SOME DIMENSIONS OF HUMAN RIGHTS STANDARDS AND THE LEGISLATIVE PROCESS

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Canadians can note the contribution made to the preparation of the draft of the *Universal Declaration*[1] by John Peters Humphrey, a native of Hampton, New Brunswick. It was Professor Humphrey who working alongside Eleanor Roosevelt, the Chair of the United Nations Human Rights Commission, produced the secretariat's draft of the Declaration. The General Assembly of the world body meeting in Paris proclaimed on December 10, 1948 the Declaration

> as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for their rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.[2]

One of the remarkable achievements of the Declaration is that the universal norm of human rights that it articulates was embraced by Member States of the United Nations notwithstanding the great diversity of philosophy, ideology or political systems of governance. Another notable fact concerning the Declaration is the number of times it has been referred to in national constitutions, legislation and judicial decisions thereby acquiring an authority which is quite unique. The Declaration not only became part of the customary law of nations, but acquired the standing which some have described as the Magna Carta of our times. Clearly, it is one of the most important instruments produced in the history of the endless struggle for the assertion of human liberties.[3]

> Since 1948 it has been and rightly continues to be the most important and far-reaching of all United Nations declarations, and a fundamental source of inspiration for national and international efforts to promote and to protect human rights and fundamental freedoms. It has set the direction for all subsequent work in the field of human rights, and has provided the basic philosophy for many legally binding international instruments designed to protect the rights and freedoms which it proclaims.[4]

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[1] *Universal Declaration of Human Rights* UNGA Res. 217(III), UN GAOR, 3rd Sess., Supp. No. 13, at 71, UN Doc. A/810 (1948), adopted by vote 48-0, with 8 abstentions, hereinafter the Declaration.

[2] Preamble to the *Universal Declaration of Human Rights.*

[3] Sean MacBride, "The Universal Declaration – 30 Years After" in Alan Falconer, ed., *Understanding Human Rights* (Dublin: Irish School of Economics, 1980) 7.

[4] *International Bill of Human Rights: Human Rights Fact Sheet No. 2, Centre for Human Rights* (Geneva: United Nations Office, 1988) 8.

The significance of the Declaration is clear. For the first time, the nations of the world had consciously joined together for the purpose of establishing a common trans-border human rights standard. Perhaps the clearest indication of the Declaration's spirit is Article 1 which affirms that, "[a]ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."[5]

Influence of the Universal Declaration on the Practice of Freedom in Canada

There are three principle institutions within Canadian society which serve to protect and promote human rights and freedoms: the courts, the legislative bodies and non-governmental organizations. The Declaration has given inspiration and guidance to the three aforementioned institutions.

The non-governmental sector has played a major role in lobbying governments to take positive measures with respect to civil and political rights as well as economic, social and cultural rights. The enactment of the provincial, territorial and federal human rights statutes is the result of the effective pressure brought to bear on governments by these organizations. The denial of equality rights and the proscription of discrimination on the basis of race, religion, and ethnic origin as provided for in the Declaration gave encouragement to many citizen groups to urge during the 1960s that governments enact anti-racial discrimination legislation. In addition, the rights of the child movement, as well as the status of women, were guided by the standard of equality articulated in the Declaration.

It is noteworthy that several provincial human rights Acts make specific reference to the Declaration.[6] Also, the increased sensitivity by Canadian courts to human rights matters was greatly assisted by the Declaration , and subsequently aided further by the two International Covenants on Human Rights. In addition, the International Covenant presents a new opportunity for the courts in Canada to pioneer a jurisprudence inspired by international human rights standards.[7]

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[5] *Universal Declaration of Human Rights*, Article 1.

[6] R.S.O. 1980, c.340, Preamble. For example, the *Ontario Human Rights* Code provides:

> Whereas recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world and is in accord with the *Universal Declaration of Human Rights* as proclaimed by the United Nations... .

[7] Noel A. Kinsella, "Tomorrow's Rights in the Mirror of History" in Gerald L. Gall, ed., *Civil Liberties in Canada* (Toronto: Butterworth, 1982) 33.

> The egalitarian human rights principle contained in the *Universal Declaration* became more evident in many Canadian court decisions after 1955. For example, one can cite the important rights case of *John Murdock Ltee.* v. *La Commission de Relations Ouvrieres* which involved the question of certification of a labour union in Quebec, when the vote of the members did not include the Indian

Particularly in the early years of the *Charter's* existence, there were several important cases in which the courts made reference to the Covenant. In the *Queen* v. *Rauca*[8], the Court of Appeal in Ontario dealt with a case which involved the question of whether the extradition of a Canadian citizen accused of Nazi war crimes was forbidden by Section 6(1) of the *Charter* :

> Every citizen of Canada has the right to enter, remain in and leave Canada.[9]

The Court held that the *Charter* must be interpreted in light of Canada's international obligations and referred specifically to Article 9 of the Covenant and stated that "there is nothing in the Covenant that gives the right not to be extradited."

In *Mitchell* v. *the Queen*[10], Mr. Justice Linden of the Ontario High Court dwelt extensively on the Covenant. It was first pointed out that in the absence of enabling legislation, the Covenant is not part of the domestic law of Canada. The applicant in this case, argued that ss. 9 and 12 of the *Charter* should be interpreted in light of the last structure of Article 15(1) of the Covenant:

> The Covenant may, however, be used to assist a court to interpret ambiguous provisions of a domestic statute, notwithstanding the fact that the Covenant has not been formally incorporated into the law of Canada, provided that the domestic statute does not contain express provisions contrary to or inconsistent with the Covenant. If such contrary provisions exist, the Covenant cannot prevail.[11]

The Justice subsequently found that he could not look to Article 15 of the Covenant for assistance in interpreting ss. 9 and 12 of the *Charter*, due to the conflict between Article 15 and s. 11(1) of the *Charter*. He added:

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workers who constituted nearly one third of the work force. Mr. Justice Nadeau held in *Gooding* v. *Edlow Invt. Corp.* that acts of racial discrimination were illegal because they were contrary to public order and good morals.

In *Morris* v. *Les Projets Bellevue Ltee.*, again the Quebec Court awarded damages in delict for "moral debasement" suffered by the plaintiff because of racial discrimination.

It would appear that these decisions in the civil law province are now clarifying the fact that racial discrimination is no longer tolerable, and that the concept of public order and good morals has developed since *Christie* v. *York Corp.* Thus we find in the case of *Phillips Beaubien et Cie* v. *Can. Gen. Elec.*, the court stating that it is easy to imagine that the standard of conduct in 1940 has since evolved, and so what would have been acceptable in that earlier period would no longer be seen as acceptable today, because the notion of public order has evolved over the course of years.

[8](1983), 41 D.L.R. (2nd) 22 5; (1984), 4 C.R.R. 42 (Ont. C.A.)

[9]*Canadian Charter of Rights and Freedoms*, s. 6(1).

[10](1984),150 D.L.R. (3d) 449 at 461.

[11]*Ibid.*

I do, however, recognize that in other cases it may be appropriate and desirable to have regard to the International Covenant when interpreting provisions of the *Charter*.[12]

In another case, the *Queen* v. *Videoflicks*[13], Mr. Justice Tarnopolsky used the Covenant in arriving at the decision that freedom of religion included not only the ability to hold and openly profess certain beliefs without interference, but also the right to observe the essential practices demanded by one's religion.[14]

Finally, in the *Queen* v. *Big M Drug Mart Ltd.*[15], concerning freedom of religion and the validity of the *Lord's Day Act,* Mr. Justice Belzill, in dissent, made the following reference to the Covenant in the decision of the Alberta Court of Appeal:

> Thus it can be seen that the Canadian *Charter* was not conceived and born in isolation. I agree. It is part of the universal human rights movement. It guarantees that the power of government in Canada shall not be used to abridge or abrogate the fundamental rights to which every Canadian, as well as every other human being in the world, is entitled by birth.[16]

Parliament and the International Covenants on Human Rights

The International Covenant on Civil and Political Rights, its Optional Protocol, and the *International Covenant on Economic, Social and Cultural Rights* were ratified by Canada on 18 May 1976.[17] Three months later on 19 August 1976, these Covenants, which were built on the foundation of the Universal Declaration, became effective for

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[12]*Ibid.* At 464.

[13](1985),14 D.L.R. (4th) at 10.

[14]*Ibid.* at 43

> In considering s. 2 of the *Charter* one must keep in mind that the fundamental freedoms therein guaranteed have been somewhat more elaborately expressed than were the corresponding freedoms in the *Canadian Bill of Rights.* Both a textual comparison and a review of the evidence before the Special Joint Committee of the Senate and the House of Commons on the Constitution, 1981-2, confirm that the *International Covenant on Civil and Political Rights* was an important source of the terms chosen. Since Canada ratified that Covenant in 1976, with the unanimous consent of the federal and provincial governments, the Covenant constitutes an obligation upon Canada under international law, by Article 2 thereof, to implement its provisions within this country although our constitutional tradition is not that a ratified treaty is self-executing within our territory, but must be implemented by the domestic constitutional process *Attorney-General for Canada* v. *Attorney General for Ontario* (Labour Conventions Case), [1937] A.C. 326, nevertheless, unless the domestic law is clearly to the contrary, it should be interpreted in conformity with our international obligation. Therefore Article 18 of the Covenant is pertinent to our consideration of the definition of freedom of conscience and religion under the *Charter.*

[15](1985), 58 N.R. at 81; (1985), 1 S.C.R. at 295 (S.C.C.).

[16]*Supra* note 19 at 149.

[17]P.C. 1975-115

Canada. It is noteworthy that this Act had the support of all jurisdictions in Canada and was the result of federal-provincial collaboration.[18]

The matter of Canada's accession to the Covenants and the process of implementation were dealt with by the ministers responsible for human rights during a Ministerial Conference held in Ottawa on December 11-12, 1975. The most critical decision made by the ministers from both levels of government in Canada in this regard relates to their acceptance of a specific set of "Modalities and Mechanisms" for Canada, as a federal state, to use in the implementation of the *Covenants and the Optional Protocol to the Covenant on Civil and Political Rights*. The modalities and mechanisms are as follows:

1. *Procedures for agreement to accede*: It was agreed that, before Canada acceded to future international human rights Covenants, there should be a process of consultation like the one conducted for the December 1975 Federal-Provincial Ministerial Conference on Human Rights.

2. *Procedures for denunciation:* The province will be consulted before the federal government denounces an international human rights Covenant. Similarly, in the same spirit, should a province wish to withdraw an earlier commitment on its part to implement within its jurisdiction an international Covenant to which Canada is a party, it should consult the federal government and the other provinces. It was recognized that, in such an event, the federal government might, in due course, find it desirable to denounce the Covenant in question.

3. *Procedures for amendment:* The federal government will consult the provinces before supporting any amendment to an international human rights Covenant.

4. *Procedures relating to the composition of Canadian delegations:* The provinces will be consulted as to the composition of Canadian delegations to meetings arising out of the Covenants. There should also be provincial participation in such delegations.

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[18]Allan Gotlieb, "The Changing Canadian Attitude to the United Nations Human Rights" in *Human Rights Federalism and Minorities* (Toronto: Canadian Institute of International Affairs, 1979) 16 at 44.

In this regard Gotlieb had written:

> Federal-provincial consultations of this character are carried out by correspondence between the Prime Minister of Canada and the provincial premiers. The object of the consultation is to determine prior to Canada's undertaking a formal international commitment requiring provincial action, whether the provinces are willing to introduce or maintain the necessary legislation. The ratification of such instruments, carried out after consultation with the provinces concerning their legislation, constituted an important development in Canadian constitutional practice... .

5. *Procedures for selecting Canadian candidates:* The selection of a Canadian candidate to sit on a body established as the continuing apparatus for an international human rights Covenant should be the subject of consultation and action in concert with the provinces.

6. *Procedures as to reports on human rights activities under the Covenants:* Procedures for reporting under the Covenants are outlined in paragraph 8 of this document.

7. *Procedures to be followed in the event of criticism by an international body of a provincial law or institutions:* In such a situation, arrangements should be made for the provinces concerned to have the opportunity:

    a) to explain, defend, or justify to the international body involved the law or institution being criticized, whether orally or in writing, and

    b) to have a representative in the Canadian delegation should such an explanation, defence or justification need to be made at an international meeting. Speaking as a member of the delegation, this person would in in concert with the federal government and any other concerned provinces, have the opportunity to explain and defend the law or institution of the province which had come under criticism.

8. *Procedures for the preparation and communication of commentaries and information:* There should be consultation with respect to the preparation and submission of Canadian reports to international bodies on human rights activities under the Covenants recognizing,

    a) the right of a province to prepare reports on its own provincial human rights activities, and

    b) the responsibility of the Federal Government, acting in concert with the Provincial Governments, to present Canadian reports.

9. Proposals for continuing intergovernmental consultation and coordination related to the implementation of the Covenants:

    a) there should be federal-provincial meetings of ministers responsible for human rights, at regular intervals and perhaps with a rotating chairmanship.

    b) there should be a continuing federal provincial committee of officials responsible for human rights, meeting at regular intervals, with rotating chairmanship and sessions held in different locations across the country.

Further to the developments in 1975, a Federal-Provincial Territorial Continuing Committee of Officials Responsible for Human Rights was established and held its first meeting in September of the following year. At that time the mandate of the Committee was described as follows:

> In order to maintain federal-provincial consultation with respect to the implementation of the Covenants, the Committee will exercise a continuing liaison function among provincial and federal departments and agencies interested in human rights questions, both within Canada and in the international field, in particular:
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> 1. By encouraging information exchange between provincial and federal departments and agencies with respect to the implementation of the Covenants and related programs.
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> 2. By ensuring, as far as possible while respecting the autonomy of each jurisdiction, better co-ordination of policies, programs and legislation connected with the implementation of the Covenants.
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> The Committee may make recommendations to the ministers responsible, but is not empowered to make decisions or to exercise control over any of the jurisdictions. The Committee will serve as a special forum for discussion and information exchange, as a tool for liaison in the implementation of the Covenants.[19]

The preparation of Canada's Report pursuant to Article 40 of the Covenant on Civil and Political Rights was one of the main areas of work for the Continuing Committee during 1976-1979. The Committee adopted a three-stage process of consultation among the jurisdictions in preparing the report. First, the provinces were asked to provide the required information or inform the Department of the Secretary of State officials, who acted as co-ordinators in drafting the report, of the province's intention to submit their own report. The second stage involved distributing the first draft for review and comment, and the third stage consisted of circulating the final draft for comment before forwarding the report to the Department of External Affairs. By March 1979, the final version of the first Canadian Report had been printed and approved and was released on 27 June 1979.[20] Discussion on the report by the Human Rights Committee took place on 27 March 1980, with many questions and comments made by committee members, including the observation that there was insufficient provincial data. As a result of the questions raised, the decision was taken to submit a supplementary report which was done on 31 October 1984.

The Human Rights Committee, in its examination of Canada's first report, also drew attention to a weakness in the area of formal mechanisms to monitor legislative compatibility with the Covenants. Thus, this topic became a matter of attention by the

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[19]Federal-Provincial-Territorial Continuing Committee of Officials Responsible for Human Rights, Document HCC-1-28 (Ottawa, September, 1976) at 1.

[20]CCPR/C/1/Add.43, Vol I and II (Canada's Report).

Continuing Committee who in turn keeps the ministers informed. At their 1983 Federal-Provincial-Territorial Conference, the Ministers reinforced the need for each Canadian jurisdiction to develop its own monitoring mechanism and to exchange data among themselves. The Ministers also requested the Continuing Committee to facilitate the process of consultation on the development by each jurisdiction of a monitoring mechanism with a view to having procedures in place and operational by 1985.

The Sporadic Impact of the Covenants on Parliament

Notwithstanding the obligations assumed by Canada and the provinces to ensure that all legislation is consistent with the human rights recognized by the Covenants, reference to these norms during the Parliamentary process is sporadic. However, the Covenants had a positive influence on the development of the *Canadian Charter of Rights and Freedoms*. During 1980 and 1981, a Special Joint Committee of the Senate and House of Commons on the Constitution of Canada heard many statements from the private and public sectors which used the International Covenant as a model for the envisaged *Canadian Charter.*

There was a great deal of debate between the premiers in Canada at that time on whether there should be a Charter of Rights entrenched in the new Constitution. Some felt it was necessary to underscore that an important federal-provincial agreement had already been achieved on a human rights standard by virtue of the federal-provincial agreement which made possible Canada's ratification of the Covenants.[21] Consequently, the New Brunswick Human Rights Commission in its submission stated:

> One of the very first points I wish to make in this oral presentation is that the decision to have Canada ratify the Covenants was taken after we achieved the unanimous consent of the eleven jurisdictions in the country. I was very pleased that on September 10 last our own Premier Hatfield reminded his colleagues of this consent to a human rights standard that already had been achieved and acted upon. Therefore, given that consent to a written standard of human rights as is found in the Covenants, we had expected that a Bill of Rights for entrenchment in the Canadian Constitution could have been easily achieved. Well that expectation, unfortunately, was not to be realized and here we are tonight.[22]

In opposition to those who sought to use the tradition of the "supremacy of parliament" as an argument against the entrenchment of the *Charter*, the New Brunswick brief pointed out that Canada's obligations under the Covenant have already

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[21]Note: The political debate among First Ministers on the Constitution and the proposed *Charter of Rights* occurred with little or no reference by First Ministers to the co-operation that was occurring among the ministers responsible for human rights legislation. Human Rights Ministers only became involved after the fact.

[22]*Brief submitted to the Joint Committee of the Senate and House of Commons on the Canadian Constitution* by Dr. Noël kinsella, Chairperson, New Brunswick Human Rights Commission (Ottawa: November, 1980).

modified the doctrine as far as human rights were concerned. Furthermore, reference was made to the change in Britain concerning this doctrine as a result of the ratification by the United Kingdom of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, and the recognition of the competence of the European Court of Human Rights with respect to Great Britain.

The Joint Committee received many briefs on the substantive provisions of the proposed Charter which used the Covenants as the standard of analysis. The Covenants were used to propose amendments to Article 1 of the draft Charter dealing with the matter of reasonable limits to the guaranteed rights and freedoms. The formula ultimately adopted by the Parliament of Canada and found in s.1 of the *Constitution Act, 1982* is as follows:

> *The Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The New Brunswick Human Rights Commission had recommended to the Joint Parliamentary Committee that Article 1 be amended. It was argued that what is considered to be "reasonable" at any particular time often depends on what is "generally accepted", so that these two tests both depend on the popular mood at any given time. This may not provide adequate protection to unpopular minorities, who are in the greatest need of protection. The words "generally accepted" are also vague and subjective. The substitution of words "strictly required" would have added a more objective and stringent test to s. 1. This expression is contained in Article 4 of the *International Covenant on Civil and Political Rights*. It was argued further that s. 1 of the *Charter* would have been improved if there was a provision clearly stating that derogation of human rights solely on the ground of discrimination ought not be constitutionally permitted.

The *Charter* provision, s. 15 on equality rights, was greatly improved over the first draft. The improvements were made as a result of many interventions using the Covenants. Thus, for example, one can see the influence of the Covenants in the open-ended nature of the proscribed grounds of discrimination which were included in s. 15 of the *Charter*.[23] The substantive rights included in the *Charter* were framed ,therefore,

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[23]S .15 of the *Charter* now provides:

> (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration or conditions disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

directly in light of Canada's international human rights obligations and in particular with reference to the Covenant.

The Human Rights Committee of the United Nations was informed that its questions and observations made in reference to Canada's first report contributed to many of the changes to the original proposal for a Charter. The Canadian delegation presenting the supplementary report to the committee on 31 October 31 1984 stated:

> Further, the influence of the Covenant, and indeed, the comments of members of this Committee in its review of Canada's First Report, contributed to many of the changes to the original proposal for a Charter. Let me mention a few.

The Place of International Human Rights Norms and the Legislative Process

Governments, like people, are not infallible. Misinterpretation of Canada's humanitarian responsibilities occasionally results in International Covenant guaranteed rights being limited without justification. These cases are periodically referred to the Human Rights Committee of the United Nations.

Such was the course of action in the *Sandra Lovelace* case; an effort which addressed the inequalities imposed by law between aboriginal men and women in Canada and the application of the *Indian Act*[24]. Until the mid 1980s, the *Indian Act* contained provisions which effectively stripped an aboriginal woman of her registered Indian status if she were to marry a non-aboriginal-registered person. This was not the case for a male. Facing the loss of her on-reserve housing rights and other First Nation/Band entitlements, Lovelace, a Maliseet woman from New Brunswick, appealed to the Human Rights Committee of the United Nations.

Despite a preliminary focus on the *Lovelace* case as one of gender inequality, the deliberations of the Committee found that the voiding of Lovelace's Indian status infringed on her cultural rights as provided for in Article 27 of the *International Covenant on Civil and Political Rights*. Article 27 of the Covenant reads as follows:

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

Canada was found to be in breach of its human rights obligations under the International Covenant because of the *Indian Act.* Consequently, Parliament enacted legislation which repealed this provision and provided for reinstatement of those who had unjustly lost their Indian status.

[24] R.S.C. 1985, c. I-5

A further example of the influence of International Human Rights norms on the parliamentary legislative process is the matter of the constitutional resolution affecting Term 17 and the Newfoundland school system. During the examination of the proposed resolution, a Joint Committee of the Senate and House of Commons gave detailed consideration to the question of compliance with Articles of the *International Covenant of Civil and Political Rights.*[25]

Looking at the issue from another angle, Canadian parliamentary and legislative affairs are sometimes misconducted as a function of improper or incorrect assumptions regarding the nature of human rights. Human rights, as a collective body of fundamental rights and freedoms, address various types of rights. As a result, sometimes the examinationof rights may be expedited by the horizontal division of rights into equal yet different groupings. For example, the nature of civil and political rights as self-executory would demand different legislative treatment than social and cultural rights which are programmatic. This is to say, the realization of the latter two rights depends heavily on the state's model of implementation or delivery mechanism. If the right is agreed to in principle but the mechanism of delivery is inadequate or non-existent, that right is functionally limited. For example, if the right to education is agreed to in principle but no funds are allocated for the construction of schools or hiring of teachers, that right is functionally limited in effectiveness.

Parliamentary committees have fallen into the trap of distinguishing rights, and sometimes consider rights as privileges because of the mechanisms for implementation and promotion. A human right is neither a goal nor a commitment. Rather, it is an imperative and an obligation. In order for Parliament to function properly, the distinction between these two concepts is crucial. For example, the Joint Committee of the Senate and House of Commons chaired by Beaudoin and Dobbie, which examined the "Charlottetown Accord", had difficulty in properly understanding social rights as human rights. In that report, it is stated that:

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[25]Report of the Special Joint Committee of the Senate and House of Commons on the Amendment to Term 17 of the Terms of Union of Newfoundland (Ottawa: Queen's Printer,1997).

In presenting the Committee an evaluation of the proposed constitutional amendment's compatibility with Canada's obligations to the provisions set forth in the Covenants, Donald Fleming raised a number of potential problems to watch for. As noted in the Committee's Report:

> Professor Fleming of the University of New Brunswick specifically addressed the issue of the interaction between the proposed Term 17 and the International Covenants. He felt that it would be virtually impossible to design the sort of objective, non-religious course on the history of religion and ethics that would comply with international obligations. Therefore an optional alternative course would have to be provided.

> While these commitments are in many ways as important to Canadians as their legal rights and freedoms, they are different. These commitments express goals, not rights .[26]

Ranking rights in vertical hierarchies inherently assigns a greater or lesser importance to particular human rights, a concept diametrically opposed to the proposition that "rights are rights are rights". Legislative activity should not be grounded on the premise that one fundamental right is qualitatively different from another. One would not get this impression from some recent parliamentary activity though. During the course of the hearing of evidence from witnesses on the topic of the Term 17 Constitutional Amendment to the Terms of Union of Newfoundland with Canada, The Honourable Stéphane Dion (President of Queen's Privy Council and Minister of Intergovernmental Affairs) declared that: "[T]here are different categories of fundamental rights, even in the Canadian *Charter*", as well as, "We agree that there are fundamental rights that cannot be removed from the constitution of a well-established democracy, and that the right to denominational schools is not such a right.[27] He further noted that:

> I am not saying that a parent's choice of education for their children is not of fundamental importance for that parent, but is not a fundamental right as recognized by Canada or throughout the world.[28]

The thesis that human rights are divisible runs contrary to the principle that rights are indivisible. Logically either a right is a right or it is not a right.

The Canadian Bill of Rights, the Charter and the Legislation Certification Process

The Canadian legislative system has within it mechanisms designed to ensure that domestic human rights principles are considered as Parliament undertakes to introduce, repeal, or modify legislation. Through the entrenchment of human rights values found in the *Canadian Charter of Human Rights, Canadian Bill of Rights*, and *International Bill of Human Rights* into the Canadian legislative process, Canada has responded to the imperative to respect a common denominator of human worth and dignity.

One of the constituent elements to the Constitution of Canada, the *Charter* sets out those rights and freedoms believed to be necessary in a free and democratic society. Preceded by and comprised of other Canadian laws such as the 1960 *Canadian Bill of*

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[26]Report of the Special Joint Committee on a Renewed Canada, *Comprehensive, universal, portable, publicly administered and accessible health care; adequate social services and social benefits; high quality education; the right of workers to organize and bargain collectively; and the integrity of the environment* (Ottawa, Queen's Printer, 1992) at 87–88.

[27]*Debates of the Senate* Volume 137, Issue 35 (18 December 1997) at 912.

[28]*Ibid.*

Rights, the *Charter* is an important milestone in that its inclusion in the *Constitution Act 1982* gives constitutional weight to the consideration of human rights. With the exception of a few rights reserved for citizens, each person in Canada is accorded the rights outlined in the *Charter* regardless of whether that individual is a Canadian citizen, permanent resident, recent immigrant, or visitor.

The Constitution is the legal and juridical spinal column of the Canadian justice and social system. All other laws, be they federal, provincial or local, must be in accordance with the values set forth in the Constitution. Since the *Charter* is a component of that Constitution, laws both old and new must not violate the rights and freedoms set forth in the *Charter*. In the event that laws limit a *Charter* right, the courts may strike them down as unconstitutional and without force or effect pursuant to Section 52 of the *Constitution Act 1982* .[29] In order that this contingency be avoided for administrative reasons and financial cost, the Minister of Justice is charged by the *Department of Justice Act* to ensure that government actions are consistent with the *Charter*. In this regard, two *modus operandi* have evolved: the Cabinet Support System and the Certification of Government Bills.[30]

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[29]Section 52(1) of the *Constitution Act 1982* reads, "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." While not part of the *Charter* itself, Section 52(1) empowers the courts to invalidate legislation which limits *Charter* rights.

[30]Before the *Charter's* inclusion into the *Constitution Act 1982*, the "watch dog" role and function of the Minister of Justice was recognized; a function that still plays a central role in the conduct of parliamentary business. The *Canadian Bill of Rights* R.S.C. 1985, App. III Part 1, section 3 provides that:

> The Minister of Justice shall, in accordance with such regulations as may be prescribed by the Governor in Council, examine every proposed regulation submitted in draft form to the Clerk of the Privy Council pursuant to the *Regulations Act* and every Bill introduced in or presented to the House of Commons, in order to ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions of this part and he shall report any such inconsistency to the House of Commons at the first convenient opportunity.

Presently, the *Department of Justice Act*, section 4.1(1) provides that:

> Subject to subsection (2), the Minister shall, in accordance with such regulations as may be prescribed by the Governor in Council, examine every regulation transmitted to the Clerk of the Privy Council for registration pursuant to the *Statutory Instruments Act* and every Bill introduced in or presented to the House of Commons by a minister of the Crown, in order to ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions of the *Canadian Charter of Rights and Freedoms* and the Minister shall report any such inconsistency to the House of Commons at the first convenient opportunity.

See also, Walter Tarnopolsky, "The Department of Justice Act: An Act Respecting the Department of Justice" in *The Canadian Bill of Rights* (2d) (Toronto: McCleland & Stewart, 1975).

The Cabinet Support System

In order to meet the Minister of Justice's mandate that ensures legislation be in accordance with the *Canadian Bill of Rights* and the *Canadian Charter of Rights and Freedoms*, the Clerk of the Privy Council, in cooperation with the Department of Justice, implemented the Cabinet Support System after seeking the approval of all deputy ministers on 21 June 1991. "The System requires all Memoranda to Cabinet (MCs) to include an analysis of the *Charter* and other constitutional implications of any policy or program proposal."[31]

The imperative for such preemptive measures is readily visible. Successful Charter challenges can often come with heavy financial obligations for the government in the form of reformative legislative provisions, extended program benefits, policy implementation delays, litigation and other legal costs. The lack of due consideration of the human rights implications of legislative behaviour can also result in confusing the relationship between federal and provincial governments.

The Cabinet Support System requires that the analytical content of the MC assess the likelihood that a legislative proposal is vulnerable to a Charter challenge. If this is the case, the MC would also assess the risk of a "successful" challenge, the consequences and ramifications of a successful challenge, and the potential costs of litigation. The MC also evaluates the potential division of power relationship problems that could occur between the federal government and the provinces, as well as whether a successful challenge will have a substantive effect on other existing or proposed legislation. If such an analysis demonstrated that the legislative proposal's vulnerability to a Charter challenge is low, the MC would note that the potential problems in terms of a challenge were negligible. If, on the other hand, it was found that there was a substantial legislative risk, the MC would recommend an appropriate course of action to the ministers.

Although in regard to legal affairs each governmental department will retain the services of legal advisors, legal counsel to the ministers is also supported by the Specialized Legal Advisory Services Section of the Department of Justice. In the role of cooperating legal counsel, the Specialized Legal Advisory Services Section offers expert advice on constitutional issues.

Despite the use of the Cabinet Support System, it is not uncommon for the assessment of legislation's human rights implications to transpire before or after the release of an MC. Often, legislation deemed particularly susceptible to a Charter challenge will be addressed before the drafting of the MC. Additionally, the MC is normally written at a fairly general level of analysis and abstraction, painting rather broad analytical strokes over problematic human rights issues. The intention here is to

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[31] *A Guide to the Making of Federal Acts and Regulations* (Ottawa: Department of Justice, 1996) at 26.

instigate ministerial-level questioning of legislative principles and dialectical modes of parliamentary investigation and trouble-shooting.

Certification of Bills

As part of the established legislative process per section 3 of the *Canadian Bill of Rights* and s. 4(1) of the *Department of Justice Act*, the Minister of Justice is responsible for ensuring that bills presented to the House of Commons by a Minister of the Crown not contravene Canada's human rights obligations as set forth in the *Canadian Bill of Rights* and the *Canadian Charter of Rights and Freedoms.* Should the Minister's investigation show that legislation is inconsistent with those obligations, that Minister is required to report as such to the Commons.

In order to fulfil the procedural obligations outlined above, the Clerk of the House of Commons must send the Minister of Justice two copies of each bill. The Deputy Minister of Justice signs a certificate certifying that the bill has been examined, whereupon the Chief Legislative Counsel examines the bill and endorses the certificates on behalf of the Deputy Minister.

Once the bill is presented in the Commons, two copies are sent to the Legislative Editing, Publishing and Data Base Management Section of the Department of Justice where the cover page of each copy is stamped as per regulations. Next two draft letters are sent to the Clerk of the House of Commons and the Clerk of the Privy Council respectively, indicating that the bill has been duly examined. After this stage the bills and draft letters are sent to a drafter in the Legislation Section who examines the bill. The documents are then sent to the Chief Legislative Counsel who conducts his/her own examination of the bill and accompanying comments, after which the letters and certificates on the copies are signed on behalf of the Deputy Minister of Justice. The copies are then sent to the Clerk of the House of Commons and the Clerk of the Privy Council.

This certification of bills mechanism is an integral part of the process of formulating legislation in Canada. Ultimately, advance constitutional review and Charter-proofing saves unnecessary expenditure of public monies, use of parliamentary time, and most importantly, Charter challenges, that legislation approved by Parliament has brought the institution of Parliament into disrepute as a defender and promoter of human rights.

Several jurisdictions in Canada have indicated that they examine proposed legislation against the obligations contained in the two International Covenants on Human Rights. It is not clear, however, that a mechanism of analysis equivalent to the Certification of Bills as provided for by the *Department of Justice Act* is in place.

Conclusion

The Universal Declaration of Human Rights together with the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social, and Cultural Rights* outline Canada's binding international human rights obligations. As a result, Canadian parliamentary legislative work must be conducted not only in accordance with the domestic *Canadian Bill of Rights* and the *Canadian Charter of Rights and Freedoms*, but also in accordance with the international human rights obligations.

The Certification of Bills and the Cabinet Support System mechanism set in place to ensure compliance with domestic human rights standards might well be extended to monitor compliance with the international norms, thus formalizing the evaluation process of legislation and their human rights implications. The present *ad hoc* system of case by case evaluation must be replaced with a systematic and analytical approach. Otherwise, those rights guaranteed to Canadians may be unduly limited without proper justification or consideration.