disjuncture between legal and political rights the result of which is a dual "deficit," of democracy and legitimacy.[33] As the decades have progressed, these deficits have led to a fundamental "crisis of ideals."[34] Weiler's solution lies in a revitalised conception of *demos*, the carving out of a wider public space within which individual participation in political discourse can be nurtured, together with a reinvigorated public philosophy of human and civil 'rights'.[35]

The idea of some kind of alternative 'dialogic' democracy has become increasingly popular.[36] One of its more fervent exponents is J. Habermas, who advocates a rejuvenated European "liberal political culture" founded on "constitutional principles of human rights and democracy."[37] Such a "culture" will hold Europe together "if democratic citizenship can deliver in terms not only of liberal and political rights, but of social and cultural rights as well."[38] The agreed solution appears to be more rights. L. Siedentop addresses the absence of "democratic legitimacy" in Europe by reinvesting, not merely an alternative form of "democratic society," but also a rejuvenated conception of right, one which reinforces a "connection between moral equality" and juridical "right."[39] Likewise, N. MacCormick stridently affirms the need for a revitalized conception of "civic" rights.[40]

The solution to the various crises of 'legitimacy' and 'governance' and 'ideals' does not, then, appear to lie in a radical rethinking of European public philosophy. Yet, there are dissenting voices. It has been argued that the 'crisis' of European 'legitimacy' is rooted in a continuing affinity with the "mythic" charms of liberal legalism.[41] Carol Lyons has recently dismissed the constitutional "fripperies" of the Union treaties and its "language of rights window-dressing."[42] It is this over-reliance which has left the 'new' Europe critically bereft of a "moral dimension" to its putative public philosophy.[43]

Rights-talk may indeed dominate current European debate, and a charter of 'rights' may be inevitable. But the critique of rights is not without voice, and the advent of the *Union Charter* makes it increasingly likely that the voice will get louder still. As we shall see in the next part of this article, the experience of the *Canadian Charter* has served to underline the inadequacies of "rights window-dressing," placing the critique of liberal legalism in ever sharper light. The advent of a *Union Charter* is just as likely to underline the same inadequacies in the overt and oppressive legalism of the 'new' Europe.

ANOTHER TIME, ANOTHER PLACE

In 1982, Canada adopted a *Charter of Rights and Freedoms*, incorporating it in Part 1 of its *Constitution Act*.[44] It provides for an interesting comparison with the *Union Charter*: first, because a number of its more controversial sections, most particularly those which seek to define its constitutional status, bear a striking resemblance to equivalent Articles in the European Charter, and second, because the critique of rights which has attached to the *Canadian Charter* will be just as apposite for the Union's.

Perhaps the most controversial of the *Canadian Charter*'s thirty-four sections are sections 1 and 33. Section 1 states that the *Charter* "guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified

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32 For discussion of the citizenship provisions and their limitations, see N. Reich, "A European Constitution for Citizens: Reflections on the Rethinking of Union and Community Law" (1997) 3 Eur. L. J. 131; and J. Shaw, "The Interpretation of European Union Citizenship" (1998) 61 Mod. L. Rev 293.

33 J. Weiler, *The Constitution of Europe: "Do the New Clothes Have an Emperor?" and other Essays on European Integration* (Cambridge: Cambridge University Press, 1999) at 259.

34 *Ibid.*

35 *Ibid.* at 77–84, 102–29, 258–60, 279–82.

36 See eg. J. Shaw, "Process and Constitutional Discourse in the European Union" 27 (2000) J.L. & Soc. 4; A. Verhoeven, "Europe Beyond Westphalia: Can Postnational Thinking Cure Europe's Democracy Deficit" (1998) 5 Maastricht J. Eur. & Comp. L. 369.

37 "The European Nation State. Its Achievements and Its Limitations. On the Past and Future of Sovereignty and Citizenship" (1996) 9 Ratio Juris 125 at 133–7.

38 *Ibid.* at 134.

39 *Democracy in Europe* (London: Penguin, 2000) at 1, 59–60, 204–5, 212–14.

40 *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (Oxford: Oxford University Press, 1999) at 131–3, 143–55, 185–9.

41 See L. Hansen & M. Williams, "The Myths of Europe: Legitimacy, Community and the Crisis of the EU" (1999) 37 J. C. M. Stud. 233.

42 Lyons, *supra* note 19 at 157.

43 *Ibid.* at 171.

44 See *supra* note 15.

in a free and democratic society." It has been suggested that Section 1 balances nineteenth century liberalism with twentieth century communitarianism.[45] It has certainly been interpreted by the Canadian Supreme Court as an instruction to maintain a "proper balance between the interests of society and the rights of individuals" and therefore "does not require, in addition to the legislative authority, a system of prior authorization."[46]

Section 33 of the *Canadian Charter* has been similarly controversial, granting the authority to "Parliament or the legislature of a province" to "expressly declare in an Act of Parliament or of the legislature" that "the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter." This provision was controversially used by the Quebec government[47] as a means of reversing a Supreme Court decision, based on section 2, which had struck down provincial legislation prohibiting the use of any language other than French on commercial signs.[48]

Sections 1 and 33 have a special resonance for the *Union Charter*. Section 1 speaks the language of proportionality, whilst Section 33 speaks that of subsidiarity. Moreover, as we shall see in the final part of this article, Articles 51 and 52 of the prospective *Union Charter* attempt to provide very similar constitutional determinants. Article 52 seeks to balance all the rights in the *Charter* against the "necessary" and genuine "objectives" of the Union. Article 51 states that the various "provisions" of the *Union Charter* are to be understood "with due regard to the principle of subsidiarity." Indeed, the defining feature of the new *Union Charter* is a pervasive anxiety not to impinge upon the perceived sensitivities of the member states.

Between sections 1 and 33, the *Canadian Charter* contains a number of particularised rights and principles. It is here that the problems of the determinancy and substantive meaning have been most readily evident, and once again these are just the kind of problems which are likely to afflict the putative *Union Charter*. Section 15's "Equality Rights" provide a very good example, and in the context of the *Union Charter*'s comparable chapter of "equality" rights, a very salutory one. The Canadian Supreme Court, like the ECJ, has encountered the intensely political nature of these difficulties. In *Andrews*, it sought to effect "substantive and ameliorative" equality over and against formal equality;[49] a strategy which bears comparison with the Community's rather more hesitant attempts to make sense of "equal treatment" provisions.[50]

Unsurprisingly, the *Canadian Charter* has attracted both applause and opprobrium, revealing in the process what one commentator has termed a "clash of constitutionalisms."[51] The more positive, such as Justice Rosalie Abella, champion the *Canadian Charter* for its ability to generate a more popular interest in rights-talk, and in so doing foster a greater sense of citizen participation in political discourse.[52] R. Penner takes the same line, applauding the ability of the *Canadian Charter* to act as an instrument for "engaged constitutional politics" and for the promotion of a "culture of liberty."[53]

Others are rather less impressed, if for different reasons. Some, such as D. Beatty, regret the decline in juristic zeal, detecting a waning of interest on the Supreme Court bench. Constrained by the political injunction articulated in section 1, *Charter* 'rights' have become little more than "standards" of "rationality" and "proportionality."[54] Most regrettable perhaps are the interpretive constraints that the Supreme Court has adopted when seeking to effect a balance between individual and community. Thus, section 15 equality rights have been more commonly invoked by men against affirmative action programmes, than by women against structural discrimination,[55] whilst the "right to life, liberty and security of the person" in section 7, compromised by the caveat "except in accordance with the principles of fundamental justice," has been unable to assist those who have claimed the right to decide when and how to end their lives.[56]

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45 For a discussion of section 1 and its attempt to balance alternative ideologies, see R. Penner, "The Canadian Experience with the Charter of Rights: Are there Lessons for the United Kingdom?" (1996) Pub. L. 104 at 108–11; and E. Alexander, "The Supreme Court of Canada and the Canadian Charter of Rights and Freedoms" (1990) 40 U.T.L.J. 31–7.

46 *Comite paritaire* v. *Potash*, [1994] 2 S.C.R 406 at 409.

47 *An Act to Amend the Charter of the French Language*, S.Q. 1988, c. 54, s. 10.

48 See *Ford* v. *Quebec (A.G.)*, [1988] 2 S.C.R. 712; and Penner, *supra* note 45 at 109–110.

49 *Andrews* v. *Law Society of B.C.*, [1989] 1 S.C.R. 143 at 178.

50 See references *supra* note 24.

51 For an overview of reactions to the Charter, see T. Bateman, "Rights Application Doctrine and the Clash of Constitutionalisms in Canada" (1998) 31 Can. J. Pol. Sci. 3.

52 R. Silberman Abella, "A Generation of Human Rights: Looking Back to the Future" (1998) 36 Osgoode Hall L.J. 595 at 601–2.

53 *Supra* note 45 at 112–21, 123–5.

54 D. Beatty, "The Canadian Charter of Rights: Lessons and Laments" (1997) 60 Mod. L. Rev. 481. For a similar conclusion, see J. Kelly, "The *Charter of Rights and Freedoms* and the Rebalancing of Liberal Constitutionalism in Canada, 1982–1997" (1999) 37 Osgoode Hall L. J. 625, concluding at 628 that the Supreme Court has settled into a "moderately activist" role.

55 For commentaries, see T. Ison, "A Constitutional Bill of Rights – The Canadian Experience" (1997) 60 Mod. L. Rev. 499 at 499–500.

56 See e.g. *Rodriguez* v. *British Columbia*, [1993] 3 S.C.R. 519.

The *Union Charter*, as we shall see, articulates very similar rights to those found in sections 7 and 15 of the *Canadian Charter*, and the problems faced will be just the same. The kind of rights articulated in section 7 are notoriously difficult to define, as cases involving abortion 'rights' vividly affirm. In the notorious *Daigle* case,[57] provincial and federal Canadian courts came to very different conclusions as to what the "right to life, liberty and security of the person" might mean under the *Quebec Charter of Human Rights and Freedoms*.[58] And whilst the Supreme Court's ultimate support for a woman's desire to have an abortion against the wishes of the putative father may have been lauded as progressive, the entire saga only reinforced the impression that the autonomy of the "autonomous self," an image so beloved of liberal jurisprudence, was something decided by the court and not the self.[59] The consonance between cases such as *Daigle* and *Grogan* is immediate.[60]

For some charter critics, the problems encountered in trying to balance 'public' and 'private' interests, and in trying to ascertain the meaning of concepts such as 'liberty' or 'equality' or even 'life' are endemic to liberal legalism. This is sufficient reason to abandon 'rights-talk' altogether. Rights-talk, it is suggested, creates an illusion of legitimacy which not only masks deeper, structural injustices abroad in modern society, but which also deflects alternative strategies which might seek to redress these injustices.[61]

Such an attitude is common amongst critical scholars and must be placed within a wider critique of liberal legalism.[62] In this vein, A. Hutchinson describes a Canada still waiting for the fulfillment of the promise of the *Canadian Charter*, trapped in a "demi-world of exquisite perdition."[63] The state of suspended animation is a conscious strategy designed to preclude genuine social reform, the "triumph of legal liberalism," as it is encapsulated most obviously in sections 1 and 33, representing the defeat of "social democracy."[64]

According to these critics, the *Canadian Charter* is a deeply ideological instrument designed to perpetuate the power of certain vested economic interests, most obviously corporations. By defining such entities as 'private', liberal legal jurisprudence protects corporations from the rigours of documents such as the *Canadian Charter*. Section 32 specifically limits the application of the *Canadian Charter* to "the Parliament and government of Canada." And, accordingly, in cases such as *Dolphin Delivery*, the Supreme Court has happily subscribed to the idea that constitutional 'duties' cannot be owed by one 'private' party to another, no matter how public the power of that private party.[65]

According to *Charter* critics, it is absurd to rationalise these parties as 'private' actors. Such bodies wield considerable power not only within markets, but within society itself, and it makes no sense to try to fit them within the fiction of a public-private distinction. Constitutional rights should attach immediately to citizens. The arguments surrounding the supposed virtues and vices of 'horizontal effect' enjoy an immediate resonance with those that surround the ECJ's refusal to develop a principle of 'horizontal effect' in Community law, and are revisited once again in the prospective *Union Charter*. Article 51 specifically addresses the "provisions" of the *Union Charter* to "institutions" and "bodies" of the Union. Though they claim to be 'fundamental', *Union Charter* rights are clearly not intended to be universal. As we shall see, there will be certain types of rights owed by certain types of bodies in certain types of situations.

A related critique concentrates on the litigation strategies of corporations. The resonance between the Canadian case *R.* v. *Big M Drug Mart*[66] and the Sunday trading cases in Community law[67] is as strong as that between *Daigle* and *Grogan*, and once again, there is a precise equivalent of the right to "freedom of conscience and religion" in Article 11 of the *Union Charter*.[68]

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57 *Tremblay* v. *Daigle*, [1989] 2 S.C.R. 530.

58 R.S.Q. c. C–12.

59 See A. Hutchinson, *Waiting for Coraf: A Critique of Law and Rights* (Toronto: University of Toronto Press, 1995) at 110–21.

60 *Grogan*, *supra* note 20. For a commentary see Phelan, *supra* note 20.

61 See eg. D. Herman, "Beyond the Rights Debate" (1993) 2 Soc.& Leg. Stud. 25 at 32; and D. Herman, "The Good, the Bad, and the Smugly: Perspectives on the Canadian Charter of Rights and Freedoms" (1994) 14 Oxford J. Leg. Stud. 589.

62 For classic examples of such critiques of rights, see J. Singer, "The Player and the Cards: Nihilism and Legal Theory" (1984) 94 Yale L. J. 1; and M. Tushnet, "An Essay on Rights" (1984) 62 Texas L. Rev. 1363.

63 *Supra* note 59 at 4–5.

64 *Ibid.* at 19–24.

65 *R.W.D.S.U.* v. *Dolphin Delivery*, [1986] 2 S.C.R. 573. For commentaries, see Hutchinson, *supra* note 59 at 128–52; P. Hogg, "The *Dolphin Delivery* Case: The Application of the *Charter* to Private Action" (1987) 51 Sask. L. Rev. 273; and D. Beatty, "Constitutional Conceits: The Coercive Authority of the Courts" (1987) 37 U.T.L.J. 83.

66 [1985] 1 S.C.R. 295.

67 See e.g. *Torfaen, Borough Council* v. *B&Q plc* C–145/88 [1989] ECR 3851; *Shrewsbury*, [1990] 3 CMLR 535; *Council of the City of Stoke-on-Trent and Norwich City Council* v. *B & Q plc*, C–169/91 [1992] ECR I–6635.

68 For commentaries on the Sunday Trading litigation and its political aspects, see R. Rawlings, "The Eurolaw Game: Some Deductions from a Saga" (1993) 20 J. L. & Society 309; and C. Barnard, "Sunday Trading: A Drama in Five Acts" (1994) 57 Mod. L. Rev. 449.

The potential hazards which attach to the fictions of liberal legalism have been noted by certain Canadian Supreme Court judges. In *Edwards Books*, Chief Justice Dickson warned that the *Canadian Charter* should not "become an instrument of better situated individuals to roll back legislation which has as its object the improvement of the conditions of less advantaged persons."[69] Similarly, in *Thomson Newspapers*, Justice LaForest recognised the potential injustice of protecting "oppressive" private organisations from the rigours of the *Canadian Charter*.[70] But, however laudable may be their intent, such observations are a ready admission that the *Canadian Charter* is founded on a number of barely tenable legalistic fictions. Moreover, it is doubtful whether any ECJ judge would be quite so willing to concede the fragility of these fictions, and seek to ameliorate them by taking a creative and progressive approach. It is certainly not the kind approach, nor the kind of rhetoric, which commonly emanates from the European Court. Social and political injustices require social and political solutions. They should not, and cannot, be left to judicial whimsy.

THE SHAPE OF THINGS TO COME?

Both the Canadian experience, and that of the Community, suggests that dealing with rights can be a tricky business. The *Union Charter* will undoubtedly bring with it a number of constitutional, as well as conceptual, interpretive and substantive problems. It cannot do otherwise. Before looking at some of these potential hazards contained within the prospective *Union Charter* articles, it is important to first consider some of the overarching political and constitutional questions.

The political question is the democratic question. As we have seen, advocates of rights invariably champion the participatory democratic potential of rights-talk.[71] Much critical commentary on the present state of Europe focuses on the absence of political debate.[72] A charter might address these problems. It is generally recognised, by both champions and critics, that the advent of a charter in Canada did much to promote public debate, and still continues to do so.[73] As such, the *Canadian Charter* enhances both legitimacy and democracy. Unfortunately, the drafting of the *Union Charter* has been typically European: the plaything of institutionalised interest groups, essentially bureacratic, barely noticed by the overwhelming majority of Europeans. Although processes of deliberation have been nominally outwith the executive processes of the intergovernmental councils, in reality the democratic benefits of a charter seem to be largely lost already.

The second set of problems are constitutional, and potentially vast. The central question of justiciability is of immense importance, and overshadows all further discussion. After intense lobbying by the British government, the Council relegated the status of the *Union Charter* to that of a mere "Declaration." What this will mean in reality remains to be seen. But it is clearly intended, for the moment at least, that the *Union Charter* will not be directly justiciable. It will certainly be persuasive to some degree, but how persuasive is anybody's guess.

At the same time, of course, this present status is not set in stone. Charters of rights never are. Status can change in time, and almost certainly will change in time. The most pertinent example here is clearly the *Social Charter*, introduced in declaratory form in 1989,[74] radically recast and incorporated into the Treaty framework in 1992 in the form of a Protocol, and then formally incorporated into the heart of the *Treaty* at Amsterdam.[75] It is quite possible that the same process awaits the *Union Charter of Fundamental Rights*. It is also quite possible that many of its rights, even if not immediately justiciable, will find their way into Union law through the creative drafting of various directives in the intervening years. This, again, was the experience of many of the 'rights' written into the original *Social Charter*.[76]

The questions of justiciability and competence are approached in the final chapter of the *Union Charter*, "General Provisions," the tenor of which clearly seeks to define limits to the *Charter*, but the existence of which militates precisely the other way. The "General Provisions" tend to protest too much. Articles 51, 52 and 53, in particular, are clearly intended to provide some kind of constitutional definition for the *Charter*, and it must be questioned why a declaratory charter should need quite so much definition. There is tangible anxiety about these three Articles, a sense that constitutional markers must be in place, not just for the present, but also perhaps for the future; markers, moreover, which might serve to guide any errant ECJ or national judges who are tempted

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69 *R.* v. *Edwards Books and Art*, [1986] 2 S.C.R. 713 at 779.
70 *Thomson Newspapers* v. *Canada*, [1990] 1 S.C.R. 425 at 510.
71 See commentary and notes, *supra* notes 31-35.
72 See Seidentop, *supra* note 39.
73 See Penner, *supra* note 45 at 104.
74 See Commission of the European Communities, *Social Europe 1/90*, (EC Commission 1990).
75 For the incorporated Protocol, see the *Consolidated Version of the Treaty on European Union*, *supra* note 4 at 239.
76 For a commentary on the passage of Community social policy from charter to treaty, see C. Barnard, "EC 'Social' Policy" in P. Craig & G. de Burca, eds., *The Evolution of EU Law* (Oxford: Oxford University Press, 1999) 479.

to seek recourse in *Charter* 'rights' whilst trying to make sense of existing Community and Union rights.

Article 51.1 states that "[t]he provisions of this Charter are addressed to institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect rights, observe the principles and promote the application thereof in accordance with their respective powers."

There are a number of points to note here. First, Article 51.1 is clearly intended to preclude any notion of horizontality. *Union Charter* rights, like those in the *Canadian Charter* and in the constitutional 'common law' of the Community, are intended for "institutions and bodies." The public-private distinction, so beloved of liberal jurisprudence, is writ large. Nominal liability will be severely restricted. The Union will not be awash with rights-claimants. The "due regard to the principle of subsidiarity," and the limitation of the *Union Charter* to Member States "only" when "implementing Union law" further enhances the sense that the *Charter* is not intended to infringe national sensitivities, any more than it is intended genuinely to empower citizens.

The prospective Article 51.2 adds that "[t]his Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties." But there is an intriguing double bind here. For if the *Union Charter* is indeed declaratory, then it carries no coercive force. Yet Article 51.2 clearly intends to limit the competence of the Community and Union. It is the kind of double bind which tends to plague supposedly declaratory statements of right. It is also the kind of double bind which tends to leave courts of law in the awkward situation of pondering whether they have the capacity to rule upon whether they have capacity to rule. Article 51 is an anxious Article, and an incoherent Article.

Article 52 is a "limitations" Article, immediately resonant of section 1 of the *Canadian Charter*, and just as likely to be just as controversial. The first part of the Article states that "[a]ny limitation on the exercise of rights and freedoms recognised by this Charter must be provided for by the law and respect the essence of those rights and freedoms." It then continues, "[s]ubject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others." Again, there is the necessary ambiguity regarding the supposed coercive power of Article 52.1 in a supposedly declaratory charter. Who is going to decide what are "necessary" limitations? Even though the *Union Charter* is declaratory, it is clearly intended to be read in conjuction with "general interests" elsewhere defined in the Community and Union, and these are likely to be justiciable. The jurisprudential sense of Article 52 is far from clear.

The political sense, however, is rather clearer. The *Union Charter*, it seems, like the *Canadian Charter*, is written in the spirit of liberal communitarianism, desperate to balance individual interests with those of the wider community — only in the 'new' Europe, the wider interests tend to be those of that most revered of liberal fictions, the rational economic actor. European Community human rights, as we have noted, have tended to be balanced against the wider "objectives" of the *Treaty*, meaning the exclusively economic objectives contained in Article 2 of the *Community Treaty*.[77] The 'fundamental' rights of the Union will be balanced against the same "objectives," cast in the reflected light of the same mythical actor.

Article 52.2 states that *Charter* rights "which are based on the Community Treaties or the Treaty on European Union shall be exercised under the conditions and within the limits defined by those Treaties." The same problems recur. Is this intended to be coercive, either directly or indirectly, when read in conjunction with the equivalent rights "based" in the existing treaties? Once again, Article 52.2 is clearly intended to reinforce existing Union and Community rights. But, at the same time, it also implies that the *Union Charter* contains a number of rights which are not merely restatements of existing rights.

Article 53 states that "[n]othing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised" in various international agreements, "including" the *European Convention*, or "by the Member States' constitutions." Interpreted by whom? Clearly intended to reassure member states, and their courts, that the *Charter* does not impinge upon their existing human rights provisions, Article 53 once again smacks of an excessive anxiety.

So much for the 'constitutional' provisions of the *Union Charter*. The third critical issue is that of the interpretive and substantive meaning of the prospective "fundamental rights." As we have already seen, it is here that the rights critique tends to bite hardest.[78] A mere glance at the prospective Union rights illustrates precisely the kinds of problems which the ECJ or any other court is likely to encounter if called upon to give meaning to these rights, either in time as part of a fully enforceable

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[77] See text accompanying notes 26-27, *supra*.

[78] See commentary and notes, *supra* notes 30-31.

incorporated charter, or for now as a mere declaration of existing rights.

But before addressing some of the particular Articles, it is worth noting the wonderfully vague aspirations contained in the Preamble. For if the *Union Charter* is to become fully justiciable at some time, rather than becoming merely a haunting and disconcerting juridical presence, these statements must be intended to help resolve interpretive and substantive uncertainties, and to guide the future evolution of the *Charter*. Preambles are supposed to define the overarching public philosophy of constitutional charters. So what can we make of the second paragraph of the *Union Charter*'s Preamble, which suggests that the "Union is founded on the indivisible, universal principles of the dignity of men and women, freedom, equality and solidarity; it is based on the principle of democracy and the rule of law"? Presumably these principles are rather different from those that are defined by the "diversity of cultures and traditions of the peoples of Europe" lauded in the third paragraph.

Unfortunately, these are the kind of aimless rhetorical aspirations that give liberal legalism such a bad name. They are as meaningless as they are useless. The final paragraph's observation, which cannot be given any possible meaning outwith the vexed issue of justiciability, proclaims that "[t]he Union therefore recognises the rights and freedoms set out hereafter." Such claims are essentially vacuous, even in jurisdictions in which asserted rights are supposed to be directly enforceable. In the European Union, a jurisdiction in which its charter of rights is something short of directly enforceable, the depth of that vacuity is all the greater.

The various imponderables articulated in the second paragraph of the Preamble pervade the actual prospective *Charter* rights. If, in due course, any court is forced to give these alleged 'rights' meaning then the potential pitfalls are all too familiar. The classic jurisprudential hard-case scenarios loom large. Article 1 seeks to assure that "human dignity" will "be respected and protected." Does this include a right to die? Article 2 confirms that "[e]veryone has the right to life." Does this include a foetus? If a member-state court is forced to wrestle with a case such as *Daigle*, or if the ECJ is revisited with a variant of *Grogan*, will it be able to resist the temptation to consider the relevance of Article 2 of the *Charter*? And should it? The Union seems keen to assert a principled position on the issue, even if it is far from clear what that position really is.

The second and third chapters of the *Union Charter* are immersed in the language of "freedom" and "equality." There are all kinds of freedoms, including the classical liberal rights to "liberty" (Article 6) and to "respect" for "private and family life" and the "home" (Article 7). Again, if a court is ever forced to consider what "private" means or "family" or "home," then it will find itself immersed in the kind of irreducible interpretive indeterminacies which are endemic to such alleged 'rights.' The ECJ has already shown itself to be decidedly uncertain as to what "family" means in the context of Community law. If it applied the same determination to the meaning in the context of Union 'fundamental rights', then the ideal family would be a market fiction. If it decided to adopt a broader cultural definition, then there would be alternative definitions of 'family' applicable in different parts of European law.[79]

Determinative problems are pervasive. Article 10 pronounces a "right to freedom of thought, conscience and religion." Any religion, no matter how peculiar? Article 11 determines a "right to freedom of expression." Any expression, no matter how offensive? Article 21 revisits the sentiments of Article 13 of the *Community Treaty*, stating that various forms of formal discrimination "shall be prohibited." Though progressive in tone, the tenor of the prohibition underlines once more, not just the problem of determinacy, but also that of enforceability. What precisely is "discrimination," where will it matter, and who will prohibit it?

As for what "equal" means, existing Community law relating to "equal treatment" provisions readily testifies to the interpretive and substantive problems which might await.[80] Article 20 states that "[e]veryone is equal before the law." Which law would this be? Domestic law? European law? Article 20 might seem progressive in tone. But a progressive tone does not conform to the idea of equality that has been developed in the jurisprudence of the European Court. As we have already noted, equality in the Community means equality for those who work, or are deemed to work; not for anyone else.[81]

Concluding Thoughts

The potential substantive and interpretative hazards are as vast as the constitution. And they will not be reduced by the assertion that the *Union Charter* is merely declaratory; nor should they be. A 'declaratory' charter will still serve to deflect attention away from alternative, more progressive strategies for social and political reform. It will still exist in the same kind of

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[79] For a discussion of the emerging problems in this area, see C. McGlynn, "Ideologies of Motherhood in European Community Sex Equality Law" (2000) 6 Eur. L. J. 29.

[80] See commentary and notes, *supra* note 24.

[81] For commentary on this definition of "work," see Scheiwe, *supra* note 24.

jurisprudential twilight as the *European Convention*. It will still tempt judges and academic commentators alike. It will just frustrate everyone a little bit more, making the longing for justiciable rights ever more desperate. And if, or more likely when, the *Union Charter* is incorporated in some form into the European 'constitution', then the fat and the fire will truly meet.

Much will depend, of course, upon the attitude of individual judges in the ECJ, something which experience suggests should be a sobering thought.[82] The Canadian Supreme Court has been recognised as tending towards a more creative judicial role, most pronounced perhaps in the early years.[83] In *Hunter* v. *Southam*, Chief Justice Dickson defined a constitution as an instrument "drafted with an eye to the future," its "function" being to "provide a continuing framework for the legitimate exercise of governmental power and when joined by a bill or a charter of rights, for the unremitting protection of individual rights and liberties."[84] It must, moreover, "be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers." The judiciary, he concluded, "is the guardian of the Constitution, and must, in interpreting its provisions, bear these considerations in mind."[85]

In other words, 'rights' change. They are not objective, and they are not themselves enough. Yet, experience militates against the idea of crusading European judges embracing the opportunity to refine the public philosophy of the European 'constitution' or to reach out beyond the confines of articulated rights, in order to effect deep progressive social reform. Whilst it has happily invented various legal doctrines, such as 'supremacy' and 'direct effect', the ECJ has shown itself to be decidedly uncomfortable when asked to make grand statements about the shape of an emergent European public philosophy.[86] It has been thrown into catatonic incoherence when asked to prosecute a consistent narrative of fundamental human rights.[87]

These questions, of substantive and interpretive consistency, and of constitutionality, as well as those of theoretical coherence and political expedience, will remain unresolved. As Chief Justice Dickson's observations imply,[88] the competence of charters, like the meaning of the rights they contain, remains irreducibly indeterminate. The *Union Charter*, regardless of its precise juridical status, introduces another dimension to European human rights law. And it is a dimension that will defy determination. The rights and wrongs of rights is a debate without end. This, of course, may be a virtue. It can be a mechanism for enhancing democratic debate. But it is likely to be less of a virtue in Europe than it is in Canada, for the European *Union Charter* has been carefully drafted precisely so that it is not going to matter that much.

The merits and demerits of such charters are as contestable as the related virtues and vices of 'human rights' themselves. There is little doubting the extent to which Europe is tempted by rights. Rights lie at the very heart of the liberal legalism which defines modern European political thought, and so the affinity should not be surprising. And it is here that the essential paradox of the 'new Europe' emerges once again. As an intense, indeed extreme, expression of modernism, this 'Europe' takes classical concepts of modern political thought to their limits, and perhaps 'beyond.' It has already gestured 'beyond' sovereignty, and indeed, beyond received ideas of democracy. Now, perhaps, the *Union Charter* is taking Europe 'beyond' rights.[89]

The peculiar status of the *Union Charter* and its 'rights' should cause everyone to rethink the conceptual parameters of 'rights-talk'. The intellectual impetus, as we noted earlier, is already emerging, the sanctity of liberal legalism already called into question. Building on familiar post-modernist writings, C. Douzinas has suggested that a revitalized transnational jurisprudence must champion an essential *humanitas* against the constraining notion of human 'rights', concerning itself rather more with the 'human' and rather less with the 'rights.'[90] A similar approach has been taken by S. Toope

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82 Canadian feminist scholars repeatedly stress the importance of specific judicial attitudes in determining the meaning of concepts such as 'equality,' and moreover the instrumental importance of dissenting judgments — a conclusion that sits awkwardly with the ECJ's refusal to publish dissents. See K. Mahoney, "Canadian Approaches to Equality Rights and Gender Equity in the Courts" in R. Cook, ed., *Human Rights of Women: National and International Perspectives* (Philadelphia: University of Pennsylvania Press, 1994) 437 at 449–56.

83 See C. Manfredi, "The Canadian Supreme Court and American Judicial Review: United States Constitutional Jurisprudence and the Canadian Charter of Rights and Freedoms" (1992) 40 Am. J. Comp. L. 213.

84 *Hunter et. al.* v. *Southam Inc.* (1985), 11 D.L.R. (4th) 641 at 649.

85 *Ibid.*

86 For a discussion of the difficulties encountered in trying to reconcile the process of legal integration with the need to nurture an emergent European public philosophy, see I. Ward, "International Order, Political Community, and the Search for a European Public Philosophy" (1999) 22 Fordham Int. L. J. 930.

87 For an uncompromising critique, see Coppel & O'Neill, *supra* note 27.

88 *Supra* note 84.

89 For a discussion of this possibility, see I. Ward, "Beyond Constitutionalism: The Search for a European Political Imagination" Eur. L. J. [forthcoming in 2001].

90 *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Oxford: Hart Publications, 2000) at 1–4, 17–19, 121–31.

who, speaking from within the Canadian experience, emphasises the need for an understanding of human 'rights' which resists the tendency to assume universal values. Human rights, he concludes presciently, is not really about legal rights at all. It is about a developed understanding of the human.[91]

Modernist theories of 'human rights' tend to the particular, and the age of 'particular' jurisprudences, as W. Twining has recently affirmed, is past. The jurisprudence of the future will be one that "emphasises the complexities and elusiveness of reality, the difficulties of grasping it, and the value of imagination and multiple perspectives in facing these difficulties."[92] This is the challenge facing jurisprudence today, and it is the challenge which faces European law, the challenge of articulating alternative expressions of progressive public philosophy. It is not a challenge which will be assuaged by a charter of so-called 'fundamental' rights. And yet Europe remains dazzled, unable to resist the allure of even more rights. The temptation has proved to be irresistible. The *Charter* awaits.❑

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I should like to thank Clare McGlynn for her helpful observations on an earlier draft of this article and also Aurelie Vinot for her considerable research assistance.

[91] See S. Toope, "Cultural Diversity and Human Rights" (1997) 42 McGill L.J. 169.

[92] W. Twining, *Globalisation and Legal Theory* (London: Butterworths, 2000) at 3–4, 47–9, 137–40, 212–13, 221–3, 243.

SOCIAL AND ECONOMIC RIGHTS? LESSONS FROM SOUTH AFRICA*

Cass R. Sunstein

INTRODUCTION

Here is one of the central differences between late eighteenth-century constitutions and late twentieth-century constitutions: The former make no mention of rights to food, shelter, and health care, whereas the latter tend to protect those rights in the most explicit terms. A remarkable feature of international opinion — firmly rejected in the United States — is that socio-economic rights deserve constitutional protection.

But should a democratic constitution really protect the right to food, shelter, and medical care? Do "socio-economic" rights of this sort belong in a constitution? What do they have to do with citizenship? Do they promote or undermine democratic deliberation? If such rights are created, what is the role of the courts?

My aim in this essay is to shed light on these questions, largely by discussing an extraordinary decision by the Constitutional Court of South Africa, one that carries some significant lessons for the future. In the *Grootboom*[1] decision, the Court set out a novel and promising approach to judicial protection of socio-economic rights. This approach requires close attention to the human interests at stake and sensible priority-setting, without mandating protection for each person whose socio-economic needs are at risk. The distinctive virtue of the Court's approach in *Grootboom* is that it is respectful of democratic prerogatives and of the limited nature of public resources, while also requiring special deliberative attention to those whose minimal needs are not being met. The approach of the Constitutional Court stands as a powerful rejoinder to those who have contended that socio-economic rights do not belong in a constitution. It suggests that such rights can serve, not to preempt democratic deliberation, but to ensure democratic attention to important interests that might otherwise be neglected in ordinary debate. It also illuminates the idea, emphasized by the Court itself, that all rights, including the most conventional and uncontroversial, impose costs that must be borne by taxpayers.

To be sure, it is far too early to say whether the Court's approach can fully accommodate the concerns of those who object to judicial protection of socio-economic rights. But for the first time in the history of the world, a constitutional court has initiated a process that might well succeed in the endeavor of ensuring that protection, without placing courts in an unacceptable managerial role. This point has large implications for how we think about citizenship, democracy, and minimal social and economic needs.

A DEBATE AND A RESOLUTION

In General

For many years, there has been a debate about whether social and economic rights, sometimes known as socio-economic rights, belong in a constitution.[2] The debate has occurred with special intensity in both Eastern Europe and South Africa. Of course, the *American Constitution*, and most constitutions before the twentieth-century, protected such rights as free speech, religious liberty, and sanctity of the home, without creating rights to minimally decent conditions of life. But in the late twentieth-century, the trend is otherwise, with international documents, and most constitutions, creating rights to food, shelter, and more.

Some skeptics have doubted whether such rights make sense from the standpoint of constitutional design. On one view, a constitution should protect "negative"

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* A different version of this essay will appear as a chapter in Cass R. Sunstein, *Designing Democracy: What Constitutions Do* (Oxford University Press, forthcoming 2001).

1 *Government of the Republic of South Africa* v. *Grootboom* 2000 (11) BCLR 1169 (CC) [hereinafter *Grootboom*].

2 See C. Scott and P. Macklem, "Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution" (1992) 141 U. Pa.. L. Rev. 1; N. Haysom, "Constitutionalism, Majoritarian Democracy and Socio-Economic Rights" (1992) 8 S. Afr. J. Hum. Rts. 451; E. Mureinik, "Beyond a Charter of Luxuries: Economic Rights in the Constitution (1992) 8 S. Afr. J. Hum. Rts. 464; D. M. Davis, "The Case Against the Inclusion of Socio-Economic Demands in a Bill of Rights Except as Directive Principles" (1992) 8 S. Afr. J. Hum. Rts. 475.

rights, not "positive" rights. Constitutional rights should be seen as individual protections *against* the aggressive state, not as private entitlements *to* protection by the state. For people who share this view, a constitution is best understood as a bulwark of liberty, properly conceived; and a constitution that protects "positive" rights can be no such bulwark, because it requires government action, rather than creating a wall of immunity around individual citizens.

But there are many problems with this view. Even conventional individual rights, like the right to free speech and private property, require governmental action. Private property cannot exist without a governmental apparatus, ready and able to secure people's holdings as such. So-called negative rights are emphatically positive rights. In fact all rights, even the most conventional, have costs.[3] Rights of property and contract, as well as rights of free speech and religious liberty, need significant taxpayer support. In any case, we might well think that the abusive or oppressive exercise of government power consists, not only in locking people up against their will, or in stopping them from speaking, but also in producing a situation in which people's minimal needs are not met. Indeed, protection of such needs might be seen as part of the necessary wall of immunity, rather than as inconsistent with it.

If the central concerns are citizenship and democracy, the line between negative rights and positive rights is hard to maintain. The right to constitutional protection of private property has a strong democratic justification: If people's holdings are subject to ongoing governmental adjustment, people cannot have the security, and independence, that the status of citizenship requires. The right to private property should not be seen as an effort to protect wealthy people; rather, it helps ensure deliberative democracy itself. But the same things can be said for minimal protections against starvation, homelessness, and other extreme deprivation. For people to be able to act as citizens, and to be able to count themselves as such, they must have the kind of independence that such minimal protections ensure.

On the other hand, a democratic constitution does not protect every right and interest that should be protected in a decent or just society. Perhaps ordinary politics can be trusted; if so, there is no need for constitutional protection. The basic reason for constitutional guarantees is to respond to problems faced in ordinary political life. If minimal socio-economic rights will be protected democratically, why involve the constitution? The best answer is to doubt the assumption and to insist such rights are indeed at systematic risk in political life, especially because those who would benefit from them lack political power. It is not clear if this is true in every nation, but it is certainly true in many places.

Perhaps more interestingly, critics of socio-economic rights have made a point about democratic institutions. In particular, they have argued that socio-economic rights are beyond judicial capacities.[4] On this view, courts lack the tools to enforce such guarantees. If they attempt to do so, they will find themselves in an impossible managerial position, one that might discredit the constitutional enterprise as a whole. How can courts possibly oversee budget-setting priorities? If a state provides too little help to those who seek housing, maybe it is because the state is concentrating on the provision of employment, or on public health programs, or on educating children. Is a court supposed to oversee the full range of government programs, to ensure that the state is placing emphasis on the right areas? How can a court possibly acquire the knowledge, or make the value judgments, that would enable it to do that? There is a separate point: A judicial effort to protect socio-economic rights might seem to compromise, or to preempt democratic deliberation on crucial issues, because it will undermine the capacity of citizens to choose, in accordance with their own judgments, the kinds of welfare and employment programs that they favour. Of course some of these points hold for conventional rights as well. But perhaps social and economic rights are especially troublesome on this count, because they put courts in the position of overseeing large-scale bureaucratic institutions.

It would be possible to respond to these institutional concerns in various ways. Perhaps constitutions should not include socio-economic rights at all. Perhaps such rights should be included, but on the explicit understanding that the legislature, and not the courts, will be entrusted with enforcement. Section IV of the *Indian Constitution* expressly follows this route, contains judicially unenforceable "directive principles" and attempts to encourage legislative attention to these rights without involving the judiciary. The advantage of this approach is that it ensures that courts will not be entangled with administration of social programs. The disadvantage is that without judicial enforcement, there is a risk that the constitutional guarantees will be mere "parchment barriers," meaningless or empty in the real world.

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[3] See S. Holmes & C. R. Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* (New York: W.W. Norton, 1999).

[4] See Davis, *supra* note 2.

The Case of South Africa

The appropriate approach to socio-economic rights was intensely debated before ratification of the *South African Constitution*.[5] The idea of including socio-economic rights was greatly spurred on by international law, above all by the *International Covenant on Economic, Social and Cultural Rights*,[6] to which I will return. Much of the debate involved the appropriate role of the judiciary. In part, this was a relatively abstract debate, posing a concrete real-world issue but founded on a set of theoretical considerations just sketched, involving judicial capacities and the proper place, if any, of socio-economic rights in a democratic constitution. But aside from these points, the debate was greatly influenced by the particular legacy of apartheid and by claims about what to do about that legacy at the constitutional level. In the view of many of those involved in constitutional design, the apartheid system could not plausibly be separated from the problem of persistent social and economic deprivation. In the end, the argument for socio-economic rights was irresistible, in large part because such guarantees seemed an indispensable way of expressing a commitment to overcome the legacy of apartheid — the overriding goal of the new *Constitution*.

We should emphasize a general point here about constitutionalism.[7] Some constitutions are *preservative*; they seek to maintain existing practices, to ensure that things do not get worse. This is of course Edmund Burke's conception of the English constitution. By contrast, some constitutions are *transformative*; they set out certain aspirations that are emphatically understood as a challenge to longstanding practices. They are defined in opposition to those practices. The *American Constitution* is a mixture of preservative and transformative features, with some provisions looking backward, and others very much looking forward. The *South African Constitution* is the world's leading example of a transformative constitution. A great deal of the document is an effort to eliminate apartheid "root and branch." Constitutions are often described as precommitment strategies, designed to ensure against myopic or mistaken decisions in ordinary politics.[8] If it is apt to describe the *South African Constitution* in these terms, this is because the document is designed to ensure that future governments do not fall prey to anything like the evils of the apartheid era. The creation of socio-economic rights is best understood in this light.

A Continuing Debate

But what, in particular, is the relationship among socio-economic rights, courts, and legislatures? The *South African Constitution* hardly speaks unambiguously on this topic. The rights in question typically take the following form, in an evident acknowledgment of limited resources:

1. Everyone has the right to [the relevant good].
2. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right.

This is the basic form of constitutional rights to "an environment that is not harmful to their health or well-being" (section 24); housing (section 26); and health, food, water, and social security (section 27).

A provision of this kind does not clearly create or disable judicial enforcement. On the basis of the text alone, it would be easy to imagine a judicial ruling to the effect that enforcement is reserved to nonjudicial actors within "the state." On this view, the *South African Constitution* is, with respect to judicial enforcement, closely akin to the *Indian Constitution*. But it would also be easy to imagine a ruling to the effect that courts are required to police the relevant rights, by ensuring that the state has, in fact, taken "reasonable legislative and other measures, within its available resources, to achieve progressive realisation of this right." If, for example, the state has done little to provide people with decent food and health care, and if the state is financially able to do much more, it would seem that the state has violated the constitutional guarantee.

In certifying the *Constitution*, the South African Constitutional Court resolved this question in just this way, concluding that socio-economic rights are indeed subject to judicial enforcement.[9] The Court said that such rights "are, at least to some extent, justiciable."[10] The fact that resources would have to be expended on them was hardly decisive, for this was true of "many of the civil and political rights entrenched"[11] in the *Constitution*. The Court correctly said that many rights, including so-called negative rights, "will give rise to similar budgetary

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5 *The Constitution of the Republic of South Africa* 1996, Act. No. 108 of 1996. See *Grootboom, supra* note 1 at para. 20; see also M. Chaskalson et al., *Constitutional Law of South Africa* (Cape Town: Juta, 2000) 41-3 - 41-4.

6 *International Covenant on Economic, Social and Cultural Rights*, GA Res. 2200A (XXI), UN GAOR, 21 Sess., Supp. No. 16, UN Doc. A/6316 (1966).

7 See L. Lessig, *Code and Other Laws of Cyberspace* (New York: Basic Books, 1999).

8 See S. Holmes, *Passions and Constraint: On the Theory of Liberal Democracy* (Chicago: University of Chicago Press, 1995).

9 Ex parte Chairperson of the Constitutional Assembly, *Re Certification of the Constitution of the Republic of South Africa* 1996 (10) BCLR 1253 (CC) at para. 78.

10 *Ibid.*

11 *Ibid.*

implications without compromising their justiciability."[12] But in a final sentence, the Court added new ambiguity, by suggesting that "at the very minimum, socio-economic rights can be negatively protected from improper invasion."[13] This last sentence added considerable ambiguity, because it did not say whether and when courts could go beyond the "minimum" to protect rights "positively", nor did it make entirely clear what it would mean to invade socio-economic rights "negatively." Perhaps the Court's suggestion was that when the state, or someone else, actually deprived someone of (for example) shelter, say by evicting them from the only available source of housing, judicial enforcement would be appropriate. But if this is what the Court meant, the socio-economic rights would hardly be justiciable at all; this would be an exceedingly narrow use of judicial authority in overseeing the relevant rights.

The ultimate outcome of the debate over judicial protection of socio-economic rights carries both particular and general interest. It is of particular interest in South Africa, where a substantial percentage of the population lives in desperate poverty. Does the *Constitution* do anything to help them? For example, might the judiciary play a role in ensuring that governmental priorities are set in the way that the *Constitution* apparently envisages? Or might judicial involvement in protecting socio-economic rights actually impair reasonable legislative efforts to set sensible priorities? The outcome has general interest because it should tell us a great deal about the social and democratic consequences, both good and bad, of constitutional provisions creating socio-economic rights. Thus far discussion of this issue has been both highly speculative and uninformed by actual practice.[14] The South African experience will inevitably provide a great deal of information.

The Constitutional Court has now rendered its first major decision involving these rights, in a case involving the right to shelter. It is to that case that I now turn.

THE BACKGROUND

The Housing Shortage and the Apartheid Legacy

It is impossible to understand the South African dispute over the right to shelter, or the proceedings in the Constitutional Court, without reference to the effects of apartheid. The central point is that in the view of most observers, the system of apartheid is directly responsible for the acute housing shortage in many areas of the nation.

One of the central components of apartheid was a system of "influx control" that sharply limited African occupation of urban areas.[15] In the Western Cape, the government attempted to exclude all African people and to give preference to the colored community. The result was to freeze the provision of housing for African people on the Cape Peninsula in 1962. Nonetheless, African people continued to move into the area in search of jobs. Lacking formal housing, large numbers of them moved into "informal settlements," consisting of shacks and the like, throughout the Peninsula. The inevitable result of the combination of large African movements into urban areas and inadequate provision of housing was to produce shortages, amounting to over 100,000 units by the mid-1990s. Since that time, governments at national and local levels have enacted a great deal of legislation to try to handle the problem. Nonetheless, many thousands of people lack decent housing. At the same time, the South African Government has limited sources and a large variety of needs, stemming from the AIDS crisis, pervasive unemployment (about 40%), and persistent, pervasive poverty.[16]

Grootboom and Wallacedene

The *Grootboom* case was brought by 900 plaintiffs, 510 of whom were children. For a long period, the plaintiffs lived in an informal squatter settlement named Wallacedene. Most of the people there were desperately poor. All of them lived in shacks, without water, sewage, or refuse removal services. Only 5% of the shacks had electricity. The named plaintiff, Irene Grootboom, lived with her family and that of her sister in a shack of about twenty square meters.[17]

Many of those at the Wallacedene settlement had applied for low-cost housing from the municipality. They were placed on a waiting list, where they remained for a number of years. In late 1998, they became frustrated by the intolerable conditions at Wallacedene. They moved out and put up shacks and shelters on vacant land that was privately owned and earmarked for formal low-cost housing. A few months later, the owner obtained an ejectment order against them. But Grootboom and others refused to leave, contending that their former sites were now occupied and that there was nowhere else to go. Eventually they were forcibly evicted, with their homes burnt and bulldozed. Their possessions were destroyed.

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12 *Ibid.*
13 *Ibid.*
14 An exception is Hungary. See A. Sajo, "How the Rule of Law Killed Hungarian Welfare Reform" (1996) 5 E. Eur. Const. Rev. 31.

15 I draw here from the *Grootboom* opinion, *supra* note 1.
16 *Ibid.* at para. 6.
17 *Ibid.* at paras. 4 & 7.

At this point they found shelter on a sports field in Wallacedene, under temporary structures consisting of plastic sheets. It was at this stage that they contended their constitutional rights had been violated. It is worthwhile to pause over the nature of human existence for those at Wallacedene. For them, insecurity was a fact of daily life. It should not be controversial to say that the status of citizenship is badly compromised for people in such conditions.

The *South African Constitution*

Two provisions were of central importance to the plaintiffs' claim. The first is section 26, which provides:

> 26. (1) Everyone has the right to have access to adequate housing.
> (2) The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
> (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

The second was section 28(1)(c), limited to children. That section reads:

> 28. (1) Every child has the right –
> ...
> (b) to family care or parental care, or to appropriate alternative care when removed from the family environment.
> (c) to basic nutrition, shelter, basic health care services and social services.

At the outset several points should be made about these sections. First, section 26(3) imposes a duty on the private sector, not only on government. Under this section, it is unconstitutional for a private person to evict another private person, or to demolish a home, without judicial permission. From the constitutional point of view, this is a striking innovation, for constitutions do not typically impose obligations on private landlords. From the standpoint of economic policy, it also raises several interesting questions. Obviously, the goal of section 26(3) is to ensure that poor people continue to have housing; but the creation of a kind of property right in continued occupancy is likely to have some unintended bad consequences. If it is difficult to evict people, landlords will have a decreased incentive to provide housing in the first instance. The result might be a diminished stock of private housing. Another result might be extensive private screening of prospective tenants, since landlords will be entirely aware that once a tenancy is allowed, it will be very difficult to terminate it. The extent of these effects is of course an empirical question.

For purposes of constitutional interpretation, the largest puzzle has to do with the relationship between sections 26 and 28. It would be possible to read section 28 as giving children unqualified rights to various goods — ensuring that children have those goods even if resources are scarce. On this view, the government has an absolute obligation to ensure that children eat, are housed, and have health care and social services. Under this interpretation, section 26 creates as qualified right for everyone ("progressive realisation") whereas section 28 requires an unqualified right for children in particular. Whether or not it is correct, this is a textually plausible reading.

The lower court proceeded in exactly this way, holding that section 28 creates a freestanding, absolute right, on the part of children, to the protections thus mentioned. On this interpretation, the rights are not qualified by "available resources" or by the "progressive realisation" clause.[18] Perhaps children are given, by that clause, two sets of rights: first to the care of adults, preferably parents; second to state support of basic needs.

GROOTBOOM IN THE CONSTITUTIONAL COURT

In *Grootboom*, the Constitutional Court rejected this interpretation of section 28. At the same time, it held that section 26 imposes a judicially enforceable duty on government; that what is required is "reasonableness"; and that the plaintiffs' constitutional rights had been violated, because of the absence of a program to ensure provide "temporary relief" for those without shelter. In short, the Court held that the *Constitution* required not only a long-term plan to provide low-income shelter, but also a system to ensure short-term help for people who had no place to live. I believe that this is the first time that the high court of any nation has issued a ruling of this general sort. What is most striking about this ruling is the distinctive and novel approach to socio-economic rights, requiring not shelter for everyone, but sensible priority-setting, with particular attention to the plight of those with the greatest need. I will say more by way of evaluation below; let us begin by tracing the Court's explanation of its decision.

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[18] *Grootboom* v. *Oostenberg Municipality and Others* 2000 (3) BCLR 277(c).

Section 26

1. A note from international law

The movement for socio-economic rights cannot be understood without reference to international law, which firmly recognizes such rights, and which seems to put the weight of international opinion behind them. Hence the Court began by emphasizing the significant background provided by the *International Covenant on Economic, Social, and Cultural Rights*[19] (a covenant signed but not yet ratified by South Africa).[20]

Section 11.1 of the *Covenant* provides that the parties "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." Hence the "parties will take appropriate steps to ensure the realization of this right." A more general provision of the *Covenant*, applicable to all relevant rights, makes a promise "to take steps ... to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognized in the Covenant by all appropriate means, including particularly the adoption of legislative measures."[21]

But what does this mean? The United Nations Committee on Economic, Social and Cultural Rights is entrusted with monitoring the performance of states under the *Covenant*. In its interpretive comments, the Committee urges that states face a "minimum core obligation," consisting of a duty to "ensure the satisfaction of, at the very least, minimum essential levels of each of the rights."[22] The Constitutional Court referred to this idea with some interest, suggesting the possibility of "minimum core obligations" imposed by section 26. But, in the Court's view, this idea has many problems because judicial enforcement would require a great deal of information to be placed before the court, in order to "determine the minimum core in any given context."[23] In this case, sufficient information was lacking, and in any event the Court thought that it would not be necessary to define the minimum core in order to assess Grootboom's complaint.[24]

2. Text and context

The Court's more specific analysis of section 26 began with an emphasis on the fact that all people have a right, not to shelter regardless of financial constraints, but to legislative and other measures designed to achieve "the progressive realization of this right." At the same time, the state, and "all other entities and persons," are constitutionally required "to desist from preventing or impairing the right of access to adequate housing."[25] By itself this idea is quite ambiguous: what counts as prevention or impairment?

The Court explained that to implement the right, the state faced two kinds of duties. With respect to "those who can afford to pay for adequate housing," the state's duty is to "unlock[] the system, providing access to housing stock and a legislative framework to facilitate self-built houses through planning laws and access to finance."[26] What is most striking here is the Court's emphasis on the "unlocking" role of the *Constitution*. On one interpretation, at least, the state is under a duty to ban a system of monopoly in housing — to create markets sufficiently flexible to provide housing to those who can pay for it. But it is not clear that this is all, or even most, of what the Court had in mind. The idea of "planning laws" and "access to finance" might be taken to mean something other than, or in addition to, a competitive housing market. But it is certainly worth noticing that the analysis of a duty for "those who can afford to pay" operates along its own separate track, requiring a kind of open housing market for those with the resources to participate.

For poor people, of course, the state's obligation is different. Here the constitutional duty might be discharged through "programmes to provide adequate social assistance to those who are otherwise unable to support themselves and their dependents."[27] In this case, the central issue was whether the government had created "reasonable" measures to ensure progressive realization of the right. The Court concluded that it had not, notwithstanding the extensive public apparatus to facilitate access to housing. The reason for this conclusion was simple:[28]

> there is no express provision to facilitate access to temporary relief for people who have no access to land, no roof over their heads, for people who are living in intolerable conditions and for people who are in crisis because of natural disasters such as floods or fires, or because their homes are under threat of demolition.

The Court acknowledged that it would be acceptable not to have a provision for those in desperate need "if the nationwide housing programme would result in

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19 *Supra* note 6.
20 *Grootboom*, supra note 1 at para. 27, note 29.
21 Article 2.1
22 The interpretive comment is cited in *Grootboom, supra* note 1 at para. 29.
23 *Ibid.* at para. 33.
24 *Ibid.*
25 *Ibid.* at para. 34.
26 *Ibid.* at para. 36.
27 *Ibid.*
28 *Ibid.* at para. 52.

affordable houses for most people within a reasonably short time."[29] Note that "most people" does not mean all people; hence, the clear implication is that a deprivation of housing for some would not necessarily be unreasonable or inconsistent with the constitutional plan. In this respect, the constitutional right involved the creation of a *system* of a certain kind rather than the creation of fully individual protections. But under the existing governmental program at the national level, it could not be said that "most people" would have "affordable houses" within a reasonably short time. Hence the nation's housing program was found to be constitutionally unacceptable insofar as:[30]

> it fails to recognize that the state must provide for relief for those in desperate need. ... It is essential that a reasonable part of the national housing budget be devoted to this, but the precise allocation is for the national government to decide in the first instance.

The Court also acknowledged that the constitutional obligation might be adequately carried out at the local level and that the local government, Cape Metro, had put in place its own land programme specifically to deal with desperate needs. But that programme had not been implemented, in large part because of an absence of adequate budgetary support from the national government. "Recognition of such needs in the nationwide housing programme requires" the national government "to plan, budget and monitor the fulfilment of immediate needs and the management of crises. This shall ensure that a significant number of desperate people in need are afforded relief, though not all of them need receive it immediately."[31]

In the Court's view, the *Constitution* does not create a right to "shelter or housing immediately upon demand,"[32] but it does create a right to a "coherent, co-ordinated programme designed to meet"[33] constitutional obligations. The obligation of the state is therefore to create such a program, including reasonable measures specifically designed to provide "relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions" or crisis situations.[34] It is here that we can find a novel, distinctive, and promising approach to a democratic constitution's socio-economic rights, an issue that I take up in more detail below.

Section 28

So much for section 26. What of section 28, which, it might be recalled, was understood by the lower court to create an absolute right to shelter for children? In brief, the Court refused to interpret section 28 in this way. Instead, it understood section 28 to add little to the basic requirements of section 26. In the Court's view, section 28 creates no independent socio-economic rights. This is an exceedingly narrow reading of section 28, evidently a product of pragmatic considerations. The Court's responsiveness to those pragmatic considerations is itself noteworthy, especially insofar as it suggests judicial reluctance to intrude excessively into priority-setting at the democratic level.

The Court's central holding was that with respect to children, the obligation to provide shelter and the like "is imposed primarily on parents and family, and only alternatively on the state."[35] What this means is that when children are removed from their parents, the state must protect the specified rights by, for example, ensuring that children are housed and fed. But section 28 "does not create any primary state obligation to provide shelter on demand to parents and their children if children are being cared for by their parents or families."[36]

To be sure, the state has some constitutional duty to children under the care of their parents and families. "[T]he state must provide the legal and administrative infrastructure necessary to ensure" compliance with section 28, through, for example, "passing laws and creating enforcement mechanisms for the maintenance of children, their protection from maltreatment, abuse, neglect or degradation."[37] The state is also obliged to comply with the various independent protections of socio-economic rights. But section 28 was found to create no freestanding obligation for the state to shelter children within the care of their parents. Since the children in *Grootboom* were being cared for by their parents, the state was not obliged to shelter them "in terms of section 28(1)."[38]

At first glance, this is a puzzling reading of section 28(1), hardly foreordained by the text of the provision. Apparently the Court was led to that reading by what it saw as the "anomalous result" of giving those with children "a direct and enforceable right to housing under" that section, while depriving those "who have none or whose children are adult."[39] This would be anomalous because it would allow parents to have special access to

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29 *Ibid.* at para. 65.
30 *Ibid.* at para. 66.
31 *Ibid.* at para. 68.
32 *Ibid.* at para. 95.
33 *Ibid.* at para. 55.
34 *Ibid.* at para. 52.
35 *Ibid.* at para. 77.
36 *Ibid.*
37 *Ibid.* at para. 78.
38 *Ibid.* at para. 79.
39 *Ibid.* at para. 71.

shelter if and because they had children. In any case a holding to this effect would make children into "stepping stones to housing for their parents."[40] But would this really be so anomalous? It might seem to make sense to say that children should have a particular priority here — that their right should be more absolute — and hence that adults with children would have a preferred position. Why would that view be especially peculiar?

The Court also expressed a stronger concern. If children were taken to have an absolute right to shelter, the document's limitations on socio-economic rights would be quite undone. "The carefully constructed constitutional scheme for progressive realisation of socio-economic rights would make little sense if it could be trumped in every case by the rights of children."[41] Here, I think, is the heart of the Court's skepticism about the idea that section 28 should be taken to create absolute rights. If section 28 were so understood, it would trump even reasonable priority-setting, thus keeping the state from deciding that in view of sharply limited resources, certain needs were even more pressing.

Evaluation

What I will urge here is that the approach of the South African Constitutional Court answers a number of questions about the proper relationship among socio-economic rights, constitutional law, and democratic deliberation. There should be little question that people who live in desperate conditions cannot live good lives. People who live in such conditions are also unable to enjoy the status of citizenship.

On the other hand, legislatures in poor nations, and perhaps in less poor ones, cannot easily ensure that everyone lives in decent conditions. An especially plausible concern with socio-economic rights is the difficulty, for courts, of steering a middle course between two straightforward positions: (a) that socio-economic rights are nonjusticiable and (b) that socio-economic rights create an absolute duty, on government's part, to ensure protection for everyone who needs them. The second position is, of course, the standard approach to most constitutional rights. If the government has violated someone's right to free speech, or to freedom of religion, it does not matter that the rights of most people, or almost everyone else, have been respected.

As I have emphasized, however, all rights have costs.[42] The right to free speech, or for that matter to freedom from police abuse, will not be protected unless taxpayers are willing to fund a judicial system willing and able to protect that right and that freedom. In fact, a system committed to free speech is also likely to require taxpayer resources to be devoted to keeping open certain arenas where speech can occur, such as streets and parks. In protecting the most conventional rights, the government must engage in some form of priority-setting. But when cases go to court, conventional rights are and can be fully protected at the individual level, and not merely through the creation of some kind of "reasonable" overall system for protection. The existence of a reasonable overall system for protecting free speech rights is not a defense to a claim that, in a particular case, a right to free speech has been violated.

By their very nature, socio-economic rights are different on this count, certainly in the light of the "progressive realisation" clause.[43] No one thinks that every individual has an enforceable right to full protection of the interests at stake. In these circumstances it is difficult indeed to find an approach that avoids two unappealing courses: creation of fully enforceable individual rights or a conclusion of complete nonjusticiability. The only alternative to these extremes is an approach to public law that is generally unfamiliar in constitutional law but that is the ordinary material of administrative law, governing judicial control of administrative agencies: a requirement of reasoned judgment, including reasonable priority-setting.

In a typical administrative law case, an agency is faced with a burden of explanation. It must show why it has adopted the program that it has chosen; it must account for its failure to adopt a program of a different sort. For courts, a special attraction of this position is that it protects against administrative arbitrariness while also recognizes the democratic pedigree of the agency and the simple fact of limited resources. If an agency has allocated resources in a rational way, it has acted lawfully.

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[40] *Ibid.*
[41] *Ibid.*

[42] Holmes and Sunstein, *supra* note 3.
[43] Section 26(2) of the *South Africa Constitution.*

What the South African Constitution Court has basically done is to adopt an *administrative law model of socio-economic rights*. Courts using that model are hardly unwilling to invalidate an agency's choices as arbitrary. That, in effect, is what the Constitutional Court did in *Grootboom*. The Court required government to develop, and fund, a program by which a large number of poor people are given access to emergency housing. What the Court called for is some sort of reasonable plan, designed to ensure that relief will be forthcoming to a significant percentage of poor people. On this view, the *Constitution* constrains government, not by ensuring that everyone receives shelter, but by requiring government to devote more resources than it otherwise would to the problem of insufficient housing for the poor. More particularly, the Court requires government to maintain a plan for emergency relief for those who need it. Such a plan would fill the gap found unacceptable in *Grootboom*.

But there is a twist here. For those whose socio-economic rights are violated, the real problem is one of government *inaction* — a failure to implement a program of the sort that, in the view of some, the *Constitution* requires. The plaintiffs in *Grootboom* were seeking government action that had not, to that point, been forthcoming, in the particular form of a right to emergency relief. Hence the *Grootboom* Court's approach is most closely connected to a subset of administrative law principles, involving judicial review of inaction by government agencies. In cases of this kind, everyone knows that the agency faces resource constraints and that in the face of a limited budget, any reasonable priority-setting will be valid and perhaps even free from judicial review. At the same time, there should be a duty of reasonableness in priority-setting, and an agency decision that rejects a statutory judgment, or that does not take statutory goals sufficiently seriously, should be held invalid. In the constitutional context, this is what the South African Court ruled in *Grootboom*.

The broader point here is that a constitutional right to shelter, or to food, can strengthen the hand of those who might be unable to make much progress in the political arena, perhaps because they are unsympathetic figures, perhaps because they are disorganized and lack political power. A socio-economic guarantee can have an enduring function. It can do so in part by promoting a certain kind of deliberation, not by preempting it, as a result of directing political attention to interests that would otherwise be disregarded in ordinary political life.

CONCLUSION

Should constitutions protect social and economic rights? It is certainly relevant that if basic needs are not met, people cannot really enjoy the status of citizens. A right to minimal social and economic guarantees can be justified, not only on the ground that people in desperate conditions will not have good lives, but also on the ground that democracy requires a certain independence and security for all citizens. But there are many complexities here. A government might attempt to meet people's needs in multiple ways, perhaps by creating incentives to ensure that people will help themselves, rather than looking to government. Perhaps there is no special need for constitutional safeguards here; perhaps this is an issue that can be settled democratically. In any case social and economic guarantees threaten to put courts in a role for which they are quite ill-suited. While modern constitutions tend to protect those guarantees, we can understand the judgment that, in some nations, they would create more trouble than they are worth.

In *Grootboom*, the Constitutional Court of South Africa was confronted, for the first time, with the question of how, exactly, courts should protect socio-economic rights. The Court's approach suggests, also for the first time, the possibility of providing that protection in a way that is respectful of democratic prerogatives and the simple fact of limited budgets.

In making clear that the socio-economic rights are not given to individuals as such, the Court was at pains to say that the right to housing is not absolute. This suggestion underlies the narrow interpretation of the provision involving children and also the Court's unambiguous suggestion that the state need not provide housing for everyone who needs it. What the constitutional right requires is not housing on demand, but a reasonable program for ensuring access to housing for poor people, including some kind of program for ensuring emergency relief. This approach ensures respect for sensible priority-setting, and close attention to particular needs, without displacing democratic judgments about how to set priorities. This is now the prevailing approach to the constitutional law of socio-economic rights in South Africa.

Of course, the approach leaves many issues unresolved. Suppose that the government ensured a certain level of funding for a program of emergency relief; suppose too that the specified level is challenged as insufficient. The Court's decision suggests that whatever amount allocated must be shown to be "reasonable"; but what are the standards to be used in resolving a dispute about that issue? The deeper problem is that any allocation of resources for providing shelter will prevent resources from going elsewhere — for example, for AIDS treatment and prevention, for unemployment compensation, for food, for basic income support. Undoubtedly the Constitutional Court will listen carefully to government claims that resources not devoted to housing are being used elsewhere. Undoubtedly those claims will be stronger if they suggest that some or all of the resources are being used to protect socio-economic rights of a different sort.

What is most important, however, is the Constitutional Court's adoption of a novel and highly promising approach to judicial protection of socio-economic rights. The ultimate effects of the approach remain to be seen. But by requiring reasonable programs, with careful attention to limited budgets, the Court has suggested the possibility of assessing claims of constitutional violations without at the same time requiring more than existing resources will allow. And in so doing, the Court has provided the most convincing rebuttal yet to those who have claimed, in the abstract quite plausibly, that judicial protection of socio-economic rights could not possibly be a good idea. We now have reason to believe that a democratic constitution, even in a poor nation, is able to protect those rights, and to do so without placing an undue strain on judicial capacities.❑

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