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TABLE OF CONTENTS

ARTICLES

ESSAY

BOOK REVIEWS

CHALLENGING ELECTORAL BOUNDARIES UNDER THE CHARTER: JUDICIAL DEFERENCE AND BURDEN OF PROOF

Ronald E. Fritz*

The right to vote is foundational in any democratic society. In Canada, this right, as enumerated in section 3 of the Charter, has spawned litigation primarily revolving around issues of electoral boundaries and variations in constituency size. Here, the author examines some major Canadian cases concerning the right to vote as it pertains to those issues. Differing approaches to matters of deference and onus of proof for justifying particular electoral boundaries and constituency sizes are raised and discussed. The author suggests that courts must develop a coherent approach to both these matters to ensure the consistent and effective application of section 3.

Le droit de vote est la pierre angulaire de toute société démocratique. Au Canada, ce droit — énoncé à l'art. 3 de la Charte — donne lieu à des actions portant principalement sur les dimensions et la délimitation des circonscriptions électorales. L'auteur examine certaines causes importantes et relève différentes façons d'aborder les questions liées à la réserve judiciaire et au fardeau de la preuve qui fondent les décisions à cet égard. Il suggère que les cours doivent élaborer une approche systématique à ces deux questions pour assurer l'application cohérente et efficace de l'art. 3.

I. INTRODUCTION

The implementation in 1982 of the section 3 "right to vote" in the Canadian *Charter of Rights and Freedoms*[1] has spawned a considerable amount of litigation pertaining to the constitutionality of electoral boundaries. The major cases will be analyzed, looking initially at the circumstances that prompted the litigation and secondly at some of the factors that guided the courts in arriving at their respective conclusions. Particular attention will be paid to how the issues of judicial deference to the legislatures and of burden of proof were addressed since these issues have played key roles in the conclusions arrived at by the courts.

The fact that the courts have exhibited considerable deference in this area is understandable given the political significance that often attaches to where constituency boundary lines are drawn and the fact that the process of drawing electoral boundaries involves a balancing of numerous factors which render it

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[1] Part I of the *Constitution Act, 1982* being Schedule B of the *Canada Act 1982* (UK), 1982, c. 11 [hereinafter *Charter*].

definition of the *Charter*-protected right that encompasses both the concept of "one person, one vote" and numerous non-quantitative factors. Unfortunately, the definition was developed without expressly considering how it could be accommodated within the allocation of burdens of proof in *Charter*-based litigation.

Ordinarily, the burden of proof rests on the individual who asserts an infringement of a *Charter*-protected right to establish the infringement. If the infringement is established then the burden shifts to the government under section 1 of the *Charter* to show that such infringement is justifiable in a free and democratic society.[2] In the context of challenging electoral boundaries, a definition of the *Charter*-protected "right to vote" leads to two problems.

The first relates to how to address the issue of burden of proof within such an analytical structure. Applying the general approach to *Charter* litigation the burden of proof would be placed on the party alleging an infringement to establish that the deviations from the provincial electoral quotient were unjustified. In the absence of a report setting out detailed reasons for the individual constituency boundaries, it is a burden that would render the *Charter*-protected right illusory in all but the most extreme of cases. Yet the courts have indicated that all deviations from the provincial electoral quotient must be justified. By stating the requirement in the positive, the courts have thereby placed a burden of justification on the government. Alternatives on how to accommodate the dual burdens of proof within the section 3 determination of whether there has been an infringement of the individual's *Charter*-protected right are posed below.

The second problem flows from the first. Defining the *Charter*-protected right so as to encompass the balancing of numerous factors and placing some burden on the government to justify deviations from the electoral quotient will mean that, effectively, any challenge will be won or lost within the section 3 determination. As will be demonstrated below, a government which is unsuccessful in justifying the deviations within section 3 will be at a loss to put forward different justifications for consideration under section 1.

Judicial deference has also played a role in terms of the nature of relief granted by the courts where infringement has been found. Declaratory rather than

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[2] Hon. B. Wilson, "Building the Charter Edifice: The First Ten Years" in G.A. Beaudoin, ed., *The Charter: Ten Years Later* (Cowansville: Les Editions Yvon Blais Inc., 1992) 93 at 95.

injunctive relief has been the most common remedy ordered, with governments being granted reasonable time to remedy the infringement. A related approach has been to refrain from finding an infringement of the *Charter*-protected right but to express an expectation that the electoral boundaries should be redrawn within a specified period of time. This latter approach indirectly accomplishes the redrawing of electoral boundaries, which is the direct result where a court declares that the *Charter*-protected right has been infringed.

Judicial deference should play a lesser role where provincial, as opposed to federal electoral, boundaries are the subject of the challenge. This is because the ombuds function performed by MLAs is generally viewed as being less onerous than that performed by MPs and, in many provinces, being an MLA is a part-time rather than a full-time vocation.

Finally, judicial deference will be examined in the context of the process that led to the creation of the electoral boundaries. The degree of judicial deference should vary with the extent to which politically partisan considerations affected the process and the extent to which constitutional requirements guided the process.

II. THE RIGHT TO EFFECTIVE REPRESENTATION

The foundational principles relating to the constitutionality of electoral boundaries were developed by Justice McLachlin, first in *Dixon* v. *British Columbia (Attorney General)*[3] when she was Chief Justice of the British Columbia Supreme Court and later in *Reference re Provincial Electoral Boundaries*[4] when she wrote the majority judgment of the Supreme Court of Canada. The circumstances serving as a backdrop to each of the cases differed markedly.

In the *Dixon* case, British Columbia had implemented new electoral boundaries for the 1986 provincial election. Although the electoral boundaries had been developed by an independent commission, the enabling legislation had

[3] (1989), 59 D.L.R. (4th) 247, [1989] 4 W.W.R. 393, 35 B.C.L.R. (2d) 273 (B.C.S.C.) [hereinafter *Dixon* cited to D.L.R.].

[4] *Reference re Provincial Electoral Boundaries (Saskatchewan)*, [1991] 2 S.C.R. 158, 81 D.L.R. (4th) 16 [hereinafter *Saskatchewan Reference* cited to S.C.R.].

significantly constrained the commissioners in carrying out their mandate.[5] In 1986 the British Columbia Civil Liberties Association, through Dixon, began its challenge of those boundaries. Based on 1986 census data, these newly implemented electoral boundaries had constituency populations which varied from 5,511 (86.47% below the provincial electoral quotient[6]) to 68,347 (63.22% above the provincial electoral quotient).[7] The challenge of the electoral boundaries went through two phases. The first phase related to whether the challenge raised a constitutionally justiciable matter, a point on which Dixon succeeded.[8] The second phase, determining whether there was an infringement, was delayed to enable the work of Justice Fisher to be completed.[9] In 1987 the British Columbia government had appointed Justice Fisher to conduct a one-person royal commission to examine all two-member electoral districts with a view to recommending the establishment of electoral districts each returning one member to the Legislative Assembly. His mandate was subsequently expanded to encompass a full-fledged redrawing of the constituency boundaries used to elect MLAs to the British Columbia Legislative Assembly. Having concluded that a fair and balanced system of representation could be accommodated by constituencies with populations varying by no more than plus or minus 25% per cent from the provincial electoral quotient, Justice Fisher proposed constituency boundaries ranging from a low of 29,220 residents to a high of 45,216 residents.[10]

In the *Saskatchewan Reference* case the events lying behind the litigation were significantly different. One of the issues on which the 1971 Saskatchewan provincial election had been fought related to the gerrymandered electoral boundaries that had been enacted by the Liberal government just prior to that election. One of the first pieces of legislation enacted under the new NDP government was the *Constituency Boundaries Commission Act*. Under that Act future electoral redistributions were to be conducted by independent

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[5] N.J. Ruff, "The Right to Vote and Inequality of Voting Power in British Columbia: The Jurisprudence and Politics of the Dixon Case" in J.C. Courtney, P. MacKinnon and D.E. Smith, eds., *Drawing Boundaries: Legislatures, Courts and Electoral Values* (Saskatoon: Fifth House, 1992) 128 at 129.

[6] The provincial electoral quotient is determined by dividing the total census or voter population by the total number of constituencies in a province.

[7] Ruff, *supra* note 5 at 143–44.

[8] *Dixon* v. *British Columbia (Attorney General)*, [1987] 1 W.W.R. 313, 31 D.L.R. (4th) 546, 7 B.C.L.R. (2d) 174 (B.C.S.C.).

[9] Ruff, *supra* note 5 at 133.

[10] British Columbia, *Report of the Royal Commission on Electoral Boundaries for British Columbia* (Victoria: Queen's Printer, December 1988) at 4.

commissions. Except for two constituencies reserved for the sparsely populated northern half of the province, southern constituencies could vary from the southern electoral quotient by a maximum of plus or minus 15 per cent.[11] In 1987 the re-elected Progressive Conservative government enacted a new *Electoral Boundaries Commission Act*. Under that Act constituencies were divided into three categories: 29 urban constituencies, 35 rural constituencies and two northern constituencies. Residents in an area designated as urban could not be joined with residents of an area designated rural and *vice versa* for the purposes of drawing the new constituency boundaries.[12] Had the pre-set allocation been strictly on the basis of "one person, one vote" there would have been 32 urban constituencies, 33 rural constituencies and one northern constituency. The impact on the urban constituencies varied significantly. For example, the Battlefords' one constituency would be 23.46% above the provincial electoral quotient while Regina's 11 constituencies would be 4.45% above the provincial electoral quotient on average. Critics were concerned that the introduction of the rural category of constituency coupled with the overrepresentation of rural residents was simply a means for the government to enhance its prospects for further re-election since, in the 1986 provincial election, 32 of the 35 seats won by the Progressive Conservative Party were from areas designated rural under the legislation. To further accommodate the overrepresentation of rural residents, the Act increased the allowable deviation for southern constituencies from the provincial electoral quotient to plus or minus 25%. New electoral boundaries were established by an independent commission acting within the constraints of its enabling legislation. The Society for the Advancement of Voter Equality (SAVE) was on the verge of instituting an action in the Court of Queen's Bench to have the electoral boundaries declared unconstitutional when the government referred the issue directly to the Saskatchewan Court of Appeal.[13] Counsel for SAVE was appointed by the Court of Appeal "to present the case in opposition to the constitutional validity of electoral boundaries described in *The Representation Act*."[14] Electoral populations varied from 6,309 (37.82% below the provincial electoral quotient) for the smallest northern constituency and 7,757 (23.55% below the provincial

[11] S.S. 1972, c. 18, s. 16.

[12] S.S. 1986–87–88, c. E–6.1.

[13] *Reference Re Electoral Boundaries Commission Act (Sask)* (1991), 90 Sask. R. 174, [1991] 3 W.W.R. 593 [cited to W.W.R.].

[14] *Ibid.* at 597.

electoral quotient) for the smallest rural constituency to 12,567 (23.84% above the provincial electoral quotient) for the largest urban constituency.[15]

In the *Dixon* case, Chief Justice McLachlin first determined that the *Charter*-protected "right to vote" should be interpreted broadly so as to encompass "equality of voting power."[16] She declined, however, to define it so as to require near absolute equality of voting power[17] as had been required by the United States Supreme Court in such cases as *Baker* v. *Carr*[18] and *Reynolds* v. *Sims*.[19] In a typically Canadian fashion she expressed a compromise position defining the section 3 right as encompassing both "equality of voting power," "the single most important factor,"[20] and other factors such as "geographic considerations affecting the servicing of a riding and regional interests"[21] that could justify deviations from the provincial electoral quotient. This flexibility was necessary in order to recognize that elected representatives "function in two roles — legislative and what has sometimes been termed the 'ombudsman role'."[22] She concluded that the extent of population disparities between then existing electoral boundaries were such "a gross violation of the fundamental concept of representation by population" as to be incapable of being justified on the basis of the other factors.[23] In arriving at her conclusion she did not make it clear whether the burden of proof under section 3 was on the party challenging the electoral boundaries to show that the deviations were unjustified or whether it was on the government defending the electoral boundaries to show that they were.

She went on to consider whether the breach of the *Charter*-protected right could be justified under section 1 of the *Charter*. Applying the test developed by the Supreme Court of Canada in *R* v. *Oakes*,[24] she concluded that the burden rested on the government to justify the infringement.[25] What is unclear, however,

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[15] See R.G. Richards and T. Irvine, "Reference Re Provincial Electoral Boundaries: An Analysis" in J.C. Courtney, P. MacKinnon and D.E. Smith, eds., *supra* note 5, 48 at 67–68.

[16] *Dixon*, *supra* note 3 at 259.

[17] *Ibid.* at 260–265.

[18] (1962) 369 U.S. 186.

[19] (1964) 377 U.S. 533.

[20] *Dixon*, *supra* note 3 at 266.

[21] *Ibid.* at 267.

[22] *Ibid.* at 266.

[23] *Ibid.* at 268.

[24] [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200, 24 C.C.C. (3d) 321 [hereinafter *Oakes* cited to S.C.R.].

[25] *Dixon*, *supra* note 3 at 270.

is what justifications could be presented under the section 1 analysis that would differ from the justifications already proffered but rejected under the section 3 analysis. This structural problem in her analysis will be developed more fully below. This confusion of sections 3 and 1 analyses and their respective relationship to issues of judicial deference to the legislature and burden of proof is best exemplified by the following passage which appears in the part of her judgment pertaining to section 1:[26]

> The process of adjusting for factors other than population is not capable of precise mathematical definition. People will necessarily disagree on how important a regional grouping is to the boundary of this riding, on how significant problems of serving constituents are to that electoral district. *It is for the legislatures to make decisions on these matters, and not for the courts to substitute their views.* Applying a test used in other areas of the law, I would suggest that the courts ought not to interfere with the legislature's electoral map *under section 3* of the Charter unless it appears that reasonable persons *applying the appropriate principles* — equal voting power subject only to such limits as required for good government — could not have set the electoral boundaries as they exist. In other words, departure from the ideal of absolute equality may not constitute breach of section 3 of the Charter so long as the departure can be *objectively justified* as contributing to better government.

After concluding that the extent of the population disparities could not be justified under section 1 of the *Charter*, and were thus unconstitutional, she went on to address what remedy would be appropriate so as to ensure that "the orderly democratic processes on which our system is founded [could] be maintained."[27] This she accomplished by employing the technique adopted by the Supreme Court of Canada in *Reference re Language Rights under the Manitoba Act, 1870,*[28] namely allowing the legislature a reasonable time to establish new electoral boundaries.[29] She observed that if the legislature adopted a scheme similar to that proposed by the Fisher Report then the Court's involvement would be at an end.[30] After some procrastination, the British Columbia Legislative Assembly implemented the electoral boundaries that had been recommended by Justice Fisher.[31]

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[26] *Ibid.* at 271 [emphases added].

[27] *Ibid.* at 281.

[28] [1985] 1 S.C.R. 721, 19 D.L.R. (4th) 1, [1985] 4 W.W.R. 385.

[29] *Dixon, supra* note 3 at 283 and 284.

[30] *Ibid.* at 283.

[31] Ruff, *supra* note 5 at 140.

Structurally, the judgment of the Saskatchewan Court of Appeal in *Reference re: Electoral Boundaries Commission Act*[32] took greater care than had Chief Justice McLachlin in the *Dixon* case in segregating the section 3 and section 1 considerations. As had Justice McLachlin, the *per curiam* judgment of the Court of Appeal eschewed defining the section 3 right as requiring absolute equality. The Court of Appeal defined it as requiring "relative or substantial equality of voting power,"[33] leaving the consideration of exceptions and the balancing of competing interests to be addressed under the section 1 part of the analysis.[34] Two aspects of the legislation led the Court of Appeal to conclude that the section 3 right had been infringed. Firstly, unlike prior legislation there was no requirement that the commissioners were to carry out their task "guided by the fundamental principle of equality of voting power."[35] Secondly, the extent of the deviations as a whole, when comparing the population figures for the urban and rural constituencies, went beyond the section 3 standard.[36] In justifying the deviations under section 1, the government argued that it was more difficult to represent a rural constituency than an urban one. The Court of Appeal acknowledged that at one time travel and communication in rural Saskatchewan had been problematic but was no longer so. "[T]he cultural, political, economic, social and other interests of the citizens of southern Saskatchewan do not much differ."[37] Many rural residents had strong educational and employment ties with urban areas. Finally, less obtrusive methods could have been employed to address any perceived representational difficulties faced by rural residents such as "additional travel allowances, support staff and 'up-to-date' communication services."[38] The Court of Appeal recognized that the large deviations for the two northern constituencies were justified so as to ensure effective representation for northern residents.[39] Since, in a constitutional reference case, the Court of Appeal is called upon to simply give its advice on the constitutionality of the question(s) formulated by the government, it did not address the issue of the appropriate remedy.

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[32] (1991), 78 D.L.R. (4th) 449 at 462, *sub nom. Reference re Provincial Electoral Boundaries*, [1991] 3 W.W.R. 593 [cited to D.L.R.].

[33] *Ibid.* at 462 and 475.

[34] *Ibid.* at 475.

[35] *Ibid.* at 467.

[36] *Ibid.* at 474.

[37] *Ibid.* at 479.

[38] *Ibid.* at 480.

[39] *Ibid.* at 481.

Because a provincial election was imminent, the Supreme Court of Canada granted expedited leave to appeal. As well, a new electoral boundaries commission was established. The commission's report, which developed electoral boundaries in the southern part of the province all with populations falling within plus or minus ten per cent of the provincial electoral quotient,[40] was never implemented when the Supreme Court of Canada, splitting 6–3, concluded that the electoral boundaries were in fact constitutional.

Justice McLachlin, in giving the judgment for the majority of the Supreme Court, observed that in defining the *Charter*-protected right, "the court must be guided by the ideal of a 'free and democratic society' upon which the *Charter* is founded."[41] She referred to the decision of Chief Justice Dickson in the *Oakes* case[42] in support of this approach. However, the quote from his judgment to which she referred appeared in the part of his judgment devoted to his section 1 analysis of the issue then before the Court and, just a few paragraphs after, he emphasized that judges should be careful not to run section 1 considerations into their analysis of the specific *Charter*-protected right.[43]

She proceeded to define the *Charter*-protected right to vote as the right to "effective representation"[44] which encompasses the following factors:[45]

> The first is relative parity of voting power . . . But parity of voting power, though of prime importance, is not the only factor to be taken into account in ensuring effective representation.
>
> . . .
>
> [S]uch relative parity as *may* be possible of achievement *may* prove undesirable because it has the effect of detracting from the primary goal of effective representation. Factors like geography, community history, community interests and minority representation *may* need to be taken into account to ensure that our legislative assemblies effectively represent the diversity of our social mosaic. These are but examples of considerations which *may* justify

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[40] Saskatchewan, *Report of Electoral Boundaries Commission 1991* (Regina: Queen's Printer, June 1991) (Chair: J.M. Archer) at 14–15.

[41] *Saskatchewan Reference*, *supra* note 4 at 181.

[42] *Oakes*, *supra* note 24 at 136.

[43] *Ibid.* at 133–34. R.E. Charney has noted that Justice McLachlin in another decision as a trial judge ran her section 1 analysis into her definition of the *Charter*-protected right, an approach which was negatively commented upon when the case was subsequently appealed to the Supreme Court of Canada: "Saskatchewan Election Boundary Reference: 'One Person-Half a Vote'" (1992) 1 N.J.C.L. 225 at 231.

[44] *Saskatchewan Reference*, *supra* note 4 at 183.

[45] *Ibid.* at 183–84, 188 and 195 [emphases added].

> departure from absolute voter parity in the pursuit of more effective representation; the list is not closed.
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> . . .
>
> The problems of representing the vast, sparsely populated territories, for example, may dictate somewhat lower voter populations.
>
> . . .
>
> [T]he goal of effective representation *may* justify somewhat lower voter populations in rural areas. Another factor which figured prominently in the argument before us is geographic boundaries; rivers and municipal boundaries form natural community dividing lines and hence natural electoral boundaries. Yet another factor is growth projections. Given that boundaries will govern for a number of years . . . projected population changes within that period *may* justify a deviation from strict equality at the time the boundaries are drawn.

Structurally, her definition creates problems for those who might wish to assert that their *Charter*-protected right has been infringed and likewise for the courts which must address the claims of infringement.

The first problem relates to the complexity of the definition itself. She lists eight distinct factors as considerations that are encompassed within the right to effective representation while acknowledging that "the list is not closed." For the most part, the factors are described using the permissive voice and are further qualified in some instances by the vague "somewhat lower voter populations." Other than identifying "parity of voting power" as being of "prime importance," she does not establish a hierarchy of importance for the other factors. She also fails to canvass how some factors may cumulatively work to justify major deviations and how some factors may counterbalance other factors. No doubt the drawing of electoral boundaries is an art and not a science and necessitates balancing a complex matrix of factors in drawing both individual and contiguous constituencies. Yet the individual is left with considerable uncertainty in assessing whether his right has been infringed.

The second problem relates to the burden of proof. Those who assert that their right has been infringed under the *Charter* carry the initial burden of proving that to be the case. If successful then the burden shifts to the government to establish that the infringement was justified in a "free and democratic society" under section 1 of the *Charter*. Justice McLachlin, by placing these complex matrix of factors into the consideration of whether the right to "effective representation" has been infringed, has cast the burden on those who assert the infringement, and not on those who were responsible for the electoral

boundaries, to show that, considering all of these factors, the deviations from "relative parity of voting power" are unjustified.[46]

This commingling of factors, most of which would be more appropriately addressed under a section 1 analysis as had been done by the Saskatchewan Court of Appeal, would not be so critical if she had divided the burdens of proof by requiring those who challenge the electoral boundaries to show that there was not "relative parity of voting power" and, if that hurdle was met, then requiring the government to establish that the deviations from the applicable provincial electoral quotient were necessary to ensure "effective representation." Unfortunately, she did not directly address the question of burden of proof. At the conclusion of her judgment she observed that "the evidence supplied by the province is sufficient to justify the existing electoral boundaries."[47] This only implicitly indicates that there was some burden under section 3 cast on the government. Yet earlier in her judgment she observed that SAVE "has presented no evidence apart from population figures supporting the contention that the variance between [Saskatoon Greystone and Saskatoon-University] is illogical or arbitrary,"[48] which imposed a heavy burden, indeed, on the party asserting the infringement since SAVE lacked any information about what factors had produced the 63.5% differential in electoral populations between these two adjacent Saskatoon constituencies. This lack of clarity has bedevilled subsequent litigation as will be demonstrated below.

The lack of clarity was also apparent when she reaffirmed her position articulated in the *Dixon* case which emphasized the need for judicial deference to the legislatures in this area "unless it appears that reasonable persons applying *the appropriate principles* . . . could not have set the electoral boundaries as they exist."[49] This mixed message feeds into the uncertainty surrounding the issue of burden of proof. She appears to be saying that the burden of justification is on

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[46] The other implication of this structure is that, despite the permissive voice, those who draw electoral boundaries *must* consider the full panoply of factors in drawing the electoral boundaries although individual constituency boundaries may be affected by only a limited number of the factors. Failure to do so would render the electoral boundaries vulnerable to a challenge.

[47] *Saskatchewan Reference*, *supra* note 4 at 197.

[48] *Ibid.* at 196.

[49] *Ibid.* at 189, citing *Dixon*, *supra* note 3 at 271 [emphases added]. In the *Dixon* case, she described the appropriate principles as "equal voting power subject only to such limits as required for good government . . . . In other words, departure from the ideal of absolute equality may not constitute breach of s. 3 of the Charter so long as the departure can be objectively justified as contributing to better government."

the government defending the deviations from the electoral quotient beyond "relative parity of voting power" but that considerable leeway will be given in assessing the reasons proffered by the government in support of the deviations.

Unlike the Court of Appeal, she concluded that the overrepresentation of the rural areas was relatively small[50] and could be accounted for by "the fact that it is more difficult to represent rural ridings than urban."[51] Unfortunately she confused "fact" with "argument," accepting as certain an argument which is not free from doubt.[52]

Despite the majority's conclusion that the Saskatchewan electoral boundaries did not infringe on the *Charter*-protected right, caution must be exhibited in concluding that deviations within plus or minus 25% of the provincial electoral quotient for other than sparsely populated northern areas (i.e. the facts in the *Saskatchewan Reference* case) will necessarily pass judicial scrutiny. Unlike the dissenting judgment,[53] the majority made no reference to any acceptable numerical extent of deviation. Instead, all deviations must be "justified."

III. THE *ALBERTA REFERENCE* CASES

To date Alberta's electoral boundaries have produced the most sustained divisive public debate and judicial attention. The controversy in Alberta has focused on how to accommodate the urbanization of Alberta society and the principle of "representation by population" while also providing an adequate voice and service to rural residents by their elected representatives. The divisiveness had been assisted by the fact that, although redistributions from 1969 until 1990 had been turned over to independent electoral boundaries commissions, the commissioners have had their discretion constrained by the categorization of constituencies into rural and urban electoral divisions with a disproportionate allocation of electoral divisions to rural areas.

Justice McLachlin's decision in the *Dixon* case that the British Columbia electoral boundaries did not meet the requirements of the *Charter* raised concerns in Alberta where population deviations in the various constituencies

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[50] *Saskatchewan Reference*, *supra* note 4 at 192.

[51] *Ibid.* at 195.

[52] See R.E. Fritz, "Drawing Electoral Boundaries in Compliance with the *Charter*: The Alberta Experience" (1996) 6 N.J.C.L. 347 at 372–375.

[53] *Saskatchewan Reference*, *supra* note 4 per Cory, J. at 167.

exceeded those in British Columbia.[54] After enacting the *Electoral Boundaries Commission Act*[55] the Alberta government referred it to the Alberta Court of Appeal to obtain its advice on the legislation's constitutionality. The reference case was put on hold until the Supreme Court of Canada had rendered its decision in the *Saskatchewan Reference* case. The Supreme Court's decision came down before the Electoral Boundaries Commission had completed its work and before new electoral boundaries had been implemented. Only supporters of the Act appeared when the reference case was argued.

The *1991 Alberta Reference* case[56] essentially required the Court of Appeal to envisage what the constituencies recommended by the commissioners would be like given the constraints imposed on them by the enabling legislation. While the Act maintained categories of rural and urban constituencies (although referred to as "multi-municipality electoral divisions" and "single municipality electoral divisions" respectively), with specified numbers of seats allocated to the cities of Calgary, Edmonton, Lethbridge, etc., it appeared to allow the commission to establish what became known as "rurban" constituencies comprised of both rural and urban residents.[57]

At the outset, the *per curiam* judgment described the Court of Appeal's role as one where "we should not interfere unless a rule or decision is demonstrably unjustified, palpably wrong, or manifestly unreasonable."[58] Of particular concern was the pre-set scheme of allocating a specified number of constituencies to multi-municipality and to single-municipality constituencies. Because the commission's discretion had been freed so as to enable the creation of "rurban" constituencies, and because the Court of Appeal believed that progress had been made in redressing the imbalance between the populations of the rural and urban areas and the seats allocated to each, the judges were not prepared to find that the Act infringed on the *Charter*-protected right.[59]

Several other aspects of the judgment warrant mentioning. First, the Court of Appeal correctly noted that the *Saskatchewan Reference* case had not

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[54] R. Knopff and F.L. Morton, "Charter Politics in Alberta: Constituency Apportionment and the Right to Vote" in *Drawing Boundaries*, *supra* note 5, 96 at 97.

[55] S.A. 1990, c. E-4.01.

[56] *Reference Re Electoral Boundaries Commission Act (Alberta)* (1991), 86 D.L.R. (4th) 447, [1992] 1 W.W.R. 481 [hereinafter *1991 Alberta Reference* cited to D.L.R.].

[57] *Supra* note 55, s. 13(2).

[58] *1991 Alberta Reference, supra* note 54 at 452.

[59] *Ibid.* at 454–55.

approved of constituencies simply because their electoral populations fell within the plus or minus 25% standard imposed by the Saskatchewan and Alberta legislation: deviations had to be necessary to ensure effective representation in order to be constitutionally supportable.[60] Second, the Court observed that "no argument for effective representation of one group legitimizes under-representation of another group."[61] Third, it noted that, had they found the pre-set allocation of seats to have infringed the *Charter*, their advice on the appropriate remedy would have been fashioned so as to produce incremental change.[62]

Subsequent to the decision being rendered by the Court of Appeal, the electoral boundaries commission developed a stalemate since no majority of the commissioners could agree on new electoral boundaries. One of the commissioners, the Chief Electoral Officer of Alberta, concluded that, given the constraints imposed by the Act, he could not recommend constituency boundaries that would meet the requirements of the *Charter*. The government determined that, in light of the pressing need to revise the electoral boundaries before the next general election, the task of revising the electoral boundaries should be carried out by a committee of the Legislative Assembly. Although the motion passed by the Legislative Assembly provided for representation on the committee by members of opposition parties, the latter refused to participate, believing that it was no longer appropriate for elected politicians to draw electoral boundaries. As a result, the new electoral boundaries ultimately adopted by the legislature were developed only by members of the governing party. Just prior to conducting a general election using these new boundaries in 1993, the government referred the question of their constitutionality to the Court of Appeal.[63]

After reviewing the facts, the *per curiam* judgment in the *1994 Alberta Reference* case noted:[64]

> It is one thing to say that the effective representation of a specific community requires an electoral division of a below-average population. That approach invites specific reasons,

[60] *Ibid.* at 454.

[61] *Ibid.* at 456.

[62] *Ibid.* at 455–56.

[63] See R.E. Fritz, *supra* note 52 at 362–66.

[64] *Reference re Electoral Divisions Statutes Amendment Act, 1993 (Alberta)* (1994), 119 D.L.R. (4th) 1 at 12, 24 Alta. L.R. (3d), 1 157 A.R. 241 [hereinafter *1994 Alberta Reference* cited to D.L.R.]. This was reinforced where the Court noted that deviations must be justified "on a division-by-division basis." *Ibid.* at 13.

> and specific facts. The Constitution of Canada is sufficiently flexible to permit disparity to serve geographic and demographic reality.
>
> It is quite another to say that *any* electoral division, for no specific reason, may be smaller than average. In the 1991 Reference, we affirmed the first, not the second. We affirm again that there is no permissible variation if there is no justification. And the onus to establish justification lies with those who suggest the variation.

Furthermore, in describing the process that led to the establishment of these electoral boundaries the Court concluded that those responsible for them had been inappropriately guided by political considerations, namely how rural residents would react to a rebalancing of rural and urban representation in the legislature.[65] It observed that the necessary constituency-by-constituency justifications for deviations were not before the Court.[66] In light of the foregoing, one would likely have anticipated that the new electoral boundaries would have been found to have been unconstitutional. Not so.

After acknowledging that some progress had been made since the *1991 Alberta Reference* case, the Court indicated that more work was needed to appropriately address the concerns of the underrepresented urban residents. In order to avoid a possible "political crisis,"[67] it refrained from declaring the electoral boundaries unconstitutional. However, the Court tempered their seeming reticence by observing that "a new and proper review is essential before the constitutional mandate of the present government expires, and we hope, before the next general election."[68] Furthermore, it characterized the extent of that review as necessitating "massive surgery."[69]

In a technical sense, the government had succeeded in defending the electoral boundaries and the intervenors had failed in their quest. The reality is that it was a pyrrhic victory, indeed, for the government. When one looks below the surface, the intervenors had succeeded. Their ultimate goal had been to have the electoral boundaries redrawn, something which the Court of Appeal expected to be done in the near future. Even had the Court of Appeal advised that the electoral boundaries were unconstitutional, it would likely have done what Justice McLachlin had done in the *Dixon* case and allowed the government to redraw the electoral boundaries within a reasonable time.

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[65] *Ibid.* at 14–16.
[66] *Ibid.* at 13–14.
[67] *Ibid.* at 18.
[68] *Ibid.*
[69] *Ibid.* at 17.

Heeding the Court of Appeal's exhortation, the enabling legislation was significantly changed and freed future commissions from any fixed allocation of seats for rural and urban residents respectively.[70] A new commission was established in 1995 and new electoral boundaries based on its report were enacted in 1996.[71] The commission continued a gradualist approach by recommending one additional seat for each of Edmonton and Calgary and a corresponding reduction in the remaining areas of the province. If full weight had been given to parity of voting power, Edmonton would have been entitled to a further additional seat and Calgary to two further additional seats based on 1991 census data, and in the case of Calgary to three additional seats based on Statistics Canada population data updated to July 1, 1995. While the commission was prepared to create "rurban" constituencies combining residents of such urban centres as Medicine Hat and Grande Prairie with rural residents living in the surrounding countryside of each, the commission was not prepared to redress the underrepresentation of the residents of Edmonton and Calgary by creating similar "rurban" constituencies.

A unique feature of the commission's report was an attempt to scientifically measure difficulties of representation by using six criteria and variable weighting within each criterion. Some criteria appear to measure the same variable (e.g., "geographic area" and "population density and sparsity") while one ("distance from the Legislature") seems irrelevant. Furthermore, even the commission's own approach did not produce equal treatment. For example, both Calgary-Buffalo (100% urban residents) and Lac La Biche-St. Paul (68% rural residents, 32% urban residents) had identical matrix rankings but the former constituency was created with a population of 12.5% above the provincial electoral quotient, while the latter's was 10.6% below.[72]

It remains to be seen whether anyone will mount a challenge to the new electoral boundaries. On the surface it appears that the changes hardly constituted the "massive surgery" that the Court of Appeal had said was required in the *1994 Alberta Reference* case.

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[70] *The Electoral Boundaries Commission Act*, 1995, S.A. 1995, c. 10.

[71] *The Electoral Divisions Act*, S.A. 1996, c. E–4.06.

[72] Alberta, *Proposed Electoral Division Areas, Boundaries and Names for Alberta: Final Report* (Edmonton: Queen's Printer, June 1996) (Chair: Judge E.R. Wachowich) at 67.

IV. THE PRINCE EDWARD ISLAND CASES

As in Alberta, the focus of litigation in Prince Edward Island has been in relation to the overrepresentation of rural residents and the underrepresentation of urban residents, especially of those residing in Charlottetown. In 1991 MacKinnon, a resident of Charlottetown, brought an application seeking a declaration that the then existing provincial electoral boundaries were inconsistent with the *Charter*-protected "right to vote" and an order requiring their redrawing. The City of Charlottetown was added as an intervenor in support of MacKinnon's action. The provincial electoral boundaries had not been redrawn since 1966. The population discrepancies were significant, varying from 63% below the provincial electoral quotient to 115% above the provincial electoral quotient, with the Charlottetown constituencies varying from 71% to 115% above the provincial electoral quotient.[73]

Understandably, the structure of Justice Des Roches's judgment followed that which Justice McLachlin had employed in the *Saskatchewan Reference* case. He considered under his section 3 analysis whether the variations from parity of voting power could be justified as being necessary to ensure the effective representation of all residents. Although the issue of burden of proof was not directly addressed, both the government and the judge appeared to consider the burden to be on the government to justify such deviations, since the bulk of the decision relating to whether there had been an infringement was spent addressing the 12 reasons advanced in support of the deviations by the government. All of the justifications advanced by the government were found wanting. Of particular significance was his rejection of the argument that it was inherently more difficult for MLAs to effectively represent rural residents. Despite the fact that a very high proportion of its residents live in the rural areas, Prince Edward Island is the most densely populated of any of the provinces.[74] Distances are not great and the province has an efficient communications network and a well-developed road system.[75] Two expert witnesses, a cabinet minister and a former premier, called by the government to support its assertion that it was inherently

[73] *MacKinnon* v. *Prince Edward Island* (1993), 101 D.L.R. (4th) 362 at 374, 329 A.P.R. 232 104 Nfld. & P.E.I.R. 232 (P.E.I.S.C., T.D.) at 373–74 [hereinafter *MacKinnon* cited to D.L.R.]. Justice Des Roches stated the total variance to be 178%. A more appropriate way of describing the variance is that the largest constituency had 486% more voters than the smallest.

[74] *Ibid.* at 374.

[75] *Ibid.* at 391.

more difficult to represent rural residents, conceded in cross-examination that the representatives of rural residents were not overburdened by their workload.[76]

Having concluded that the electoral boundaries infringed section 3 of the *Charter*, Justice Des Roches turned to consider whether they could be saved under section 1. Since the government proffered only those justifications under section 1 that had already been rejected under his section 3 determination,[77] Justice Des Roches, not surprisingly, concluded that the government had failed to meet its burden under section 1.

Just as Justice McLachlin had done in the *Dixon* case, Justice Des Roches did not establish any deadlines or specific requirements to govern the task of redrawing the electoral boundaries. However, he made a number of observations that were to serve as a rough guide. These included: (i) that the redrawing be accomplished within one year of the issuance of his judgment;[78] (ii) that, although not constitutionally necessary, it was preferable that the redrawing be done by an independent commission;[79] and, (iii) that, given the evidence heard at the trial, deviations greater than ten per cent from the provincial electoral quotient would appear unnecessary.[80]

An electoral boundaries commission was created, made up primarily of sitting Members of the Legislative Assembly. The commission's report was completed just outside the one year period suggested by Justice Des Roches. The recommended constituencies included 40% which varied from the provincial electoral quotient by *more than* plus or minus ten per cent, 40% which varied from the provincial electoral quotient by between plus or minus five to ten per cent and 20% which varied from the provincial electoral quotient by less than five per cent.[81] The largest exceeded the provincial electoral quotient by 13.83% and the smallest fell below the provincial electoral quotient by 12.37%. The largest exceeded the smallest by 29.9%.

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[76] *Ibid.* at 380–81.

[77] *Ibid.* at 394.

[78] *Ibid.* at 399.

[79] *Ibid.* at 397.

[80] *Ibid.*

[81] Prince Edward Island, *Report of the Election Act and Electoral Boundaries Commission* (Charlottetown: March 1, 1994) (Chair: L. MacPherson) Appendix V.

The commission's recommendations were not ultimately implemented. Instead, a private member's bill was passed[82] which resulted in even greater deviations from the provincial electoral quotient than had been recommended by the commission: 77.78% of the constituencies varied from the provincial electoral quotient by *more than* plus or minus ten per cent, 18.52% varied from the provincial electoral quotient by between plus or minus five to ten per cent and 3.7% varied from the provincial electoral quotient by less than five per cent. While none of the constituencies recommended by the commission exceeded the provincial electoral quotient by greater than plus or minus 15%, 59.3% of the implemented electoral boundaries did. The largest exceeded the provincial electoral quotient by 21.10% and the smallest fell below the provincial electoral quotient by 19.92%. The largest exceeded the smallest by 51.23%.[83]

The City of Charlottetown sought a declaration that the electoral boundaries violated the *Charter*-protected "right to vote" and MacKinnon appeared as an intervenor in support of the City's claim.[84] If one read the last part of Chief Justice MacDonald's reasons for judgment before reading the first part, one would have anticipated a finding in favour of those seeking the declaration. However, he concluded that the boundaries did not breach the *Charter*.

It is in the last part of his judgment that Chief Justice MacDonald examined whether the deviations from parity of voting power could be justified. Except for acknowledging that even greater deviation could have been justified for the smallest constituency in which a significant portion of the Island's Acadian

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[82] *The Electoral Boundaries Act*, S.P.E.I. 1994, c. 13.

[83] Prince Edward Island redraws electoral boundaries based on voter populations and not census populations. Between when the *Charlottetown* case was argued and when the trial judge issued his decision in December 1996, a general election was held. The deviations became even greater at the extremes with 33.33% of the constituencies exceeding the provincial electoral quotient by more than 20% and 14.81% exceeding the provincial electoral quotient by more than 25%. The largest exceeded the provincial electoral quotient by 27.3% and the smallest fell below the provincial electoral quotient by 25.4%. The largest exceeded the smallest by 70.66%. For an analysis of the strengths of constituencies being based on voter rather than census populations, see M. Eagles, "Enhancing Relative Voter Equality in Canada: The Role of Electors in Boundary Adjustment" in D. Small, ed., *Drawing the Map: Equality and Efficacy of the Vote in Canadian Electoral Boundary Reform* (Toronto: Dundurn Press, 1991) 175, and Royal Commission on Electoral Reform and Party Financing, *Final Report: Reforming Electoral Democracy*, vol. 1 (Ottawa: Supply and Services Canada) at 160–62.

[84] *Charlottetown (City)* v. *Prince Edward Island* (1996), 142 D.L.R. (4th) 343 (PEI SC TD) [hereinafter *Charlottetown (S.C.)*].

population resided,[85] he rejected all arguments posed by the government in support of the deviations. As had Justice Des Roches, he concluded that it was not inherently more difficult to effectively represent rural residents in the province than to represent urban residents.[86] He accepted the applicants' argument that geographic barriers played little role in drawing the province's constituency boundaries.[87]

Two aspects of the last part of his judgment are puzzling in light of what he wrote in the first. The first is his express agreement with Justice Des Roches that a maximum variance "of ± 10% might be appropriate for Prince Edward Island."[88] The second is his express agreement with Justice Des Roche "that county boundaries should be ignored"[89] in drawing the province's electoral boundaries.

Turning to the first part of his judgment, the challengers of the electoral boundaries focused primarily on the extent of the deviations from equality of voting power. The pivotal questions in this part of his judgment related to the role of the court and the burden of proof when electoral boundaries were challenged under the *Charter*. On the former question he referred with approval to Justice McLachlin's comments in the *Dixon* and *Saskatchewan Reference* cases and to the Alberta Court of Appeal's description relating to the need for judicial deference to the legislature.[90] On the second question he wrote:[91]

> The burden of establishing that there has been an infringement of s. 3 of the *Charter* is upon the party alleging the infringement. In the appellants' pre-hearing brief, post-hearing submissions and argument at trial there appears to have been an attempt to gloss over this requirement and to put the burden immediately upon the government to justify any infringement. This latter approach is wrong. The person alleging a breach of the *Charter* must first prove the breach before the government is required to justify the breach under s. 1 of the Charter.

Chief Justice MacDonald's conclusion failed to fully appreciate how the analytical structure of Justice McLachlin's judgments in the *Dixon* and *Saskatchewan Reference* cases must be taken into account when addressing the issue of burden of proof since it is not an issue which she addressed directly. As

[85] *Ibid.*
[86] *Ibid.* at 358.
[87] *Ibid.* at 356.
[88] *Ibid.* at 360.
[89] *Ibid.* at 357.
[90] *Ibid.* at 348–49.
[91] *Ibid.* at 353.

was noted above, by defining the "right to vote" in the manner that she did, Justice McLachlin incorporated matters of justification into her section 3 analysis that naturally fit within a section 1 analysis. Since those who allege that their *Charter* right has been infringed are not privy to the work of the body or person responsible for the redrawing of the electoral boundaries, it would be impossible, in the absence of a detailed published report, for them to focus on aspects other than the deviations.

In considering the extent of the variances, he concluded that they were not "large enough or so manifestly unreasonable that the Court should interfere in the electoral process and invalidate the existing legislation."[92] It appears that this conclusion was significantly influenced by the fact that, in essence, the overrepresentation of Kings County residents by one seat and by the underrepresentation of Queens County residents by one seat had prompted the litigation.[93] When viewed in that way, the concern of the applicants seems insignificant indeed.

On the other hand, all deviations must be justified on the basis that they are necessary to ensure the effective representation of all residents. Yet, in the last part of his judgment he rejected every justification proffered by the government. The deviations far exceeded the plus or minus ten per cent limit of deviation that Justice Des Roches had considered to be warranted and with which Chief Justice MacDonald expressly agreed.[94] As well, a conclusion based on the overrepresentation of one county's residents and the underrepresentation of another's is hard to reconcile with Justice Des Roches's conclusion that county boundaries could be ignored in drawing the province's electoral boundaries, a finding with which Chief Justice MacDonald expressly agreed.

It must be recognized that Chief Justice MacDonald qualified his decision in a number of the concluding paragraphs of his judgment by emphasizing that it might well be different should circumstances change.[95] Unfortunately, without

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[92] *Ibid.* at 355.

[93] *Ibid.* at 354. This would be the result if parity of voting power had dominated the process of redistribution.

[94] Furthermore, the 1996 redistribution of the Prince Edward Island's federal constituencies varied from 7.3% below to 5.6% above the applicable electoral quotient, the second smallest range of deviations of any of the provinces, a much tighter range than for the provincial constituencies created at much the same time.

[95] *Ibid.* at 361–62.

expressly indicating what degree of change would be necessary to lead to an opposite conclusion, he was simply inviting further litigation.

It should also be noted that the reasoning of the Court of Appeal in the *Alberta Reference* cases had a significant impact on his ultimate conclusion. However, he failed to appreciate that, although the *1994 Alberta Reference* case had held that the electoral boundaries had not infringed the *Charter*-protected right, effectively the Court of Appeal had found against the government in that the judges expected that the electoral boundaries should be redrawn before the next general election. Chief Justice MacDonald's judgment placed no corresponding obligation on the government.

In a 2–1 decision, the Appeal Division upheld Chief Justice MacDonald's conclusion that the Prince Edward Island provincial electoral boundaries complied with the requirements of the *Charter*.[96] The issue of burden of proof received significant attention in both the majority and the dissenting judgments. Counsel for the City of Charlottetown argued that Justice McLachlin in the *Saskatchewan Reference* case had subsumed the usual section 1 analysis into the section 3 analysis[97] with the result that she had placed an insurmountable burden on the party alleging an infringement of the *Charter*-protected right. The effect of the argument was to invite the Court to redefine the *Charter*-protected right.

Carruthers, Chief Justice of Prince Edward Island, writing for the majority, declined the invitation as he considered himself bound by Justice McLachlin's definition. Although recognizing that the burden of proof of justification fell upon the province, he was equivocal as to whether that burden was located within section 3 or section 1.[98] Consideration of the appellant's argument occurred only after he had concluded that the aggregate deviations did not establish an infringement of the *Charter*. He noted that the allocation of constituencies on a county basis resulted in one of the three counties being overrepresented by one constituency while another was similarly underrepresented. As well, the number of constituencies allocated to rural electors constituted a five per cent overrepresentation, with a corresponding underrepresentation of urban electors.[99] No attempt was made to consider whether the percentage deviations from electoral equality could be justified on

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[96] *Charlottetown (City)* v. *Prince Edward Island*, (1998) 169 NFLD & PEIR 188, 521 APR 188 (PEICA) [cited to APR].

[97] Support for this position can be found in R.E. Charney, *supra* note 43.

[98] *Supra* note 96 at 205–6.

[99] *Ibid.* at 202–3.

a constituency-by-constituency basis. Unlike the trial judge, Chief Justice Carruthers simply listed the arguments of justification submitted by the province without analyzing their merits.[100]

Indeed, the approach taken by the Chief Justice with respect to the nature of the burden on the party alleging the infringement was imposing. The burden is to show that the electoral boundaries did "not provide effective representation to the electors of the province"[101] and "more than numbers [are] required."[102] He failed to explain how the burden to show that the deviations were unjustified could be met by the party alleging the infringement and how it related to the burden of justification imposed on the province.

Justice Mitchell, in his dissent, attempted to meet the argument of the appellant not by redefining the *Charter*-protected right but rather by recognizing concurrent burdens within section 3:[103]

> [J]ust because the applicant in a Charter case bears the ultimate burden does not mean they bear this burden at every turn on every relevant issue. In practice, the burden of persuasion tends to shift back and forth between the parties depending on what the issue is and who is seeking to rely on it. Of course, if at the end of the day the evidence does not establish a violation on a balance of probabilities, the applicant loses. In my view, the evidence adduced by the appellant was sufficient to meet the threshold for shifting the burden of persuasion to the respondent to justify the deviances.

In determining that the City of Charlottetown had met its threshold burden, he acknowledged that the distribution of districts among urban and rural voters was not "significantly out of line with their respective percentages of the population."[104] He noted, however, that nearly 60% of the constituencies exceeded the provincial quotient by more than 15%, a level of deviation which far exceeded those found in New Brunswick, Nova Scotia or federally.[105] He agreed with the trial judge that "virtually all of the grounds of justification for the variances advanced by the respondent are without merit. The lone exception related to . . . Evangelene-Miscouche,"[106] the primarily Acadian constituency.

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100 *Ibid.* at 201–2.
101 *Ibid.* at 194.
102 *Ibid.* at 206.
103 *Ibid.* at 209.
104 *Ibid.*
105 *Ibid.* at 209–10.
106 *Ibid.* at 210.

After concluding that the electoral boundaries constituted an infringement of the *Charter*-protected right, he concluded that the province had not met the burden under section 1. He observed:[107]

> I do not agree with the view of the majority of this court that any variances falling within +/- 25% should be tolerated. All deviances must be justified. Here, except for [Evangelene-Miscouche], they were not.

As had Chief Justice McLachlin in the *Dixon* case and Justice des Roches in the *MacKinnon* case, Justice Mitchell would have suspended the declaration of invalidity for 18 months so as not to precipitate a constitutional crisis.[108]

V. OTHER LITIGATION

The work of redrawing electoral boundaries often concludes either shortly before a general election must be held, due to the expiration of the government's mandate under the *Constitution Act, 1982*[109] or shortly before the government in power is contemplating calling a general election to renew its mandate.

There have been a number of cases where injunctive relief has been sought either to prevent an election being called utilizing the new electoral boundaries in a specific constituency (or group of constituencies),[110] to prevent the calling of a general election in the province as a whole based on the new electoral boundaries[111] or to prevent the holding of a general election in the province after the election has been called.[112] The arguments in these cases have revolved around the inadequate reflection of a community of interest in the new boundaries that have been established. In all instances, the injunctive relief has

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107 *Ibid.* at 213.

108 *Ibid.* at 214.

109 *Supra* note 1, s. 4. This was the situation when the *Saskatchewan Reference* case was being argued before and being considered by the courts.

110 *Bedford (Town)* v. *Nova Scotia (Law Amendments Committee)* (1993) 123 N.S.R. (2d) 355, 340 A.P.R. 355 (N.S.C.A.).

111 *Lac La Biche (Town)* v. *Alberta* (1993), 102 D.L.R. (4th) 499 (Alta. C.A.). For a full discussion of all of the related proceedings initiated by the Town of Lac la Biche, see *supra* note 52 at 368–70.

112 *Société des Acadiens* v. *Canada* (1997), 480 A.P.R. 330, 188 N.B.R. (2d) 330 (N.B.Q.B. T.D.).

been denied. A common theme in the judicial decisions has been that the balance of convenience favours the holding of the general election.[113]

The failure to obtain injunctive relief does not foreclose the continuation of an action for declaratory relief.[114] The Société des Acadiens are continuing in their pursuit to have the newly implemented federal New Brunswick electoral boundaries declared to be unconstitutional. The basis of their action is that the francophone population is being denied the right to effective representation because a number of francophone communities have been grouped with anglophone communities, thus creating constituencies whose residents do not share a common community of interest, and because one constituency with a francophone majority disappeared in the redistribution.

VI. JUDICIAL DEFERENCE IN THE CONTEXT OF PROVINCIAL ELECTORAL BOUNDARIES

To date, with the exception of the *Société des Acadiens* case, it has been provincial rather than federal electoral boundaries that have been challenged. Although the *Saskatchewan Reference* case involved a challenge to provincial electoral boundaries, there is nothing in Justice McLachlin's judgment to indicate that her definition of the *Charter*-protected "right to vote" did not apply to federal electoral boundaries.

In the *Saskatchewan Reference* case she noted that "elected representatives function in two roles — legislative and what has been termed the 'ombudsman role'."[115] She emphasized that parity of voting power was of prime importance to ensure the effective representation by elected representatives carrying out both roles.[116] She also acknowledged that other factors may be considered to ensure

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113 In the *Lac la Biche* case, *supra* note 111, there were two other important reasons for denying the injunction. Firstly, the granting of the injunction would not have prevented the calling of a general election based on the old electoral boundaries that were conceded to infringe upon the *Charter*. Secondly, the Town declined to put up the necessary security for the costs associated with holding another election if it was ultimately unsuccessful in its challenge.

114 The concerns of the Town of Lac la Biche became subsumed in the *1994 Alberta Reference* case, *supra* note 64.

115 *Supra* note 4 at 183.

116 *Ibid.* at 183–84. See also the *Dixon* case, *supra* note 3 at 266 where she wrote:

> Relative equality of the number of voters per representative is essential to the conduct of both these roles.
>
> In the legislative role, it is the majority of elected representatives who determine who

effective representation[117] and it is these other factors that can be used to justify deviations from parity of voting power.

The conditions within each province are the same whether one is devising provincial or federal electoral boundaries. Given that constancy, the need for deviations from parity would appear, for a number of reasons, to be less in the case of provincial electoral boundaries than in the case of federal electoral boundaries.

As Table 1 below demonstrates, the ratio of provincial representatives to federal representatives in each of the provinces varies from a low of 1.3:1 in Ontario to a high of 6.9:1 in Newfoundland and a median ratio of 4.1:1.

forms the government and what laws are passed. In principle, the majority of elected representatives should represent the majority of the citizens entitled to vote. Otherwise, one runs the risk of rule by what is in fact a minority. . . . If there are significant discrepancies in the numbers of people represented by the members of the legislature, the legitimacy of our system of government may be undermined.

Relative electoral parity is similarly essential to the elected representative's "ombudsman" function which requires the representative and his or her staff to deal with individual problems and complaints of constituents. It is not consistent with good government that one member be grossly overburdened with contituents, as compared with another member.

[117] *Supra* note 45 and the text thereto.

TABLE 1

Province	# Provincial Representatives	# Federal Representatives	Ratio of Provincial to Federal
British Columbia	75	34	2.2:1
Alberta	83	26	3.2:1
Saskatchewan	58	14	4.1:1
Manitoba	57	14	4.1:1
Ontario	103	103	1.0:1
Quebec	125	75	1.7:1
New Brunswick	55	10	5.5:1
Prince Edward Island	27	4	6.8:1
Nova Scotia	52	11	4.7:1
Newfoundland	48	7	6.9:1

Thus with the exception of the province of Ontario, not only is each provincial representative representing fewer people than his or her federal counterpart, but constituencies on average should be smaller in territorial size.

Furthermore, federal representatives have a more difficult task of personally performing their ombuds role than their provincial counterparts. In a study done by Southam Newspapers, legislative sitting days in 1997 in each of the provinces, except in the province of Ontario, were exceeded by the number of sitting days of the House of Commons.

TABLE 2

Province	# Sitting Days
New Bruswick	32
Alberta	38
Nova Scotia	39
Newfoundland	51
Saskatchewan	54
Prince Edward Island	65
Manitoba	77
Quebec	78
British Columbia	84
Ontario	130
House of Commons	93[118]

The increased sitting time means that federal representatives are potentially away from their constituencies for greater periods of time. As well, they usually have to expend greater amounts of time travelling between their constituencies and the place where legislative sittings occur.

It is doubtful that it can be established that the representational roles of federal representatives are significantly different than those of their provincial counterparts. On the assumption that Canadians are effectively represented

[118] J. Aubry, "The Price of Politics" *The [Saskatoon] Star-Phoenix* (4 May 1998) A1. The figure of 93 for the House of Commons corresponds to the text of the article and not to the table that was published. In the case of the House of Commons, Aubry noted that the number of sitting days was unusually low, probably because of the holding of the federal election in 1997. By comparison there were 122 sitting days in 1996. In the case of Ontario, the new government needed significantly more sitting days in 1997 to accommodate its massive and controversial legislative program.

within the requirements of the *Charter* by their 298 federal representatives,[119] then the need for deviations from parity of voting power should be less in fashioning the 683 constituencies for provincial representatives. Ironically, recent work by Courtney demonstrates that generally there is greater adherence to parity of voter power in the recently created federal electoral boundaries than is the case of the comparable provincial electoral boundaries.[120]

VII. CONCLUSION

The courts have been justifiably reticent in interposing their presence where an individual claims that a legislature, which is responsible for implementing electoral boundaries, is infringing upon the former's *Charter*-protected "right to vote." That reticence has been expressed in the cases through the notion of judicial deference. Despite that deference, courts have been prepared to side with individual claimants where the deviations from parity of voting power were substantial, such as in the *Dixon* and *MacKinnon* cases. The extent of judicial deference increases as the extent of the deviations decreases. The *1994 Alberta Reference* case is the most significant case where the extent of the deviations were neither substantial nor insignificant. As has been argued above, although the Court of Appeal in that case did not directly find the electoral boundaries to infringe upon the *Charter*-protected right, they indirectly did so by expressing their expectation that the electoral boundaries be redrawn before the next general election.

If care is not taken by the courts in properly allocating the burdens of proof, the analytical structure adopted by the majority of the Supreme Court of Canada in the *Saskatchewan Reference* case potentially raises daunting hurdles for those asserting infringement of individual rights in these mid-range cases. By defining the *Charter*-protected "right to vote" as meaning the "right to effective representation," which includes "parity of voting power" and a myriad of other factors, Justice McLachlin seems to have introduced into her section 3 analysis considerations that one would have ordinarily expected to be covered in a section

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119 Table 1 excludes any comparisons between provincial and federal representatives in the Yukon and Northwest Territories and in Nunavut.

120 This can be demonstrated by comparing the calculations made by J.C. Courtney, "Life with Carter: Electoral Boundaries in the '90s" (Paper presented at the annual Conference of the Canadian Political Science Association, University of Ottawa, 2 June 1998 of the Federal Electoral Districts Gini Indexes 1966–1996 in Table 2 at 26 with the calculations of the Provincial Electoral Boundaries Gini Indexes Pre- and Post- Carter Decision in Table 4 at 28.

1 analysis. With such an analytical structure, care must be taken in addressing burden of proof, an issue which she did not directly address. A traditional approach that places the burden of proof on the person who asserts that a *Charter*-protected right has been infringed, as exemplified by Chief Justice MacDonald in the *Charlottetown* case, will doom to almost certain failure the assertion of infringement. And yet, even Justice McLachlin acknowledged that deviations must be justified. How then can one accommodate her definition of the *Charter*-protected right which includes such a complex matrix of factors?

One way is to recognize two burdens of proof co-existing within the section 3 analysis. The first would be on the individual who asserts the infringement of the right to show non-insignificant deviations from parity of voting power. As Justice McLachlin pointed out, strict equality may be practically impossible, especially without continually redrawing electoral boundaries and updating voter data. In determining whether there are such deviations, the court should not apply a simplistic numerical guideline but should come to a conclusion by assessing the overall pattern of deviations. Once this ill-defined threshold has been crossed, then the burden should shift to the government to justify the deviations, taking into account the numerous factors identified by Justice McLachlin. This was the approach of the Alberta Court of Appeal in the *1994 Alberta Reference* case which expressly stated that "the onus to establish justification lies with those who suggest the variation."[121] It was also the position of Justice Mitchell dissenting in the appeal of the *Charlottetown* case.[122]

Another way is to adapt the approach taken by the Supreme Court of Canada in *Snell* v. *Farrell*[123] to this context. That case dealt with the issue of burden of proof in actions in the tort of negligence where the facts indicated numerous possible causes for the injury or loss sustained by the plaintiff. Ordinarily, the plaintiff has the burden on a balance of probabilities of establishing that the injury or loss was caused by the defendant's negligence. Some prior cases had, in these complex factual situations, shifted the burden of proof onto the defendant to establish that the defendant had not been negligent. The Supreme Court of Canada concluded that, except for very exceptional cases, the legal burden of proof should rest with the plaintiff. Justice Sopinka indicated that if, at the close of the plaintiff's case, the defendant adduces no evidence, "an inference of causation may be drawn although positive or scientific proof of causation has not been adduced. If some evidence to the contrary is adduced by

121 *Supra* note 64 and the text thereto.

122 *Supra* note 96.

123 [1990] 2 S.C.R. 311.

the defendant"[124] the court is to determine, on the basis of common sense, what was the likely cause of loss. In this the court was to employ a "robust and pragmatic approach to the . . . facts."[125]

Adapting that approach to this context, one would say that the burden is on the individual alleging the infringement of his or her *Charter*-protected "right to vote" to establish that the deviations have crossed the ill-defined threshold. In the absence of justification for the deviations being tendered by the government, the court should find that the person asserting the infringement has satisfied the burden of proof. Where justifications are tendered by the government, the court should weigh those explanations keeping in mind the complex matrix of factors that must be taken into account in redrawing electoral boundaries and the general predilection of the courts to defer to the legislatures in this area. If the explanations tendered are considered plausible, the action should be dismissed on the ground that the party alleging the infringement has failed to meet their burden of proof.

The best approach would be that taken by the Saskatchewan Court of Appeal in the *Saskatchewan Reference* case which defined the *Charter*-protected right as the right to "relative or substantial equality of voting power," leaving the other factors identified by Justice McLachlin to be addressed under section 1 of the *Charter*. Failing a redefining by the Supreme Court of Canada of the *Charter*-protected right, the approach placing co-extensive burdens within the section 3 analysis best mirrors the approach taken by the Saskatchewan and Alberta Courts of Appeal. However, an adapted *Snell* approach better accords with the traditional notion that the burden of proof lies on the person alleging an infringement of his or her *Charter*-protected right. It should also be recognized that, where the party alleging the infringement is successful under Justice McLachlin's approach, it is unlikely that the government will be able to justify the deviations under the section 1 analysis.

Justice McLachlin,[126] the Alberta Court of Appeal in the *1994 Alberta Reference* case[127] and Justice Mitchell dissenting in the appeal of the *Charlottetown*[128] case indicated that all deviations from "parity of voting power"

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124 *Ibid.* at 330.

125 *Ibid.* citing with approval *Wilsher* v. *Essex Area Health Authority*, [1988] 2 W.L.R. 557 (H.L.).

126 *Supra* note 26 and the text thereto.

127 *Supra* note 63 and the text thereto.

128 *Supra* note 96 at 213.

had to be justified. Thus, one could attempt to show that a single constituency's boundaries deny effective representation to the residents therein. Challenges brought to date involving an individual constituency or several related constituencies have tended to be based on an argument that a community of interest has not been adequately recognized. However, as Justice McLachlin noted in the *Saskatchewan Reference* case, community of interest is only one of many factors that may be taken into account in drawing electoral boundaries. As noted earlier, she did not establish a hierarchy of importance for the factors. As well, in some instances factors may counterbalance each other. One practical limitation is that a constituency's boundaries are not drawn in isolation. Changes in one may have unacceptable consequences in other constituencies. It would be rare, indeed, to be able to successfully argue an infringement in relation to one or related constituencies unless the overall configuration of electoral boundaries raises constitutional concerns.

As argued above, the threshold level of permissible deviation should vary according to whether it is provincial or federal electoral boundaries that are being challenged. The need for deviations from parity of voting power would appear to be less in the case of provincial electoral boundaries than in the case of federal electoral boundaries.

Justice Sopinka, in concurring with Justice McLachlin in the *Saskatchewan Reference* case, noted that there is no constitutional requirement that electoral boundaries be drawn by independent electoral boundaries commissions.[129] Justice Des Roches in the *MacKinnon* case acknowledged that it was "preferable" that electoral boundaries be redrawn by an independent commission but refrained from making that a requirement of his order.[130] The Alberta Court of Appeal in the *1994 Alberta Reference* case did note that:[131]

> It does not follow, however, that the same level of deference is appropriate when the author of the boundary is some person, or group of persons, who is not insulated from partisan influence, and who may be tempted to engage in some traditional political games, like gerrymandering or logrolling. Compromise, and partisan advantages may be very much a part of the political process, and we in no way disparage it. But we might not do justice to

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129 *Supra* note 4 at 198.

130 *Supra* note 79.

131 *Supra* note 64 at 19. Chief Justice Carruthers on the appeal of the *Charlottetown* case rejected such an argument: *supra* note 96 at 204. He justified his position simply on the basis that Justice Sopinka in the *Saskatchewan Reference* case had indicated that there is no constitutional requirement that electoral boundaries be drawn by an independent electoral boundaries commission.

the Charter if we failed to offer a fresh assessment where before there was no independent review.

Where electoral boundaries are the product of an independent commission operating under enabling legislation which gives it unfettered discretion and taking account of the requirements of the *Charter*, the utmost judicial deference should be paid to its work. Where a commission's discretion has been constrained by enabling legislation that entails politically partisan concerns or where the independent commission has not acknowledged in a meaningful, as opposed to self-serving, way that its work has been guided by the requirements of the *Charter*, less judicial deference should be paid to its work. Little or no judicial deference should be paid where the electoral boundaries are the product of a politically partisan process.

Finally, the granting of an interim or final injunction will not usually be appropriate because of its impact on the ability of a government in power to call a general election at any time during its mandate. Where an interim injunction is sought after a general election has been called, the balance of convenience will clearly favour the holding of the general election since, at this stage, those alleging the infringement have not yet established that an infringement would occur if the general election was run on those electoral boundaries. Where the calling of a general election has not occurred and is not imminent, a short-term interim injunction pending the hearing on whether the *Charter*-protected right has been infringed may be appropriate. Where the court determines that the electoral boundaries do infringe the *Charter*-protected right, judicial deference would likely lead the court to avoid the constitutional crisis that the granting of a final injunction would precipitate. Instead, it would likely declare the electoral boundaries unconstitutional but give the legislature a reasonable length of time to remedy the situation. Even the exercise of the government's prerogative to call a general election after the electoral boundaries have been declared unconstitutional but before the process of redrawing the electoral boundaries has been completed would not likely lead to the granting of an injunction. To do otherwise would likely precipitate a constitutional crisis, something the courts would be loathe to do.

THE CIVIL SOCIETY AND ITS ENEMIES: THE CASE OF ISRAEL

Michael Keren*

This study discusses the difficulties faced by Israel's civil society in its attempts to maintain a "bourgeois public sphere," as defined by Habermas, in which public concerns exceeding both the demands of the market and the guidelines of the state are expressed. With the loosening of socialist political and cultural hegemony in the 1970s and 1980s, a civil society, previously suppressed by the socialist state, attempted to reassert itself, especially by bringing civil rights issues to the courts. In doing so, it encountered new social forces constraining the public sphere, notably nationalism, populism and bureaucracy. The implications of these constraints to the "civil society project," advocated throughout the world, are then discussed.

L'auteur fait état des difficultés qu'éprouve la société civile israélienne à tenter de maintenir la sphère publique bourgeoise, telle que l'entend Habermas, comme espace de débat émancipé où s'expriment les préoccupations publiques échappant à la fois aux exigences du marché et aux directives de l'État. Avec le relâchement de l'hégémonie politique et culturelle socialiste survenu dans les années 1970 et 1980, la société civile, auparavant réprimée par l'État socialiste, a tenté de se réaffirmer en portant les questions de droits civils devant les tribunaux, notamment. Ce faisant, elle a dû affronter de nouvelles forces sociales limitant l'espace public — le nationalisme, le populisme et la bureaucratie. Les implications des nouvelles contraintes imposées au "projet de société civile" préconisé dans le monde entier sont ensuite étudiées.

I. INTRODUCTION

In 1989, coinciding with the revolutions in Europe, MIT Press published the English translation of Jürgen Habermas's *The Structural Transformation of the Public Sphere*, written in 1962.[1] Habermas's study of the European bourgeoisie between the seventeenth and nineteenth centuries became a building block in a worldwide project encouraging the "resurrection, reemergence, rebirth, reconstruction or renaissance of civil society."[2] "Civil society" refers to the plurality of social groups that, in addition to their relations to the free market and

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This study was conducted as part of a legal biography of Israeli lawyer Amnon Zichroni who was involved in the three cases discussed here. I am grateful to Professor Charles Maier of Harvard University, and to two anonymous referees, for their helpful comments.

[1] J. Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (Cambridge, Mass.: MIT Press, 1994).

[2] J.L. Cohen & A. Arato, *Civil Society and Political Theory* (Cambridge, Mass.: MIT Press, 1992) at 29.

the sovereign state, conduct a free, constructive, public discourse.[3] Habermas provided the arena for such discourse by pointing at "a theater in modern societies in which political participation is enacted through the medium of talk."[4]

"Public sphere" is "the sphere of private people come together as a public."[5] It emerged as part of the evolution of the European bourgeoisie. The liberalization of the market since the High Middle Ages, wrote Habermas, transformed social relations from feudal dependency to individual exchange. Civil society crystallized as a private realm, a process enhanced by new media, such as the newspaper and the literary salon, that allowed individuals to engage in issues exceeding the will of economic patrons, church patriarchs and state leaders.

The public sphere, composed of private citizens exchanging opinions of public significance, developed under absolutism, which accounts for the public's awareness of itself. Under absolutism, the public sphere turned into "an organ for the self-articulation of civil society with a state authority corresponding to its needs."[6] Intellectual and legal traditions developed that recognized the universality of civil liberties and constitutional rights. However, in the nineteenth century, with the decline of the literary public, the advertising function undertaken by the mass media and the bureaucratization of the constitutional state, all of which are related by Habermas to government interventionism, this idealized public sphere was transformed. Yet Habermas calls for restoration of the two conditions which make it politically effective: "the objectively possible minimizing of bureaucratic decisions and a relativizing of structural conflicts of interest according to the standard of a universal interest everyone can acknowledge."[7]

In 1962, Habermas could still overcome the Frankfurt School's pessimism regarding modern mass society and call for reemergence of rational public

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[3] See D. Colas, *Civil Society and Fanaticism: Conjoined Histories* (Stanford: Stanford University Press, 1997); J.A. Hall, ed., *Civil Society: Theory, History, Comparison* (Cambridge: Polity Press, 1995); E. Shils, "The Virtue of Civil Society" (1991) 26 Government and Opposition 3; M. Walzer, "The Civil Society Argument" in R. Beiner, ed., *Theorizing Citizenship* (Albany, N.Y.: State University of New York Press, 1995) 153.

[4] N. Fraser, "Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy" in C. Calhoun, ed., *Habermas and the Public Sphere* (Cambridge, Massachusetts: MIT Press, 1994) 109 at 110.

[5] J. Habermas, *supra* note 1 at 27.

[6] *Ibid.* at 74.

[7] *Ibid.* at 235.

discourse in which private persons form agreement beyond the demands of the market and the guidelines of the state. But over the years, the restoration of a public sphere, based on the experience of the European bourgeoisie, has become harder and harder. Today, the public sphere is challenged everywhere — in Eastern and Western Europe, in North America and the Third World — but nowhere more so than in Israel.

Israel after independence was marked by the political and cultural hegemony of a socialist state. With the gradual development of a free market economy in the 1970s and 1980s, a civil society attempted to assert itself by forming a new arena for public discourse, free of state control. However, this attempt at self-assertion, mainly through litigation in the courts, failed when the civil society encountered new political forces constraining the public sphere, especially nationalism, populism and bureaucracy. An analysis of these constraints is illuminating because Israel's civil society has its origins, literally, in the European bourgeoisie. Its failure to maintain a "bourgeois public sphere" thus throws light not only on the difficulty to apply this notion in a specific modern context, but also on what seems to be the end of the historical process described by Habermas. Moreover, since nationalism, populism and bureaucracy prevail far beyond Israel's boundaries, the Israeli experience, outlined below, raises gloomy thoughts about the universal hope for rational public discourse.

This hope has been expressed in the 1990s by thinkers impressed by the revolutions in Europe, especially Solidarity's struggle in Poland, which renewed the interest in "civil society." This concept, originating in Aristotle's *Politics*, was used during the Reformation to describe constitutional regimes, and later came to characterize "civilized" states that, since Hegel, had been associated with bourgeois society.[8] Many symposia held on the civil society in the 1990s expressed the hope that societies in transition from socialist collectivism to free market economies would adopt political regimes allowing a domain of public discourse free of state and market controls.[9] Benjamin Barber, for instance, called for "the reconstruction of civil society as a framework for the reinvention of democratic citizenship, a mediating third domain between the overgrown but increasingly ineffective state governmental and the metastasizing private market

[8] See D. Colas, *supra* note 3.

[9] See R. Dahrendorf, *Reflections on the Revolution in Europe* (London: Chatto & Windus, (1990); P.B. Lehring, "Toward a Multicultural Civil Society: The Role of Social Capital and Democratic Citizenship" (1998) 33 Government and Opposition 221.

sectors.[10] To Barber, the domain of the citizen, mediating between private markets and big government, bears an international promise. "In the international domain," he wrote, "where states are weak and markets dominant, civil society can offer an alternative identity to people who otherwise are only clients or consumers — or passive spectators to global trends they can do nothing to challenge. It can make internationalism a form of citizenship."[11]

In what follows, I discuss the relations between civil society and state in Israel, stressing the bourgeois sources of the civil society and its suppression by the socialist state. I then follow three failed attempts at reassertion of the civil society in the 1970s and 1980s, explaining them by the constraints posed by nationalism, populism and bureaucracy on the public sphere. I conclude by pointing at the implications of these failures to the civil society project.

II. CIVIL SOCIETY AND STATE IN ISRAEL

Israel was conceived by thinkers, many of whom were members in good standing in Europe's intellectual circles of the late nineteenth and early twentieth century. Their thought was deeply rooted in the notions of the Central European bourgeoisie which themselves were, to a large extent, the product of Jewish thinkers. To Theodor Herzl, founder of the Zionist movement (the Jewish national movement), the Jewish society to be formed in Palestine was to be designed after the Central European model. His pamphlet *The Jewish State*, published in 1896, was a call to the Jewish middle classes to join his vision: "Lawyers, doctors, engineers of every description, young businessmen — in fact, all Jews in search of opportunity who are fleeing oppression in their native lands to make a living in other parts of the world — will assemble on a soil so full of promise."[12]

Realizing that the first to leave Europe for the Jewish state would be the lower classes, Herzl expected them to prepare the ground for a bourgeois society modelled after his native Austro-Hungarian empire:[13]

> In accordance with a predetermined plan they will build roads, bridges, and railways, set up telegraph installations, regulate rivers, and provide themselves with homesteads. Their labor will bring trade, trade will create markets, the markets will attract new settlers — for

[10] B. R. Barber, *Jihad vs. McWorld: How Globalism and Tribalism are Reshaping the World* (New York: Ballantine Books, 1996) at 285.

[11] *Ibid.* at 285.

[12] T. Herzl, *The Jewish State* (New York: Herzl Press, 1970) at 83.

[13] *Ibid.* at 50.

everyone will come voluntarily, at his own expense and his own risk. Herzl all but proposed a constitution for an "aristocratic republic,"[14] resembling Venice during the renaissance, in which virtue, as defined by Montesqieu, would prevail.

Herzl's bourgeois vision of the Jewish state received its theoretical expression in writings by Max Nordau, a medical doctor and one of the best known intellectuals in *fin de siécle* Europe, who gave a keynote address in the first Zionist congress convened in Basle in 1897. In his writings, intended to combat decadence in European culture, Nordau stressed the importance of human reason in social progress. Criticizing Stoic, contractual and Kantian notions of morality, he related the human capacity of moral inhibition to human reason which is capable to foresee the consequences of one's action:[15]

Morality is foresight, but it is only among the elect that the latter is developed to such a pitch that it is possible to form images of the consequences of action and abstention sufficiently clear and definite to exercise a restraining or encouraging influence.

Based on his biological observations, Nordau concluded that this moral quality of inhibition is the mark of advanced organisms and applied this conclusion to societies. In contrast to Rousseau's escape to the state of nature in his search of morality, he attributed a higher morality to societies with a developed set of public institutions and a public sphere:[16]

Saint Martin no longer needs to divide his cloak to give half to a poor shivering man. The public charity commission gives him winter clothes if he cannot afford to buy any. No knights are needed to protect innocence, weakness and humility from oppressors. The oppressed appeal successfully to the police, the court of justice, or, by writing to the papers, to public opinion.

The main advocate of Zionism as an extension of the Central European bourgeoisie was Vladimir Jabotinsky. He cherished the initiative and creativity embedded in the middle classes and believed that the future belongs not to the working class that dominated the Zionist endeavour in Palestine, but to the bourgeoisie. To him, future society would be a progressive bourgeois-liberal society, combining political freedom with social advancement. Private capital and private initiative would provide the required impetus for a speedy realization of the Zionist idea. As analyzed by Yaacov Shavit:[17]

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[14] *Ibid.* at 99.

[15] M. Nordau, *Morals and the Evolution of Man* (London: Cassell, 1922) at 49.

[16] *Ibid.* at 238.

[17] Y. Shavit, *Jabotinsky and the Revisionist Movement 1925–1948* (London: Frank Cass, 1988) at 285.

> the ideal bourgeois type in the eyes of Jabotinsky was an entrepreneur with a civic conscience; someone who from a national point of view combined in himself qualities such as republican values, economic and industrial initiative — one who was capable of moving the wheels of industry and civilization through his industrious and innovative qualities, his brains and his capital. This was the idealized image of the French and British middle class which during the nineteenth century had spearheaded the Industrial Revolution and the struggle for political emancipation, as well as the struggle for national independence in various other countries. This republican entrepreneur was an individualist with a natural dislike for the anti-liberal and anti-democratic approach of marxist and socialist collectivism.

The bourgeois ideology, advanced by the early leaders of the Zionist movement, had its social base in the so called "civil circles" — merchants, shopkeepers, small landowners, industrialists and professionals — who immigrated to Palestine between the two world wars and settled mainly in the cities. They established political parties with liberal platforms resembling those of European middle-class parties, as well as a variety of economic and social institutions. But their impact on public life in pre-state Israel and during the first three decades of statehood was minimal as a result of the dominance of socialist collectivism in Palestine. The socialist movement, headed by David Ben-Gurion, despised the bourgeoisie and fiercely fought its political leaders in the name of "creative pioneering."[18] This notion implied that Palestine's future depended not on private initiative but on collective settlement and that development by private capital was neither possible nor desirable.

In 1920, Ben-Gurion played a major role in founding the General Federation of Labor, which controlled a large part of the country's economy, and served as the recruitment base of the country's political leadership. In 1933, he gained control over the world Zionist movement and coined the phrase "from class to nation" which summarized his ideology, according to which "private capital was permissible as long as it utilized Jewish labor and increased the prospects for both Jewish immigration and a Jewish economy."[19]

As Israel Kolatt has explained, Ben-Gurion's attacks upon the bourgeois sectors, particularly against Jabotinsky, were not directed at their consolidating themselves through private capital but at their alleged lack of national solidarity. Indeed, when in 1948 he proclaimed the State of Israel, Ben-Gurion made major efforts at enhancing such solidarity. This included the establishment of a strong state with working democratic institutions yet with an economic, political and

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[18] D. Ben-Gurion, *Israel: A Personal History* (New York: Funk & Wagnalls, 1971) at 229.

[19] I. Kolatt, "Ben-Gurion: Image and Reality" in R.W. Zweig, ed., *David Ben-Gurion: Politics and Leadership in Israel* (London: Frank Cass, 1991) 15 at 25.

ideological hegemony of the socialist movement. A one-time admirer of Lenin, he demanded that the citizenry join in the state-building effort in body and mind. Private initiative was restrained by an elaborate system of bureaucratic controls, favouring Federation of Labor enterprises, and private affairs were subordinated to the affairs of state through policies encouraging large families, unifying parochial educational systems, issuing a national draft, etc. Ben-Gurion demanded the mobilization of society and its spiritual leaders to support the national tasks at hand. In 1949, for instance, he assembled the country's writers and called for subordination of their creative talents to the pioneering ideology. Such cultural mobilization did not always remain rhetorical but was manifested in practices like press censorship.[20]

This left no room for the assertion of a civil society as defined before. In the Ben-Gurion era (1948–1963), the public sphere was dominated by an ideology cherishing the national-collective effort and intolerant toward the individual challenging the collective — by conscientious objection, for instance — or toward the voluntary group proposing another way. This ideology was reinforced by the experience of the War of Independence as well as by the massive tasks of security and absorption of immigrants in the 1950s that aligned the country's intellectual elites around a mainstream discourse. As Shlomo Sand has written:[21]

> [M]ost cultural creation in the first decade of the life of the state consisted in committed, nationalistic works that revelled in the birth of the state. The intellectual classes quickly completed the process of conformist integration within the new cultural establishment, and thereby contributed greatly to erasing the borders between state and civil society. Indeed, reducing the separation between the state and civil society was necessary for continuing the rapid consolidation of a new national culture.

III. REASSERTION OF THE CIVIL SOCIETY

This convergence of state and civil society could not last long. As effective as socialism has been in controlling the Zionist project, its aim of transforming the entire occupational structure of the Jewish people, and turning them into manual workers, farm labourers and pioneers, was too ambitious. With the economic growth in Israel of the 1960s, free enterprise began to play an increasing role in the economy and subsequently, state controls were lifted in the

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[20] M. Keren, *Ben-Gurion and the Intellectuals: Power, Knowledge and Charisma* (DeKalb, Illinois: Northern Illinois University Press, 1983).

[21] S. Sand, "Between the Word and the Land: Intellectuals and the State in Israel" in J. Jennings and A. Kemp-Welch, eds., *Intellectuals in Politics: From the Dreyfus Affair to Salman Rushdie* (London: Routledge, 1997) 102 at 110.

cultural sphere as well. Israeli literature of the 1960s, for instance, turned away from national themes towards a focus on the individual.[22] A similar trend could be found in theatre, the visual arts and the humanities where the previous preoccupation with biblical, historical and archeological studies, related to the revival of the Jewish people, was supplemented by universal themes. Upon Ben-Gurion's resignation in 1963, a public discourse characterized by political-messianic rhetoric was replaced — on the radio, in book clubs, in institutions of higher learning, etc. — by a plurality of concerns. This resulted in the civil circles regaining their place in society, both politically and symbolically. As in other industrial societies, the public image of the pioneer turned into an anachronism, while the industrialist, the professional and the stock market wizard had made their way to become role models.

The main arenas for the reassertion of the civil society were the courts. While the civil society emerging in Europe against the background of "ancient-regime" enlightened absolutism could assert itself through an elaborate system of political parties representing its concerns, the Israeli party system had been anything but representative; it catered to ideological orientations, not to civil concerns. Party discourse concerned itself with questions of importance to the state, especially with state security, not to the citizen as such. Individuals and groups, wishing to protect their civil rights, or to expand the scope of these rights, could find little help in party activity and turned to the legal system. That system, designed mainly after the British model, gave them wider opportunities for expression, especially in the High Court of Justice which never lost its status in Israeli public opinion as an independent body with high integrity. In court, conscientious objectors could litigate their rights even if the larger community rejected their views, oppressed minorities could demand fair allocation of resources in light of natural law principles, etc. Thus, the court became an important locus for an observation of the discourse between the civil society and the state.

In order to facilitate the analysis of litigation by individuals and groups in the Israeli courts, I would like to propose a typology of arguments that may be seen as available to any civil society in its negotiations with the state. I refer to three well-known arguments derived from the history of political ideas — the contractual, the utilitarian and the conscientious.

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[22] See G. Abramson, "Israeli Literature as an Emerging National Literature" in S.I. Troen and N. Lucas, eds., *Israel: The First Decade of Independence* (Albany, N.Y.: State University of New York Press, 1995) 331.

a. The Contractual Argument

The contractual argument refers to the notion that the state's base of legitimacy is the implicit consent of the governed. Thus, citizens cannot be treated as subjects subordinated to arbitrary rule but as holders of civil rights. The citizens' duties to the state are matched by the duty of the state to treat them justly. In his articulation of the principles of justice that ought to prevail in a near just state, John Rawls[23] proposed to derive them from the outcome of negotiations between rational individuals behind a "veil of ignorance," that is, free of considerations stemming from their relative status in society. And although the Rawlsian principles were not necessarily designed for the civil society, they furnish some of the strongest arguments for individuals and groups facing the state in modern times, who may litigate their case in the name of violations of a contractual relationship thus conceived.

b. The Utilitarian Argument

The utilitarian argument calls for the protection of civil rights due to their utility to the majority of the community. This argument considers it morally wrong, on utilitarian grounds, to deprive anyone of personal liberty, property and other legal rights. Freedom of speech, in particular, is protected by the societal need to maintain an autonomous sphere of individual expression, labeled by John Stuart Mill "the inward domain of consciousness."[24] The need to maintain that domain implies the liberty of conscience, thought and feeling, scientific and theological inquiry, etc. The utilitarian argument, according to which the prevention of free speech leads to social stagnation, has underlined free speech litigation in all democratic societies.

c. The Conscientious Argument

A third argument may be derived from the famous 1848 lecture on "civil disobedience" by American writer Henry David Thoreau, who placed the human conscience above state law, claiming that right and wrong are not the products of decisions by majorities but of human conscience:[25]

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[23] J. Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1973).

[24] J.S. Mill, *Utilitarianism, On Liberty and Considerations on Representative Government*, H.B. Acton, ed., (London: Everyman's Library, 1972) at 75.

[25] H.D. Thoreau, "Civil Disobedience" in H.A. Bedau, ed., *Civil Disobedience: Theory and Practice* (Indianapolis: Pegasus, 1969) 27 at 28.

> It is not desirable to cultivate a respect for the law, so much as for the right. The only obligation which I have a right to assume, is to do at any time what I think right.

Despite Thoreau's little concern for a patterned relationship between the civil society and the state, to the extent of allowing a degree of anarchism, he provided the civil society with another important argument in its negotiations with the state. That argument refers not to the social contract, or to the utility of civil rights, but to the moral implications of given state laws, as judged by the individual's conscience.

As the grip of socialist collectivism had loosened in Israel in the 1960s, and issues of concern to the citizenry found their way to the legal arena, all three arguments were raised. However, the civil society encountered new social forces once it entered this arena. I shall now demonstrate it by reference to three cases, matching the three cells of the typology, which came to public attention in the 1970s and 1980s. These cases have not broken new legal ground, but they provide good insight into the new constraints on Israel's public sphere. The first concerns a challenge to the social contract met with the counter-challenge of nationalism, the second is a freedom of speech battle blurred in populist politics, and the third involves the protection of human rights in the territories occupied by Israel in 1967 made difficult by bureaucracy.

IV. THE SOCIAL CONTRACT AND NATIONALISM

The first case concerns the attempt by secular Israeli Jews to set themselves free from the firm control of coalition governments in which small religious parties gained veto power and effectively used it as a means to enforce orthodox legislation on the entire population. Those harmed by orthodox legislation could not rely on their elected officials, entangled in coalition politics, and brought their agonies to court. These agonies were hard indeed. In 1950, the "Law of Return" was legislated according to which Israeli citizenship was granted to every Jew who immigrates to Israel. But the question "who is a Jew?" became a source of deep controversy because Jewish orthodoxy applies a strict definition of "Jew" as someone born to a Jewish mother. This implied that children of a Jewish father and non-Jewish mother were left with no status in the Jewish state. The lack of status stemmed from the lack of a category of citizenship devoid of national affiliation, e.g. Jew or Arab. Add to this the monopoly of a state-sanctioned, orthodox Chief Rabbinate over all matrimonial matters, and one is left with endless human tragedies — couples refused a marriage licence because one of them was not Jewish, women abandoned by their husbands who were banned from remarrying, etc.

In 1970, Dr. George Tamarin, a psychologist at Tel Aviv University, tried to put this form of state control over personal affairs to legal test by challenging the contractual relation between the individual and the state. That year, the Supreme Court had decided that the children of a Jewish navy major, Benjamin Shalit, who was married to a non-Jewish woman, be registered as Jews, and recommended that the category of "nationality" be erased altogether. This decision led to a coalition crisis, initiated by the religious parties, that ended in their victory. The Knesset (Israel's parliament) passed a law according to which only children born to Jewish mothers would be registered as Jews. On April 18, 1970, Tamarin, angered by the outcome of the coalition crisis, wrote a letter to the Minister of Interior asking to change the registration under the category of "nationality" in his identity card from "Jewish" to "Israeli." A change of registration required a public notice. He thus filed a petition with the district court, requesting to appear before it and allege in good faith his commitment to the Israeli nationality which, he argued, ought to be defined by one's subjective sense of belonging to an ethnic group.

In the petition requesting to strip himself of his Jewish nationality, Tamarin wrote that his nationality was determined by an immigration officer upon his arrival from Yugoslavia in 1949, and the officer should have in fact registered him as "Jewish and Croatian," for one's nationality is never exclusive. At that time, he wrote, the Israeli nation did not exist yet, but over the years, he developed a sense of belonging to and identification with such a nation, while his feelings towards his native Croatia had diminished. Tamarin supported his case by quotations from modern philosophers stressing subjective rather than objective criteria in determining nationality and defined the Knesset law, forcing upon individuals a nationality based on data related to their mother, as utterly racist.[26]

Despite the district attorney's demand not to consider Tamarin's request on the ground that the court is not an arena for academic debates, Judge Yitzhak Shilo decided to rule on the matter. He understood all too well the nature of the challenge: here was a citizen of the state demanding, in Rawlsian fashion, to be exempt from the social contract as a result of recent legislation redefining its fundamental rules in a way he could not agree with. The judge did not take issue with Tamarin's claim (supported by the Supreme Court in the *Shalit* case) that a democratic state cannot force on an individual an affiliation which is open to ideological disagreements. Had Tamarin argued that strong disagreements with his government's policies led him to fully identify with the Croatian nation, the

[26] Tel-Aviv-Jaffa D.C. 907/70.

judge said, he would have granted him permission to change his registration to "Croatian." However, there exists no Israeli nation in separation from a Jewish nation, wrote the judge, and there never existed one, not even during biblical times, when King Solomon's kingdom was divided between Israel and Judea.[27]

Here lay the main obstacle to the civil society. The judge did not deny the oppressive nature of state laws imposing on an individual an undesired affiliation that exceeds the Hobbesian idea of a social contract as an agreement necessitated by considerations of safety. The judge even agreed that national affiliation ought to be determined by individual choice. He wrote, however, that as a judge "living amongst his people," the separation between the Israeli state and the Jewish nation seemed to him impossible. In other words, his ruling against Tamarin was based on a national consensus that did not allow a redefinition of the social contract. His decision was upheld by the Supreme Court, which was also part of the same national consensus.

In his appeal to the Supreme Court, Tamarin claimed that the decision whether an Israeli nation exists or not cannot be made by a judge on the basis of his "living amongst his people." Judge Simon Agranat, who wrote the Supreme Court decision, seemed to concur. He agreed that individuals should be allowed to determine their national affiliation by personal judgement, rather than by collective imposition. But he added that this holds true only in regard to nations that can be proven to exist by objective criteria. He quoted a large number of studies proving that many Israelis felt a strong sense of Jewish identity, and claimed that the demand by Tamarin and a few others to give up their ethnic identification as Jews for the sake of a new *Israeli* affiliation is none but a separatist trend which cannot be justified by the principle of self-determination. Had it been allowed, Agranat wrote, it would have led to the political and social disintegration of the entire Jewish nation.[28] Thus, in order to protect the Jewish nation against political and social disintegration, Israel's Supreme Court supported a condition in which the state was not defined in relation to the civil society but to Jewish nationalism. With the further strengthening of orthodox interpretations of Jewish nationality in later years, this condition did — paradoxically — threaten national disintegration by creating a deep rift between Israel and non-orthodox Jews in the Jewish Diaspora.

[27] *Ibid.*

[28] Jerusalem, S.C. 630/70.

V. FREEDOM OF SPEECH AND POPULISM

Novelist Yizhar Smilansky, better known by his pen-name S. Yizhar, belongs to the so-called "War of Independence Generation." This is a group of Israeli writers who, in the 1940s and 1950s, produced literary works reflecting in awe and wonder the experience of the state-building effort. Yizhar, born in 1916 to one of the first families of Jewish settlers in Palestine, became a national idol and was particularly cherished by David Ben-Gurion who considered him the model writer committed to the national cause. This was so despite of the fact that Yizhar never allowed his fascination with the Zionist endeavour in Palestine to affect his "inward domain of consciousness." In fact, he produced some of the most thought-provoking writings on the War of Independence, especially in the two short stories, "The Prisoner," published in November 1948, and "*Hirbet Hiza'h*," published in May 1949. "The Prisoner" describes the predicament of a soldier guarding an Arab prisoner in spite of his urge to release him, and "*Hirbet Hiza'h*" — the conquest of an Arab village and the forced evacuation of its inhabitants, from the perspective of a narrator to whom the scene resembles historical incidents of Jews being forced out of their homes.

The publication of the two stories when the War of Independence was barely over caused a fair amount of criticism in the young state,[29] but Yizhar managed to stay away from the political discourse on his work, consistently refusing to surrender his literary skills to ideological battles. When asked in interviews whether his short stories were motivated by political protest he insisted on their artistic nature:[30]

> Picasso's 'Guernica' is a protest, but it is also a work of art. Otherwise, as soon as the political context changed, it would have become an advertisement, a placard, a poster. Now if 'The Prisoner' is nothing but a protest against the mistreatment of Palestinian villagers during the War of Independence, it should be consigned to oblivion.

Thus, at a time in which efforts were made to harness literature to the state-building effort, Yizhar maintained his autonomy as writer. Three decades later this became all but impossible.

In elections held in May 1977, the hegemony of the socialist movement in Israeli politics came to an end with the rise to power of the right-wing Likud party. In principle, the rise to power of a party with a stronghold in the civil

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[29] G. Ramras-Rauch, *The Arab in Israeli Literature* (Bloomington, Indiana: Indiana University Press, 1989).

[30] E. Fuchs, *Encounters with Israeli Authors* (Marblehead, Mass.: Micah, 1982) at 22–23.

circles and heading a coalition of bourgeois parties, notably the Democratic Party for Change, could encourage a public sphere responsive to a civil society. This, however, did not happen because, as rightly sensed by Likud's leadership, the Israeli intellectual community had its roots in the socialist movement and many of its incumbents suspected the new regime. Rather than inspiring the blooming of a thousand flowers, the political upheaval of 1977 gave rise to a polarized, politicized discourse that left little room for a domain of consciousness devoid of political and ideological orientations.

Yizhar's *"Hirbet Hiza'h"* was one of the first victims of this process. On February 7, 1978, a dramatized version of the story was to be broadcast on Israel Television. To Likud and its religious coalition partners, this was perceived as an attempt by a national television station, allegedly dominated by intellectuals of the left, to humiliate the new government. Subsequently, two government sympathizers in the Israeli Broadcasting Authority filed an appeal to the Minister of Education, who was a member of the National Religious Party, against the decision to screen the play. The screening was delayed and all hell broke loose. On the surface, politicians, journalists, lawyers and others joined forces in a freedom of speech battle, in a manner reminiscent of nineteenth century Benthamite gentlemen, but the affair marked a new phase in Israeli life — the rise of populism. "Populism" refers to the breakdown of institutional dialogue and its transfer to the street. In a populist setting, problems of high public saliency are not solved by parliamentary debate or other orderly procedures devised in democracies, but become matters of heated, unstructured debate stirred by a sensational press.[31]

Since this phenomenon has become all too familiar in modern industrial societies, it would be superfluous to elaborate on the specifics of the *"Hirbet Hiza'h"* affair. Suffice to say that it had all the ingredients of populist discourse: emotional statements on the independence of the Broadcasting Authority, declarations by almost every politician, intellectual and commentator in the country, a last-minute appeal to the Supreme Court to overrule the Minister of Education's decision submitted by two lawyers violating traffic laws in their rush to file it before the original screening time of the drama, etc. And as is often the case, the affair ended quietly. Israel Television screened the drama a few weeks later and Jordan Television copied it and used it as part of an anti-Israeli propaganda campaign.

[31] M. Keren, *Professionals against Populism: The Peres Government and Democracy* (Albany, NY: State University of New York Press, 1995).

The lessons of this affair, however, are worth noting. On the surface, it had all the ingredients of a classical freedom of speech battle. On one side of the fence stood Socrates and on the other — the government, holding a hemlock. As one opposition party claimed, the freedom of artistic expression in the country was at stake. However, in the public sphere of 1978, artistic expression was the last thing on anybody's agenda. Yizhar's work became a tool in a political and ideological game in which artistic autonomy had been jeopardized.

The story of the young soldier tormented by the evils he observed during a war, and thus exposing the tragedy, complexity and ambivalence of war, was no longer treated as a thought-provoking piece of art but as current affairs. In this sense, there was no difference between those who banned the drama because of its political overtones and those who produced it in the first place in order to bash their political opponents. Like Jordan Television, to which Yizhar's predicament became a sheer propaganda device, the Israeli discourse politicized it and made it a weapon in its street fights. The lifting of the hegemony of the socialist state had thus hardly contributed to individual autonomy. To the contrary, Ben-Gurion who called upon the country's writers to lend a hand in the state-building process did not prevent the creation of "*Hirbet Hiza'h*," while the populist crusade of 1978 invaded the autonomous domain which made it possible. This may be the reason why, with increasing populism in Israeli society, some gifted writers, playwrights and filmmakers seemed to have lost much of their creative urge and ventured to produce political placards instead.

VI. HUMAN RIGHTS AND BUREAUCRACY

As a result of its swift victory in the Six Day War of 1967, Israel found itself in occupation of territories three times its size, inhabited by a large Palestinian population. The political leadership, unprepared for the ordeal, engaged in endless ideological debates that could not solve the many problems stemming from the need to manage daily life in the occupied territories. Policy-making was thus largely turned over to the military and the Supreme Court. These two institutions, following relatively well-established codes and traditions, were burdened with the questions that the divided political system could not agree on. Decisions regarding the fate of the population under occupation were left to soldiers and judges.

An important element in the complex story of the occupation concerns the attempt by small segments of the civil society to stand guard against violations of human rights in the occupied territories. Although Israeli society as a whole preferred to ignore what was going on there, several civil rights associations and

professional groups, mainly lawyers and medical practitioners, attempted over the years to apply conscientious standards to a fundamentally oppressive situation. The Supreme Court, whose solidity and professionalism allowed it to maintain its respectability at a time in which most political institutions lost it as a result of their helplessness vis-à-vis the occupation, became the main locus for these attempts. This sparked an ongoing controversy over the Supreme Court's role — since it could apply Israeli and international laws to concrete cases rather than make fundamental political changes, it was accused by some of legitimizing the occupation, while others stressed its contributions in concrete cases.[32] Without taking sides in this controversy, I would like to point at a constraint on the application of human rights principles in the occupied territories. I refer to a constraint stemming not from state policy, nor from the behaviour of the Supreme Court, but from the role of "bureaucracy," referring to the elaborate system of structures, processes and roles characterizing modern industrial societies.

At the turn of the century, Franz Kafka described the nightmare of the individual subjected to the power of bureaucracy. One can only imagine how hard the situation becomes under occupation. However hard a condition of occupation is, it turns into a complete nightmare when a whole society practically controls another through its tax collectors, water explorers, switchboard operators, military officers, land assessors, road constructors, and other agents of bureaucracy. One can, of course, consider the above functionaries operating in the occupied territories as agents of an oppressive state, but this tells only part of the story, because "bureaucracy" is not confined to the state, which is subjected to its contingencies no less than the individual conscience.

Attempts to combat human rights violations in court were often met not by state objection but by the contingencies of bureaucracy. For example, the Supreme Court opened its gates to Palestinian Arabs whose land had been confiscated in order to construct Jewish settlements. In 1979, one such settlement, Elon Moreh, was ordered by the court to dismantle when the judges remained unconvinced by the settlers' argument that the land had been promised to them by God. However, the court was no help when the construction of settlements was justified by security considerations. This signified the power held by the military as a bureaucratic institution — few military commanders

[32] See R. Shamir, "'Landmark Cases' and the Reproduction of Legitimacy: The Case of Israel's High Court of Justice" (1990) 24 Law and Soc. Rev. 781; G.E. Bisharat, "Courting Justice? Legitimation in Lawyering under Israeli Occupation" (1995) 20 Law and Soc. Inquiry 349.

anywhere would ever object to the expansion of "security zones." Needless to say that the contingency created by the increasing role of bureaucrats usually worked against the inhabitants of the territories. There were numerous cases in which the very application of bureaucratic measures common in Israel, such as the distribution of identity cards, the collection of general sales taxes, or the submission of newspapers to military censorship, became oppressive measures whether or not they were intended to be.

The intentions were mostly unclear or irrelevant. Consider the case of Raimonda Tawil, a well-known anti-occupation activist, who was detained several times by the military command of the West Bank. Human rights activists who defended her in her various ordeals had to cope less with a government considering her an enemy than with bureaucratic institutions, like the post office in the city of Ramalla. In one case, the post office disconnected her telephone by demand of the local military governor. Telephone service was restored after a long exchange of letters, of the kind preoccupying citizens in the modern world, which revealed that the telephone had actually been registered in her husband's name. This legal battle may sound trivial but it was no trivial matter to the lawyers involved, who realized that the telephone issue boils down to whether the occupation be conducted by military rule, in accordance with international law, or by an entire society through its bureaucratic institutions. Or consider the long deliberations stemming from conflicting interpretations of newspaper contents banned by military censors. Civil rights attorney Amnon Zichroni, who in 1985 took the case of East Jerusalem newspapers banned by the Israeli censor, found himself preoccupied not with state officials lacking a conscience but with bureaucrats differing in their interpretation of pictures and caricatures. To be sure, such incidents did not lessen the impact of the occupation but, in a very real sense, strengthened it, as the oppressive power of today's bureaucracy seems much harder to cope with than that of the state.

VII. CONCLUSION

"Civil society" is one of the most commonly used terms in the 1990s. After the revolutions in Europe, it was believed that the collapse of communism would lead to the formation of free markets and subsequently to the blooming of a "bourgeois public sphere" in which a plurality of social groups interact in open, rational discourse. Such interaction, it was believed, would support the building of democratic institutions even in countries with little democratic experience.

It is hard to disagree with Benjamin Barber's statement that "for peoples so cynical about their own democratic institutions to recommend democracy to

cousins in transitional states or to conceive of global democracy in the world beyond sovereign borders is problematic at best."[33] The reason why this is problematic stems less from the hypocrisy hinted at by Barber than from the inapplicability in today's world of concepts so strongly related to the historical development of the central European bourgeoisie. In following the route gone by Israel's civil society in its conscious attempt to sustain a "bourgeois public sphere," we encountered some of the constraints involved, in particular, the forces of nationalism, populism and bureaucracy. These forces prevented the assertion of discourse on all three levels considered in this study: the contractual, the utilitarian and the conscientious.

Although the Israeli experience involves many unique features, stemming from the fusion of religious and secular identities, the ongoing struggle with its Arab neighbours, etc., the failure of the civil society in this specific context may bear broader implications. It may be argued that the chances of constructing a social contract along the principles set by Rawls for the near-just state are slim indeed. A social contract reflecting the outcome of negotiations behind a "veil of ignorance," that is, one based on abstract, universal, rational individual interests rather than on concrete parochial, emotional ethnic ones can hardly be conceived. We have seen the difficulty to apply an individualistic conception of citizenship in a democracy, which makes one wonder what the fate of such a conception would be in societies lacking a democratic tradition altogether. As Michael Ignatieff has reminded us, the collapse of the strong communist dictatorships in Eastern Europe cannot be expected to give rise to a hidden individualism, the product of western wishful thinking, as much as to "nationalist paranoia."[34]

Similarly, the collapse of totalitarian systems monopolizing the truth in Orwellian fashion does not necessarily entail the construction of political regimes with a greater concern for the truth. The rise to prominence of the modern mass media has been accompanied by a promise for free expression, which remains unfulfilled due to populist trends in many societies. Nowhere in the world are individuals protected against blunt distortions of the truth and vulgar penetration of the inner domain of consciousness by political and commercial forces.

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[33] Barber, *supra* note 10 at 280.

[34] M. Ignatieff, *The Warrior's Honour: Ethnic War and the Modern Conscience* (Toronto: Viking, 1998) at 45.

Finally, Kafka's nightmares at the turn of the century seem to materialize not in the form of strong state structures oppressing the individual but by subjecting the civil society to the contingencies of bureaucracy. As we have seen, this has made it much harder for those attempting to follow the imperatives of the human conscience to identify oppressive forces in the public sphere.

JUST WORDS AND SOCIAL JUSTICE

Keith Ewing*

The need and desirability of entrenching a social charter has been greatly debated in Canada, especially since the failed Charlottetown Accord. The author makes a case for entrenching a social charter on policy grounds — protecting the rights and welfare scheme we already have — since the law is one of the best tools we have to "transform social relations." The author believes that constitutionally protected explicitly social rights can lead to a "socially just and progressive society" even if courts find protected liberal rights to be paramount when the two conflict. The author uses examples from several American states' and European constitutions, as well as Joel Bakan's critique of the Charter, to illustrate that a social charter can address the causes of social inequality if it takes a "broad approach to the social conditions of citizens," while acknowledging the inherent enforcement problems that have plagued Charter rights since 1982.

Depuis l'échec de l'Accord de Charlottetown, surtout, le Canada se demande s'il est utile et opportun d'inscrire une charte sociale dans la Constitution. Évoquant des questions de principe, l'auteur se déclare en faveur de la protection des droits et du régime d'assistance sociale déjà acquis – la loi étant un des outils qui permet le mieux de "transformer les relations sociales." Il est d'avis que la protection constitutionnelle explicite des droits sociaux peut aboutir à l'édification d'une "société juste et évoluée," même si les tribunaux donnent préséance aux droits protégés de type libéral en cas de conflits entre les deux catégories. À partir d'exemples tirés de la Constitution de plusieurs États américains et pays européens, et de la critique que Joel Bakan fait de la Constitution — et tout en reconnaissant les difficultés inhérentes que pose l'application des droits et garanties de la Charte depuis 1982, l'auteur montre qu'une charte sociale peut traiter des causes d'inégalités sociales si elle aborde les conditions sociales des citoyens dans une perspective large.

I. INTRODUCTION

On 5 February 1996 new social security regulations came into force in Britain. Entitled the Social Security (Persons From Abroad) Miscellaneous Amendments Regulations 1996,[1] the purpose was to remove completely social welfare entitlement from certain categories of asylum seeker. These were respectively those who submitted a claim after their immediate arrival in Britain, and those who had their applications rejected by the Home Secretary but who exercised their right to appeal to the independent appellate authorities. The intended effect of the new measures — the 'desirability' of which 'no one could dispute' — was to discourage economic migration and in the process save British taxpayers some £200 million annually. In

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[1] SI 1996/30.

R. v. *Secretary of State for Social Security, ex parte Joint Council for the Welfare of Immigrants*,[2] however, the regulations were successfully challenged on the ground that they were *ultra vires* the parent Act, the *Social Security Contributions and Benefits Act 1992*. In a majority judgment (Neill L.J. dissenting) the Court of Appeal held that the effect of the regulations was to so undermine the statutory right of appeal for asylum seekers as to render these rights nugatory. "Either that," said Simon Brown L.J., "or the 1996 regulations necessarily contemplate for some a life so destitute that, to [his] mind, no civilized nation can tolerate it."[3]

In reaching this admirable decision,[4] the Court of Appeal thought it unnecessary to resort to instruments such as the European Convention on Human Rights, referring instead to the 200- year-old dictum of Lord Ellenborough C.J. in *R.* v. *Eastbourne (Inhabitants)*[5] where he said in a case relating to poor relief:

> As to there being no obligation for maintaining poor foreigners before the statutes ascertaining the different methods of acquiring settlements, the law of humanity, which is anterior to all positive laws, obliges us to afford them relief, to save them from starving.

According to Simon Brown L.J. in this case, "Parliament cannot have intended a significant number of genuine asylum seekers to be impaled on the horns of so intolerable a dilemma: the need either to abandon their claims to refugee status or alternatively to maintain them as best they can in a state of utter destitution."[6] "Primary legislation alone," he continued, would be required to "achieve that sorry state of affairs," an important observation which begs equally important questions. In particular, should it be possible for Parliament by primary legislation to remove the right of asylum seekers to a basic minimum existence which the government itself may not remove by means of secondary legislation (save with the clearest authority)?

II. DEMOCRATIC GOVERNMENT AND CONSTITUTIONAL LAW

The *JCWI* case in fact raises much wider questions about what might loosely be referred to as social rights. But before we consider these questions, it is necessary to say something about the question of rights generally, and in particular the relationship between rights and democracy. This is an issue to which we all come

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[2] [1996] 4 All E.R. 385 [hereinafter *JCWI*].

[3] *Ibid.* at 401.

[4] Slightly diminished by the suggestion that the needs of asylum seekers could be met by way of refugee hostels and benefits in kind (Simon Brown L.J. at 401).

[5] (1803) 4 East 103 at 107.

[6] *Supra* note 2 at 402.

from a different perspective and with a different outlook: there is no unalterable truth and no one has a monopoly of wisdom; there are as many theories or variations thereon as there are constitutional scholars. But together with Great Britain, Canada shared the principle of parliamentary sovereignty, a constitutional principle acquired before the advent of democracy yet one which might be said to be the most democratic of all constitutional principles: it is in the principle of parliamentary sovereignty that the principles of democracy and constitutional law converge. This is because in the democratic era, parliamentary sovereignty is the legal and constitutional device which best gives effect to the political principle of popular sovereignty, whereby the people in a self-governing community are empowered — without restraint — to make the rules by which they are to be governed through the medium of elected, representative and accountable officials.[7]

But as we now know, the democratic potential of popular and parliamentary sovereignty has been undermined by the liberal project, concerned to place boundaries on the liberating power of the franchise.[8] This has been achieved in a number of ways, not least by the political mobilization of those who have most to lose from the power of democratic forces, in a manner whereby "the possessing class rules directly through the medium of universal suffrage."[9] This takes many forms which include direct influence over the electoral process on the one hand, and direct influence over the political process on the other. Examples of the former include the power of the institutional press which help to define and determine the boundaries of acceptable political debate (protected in doing so by their political right to freedom of expression), and the commercial influence which money and power have over political parties, both as a source of funding and as a source of influence. Examples of the latter include the direct influence of profit-maximizing economic interests on public policy, exercised in a number of ways and becoming more acute as national governments become increasingly vulnerable to the international flow of money. Elected national governments can thus quickly become the captive clients of multinational corporate interests.[10]

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[7] See K.D. Ewing, "The Human Rights Act and Parliamentary Democracy" (1999) 62 M.L.R. 79.

[8] See C.B. Macpherson, *The Life and Times of Liberal Democracy* (Oxford: Oxford University Press, 1977).

[9] F. Engels, "The Origin of the Family, Private Property and the State" in K. Marx and F. Engels, *Selected Works* (NY: International Publishers, 1968) at 588–89.

[10] For an earlier study to this effect see R. Miliband, *The State in Capitalist Society* (NY: Basic Books, 1969). Also E. Kefauver, *In A Few Hands: Monopoly Power in America* (NY: Pantheon Books, 1965) [old but good]. From a Canadian perspective, see D. Francis, *Controlling Interest: Who Owns Canada?* (Toronto: Macmillian, 1986) and T. Harrison and G. Laxer, eds., *The Trojan Horse: Alberta and the Future of Canada* (Montreal: Black Rose

But the democratic potential of popular and parliamentary sovereignty has been undermined also by institutional devices such as charters of rights and bills of rights which impose a legal restraint on the sovereignty of the people. These restraints are sometimes justified as being a necessary accompaniment to popular sovereignty by ensuring that the political channels for democratic participation are kept open and unobstructed, and sometimes also as a way of protecting discrete and insular minorities from abuse at the hands of a majority government.[11] Indeed, even on the left it is sometimes argued that "decisions of legislatures or governments are [not] necessarily more democratic than those of courts," with Joel Bakan pointing out that "[b]ecause of unequal political resources, the existence of multiple parties, and numerous imperfections in extant democratic institutions, electoral processes cannot always produce governments, and certainly not particular policies, that have majority support."[12] But entrenched liberal rights generally do not compensate or operate in the manner anticipated, and in practice protect and defend the interests of the already powerful,[13] though admittedly not usually as far as in the United States where the Supreme Court has on a number of important occasions effectively married the principles of political liberalism to the principles of economic liberalism in a way which reinforces the political influence of wealthy interests.[14]

The existence or introduction of charters or bills of rights changes the entire constitutional landscape. They raise questions about the way in which a society wishes to be organized and the power of its representative institutions. But they also create a constitutional vacuum in the sense that charters or bills of rights reinforce the bias in favour of liberty over all other principles,[15] and in particular over equality

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Books, 1995).

[11] See esp. J. Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980) and P. Monahan, *Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada* (Toronto: Carswell/Methuen, 1987). For an Elyesque argument in favour of constitutional protection for the poor, see M. Jackman, *infra* note 16.

[12] J. Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997) at 6–7.

[13] This is particularly true to the extent that they permit corporate interests to take advantage of the 'human' rights which they embrace, about which little needs to be said to a Canadian audience. But see *Hunter* v. *Southam Inc.* (1984), 11 D.L.R. (4th) 641 (S.C.C.); *R.* v. *Big M Drug Mart*, [1985] 1 S.C.R. 295; and *RJR-MacDonald* v. *Canada*, [1995] 3 S.C.R. 199.

[14] See esp. *Buckley* v. *Valeo*, 424 U.S. 1 (1976) and *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765 (1978).

[15] See K.D. Ewing, *Money, Politics and Law: A Study of Electoral Campaign Finance Reform in Canada* (Oxford: Clarendon Press, 1992) at c. 2.

which has been recognized as a constitutional principle at least since Dicey.[16] His concern, however, was with the principle of *legal equality* or equality before the law, an important but limited application of the overriding constitutional principle of equality. The second dimension of that principle is *political equality*, recognized not by the common law but by statutory initiatives such as those relating to universal suffrage. It is this dimension of the principle of equality which is recognized in *Libman* v. *Quebec*[17] where in defending limits on the permitted election expenses of parliamentary candidates and political parties the Court acknowledged that:[18]

> [S]pending limits are essential to ensure the primacy of the principle of fairness in democratic elections. The principle of electoral fairness flows directly from a principle entrenched in the Constitution: that of the political equality of the citizens. If the principle of fairness in the electoral sphere is to be preserved, it cannot be presumed that all persons have the same financial resources to communicate with the electorate.

In the same case, the Court also recognized that "laws limiting spending are needed to preserve the equality of democratic rights and ensure that one person's exercise of the freedom to spend does not hinder the communication opportunities of others."[19] But although this recognition of the principle of political equality is of supreme importance, the constitutional principle of equality has a third dimension, namely the principle of *social equality*. Clearly more contestable than the other dimensions of the principle of equality, it does not mean that there should be absolute equality between citizens on social questions, any more than the principle of political equality does or can guarantee equality of political influence or equality of electoral opportunity. But it does mean that we should be moving in the direction of equalizing opportunities and income for two reasons: not only is it the mark of a

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[16] A.V. Dicey, *An Introduction to the Study of the Law of the Constitution*, 10th ed. (London: Macmillan, 1959). It is true that provisions such as s. 15 of the Canadian *Charter* provide that "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination." But this applies only to legal equality. On social equality see the decision in *Re Masse et al and The Queen in Right of Ontario* (1996), 134 D.L.R. (4th) 20, and also R.A. Hasson, "What's Your Favourite Right? The Charter and Income Maintenance Legislation" (1989) 5 J.L. & Soc. Pol'y 1. For claims that equality is a constitutional principle see J. Jowell, "Is Equality a Constitutional Principle?" (1994) 47 C.L.P. 1 and B. Hepple, "Social Values in European Law" (1995) 48 C.L.P. 39. And for a strong argument that poverty should be covered by s. 15 of the *Charter*, see M. Jackman, "Constitutional Contact with the Disparities in the World: Poverty as a Prohibited Ground of Discrimination Under the Canadian *Charter* and Human Rights Law" (1994) 2 Review of Constitutional Studies 76.

[17] (1997), 151 D.L.R. (4th) 385 (S.C.C.).

[18] *Ibid.* at 410.

[19] *Ibid.*

socially just and progressive society, but it is also a necessary precondition of both legal and political equality.[20] We are hardly equal before the law if our rights depend on an unattainable income or if for want of resources we are unable to enforce what rights we have.[21] And we are hardly the beneficiaries of equal political rights if we lack the resources to mount a credible campaign: it is not enough to restrict the rich without simultaneously empowering the poor.

III. CONSTITUTIONAL LAW AND SOCIAL RIGHTS

We can now return to the *JCWI* case, and the questions which it raises. If asylum seekers should be entitled to a basic minimum level of income protection, what about other members of the community? Should they have equally recognized claims protected from violation by primary or secondary legislation, and what should these claims be? Should they be confined to income maintenance, or should they extend to include matters such as health care, housing, work and the conditions in which work is performed? These questions take us to the heart of the debate about the role of social rights in constitutional law, and in particular about whether there should be — in the Canadian context — a second charter entrenched in the constitution, this time protecting explicitly social rights. These are questions which were considered in Canada as recently as 1992 in the Charlottetown Accord, with its proposals for the "preservation and development of the Canadian social and economic union."[22] But although the proposals were defeated in the referendum along with the rest of the Accord, they "are likely to surface again,"[23] even if not necessarily in the same form.

There are at least two reasons from constitutional law why the constitutional protection of social rights should be supported if the matter arises again. In the first place, entrenchment is most obviously a means of safeguarding the social rights in question. A good example is paradoxically provided by New York, where the State Constitution provides that "The aid, care and support of the needy are public concerns and shall be provided by the State and by such of its sub-divisions, and in such manner and by such means, as the legislature may from time to time

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[20] On the latter see J-J. Rousseau, *The Social Contract* (Harmondsworth, UK: Penguin Books, 1968): democracy presupposes "a large measure of equality in social rank and fortune, without which equality in rights and authority will not last long" (Bk. III, ch. 4). See also R. Dahrendorf, "Citizenship and Social Class" in M. Bulmer and A.M. Rees, eds., *Citizenship Today: The Contemporary Relevance of T.H. Marshall* (London: UCL Press, 1996).

[21] See the seminal article by R.A. Hasson, *supra* note 16 at 34: it is "virtually impossible for welfare recipients to participate in the judicial process."

[22] Consensus Report on the Constitution (Charlottetown, 28 August 1992, Final Text) at 2.

[23] *Supra* note 12 at 135.

determine." New York is in fact not the only American state to make provision of this kind. It is surprising to read that one of the purposes for which the Illinois Constitution is ordained is to "eliminate poverty and inequality; assure legal, social and economic justice; [and] provide opportunity for the fullest development of the individual." It is perhaps even more surprising that other states should impose a duty on the legislature to "provide for public welfare" (Alaska), to "pass suitable laws for the protection and promotion of public health" (Michigan), and "provide such economic assistance and social and rehabilitative services as may be necessary for those inhabitants who, by reason of age, infirmities or misfortune may have need for the aid of society" (Montana).[24]

These are perhaps not the best examples of the phenomenon of social rights if our goal is the contribution of such rights to strategies of redistribution or the principle of equality. But with that not insubstantial caveat, we can return to New York where it is soon revealed that even measures as loosely structured as these can readily become justiciable and enforceable by the courts. In 1976 the state amended its social services legislation to withdraw eligibility for welfare payments from claimants under the age of 21 who were not living with a parent or other legally responsible relative. Those in this category would qualify for benefit only if they had first brought proceedings "to compel such legally responsible relatives to provide for or contribute to such person's support."[25] Once armed with a court order, the individual could claim benefit which would then be recovered by the state from the responsible relative. In *Tucker* v. *Toia,*[26] the New York Court of Appeals held that the state constitution imposed a mandatory duty to aid the needy which could not be ignored or easily evaded by denying public assistance to those classified as needy.[27] In this case the court ruled unconstitutional legislation which would "effectively deny public assistance to persons under the age of 21"[28] who met all the criteria for determining need on the sole ground that they had not secured a final disposition in support proceedings.

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[24] For a good review of American state constitutions, see Ontario, Constitutional Law and Policy Division, Ministry of the Attorney General, *The Protection of Social and Economic Rights: A Comparative Study* (Toronto: The Division of Constitutional Law and Policy, 1991).

[25] *Social Services Law*, s. 158(a).

[26] 371 N.E. 2d 449 (1977).

[27] For a critique of this provision, see J. Marchi, "New York's Welfare Meltdown" *New York Times* (12 August 1996).

[28] *Supra* note 26 at 452.

But apart from thus helping to protect social rights, constitutional entrenchment serves a second function: it helps to protect social legislation from attack by the courts on the ground that it violates the liberal principles in the *Charter* or *Bill of Rights*. Entrenchment does so by giving constitutional authority to the legislation and the values it embraces, and by requiring the courts to reconcile conflicting constitutional interests. It is true that the courts might subordinate constitutionally protected social rights to constitutionally protected liberal rights: but the value of entrenchment is that the latter would not *inevitably* trump the former, as would otherwise be the case.[29] The issue arises, for example, when trade union rights are challenged on the ground that they present a threat to an employer's constitutionally guaranteed right to property and when tenants' rights are challenged on the ground that they present a threat to a landlord's right to private property.[30] A recent example of the problem is provided by the Irish case, *In the Matter of the Employment Equality Bill 1996*,[31] where it was held that the Bill violated the constitutional right to property on the ground that employers were required to "bear the cost of all special treatment or facilities which the disabled person may require to carry out the work." This is despite the fact that an exception was made where the cost would give rise to "undue hardship" to the employer.[32]

It is not claimed that the result would have been different if the rights of the disabled had been grounded in a more secure constitutional base. But it could of hardly have been a disadvantage to the authors of the legislation if the courts were required to allocate priorities between social rights and property rights in a case such as this, and compelled to justify the allocation which they made on grounds other than the fact that one was rooted in the constitution and the other in merely ordinary legislation. Although this issue is not perhaps quite so acute in Canada — the

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[29] Apart from protecting social rights from constitutional challenge, entrenchment would also be a potentially valuable guide in the interpretation of social legislation. See for example, *R.* v. *Hillingdon LBC, ex parte Puhlhofer* [1986] 1 A.C. 484 for a good example where such guidance might have been useful.

[30] *NLRB* v. *Babcock and Wilcox Co.*, 351 U.S. 105 (1956) and *Blake* v. *Attorney General* [1982] I.R. 117. For an account of Blake and its progeny, see C.A. Gearty, "Democracy and A Bill of Rights: Some Lessons from Ireland" in K.D. Ewing, C.A. Gearty and B.A. Hepple, eds., *Human Rights and Labour Law: Essays for Paul O'Higgins* (NY: Mansell, 1994) 188. See also *Camara* v. *Municipal Court*, 387 U.S. 523 and *Marshall* v. *Barlow's Inc.*, 436 U.S. 307 (1977).

[31] Unreported. I am grateful to my colleague Aileen McColgan for bringing this case to my attention.

[32] This was held only to compound the mischief insofar as it implied that "the employer would have to disclose his financial circumstances and the problems of his business to an outside party."

Canadian *Charter of Rights* is unusual in not expressly protecting property rights — it remains the case that even in Canada the formal recognition of social rights in the Constitution would be valuable in giving a strong voice to issues which might otherwise be neglected. A good example is the tobacco advertising case which stands as an embarrassment to the otherwise proud international reputation of the Supreme Court of Canada.[33] Although it is impossible to predict how the court on the day in that case would have reacted to the ban in the context of a constitutional obligation to promote the health of Canadians, the elevation of health to the level of constitutional status would nevertheless have created an obstacle to a court willing to press the claims of corporate interests — which is not to deny the agility of the justices or their capacity to overcome such obstacles.[34]

IV. JOEL BAKAN: *JUST WORDS*

A different view of the role which social rights should play in Canadian constitutional law is offered by Joel Bakan in his admirable book *Just Words: Constitutional Rights and Social Wrongs*.[35] Conceived mainly as a critique of the *Charter* and its jurisprudence, the book nevertheless addresses directly the question of whether there is a constitutional role for a social charter. Although the book is not concerned exclusively with the question of social rights, the consideration of this question is enriched by its analysis within the broader setting of *Charter* experience in Canada. Bakan is concerned to analyze the *Charter* from an external perspective, expressing an interest in "the social and ideological dimensions of *Charter* law, not questions about its validity or soundness as judged by the internal conventions of legal method."[36] But unlike other progressive scholars, Bakan is prepared to accept a legitimate role for the *Charter* as a political and legal instrument, rejecting critics such as Michael Mandel who contend that the process of *Charter* litigation is inherently undemocratic because it enables judges to override the decisions of elected representatives,[37] and rejecting also the criticisms of Allan Hutchinson and others that rights discourse is inherently regressive because it imposes an "impoverished and partial notion of social life."[38]

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[33] *RJR-MacDonald* v. *Canada*, *supra* note 13.

[34] The task of constitutional law is to make these barriers as high as possible.

[35] *Supra* note 12.

[36] *Ibid.* at 5.

[37] M. Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Wall and Thompson, 1989).

[38] A. Hutchinson, *Waiting for Coraf: A Critique of Law and Rights* (Toronto: University of Toronto Press, 1995) at 24.

So what is Bakan's point? In what is a significant deepening to our understanding of the *Charter* (though much of the analysis is transportable across geographical frontiers), it would appear to be classical Marxism (or a variation thereon), insofar as he takes issue with some *Charter* critics for their "inattention to the effects of underlying social and economic forces," and their "insufficient attention to the constraining influences of economic, social, and political conditions on the operation and effects of the Charter."[39] In his preface to *A Contribution to the Critique of Political Economy*, Marx instructs us that "legal relations as well as forms of state are to be grasped neither from themselves nor from the so-called development of the human mind, but rather have their roots in the material conditions of life." He continues more explicitly by asserting that:[40]

> In the social production of their life, men enter into definite relations that are indispensable and independent of their will, relations of production which correspond to a definite stage of development of their material productive forces. The sum total of these relations of production constitutes the economic structure of society, the real foundation, on which rises a legal and political superstructure and to which correspond definite forms of social consciousness. The mode of production of material life conditions the social, political and intellectual life process in general.

Bakan appears to take this line of reasoning and to test it in the context of contemporary Canada, his central argument being that the *Charter* "must be explained in relation to the specific condition in which it operates." He continues:[41]

> All political institutions, including the Charter and rights, are necessarily constrained in their operation by the wider social system that they are established to govern. That is why it is necessary to be sceptical of both Charter optimism and pessimism when they are based on allegedly essential features of the Charter or rights. The emancipatory and egalitarian potential of the Charter ultimately depends on the social and historical circumstances surrounding its use.

Bakan reserves strong criticism for the failure of the *Charter* to promote social justice (though was it ever intended that it should?), and more pertinently for the fact that "social injustice is actually worsened by the Charter in some areas."[42] Here he draws attention to the "unfortunate symbiosis between the anti-government ideology of neo-liberal right-wing politics and the deregulatory form of Charter rights," noting the use of the *Charter* by some (including corporations) to avoid legislative restrictions designed to prevent them harming others.[43]

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[39] *Supra* note 12 at 8–9.
[40] *Supra* note 9 at 182.
[41] *Supra* note 12 at 9.
[42] *Ibid.* at 4.
[43] *Ibid.* at 4.

So how then does Bakan deal with the entrenchment of social rights? Here he argues that "it is unlikely that a social charter would have done what those who supported the idea wanted it to do."[44] He gives two principal reasons for this view, the first of which is that "because of their abstract formulation, there is no guarantee that social rights would be interpreted progressively by judges or other authoritative interpreters, and there is a risk that they would be given regressive meanings."[45] So far as the latter consideration is concerned, Bakan claims plausibly that there is a danger that a government could justify an attempt to lower social welfare payments or a minimum wage by reference to the fact that the proposed new rate is still higher than the minimum rate required by the social charter. Indeed a social charter may even "prompt governments to cut spending and lower regulatory standards if the minimum levels determined acceptable under a social right are lower than existing ones,"[46] while a government "could also use social rights against public sector employees," by defending "back-to-work legislation for striking teachers or nurses on the ground that individuals are denied rights to education or health by strike-related school or hospital closures."[47] There is also the danger that "businesses may claim that certain kinds of economic and social regulation deny that service to consumers and thus violate a social right."[48]

The second reason for caution relates to the atomistic form of social rights, which Bakan contends would "address only discrete symptoms, not the complicated causes, of social inequality."[49] In a particularly powerful passage he writes:[50]

> Social assistance is the only program that is genuinely progressive, but it provides little more than means for survival, allowing people to live in poverty rather than die from it. Universal access to state services may provide a 'safety net,' but it has not transformed (nor will it) socially and legally enforced structures of economic inequality and the unequal distribution of suffering and want that they engender.

This leads Bakan to conclude that we should not expect the "constitutionalizing of universal access to such services through a social charter or covenant to change very much,"[51] citing health care as a "good example of the problem."[52] Thus a

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[44] *Ibid.* at 134.
[45] *Ibid.* at 134.
[46] *Ibid.* at 137.
[47] *Ibid.*
[48] *Ibid.*
[49] *Ibid.* at 134.
[50] *Ibid.* at 139.
[51] *Ibid.* at 139.
[52] *Ibid.*

constitutional obligation "to ensure that all Canadians have access to health care" would do nothing to address "the social determinants of ill health, particularly the unequal social relations that have much to do with why and to whom illness happens[53]. . . . The most that can be hoped for from a social right to health services is promotion of equal access to medical treatment, not equal access to health."[54]

V. SOCIAL RIGHTS: IMPAIRED CANADIAN VISION

It is not difficult to sympathize with these sentiments which seem particularly pertinent in the specific context of the proposals in the Charlottetown Accord.[55] The draft legal text begins by making clear that as a proposed amendment to section 36 of the *Constitution Act, 1981* it was not intended to alter "the authority of Parliament, the provincial legislatures or the territorial legislative authorities,"[56] so that the social provision which it did contemplate would not operate in the same way as the *Charter of Rights and Freedoms* as set out in Part 1 of the *Act*. In other words, constitutional recognition of social rights was not to bring parity of constitutional status, and indeed it was expressly provided that the proposed new text would not "have the effect of modifying the interpretation of the rights and freedoms referred to in the [*Charter*]."[57] It is far from clear what this last provision was intended to achieve: did it mean for example that the *Charter* was to be construed without the benefit of referring to the social measures in the proposed amendment? If so, the constitutional effect of the amendment would have been greatly diminished in practical terms, particularly in view of the fact that the measures proposed would not in themselves otherwise have been actionable or enforceable in the courts.

But it is not only the second-class status of social rights which was a matter for concern, particularly when compared with the *Charter of Rights and Freedoms*. Also important is the form in which the proposed measures were cast, said to be "policy objectives"[58] rather than obligations on governments or rights of individual citizens

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[53] *Ibid.*

[54] *Ibid.* at 139–140. On the problem of health inequality in Britain, see The Black Report, *Inequalities in Health* (Harmondsworth, England: New Penguin Books, 1982).

[55] For a valuable account of this episode, see J. Bakan and D. Schneiderman, eds., *Social Justice and the Constitution: Perspectives on a Social Union for Canada* (Ottawa: Carleton University Press, 1992).

[56] *Charlottetown Accord (1992), Draft Legal Text* (Ottawa: 1992) at s. 36.1.

[57] *Ibid.*

[58] *Ibid.* at s. 36.1(2).

or their organizations. These policy objectives for the "preservation and development of the social union"[59] were said to include:

(a) providing throughout Canada a health care system that is comprehensive, universal, portable, publicly administered and accessible;

(b) providing adequate social services and benefits to ensure that all individuals resident in Canada have reasonable access to housing, food and other basic necessities;

(c) providing high quality primary and secondary education to all individuals resident in Canada and ensuring access to post-secondary education;

(d) protecting the rights of workers to organize and bargain collectively; and

(e) protecting, preserving and sustaining the integrity of the environment for present and future generations.

Other policy objectives included "full employment"[60] and a "reasonable standard of living."[61]

What is striking about these proposals is the generality of the drafting and the narrow range of issues which they covered. It is at this point we begin more fully to appreciate Bakan's concerns about the atomistic nature of social rights and his observation about "the obvious links between poverty/economic insecurity and inadequate nutrition and shelter, unsafe and unhealthy jobs, neighbourhoods and higher rates of violent crime, accidents, industrial pollution and other health hazards."[62] But it is not clear if a social charter need suffer this fate, for it is clear that other social charters adopt a much more holistic view of the problems which they are designed to address and are not as selective in their coverage as the proposed Canadian measure arguably purported to be (though this is a flaw which perhaps is overdone). A good example of this is the International Covenant on Economic, Social and Cultural Rights (ICESCR) which paradoxically (for we would not normally expect such strengths in international law versus constitutional law) is drafted in much more specific terms, and which covers greater ground in much greater detail. Written in the language of rights, the ICESCR recognizes the right to work, the right to just and favourable conditions of work, trade union rights

[59] *Ibid.*
[60] *Ibid.* at s. 36.1(3)(c).
[61] *Ibid.* at s. 36.1(3)(d).
[62] *Supra* note 12 at 140.

(including the right to strike), the right to social security and social insurance, as well as protection for the family and pregnant women, and so on.[63]

Yet weak though the substance of the proposed social charter may have been, it suffered also in terms of an uncertain supervisory and enforcement machinery. As conceived by Ontario, supervision of these principles would be by means of "an independent and open mechanism" which could be established "either in a reformed Senate or as an independent body."[64] Ontario in fact proposed that an independent commission should be established to monitor the implementation of the social charter, though it does not appear to have been proposed as a judicial body, or indeed a body to which complaints might be made by aggrieved individuals or organizations.[65] In the end the matter was fudged, with the draft legal text of the Accord proposing simply that the prime minister and the premiers would establish a mechanism to monitor the progress made in relation to the objectives set out in the text.[66] It had earlier been proposed by the Special Joint Committee chaired by Gerald Beaudoin and Dorothy Dobbie that an intergovernmental agency should be established to "review, assess and report" on the performance of the federal, provincial and territorial governments in meeting the goals of the proposed social charter.[67] But bearing in mind that the social charter was not to be justiciable, this was a proposal for the softest of soft law.

In truth, the provisions of the proposed social charter were largely unenforceable: as Bakan points out "[c]oncepts such as 'adequate social services and benefits,' 'high quality education,' 'just and favourable working conditions' ... are broad enough to accommodate interpretations from different groups with conflicting interests that are

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[63] Another example is the Council of Europe's Social Charter, which has recently been revised. See A. Hendriks, "Revised European Social Charter" (1996) 3 Neth Q of Human Rights 341. This is not to be confused with the EU Social Charter which has been dubbed an 'abject failure' (M. Mandel, "Sovereignty and the New Constitutionalism" in D. Drache and R. Perrin, eds., *Negotiating with a Sovereign Quebec* (Toronto: J. Lorimer, 1992) 224), an uncompromising view which not everyone would share, at least without a hint of equivocation. For a good account of EU Social Policy, see B. Bercusson, *European Labour Law* (London: Butterworths, 1996).

[64] J. Bakan and D. Schneiderman, *supra* note 55 at 164.

[65] On the Ontario position, see Ministry of Intergovernmental Affairs, A Canadian Social Charter: Making Our Shared Values Stronger. A Discussion Paper (Toronto: The Ministry of Intergovernmental Affairs, 1991).

[66] Compare the new collective complaints procedure under the Council of Europe's Social Charter of 1961. See D. Harris, *The Collective Complaints Protocol to the European Social Charter* (Council of Europe, 1997).

[67] J. Bakan and D. Schneiderman, *supra* note 55, Appendix III.

at once contradictory and plausible."[68] There is no objective standard by which they can be judged and no guidance to the supervisory body as to how such a standard could be developed. As a result, the effect of any such measures would depend to a greater extent than is normally the case on the ideological predisposition of the members of the supervisory body: the policy objectives allowed so much discretion as to the means to be adopted that it could be contended with conviction that they are best delivered by the neo-liberal policies of Thatcher/Reagan/Mulroney,[69] as by the social democratic policies adopted by western governments from the 1930s until the 1970s. These are questions which are probably incapable of proof one way or the other (though it has to be said that when the Thatcher/Major administration was required to satisfy a court that a regulated labour market causes unemployment it was unable to do so).[70]

VI. SOCIAL RIGHTS: EUROPEAN CONSTITUTIONAL REALITY

If we transpose Bakan's concerns about social rights, we begin with his claims about the atomistic nature of such protections. As already suggested, this is perhaps overplayed in the case of the Charlottetown Accord, though it is certainly a feature of the American State constitutions to which we referred. But it need not be like this, with a number of European constitutions revealing that a broader approach to the social condition of citizens can also be adopted. One example is France where the preamble to the Constitution of the Fourth Republic proclaims a number of "political, economic and social principles."[71] These include equal rights for men and women and a number of protections for workers and their trade unions. In particular it is provided that everyone has the duty to work and the right to employment, and that no one shall be allowed to suffer injury in respect of his work or occupation by reason of his origins, his opinions or his beliefs. The right to join and take part in trade union activities is covered, as is the right to strike and the right to take part 'through delegates' in the collective arrangement of work conditions. Moreover, guarantees are included in respect of "health care, material security, rest and leisure" and provision is made for the "right to subsistence from the community" for anyone

[68] *Supra* note 12 at 136.

[69] See F.A. Hayek, *The Constitution of Liberty* (Chicago: University of Chicago Press, 1960).

[70] *R.* v. *Secretary of State for Employment, ex parte EOC*, [1995] 1 A.C. 1.

[71] A commitment to the principles of the Preamble to the Constitution of the Fourth Republic (together with the Declaration of the Rights of Man 1789) is reaffirmed in the Preamble to the Constitution of the Fifth Republic 1958.

who "by reason of age, physical or mental condition, or economic situation is incapable of working."[72]

There is a rich variety in the nature of constitutional protection for social rights in European national constitutions: each makes social provision in different ways and with different degrees of completeness. But it is to Italy that we must turn for what is the fullest treatment, with Part One of the 1947 Constitution beginning with a number of basic principles.[73] By article 1 it is provided that Italy is "a democratic republic founded on labour," and that "sovereignty belongs to the people who exercise it in a manner and within the limits laid down in the constitution." In article 3 it is provided that "all citizens are invested with equal social status and are equal before law, without distinction as to sex, race, language, religion, political opinions and personal or social conditions." Also important is the acknowledgement in article 3 that it is the responsibility of the Republic "to remove all obstacles of an economic and social nature which, by limiting the freedom and equality of citizens, prevents the full development of the individual and the participation of all workers in the political, economic and social organization of the country." The other general principle which might be noted here is that contained in article 4 in which the Republic recognizes the right to work, and undertakes to promote the conditions that will make this right effective.

The possible charge that this is just hot air is perhaps rendered less sustainable by Part One of the Constitution which deals with the Rights and Duties of Private Citizens, including "Ethical and Social Relations" in Title II and "Economic Relations" in Title III. The former recognizes the family as a natural association founded on marriage, but as usual in a text of this kind, one "based on the moral and legal equality of husband and wife," albeit "within the limits laid down by the laws for ensuring family unity."[74] Apart from a number of other provisions dealing with the family, Title II deals also with three quite different matters. By article 32 the Republic undertakes to provide health care as a basic right of the individual and in the interests of the community; medical assistance is to be provided to the indigent free of charge, though no provision is made about the quality of such assistance.

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[72] For a consideration of these provisions, see J. Bell, *French Constitutional Law* (Oxford: Clarendon Press, 1992). See also A. Stone, *The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective* (Oxford: Clarendon Press, 1992). On the right to strike specifically, see M. Forde, "Bill of Rights and Trade Union Immunities: Some French Lessons" (1984) 13 I.L.J. 40.

[73] For background on the Italian system, see A. Pizzorusso, V. Vigoriti, and G.L. Certoma, "The Constitutional Review of Legislation in Italy" (1983) 56 Temple Law Q 502.

[74] Article 29.

Article 33 affirms the freedom of art and science and, just as importantly, freedom of instruction in these disciplines. The same article — which imposes a duty on the state to establish public schools but also reserves the right of individuals and organizations to found their own schools — guarantees a right to academic autonomy,[75] while article 34 states simply that "education is available to everyone" and obliges the state to support capable students and their families "to attain the highest degrees of learning."

Title III deals partly with workers' rights. By article 35 the Republic is committed to safeguarding labour in all its forms and methods of execution, and recognizes the need for "the professional or vocational training and advancement of workers." So far as the right to a fair wage is concerned, article 36 provides that a worker is entitled to wages "in proportion to the quantity and quality of his work, and in any case sufficient to provide him and his family with a free and dignified existence."[76] Article 36 also provides that a maximum number of daily working hours should be prescribed by law, and that workers are entitled to a weekly day of rest and to annual holidays with pay. By virtue of article 37, "female labour" enjoys "equal rights" and "the same wages for the same work," as "male labour," and conditions of work must make it possible for women at work "to fulfil their essential family duties and provide for the adequate protection of mothers and children." Article 38 deals with entitlement to social assistance and social insurance, while articles 39 and 40 deal with the "freedom in the organization of trade unions" and the right to strike respectively. The only compulsion which may be imposed on trade unions is a duty to register with public authorities, though the constitution provides that it is a condition of registration that "the statutes of the union sanction an internal organization on a democratic basis."

It is perhaps to be expected that a constitution dealing with social and economic rights would deal with the rights of workers and their trade unions. But Title III also deals in a most fascinating way with the rights of private property, with article 41 declaring that "private economic enterprise is open to all." But it also provides that private enterprise cannot be "applied in a manner as to be in conflict with social utility or when it is prejudicial to security, freedom and human dignity," and that the law is to prescribe "such planning and controls as may be advisable for directing and coordinating public and private economic activities towards social objectives." The remaining provisions of Title III authorize limits on the private ownership of property

[75] At least insofar as universities have the right to draft their own regulations within the limits laid down by State legislation.

[76] On which see M. Mandel, *supra* note 37 at 226.

"with the object of ensuring its social function,"[77] and permit also the expropriation of private property "to the state, to public bodies or to labour or consumer communities."[78] But expropriation may only occur "for purposes of general utility," with the "payment of compensation," in the case of "certain undertakings or categories of undertakings operating essential public services, sources of power or exercising monopolies and invested primarily with a character of general interest." Steps are also authorized in respect of privately owned land, with a view to "securing a rational utilization of the soil" and establishing "equitable and rational social relations."[79]

VII. THE SUPERVISION AND ADJUDICATION OF SOCIAL RIGHTS

What are we to make of this impressive catalogue of constitutional rights, which although wide ranging nevertheless has obvious gaps, reflecting perhaps the obvious point that all constitutional texts are a reflection of the values of their time? Unlike Spain, which has a more recent constitutional text, there is no provision in the Italian constitution for "the right to enjoy an environment suitable for personal development."[80] There is also a more urgent concern with the catalogue of social rights in the Italian constitution, which is simply that there is little point in having such an impressive constitutional package if it cannot be effectively enforced.[81] Which brings us to another of Bakan's concerns with social rights: even if they can be found to be justiciable (and more importantly, horizontal in application), there is every chance they could be rendered useless (or worse) by the courts.[82] It is not

[77] Article 42.

[78] Article 43.

[79] Article 44.

[80] But article 9 of the Italian Constitution does commit the Republic to safeguarding the natural beauties and the historical and artistic wealth of Italy.

[81] See also Bell, *supra* note 72, on the French constitution where he writes that: "The overall approach of the Conseil has been to accept that the vague and non-self-executing character of the provisions of the Preamble creates constitutional values, but to leave the legislature a large measure of discretion as to their implementation" (at 157–58).

[82] See also M. Mandel, *supra* note 37 at 226–27. As Bakan indicates, it is not only the courts which can defeat the operation of social rights, as the experience of parliamentary supervision in Finland makes clear. The Constitution made provision for the right to work, construed by the appropriate parliamentary committee as imposing an obligation on government and Parliament. But this position was revised in the 1980s in the light of economic conditions, the parliamentary committee dividing on party lines to conclude that the constitutional guarantee was now only "programmatic" rather than "juridically precise." See M. Scheinin, "Constitutional Law and Human Rights" in J. Poyhonen, ed., *An Introduction to Finnish Law* (Helsinki: Finnish Lawyers' Publishing, 1993) at 42–44. On

difficult to be sceptical about the way in which social rights are dealt with by the judicial branch, particularly in common law systems, and indeed it is not necessary to leave Canada to find good examples to fuel such scepticism. These are the *Alberta Reference* and its progeny,[83] in which the Supreme Court of Canada held that the right to freedom of association in the *Charter* does not include the right to strike or the right to engage in collective bargaining.[84] But, again, it need not be like this, as the experience of Italy reveals.

This is not to deny that there are problems with the judicial enforcement of social rights, or indeed that their constitutional entrenchment would be effective or successful in common law systems which draw their judges from the cadres of private practice,[85] unlike some of the civilian systems which we have mentioned which have a professional career judiciary. But it does suggest that as a matter of practice it is possible for social rights to be made to work. It is true that not all the social provisions of the Italian constitution are justiciable, though this is not true of article 36 which has been said to be "immediately operative and binding between employers and employees," and indeed is "the first constitutional norm to be accorded such a binding effect between private parties by the courts."[86] As a result of the horizontal effect of this particular provision, any term of the contract of employment which provides a rate of pay which is not sufficient to provide a free and dignified existence is void. The question which arises, however, is how to determine what the rate of pay for this purpose should be, a task which social lawyers in Canada and elsewhere would rightly hesitate about handing over to the courts to determine.[87]

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the right to work, see B. Hepple, "The Right to Work" (1981) 10 I.L.J. 65.

[83] *Re Public Service Employees Relations Act (Alta)*, [1987] 1 S.C.R. 313. See T.J. Christian and K.D. Ewing, "Labouring Under the Canadian Constitution" (1988) 17 I.L.J. 73.

[84] Bakan distances himself from the critics of this decision, arguing that flexible production methods and the moving of production to jurisdictions where labour is cheap "combine to create conditions in which legal rights to unionize, bargain and strike have lost much of their power to protect workers' interests" (*supra* note 12 at 81). In response, however, it is difficult to see how the ability of unions to defend themselves against these attacks on their influence is helped by a strategy of legislative attack and constitutional abstention. Also see H. Glasbeek, "The Social Charter: Poor Politics for the Poor" in J. Bakan and D. Schneiderman, *supra* note 55 at 115.

[85] For a blistering account of such problems, see H. Glasbeek, *ibid.*

[86] T. Treu, "Italy" in R. Blanpain, ed., *International Encyclopedia of Labour Law and Industrial Relations*, vol. 7 (Deventer, Netherlands and Boston: Kluwer Law and Taxation Publishers, 1977, updated to March, 1991) at para. 422.

[87] For a recent powerful critique of legal reasoning in Canada, see F.C. DeCoste, "The Impossibility of Fetal Rights and the Obligations of Judicial Governance" (1998) 36 Alta. L. Rev. 725, esp. at 741.

The answer in Italy — where there is no minimum wage — is that the rate determined by the courts will normally be based on collective agreements applicable to workers in the same category as the complainant.

Also in sharp contrast with common law systems is the approach to the right to strike as guaranteed by article 40. According to Treu, this "represents a fundamental innovation with respect to the classical principles of formal equality and democracy, since it recognizes the right of workers alone (there being no right of lock-out) to withdraw their labour in order to promote their own interests."[88] Indeed the right to strike in article 40 is regarded as "one of the means granted to the workers"[89] to remove what article 3 of the Constitution refers to as the obstacles which "by limiting the freedom of equality of citizens" prevent "the full development of the individual and the participation of all workers in the political, economic and social organization of the country." The effect is to protect the right to strike from any form of sanction imposed by the state, as well as from any discriminatory action by employers designed to impede the exercise of the right. This is not to say that there are no restrictions permitted on the right to strike; the courts accept that the right may be limited in the case of the police and military, and also to an indeterminate extent in the case of other public sector workers. But it is a far cry from common law jurisdictions, not least because the legitimacy of the political strike is recognized by the Constitutional Court.

As we have seen, Part One of the Italian Constitution does not only protect workers' rights. Also interesting are the provisions of articles 41 *et seq.* regulating the ownership of private property.[90] So although "private economic enterprise is open to all," it is not to be applied in a manner which conflicts with social utility or in a manner prejudicial to security, freedom and human dignity. This has been construed to protect planning controls, environmental controls, competition law and restrictions on the import of tobacco. Although it might be argued that labour rights would violate the right to free enterprise, such a claim is unlikely to proceed very far in the Italian constitutional context, unlike in the United States in an earlier era: in the first place such rights are protected expressly by the constitution and could always be asserted in the event of any statutory restriction; and secondly the right to free enterprise is expressly limited in a manner which seeks to ensure the "social function" of private property.[91] The rights of workers would surely be a pre-eminent

[88] T. Treu, *supra* note 86 at para. 468.

[89] *Ibid.* at para. 469.

[90] On the comparable provisions of French law, see J. Bell, *supra* note 72 at 176–79.

[91] A. Canadian, A. Gambaro and U. Mattei, "The Law of Property in Italy" in A. Pizzorusso, ed., *Italian Studies in Law*, vol. 1 (Dordrecht; Boston: Martinus Nijhoff, 1992) 123.

issue of social utility and self-evidently a matter pertaining to human dignity. Indeed, although the Constitutional Court has accepted the legitimacy of strikes in essential services (despite article 40), this was done on the basis of a perceived public interest qualification on the constitutionally protected right to strike. There has been no question so far that any such limitations could be justified to protect the private interests safeguarded by article 41.

A good example of article 41 in operation is provided by *Corte Costituzionale*, Decision No. 388 of 21–30 July 1992, challenging the constitutionality of legislation which imposed "a very strict system of protection by imposing a form of public control over all cultural goods, moveable or immoveable, which are privately owned."[92] The issue in this case concerned attempts by national and local government to prevent the change of use of commercial premises from traditional business activities to fast-food restaurants, in order to protect and enhance the "national cultural heritage by preserving the traditional character of historical centres."[93] It is true that on its facts the case does not deal directly with social rights, as that term has been considered in this review. Nevertheless the decision of the court does provide a valuable insight into the extent to which property rights have been subordinated to social interests, the court taking fully into account a modernized conception of the constitutional guarantee in article 9 which provides that the Republic safeguards "the natural beauties and the historical and artistic wealth of Italy." In upholding the legislation, the Court emphasized the importance of "ending the deterioration of areas of particular interest, by impeding the proliferation of commercial activities which by replacing traditional ones, produce effects, which are damaging and distorting. . . ."[94]

VIII. CONCLUSION

Bakan has raised a number of objections to social rights: these include first their atomistic quality; and secondly their possible misinterpretation by the courts. These are admittedly serious concerns, but they are not inevitable features of the process. As we have seen, continental European constitutions view the social dimension in general terms, while one lesson from the Italian courts is that the narrow approach to interpretation found in the constitutional courts of common law systems is not a universal phenomenon. But would the constitutional entrenchment of social rights

[92] A. Biondi, "The Legal Protection of Traditional Commercial Activities" (1995) 4 Int. J. of Cultural Property 129 at 130.

[93] *Ibid.* at 129.

[94] *Ibid.* at 133–134.

"address only discrete symptoms, not the complicated causes, of social inequality?"[95] Perhaps. If so the constitutional protection of social rights would in that sense presumably be no different from social rights clothed in statutory rather than constitutional form. Although it may well be true that such rights simply allow people "to live in poverty rather than die from it,"[96] no one seriously suggests that we should repeal such legislation, withdraw all statutory recognition of social rights, and fall back on the common law. Yet this would be the logical position of those who argue against the constitutional protection of such rights on the ground of their limited palliative potential.

There may well be no point in entrenching constitutional rights if they serve little practical purpose, a means of simply keeping the living dead alive (though the living dead may have something to say about that). But the reasons for such an initiative are in fact to be found in Bakan's book where he concludes, on an optimistic and uplifting note, by proposing that "progressive social change can be facilitated by an activist state,"[97] expressly repudiating the notion that "the quest for social equality and justice is futile within capitalism."[98] Of crucial importance in this context is his claim that by "focussing on property relations," his aim is to "identify a crucial source of social power and inequality in capitalism and to suggest that efforts at promoting equality must be concerned with curbing, and protecting people from, exploitative and oppressive uses of that power."[99] This bring us back to the arguments against social rights, where Bakan's position may be something of an Achilles heel in an otherwise faultless presentation. One of the techniques available to the activist state, and one of the techniques for regulating the asocial use of private property and private economic power, is the law which has the potential to transform social relations, and the potential also to mark transformations which may already be taking place. If socialization is not to be by means of legal instruments, how else is it to occur?

It may well be true that the "struggle for social justice is much larger than constitutional rights," and that "it is waged through political parties and movements,

[95] *Supra* note 12 at 134.
[96] *Ibid.* at 139.
[97] *Ibid.* at 146.
[98] *Ibid.* at 147.
[99] *Ibid.* at 147.

demonstrations, protests, boycotts, strikes, civil disobedience, grassroots activism, critical commentary and art."[100] But if so, political action must be undertaken for a purpose, and that purpose presumably is to effect political change, which one way or another will have to be reflected in law if it is to be sustained. That being so, the highest form of expression which western legal systems typically acknowledge is constitutional law, and it is there that we should aim to entrench social gains made in the political process, without denying that "rights discourse" is a "blunt tool" for "redressing social injustice."[101] The constitutional entrenchment of social equality as a constitutional principle, and social rights (with all their limitations)[102] as constitutional rights, is a way of consolidating the gains that have been made and protecting them from erosion by temporal majorities.[103] We should not lose sight of the fact that all constitutional reform is "a mere means to further ends,"[104] rather than an end in itself. But equally we should not lose sight of the fact that "the effective enforcement of a social charter has ideological and practical problems to overcome," requiring "different politics than any that have been presented at the [Canadian] constitutional table."[105]

100 *Ibid.* at 152.

101 *Ibid.* at 152.

102 See K. Marx, "Critique of the Gotha Programme" in K. Marx and F. Engels, *supra* note 9, 324. See also M. Mandel, "Sovereignty and the New Constitutionalism" *supra* note 37 at c.

103 For while the goal must be to build upon achievements and expand horizons, we must recognize with Kautsky that the electors may vote against a progressive government (K. Kautsky, "Dictatorship and Democracy" in P. Goode, ed., *Karl Kautsky: Selected Political Writings* (London: Macmillan, 1983) 117.

104 F. Engels, *The Condition of the Working Class in England* (California: Stanford University Press, 1968) at 272.

105 H. Glasbeek, *supra* note 84 at 117.

The Tenth McDonald Lecture

EQUALITY JURISPRUDENCE: THE ORIGIN OF DOCTRINE IN THE SOUTH AFRICAN CONSTITUTIONAL COURT

Justice Albie Sachs*

Established in 1994, the Constitutional Court of South Africa is charged with the interpretation and enforcement of South Africa's new constitution. This article examines the Court's interpretation of equality rights in South Africa's Bill of Rights. Drawing from international equality jurisprudence, as prescribed by the Bill of Rights, the Court sought to create an approach valid for the South African context yet picking up from other jurisdictions principles and ideas internationally recognized as valuable. The article highlights the impact which Canadian equality jurisprudence has had on the development of South African equality doctrine, while providing an overview of the South African case law which has given rise to the emergence of six salient and interconnected themes in their evolving jurisprudence.

Établie en 1994, la Cour constitutionnelle d'Afrique du Sud est chargée d'interpréter et de faire respecter la nouvelle Constitution de la République. L'auteur examine comment la Cour interprète les droits à l'égalité inscrits dans la Déclaration des droits du pays. Se fondant sur la jurisprudence internationale, comme le prescrit le Bill of Rights, la Cour s'est efforcée d'adopter une approche adaptée à la fois au contexte sud-africain et respectueuse des principes et à des idées dont la valeur est reconnue mondialement. L'auteur souligne que l'exemple canadien a exercé une influence notable sur l'élaboration de la doctrine sud-africaine à cet égard; et il fournit un aperçu de la jurisprudence sud-africaine qui a donné lieu à l'émergence de six grands thèmes reliés entre eux dans l'évolution de la philosophie du droit sud-africain.

Mr. Hugo was aggrieved. While sitting in prison near Durban he got to know that the newly inaugurated President, Mr. Nelson Mandela, had issued

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* Justice of the Constitutional Court of South Africa. This is a lightly edited transcript of the Tenth McDonald Constitutional Lecture delivered on April 21, 1998 at the Faculty of Law, University of Alberta. I have added a post-script and rather extensive footnotes so that the precise reasoning of the Constitutional Court will accompany my rather sweeping observations.

The South African Constitutional Court came into existence some months after the country's first democratic elections in 1994. Its members were: Arthur Chaskalson (President); Ismail Mahomed (Deputy-President, now Chief Justice of the Supreme Court of Appeal); Pius Langa (now Deputy-President); Laurie Ackermann; John Didcott; Richard Goldstone; Johann Kriegler; Thole Madala; Yvonne Mokgoro; Kate O'Regan; Albie Sachs. It has the last word on the interpretation and enforcement of the Constitution, while the Supreme Court of Appeal has the final say on all other matters.

what was called a "Presidential Act"[1] ordering the release of: disabled people, children under a certain age and mothers of children under 12. Mr. Hugo said (after taking legal advice): "I have a child under 12, whose mother is dead. Why have I been left out? That's discrimination, a violation of my rights under section 8 of the Bill of Rights in South Africa's new Constitution."[2]

Mr. Prinsloo was a farmer, five hundred miles away, and he was also aggrieved. A fire had spread from his land on to a neighbour's property, causing extensive damage. The *Forestry Act*[3] said that if you lived in a "non-fire controlled zone," which he happened to do, and fire spread from your land and caused damage to a neighbour's property, you had to prove that you had not been negligent. Mr. Prinsloo alleged that putting the onus on him was a denial of his right to equality[4] under section 8 of the Bill of Rights.[5] "Why should I be treated differently from people in fire-controlled zones?" he asked (after getting a legal opinion).

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1 *Presidential Act* 17 of 27 June 1994.

2 *President of the Republic of South Africa and Another* v. *Hugo* 1997 (6) B.C.L.R. 708 (C.C.) (1997 (4) S.A. 1) [hereinafter *Hugo*].

3 *Forestry Act* 122 of 1984, s. 84.

4 The Constitution of the Republic of South Africa Act 200 of 1993, s. 8 reads:

(1) Every person shall have the right to equality before the law and to equal protection of the law.

(2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.

(3) (a) This section shall not preclude measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedom.

(b) Every person or community dispossessed of rights in land before the commencement of this Constitution under any law which would have been inconsistent with subsection (2) had that subsection been in operation at the time of the dispossession, shall be entitled to claim restitution of such rights subject to and in accordance with sections 121, 122 and 123.

(4) *Prima facie* proof of discrimination on any of the grounds specified in subsection (2) shall be presumed to be sufficient proof of unfair discrimination as contemplated in that subsection, until the contrary is established.

The text of the final constitution is reproduced *infra*, note 59.

5 *Prinsloo* v. *Van der Linde and Another* 1997 (6) B.C.L.R. 759 (C.C.) (1997 (3) S.A. 1012) [hereinafter *Prinsloo*].

These cases happened to reach the Constitutional Court at roughly the same time, and in the strange way that jurisprudence sometimes has, two people who were never to meet became close accomplices in the evolution of basic doctrine. In the words of Justice Cardozo:[6] "the sordid controversies of litigants are the stuff out of which great and shining truths will ultimately be shaped. The accidental and the transitory will yield the essential and the permanent." So it came about that hearing these two cases in near conjunction compelled our Court to reflect on what the equality principle in our new Bill of Rights was all about. Who should be safeguarded by it? What kinds of legislation or executive action should raise questions of viewing equal protection not just as a 'good thing,' but as a fundamental human right?

We began the search for answers, as our Bill of Rights encourages us to do, with a look at international jurisprudence on the question.[7] In general terms, in interpreting our Bill of Rights we are required to apply the principles and promote the values of an 'open and democratic society based on freedom and equality.'[8] And I'm sure you will all be happy to know that we regard Canada as an open and democratic society based on freedom and equality. When looking around to see how the question of equality had been handled in other countries, we were not searching for precedent or for decisions on similar factual situations. We were trying to find basic principles, an approach, a perspective, which would guide us in our quest to protect fundamental human rights and enable us to do so in a manner which resonated with our Constitution and our historical circumstances.

A more profound contrast we could hardly have imagined: someone sitting in prison, feeling aggrieved because he was being treated differently as a man, a father, a male parent, from the way he would have been treated if he had been a female parent, as compared to somebody worried about being more at risk of paying compensation because he happened to be in a non-fire controlled zone

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[6] B.N. Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921) at 35.

[7] The Constitution of the Republic of South Africa Act 200 of 1993, s. 35(1) reads: "In interpreting the provisions of this Chapter a court of law shall . . . have regard to the public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law."

[8] *Ibid.*, s. 35(1) provides further that: "In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality. . . ."

rather than a fire-controlled one. One sensed that the distinction could be analytically useful, and the obvious thing to do was to seek direction from the jurisprudence of countries of common law background that had bills of rights similar to ours.

In the United States, the equal protection clause was clearly designed to protect former slaves from being discriminated against.[9] An enormous amount of doctrine subsequently emerged on what equal protection signified question of equality. A huge gap evolved between, on the one hand, the very deferential minimum quantum of rationality that all laws were said to require, and on the other, the strict scrutiny applied to laws classifying persons according to race. The distinction appears to be stark and easily understandable until we discover that the Supreme Court has invented an intermediate category to deal with gender and sex discrimination, with some situations being more intermediate than others. Brilliance of articulation does not necessarily go hand in hand with consistency of outcome; the US Supreme Court thrives on disagreement rather than agreement. To make matters worse, majorities become minorities, and minorities become majorities. I get benefit and pleasure from the way that Justice Brennan articulated his legal philosophy. But in some cases he was in the majority, and then a few years later when the composition of the court was different, he came to be in the minority. It was the same Brennan with the same kind of approach; could we simply pick and choose the judgments we liked the best, of the judges we admired the most? Would it be helpful to us in South Africa to import all the arguments that divided American lawyers? In the end it seemed hard to get clear and convincing doctrine on equality from a deeply fissured US Supreme Court operating with a different constitution in a different historical and cultural setting.

We looked to the work of the Indian Supreme Court. It too had a coruscating and technically robust jurisprudence, developed by judges who wrote about fundamental rights in admirably passionate terms.[10] Yet the text and the context of the Indian Constitution were different from ours. Moreover, the judges used words like "differentia:" the differentia must be rationally connected

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[9] US Const., amend. XIV §1: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

[10] See generally, D.D. Basu, *Shorter Constitution of India*, 10th ed. (New Dehli: Prentice Hall of India, 1988) at 63; H.M. Seervai, *Constitutional Law of India*, 3d ed., vol. 1 (Bombay: N.M. Tripathi Private Ltd., 1983) at c. 9.

to the purpose of the legislation. Not quite knowing what the word "differentia" meant, I tried to get guidance, but then found that I needed guidance in relation to the guidance. Did we want to encourage endless research and argument into what the different Indian judges had said and meant at diverse moments?

Next we looked at Canadian jurisprudence on equality, a dynamic area of *Charter* interpretation, and an interesting and fascinating one. For me, the *Andrews*[11] case provided more illumination than any other I had read from any jurisdiction, and although the actual outcomes proposed by the judges were disparate, a forceful guiding principle emerged. As I understood it, the decision centred equality law on the need to overcome discrimination against groups historically subject to disadvantage. I thought, "Hooray, the Canadians have found the magic bullet that cures all equality-related infirmity." Of special value was the fact that like the *Charter*, our Bill of Rights was structured around a two-stage mode of analysis: has a right been infringed? If so, can the limitation be justified (although limitations analysis in my view does not fit comfortably with equality jurisprudence, where I would prefer balancing to be done at the stage of considering whether there has been unfair discrimination, to asking at a later stage whether unfair discrimination can be justified)? But then I read the later judgments. And the Court divides 4:3:1, 2:3:3. Some judges agree with other judges on some aspects and not on others, and it becomes very, very difficult to extract unequivocal and easily transferrable doctrine. By a fortunate course of events, at about that time I was invited to a conference (in Halifax) of the Canadian Institute of Judicial Administration, and heard an absorbing talk on equality by Professor Lynn Smith. She summed it all up in about 20 pages, with a nice table, (A, B, C, D, E) making the case law easy for outsiders. Yet, at the end, there were at least three major positions to choose from. We don't want our counsel jumping up and down saying we support this bloc in the Canadian Supreme Court or that bloc. It should not be necessary in South Africa to become an expert on the intricate and fascinating oscillations of the Canadian Supreme Court. That is what we expect the trade of Canadian lawyers to be about. So what do we do?[12]

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[11] *LSBC* v. *Andrews*, [1989] 1 S.C.R. 143.

[12] *Brink* v. *Kitshoff NO* 1996 (6) B.C.L.R. 752 (C.C.) (1996 (4) S.A. 197) at para. 39 per O'Regan J.: "The different approaches adopted in the different national jurisdictions arise not only from different textual provisions and from different historical circumstances, but also from different jurisprudential and philosophical understandings of equality." *Prinsloo, supra* note 5 at para. 19 per Ackermann, O'Regan and Sachs JJ.: "it would (therefore) seem that a simplistic transplantation from other countries into our equality jurisprudence of

Equality by its very nature is difficult. It is difficult philosophically and difficult to apply in practice. People change, ideas change, judges change. There are hundreds of years of experience in liberty jurisprudence and in achieving an appropriate balance between the rights of the citizens and the responsibilities of those exercising public power.[13] Yet it was only in the 1870s that equality jurisprudence started in the United States, and then with the abysmal "separate but equal" doctrine.[14] One cannot expect clean and clear doctrine on a topic that by its very nature is messy, full of contradictions and constantly evolving. It would be illusory to think that a formula can be whipped up that is going to answer all questions everywhere. The best we could do was to create an approach that was valid for us in South Africa, interpreting our constitutional text in the light of our reality, yet picking up from other jurisdictions those transportable ideas that were most valuable and accepted internationally.

All of law differentiates, distinguishing between one group and another; that is the nature of law, it classifies. Benefits and burdens are associated with classifications: a householder, a student, a patient, a litigant, as opposed to the non-householder, the non-student, the non-patient, etc. Classification is at the heart of legislation.[15] If the courts felt compelled by equality doctrine to evaluate every piece of legislation for its reasonableness and justifiability, they would have no time left for other work. Sometimes more is less, and less is more. Good judicial resource management requires a principled pre-selection of cases (docket control) based on criteria related to why a bill of rights was adopted in the first place. Astute litigants should not be permitted to use mere differentiation in laws for tactical or delaying purposes, clogging up the courts so that truly meritorious cases get swamped and lost. In theory every case should be equal and have an equal chance of reaching the Constitutional Court; but some cases, in terms of equality principle, are more equal than others, more meritorious by their very

formulae, modes of classification or degrees of scrutiny, might create more problems than it solved."

[13] *Ibid.* at para 20: "While our country, unfortunately, has great experience in constitutionalising inequality, it is a newcomer when it comes to ensuring constitutional respect for equality."

[14] See *Plessy* v. *Ferguson* 163 U.S. 537 (1896).

[15] *Ibid.* at para. 24: "It must be accepted that, in order to govern a modern country efficiently and to harmonise the interests of all its people for the common good, it is essential to regulate the affairs of its inhabitants extensively. It is impossible to do so without differentiation and without classifications which treat people differently and which impact on people differently."

nature. Peter Hogg, whom I find most useful as a guide to mainstream thinking in Canada on jurisprudential questions, has pointed out that in the first few years of the *Charter* jurisprudence of the Canadian Supreme Court, hundreds of cases were brought under the equality section,[16] frequently, I understand, by privileged and advantaged persons. The success rate was low and the time taken high. Reading between the lines, it seems that a need was felt to separate cases that truly raised constitutional questions from those based on the ordinary differentiations that make up standard law-making.

It was in this setting that *Andrews* was decided. Now it all seems so obvious, namely, that equality jurisprudence should be based on the anti-discrimination or human rights principle. Yet nothing is obvious until attention is drawn to it, when suddenly and retrospectively it becomes self-evident. Studying the judgment brought home to me that there could be two distinct bases for judicial intervention in relation to equal protection of the law: the rational relationship rationale[17] and the human rights rationale. Rationality review features strongly in US and Indian equality jurisprudence, though it rarely results in legislation being struck down. It requires that legislation must serve some legitimate purpose, that there be some kind of discipline, or, as Cass Sunstein puts it, it mustn't represent a "naked preference." But it's very, very easy to pass that threshold.

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[16] See P.W. Hogg, *Constitutional Law of Canada*, 3d ed. (Toronto: Carswell, 1992) at 1162: "A study prepared in 1988, only three years after the coming into force of s. 15 . . . found 591 cases (two-thirds of which were reported in full) in which a law had been challenged on the basis of s. 15. Most of the challenges seemed unmeritorious, and most were unsuccessful; but the absence of any clear standards for the application of s. 15 encouraged lawyers to keep trying to use s. 15 whenever a statutory distinction worked to the disadvantage of a client."

[17] *Prinsloo*, *supra* note 5 at para. 25–26 per Ackermann, O'Regan and Sachs JJ.: "In regard to mere differentiation the constitutional state is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest "naked preferences" that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional state. . . . This has been said to promote the need for governmental action to relate to a defensible vision of the public good, as well as to enhance the coherence and integrity of legislation. In Mureinik's celebrated formulation, the new constitutional order constitutes 'a bridge away from a culture of authority . . . to a culture of justification." Accordingly, before it can be said that mere differentiation infringes s. 8 it must be established that there is no rational relationship between the differentiation in question and the governmental purpose which is proffered to validate it."

The main focus of equality jurisprudence is what I would call the human rights dimension. Equality as we understand it in the contemporary world is associated with non-discrimination. It is designed to deal with the ways and means whereby societies marginalize, oppress, diminish or demean people because they are what they are. That is what is generally understood by equality. That is what the international human rights instruments were designed to respond to. The Universal Declaration of Human Rights[18] was adopted to deal with the memory of terrible genocide, racial persecution, the denial of the humanity of people simply because they were Jews, gypsies or gays, whichever it might have been. Bearing in mind our own distinctive past, this had to be the launch pad for a coherent philosophy of equality for South African jurisprudence.[19]

The equality clause is the first substantive clause in our Bill of Rights; it comes before the right to vote or the right to free expression. It is our 'First Amendment.'[20] Our new democratic Constitution and Bill of Rights were

[18] U.N., GA Res. 217 (III) (1948).

[19] *Ibid.* at para 31 and 33. "We are emerging from a period of our history during which the humanity of the majority of the inhabitants of this country was denied. They were treated as not having inherent worth; as objects whose identities could be arbitrarily defined by those in power rather than as persons of infinite worth. In short, they were denied recognition of their inherent dignity. Although one thinks in the first instance of discrimination on the grounds of race and ethnic origin one should never lose sight in any historical evaluation of other forms of discrimination such as that which has taken place on the grounds of sex and gender. In our view unfair discrimination, when used in this second form in s. 8(2), in the context of s. 8 as a whole, principally means treating persons differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity.... Where discrimination results in treating persons differently in a way which impairs their fundamental dignity as human beings, it will clearly be a breach of s. 8(2). Other forms of differentiation, which in some other way affect persons adversely in a comparably serious manner, may well constitute a breach of s. 8(2) as well."

[20] *Fraser* v. *Children's Court, Pretoria North, and Others* 1997 (2) B.C.L.R. 153 (C.C.) (1997 (2) S.A. 261) [hereinafter *Fraser*] at para. 20 per Mahomed D.P.: "There can be no doubt that the guarantee of equality lies at the very heart of the Constitution. It permeates and defines the very ethos upon which the Constitution is premised." *Hugo*, *supra* note 2 at para. 74 per Kriegler J.: "The importance of equality in the constitutional scheme bears repetition. The South African Constitution is primarily and emphatically an egalitarian constitution. The supreme laws of comparable constitutional Sates may underscore other principles and rights. But in the light of our own particular history, and our vision for the future, a Constitution was written with equality at its centre. Equality is our Constitution's focus and organising principle. The importance of equality rights in the Constitution, and the role of

designed precisely to overcome apartheid, separation, inequality, to eliminate the practice of determining peoples' rights, duties and responsibilities simply on the basis of the colour of their skin, or the birthplace of their ancestors. It is impossible not to interpret our constitutional equality aspirations except against the background of institutionalized racism. At the same time, we have to recognize that inequality, (discrimination, subordination, treating people as inferiors, denying them full citizenship in a moral sense), isn't based simply on race.[21] Possibly it is the awareness of the pain that people suffered under apartheid and continue to endure today because of the legacy of the past, that has made us especially sensitive to all forms of marginalization and exclusion. In any event, our Bill of Rights has an expansive list of categories of unlawful discrimination: discrimination on the grounds of race, colour, creed, language, disability, age, and sexual orientation are some of the grounds: Gays and lesbians are not, as in Canada, an 'analogous group!' Once you are aware of oppression and prejudice in one area, you extend that awareness to other categories. The underlying principle must be respect for the equal worth and dignity of all human beings.

It was relatively easy to apply a rationality review coupled with a human rights approach to Mr. Prinsloo in the non-fire control zone. In fire-controlled zones, express statutory duties were placed on landowners, while in non-fire controlled zones, persons were prodded by the shifted onus of proof to take special precautions against fire-spread from their land. There was a rational purpose behind preventing those who had peculiar knowledge of what had happened on their land from simply saying: "I don't know how it started, it is up to you to prove it was my fault." What about the human rights dimension? Here we were able to pick up something directly from Lynn Smith's helpful analysis. It was a quotation from Madame Justice L'Heureux-Dubé,[22] who was in a minority of one amongst her colleagues and included in the survey, it seems, almost to complete the picture, because you can't leave out a judge! In that one

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the right to equality in our emerging democracy, must both be understood in order to analyse properly whether a violation of the right has occurred."

[21] *Brink* v. *Kitshoff NO*, *supra* note 12 at para. 41 per O'Regan J.: "Although our history is one in which most visible and the most vicious pattern of discrimination has been racial, other systematic motifs of discrimination were and are inscribed on our social fabric. In drafting s. 8, the drafters recognised that systematic patterns of discrimination on grounds other than race have caused, and may continue to cause, considerable harm. For this reason, s. 8(2) lists a wide, and not exhaustive, list of prohibited grounds of discrimination."

[22] See *Egan* v. *Canada* [1995] 2 S.C.R. 513, 29 C.R.R. (2d) 79 at 104–5.

paragraph she articulated much that seemed to capture the underlying thrust of our equality provisions. The emphasis, she said, is on the extent to which dignity as a human being is being assailed because of membership of a particular group. It was quoted in *Hugo*,[23] and I will repeat the quote here:

> This court has recognized that inherent human dignity is at the heart of individual rights in a free and democratic society: *Big M Drug Mart Ltd* [(1985) 13 C.R.R. 64] at 97 . . . (per Dickson J. (as he then was)). More than any other right in the *Charter*, section 15 gives effect to this notion. . . . Equality, as that concept is enshrined as a fundamental human right within section 15 of the *Charter* means nothing if it does not represent a commitment to recognising each person's equal worth as a human being, regardless of individual differences. Equality means that our society cannot tolerate legislative distinctions that treat certain people as second-class citizens, that demean them, that treat them as less capable for no good reason, or that otherwise offend fundamental human dignity.

The emphasis she placed on the actual impact of a measure on the personal dignity of members of a group appeared to be far more useful than the American strict scrutiny test. The American test seemed to be too formalistic and de-contextualized for South African purposes — too lax in its range and too rigid in its result. Respect for human dignity became the centrepiece of our equality analysis. Mr. Prinsloo's pocket might have been affected by the special onus of proof, but his dignity was not assailed, and his equality challenge was accordingly rejected.[24]

But what about Mr. Hugo? The test was now straightforward enough, yet the context was complicated. This case required a close look at the actual impact of a measure, rather than the formal distinctions it drew, to see if it in reality undermined human dignity. The first question before us was whether we could

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[23] *Hugo*, *supra* note 2 at para. 41; it was also quoted in *Prinsloo*, *supra* note 5 at para. 32; *Harksen* v. *Lane NO and Others* 1997 (11) B.C.L.R. 1489 (C.C.) (1998 (1) S.A. 300) [hereinafter *Harksen*] at para. 93.

[24] *Prinsloo*, *supra* note 5 at para. 41 per Ackermann, O'Regan and Sachs JJ.: "The regulation effected by s. 84 in the present case differentiates between owners and occupiers of land in fire control areas and those who own and occupy land outside such areas. Such differentiation cannot, by any stretch of the imagination, be seen as impairing the dignity of the owner or occupier of land outside the fire control area. There is likewise no basis for concluding that the differentiation in some other invidious way adversely affects such owner or occupier in a comparably serious manner. It is clearly a regulatory matter to be adjudged according to whether or not there is a rational relationship between the differentiation enacted by s. 84 and the purpose sought to be achieved by the Act. We have decided that such a relationship exists."

even review a presidential pardon. There was much international authority and South African precedent to say that we could not. We decided that we could, holding that in our new constitutional democracy no public official, not even the President exercising expressly conferred presidential powers, could act outside the scope of the Bill of Rights. We were able to cite some statements by Madame Justice Bertha Wilson in the *Operation Dismantle*[25] case in support of our approach. (I might mention that the issue had a certain poignancy. When President Nelson Mandela launched our Court, he said: "The last time I got to my feet in a court was to find out if I was going to be hanged; today I stand up to inaugurate South Africa's first Constitutional Court." To show our gratitude, eight months later we struck down two important election proclamations of his.[26] Then, instead of getting all huffy, he declared that he fully accepted the decision of the Constitutional Court. This was an important moment for the establishment of constitutionalism in our country.) The fact that we could review did not, however, mean that we should review. The President had clearly differentiated on one or more of the enumerated grounds: the question was whether he had acted unfairly in doing so. What do you think? All of those who think it was unfair discrimination — please raise your hands. Who thinks it wasn't unfair discrimination? Who doesn't think? The majority! For the sake of the record, on the right side of the house I'd say about 50:1 indicated that it was unfair discrimination. On the left side of the house it was about 30:2, with a fair number of abstentions. A large number of you expressed no opinion. Do you want to know what our Court decided?

One judge decided the issue was moot, so that left ten judges. Eight held that it was not unfair discrimination. Very crudely put, the argument was: Mr. Hugo had not lost any right or benefit or suffered any prejudice because an act of Presidential grace had benefited the mothers. The Presidential Act was a one-off act of generosity to various vulnerable groups, not part of a patterned course of conduct marginalizing men. The real choice was between releasing 440 women or freeing no one at all, since the number of fathers of children under twelve would have been about 15,000, an unacceptably high total for a crime-stricken public to accept as legitimate beneficiaries of Presidential largesse. As far as the children's rights were concerned, to have 440 women released would benefit at least 440 children, and the President was entitled to take account of the

[25] *Operation Dismantle* v. *The Queen*, [1985] 1 S.C.R. 441.

[26] *Executive Council, Western Cape Legislature, and Others* v. *President of the Republic of South Africa and Others* 1995 (4) S.A. 877 (C.C.).

fact that mothers tended in reality to be the primary care-givers. Looked at contextually, therefore, the impact on Mr. Hugo had not been such as to reinforce patterns of systemic disadvantage or to impair his dignity in any way.[27]

One judge decided it was unfair discrimination but that the measure could be justified in terms of our limitations clause, basically on the grounds mentioned above.[28] The tenth judge said that the discrimination was both unfair

[27] *Hugo, supra* note 2 paras. 38 to 40 and 47 *per* Goldstone J.: "That parenting may have emotional and personal rewards for women should not blind us to the tremendous burden it imposes at the same time. It is unlikely that we will achieve a more egalitarian society until responsibilities for child rearing are more equally shared. . . . To use the generalisation that women bear a greater proportion of the burdens of child rearing for justifying treatment that deprives women of benefits or advantages or imposes disadvantages upon them would clearly, therefore, be unfair. . . . That, however, has not happened in this case. The President has afforded an opportunity to mothers, on the basis of the generalisation, that he has not afforded to fathers. . . . But although that does, without a doubt, constitute a disadvantage, it did not restrict or limit their rights or obligations as fathers in any permanent manner. It cannot be said, for example, that the effect of the discrimination was to deny or limit their freedom, for their freedom was curtailed as a result of their conviction, not as a result of the Presidential Act. That Act merely deprived them of an early release to which they had no legal entitlement. The Presidential Act may have denied them an opportunity it afforded women, but it cannot be said that it fundamentally impaired their rights of dignity or sense of equal worth. The impact upon the relevant fathers was, therefore, in all circumstances of the exercise of the Presidential power, not unfair."

[28] *Ibid.* at paras. 93 and 106 per Mokgoro J.: "Section 8 of our Constitution gives us the opportunity to move away from gender stereotyping. Society should no longer be bound by the notions that a woman's place is in the home (and, conversely, not in the public sphere), and that fathers do not have a significant role to play in the rearing of their young children. Those notions have for too long deprived women of a fair opportunity to participate in public life, and deprived society of the valuable contribution women can make. Women have been prevented from gaining economic self-sufficiency, or forging identities for themselves independent of their roles as wives and mothers. By the same token, society has denied fathers the opportunity to participate in child rearing, which is detrimental both to fathers and their children. . . . Despite my reservations at its gender stereotyping, I conclude that the Presidential Act is justified. First, although fathers have not benefited from the group pardon, they are still entitled to apply for remission on an individual basis. Second, I agree with Goldstone J. that, politically, it would have been virtually impossible to release all men and women with children under twelve because of the sheer numbers involved. Further, there would have been great administrative inconvenience in engaging in a case-by-case evaluation for each mother and father as to whether they were the primary care giver for their child. Thus the basic question put to us is whether only the women should have been released, or no one released."

and unjustifiable.[29] The unfairness, however, was not to Mr. Hugo; he was in prison not because he was a man, but because of his crime. The unfairness was to women in general because the terms of the amnesty perpetuated the damaging stereotype of women as child-minders and of men as providers.[30] The dilemma facing the Court was real. On the one side was a patriarchal generalization that was being reinforced. On the other, burdens were being lifted from 440 women, members of a group that had been historically disadvantaged and who in real life could be taken generally to have bonded more firmly with their children than the male prisoners had done.[31] If you belonged to the school of thought that said any

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[29] See *ibid.* at paras. 63–88 per Kriegler J.

[30] *Ibid.* at paras. 80, 82, 83 and 85 per Kriegler J.: "Reliance on the generalisation that women are the primary care givers is harmful in its tendency to cramp and stunt the efforts of both men and women to form their identities freely. . . . I am prepared to accept, without deciding, that in very narrow circumstances a generalisation — although reflecting a discriminatory reality — could be vindicated if its ultimate implications were equalising. But I would suggest that at least two criteria would have to be satisfied for this to be the case. First, there would have to be a strong indication that the advantages flowing from the perpetuation of a stereotype compensate for obvious and profoundly troubling disadvantages. Second, the context would have to be one in which discriminatory benefits were apposite. . . . In terms of the first criterion, the benefits in this case are to a small group of women — the 440 released from prison — and the detriment is to all South African women who must continue to labour under the social view that their place is in the home. In addition, men must continue to accept that they can have only a secondary/surrogate role in the care of their children. The limited benefit in this case cannot justify the reinforcement of a view that is a root cause of women's inequality in our society. . . . In effect the Act put the stamp of approval of the head of State on a perception of paternal roles that has been proscribed. Mothers are no longer the 'natural' or 'primary' minders of young children in the eyes of the law, whatever tradition, prejudice, male chauvinism or privilege may maintain. Constitutionally the starting point is that parents are parents."

[31] *Ibid.* at paras. 113 and 114 per O'Regan J.: "In this case, mothers have been afforded an advantage on the basis of a proposition that is generally speaking true. There is no doubt that the goal of equality entrenched in our Constitution would be better served if the responsibilities for child rearing were more fairly shared between fathers and mothers. The simple fact of the matter is that at present they are not. Nor are they likely to be more evenly shared in the near future. For the moment, then, and for some time to come, mothers are going to carry greater burdens than fathers in the rearing of children. We cannot ignore this crucial fact in considering the impact of the discrimination in this case. With respect, therefore, I cannot agree with Kriegler J. that it is a 'profound and troubling' disadvantage for women when the President says that mothers play a special role in nurturing children. The profound disadvantage lies not in the President's statement, but in the social fact of the role played by mothers in child rearing and, more particularly, in the inequality which results from it. Putting an end to that inequality is a major challenge for our society. There can be

differentiation between men and women was objectionable because it reinforced stereotypes, then the answer was clear — the tenth judge was right. If, on the other hand, you focused on the actual lives led by actual people, and looked at women where they were in life and what their actual wants and needs were, you would end up with the majority.

The case highlighted in a vivid way the tension that can exist between a powerful broad principle and the concrete lives that people lead. I had no problem in agreeing with the notion that being kind to some women was not being cruel to all women, nor was it injurious to the self-esteem or dignity of the male prisoners. Similarly, it would have been an unconvincing form of pro-feminism to say to the women: we are not going to let you be with your kids because to do so would be paternalistic and undermine your dignity and be damaging to womanhood in general.

As far as Mr. Hugo himself was concerned, he was not being oppressed because he was a man; his dignity was not being touched in any way. He could always apply for early release, and if the relationship with his child was particularly relevant, that could be a factor taken into account on an individualized basis. Theoretically, a non-gendered release of all parents in an active relationship with their children would have been ideal. But, in practical terms, it was administratively just not feasible for a case-by-case enquiry to be made. It was 440 women or nobody. Looking back, I wonder how much I might have been unconsciously influenced by what I had learnt years back from my former wife about the common law prisoners she had met while a political prisoner, namely, that the only bright and meaningful thing in their wrecked and marginalized lives had been their relationships with their children.

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no doubt that where reliance upon the generalisation results in greater disadvantages for mothers, it would almost without question constitute unfair discrimination. On the other hand, were we to establish the rigid rule proposed by Kriegler J. that reliance upon that generalisation even to afford some advantage to mothers would, except in very narrow circumstances, be unfair, we may well make the task of achieving the equality desired by the Constitution more difficult. On the facts of this case, I conclude that the President's reliance upon the fact of women's greater share of child rearing responsibilities in order to afford advantage to some women has not caused any significant harm to other women. . . . That harm would have been far more significant in my view if it had deprived fathers in a permanent or substantial way of rights or benefits attached to parenthood."

I can see from your expressions that the decision would not have gone down all that well if you had been the jury. Nevertheless, it is one of the foundations of our equality jurisprudence. I will now take you quickly through some other equality cases that we have had, before concluding with the latest, and, as far as I am concerned, the most controversial one of all.

In a matter reported as *Brink* v. *Kitshoff NO*,[32] the estates of women married to insolvents were treated differently from the estates of men married to insolvents. That was a clear violation of the equality principle, without any justification. We struck down that particular law.

If any of you feel that we are completely unsympathetic to the rights of fathers, consider the *Fraser*[33] case, a poignant matter that achieved great publicity in South Africa. Laurie Fraser was living in a commune with Adriana Naude. He was a computer expert, she a violinist; she got pregnant and they split up before the child was born. When the child was born she placed the child for adoption and he objected: "It's my child, how can you give the child up for adoption without involving me?" The Act[34] says that the consent of both parents is required when the parents are married, but only that of the mother if they are not married. This, he contended, was unfair discrimination against fathers. The hearing of the so-called 'fathers' rights case' revealed many contradictions. One pro-feminist *amicus curiae* argued that there were many fathers, such as rapists, who were totally unmeritorious, with no real interest in the child, but who could nevertheless delay adoption proceedings and cause undue prejudice to the well-being of the biological mother, the child and the adoptive parents. Another pro-feminist *amicus*, argued to the contrary that there were unmarried fathers who had close bonds with their children, and any blanket refusal to encourage them and all fathers to take equal responsibility for the care of their children would perpetuate stereotypes injurious to women, men and children alike. All fathers, the latter argued, should at least be heard, even if not required to give consent. We in fact decided the case on grounds that were narrow but technically sufficient to declare the law invalid, and then put Parliament to terms to adopt a new provision that would strike the right balance between the claims of meritorious and unmeritorious fathers. We held that it was unfair to discriminate

[32] *Brink* v. *Kitshoff NO*, *supra* note 12. This issue related to the fact that life policies ceded from husband to wife were treated differently from those ceded from wife to husband.

[33] *Fraser*, *supra* note 20.

[34] *Child Care Act* 74 of 1983, s. 18(4)(*d*).

against Muslim and Hindu fathers, whose marriages were not recognized, while those of Christian fathers were.[35] The judgment of the Court went on strongly to emphasize the importance of encouraging paternal responsibility for and involvement in child-rearing.[36]

[35] *Ibid.* at para. 21 per Mahomed D.P.: "In my view the impugned section . . . impermissibly discriminates between the rights of a father in certain unions and those in other unions. Unions which have been solemnised in terms of the tenets of the Islamic faith, for example, are not recognised in our law because such a system permits polygamy in marriage. It matters not that the actual union is in fact monogamous. As long as the religion permits polygamy, the union is 'potentially polygamous' and for that reason, said to be against public policy. The result must therefore be that the father of a child born pursuant to such a religious union would not have the same rights as the mother in adoption proceedings pursuant to s. 18 of the Act. The child would not have the status of 'legitimacy' and the consent of the father to the adoption would therefore not be necessary, notwithstanding the fact that such a union, for example under Islamic law, might have required a very public ceremony, special formalities and onerous obligations for both parents in terms of the relevant rules of Islamic law applicable."

[36] *Ibid.* at para. 43 per Mahomed D.P.: "Unmarried fathers, by the acceptance of their paternity and parental responsibility, may often be qualified to make the most active inputs into the desirability of such an adoption order and in certain circumstances they may legitimately wish to withhold their consent to such an adoption order. It is equally evident that not all unmarried fathers are indifferent to the welfare of their children and that in modern society stable relationships between unmarried parents are no longer exceptional. The statutory and judicial responses to these problems are therefore nuanced, having regard to the duration of the relationship between the parents of the children born out-of-wedlock, the age of the child sought to be given up for adoption, the stability of the relationship between the parents, the intensity or otherwise of the bonds between the father and the child in these circumstances, the legitimate needs of the parents, the reasons why the relationship between the parents has not been formalised by a marriage ceremony and generally what the best interest of the child are."

In the *Harksen* case[37] we had to deal with a differentiation between spouses and non-spouses made by insolvency (bankruptcy) law. The law required the trustee of an insolvent to take in, as part of the insolvent estate, all the property of the insolvent spouse, who then could get it back only on proof of ownership. All the judges agreed that there was discrimination on the grounds of marital

[37] *Harksen, supra* note 23. All the judges agreed on the way equality analysis should proceed. The following summary of South African jurisprudence on equality has since come to be known as 'the Harksen test.' Per Goldstone J., *ibid.* at paras. 43, 44, 46–48: "[T]he first inquiry must be directed to the question as to whether the impugned provision does differentiate between people or categories of people. If it does so differentiate, then in order not to fall foul of s. 8(1) of the interim Constitution there must be a rational connection between the differentiation in question and the legitimate governmental purpose it is designed to further or achieve. . . . Differentiation that does not constitute a violation of s. 8(1) may nonetheless constitute unfair discrimination for the purposes of s. 8(2). . . . The determination as to whether the differentiation amounts to unfair discrimination under s. 8(2) requires a two-stage analysis. Firstly, the question arises whether the differentiation amounts to 'discrimination' and, if it does, whether, secondly, it amounts to 'unfair discrimination' . . . . Section 8(2) contemplates two categories of discrimination. The first is differentiation on one (or more) of the 14 grounds specified in the subsection (a 'specified ground'). The second is differentiation on a ground not specified . . . but analogous to such ground. . . . There will be discrimination on an unspecified ground if it is based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them adversely in a comparably serious manner. . . . In the case of discrimination on a specified ground, the unfairness of the discrimination is presumed, but the contrary may still be established. In the case of discrimination on an unspecified ground, the unfairness must still be established before it can be found that a breach of s. 8(2) has occurred."

status, a non-specified ground.[38] The only issue was whether it was unfair.[39] A majority of five judges held that because husbands and wives often merged their property, and because the process of retrieval from the insolvent estate was not unduly difficult, and bearing in mind the interest of creditors, the discrimination was not unfair. Three decided that it was indeed unfair to single out for this treatment spouses, rather than all members of a household, and that the process of vesting and retrieval, which was found nowhere else in the world (except perhaps in the Netherlands),[40] was unduly onerous. I was the ninth judge and

[38] *Ibid.* at para. 50: "What the specified grounds have in common is that they have been used (or misused) in the past (both in South Africa and elsewhere) to categorise, marginalise and often oppress persons who have had, or who have been associated with, these attributes or characteristics. These grounds have the potential, when manipulated, to demean persons in their inherent humanity and dignity. There is often a complex relationship between these grounds. In some cases they relate to immutable biological attributes or characteristics, in some to the associational life of humans, in some to the intellectual, expressive and religious dimensions of humanity and in some cases to a combination of one or more of these features. The temptation to force them into neatly self-contained categories should be resisted. Section 8(2) seeks to prevent the unequal treatment of people based on such criteria which may, amongst other things, result in the construction of patterns of disadvantage such as has occurred only too visibly in our history."

[39] *Ibid.* at para. 52: "In order to determine whether the discriminatory provision has impacted on complainants unfairly, various factors must be considered. These would include:

(a) the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage, whether the discrimination in the case under consideration is on a specified ground or not;

(b) the nature of the provision or power and the purpose sought to be achieved by it. If its purpose is manifestly not directed, in the first instance, at impairing the complainants in the manner indicated above, but is aimed at achieving a worthy and important societal goal, such as, for example, the furthering of equality for all, this purpose may, depending on the facts of the particular case, have a significant bearing on the question whether complainants have in fact suffered the impairment in question . . .;

(c) with due regard to (a) and (b) above, and any other relevant factors, the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature.

These factors, assessed objectively, will assist in giving 'precision and elaboration' to the constitutional test of unfairness. They do not constitute a closed list."

[40] *Ibid.* at paras. 93, 96 and 97 per O'Regan J.: "I agree that marital status is a matter of significant importance to all individuals, closely related to human dignity and liberty. For most people, the decision to enter into a permanent personal relationship with another is a momentous and defining one. It requires related decisions concerning the nature of the relationship and its personal and proprietary consequences. In my view, these considerations

went off on a tangent of my own. I said that what was unfair was the underlying concept of marriage in which only one business mind was seen to be at work.[41] This was demeaning to the two partners in a marriage relationship. If Jack falls down and breaks his financial crown, why should Jill come tumbling after?[42] The focus on spouses, rather than on household family, betrayed support for patriarchal notions which perpetuated disadvantage for wives. In court, counsel always referred to the spouse as "she, she, she," and in all of the literature it was "she, she, she." Interestingly, in all the articles, women authors opposed the provision while men tended to favour it. In preparing a judgment, you do not count up the number of articles for and against a position and then check for the gender of the authors. Yet bells start ringing: why does an apparently innocuous and gender-free provision appear as inimical, hostile and oppressive to some

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are sufficient to accept that marital status may give rise to the concerns of s. 8(2). . . . The applicant did not seek to establish that the provisions under challenge were indirectly discriminatory on the ground of gender. Although I have little doubt that at times provisions discriminating on the grounds of marital status will implicate a pattern of discrimination rooted in one of the patterns established in our past, I cannot conclude that that is the case here. . . . On the other hand, the effect of the discriminatory provisions on the spouses of insolvents is substantial."

[41] *Ibid.* at paras. 121 and 125 per Sachs J.: "Manifestly patriarchal in origin, s. 21 promotes a concept of marriage in which, independently of the living circumstances and careers of the spouses, their estates are merged. . . . Its underlying premise is that one business mind is at work within the marriage, not two. This stems from and reinforces a stereotypical view of the marriage relationship which, in the light of the new constitutional values, is demeaning to both spouses. . . . Being trapped in a stereotyped and outdated view of marriage inhibits the capacity for self-realisation of the spouses, affects the quality of their relationship with each other as free and equal persons within the union, and encourages society to look at them not as 'a couple' made up of two persons with independent personalities and shared lives, but as 'a couple' in which each loses his or her individual existence. If this is not a direct invasion of fundamental dignity it is clearly of comparable impact and seriousness." Months after I wrote my judgment, I was pleased to discover that in a United States Supreme Court case dealing with prohibition of birth control, Justice William Brennan had declared: "Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup." *Eisenstadt* v. *Baird* 405 U.S. 438 (1972) at 453.

[42] *Ibid.* at para. 122 per Sachs J.: "Take the case of Jill, a Cabinet Minister, Judge, attorney, doctor, teacher, nurse, taxi driver or research assistant. She has a career, income and estate separate from that of her spouse, Jack, who for his part has his own career, income and estate. If Jack falls down and breaks his financial crown, it is only on manifestly unfair assumptions about the nature of marriage that Jill should be compelled by the law to come tumbling after him. The marriage vows were to support each other in sickness and in health, not in insolvency and solvency."

people and not to others? Is there something in lived experience which renders certain phenomena sharply felt for some groups and invisible to others, doing so as a factor of their very membership of such groups? Can the web of disadvantage consist of umpteen seemingly neutral threads joined by the habits of patriarchy?[43] And how does one prove the invisible, the experiential? Is it like the air we breathe, something of which we can take judicial notice, or must there be proof — so many parts nitrogen, so many parts oxygen?

In the *Larbi-Odam* case,[44] we had to deal with discrimination against non-nationals. Teachers from elsewhere on our continent, who had worked for years in South Africa, were confronted by regulations negotiated with a regional section of a teacher's union, that prevented them from becoming members of the permanent teaching staff. This meant that as temporary teachers they could be replaced by South African teachers who might have qualifications far inferior to theirs. Many in fact had a right to permanent residence and we felt it unfair to say in effect that they had satisfied the immigration authorities that even though they could stay in the country to work as teachers, they could then not be employed on the same basis as other teachers.[45] Hovering in the background was

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[43] *Ibid.* at para. 124: "an oppressive hegemony associated with the grounds contemplated by s. 8(2) may be constructed not only, or even mainly, by the grand exercise of naked power. It can also be established by the accumulation of a multiplicity of detailed, but interconnected, impositions, each of which, de-contextualised and on its own, might be so minor as to risk escaping immediate attention, especially by those not disadvantaged by them."

[44] *Larbi-Odam and Others* v. *Member of the Executive Council for Education (North-West Province) and Another* 1997 (12) B.C.L.R. 1655 (C.C.) (1998 (1) S.A. 745).

[45] *Ibid.* at paras. 28, 38 and 43 per Mokgoro J.: "Where the purpose and effect of an agreed provision is to discriminate unfairly against a minority . . . its origin in negotiated agreement will not in itself provide grounds for justification. Resolution by majority is the basis of all legislation in a democracy, yet it too is subject to constitutional challenge where it discriminates unfairly against vulnerable groups. . . . As far as permanent residents are concerned the regulation is the source of their insecurity, denying them the opportunity to take up permanent employment and requiring them to accept the more precarious status of temporary employees with all the disadvantage attached to that, or to abandon their chosen profession and seek work in other fields . . . [T]emporary residents may in fact have employment of a permanent nature through holding one job and renewing their temporary residents permits from time to time. Although their temporary residence status may give rise to insecurity and expose them to the risk that they will be required to terminate their employment and leave the country, it could well be argued that they should not be exposed to discrimination in the job market for as long as they are permitted to live and work in South Africa."

the awareness of our past where labour was bureaucratically controlled, together with the knowledge that a tendency existed all over the world to treat foreigners as a subordinate class particularly vulnerable to abuse in the labour market.

Before discussing the most recent case, which dealt with indirect discrimination on grounds of race, I will highlight what seem to me to be six salient and interconnected themes of our evolving jurisprudence.

The first is the need to evaluate the challenged measure in its concrete legislative and social context rather than according to abstract categories.

Second, the measuring rod should be the extent to which substantive rather than formal equality is achieved. To treat everybody the same when they are in fact in unequal situations, is to perpetuate inequality.[46] On the other hand, equality is promoted when special efforts are made to enable people belonging to subordinated groups to escape from circumstances that degrade and marginalize them. Such steps may expressly take account of race and gender, provided they are undertaken in a principled and not in an opportunistic or unfair manner. Equality is accordingly something still to be achieved, not something that has to be preserved. I believe that Ronald Dworkin was a previous lecturer here, and I am honoured to be at the podium where he stood. I think he got it right when he said that the essence of equal protection is not equal treatment but equal respect and concern, which might require different treatment.

Third, it is necessary to look primarily to the impact on the lives of the people actually affected, to see whether or not equality is being advanced or denied.

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[46] *Hugo*, *supra* note 2 at para.112 per O'Regan J.: "To determine whether the discrimination is unfair it is necessary to recognise that although the long-term goal of our constitutional order is equal treatment, insisting upon equal treatment in circumstances of established inequality may well result in the entrenchment of that inequality. There are at least two factors relevant to the determination of unfairness: it is necessary to look at the group or groups which have suffered discrimination in the particular case and at the effect of the discrimination on the interests of those concerned. The more vulnerable the group adversely affected by the discrimination, the more likely the discrimination will be held to be unfair. Similarly, the more invasive the nature of the discrimination upon the interests of the individuals affected by the discrimination, the more likely it will be held to be unfair."

Fourth, special attention must be paid to the manner in which inequality systemically flows from patterns of disadvantage, subordination and dominance, which may exist outside of the measure under consideration. Thus, measures that happen to reinforce disadvantage are more likely to breach equality than those designed to overcome it. This is not to say that white men like me cannot be oppressed or cannot be the subject of unfair discrimination.[47] Of course we can, but we should not be unduly ruffled by measures taken to interfere with and overcome those structured patterns of disadvantage that hold back the enjoyment by others of the many benefits of life that we may take simply for granted as our natural due.

Fifth, the core enquiry must always be the extent to which the measure impairs the dignity and sense of self-worth of members of the group affected, or impacts upon them in some other comparably serious manner.

Finally, in making such determination, the subjective experience or sense of injury of members of the affected group must be objectively analyzed in light of the values of the Constitution.

These ideas are in my view fully consonant with the importance attached by Chief Justice Dickson to the synergy between law, life and underlying values, and the emphasis placed by Madame Justice Bertha Wilson on impact, context and patterns of disadvantage. I won't single out any current judges for praise, they might be embarrassed by support from someone like myself. I will mention, however, that shortly after the *Hugo* judgment was published, Madame Justice L'Heureux-Dubé accepted an invitation to come to South Africa to enjoy what we regarded as a well-deserved intellectual and moral triumph. As you know, she is a lively, bubbling, effervescent, communicative person with a sharp brain who lives the kind of philosophy that she talks about. Her visit was a great success.

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[47] *Ibid.* at para. 41 per Goldstone J.: "The prohibition on unfair discrimination in the interim Constitution seeks not only to avoid discrimination against people who are members of disadvantaged groups. It seeks more than that. At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that is the goal of the Constitution should not be forgotten or overlooked."

I come to the last leg of this particular journey, the case of *Pretoria City Council* v. *Walker*.[48] Mr. Walker lived in a relatively affluent area of Pretoria and belonged to a group that felt deeply aggrieved. His complaint was that he was being called upon to pay full metered rates for water and electricity, and was being sued when in default, while the people living in the black townships a couple of miles away, first of all, had their rates subsidized, secondly, were required to pay flat rate sums and, finally, were not being summonsed when in default. This, he argued, amounted to unfair discrimination against him based simply on the fact that he lived in a white suburb and not in a black one. The council, which represented a part of Pretoria consisting mainly of affluent and overwhelmingly white suburbs but included two black townships, had more white than black members. Nevertheless, it took positions apparently sympathetic to the inhabitants of the black townships and justified them on the following grounds: a certain measure of cross-subsidization was inevitable when it came to electricity and water charges; they could only charge lump-sum amounts in the townships, because meters still had to be installed; and summonses for non-payment were being slowly and progressively introduced, starting with the wealthier property owners. This latter process was being gently conducted so as to convert a culture of resistance and non-payment by a poverty-stricken and oppressed community, into a culture of civic rights and responsibilities of a community that regards itself as part of the civic whole. And they pointed to the fact that the level of payments had in fact doubled.

Well, was it, or was it not, a case of unfair discrimination against Mr. Walker? I see that most of you feel that it was not.

I haven't been completely fair with you in putting the question. I didn't give you the full text of section 8. The section provides that *prima facie* proof of discrimination, whether direct or indirect, gives rise to a presumption of unfairness. The case also turned to some extent on an appreciation of the facts. The whole Court accepted that the limited degree of cross-subsidization did not amount to unfair discrimination nor, in the circumstances, did the different modes of fixing charges. All but one of the judges agreed that issuing summonses only against defaulters in the affluent areas amounted to indirect

[48] *Pretoria City Council* v. *Walker* 1998 (3) B.C.L.R. 275 (C.C.) (1998 (2) S.A. 363).

discrimination on the grounds of race,[49] and that being so, the council was obliged to rebut the presumption of unfairness, which it had not done.[50] Only one

[49] *Ibid.* at paras. 31, 32 and 35 per Langa D.P.: "The inclusion of both direct and indirect discrimination within the ambit of the prohibition imposed by s. 8(2) evinces a concern for the consequences rather than the form of conduct. It recognises that conduct which may appear to be neutral and non-discriminatory may nonetheless result in discrimination and, if it does, that it falls within the purview of s. 8(2). . . . The fact that the differential treatment was made applicable to geographical areas rather than to persons of a particular race may mean that the discrimination was not direct, but it does not in my view alter the fact that in the circumstances of the present case it constituted discrimination, albeit indirect, on the grounds of race. It would be artificial to make a comparison between an area known to be overwhelmingly a 'black area' and another known to be overwhelmingly a 'white area', on the grounds of geography alone. The effect of apartheid laws was that race and geography were inextricably linked and the application of a geographical standard, although seemingly neutral, may in fact be racially discriminatory. In this case, its impact was clearly one which differentiated in substance between black residents and white residents. The fact that there may have been a few black residents in old Pretoria does not detract from this. . . . According to Sachs J., . . . s. 8(2) is triggered only by differentiation which imposes 'identifiable disabilities' or threatens 'to touch on or reinforce patterns of disadvantage' or 'in some proximate and concrete manner threaten(s) the dignity or equal concern or worth of the persons affected' and, in the absence of such consequences, the presumption under s. 8(4) does not arise. This, in my view, is contrary to the decisions of this Court in the four cases to which I have referred, in which it was held that differentiation on one of the specified grounds set out in s. 8(2) gives rise to a presumption of 'unfair discrimination.' I can see no reason for distinguishing in this regard between discrimination which is direct and that which is indirect."

[50] *Ibid.* at paras. 47, 48, 77, 80 and 81 per Langa D.P.: "I am acutely aware that generalisations are invidious and that there are undoubtedly some members of the white community who are poor and some from the black community who are wealthy. The fact of the matter is that the discriminatory practices of the past were designed to and did benefit the white community whilst inflicting disadvantage on the black community. . . . The respondent does however belong to a racial minority which could, in a political sense, be regarded as vulnerable. It is precisely individuals who are members of such minorities who are vulnerable to discriminatory treatment and who, in a very special sense, must look to the Bill of Rights for protection. When that happens a Court has a clear duty to come to the assistance of the person affected. Courts should, however, always be astute to distinguish between genuine attempts to promote and protect equality on the one hand and actions calculated to protect pockets of privilege at a price which amounts to the perpetuation of inequality and disadvantage to others on the other. . . . A properly formulated policy to promote a culture of payment in areas in which there had been a culture of boycott would not have been aimed at impairing the respondent's interests in any way . . . [i]f carefully formulated and implemented. . . . The burden of rebutting the presumption of unfairness was on the council. The effect of what was done was to . . . single out white defaulters for legal action while at

judge demurred, arguing that Mr. Walker had suffered no discrimination at all,[51] nor had he been treated unfairly;[52] he was being asked to pay because he received

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the same time consciously adopting a benevolent approach which exempted black defaulters from being sued. . . . No members of a racial group should be made to feel that they are not deserving of equal 'concern, respect and consideration' and that the law is likely to be used against them more harshly than others who belong to other race groups. This is the grievance that the respondent has and it is a grievance that the council officials foresaw when they adopted their policy. . . . The impact of such a policy on the respondent and other persons similarly placed, viewed objectively in the light of the evidence on record, would in my view have affected them in a manner which is at least comparably serious to an invasion of their dignity."

[51] *Ibid.* at paras. 113, 115, 118 and 129 per Sachs J.: "[T]o establish that the impact of indirect differentiation is *prima facie* discriminatory on grounds specified in s. 8(2), the measure must at least impose identifiable disabilities, burdens or inconveniences, or threaten to touch on or reinforce patterns of disadvantage, or in some proximate and concrete manner threaten the dignity or equal concern or worth of the persons affected. In the present case, I fail to see how the decision not to issue summonses against persons in Atteridgeville and Mamelodi in any way threatened to or was capable of imposing burdens or reinforcing disadvantage for the complainant, withholding benefits from him or undermining his dignity or sense of self-worth. It did not discriminate against him; it did not even reach him. . . . The concept of indirect discrimination, as I understand it, was developed precisely to deal with situations where discrimination lay disguised behind apparently neutral criteria or where persons already adversely hit by patterns of historic subordination had their disadvantage entrenched or intensified by the impact of measures not overtly intended to prejudice them. I am unaware of the concept being expanded so as to favour the beneficiaries of overt and systematic advantage. . . . I am far from convinced that differential treatment that happens to coincide with race in the way that poverty and civic marginalisation coincide with race, should be regarded as presumptively unfair discrimination when it relates to measures taken to overcome such poverty and marginalisation. . . . It might well be that, even in the absence of concrete disadvantage, the symbolic effect of a measure (or the absence of a measure that should have been taken) could impair dignity in a way which constitutes unfair discrimination. This could arise if the selective enforcement involved deliberate targeting whether direct or disguised, or was so related in impact to patterns of disadvantage as to leave the persons concerned with the understandable feeling that once more they were being given the short end of the stick. An understandable sense of unfairness, however, cannot be separated from the purpose for which the measure was taken and the means used for its achievement; the more manifestly justifiable the public purpose in the light of the objectives of the Constitution, the less scope for a legitimate feeling of having been badly done by."

[52] *Ibid.* at paras. 130, 132 and 135 per Sachs J.: "What is fair . . . must be viewed simultaneously from the diverse points of view of all the inhabitants of the whole of Pretoria, bearing in mind the values enshrined in the Constitution. All were entitled to equal respect, and all had the right to have their concerns and sensitivities taken account of in an equal manner. This did not require the same treatment for all. Any blanket application of identical

water and electricity, not because he was white, and far from being a victim of prejudice, was the beneficiary of a structured system of advantage; accordingly, his dignity and sense of self-worth were not being impaired in any way, nor was any pattern of advantage or disadvantage of the group to which he belonged being reinforced or tracked by the council's conduct. If he had a complaint at all, it was not one of unfair discrimination but of unequal application of the law. His lament should not have been, "Why pick on me?" But rather, "Sue my neighbour as myself." Well, I must tell you that the sole dissentient was me.

POSTSCRIPT

The above lecture, given in the warm ambience of the University of Alberta Law Faculty, dealt largely with the relation between equality and disadvantage. While in Edmonton I pestered my hosts, the Centre for Constitutional Studies, for material on a separate but related theme, namely that of equality and difference. They responded generously, and not long afterwards I was able to benefit from their support. This was in a concurring judgment I wrote on a case brought (successfully) by the National Gay and Lesbian Coalition under the 1996 Constitution[53] to have anti-sodomy laws declared unconstitutional.[54] On this

measures in all of Pretoria irrespective of particular circumstances and the vast structural inequalities that existed, would not have represented equal concern but rather, have manifested equal unconcern. . . . The differential debt recovery measures were not taken because the inhabitants of old Pretoria were white. Nor did they in fact impose new burdens or disadvantages on the white inhabitants of Pretoria, who, as it happened in the circumstances, were not a politically vulnerable minority, if that were relevant. Furthermore, looked at objectively, these measures could not be said to have impacted unfairly on them by reinforcing negative stereotypes or patterns of disadvantage associated with their skin colour, nor did they affect their dignity or sense of self-worth. The fact that a complainant chooses to wear the cap of a victim of race discrimination, does not mean that the cap fits. . . . The council was faced with the heavy responsibility of converting an area that had long existed outside of the sphere of effective municipal government into one functioning as an integral part of our new constitutional State at the local level. I find it quite forced to say that the inherently difficult process of equalising the basic conditions and setting in which municipal services were rendered and charged for, in any way impacted adversely on the white inhabitants of the city. On the contrary, it was manifestly in the interests of all the residents of Pretoria, black and white, to see a single civic community being established, and the council was entitled to take reasonable steps to achieve this result."

[53] The Constitution of the Republic of South Africa Act 108 of 1996 (sometimes referred to as the final Constitution), s. 9:

(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

occasion, I am happy to report, my colleagues all indicated their agreement in spirit with my approach,[55] which, I might say, I regard as the Centre for

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
(3) The state may not unfairly discriminate directly or indirectly against on anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth.
(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

[54] *National Coalition for Gay and Lesbian Equality and Another* v. *Minister of Justice and Others* 1998 (12) B.C.L.R. 1517 (C.C.) at para. 26 per Ackermann J.: "I turn now to consider the impact which the common law offence of sodomy has on gay men . . .
(a) The discrimination is on a specified ground. Gay men are a permanent minority in society and have suffered in the past from patterns of disadvantage. The impact is severe, affecting the dignity, personhood and identity of gay men at a deep level. It occurs at many levels and in many ways and is often difficult to eradicate.
(b) The nature of the power and its purpose is to criminalize private conduct of consenting adults which causes no harm to anyone else. It has no other purpose than to criminalize conduct which fails to conform with the moral or religious views of a section of society.
(c) The discrimination has, for the reasons already mentioned, gravely affected the rights and interests of gay men and deeply impaired their fundamental dignity."

[55] *Ibid.* at paras. 127 and 129 per Sachs J.: "In the case of gays, history and experience teach us that the scarring comes not from poverty or powerlessness, but from invisibility. It is the tainting of desire, it is the attribution of perversity and shame to spontaneous bodily affection, it is the prohibition of the expression of love, it is the denial of full moral citizenship in society because you are what you are, that impinges on the dignity and self-worth of a group. . . . At the heart of equality jurisprudence is the rescuing of people from a caste-like status and putting an end to their being treated as lesser human beings because they belong to a particular group. The indignity and subordinate status may flow from institutionally imposed exclusion from the mainstream of society or else from powerlessness within the mainstream; they may also be derived from the location of difference as a problematic form of deviance in the disadvantaged group itself, as happens in the case of the disabled. In the case of gays it comes from compulsion to deny a closely held personal characteristic. To penalise people for being what they are is profoundly disrespectful of the human personality and violatory of equality."

Constitutional Studies approach,[56] if not the Alberta approach. I accordingly thank the McDonald family and the Centre for enabling a rich North-South jurisprudential journey to take place. The road to equality may have no final resting point, but it does have its important milestones.

[56] See also *ibid.* at paras. 132, 134 and 135 per Sachs J.: "The present case shows well that equality should not be confused with uniformity; in fact, uniformity can be the enemy of equality. Equality means equal concern and respect across difference. It does not presuppose the elimination or suppression of difference. Respect for human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply a levelling or homogenisation of behaviour but an acknowledgment and acceptance of difference. At the very least, it affirms that difference should not be the basis for exclusion, marginalisation, stigma and punishment. At best, it celebrates the vitality that difference brings to any society. . . . What the Constitution requires is that the law and public institutions acknowledge the variability of human beings and affirm the equal respect and concern that should be shown to all as they are. At the very least, what is statistically normal ceases to be the basis for establishing what is legally normative. More broadly speaking, the scope of what is constitutionally normal is expanded to include the widest range of perspectives and to acknowledge, accommodate and accept the largest spread of difference. What becomes normal in an open society, then, is not an imposed and standardised form of behaviour that refuses to acknowledge difference, but the acceptance of the principle of difference itself, which accepts the variability of human behaviour. . . . [O]ur future as a nation depends in large measure on how we manage difference. In the past difference has been experienced as a curse, today it can be seen as a source of interactive vitality. The Constitution acknowledges the variability of human beings (genetic and socio-cultural), affirms the right to be different and celebrates the diversity of the nation."

SPEAKING THE UNSPEAKABLE

WHISTLING PAST THE GRAVEYARD: CONSTITUTIONAL ABEYANCES, QUÉBEC AND THE FUTURE OF CANADA

by David M. Thomas (Toronto: Oxford University Press, 1997) pp. xxvii, 263.

Reviewed by Roderick A. Macdonald

There are two pervasive features of human interaction that often escape the attention of those, like jurists and political scientists, whose disciplinary preoccupations are with institutions and documents. One is the quest for meaning in the tacit, reciprocal adjustment of expectations that constitutes the continuing mediation of our lives together; the other is fear of knowing too much about the well-springs of our own motivations and the motivations of others. Happily, Canadian constitutional theorists have not always been oblivious to them. Over the past few decades, some have developed a rich array of concepts and understandings by which to navigate this uncertain terrain normally occupied by sociologists and psychologists.

But constitutional interaction is not just a grander form of interpersonal interaction. *Pace* Aristotle, the state is not just the family writ large. The scale of history and geography, demographics and diversity, power and agency that must be tempered in public political life conduces to a formality and textuality rarely seen in families. Hence, constitutional interaction gives rise to and is shaped by institutions and institutional processes that appear (at least to many scholars) to expropriate all manner of non-institutional interaction. Hence also, constitutional interaction gives rise to and is shaped by documents that appear (at least to many scholars) to exhaustively capture normativity. Preoccupation with institutions and texts, as well as with their authors and agents, has been the stock-in-trade of traditional Canadian constitutional scholarship.

Whistling Past the Graveyard has the signal merit of revealing the inadequacies of these orthodox understandings. It points to how the deep and unacknowledged structure of modern constitutionalism necessarily balances, however uneasily, two contradictions about texts: the need **not** to say something by explicitly saying it; and the need to say something by **not** explicitly saying it.

Take the first point. Polysemic constitutional boilerplates like "free and democratic society" and "rights," and vacuous concepts like "ministerial responsibility" serve the equivalent function to the perfunctory spousal "I love you." They permit us, at one and the same time, "to say, but **not** to say." In the hands of those impoverished souls who delight in close analysis of constitutional documents, they permit the *hubris* that all normativity derives from texts. From this flows the delusion that all constitutional artefacts are capable of characterization as one of four normative types: the explicit text (most notably the various statutes relabelled *Constitution Acts* in 1982); the authorized interpretation of the texts so identified (or the judicial gloss, whether by the Judicial Committee of the Privy Council or by the Supreme Court of Canada); the unwritten law of the constitution reflecting those implicit common law rules and doctrines (such as the rule of law or parliamentary supremacy) that have achieved the status of cognizable slogans; and the tacit accommodations of institutions, actors and the public that are understood as having "crystallized" into conventions.

Less attention is paid to the imaginary pendants of these artefacts: the myths, the fictions, the taboos and the abnegations by which we mimic the conjugal "conversation" that says all by saying nothing. Rare is the scholar (indeed, rare is the spouse) who is able to speak the unspeakable without falling into the trap of purporting not to say, but in fact saying. David Thomas is one of these. He has done so in a manner that speaks most precisely through what it does not explicitly say. Borrowing from

Richard Foley, he has presented an evocative assessment of the role, the manner and the character of Canadian constitutional abeyances. In Foley's lexicon, abeyances are "a set of implicit agreements to collude in keeping fundamental questions of political authority in a state of irresolution . . . ." (2) For Thomas, Canada's central abeyance is "the status and recognition of Québec as something other than a province, . . . " (xvii). *Whistling Past the Graveyard* focuses on this now visible abnegation, and on its perverse attraction to politicians, pundits and academic powder-monkeys — especially over the past fifty years. Thomas (intentionally?) leaves our foundational constitutional *imaginaire* in abeyance — still unspeakable. For this one can only be grateful.

I much enjoyed this book, although its length (263 pages) strikes me as paradoxical. How much should one really write about the manner in which we have come not to write? At the risk of violating my own injunction, however, I should like to offer three supplementary observations.

First, almost by necessity, talk of "constitutional abeyances" engages one in a presentist exercise. Evidence that agents colluded so as not to deal with a question is usually read in the light of how today's agents would act. Is it really true that civil liberties were an abeyance in 1867? Might they not have been more like airplanes? Again, is it really true that aboriginal peoples were an abeyance? Might they not have been seen, rather, as an issue likely to solve itself? While whig historians feel the need to reconstruct the present as an inexorable outcome of the past, we should not assume that today's understandings control how an event or a decision was understood at some previous moment. In an important sense, we are always discovering our abeyances *ex post facto*. An abeyance comes to be seen as such only because of an epistemological shift. For example, might not the reason why language was not directly negotiated in 1867 have to do with the fact that it was then inconceivable that governments would legislate about language?

Second, to recognize epistemological shifts is to acknowledge the close connection between abeyances and surrogates. We may now see an abeyance where our ancestors merely saw a logical concomitant of some other principle explicitly dealt with. That legislatures in Ottawa and Québec were held to a loose standard of bilingualism is a reflection of the difference between procedural institutions of the state and substantive institutions of civil society. There is no parliamentary morality that antedates Parliament. But where education is a prerogative of religious institutions, the morality of these religious institutions invariably antedates the pedagogical form through which it is purveyed. Dissentient schools were protected as a surrogate for tracing the connections between geography, religion and language in defining the frontiers of civil society. Consider the counterfactual: a secular world comprising two competing institutions in civil society with normative power over language — *une academie française* and an English Academy. Would section 93 then have dealt directly with language?

My third observation relates to the point with which I began. Finding meaning in the tacit mediation of our lives together, and recoiling from knowing too much about why we and others act as we do, confront us with "the law" before "the text." By contrast, the manner in which the idea of an abeyance is framed subtly privileges the written — the text. An abeyance is something you do not write about in your constitution. On this interpretation, one might well see in the Treaty of Paris of 1763, the *Québec Act, 1774*, the *Constitutional Act, 1791*, the *Act of Union, 1841*, and the *British North America Act, 1867* the occasions for abeyance. But cannot the analysis be reversed? Might we not even say that there can, by definition, be no abeyances when the constitution is seen to embrace everyday tacit negotiation and accommodation of political interest. In this light, the redaction of any constitutional document — the *Constitution Act, 1867* and the *Constitution Act, 1982* included — is an admission of constitutional abnormality. And where the resulting text purports to actually say

something, we are truly *Whistling Past the Graveyard.*

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CONSTITUTIONAL LAW

by Patrick J. Monahan
(Concord, Ontario: Irwin Books, 1997) pp. xvii, 492.

Reviewed by Andrew Heard

A daunting task faces anyone hoping to write a useable textbook on Canadian constitutional law, with the main difficulty lying in trying to be sufficiently comprehensive without producing a weighty tome that would daunt most students. Patrick Monahan has met the challenge with a great deal of success, but thanks largely to the complete exclusion of some significant areas of the constitution. Writing as part of the *Essentials of Canadian Law* series, published by Irwin Law, Monahan was able to leave the *Charter of Rights* and aboriginal issues to other books. Thus Monahan's text concentrates on the institutions of government and the division of powers, as well as the nature of the constitution and its amendment.

Constitutional Law is organized into six parts, which provide three separate views of the constitution and its operation. The first four parts comprise an introductory overview of the constitution. The various formal and unwritten components of the constitution are canvassed in Part One. The second part provides an interesting historical review of pre-Confederation constitutional developments, a brief summary of the legal framework of the executive and legislative branches of Canadian government, and a sketch of the division of powers between the federal and provincial governments. This part ends with a rather superficial chapter that mixes discussion of the judiciary with a thumbnail sketch of the federal-provincial division of powers. Part Three delves into some of the issues relating to constitutional amendment, with much of the discussion focusing on the various processes that have been tried or proposed for formal amendments. The three chapters of Part Four cover the legacy of the division of powers decisions of the Judicial Committee of the Privy Council. The text then delves into a detailed discussion of the significant impact which the cases dealing with the Peace, Order and Good Government clause have had on the interpretation of the constitution, resulting in the divided jurisdiction over criminal matters and the complexities of regulating trade and commerce in Canada. Part Five provides two case studies — the environment and transportation — to illustrate how interwoven federal and provincial jurisdiction are over such policy fields. Monahan then concludes the book in Part Six with a discussion that focuses largely on the political issues surrounding Canada's constitutional future. Overall, the book affords three views of the constitution through its various discussions: the substantive content of the constitution, the ongoing changes wrought to that substance by judicial interpretation and the political dynamics surrounding and propelling constitutional change.

A challenge for someone writing a text book on the constitution is to balance the need for writing in a 'reference' style while still providing enough insights into the controversies involved. In this regard Monahan has mixed success. He does provide some thought-provoking passages in which he offers personal reflections. For example, he argues that the federal-provincial division of powers does not need to be re-drawn, contrary to the views of many premiers: "Either level of government has sufficient constitutional authority to intervene in virtually any policy area that is deemed to be of significance in the 1990s" (220). Another example is found in his development of a fourth source of federal authority under the POGG power: "Parliament may enact legislation directed to persons, transactions, or activities within particular provinces, as long as it does so in order to remedy or deal with the interprovincial impacts

or effects of such matters" (246). However, the author fails at times to draw attention to controversies or potential problems: The reach of the preamble to the *Constitution Act, 1867* is only tangentially dealt with; the federal spending power is assumed to be constitutional and its practical effects on provincial jurisdiction are largely left unexplored; and the political effects and constitutionality of the regional veto amending formula adopted in federal legislation are insufficiently scrutinized.

The only substantive weakness of this book lies in its organization as discussions of many topics are spread out over several chapters. Apart from that, a few minor quibbles arise: The book does not directly discuss interpretative principles used by the courts in division of powers cases, such as pith and substance, double aspect, singling out and colourability; the delegation of legislative powers is touched on but not really dealt with outside the two case studies; and the complex interaction of constitutional conventions and their use in court cases are also unexplored in a text that ties many other political dimensions into the constitution.

Given the length of the book (minus appendices and notes, the text runs 374 pages), the author could not hope to exhaustively cover the topics which could be discussed, even within the limits of its stated purview. However, Monahan does provide us with a book that sufficiently balances breadth and depth of coverage so that it should be of great use to classes on the Canadian constitution. It is a very welcome addition to Canadian constitutional literature that will be profitably read by political science and law students alike.

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INTERPRETING THE FREE EXERCISE OF RELIGION: THE CONSTITUTION AND AMERICAN PLURALISM

by Bette Novit Evans (Chapel Hill: University of North Carolina Press, 1997) pp. 294.

Reviewed by Brian Walker

One of the strengths of Bette Novit Evans' book *Interpreting the Free Exercise of Religion: The Constitution and American Pluralism* is its attentiveness to the role religion plays as a form of community practice. For Evans, the crucial point about religions is that they are not simply bodies of doctrine to which people adhere but comprehensive systems which tend to shape many or all aspects of their adherents' lives. Religion is about rituals and observations, ways of dressing and bathing, about kneeling, standing, eating and fasting, about sacrificing animals and ingesting hallucinogenic drugs.

Evans shows great sensitivity to the burdens placed on individuals when religion is interpreted as a mere matter of conscience and not as a mandated set of outward expressions. She refers frequently to Justice Rehnquist's decision in *Goldman* v. *Weinberger*, in which an Orthodox Jewish officer's desire to wear a yarmulke with his military uniform was portrayed as a matter of personal choice rather than as an obligatory religious command. Evans argues that such interpretations illegitimately narrow the range of activities which might be protected under the Free Exercise clause, overlooking the way religions entail particular decisions about the actions one undertakes in everyday life. Evans' sensitivity to this aspect of religious jurisprudence hones her awareness of the frequently tragic nature of the tension between church and state. Free Exercise interpretation is not merely about guaranteeing space for the individual conscience, but is an attempt to work out a *modus vivendi* between two potentially totalizing institutions; on the one hand the state and its office holders, which aim to regulate and shape all aspects of the lives they

govern, and on the other hand religious communities, whose members sometimes want to express their faith in every aspect of their existence. Evans follows Robert Cover in seeing conflicts between states and religious communities as revolving around tragic tensions between two different jurisgenerative orders, neither one of which has any normatively obvious claim to primacy.

Evans sets out several different strains of interpretation which one can see at work in Free Exercise cases over the last twenty years. One might, for example, see the principle behind the First Amendment as being about the protection of the state from religious controversy. From this view, the courts might favour strict separation because their goal is to maintain a civil peace amidst a population fractured by religious heterogeneity. If the state aids any particular religion it risks embroiling itself in sectarian disputes which could well break the civic frame. But Evans points out several problems with this account. For one thing, the interests of civic peace would offer little protection to small religious minorities which do not have the political power to stand as a serious threat to the state. Yet many of the most important Free Exercise cases which have come before the US Supreme Court in recent years have focussed on the religious needs of such minority communities; Santeria churches in Florida, Native American peyote ritualists and groups which want to teach transcendental meditation in public schools. Moreover, it is by no means clear that religious discord is one of the most pressing problems in America: Why single out this particular form of factionalism as peculiarly worthy of attention when we accept so many other forms of discord as natural parts of the democratic process?

Another line of analysis which Evans examines focuses on the way the Free Exercise clause might protect religious choice. The goal here is to protect the individual against coercion. To illustrate this, Evans quotes the Supreme Court decision in *Sherbert* v. *Verner* which accepted Ms. Sherbert's refusal to work on her sabbath on the grounds that she should not be forced to choose between her religion and her livelihood. Evans finds this to be a valuable perspective but worries that it is slanted towards a view of religions as voluntary associations, a view which many religions do not share. The criterion of coercion is also difficult to interpret in the case of religious communities, many of which insist on orthodoxies of belief and practice. Evans discusses cases from the 1970s and 1980s which focussed on cult deprogramming and shows the difficulties which arise when it is assumed that religion is based on free choice. Can one say that a member of the International Society for Krishna Consciousness (ISKON) has been coerced or brainwashed (and is thus not *freely* exercising his or her) while somebody who was raised in Catholic schools was not? Coercion may prove to be a puzzlingly elusive criterion.

The interpretive principle which Evans adopts is the associational pluralism familiar to readers of James Madison and Robert Dahl. Evans believes that the First Amendment is focussed on protecting groups and practices which might provide alternative sources of meaning to that of the state. When properly interpreted, Evans argues, the Free Exercise clause becomes one of the central foundations of American pluralism, justifying groups in the maintenance of their particular lifeways and forms of practice in the face of state activities which might otherwise tend to erode group difference and produce a dangerous homogeneity. Yet she also emphasizes that religious autonomy must not be gained at the expense of the requirements of common citizenship: Insular groups who wish to raise their children in pristine aloofness from the pluralsim of the wider culture may not expect help from the state in doing so. Thus, a Hasidic community which seeks school redistricting in order to gain public monies to educate its children (as in *Board of Education of Kriyas Joel Village School District* v. *Grumet*) would line up religious and political borders in a way that countervenes the pluralism promoted by the Free Exercise clause.

In advocating a pluralistic interpretation of the Free Exercise clause, Evans makes no pretense to have set out an original position, and

like anyone who suggests that the best way forward to is balance a range of goods (both pluralism and comprehensive association), Evans is vulnerable to those who would claim that she has given no clear idea as to how one is to determine the ranking on a case-to-case basis. Evans is sympathetic to claims of religious autonomy, but someone who believes that intransigent and militant fundamentalisms put pluralism at risk might argue that the threats to a common democratic culture merit a certain severity towards religious claims (and this in the name of pluralism itself). Accounts aiming at reflective equilibrium can always be attacked by those who argue that one or another of the values that they attempt to bring into balance has not been given sufficient weight. Still, in an era when so many of the dominant political voices are *terribles simplificateurs*, this desire to pay attention to a full range of intuitions and issues is itself welcome. Because of this grounding commitment, *Interpreting the Free Exercise of Religion* turns out to be a useful and, at times, suble survey of the issues involved in Free Exercise jurisprudence over the past twenty years.

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WOMEN AND FAMILY LAW: CONNECTING THE PUBLIC AND THE PRIVATE

by Patricia McGee Crotty (New York: Peter Land Publishing, Inc., 1997) pp. xii, 170.

Reviewed by Mary Jane Mossman

> This is a book about women and public policy. It examines women and politics in a slightly different manner than do similar works in this field. It does not focus on individual women, individual movements, or individual countries; rather it uses empirical data to compare and contrast women's status in many nations.[1]

In her introductory comments to this book, Patricia McGee Crotty defines her overall purpose in terms of three major goals. One is to expose readers to different feminist perspectives on women and politics and to demonstrate how differing perspectives affect the substance of demands women make on governments. According to the author, the text is intended to help readers evaluate "the strengths and limitations of each perspective and ... its political consequences for women."[2] The second goal is to train readers to evaluate data on the role of women in politics, encouraging readers to consider whether, and to what extent, the data gathered in different countries accurately reflect the status of women. The author also encourages readers to suggest alternative approaches that could expand the scope of the analysis. Finally, the book aims to expose readers to comparative analysis in the social sciences, comparing the gender gap in sixty-four nations and the relative influence of

1 P.M. Crotty, *Women and Family Law: Connecting the Public and the Private* (New York: Peter Land Publishing, Inc., 1997) at ix.
2 *Ibid.* at ix.

"cultural, economic and political" factors on this gap.[3]

For the most part, the author is successful in relation to all three of these objectives. The book consciously takes as its starting point the 1984 publication edited by Robin Morgan, *Sisterhood is Global*,[4] updating and expanding its data. According to Morgan, her book was an "international anthology [that] grew during fifteen years of networking, fundraising, researching, commissioning, translating, and editing articles."[5] The result was a fascinating (particularly in retrospect) view of the status of women in many different nations and continents, with some overall statistical and evaluative assessment. From the perspective of the 1990s, *Sisterhood is Global* reflects the strengths and diversity of the individual voices in each country report and the overall impact of all of these voices focuses on an assessment of women's status worldwide. *Women and Family Law* pays tribute to, and builds upon, the foundation created by *Sisterhood is Global*. In doing so, *Women and Family Law* shows the continuing need for coherent and critical assessments of both data and strategies in relation to legal and political reforms in the world.

Women and Family Law demonstrates, at the outset, how issues about women and family law necessarily engage both "the public" and "the private." Thus, the author explains how political organizations have traditionally "relegated women to the private sphere, removed from politics."[6] However, as she argues:[7]

> power exists in everyday life, so relationships established within this sphere have important political ramifications. The cultural, economic, and social practices adopted in the private realm impact heavily on women's lives . . . .

Even more significantly, the author argues for the significance of law, especially family law, in establishing the fundamental conditions of women's lives, and the (im)possibility of changing these conditions:[8]

> Judicial policymaking and the creation of legal rights have been challenged as ineffective strategies for social change by those who believe that laws simply institutionalize the values of a ruling elite. This study reveals, however, that although law may not be all powerful, it is also not completely powerless. Laws that equalize women's rights in the home have a positive relationship with their overall status. In addition, laws are more capable of being altered than are cultural traditions, economic systems, and political institutions.

These are important claims about the role and significance of legal reforms, claims that many feminist legal theorists[9] might dispute. All the same, *Women and Family Law* manages to situate these ideas within a broad context of feminist theorizing and social science data so that the claims can be evaluated by readers.

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3 *Ibid.* at ix.

4 R. Morgan, *Sisterhood is Global* (Garden City, NY: Anchor and Doubleday, 1984; and reprinted New York: The Feminist Press, 1996).

5 *Ibid.*, at preface to the Feminist Press Edition, vii.

6 *Supra* note 1 at 5.

7 *Ibid.*

8 *Ibid.* at 8.

9 See e.g., M. Thornton, "Feminism and the Contradictions of Law Reform" (1991) 19 Int. J. Soc. L. 453; J. Fudge, "The Effect of Entrenching a Bill of Rights upon Political Discourse: Feminist Demands in Sexual Violence in Canada" (1989) 17 Int. J. Soc. L. 445; C. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge, Mass.: Harvard University Press, 1987).

The chapters on theory (Chapter 2), the status of women (Chapter 3) and issues in family law (Chapter 4) provide both detailed information and critical perspectives, so that a reader can develop an excellent basis for evaluating the conclusions presented in the country reports. Thus, for example, in assessing the role of international human rights protections, the author comments:[10]

> In addition to defining women's rights as human rights and gaining international support, feminists realize they must also increase their influence over the public institutions and policies that structure social roles within nations. In order to accomplish these goals, they have instituted policy networks and advocacy groups devoted to promoting programs that meet the special needs of women. The international dimension of these connections was evident at the 1995 Women's Conference in Beijing. For these to be effective, however, it is important that feminists learn what political structures and public policies have already proved beneficial to women. These insights can be gained from recent research in the social sciences.

More specifically, Chapter 3 identifies two "private sector" indices: life expectancy and literacy; and two "public sector" indices: workforce participation and political positions held by women and men. As well, the author constructs a "gender gap index," combining the individual indices. As she states, "[d]iscovering statistics that accurately reflect status is challenging and requires creative thinking as well as persistence"[11]— a rare and refreshing acknowledgement that statistics are not self-interpreting. Perhaps not surprisingly, the author's data suggest that women are better off in developed countries, especially Nordic ones, and that the gender gap is largest in Third World countries, especially Islamic ones.

In Chapter 4, the author then considers the role of family law in the pursuit of women's equality, reviewing indices of constitutional and statutory protection of women's human rights and the relationships between these legal protections and the material well-being of women. She provides a detailed examination of statistical and other data in a number of countries of the world, showing how such an exercise shifts attention from the apparently universal subordination of women to its many variations.[12] She concludes that the presence of statutory protections (and the absence of statutory restrictions) on the rights of women under family law moderately improves the status of women by narrowing the gender gap. As she states:[13]

> The questions [sic] is not whether laws work perfectly to promote justice for women. They do not. However, laws can be adjusted and modified over time. In the interplay between law and culture, changing the law has the potential to change cultural practices. Law shapes as well as reflects society.

Chapters 5 and 6 provide a detailed review of country reports and an overall data analysis to reveal insights about why women's status differs from that of men and why the degree of the gap varies from nation to nation. As she concludes,[14]

> Results of correlation and regression analyses indicate that political culture as measured by family law codes plays a major role in influencing women's status. . . . Although not everyone believes that equality under the law is a matter of justice to which each man and woman is entitled, it appears that statutory laws relating to family concerns provide a starting point for women in their search for equality.

Overall, this book provides an excellent model of cogent analysis and empirical data that is both comprehensive and critical. Although

[10] *Supra* note 1 at 29.
[11] *Ibid.* at 71.
[12] *Ibid.* at 104.
[13] *Ibid.* at 105.
[14] *Ibid.* at 148.

written from a Western perspective, it takes account of conditions and ideas from other parts of the world in a respectful way, encouraging questions and dialogue. It is also a challenging interdisciplinary text, with its combination of social science data, constitutional and legal analyses, and theories of equality and social change. The questions at the end of each chapter challenge readers (especially students) to engage with the arguments and define their own standpoints. In this context, *Women and Family Law* offers a range of ideas and information for both scholars and activists who want to use ideas about women's equality to achieve substantive and international human rights goals.

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CHARTING THE CONSEQUENCES: THE IMPACT OF THE CHARTER OF RIGHTS ON CANADIAN LAW AND POLITICS

by David Schneiderman and Kate Sutherland, eds. (Toronto: University of Toronto Press, 1997)

Reviewed by Richard Sigurdson

Academics have been critical of the Canadian *Charter of Rights and Freedoms* and the judiciary for years. Critics on the right, including the Reform Party, allege that parliamentary supremacy has been undermined and that the *Charter* is being used with reckless abandon by "special interest" groups.. Others have charged that the courts fail to protect those with the least power and influence in society — the poor, workers, women, Aboriginal peoples, homosexuals and ethnic minorities. These attacks are usually framed as criticisms of the *Charter*, not of individual judges, but this is not always the case. Critics on the right, for instance, often assume that judges have a left-liberal bias, which shows up in their sympathy for various equality-seeking claimants, while those on the academic left often point out that judges and lawyers are for the most part wealthy, white, middle-aged males who cannot help but reflect the attitudes of the dominant class.

Given this burgeoning national debate about the role of the judiciary in post-*Charter* Canada, the present volume is timely and instructive. The difficulties facing the Supreme Court are the result of changes to the types of cases it hears. These changes mean that the courts are now at the centre of the most controversial social, political, economic and moral issues of our times. The articles collected in *Charting the Consequences* demonstrate how this change to the role of judges has also encouraged Canadian legal scholars to focus their attentions more widely on the interrelations between law, politics, and society. Of course, much of the *Charter* literature still consists of closely written, densely legalistic analyses of *Charter* jurisprudence. But some of the most interesting work today, including the essays collected in the present volume, seek "not only to look at the jurisprudence but also to move beyond it, into the realm of what economists describe as 'externalities,' examining what effect, if any, the *Charter* and its jurisprudence have had on non-constitutional aspects of the law and on the dynamics of legislative power, provincial politics and social movements" (xi). In other words, the advent of the *Charter* has inspired legal scholars to delve into heady topic areas normally reserved for scholars in political science, sociology, gender studies, economics, women's studies, cultural anthropology, native studies and so on.

Contributors to *Charting the Consequences* exhibit a range of viewpoints but mainly align themselves with leftist or progressive critics of the *Charter*. Thus, the editors note at the outset that the "essays in this collection lead to the conclusion that those *Charter* claims that fit well with the dominant intellectual and political milieu — for example, claims by business enterprises — fared well. Those that did not fit — for example, claims based on grounds of poverty, sexual orientation

and race — did not" (xiii). This *Charter* pessimism is not shared equally by all contributors. It is most clearly seen in the articles dealing with business and the *Charter*, tax law and access to justice. Richard Bauman explains that the courts have allowed room for economic rights claims, even though they were explicitly excluded from the text of the *Charter*. This inclusion permits business enterprises to benefit disproportionately from *Charter* litigation. Kathleen Lahey shows that in spite of high hopes by various equality-seeking groups, most notably women, the current income tax regime has been shielded from disruption by *Charter* challenges. And based on her assessment of the "*concrete* achievements for those who are *most* disadvantaged," Mary Jane Mossman concludes that "access to significant justice reforms has not yet been achieved" (273). Yet Mossman ultimately concedes that this does not mean that the *Charter* has had no positive impact on access to justice, since "the *Charter*'s promise has grounded demands for change, particularly in relation to access to legal education and the profession, and these demands may increase access to justice for the future" (289).

This ambivalent attitude towards the *Charter* — noting its limitations but recognizing its promise and practicality — reverberates throughout most of these articles. This is especially evident in the chapters on Aboriginal politics and sexual orientation. Both Aboriginal groups and gay and lesbian activists have enjoyed significant victories in the courts since 1982. The authors in this volume are sensitive to the attraction that *Charter* politics holds for minorities which have long suffered discrimination and exclusion from Canadian political life. John Borrows argues that the *Charter*, by employing the powerful language of rights, has helped liberate some First Nations people from the oppression they encounter in Canadian society and has advanced the cause of self-government. At the same time, disputes have arisen within First Nations communities over the use of the *Charter*, most importantly over the matter of preserving gender equality within aboriginal organizations. Still, Borrows concludes that while "there are many constraints in the employment of rights, such rights possess the potential to remove impediments to greater individual and collective self-determination for Aboriginal peoples" (184). A similar note is struck by Didi Herman, who emphasizes that her own approach could best be described as one of "critical pragmatism." That is, we should accept that the *Charter* is here to stay and that progressive activists can use it to their advantage, as many gay and lesbian claimants have already done. However, we should retain our critical perspective, realizing that some forms of *Charter* litigation are better than others while never forgetting that litigation is only one of many necessary forms of struggle for equality and inclusion. This point is re-enforced by Kate Sutherland who suggests that the early *Charter* rulings on private litigation, which dealt such a blow to the expectations of many equality-seeking groups, may not be the last word on the subject. On the contrary, she says, "the private-law context must not be overlooked as an arena where rights discourse and litigation strategies may be used successfully" (264).

The strongest holdouts against accepting any positive aspects of the *Charter* and of rights discourse are Joel Bakan and Michael Smith, who offer a critical assessment of the failure of the 1992 Charlottetown Accord in light of current rights debates. In particular, they focus on the cases of two groups: the Native Women's Association of Canada (NWAC) and the National Action Committee on the Status of Women (NAC). Both of these organizations rejected the accord, fearing its potential damage to the *Charter*'s equality provisions, and members of NWAC employed rights-based litigation to protest their exclusion from the constitutional process. According to the authors, NWAC and NAC had their progressive messages distorted by the liberal media, thus demonstrating how rights claims are inevitably translated into dominant ideological terms. The peril of rights-based strategies, then, is that progressive political positions may be absorbed by, and their members co-opted into, the dominant ideology of liberal-democratic rights. The authors extend their critique to all advocates of "left pluralism" and new social movement theory, which wrongly conceives of politics in terms of language, discourse and other modes of

cultural representation instead of socio-economic class. This chapter contrasts sharply with others in *Charting the Consequences*, which tend to rely on empirical evidence of new social movement experiences with *Charter* litigation and rights-based argumentation to conclude that some form of "critical pragmatism" may be the best approach for equality-seeking groups. Moreover, this chapter suffers from the fact that it discusses a crucial event in Canadian constitutional history with little or no reference to that very history. Yet, the issues at stake for NWAC and NAC, and the strategies employed by all sides, can only be understood in the context of what came before, especially in the negotiations that resulted in the *1982 Constitution Act* and the failed Meech Lake Accord.

Understanding of such historical-political factors is the strong point in the two articles dealing with provincial politics. Although events subsequent to the publication of this book have left these chapters on Québec and Alberta somewhat dated, they are nonetheless exemplary in their careful analyses of the *Charter*'s impact in Canada's two most distinct societies. Yves de Montigny provides a detailed examination of *Charter* jurisprudence in Québec, demonstrating that the Supreme Court has not been the centre of controversy in Québec precisely because it has been able to deal sensitively with issues of diversity and provincial autonomy. This was most recently demonstrated, albeit in a non-Charter case, when the Court's ruling in the Québec secession reference was hailed by both separatists and federalists as a reasonable *legal* approach to a thorny *political* matter. Ian Urquhart's fine piece on the interplay between *Charter* politics and provincial political culture helps explain much of the current debate over the role of the courts. Most importantly, Urquhart examines the public perceptions among conservative Albertans, who vote Reform federally and Conservative provincially. And, as Alexandra Dobrowolsky points out in her survey of the impact of the *Charter* on political science, Alberta is also home to the most influential academic attacks on the *Charter*. Much of the current controversy over judicial activism in post-*Charter* Canada originates in the "wild rose province" and Urquhart's work helps us to make some sense of this phenomenon.

In conclusion, it is worth pondering the disturbing fact that the right-of-centre critics of the *Charter* — supported, of course, by conservative political parties with a great deal of clout — have had so much more of an effect on the current debate than academic critics with other points of view. Nevertheless, students in law and the social sciences should take the time to read these chapters and to come to their own conclusions about the impact, positive or negative, of the *Charter of Rights* on Canadian law and politics.

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CITIZENSHIP AFTER LIBERALISM

by K. Slawner and M.E. Denhim, eds. (New York: Peter Lang Publishing Inc., 1998)

Reviewed by Kim Rubenstein

This book is the twelfth volume of the series: Major Concepts in Politics and Political Theory and it is the outcome of a 1996 conference held at the University of Toledo, Ohio, USA. While the presentations are over three years old, the subject of citizenship is just as pressing and problematic now, and the issues are of continuing significance and interest to political scientists, philosophers, social scientists, lawyers and educationalists. Indeed, the editors state that "the articles in this volume explore the philosophical, legal, moral and practical challenges to citizenship 'after liberalism'" (2) and it is this interdisciplinary emphasis that brings great value to this collection.

The focus, however, as the title suggests, is philosophical. Those more interested in some of the practical, concrete expressions of citizenship as a legal status will find the book a little thin. For instance, legal issues such as the centrality of citizenship as a tool of international travel and work, or the specific rights and responsibilities that should flow from it, or even whether the existence of dual citizenship should be encouraged in domestic citizenship legislation, are not addressed. This is not a criticism, but simply a clarification of the largely theoretical emphasis of this book.

In fact, the questions that the conference and the chapters addressed are outlined by the editors in the first chapter as follows: Can liberalism accommodate new pluralistic demands? Can it continue to provide for political equality and economic security in a radically transformed global environment? What sort of education is necessary for the production of citizens? How can political agency be understood in a postsovereign world? How can citizenship be recreated after a major political upheaval? What is the relationship between citizenship, nationality and the state? Each of these questions is fundamental to the more practical legal aspects of citizenship and they provide an interesting framework to reflect upon those issues.

The book consists of ten chapters. The first, by the editors, summarises and places into context the volume. They remind us that, while there may have been varying concepts of citizenship in Western democratic states over the centuries, the common core of the notion has been the liberal framework of "the individual [a]s the primary site of political agency" whereas the state is "the exclusive stage for political identification" (1). It is the challenges to this framework with which, of course, the rest of the volume is concerned. Chapter two is by Roberto Alejandro — author of *Hermeneutics, Citizenship and the Public Sphere* (NY: Suny Press, 1993) — and is called, "Impossible Citizenship." This reviewer was familiar with Alejandro's book, but it would have been valuable in this volume to have a separate note or list of speaker biographies. This would have helped situate all the writers in their disciplines. Alejandro's chapter seeks to examine citizenship in the light of three theoretical approaches and to understand their relevance to the citizen's current predicament. He argues that citizenship is an impossibility, involving internal conflicts leading to new theoretical and political conceptualisation. His argument takes us far from Aristotle and Hobbes, where power was easily located in some form of nationhood, to the private institutions of today which have "established new criteria for measuring citizenship . . . [so that] shopping may well be a civic virtue" (19) in today's liberal societies. He asks us to view citizenship as consumption. This is a dramatic and engaging chapter, challenging traditional liberal notions of citizenship.

The next chapter, by Matteo Gianni, "Taking Multiculturalism Seriously: Political Claims for a Differentiated Citizenship" offers both an analytical discussion of the relationship between multiculturalism and citizenship and a defence of the idea of differentiated citizenship (as discussed mainly by Iris Marion Young) as a possible way to settle multicultural disputes. This chapter combines the theoretical and practical more specifically, in promoting a system of representative democracy that values difference. The following chapter by William Meyer also looks at these notions. In "The Politics of Differentiated Citizenship," he concludes that "it is in the realm of citizenship as practice that we must look for a solution to the problem of difference" (77). This leads in nicely to Karen Slawner's "Uncivil Society: Liberalism Hermeneutics and 'Good Citizenship'," for this chapter also concentrates on citizenship as practice.

Slawner critiques civil-society discourse and highlights two problems as she sees them: first, that citizenship is discussed as if it had nothing to do with democratic government, and second, that the discussion of the 'universal subject' restricts the beliefs and identities of those persons making the political decisions in the civil society. It is in this chapter that we see some direct discussion of the legal status of citizenship, as she rejects the often championed view that the legal status is independent of the

"desirable activity" notion. She argues that the "rigid distinction between state, market, and civil society is untenable" (87). In order to think of ways forward she suggests that Hans Georg Gadamer's hermeneutics may provide a useful framework.

The next two chapters address citizenship education. David Kahane does so by critiquing the "virtue theorists" and he argues in "Liberal Virtues and Citizen Education" that we need to hear more of the "citizenship stories," rather than requiring a single understanding of the good citizen. In doing so, he suggests that we may in fact expand people's sense of the range of liberal virtues that are necessary for good citizenship. The notion of stories is followed by conversations in Elizabeth Wingrove's chapter "Educating for Citizenship: Reflections on Pedagogy as Conservation and Critique." The conversation here is between Hannah Arendt and Henry Giroux. They each have different stories about the democratic space in which education occurs. Giroux's view of the school as an extension of public space is in contrast to Arendt's conception of it as a sheltered area. Wingrove argues that both are right and wrong, and that a fluid approach to the space is necessary. In those two chapters we see a strong contribution to theory and practice in citizenship and its place in education.

The remaining three chapters complete the book with a stronger political emphasis. Ed Wingenbach asks in "Justice After Liberalism: Democracy and Global Citizenship" how we might "develop an alternative conception of the political that would allow us to escape the demand for stability, sovereignty, and management in such a way that a just and truly democratic alternative to liberal capitalism might arise?" (148) He does so by looking at recent work by Jacques Derrida, and he gives democracy a messianic dimension. He also argues that global citizenship in a post-liberal democracy should demand a level of substantive equality which in practical terms encourages real participation. A more region-specific political perspective is given in Margarita Balmaceda's "Recreating Identity After Homo Sovieticus: Language and the Definition of a New Pan-Russianness" wherein she looks at how some of the former communist states have dealt with citizenship. This chapter highlights the conflicts and tensions between citizenship as allegiance to the state and citizenship as ethnicity. The role and value of language is "crucial" to a new form of Russian citizenship, in Balmaceda's view, because of its centrality to identity and sovereignty.

The final chapter is country specific, as Ronald Beiner's chapter asks "Citizenship and Nationalism: Is Canada a 'Real Country'?" His question arises from Lucien Bouchard's declaration that Canada is not a real country, and his chapter explains the struggle between Canadian citizenship and Québecois nationalism. Beiner grounds this struggle in some useful political philosophy, which applies beyond Canada. He argues that, in theorizing citizenship, "one must take up questions of membership, national identity, civic allegiance, and all the commonalities of sentiment and obligation that give effect to the legal and ethical bonds constitutive of a given political community" (185). He sets up five theoretical frameworks addressing why citizens commit themselves to the particular locus of political agency that they do. They are the liberal, pluralist, welfarist, nationalist and Arendtian conceptions of citizenship, and he looks at why each of them falls short of a satisfactory solution to his conundrum. In his view, Canada offers an excellent model of theoretical reflection on the nature of citizenship and the perplexities of trying to sustain a civic community in the late twentieth century.

All of the issues raised in this volume will continue to be pressing and relevant as we move into the twenty-first century. In Australia, for instance, the Howard Government has set up an Australian Citizenship Council, headed by former High Court Justice and Governor-General Sir Ninian Stephen, to address some of the questions of membership, national identity, civic allegiance and how these relate to the legal framework, as expressed in the *Australian Citizenship Act*. Together with the same government's National Multicultural Advisory Council, their existence reflects a current policy

concern for Australia's decision makers. And questions of citizenship, ethnicity and national identity are pressing questions that flow from other political situations, such as the crisis in Kosovo, which reflects a more volatile perspective. While this volume does not provide all of the solutions to these issues, it does provide valuable material and useful guidance to those seeking to continue to find answers to these questions. It consequently enlarges the wealth of citizenship literature available for those willing to be informed.

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R.F. Devlin, ed., *Canadian Perspectives on Legal Theory* (Toronto: Emond Montgomery, 1991).

For edited books by separate author:
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Subsequent references:
Ibid. if immediately above or *supra* note # if further above. You may use *infra* note # for references below.

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