

Reaching Beyond (Without Abandoning) the Category of “Economic, Social and Cultural Rights”

Craig Scott*¹

I. INTRODUCTION

One of the dominant normative features of the Universal Declaration of Human Rights (UDHR)² is the relatively integrated translation of the aspiration to protect human dignity into the enumeration of fundamental human rights. The bifurcation of what is now thought of as the two grand categories of human rights (so-called “civil and political rights” and “economic and social rights”) had yet to occur at the time of the UDHR’s adoption. These categories were progeny of the UDHR, later created through two instruments: the International Covenant on Civil and Political Rights (ICCPR)³ and the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁴

* *Craig Scott* is Associate Professor of Law, University of Toronto.

1. The author would like to thank the Social Sciences and Humanities Research Council of Canada for its generous financial support. This article is based on Craig Scott, (Re)integrating Human Rights—Part II: An Argument for Attending to the Multiplicity of Relations Amongst Human Rights Norms, Paper Presented at the International Human Rights Workshop: Economic, Social and Cultural Rights: Fifty Years After The Universal Declaration, Univ. of British Columbia, Vancouver (8–10 Oct. 1998) (manuscript on file with the author). For a report on the conference, see MELINA BUCKLEY, ECONOMIC, SOCIAL AND CULTURAL RIGHTS: FIFTY YEARS AFTER THE UNIVERSAL DECLARATION: PROCEEDINGS OF AN INTERNATIONAL HUMAN RIGHTS WORKSHOP (1998) (available from the University of British Columbia).
2. Universal Declaration of Human Rights, *adopted* 10 Dec. 1948, G.A. Res. 217A (III), U.N. GAOR, 3d Sess. (Resolutions, part 1), at 71, U.N. Doc. A/810 (1948), *reprinted in* 43 AM. J. INT’L L. 127 (Supp. 1949).
3. International Covenant on Civil and Political Rights, *adopted* 16 Dec. 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (*entered into force* 23 Mar. 1976) [hereinafter ICCPR].
4. International Covenant on Economic, Social and Cultural Rights, *adopted* 16 Dec. 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3 (*entered into force* 3 Jan. 1976) [hereinafter ICESCR].

This article argues for a return to the original promise of the UDHR: human dignity should be pursued in light of both the overarching purposes and the underlying values of human rights protection, rather than under the constraint of false dichotomies. Thus, while continuing to endorse the argument that more effective inclusion of economic, social, and cultural rights within the community of human rights is fundamentally important, this article may seem to approach this aim in a rather odd fashion. The specific goal is to suggest, with knowing irony, that one may take the category of economic, social, and cultural rights most seriously by not taking it too seriously.

Section II discusses the genesis of this article, by locating it as, in part, a development of my earlier work on the interdependence of human rights norms, and, in part, as a self-critical response to dangers I now perceive. These dangers arguably arise from the excessive focus now placed on distinct legal categories of human rights and on their textualized form in treaties. Thus, Section II discusses the risks of legalistic channeling of human rights discourse, including by a reification of the category of economic, social and cultural rights. Section II advocates a more self-conscious striving for integrated approaches to understanding human rights. These approaches resist allowing the current categorizations of rights to take on a life of their own in such a way that we lose sight of the goals and values that human rights discourse should be serving. By reaching beyond perceived categories of human rights, we are better able to conduct a more purposive analysis that includes paying attention to the instrumental dimensions of rights protection. Such aspirations can be found in the doctrinal emphasis on making rights effective and on open organizing assumptions, such as Professor Lucie Lamarche's notion of "global interdependence."⁵ Section III clarifies the analytical claim that we can, and should, use categories of human rights and query, or challenge, those categories at the same time.

With the concept of interdependence thus understood, Section III continues by exploring five normative relations among rights, commenting on how these relations both transcend and affirm categorical analysis of human rights. In Section IV, the article illustrates the analysis thus far developed by applying it to the situation of migrant worker housing under the European Social Charter.⁶ Finally, Section V offers concluding comments, focusing on the transition from normative relations to real-world institutional relations.

5. See *infra* notes 12–14 and accompanying text.

6. European Social Charter, *opened for signature* 18 Oct. 1961, Europ. T.S. No. 35 (*entered into force* 26 Feb. 1965), *reprinted in* BASIC DOCUMENTS ON HUMAN RIGHTS 363 (Ian Brownlie ed., 3d ed. 1983).

II. THE NEED TO REACH BEYOND PREVAILING CATEGORIES FOR A MORE INTEGRATED NORMATIVE ANALYSIS: THE ODYSSEY OF INTERDEPENDENCE

A. Interdependence and the Problem of Reifying Categories

This article builds on an agenda with which I have been associated over the past decade regarding the interpretation and protection of international human rights. That work has sought to make the case for legal significance of the normative interdependence of the two grand categories of human rights: civil and political rights and economic, social, and cultural rights.⁷ Since the earliest attempts to develop this concept of “interdependence,” I warned that reliance on this concept creates a risk of legalistic “rigidification” unless one constantly keeps in mind that the idea of interdependence “has been developed not for the sake of rights but for the sake of persons.”⁸ The warning took the following form:

The point of reference, in this [article’s] discussion as well as in international human rights law [more generally], should be the promotion of being human or of the capacity to be human. The term *human rights* tends to push rights to the foreground, suggesting they are somehow tangible and objective entities that interact (for instance, interdependently), are violated, are promoted and so forth. The term interdependence attempts to capture the idea that values seen as directly related to the full development of personhood cannot be protected or nurtured in isolation. It is not meant to create the impression of relationships between rights as entities with some kind of objective existence. . . .⁹

One might argue, however, that my own elaboration of the idea of interdependence—that there are two main analytical components (“organic interdependence” and “related interdependence”)—displayed just such a rigid, legalistic tendency. Moderating, but not countering, this tendency was a parallel concern to inform these analytical constructs with a “social meaning” of interdependence that prioritizes the experience, perspective,

7. See Craig Scott, *The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights*, 27 *OSCOODE HALL L.J.* 769 (1989); Craig Scott & Patrick Macklem, *Constitutional Ropes of Sand or Justiciable Guarantees?: Social Rights in a New South African Constitution*, 141 *U. PA. L. REV.* 1 (1992). To say that I seek to “build on” this work may overstate the matter. I intend this paper to be, in certain respects, a self-critique.

8. Scott, *supra* note 7, at 786.

9. *Id.* The only serious qualification I would now make to this passage would be not to place emphasis on the “term” having the tendency to push “rights” to the foreground but on the institutional processes of human interpretation, dominated by social elites and lawyers, that always have the potential to have this effect. The significance of this qualification will become apparent in the concluding Section IV, *infra*.

and analysis of those persons most affected by human rights violations.¹⁰ Despite the force with which my 1989 article asserted the importance of social meaning, this parallel concern remained a bracketed caveat. Instead, social meaning should have stood more firmly alongside analytical meaning as a necessary twin pillar in elaborating on the idea of interdependence.

Thus, on the occasion of the fiftieth anniversary of the UDHR, this article advocates a healthy suspicion of current legal categories, at least to the extent that those categories result in a certain formalism that, disconnected from both overarching purposes and prevailing social realities, can lessen human rights protections.¹¹ Instead, general conceptual analysis of human rights (and the legal interpretations partly attendant on such analysis) should be approached with sustained attention to the underlying humanity of human rights and to the reality that human experience rarely confines itself to neat categories, much less to highly abstract ones. Such an analytical shift requires us to search out ways to approach received categories with a certain wariness of the aptness of those categories, and with an associated willingness to cross back and forth among categories. We must further be prepared to engage in category-crossing to the point that we begin to defy the categories themselves by developing our shared sense of when it is unhelpful, or even harmful, to try to understand a given rights claim or context in terms of existing categories. From this perspective, legal formulations of rights and presumptive categories of rights (such as "economic, social and cultural rights," "women's rights," and "equality rights") may be viewed as little more than starting points for analysis.

Examining the humanity of human rights points people in the right direction, but does not indicate either the roads to be taken or the final

10. For an elaboration of the notions of "organic" and "related" interdependence, see *id.* at 778–86. In simplified terms, "organic interdependence" refers to a situation where two rights are linked organically such that one is actually part of the other (for example, the right of infants to be protected from health threats that lead to infant mortality as part of the right to life), and "related interdependence" to a situation where two rights are distinct but one has a beneficial impact on enjoyment of the other (for example, the right to a fair trial can impact favorably on the right to social assistance). While relationships among rights can be one of *mutual* organic or related linkages, and thus one of *interdependence* on a very concrete scale, the term "interdependence" is generally used to suggest the interactive and mutually supportive relationship of all human rights, including various categories of rights, at a more general level. In this way, even if in a concrete context it seems analytically correct to emphasize the partial dependence of one right upon protection of another (but not vice versa), this does not mean that the two rights do not relate in a more mutually dependent way when viewed more systemically and/or across a range of contexts. On the social meaning of interdependence, see *id.* at 786–89. "From the vantage point of the underside of history, the intimate relationship between all human rights has a potential grounding in social experience and a resultant meaning that may be far ahead of understandings generated in less oppressive conditions." *Id.* at 786.

11. A case to be made that will only partially be made in the present paper.

destination. Those roads and destinations must emerge from interpretive processes that resolutely keep in view the need for purposive attention to the diversity of fundamental values and goods served by human rights protection. Many such fundamental values and goods are central to the UDHR (for example, liberty, equality, dignity, well-being, security of the person, and participation in community). These interpretive processes necessarily require that attention be given to how, for particular persons in particular contexts, fundamental values and goods are advanced or thwarted. By breaking out of overly rigid categories, human rights analysis can better focus on the underlying interests that rights should serve to protect (individual and communal, intrinsic and instrumental) and the kinds of harms, practices, and systems that have historically generated the need for a discourse on human rights.

B. Rejecting Technical Textuality

Especially after fifty years of gradually building up a body of juridical human rights doctrine, there is a risk that rights analysis could lose touch with the basic rationales for human rights protection. Legal doctrine can all too easily come to develop a legal logic all its own, to the point that the tail (of doctrinal analysis) begins to wag the dog (of human rights). Quite apart from this general risk, an additional problem surfaces from associating the idea of interdependence too closely with the legal textualities of existing human rights treaties. For example, my 1989 article may not have sufficiently avoided this problem in its attempt to establish a persuasive framework where normative interchange or “permeability” could occur between different international legal instruments such as the ICCPR and the ICESCR. While the goal was to enhance the effectiveness of human rights protection, most notably of the economic, social and cultural rights associated with the ICESCR, the close focus on treaty texts may have been overdone. This strong linkage between interdependence and inter-treaty textual relations has led Professor Lucie Lamarche to distinguish, with considerable justification, between “technical interdependence” (with which she appears to associate my work) and a more wide-ranging and purposive “global interdependence.”¹² This latter understanding of interdependence looks to the entire broadly defined and evolving juridical universe of human rights norms. By Lamarche’s global interdependence approach, these norms should inform the progressive and generous development of human rights interpretations

12. LUCIE LAMARCHE, PERSPECTIVES OCCIDENTALES DU DROIT INTERNATIONAL DES DROITS ÉCONOMIQUES DE LA PERSONNE 169–85 (1995).

quite apart from whether a given interpretation follows from normative inter-treaty borrowing in situations where textual signals (for example, the preambles of both the ICCPR and ICESCR) seem to permit or even mandate such borrowing.¹³

Lamarche's critique seems to be that "technical interdependence" is not so much wrong as it is limited.¹⁴ My own concerns may now actually run deeper. Inter-treaty borrowing of norms does not always lead to what Professor J.G. Merrills has called "amplification" of the norm in the instrument being interpreted.¹⁵ Interdependence analysis that focuses on apparent legally sound arguments about inter-treaty permeability can easily become inadvertently complicit with ceiling effects when the logic of a "certain kind of legal mind" begins to compare treaty texts. A ceiling effect is created when an institution (for example, one of the UN human rights treaty bodies) refers to human rights commitments found in a legal instrument other than its own as a reason to *limit* the meaning, and thus the scope of protection, given to a right in that institution's own instrument. An example would be the meaning that the Human Rights Committee, which oversees the ICCPR, could give to Article 22(1), which protects "the rights to freedom of association with others, including the right to form and join trade unions for the protection of [one's] own interests."¹⁶ Does this right include the right to strike? Assume that the Human Rights Committee decides to refer to Article 8 of the ICESCR for guidance and notes that the right to strike is expressly mentioned in that ICESCR article (in Article 8(1)(d)) as is the "right to form and join trade unions (in Art. 8(1)(a))."¹⁷ From that, assume the Committee concludes that the ICCPR, by virtue of having expressly included the right to form and join a union, but not also having expressly included the right to strike, must be interpreted in such a way that "freedom of association" in Article 22(1) of the ICCPR does not include the "right to strike." An alternative interpretive move would be for the Human Rights Committee to accept that "freedom of association" in Article 22(1) of the ICCPR does include some "right to strike," but that the right can be no more generous than that found in the ICESCR. Thus, given that Article 8(1)(d) of the ICESCR qualifies the granting of a right to strike with the words "provided that it is exercised in conformity with the laws of the particular country," this line of reasoning would see the Committee importing this serious limitation into any right to strike that it finds implicit in Article 22(1)'s freedom of association guarantee. Using another instrument (the

13. See *id.* at 169.

14. See *id.* at 172-73.

15. J.G. MERRILLS, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS* 218-19 (2d ed. 1993).

16. ICCPR, *supra* note 3, art. 22(1).

17. ICESCR, *supra* note 4, art. 8(1)(a).

ICESCR) in these ways in order to justify a restrictive interpretation of a human right in an institution's (the Human Rights Committee's) own instrument (the ICCPR) is an example of according ceiling effects to that other instrument. The foregoing example has illustrated two kinds of ceiling effects which, for greater clarity, are discussed separately below. Each suffers from a juridical disease that can be called "negative textual inferentialism."

Perhaps the worst form of such legal formalism uses legal reasoning that says, in effect: "what is *specifically* protected in *that* treaty cannot be read into *general* words in *this* treaty." With respect to the European Convention on Human Rights (ECHR or European Convention),¹⁸ for example, the European Court of Human Rights in *Kosiek v. Federal Republic of Germany* refused to read the right to freedom of expression in Article 10 of the ECHR as including protection against the denial of public service employment due to one's political views. The Court reached this result despite the fact that both the UDHR and the ICCPR protect equal access to work in the public service.¹⁹ Instead, the Court drew a negative textual inference from these related human rights instruments. The Court invoked the fact that the UDHR and the ICCPR protected equality of access to public service employment as a reason for refusing to read generally worded protections in the European Convention to include protections that had not been mentioned in specific terms.²⁰ This result is certainly the opposite of what an approach of global interdependence would suggest.²¹

An equally problematic and closely related form of negative textual inferentialism is seen when a treaty body starts its interpretive analysis from the premise that similar rights appear in parallel treaties. The treaty body then uses either a limited formulation in the other treaty, or a restrictive interpretation of that formulation, as a reason not to go further in defining its own treaty's meaning. Sometimes this can amount to no more than a treaty body saying that a different treaty does *not* provide a positive reason for a broad interpretation of its own treaty. However, it blurs very easily into citation of the other treaty as a positive reason *against* a broad interpretation

18. European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* 4 Nov. 1950, 213 U.N.T.S. 221, Europ. T.S. No. 5 (*entered into force* 3 Sept. 1953), *amended by* Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, *signed* 11 May 1994, Europ. T.S. No. 155 (*entered into force* 1 Nov. 1998), *reprinted in* 33 I.L.M. 943, 960 (1994) (Protocol No. 11 restructured the control machinery established by the Convention, resulting in the renumbering of several of the articles.) [hereinafter ECHR].

19. *Kosiek v. Federal Republic of Germany*, 105 Eur. Ct. H.R. (ser. A) (1986), *reprinted in* 9 Eur. H.R. Rep. 328 (1986).

20. *See id.* ¶¶ 34, 39.

21. MERRILLS, *supra* note 15, at 220 (referring to this form of reasoning more neutrally as reasoning from "indicative omissions"). *See also* Scott & Macklem, *supra* note 7, at 99–100.

of its own.²² Such use of other treaties to create normative ceilings occurs despite it being standard for human rights treaties such as the ICCPR to contain a savings clause stipulating, for example, that there shall be

no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, *conventions*, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.²³

In technical legal terms, such clauses are a legal directive addressed to state parties to the particular treaty containing the clause; these clauses are not addressed to a treaty body (like the European Court or one of the UN human rights treaty bodies) that has interpretive authority under *another* treaty. Thus, such a treaty body may believe that it may, in strict law, rely on the other treaty as a reason not to develop a more extensive understanding of its own treaty, despite the presence of such clauses, and even though the other treaty enjoins the states from engaging in such “pretext.”

In contrast, when one views interdependence more “globally” and less “technically,” to borrow Lamarche’s terminology, the result can be amplification of human rights protection even when a more technical—and conservative—interpretation seems plausible. Take, for example, the European Court of Human Rights case of *Airey v. Eire*.²⁴ In that case, the Court used the idea of effectiveness to read some measure of civil legal aid protection into the right to a fair trial (and the implied right to access to a court).²⁵ The issue was whether an economically disadvantaged woman, Mrs. Airey, seeking legal separation from her husband had the right to legal aid, so that she might be represented by a lawyer in court.²⁶ If the analysis had proceeded with the Court looking to see if there was an authoritatively

22. See the examples of the European Court using the European Social Charter to cap the meaning of “freedom of association” in the European Convention and using ILO conventions to limit the meaning of “forced or compulsory labour” in the European Convention. See MERRILLS, *supra* note 15, at 222–24; Scott and Macklem, *supra* note 7, at 100 n.345.

23. ICCPR, *supra* note 3, art. 5(2) (emphasis added). See also the virtually identical ICESCR, *supra* note 4, art. 5(2). See also ECHR, *supra* note 18, art. 60 (renumbered as art. 53); European Social Charter, *supra* note 6, art. 32.

24. *Airey v. Ireland*, 32 Eur. Ct. H.R. (ser. A) (1979), *reprinted in* 2 Eur. H.R. Rep. 305 (1979).

25. See *id.* ¶¶ 20–24. At paragraph 24, the Court stated:

The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective. . . . This is particularly so of the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial. . . . It must therefore be ascertained whether Mrs. Airey’s appearance before the [Irish] High Court without the assistance of a lawyer would be effective, in the sense of whether she would be able to present her case properly and satisfactorily.

Id. ¶ 24.

26. See *id.* ¶¶ 8–12, 22–24. At the time the Court decided *Airey*, divorce was still illegal in Ireland. See *id.* ¶ 10. The woman in *Airey* was instead seeking legal representation for a separation order. *Id.* ¶ 9.

recognized "economic" or "social" right to legal aid outside the criminal context (for example, in either the European Social Charter or the ICESCR), it would have found nothing to support such a claim and legalistically could have concluded that an analysis based on interdependence of *legal human rights* suggested there was no such right. Additionally, the Court could have looked to the express provision for criminal legal aid in the Convention itself and concluded that non-criminal legal aid was not, therefore, protected under the Convention. Instead, the Court relied on the idea of making rights effective, or non-illusory, joined to a highly purposive subtext of promoting the "substantive" equality of those in positions of social and economic disadvantage.²⁷

The key point is that making rights effective, by way of interpreting rights to have social and economic dimensions that place positive duties on the state, need not proceed by borrowing from rights that already have a recognized legal pedigree as social and economic rights.²⁸ Instead, effective human rights protection can, and should, be a result of a contextual interpretive analysis of what is needed to make a right truly a right of "everyone" (with special attention to members of presumptively disadvantaged and vulnerable groups, such as Mrs. Airey).

III. ANALYSIS THAT USES CATEGORIES WHILE CHALLENGING CATEGORIES

Some may insist that it is all well and good to try to begin rights analysis by querying, or challenging, categories, but that surely these categories provide needed foundations for clear reasoning and communication, especially in law. In view of the cogency of this criticism, it is important to probe further into what is involved when we employ categories and challenge them at the same time. It may be helpful to think of such a practice in several ways that can perhaps be summed up in terms of the "provisional," "partial," and "relational" nature of categories.²⁹

27. On the notion of "substantive equality," see Bruce Porter, *Beyond Andrews: Substantive Equality and Positive Obligations After Eldridge and Vriend*, 9 CONST. F. 71 (1998).

28. Much less a pedigree that includes an analysis of whether a specific state has consented to protect that right through ratifying a relevant treaty without reservation against the norm in question.

29. In what follows, this article will generally refer to categories in the sense of umbrella categories (for example, "children's rights") that gather together a range of human rights. There will be some slippage in usage, however, in that on occasion the article will also treat standard formulations of human rights (for example, "the right to life") as themselves constituting categories. As a matter of conceptual accuracy, breadth of coverage is not a defining criterion for the idea of category and I believe it can be helpful at times to think of any given right (especially in its most abstract formulation) as a category that, to return to this essay's theme, we need to both work with and query at one and the same time.

First, the "provisional" nature of a category refers to seeing that category as the best working hypothesis currently available for making sense of a normative or empirical phenomenon. No one is under the illusion that the category is a timeless one. The desirability of the category is open to revision in light of what is later discovered about it—including what has been learned about its usefulness in addressing the problems and issues that the category is presumably designed to address. Not only is the category open to revision (whether modification or wholesale replacement) but revision is even expected. This will likely occur in direct proportion to how categories emerge over time as part of an effort to understand and respond to a larger reality that defies easy understanding.

This point leads to the second feature of the practice of ironic use of categories: their "partial" nature. Categories are part of a whole. As the understanding of that whole (for example, the purposes that should animate human rights law) changes, so too may the categories that must cohere with that whole.

Third, to some extent because of their partial nature, categories can only fully be understood "relationally." Just as a "boy" only understands himself as such in relation to what is (or is constructed to be) a "girl" and an "adult," the meaning of any given category of human rights is, to a significant extent, a function of its relation to other categories. For example, the content of the "right to life" looks different when viewed in light of the "right to health." Similarly, the rights of children to parental care look different when perceived through the rights of women to equality and security. A claim involving rights may not, and very often does not, implicate only one right within one so-called category of rights. Rather, one can only make sense of many claims if one has the latitude to relate the different interests at stake without being locked into a mentality or institutional practice of slotting the claim into one label or another. Professor Rebecca Cook put the matter nicely when she wrote that "[w]omen's health interests often cross the boundaries that separate one legally described right from another."³⁰ For example, it would not be difficult to locate aspects of such interests, even in a narrower health category such as reproductive health, in each one of the six main UN human rights treaties.³¹

30. REBECCA J. COOK, *WOMEN'S HEALTH AND HUMAN RIGHTS: THE PROMOTION AND PROTECTION OF WOMEN'S HEALTH THROUGH INTERNATIONAL HUMAN RIGHTS LAW* 19 (1994).

31. See Convention on the Elimination of Discrimination Against Women, *adopted* 18 Dec. 1979, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/46 (1980) (*entered into force* 3 Sept. 1981), *reprinted in* 19 I.L.M. 33 (1980) [hereinafter CEDAW]; Convention on the Rights of the Child, *adopted* 20 Nov. 1989, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/49 (1989) (*entered into force* 2 Sept. 1990), *reprinted in* 28 I.L.M. 1448 (1989) [hereinafter CRC]; International

Potentially, there are many different scenarios in which human rights norms from different treaties can be thought of as both partial and relational in ways that can affect the interpretive processes of giving (provisional) content to those norms. Following are some very brief observations about five kinds of normative relations that transcend categories even while affirming those same categories. These are: (A) interdependence of rights, (B) interrelationships of persons, (C) concretization of general rights, (D) particular forms of universal rights, and (E) intersectionality.³²

A. Interdependence of Rights

The interdependence of human rights has already received considerable attention in this essay. In its origin in UN discourse, this concept was applied to the relationship between the categories of civil and political rights and economic, social and cultural rights, as part of the normative politics surrounding the creation of the two Covenants, the ICCPR and the ICESCR.³³ With the passage of time, however, political discourse has begun to whittle away at the categorical juxtaposition of the two grand categories, substituting formulations of the principle of interdependence that refer to *all* human rights, regardless of the categories to which they belong. For example, the 1993 Vienna Declaration on Human Rights states: "All human rights are universal, indivisible and interdependent and interrelated."³⁴ This

Convention on the Elimination of All Forms of Racial Discrimination, *adopted* 21 Dec. 1965, 660 U.N.T.S. 195 (*entered into force* 4 Jan. 1969), *reprinted in* 5 I.L.M. 352 (1966) [hereinafter CERD]; Convention Against Torture and Other Cruel, Degrading, or Inhuman Treatment or Punishment, *adopted* 10 Dec. 1984, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (1985) (*entered into force* 26 June 1987), *reprinted in* 23 I.L.M. 1027 (1984), *substantive changes noted in* 24 I.L.M. 535 (1985) [hereinafter CAT]; ICESCR, *supra* note 4; ICCPR, *supra* note 3. The respective committees for these instruments are the (1) Committee on the Elimination of Discrimination Against Women [also hereinafter CEDAW], (2) Children's Rights Committee [also hereinafter CRC], (3) Committee on the Elimination of Racial Discrimination [also hereinafter CERD], (4) Committee Against Torture [also hereinafter CAT], (5) Committee on Economic, Social and Cultural Rights (CESCR), and (6) Human Rights Committee (HRC).

32. The sources for each of these short-hand descriptions will become apparent in the upcoming discussion of each in turn.

33. See Scott, *supra* note 7, at 798–811 (discussing two General Assembly Resolutions of 1950 and 1952, the "Unity Resolution" and the "Separation Resolution").

34. Vienna Declaration and Programme of Action, U.N. GAOR, World Conf. on Hum. Rts., 48th Sess., 22d plen. mtg., part I, ¶ 5, U.N. Doc. A/CONF.157/24 (1993), *reprinted in* 32 I.L.M. 1661, 1665 (1993) [hereinafter Vienna Declaration]. The following are the author's personal observations based on having attended all three weeks of the Vienna Conference and having observed the entire behind-closed-doors drafting process from beginning to end. The above quoted sentence may be the most inelegant sentence ever to appear in an international human rights instrument. I am not inclined to see great difference in the history of the usage of the terms "indivisible" and "interdependent," although I personally prefer "indivisibility" as a way to express the richer multidirectional web of relations

trend is, on the whole, to be welcomed for its potential to promote less legalistic and category-dominated interdependence analysis.

There are dangers, however, to keep in mind. One such danger is that the Vienna Declaration expresses the interconnection of human rights in so many abstract ways that it risks conveying the impression of meaningless sloganeering and thereby undermines attempts at more serious invocations of the ideas of interdependence and indivisibility. Another danger is of a flattening effect created by undifferentiated references to "all" human rights. While it is true that the interdependence of overarching, grand categories of human rights speaks to the equal importance of those broad categories for human dignity, all legally recognized human rights cannot be of equal importance. This is especially true in concrete contexts where (hopefully principled) trade-offs among human rights are sometimes necessary. Rights advocates and defenders must encourage the idea of interdependence but not to the point that it helps to promote a discourse where all human rights, and thus all human rights violations, are treated as legally indistinguishable.

A final concern relates to the danger that a complete demolition of categories such as economic, social, and cultural rights or women's rights might be promoted by Vienna-style formulations. To a very important extent, such categories have arisen and continue to exist as categories of resistance to dominant human rights discourses. Varying degrees of discursive power have emerged from the very marginality of these categories. Arguably, such discursive power is now beginning to attract not only lip service but also some institutional mainstreaming within the United Nations.³⁵ Therefore, one danger in abandoning talk of such (potentially) counter-hegemonic categories is that those social, political, cultural, and

among various human rights—something similar to what Lamarche seems to mean by "global interdependence." As for "interrelated," this notion seems to be so neutrally formulated as to be meaningless. Some states at the Vienna World Conference on Human Rights, most of them Western, displayed their strong preference for the term "interrelated" in part because they viewed "interdependence" as a code word used by many non-Western state elites for the priority of social and economic rights.

35. For example, the Annual Meeting of the Chairpersons of the UN Human Rights Treaty Bodies addressed specific and potentially far-reaching recommendations to the six main UN human rights committees in 1995 and again in 1996. See *Human Rights Questions: Implementation of Human Rights Instruments*, UN GAOR, 50th Sess., Agenda item 112(a), ¶ 34, U.N. Doc. A/50/505 (1995); *Human Rights Questions: Implementation of Human Rights Instruments*, UN GAOR, 51st Sess., Agenda Item 110(a), ¶ 58, U.N. Doc. A/51/482 (1996). Also, by way of example, in the Rome Statute of the International Criminal Court, adopted 17 Jul. 1998, U.N. Doc. A/CONF.183/9 (1998), reprinted in 37 I.L.M. 999 (1998), several provisions show a consciousness of the relevance of gender balance within the court structures as well as expertise in the particular harms suffered by women. See, e.g., *id.* art. 36(8)(a)(iii) ("[a] fair representation of female and male judges" as a criterion in the election of judges to the Court); *id.* art. 36(8)(b) ("the need [for] judges with legal expertise on specific issues, including, but not limited to, violence against women or children").

economic power relations in the international order that tend to assimilate all human rights to rights close to the heart of the privileged may become more difficult to name and challenge.

B. Interrelationships of Persons

When discussing, as above, the interdependence of human rights, the focus tends to be on interdependence within the bundle of rights of a given human person or human group (each member of which possesses the same right or rights). Another fruitful approach to interdependence is in terms of the interrelationships of persons.³⁶ Thus, one reason for according a right to person *X* (or one reason for according a given right a certain weight in legal argument) may be the interconnections between respecting *X*'s rights and those rights of person *Y*. For example, political expression tends to draw a particularly high level of protective scrutiny from treaty bodies like the European Court of Human Rights because of its instrumental value for certain collective goods (notably a democratic culture). Similarly, one person's freedom of expression may also take on added weight if that expression is used to draw attention to the violations of the human rights of others. Thus, the rights accorded to human rights defenders as a special category of persons are not fully equitable with a specification or particularization of abstract rights to freedom of expression, freedom of association, and so on. These rights have added value precisely because of their instrumental relationship to protection of others' rights.³⁷

The key area in which the interdependence of persons is manifest and most relevant to human rights analysis is probably in the area of children's rights. Take the example of workers seeking unionization who are dismissed by their company. The workers go to court and seek an interim injunction to prevent their dismissal until full argument on the issue can proceed. One could define what is at stake in terms of the complex of rights of those workers, such as the right to work and the right to organize. This alone might give a judge all the reason needed to order that their employment continue. Yet, their rights are valuable not only with respect to themselves. The rights of their children, as well as other dependent family members, are at stake. Especially where the pedigree of children's social and economic

36. Indeed, it may be that the Vienna Declaration's use of the term "interrelated" can be pushed toward some such meaning.

37. On the instrumental linkage of certain kinds of rights with the promotion of collective goods, see JOSEPH RAZ, *THE MORALITY OF FREEDOM* 245–63 (1986) (the discussion at pages 254–55 is particularly relevant). For an excellent critical review of this approach, see Joseph Chan, *Raz on Liberal Rights and Common Goods*, 15 *OXFORD J. LEGAL STUD.* 15 (1995).

rights is well-established, the rights of the children are such that they bolster the rights of their worker parents.³⁸

The preceding discussion clarifies one reason why a sustained interpretive engagement needs to occur between the rights in the central Covenants, the ICESCR and the ICCPR, and the Convention on the Rights of the Child (CRC).³⁹ The CRC is resplendent with provisions that highlight the many dimensions of the interdependence of parents and children in a way that complements, and goes beyond, the "right to family life" jurisprudence under the ECHR and the ICCPR. For example, CRC Articles 9 and 10, *inter alia*, deal with the right of parents and children not to be separated from each other.⁴⁰ In a series of cases in various domestic courts, children's rights

38. This example flows from the author's personal experience while visiting South Africa in 1995 and knowledge of a case being considered at the time. In the South African Constitution, constitutional human rights have the legal potential to be invoked in horizontal relations, for example, between workers and a company. See S. Afr. CONST., ch. 3, § 8 (adopted by the Constitutional Assembly on 8 May 1996 and as amended on 11 Oct. 1996). With the example of workers and a company, in a classic constitution where no "horizontal" application is permitted (but only "vertical" application between the state and non-state actors), the injunction could be sought against the state in light of the state's duty to protect private persons from harm by other private persons.

A third possibility, which the author began to explore in a recent address in South Africa, is that both the state and the relevant private actors could be joined in a human rights action, thus producing "diagonality" analysis. Diagonality offers possibilities for rights-based scrutiny that is more structural and comprehensive than is possible according to a stark either/or division of the applicability of rights into the categories of "horizontal" versus "vertical." This potentially more effective scrutiny emanates from looking at the field of responsibility and power relations that involve the state and non-state sectors simultaneously and then linking that analysis to appropriate allocation of both legal responsibility and creative (including joint) remedies. See Craig Scott, *Social Rights: Towards a Principled, Pragmatic Judicial Role*, 1 ESR Rev., Mar. 1999, at 4, 5-6 (ESR Review is a quarterly publication of the Community Law Centre (University of Western Cape) and the Centre for Human Rights (University of Pretoria)). The just cited article is a distillation of Craig Scott, *Enforcing Social and Economic Rights: In Quest of a Judicial Role That Is Principled, Pragmatic, and Creative (All At the Same Time)*, Keynote Address at the Conference on Giving Effect to Socio-Economic Rights: The Role of the Judiciary and Other Institutions, Johannesburg, South Africa (6-7 Oct. 1998). A future article will hopefully develop the thoughts on diagonality from this address, including, perhaps, a diagrammatic depiction of the concept.

39. CRC, *supra* note 31.

40. See *id.* arts. 9, 10. Article 9 states that:

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

in general, and CRC rights in particular, have been invoked by parents when the state has sought to deport the parents from a country in which they are not nationals but in which their children are.⁴¹ In *Baker v. Canada*, recently argued on appeal before the Supreme Court of Canada, the appellant and three intervenors emphasized, *inter alia*, the interdependence of the constitutional rights to security of the person of both Ms. Baker and her four children.⁴² They rested their argument in part on the Baker family members' *mutual need* for the support and care of each other, especially in view of the social and economic disadvantage resulting from poverty and race that would be exacerbated by separating their family through the deportation of Ms. Baker.⁴³

Other examples of linkages between the rights of different persons are sprinkled throughout treaty texts, especially, again, in the interconnection among the rights of family members. Article 19 of the European Social Charter secures a number of specific rights for migrant workers but also

4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

Id. art. 9.

Article 10 further states that:

1. In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.

2. A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts with both parents. Towards that end and in accordance with the obligation of States Parties under article 9, paragraph 2, States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order (*ordre public*), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention.

Id. art 10.

41. See, e.g., *Minister for Immigration and Ethnic Affairs v. Teoh* (1995) 183 C.L.R. 273 (Austl.); *Tavita v. Minister of Immigration* [1993] 2 N.Z.L.R. 257 (C.A.); *Baker v. Canada* (Minister of Citizenship and Immigration) [1997] 142 D.L.R. 555 (Can.).
42. The three intervenors on behalf of Ms. Baker were the Charter Committee on Poverty Issues, the Canadian Council of Churches, and a coalition headed up by Justice for Children and Youth. See *Factum of the Charter Committee on Poverty Issues* ¶¶ 23–25, 33–34, *Baker v. Canada* (Minister of Citizenship and Immigration) [1997] 142 D.L.R. 555 (Can.) (S.C.C. No. 25823) (filed with the Registrar of the Supreme Court of Canada 4 Sept. 1998). The Court heard oral argument on 4 Nov. 1998. No judgment has yet been released.
43. See *id.*

states that the purpose of these rights is to ensure "the effective exercise of the right of migrant workers *and their families* to protection and assistance. . . ."44 Article 10(1) of the ICESCR requires that the "widest possible protection and assistance should be accorded to the family . . . particularly . . . while it is responsible for the care and education of dependent children."45 Moreover, Article 10(2) requires "[s]pecial protection . . . [to] be accorded to mothers during a reasonable period before and after child-birth."46

One should note that the interdependence of rights of different persons has another dimension brought on by the fact that rights are not absolute and that human rights of different persons must be mutually accommodated. Rights of different people are probably as often at odds as they are instrumentally valuable to each other.⁴⁷ Thus, one common reason for limiting the rights of one person's or group's rights is "the rights and freedom of others."⁴⁸ For example, one person's freedom of expression may, in some contexts, look less absolute when viewed in light of another's right to work.⁴⁹

-
44. European Social Charter, *supra* note 6, art. 19. There are, no doubt, patriarchal foundations to most of the explicit examples of such interdependence of different persons' rights within the family context. With regard to Article 19(6), which deals with family reunion, the Appendix to the Charter states explicitly: "For the purpose of this provision, the term 'family of a foreign worker' is understood to mean at least *his* wife and dependent children under the age of 21 years." *Id.* app. on art. 19, ¶ 6 (emphasis added). Note that such gendered language has been removed systematically from the Revised Charter. See European Social Charter (Revised), *opened for signature* 3 May 1996, art. 19, Europ. T.S. No. 163, *reprinted in* 14 NETH. Q. HUM. RTS. 341 (1996). See also ICCPR, *supra* note 3, art. 17 (referring to everyone's right not to be subjected to arbitrary interference with "his . . . family"); ICESCR, *supra* note 4, art. 11 (referring to everyone's right to an adequate standard of living "for himself and his family"). While such dated linguistic usage should alert us to some of the problems with making some persons' rights depend upon those of others, this does not detract from the conceptual point, nor, for that matter, from the reality of that dependence in many relationships.
45. See ICESCR, *supra* note 4, art. 10(1).
46. See *id.* art. 10(2).
47. For a particularly useful discussion of this dimension of rights in terms that argue why it is incoherent to speak of *maximizing*, in some metaphorically quantitative sense, all human rights, see JOHN RAWLS, POLITICAL LIBERALISM 331-40 (1993).
48. See, e.g., ICCPR, *supra* note 3, arts. 12(3), 8(2), 19(3), 21, 22(3). Article 19 explicitly refers to the "rights and reputations of others." *Id.* art. 19(3).
49. See *Slaight Communications, Inc. v. Davidson* [1989] 1 S.C.R. 1038, 1056-57, 1078-81 (Can.). In this case, the Supreme Court of Canada dealt with a claim of violation of freedom of expression after the government (a labor adjudicator) ordered an employer, who had maliciously maligned a productive employee before eventually unjustly dismissing him, to respond to any request for a reference from a future prospective employer with a letter that stated only the bare facts of his employment record without adding anything to that reference. See *id.* at 1046-47. The Court reasoned that, while this did infringe freedom of expression, the infringement was justified in view of the power relations that characterize employment situations and in view of the value to be placed on facilitating the unjustly dismissed employee's search for a new job, a search that should proceed without fear of the employer continuing his unjust treatment in the form of unfair statements that would

Attention to the notion of the interrelationship of persons thus adds a social dimension to the analysis of rights on two scores. First, it can point out another reason to accord a right or to give a right added importance. Second, it can point to a specific justification for limiting the meaning or application of the rights of one person or group. Nonetheless, these two social dimensions can exist in some tension within one interpersonal relationship. For example, the above mentioned situation of a mother's rights in relation to her newborn child has been interpreted under the European Social Charter to make it mandatory for a woman to take a certain number of weeks of leave from work after childbirth.⁵⁰ Although the rights of the child provide a reason for affording certain rights to the mother, those very same rights of the child are also used to cut back on the rights of the mother.⁵¹

Recognition of children's rights has changed the nature of the interrelationship of the rights of parents and the rights of children. The situation has moved from one where some parental rights were in part justified because parents were deemed the agents for protecting children's interests, to a situation where children's rights are a way to modify parents' rights.⁵² For instance, one can see a tension between these two effects of children's rights within the ICESCR's Article 13, the provision on the right to education. Article 13(1) states that one purpose of education rights is to "enable all persons to participate effectively in a free society . . . [and] promote understanding, tolerance, and friendship among all nations and all racial, ethnic or religious groups."⁵³ Nevertheless, Article 13(3) then goes on to accord a liberty to parents "to ensure the religious and moral education of their children in conformity with their own convictions."⁵⁴ What about the situation of parents who wish to inculcate their children with exclusivist convictions that teach them that other religious or ethnic groups are less

likely be made to future employers. See *id.* at 1048–57. In its analysis of the legitimate justification for infringing freedom of expression on these facts, the Court specifically invoked the right to work in Article 6 of the ICESCR. See *id.* at 1056.

50. See Scott & Macklem, *supra* note 7, at 34 n.100 (citing the progression of the jurisprudence of the Committee of Independent Experts interpreting Article 8(1) of the European Social Charter). See also DIRECTORATE OF HUMAN RIGHTS, COUNCIL OF EUR., *WOMEN IN THE WORKING WORLD: EQUALITY AND PROTECTION WITHIN THE EUROPEAN SOCIAL CHARTER*, 47–56 (1995) [hereinafter *WOMEN IN THE WORKING WORLD*].

51. For criticism of this interpretation, see Scott & Macklem, *supra* note 7, at 32–35, 34 n.100. For the point that this mandatory period of post-birth leave is controversial among states, see *WOMEN IN THE WORKING WORLD*, *supra* note 50, at 52.

52. The precise balance has a lot to do with reconceiving children's interests in terms of active agency instead of passive benefits, as well as moving from a conception where it was not so much children's interests (and thus rights) that shored up parents' rights as it was an ownership conception of the relationship between parent and child.

53. ICESCR, *supra* note 4, art. 13(1).

54. *Id.* art. 13(3).

worthy? A hint of the needed reconciliation is found in Article 13(4), which conditions the right to establish non-state educational institutions on "the observance of the principles set forth in paragraph 1."⁵⁵

C. Concretization of General Rights

There are certain derivative relations between general and concrete rights found in different human rights treaties or developed through interpretation. The best example is the relationship between the Convention Against Torture (CAT)⁵⁶ and Article 7 of the ICCPR.⁵⁷ CAT is in some ways a series of specifications of the generally worded right in the ICCPR.⁵⁸ Similarly, one could read the entire Convention on the Elimination of All Forms of Racial Discrimination (CERD)⁵⁹ as a concrete manifestation of general norms prohibiting discrimination based on race, color, and related grounds found in other treaties, such as Articles 2(1), 3 and 26 of the ICCPR,⁶⁰ Article 2(2) and 3 of the ICESCR,⁶¹ and Article 2(1) of the CRC.⁶² The same could be said of the

55. *Id.* art. 13(4).

56. *See* CAT, *supra* note 31.

57. *See* ICCPR, *supra* note 3, art. 7.

58. On the relationship between the formulation of the rights in CAT and in Article 7 of the ICCPR, the earlier warnings about ceiling effects need to be borne in mind. The general phrasing of Article 7 is open-textured enough to be read as applying to a range of conduct that is wider than that covered by the definition of torture in Article 1(1) of CAT, as it may end up being interpreted. Ceiling effects may be a particular concern where one legal instrument concretizes more generally worded rights in another instrument. This is because the dynamic in interstate negotiation towards a lowest common denominator consensus is strongest when the text on which agreement is being sought is more detailed.

59. *See* CERD, *supra* note 31.

60. *See* ICCPR, *supra* note 3, arts. 2(1), 3, 26. Article 2(1) states that:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Id. art. 2(1).

Article 3 further states, "The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant." *Id.* art. 3.

Additionally, Article 26 states:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Id. art. 26.

61. *See* ICESCR, *supra* note 4, arts. 2(2) ("The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."), 3 ("The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.").

relationship of the Convention on the Elimination of Discrimination Against Women (CEDAW)⁶³ to the ICCPR and ICESCR, to the extent that one looks at generally worded provisions regarding women in the latter treaties and assumes that the main thrust of the provisions on sex discrimination primarily concerns discrimination against women. Similarly, general concepts relating to the protection of children found in Article 10(3) of the ICESCR⁶⁴ and Article 24 of the ICCPR⁶⁵ can be said to have been given more concrete form in many, if not all, of the rights in the CRC.⁶⁶

D. Particular Forms of Universal Rights

In discussing the relationship between the general and concrete, this article spoke of the grounds of nondiscrimination serving as general norms from which concrete elaboration could proceed, notably in CERD, CEDAW, and the CRC. Another aspect of the relationship between the general and the concrete exists, however, and is better captured by the notion of the relationship between the "particular" and the "universal."⁶⁷

62. See CRC, *supra* note 31, art. 2(1). This provision reads:

States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

Id.

63. See CEDAW, *supra* note 31.

64. See ICESCR, *supra* note 4, art. 10(3). This provision reads:

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

Id.

65. See ICCPR, *supra* note 3, art. 24. Article 24 reads:

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

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

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

Id.

66. This is quite apart from the extent to which the CRC can be viewed as one aspect of elaborating the norm prohibiting age discrimination, which is not expressly mentioned in the Covenants but is covered by the words "other status" in the Covenants' antidiscrimination clauses. See ICESCR, *supra* note 4, art. 2(2); ICCPR, *supra* note 3, arts. 2(1), 26. For the text of these provisions, see *supra* notes 61 & 60, respectively.

67. See SEYLA BENHABIB, *SITUATING THE SELF: GENDER, COMMUNITY, AND POSTMODERNISM IN CONTEMPORARY ETHICS* 148–77 (1992) (developing extensively the general/concrete dialectic along lines this article wishes to discuss in terms of the universal/particular).

The struggle for human rights can be studied by focusing on both *what* interests and *whose* interests human rights protect. From the time that human rights initially emerged as a self-conscious discourse of entitlement in moral debate and international relations, the question of *who* has *what* human rights has been intimately related to underlying, broader debates. These debates address what interests are worthy of protection in the name of freedom and who is worthy of recognition in the name of equality.⁶⁸ The history of the concept of human rights law has been, to a significant extent, a history of the gradual, piecemeal inclusion of different groups within the universalistic rubric of "human."⁶⁹

This kind of equality claim might be understood as part and parcel of the deeper structure of human rights. Many recent and current international standard-setting activities involve the attempt to cluster rights in terms of their holders, or beneficiaries, and only secondarily in terms of the interests protected.⁷⁰ The interests protected are specified or derived based on the particular interests of different subgroups of humanity. In the inter-treaty context, CEDAW (women's rights) and the CRC (children's rights) illustrate this clustering trend. CERD is a little more difficult to categorize in this way because the norms on racial discrimination are phrased in universal terms in such a way that any person could potentially be a victim in any national context. However, this formalistic textual approach only somewhat undercuts the primary focus of CERD scrutiny, which is generally understood to be those racial or ethnic groups who are in a position of relative powerlessness (usually minorities but not always). The key point to be made is that the evolution of the international standard-setting process is testimony to the idea that the perspectives and interests of "others" can become part of the evolution of the very content of rights. As the meaning of standards are not set in stone, there is a continuous need for the interpretive process to take into account this dynamic.

The first aspect of the particularization of the universal relationship—

68. See Craig Scott, *Indigenous Self-Determination and Decolonization of the International Imagination: A Plea*, 18 HUM. RTS. Q. 814, 815 (1996).

69. This is not to deny that there are continuing and shifting structures of exclusion.

70. See, e.g., Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, adopted 18 Dec. 1992, G.A. Res. 47/135, U.N. GAOR, 47th Sess., 92d plen. mtg., Annex, U.N. Doc. A/Res/47/135/Annex (1992), reprinted in 32 I.L.M. 911 (1993); Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO No. 169), adopted 27 June 1989, 72 ILO OFFICIAL BULL. 59 (entered into force 5 Sept. 1991), reprinted in 28 I.L.M. 1382 (1989); Framework Convention for the Protection of National Minorities, opened for signature 1 Feb. 1995, Europ. T.S. No. 157 (entered into force 1 Feb. 1998), reprinted in 34 I.L.M. 351 (1995); Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women ("Convention of Belém do Pará"), adopted 9 June 1994, OAS/Ser.L.V/II.92/doc.31/rev.3 (1994), reprinted in 33 I.L.M. 1534 (1994).

the formal equality aspect—sees particularistic treaties as vehicles for straightforward access by a particular group to universal rights that either have, in principle, excluded that group or have, in practice, been applied restrictively. Hence, Article 12(1) of the CRC accords a “child capable of forming his or her own views the right to express those views freely in all matters affecting the child,”⁷¹ and Article 12(2) prescribes the “opportunity to be heard in any judicial and administrative proceedings affecting the child.”⁷² Each of these can be said to be concretizations of general norms found in the ICCPR, Article 19 (freedom of expression) and Article 14 (fair trial), but they are also extensions of norms that had not, for the most part, been considered even in principle as including children.⁷³ In a similar vein, much of CEDAW could be read as making even more explicit that which is already explicit in the Covenants, namely that women enjoy the same human rights as men. In that sense, CEDAW could be seen simply as concretizing general norms such that, for example, the health rights of women are just a specific form of the right of everyone to health. Such a view of the effect of CEDAW would be too anodyne, however, given that in practice women have not received an equality of attention that would allow access to the same rights as men. Here, one can see CEDAW as an exercise in combating gender discrimination within human rights discourse itself.

There is, furthermore, a second aspect of particularization of the universal—the substantive equality aspect—which is not captured by the idea of inclusion in the same rights.⁷⁴ Not every group has precisely the same interests that need protecting or promoting in the name of the general purposes that animate human rights doctrine (relieving suffering, respecting human dignity, and so on). Thus, universal rights do not have to mean that everyone has the same rights, or at least the same concrete rights. Children have rights to forms of support and educational protections that adults do not. Women have certain rights in relation to reproductive matters that men do not. Quite apart from biological differences, human rights law is full of contextual differences in the applicability of concrete rights that are related to the social circumstances of a particular group. An aboriginal community may have certain rights within Article 27 of the ICCPR⁷⁵ related to land and

71. CRC, *supra* note 31, art. 12(1).

72. *Id.* art. 12(2).

73. The threatening nature of the inroads being made in the name of children’s equality is clear when one notes the qualifications appearing at the end of both Article 12(1) and 12(2). See *id.* arts. 12(1), 12(2).

74. For a brilliant discussion of the nature of “formal” and “substantive” equality, see Porter, *supra* note 27.

75. See ICCPR, *supra* note 3, art. 27 (“In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.”).

natural resources because of the way the environment ties into their cultural or community survival needs. Some of these rights may have a property rights dimension. These are still human rights even if there is no general (non-treaty) right to property in international human rights law and even if most other communities cannot make exactly the same claim because they do not have a similar mix of cultural, spiritual, and economic ties to the land base and resources. On a related front, socially and economically disadvantaged groups (especially as amalgamated into the compendious group, "the poor") are, according to the evolving jurisprudence of the Committee on Economic, Social and Cultural Rights, entitled to a priority of attention that gives them a special call on scarce state resources, including (indeed, especially) during fiscally tough times.⁷⁶ All of these instances of substantive equality tied to differential rights can still be formulated in terms of both abstract general values and detailed generalizable rules such that their pedigree as human rights is unquestionable. That does not, however, detract from the basic point that, in a given context and for a given time period, members of one group may have concrete rights that others do not need. The crucial implication is the desirability of understanding the particular in light of the universal, and vice versa.

E. Intersectionality

Lastly, there are intersectional relations among norms that are a by-product of the experience of persons who belong to more than one group that is systemically disadvantaged.⁷⁷ Intersectionality is a term developed by North American "critical race theory" scholars wishing to relate feminist analysis to the experience of different women, whose experience of being a woman is not universal and whose prescriptions for combating sexism are also not universal.⁷⁸ In the context of the situation of black women in the United

-
76. See General Comment No. 3, U.N. ESCOR, Comm. on Econ., Soc. & Cult. Rts., 5th Sess., U.N. Doc. E/1991/23 (1990), reprinted in *ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK* 442 (Asbjørn Eide et al. eds., 1995).
77. There is much in common here with Lamarche's advocacy of contextualized "global interdependence." See LAMARCHE, *supra* note 12, at 158. Knowledge of intersectional experience enhances the quality of interdependence analysis.
78. See generally Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139; Kimberlé Crenshaw, *Whose Story Is It Anyway? Feminist and Antiracist Appropriations of Anita Hill*, in *RACE-ING JUSTICE, EN-GENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY* 402 (Toni Morrison ed., 1992) [hereinafter Crenshaw, *Whose Story Is It Anyway?*]; Nitya Iyer, *Categorical Denials: Equality Rights and the Shaping of Social Identity*, 19 QUEEN'S L.J. 179 (1993); Nitya Duclos, *Disappearing Women: Racial Minority Women in Human Rights Cases*, 6 CAN. J. WOMEN & L. 25 (1993).

States, Professor Kimberlé Crenshaw described intersectionality and its legal significance in the following compelling terms, worth reproducing at some length:

The particular experience of black women in the dominant cultural ideology of American society can be conceptualised as intersectional. Intersectionality captures the way in which the particular location of black women in dominant American social relations is unique and in some senses unassimilable into the discursive paradigms of gender and race domination. One commonly noted aspect of this location is that black women are in a sense double-burdened, subject in some ways to the dominating practices of both a sexual hierarchy and a racial one. In addition to this added dimension, intersectionality also refers to the ways that black women's marginalization within dominant discourses of resistance limits the means available to relate and conceptualize our experiences as black women Underlying the legal parameters of racial discrimination are numerous narratives reflecting discrimination as it is experienced by black men, while the underlying imagery of gender discrimination incorporates the experience of white women. The particularities of black female subordination are suppressed as the terms of racial and gender discrimination require that we mould our experience into that of either white women or black men in order to be legally recognized The consequences of multiple marginality are fairly predictable—there is simply silence of and about black women. Yet black women do not share the burdens of these elisions alone. When feminism does not incorporate opposition to patriarchy, race and gender politics often end up being antagonistic to each other and both interests lose.⁷⁹

The implications of the idea of intersectionality are potentially rich and complex, but the most basic implication is quite straightforward: normative relationships among human rights located in different treaties, or in different discourses generally, can be fruitfully approached in terms of intersectionality. A few examples will make the point. CEDAW and the CRC would interact intersectionally when their combined mandate focuses on the "girl child." CEDAW and CERD would themselves intersect so as to produce the potential for an analysis in which gender is brought to race and race to gender. Similarly, when the norms in the ICESCR and CEDAW are imagined as in dialogue with each other, women's poverty becomes more visible to *both* committees.

79. Crenshaw, *Whose Story Is It Anyway?*, *supra* note 78, at 404–05.

III. MIGRANT WORKERS' HOUSING UNDER THE EUROPEAN SOCIAL CHARTER: AN EXAMPLE OF MULTIPLE NORMATIVE RELATIONS

It may help at this point to show how one can sometimes see all five normative relations as being relevant to a given area of human rights analysis. As already mentioned, the European Social Charter contains a specific provision designed to protect migrant workers.⁸⁰ In particular, the Committee of Independent Experts (Committee) has created an interesting jurisprudence on the housing rights of migrant workers.⁸¹ The Committee has consistently held that migrant workers have the right to additional measures of state assistance in securing adequate housing.⁸² This has resulted in two lines of case law developed in the face of resistance from some states who have tried to insist that the Social Charter only guarantees a limited right to formal equality in housing, as expressed in Article 19(4)(c), and that this limited guarantee should not be outflanked by interpretations of the Social Charter that are "in the view of these states" unduly expansive.⁸³

80. See *supra* note 44 and accompanying text.

81. Two relatively recent distillations of the Committee's case law have assisted greatly in formulating the following narrative. See DIRECTORATE OF HUMAN RIGHTS, COUNCIL OF EUR., *THE FAMILY: ORGANISATION AND PROTECTION WITHIN THE EUROPEAN SOCIAL CHARTER* ¶¶ 30–40, 45–46, 66–67 (1995) [hereinafter *THE FAMILY*]; LENIA SAMUEL, *FUNDAMENTAL SOCIAL RIGHTS: CASE LAW OF THE EUROPEAN SOCIAL CHARTER* 405–12, 414–25 (1997). One should note that the Committee's "case law" has been produced, to date, through the "conclusions" the Committee adopts after having scrutinized each state's report on compliance during a reporting cycle. The Council of Europe publishes these conclusions cycle-by-cycle. See, e.g., COMMITTEE OF INDEPENDENT EXPERTS OF THE EUROPEAN SOCIAL CHARTER, COUNCIL OF EUR., *CONCLUSIONS XIII-2*, at 19 (1995) (reporting on the second part of the 13th cycle, which took place January to December 1994). To date, the Council of Europe has also periodically published volumes of article-by-article case law digests each called *Case Law on the European Social Charter*. *CASE LAW ON THE EUROPEAN SOCIAL CHARTER* (1982 & Supp. 1 1986 & Supp. 2 1987 & Supp. 3 1993). For ease of reference, the following narrative will, on the whole, limit itself to citations to *The Family*, and to Samuel's work. The reader can then find the further citations to the specific volume of *Conclusions* or *Case Law on the European Social Charter* at the indicated pages in those two secondary sources.

82. See *THE FAMILY*, *supra* note 81, ¶¶ 33–34, 68–70.

83. The relevant provisions of the European Social Charter for the following account are Article 16 ("*The right of the family to social, legal and economic protection*") and Article 19 ("*The right of migrant workers and their families to protection and assistance*"), which read:

Article 16

With a view to ensuring the necessary conditions for the full development of the family, . . . [the] Parties undertake to promote the economic, legal and social protection of family life by such means as . . . provision of family housing . . .

...

Article 19

With a view to ensuring the effective exercise of the right of migrant workers and their families to protection and assistance[,] . . . [the] Parties undertake:

...

The first line of the Committee's case law has insisted that Article 19(4)(c) does not mean that states may be satisfied with treating national and foreign workers the same in law.⁸⁴ Such "equality in law" must be supplemented by an inquiry into whether there is "equality in practice."⁸⁵ For instance, it was indirect discrimination for Norway to require a minimum period of residence in a given town as a precondition to securing low-cost housing, even though this applied to Norwegians and foreign nationals alike.⁸⁶

The second line of European Social Charter case law moves from a focus on the express mention of housing in Article 19(4)(c) to a generous interpretation of Article 19(6), a provision that fails to mention housing at all.⁸⁷ The Committee has invoked the state's duty to promote family reunion (Article 19(6)) as a basis for going beyond the *de facto* (effects-oriented) equality analysis of the actual application and practical impact of specific housing laws required by the line of case law regarding Article 19(4)(c). The result has been an interpretation of Article 19(6) that reads it as requiring a thoroughgoing substantive equality that focuses on the need for protection in the housing realm for foreign workers, whether or not any public housing laws for the population at large even exist.⁸⁸ The Committee reasons that the

(4) to secure for such workers . . . treatment not less favourable than that of their own nationals in respect of the following matters:

...
(c) accommodation;
...

(6) to facilitate as far as possible the reunion of the family of a foreign worker permitted to establish himself in the territory

European Social Charter, *supra* note 6, arts. 16, 19.

84. THE FAMILY, *supra* note 81, ¶¶ 70–78.

85. *Id.* ¶ 74.

86. *Id.* ¶ 75. The Committee noted:

Where a Norwegian municipality imposes a residence requirement, it is easier for Norwegians to fulfil that requirement in the town in which they normally live, creating a "de facto" less favourable situation for a foreigner. While a Norwegian is in a comparable situation if he wishes to move to another town, by definition a migrant worker cannot prove residence in any Norwegian town. These residence requirements, therefore, while formally providing for equality of treatment, create an inequality of substance and are therefore not in keeping with the provisions of the Charter.

Id.

87. See European Social Charter, *supra* note 6, art. 19(6). For the pertinent text of Article 19(6), see *supra* note 83.

88. See THE FAMILY, *supra* note 81, ¶ 94 (quoting COMMITTEE OF INDEPENDENT EXPERTS OF THE EUROPEAN SOCIAL CHARTER, COUNCIL OF EUR., CONCLUSIONS III, at 94 (1973) ("[Article 19(6)] indeed appears to oblige a State which accepts it to take special steps to aid foreign workers to find accommodation, unless conditions on the housing market are such that no steps are necessary.")). See also COMMITTEE OF INDEPENDENT EXPERTS OF THE EUROPEAN SOCIAL CHARTER, COUNCIL OF EUR., CONCLUSIONS VII, at 105 (1981) (stating that the housing shortage in Sweden, particularly of multi-family homes, meant that Sweden was under an obligation to take practical measures with a view to remedying the situation due to the barrier the lack of homes created for foreign workers in finding accommodation and thus in being reunited with their families).

family reunion required by Article 19(6) is inhibited if a worker cannot find housing adequate to meet the needs of the family he hopes to bring to his country of work.⁸⁹ It is worth noting that, beyond adequate housing being a practical consideration for the worker in deciding whether to bring family members to his country of work, some states have actually invoked a migrant worker's lack of adequate housing as a ground for refusing family reunion.⁹⁰

The Committee speaks of the link between family rights and housing rights in terms of the "fundamental importance for family reunion of adequate housing." This justifies the Committee reading Article 19(4)(c) and Article 19(6) in tandem so as "to oblige a state . . . to take special measures to aid foreign workers to find accommodation, unless conditions on the housing market are such that no steps are necessary."⁹¹ This result, a special positive right to housing for migrant workers, is also assisted by the Committee viewing Article 19(6)'s right to family reunion as a concrete manifestation of Article 16's general right to protection of all families, including provision of family housing.⁹² Finally, it is likely that a background consideration that has motivated the Committee is an awareness of the particular needs of migrant workers—a vulnerable group in most European settings. Reasons for their vulnerability include the racism and xenophobia that lie below the surface of otherwise facially neutral housing law provisions and burden even further their struggle for economic survival.

The foregoing narrative of the migrant workers' housing jurisprudence under the European Social Charter has been composed in such a way that elements of the five different normative relations among rights and categories of rights can begin to be discerned. It is of considerable interest that these relations are prominent in the interpretive analysis of a single institution working with a single human rights document. It demonstrates that different angles of vision embedded in different kinds of relationships among rights can be found in many treaties even without drawing on external norms. Yet, the Committee's analysis was arguably contingent on this particular treaty having all of the textual touchstones sufficiently in place so as to permit these five sets of relations to be perceived clearly. However, within the UN human rights treaty order, the relative isolation of

89. See *THE FAMILY*, *supra* note 81, ¶ 95.

90. An example of this is Norway. See *SAMUEL*, *supra* note 81, at 421 ("The Committee criticised Norway for making suitable housing a prerequisite for family union while at the same time preventing the worker from applying for family housing as long as he was living alone in the country.") (citing *COMMITTEE OF INDEPENDENT EXPERTS OF THE EUROPEAN SOCIAL CHARTER, COUNCIL OF EUR., CONCLUSIONS IV*, at 126 (1975); *COMMITTEE OF INDEPENDENT EXPERTS OF THE EUROPEAN SOCIAL CHARTER, COUNCIL OF EUR., CONCLUSIONS V*, at 136 (1977)).

91. *THE FAMILY*, *supra* note 81, ¶¶ 94, 96.

92. *Id.* ¶ 81.

these same normative touchstones could result in a very different analysis unless inter-treaty institutional dialogue were a conscious feature of the analysis of each treaty body having a purchase on some dimension of the housing rights issue.⁹³

IV. FINAL COMMENTS: FROM NORMATIVE RELATIONS TO INSTITUTIONAL RELATIONS

The concluding sentence of the last subsection hinted at a theme that has been implicit in this entire article but has been deliberately avoided to this point: imagined, or virtual, dialogues among human rights norms across received categories find their real world analogue in the institutional dialogues among the different bodies charged with interpreting various categories of human rights. The consequences of rethinking social rights are thus not limited either to some abstract sphere of scholarly reflection or to the reasoning processes within any given international human rights treaty body. Rather, relations among norms and normative instruments also have implications for institutional relations. If one knows that it is desirable in some respects to think of norms relationally and holistically rather than as completely discrete norms to be understood and applied in isolation from each other, one should wish to see the institutions primarily charged with presumptively different categories of norms interacting in such a way that each can understand its interpretive mandate in its fullest sense.⁹⁴ This is doubly the case because most norms arguably fall within more than one category even within the current categorizations—such that it can often be detrimental to think in categorical terms even as a starting point for analysis.

Viewed in this way, problems emerge if institutional relations are such that, to take the extreme case, six different UN human rights committees look at related health matters from the perspective of their own treaty's mandate without locating that perspective dialogically (in relation to the mandates of the other treaties). Thus, an integrated consideration of rights is desirable whenever useful and possible. This is not to say that such

93. Every committee (except the CAT) would seem to have a strong interest in this issue, and would be joined in that shared interest upon the addition of whatever institution may be assigned the role of overseeing the Migrant Workers Convention, which has yet to enter into force. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, *adopted* 18 Dec. 1990, G.A. Res. 45/158, U.N. GAOR, 45th Sess., Agenda Item 12, U.N. Doc. A/RES/45/158 (1991) (*opened for signature* 2 May 1991), *reprinted in* 30 I.L.M. 1517 (1991).

94. See Jennifer Nedelsky & Craig Scott, *Constitutional Dialogue*, in *SOCIAL JUSTICE AND THE CONSTITUTION: PERSPECTIVES ON A SOCIAL UNION FOR CANADA* 59, 64 (Joel Bakan & David Schneiderman eds., 1992).

integrated consideration does not occur, in degrees, in the work of international human rights bodies. It is only to say that it is not much encouraged. Institutional interaction is a necessary part of such encouragement. Thus, for example, the interdependence of human rights in the two Covenants implies the desirability of cooperative interaction approximating joint elaboration of the norms in the ICCPR and ICESCR.⁹⁵ This is not the occasion to pursue this crucial link between normative relations and institutional relations. Instead, that project is underway in two other articles in which arguments can be found for institutional reform of the way in which the UN human rights treaty bodies interact, including an argument for moving toward *de facto* institutional integration of the six treaty bodies through cooperative institutional experimentation.⁹⁶

-
95. See Scott, *supra* note 7, at 847–50. “Inter-Committee ‘cross-fertilization’ may help create a symbiotic relationship *between the Covenants*, and may foster subtler, more sophisticated and more creative understandings of human rights and their interrelationships.” *Id.* at 849 (emphasis added).
96. See Craig Scott, *Bodies of Knowledge: A Diversity Promotion Role for the UN High Commissioner for Human Rights*, in *THE FUTURE OF UN HUMAN RIGHTS MONITORING* (Philip Alston & James Crawford eds., forthcoming 1999); Craig Scott, *Towards the Institutional Integration of the Core Human Rights Treaties*, in *LINKING THE DOMESTIC AND THE INTERNATIONAL: ECONOMIC, SOCIAL AND CULTURAL RIGHTS* [provisional title] (Valerie Oosterveld et al. eds., forthcoming 2000).