

# THE INTERDEPENDENCE AND PERMEABILITY OF HUMAN RIGHTS NORMS: TOWARDS A PARTIAL FUSION OF THE INTERNATIONAL COVENANTS ON HUMAN RIGHTS<sup>©</sup>

BY CRAIG SCOTT\*

Using the doctrine of interdependence of human rights as a starting point, the author considers the extent to which international human rights norms located in the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) "permeate" the parallel *International Covenant on Civil and Political Rights* (ICCPR), thereby permitting certain social and economic rights to be subjected to the individual petition procedure under the ICCPR's Optional Protocol. After elucidating the notion of interdependence, the author evaluates the salience of the concept in international human rights discourse, and weighs this against arguments for the continued normative separation of the Covenants based on justiciability as well as normative and jurisdictional conflicts. The author argues that a partial normative unity should be forged between the two Covenants by means of creative interpretation and by the forging of institutional linkages between the supervisory organs for the two Covenants. In light of the permeability presumption thus developed, the author then concludes with an analysis of decisions taken by the Human Rights Committee in the areas of equal protection of the law, the right to a fair hearing, freedom of association, and the right to life.

---

<sup>©</sup> Copyright, 1989, Craig Scott.

\* B.A. (McGill), B.A. (Oxon.), LL.M. (London/LSE), LL.B. (Dalhousie), Assistant Professor, Faculty of Law, University of Toronto. This is a revised version of an essay submitted in partial fulfilment of the LL.M. at the University of London. I would like to thank Marie Chen and Michelle Leighton for their assistance in typing and proofreading the original version and the editors of the *Journal* for their painstaking editorial assistance. I also wish to thank Professor Rosalyn Higgins of the London School of Economics for her helpful comments. Any errors or inadequacies remain my responsibility. The research for this article is up-to-date as of April 1988.

I. INTRODUCTION .....	771
II. SITUATING THE HUMAN RIGHTS COMMITTEE ..	772
III. THE INTERDEPENDENCE AND PERMEABILITY OF HUMAN RIGHTS .....	778
A. <i>The Concept of Interdependence</i> .....	779
1. Related and organic interdependence .....	779
2. Interdependence and social meaning .....	786
B. <i>Interdependence and the Two Covenants: Did         Separation Imply Separability?</i> .....	791
1. The reasons for separate instruments .....	791
2. The place of the principle of interdependence ...	798
3. The balance between centrifugal and centripetal forces .....	811
C. <i>The Recent History and Present Context of the         Principle of Interdependence</i> .....	814
1. The 1968 <i>Proclamation of Tehran</i> and General Assembly Resolution 32/130 of 1977 .....	815
2. The current context: 1986 and 1987 .....	819
3. The interpretative relevance of the extra- covenant context .....	826
IV. BARRIERS TO PERMEABILITY .....	831
A. <i>The Justiciability Misconception</i> .....	832
B. <i>Normative and Jurisdictional Overlaps and Conflicts</i> ..	841
V. PERMEABILITY UNDER THE ICCPR .....	850
A. <i>Article 26: Equal Protection of the Law</i> .....	851
B. <i>Article 14(1): The Right to a Fair Hearing</i> .....	860
C. <i>Article 22(1): Freedom of Association</i> .....	869
D. <i>Article 6(1): The Right to Life</i> .....	875

## I. INTRODUCTION

The *interdependence* of human rights is a term that is increasingly prominent in international human rights discourse. In particular, the notion of interdependence has assumed growing importance within the political organs of the United Nations (UN).<sup>1</sup> Even so, as with much ritualistic language, our conceptions of the meaning and implications of the concept are largely inchoate.

The idea of *permeability* is put forward as one means of giving practical legal effect to the abstract doctrine of interdependence which has, thus far in its lifespan, existed as little more than a rhetorical slogan. By permeability I mean, in broad outline, the openness of a treaty dealing with one category of human rights to having its norms used as vehicles for the direct or indirect protection of norms of another treaty dealing with a different category of human rights. Norms that overlap, either implicitly as a product of the interpretative process or explicitly on the face of the textual provisions, are particularly relevant.<sup>2</sup>

The specific goal of this article is to consider the extent to which human rights norms located in the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) can permeate the norms in the *International Covenant on Civil and Political Rights* (ICCPR). Such permeability would permit economic rights to be subjected to the supervisory jurisdiction of the ICCPR's Human Rights Committee, specifically its Optional Protocol jurisdiction. Thus, individuals would be given access to a petition procedure that is not available under the ICESCR, restricted as it is to a reporting system of implementation.<sup>3</sup>

---

<sup>1</sup> See the most recent General Assembly resolution entitled "[I]ndivisibility and interdependence of economic, social, cultural, civil and political rights" (Resolution 41/117 of 4 December 1986). This resolution is briefly discussed in Section (hereinafter S.) III.C.2. See S.III.A.1 for an elaboration of the concept of interdependence.

<sup>2</sup> I would like to express my appreciation to Professor Rosalyn Higgins for coining this term. The definition, elaboration and application of the term remain my responsibility alone.

<sup>3</sup> For the ICESCR, ICCPR and Optional Protocol, see Council of Europe, *Human Rights in International Law: Basic Texts* (Strasbourg: Council of Europe Publications, 1985) [hereinafter *Basic Texts*] at 14, 26 and 49, respectively. Permeability, therefore, refers in the present context to the flow of norms from the ICESCR to the ICCPR. A study of the flow

The doctrine of interdependence can serve as a starting point for developing a general interpretative presumption for permeability. The separation of the two Covenants does not mean that the human rights norms contained therein are separable. Instead, a partial normative unity can be gradually forged between the Covenants, by means of creative interpretation and by the forging of institutional linkages between the Human Rights Committee and the new Committee on Economic, Social and Cultural Rights.<sup>4</sup> Such a process is more in keeping with the insights and imperatives of the interdependence of human rights than is the continued isolation of the two Covenants from each other.

## II. SITUATING THE HUMAN RIGHTS COMMITTEE

This study attempts to deal with the general issue of permeability by using the ICCPR and the ICESCR as expository

---

of norms from the ICCPR to the ICESCR is also desirable, but remains outside the scope of this article.

It must be emphasized that the terms *economic rights* and *political rights* are used purely for convenience. Furthermore, the term *economic rights* does not include commercial economic liberty rights or classical property rights; rather, it refers to the very different breed of economic, social and cultural rights found in the ICESCR. In the *Canadian Charter of Rights* context, academic commentators and the judiciary tend to use the term *economic rights* indiscriminately. For an article sensitive to the difference, see I. Johnstone, "Section 7 of the Charter and Constitutionally Protected Welfare" (1988) 46 U.T. Fac. L. Rev. 1.

<sup>4</sup> The new Committee was established by Economic and Social Council (ECOSOC) Resolution 1985/17 of 28 May 1985: see ECOSOC, *Selected Resolutions and Decisions of the Economic and Social Council Relating to the Implementation of the International Covenant on Economic, Social and Cultural Rights*, UN Doc. E/C. 12/1987/1 (17 December 1987) at 11. See S.III.C.2 and S.IV.A. For an overview of the new Committee, see P. Alston, "Out of the Abyss: The Challenges Confronting the New UN Committee on Economic, Social and Cultural Rights" (1987) 9 Hum. Rts. Q. 332 [hereinafter Alston, "Out of the Abyss"]. See also P. Alston & B. Simma, "First Session of the UN Committee on Economic, Social and Cultural Rights" (1987) 81 Am. J. Int. L. 747, as well as P. Alston & B. Simma, "Second Session of the UN Committee on Economic, Social and Cultural Rights" (1988) 82 Am. J. Int. L. 603. For the new Committee's reports, see *Committee on Economic, Social and Cultural Rights: Report on the First Session* (9-27 March 1987), U.N. ESCOR, 1987, Supp. (No. 17), U.N. Doc. E/1987/28 and *Report on the Second Session* (8-26 February 1988), U.N. ESCOR, 1988, Supp. (No. 4), U.N. Doc. E/1988/14. The Human Rights Committee was established under Article 28 of the ICCPR (ICCPR 28). By Article 1 of the Optional Protocol, it may consider communications from individuals alleging violations of rights in the ICCPR by States Parties to the Protocol.

vehicles. However, specific attributes of the Covenant system may render it more or less conducive to permeability than is the case with other legal systems, whether they be international or domestic. The analysis must be sensitive to these attributes, although not slavishly so.<sup>5</sup>

This issue is as topical as it is important. The Human Rights Committee has had to deal directly with the permeability question in a number of views handed down from its 1986 and 1987 sessions, on issues such as whether economic rights from the ICESCR may be protected indirectly by the Article 14 fair hearing and the Article 26 equal protection provisions of the ICCPR.<sup>6</sup> Increasingly challenging and controversial claims may soon follow, such as arguments for directly incorporating the right to an adequate standard of living, found in Article 11 of the ICESCR, into the right to life found in Article 6 of the ICCPR.<sup>7</sup> Bold as the Committee has been in its most recent cases on Article 26, the possibility exists that it will draw a hasty and ultimately arbitrary line: for example, by distinguishing the

---

<sup>5</sup> For example, Article 38, Part III of the European Social Charter, 18 Oct. 1961, Gr.Brit.T.S. 1965 No. 38, 529 U.N.T.S. 89, contains the following reference: "It is understood that the Charter contains legal obligations of an international character, the application of which is submitted solely to the supervision provided for in Part IV thereof." The ICESCR, on the other hand, contains no comparable article. Clearly the presence of this provision introduces a factor into the analysis of permeability within the Council of Europe system which will not apply as regards the UN Covenant system. This is not to suggest that this factor need be determinative, as will become apparent from my reference to some relevant European Convention of Human Rights cases. Also, in a series of Indian Supreme Court cases, economic rights contained among the Directive Principles of State Policy of Part IV of the Indian Constitution have been implied into the political rights, or Fundamental Rights, of Part III despite the presence of an express non-justiciability clause governing the Directive Principles. The non-justiciability clause of the Indian Constitution is Article 37, which reads: "The provisions contained in this Part (IV) shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws."

The "Council of Europe system" refers to the European Convention on Human Rights [hereinafter ECHR] and the European Social Charter [hereinafter ESC]: see Council of Europe, *Basic Texts*, *supra*, note 3 at 101 and 146, respectively. For the Constitution of the Republic of India, 1949, see A.P. Blaustein & G. H. Flanz, eds, *Constitutions of the Countries of the World*, vol. VII (Dobbs Ferry, New York: Oceana Publications, 1986) at 14 (of insert issued June 1986).

<sup>6</sup> See Ss.V.A and B for discussion of these decisions. The Committee's decisions are known as *views*: see Optional Protocol 5(4), *supra*, note 3.

<sup>7</sup> See Ss.III.B.1 and V.D for a discussion of this relationship.

direct protection from the indirect protection of economic rights, and by seeking refuge in inadequate conceptions of non-justiciability. This article seeks to forestall such retrenchment and, viewed in more positive terms, to lay the groundwork for a deeper and more dynamic interaction between the two Covenants.

Furthermore, the interpretation placed on the ICCPR is of considerable significance for the law and politics of human rights in Canada. With regard to the interpretation of rights in the *Charter of Rights and Freedoms*, the Supreme Court of Canada has emphasized the persuasive authority of interpretations placed by international quasi-judicial organs on international human rights treaties to which Canada is party. Regardless of the evolution of the Human Rights Committee's own jurisprudence, the theoretical insights of the notions of interdependence and permeability may be independently called in aid before the Canadian courts.<sup>8</sup> Nor should it be ignored that Canada can be directly impleaded under the ICCPR communication procedure. Indeed, two of the recent permeability cases decided by the Committee involved Canada.<sup>9</sup> Also, given that Canada appears to treat seriously the Committee's technically non-

---

<sup>8</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c.11. For a recent overview, see J. Claydon, "The Use of International Human Rights Law to Interpret Canada's Charter of Rights and Freedoms" (1987) 2 *Conn. J. Int. L.* 349. For the most forceful and articulate exposition to date of the relevance and role of international human rights law in *Charter* interpretation, see the dissent of Chief Justice Dickson (Wilson, J. concurring) in *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 [hereinafter the *Alberta Reference*] at 348-59, especially at 349. An argument for interpreting the human right to education into s. 7 of the *Charter* may be found in A.W. MacKay & G. Krinke, "Education as a Basic Human Right: A Response to Special Education and the Charter" (1987) 2 *Can. J. of Leg. Stud.* 73.

<sup>9</sup> Probably the most well-known case involving Canada is *Sandra Lovelace v. Canada* (Communication No. 24/1977) in United Nations, *Human Rights Committee: Selected Decisions Under the Optional Protocol (Second to Sixteenth Sessions)* (United Nations, 1985) 83 [hereinafter *Lovelace*]. The only statistics available to me reveal that, as of 31 July 1982, there were 35 communications involving Canada, a figure only surpassed by Uruguay (55): United Nations, *HRC: Selected Decisions*, *ibid.* at 158. It is my understanding that Canada remains the second most impleaded country under the Optional Protocol. The two permeability cases involving Canada are *Y.L. v. Canada* (Communication No. 112/1981) HRC 1986 Report, and *J.B. et al. v. Canada*, HRC 1986 Report 151. *J.B. et al. v. Canada* is the ICCPR version of the *Alberta Reference*, *supra*, note 8. The Human Rights Committee handed down its admissibility decision in that case prior to the release of the Supreme Court of Canada decision.

binding views, Canadian lawyers should be aware of the possibilities of international human rights law.<sup>10</sup>

The following inquiry may appear to take for granted a relevance and authority of international human rights law that, taken in isolation, would be suspect. Isolation could take two forms: first, the isolation of law and legal action from broader social and political processes; and second, the isolation of international law from municipal legal and socio-political activity.

On the first count, consider the experience of social-action or public-interest lawyers who have sought to use the legal process to vindicate claims for welfare rights. The primary value of the so-called legalization of welfare is that it allows marginalized and relatively powerless persons in society to use litigation as a strategic tool in the social struggle for their right to be human.<sup>11</sup> There can be no doubt that "in the field of social welfare, the courts alone are most unlikely to be a useful vehicle for achieving social change.... The most important potential role for legal challenge can be that it can politicize issues by forcing them into the arena of political debate."<sup>12</sup> One facet of this approach is that rights can be used as banners in the assertion of political claims. It has been suggested that welfare rights that are enshrined in constitutional and statutory instruments in Latin America, but that have remained underenforced

---

<sup>10</sup> It appears that *An Act to Amend the Indian Act* (1985) S.C. 1984-85-86, c. 27, was enacted in response to the Human Rights Committee's finding of a violation of the ICCPR in *Lovelace, ibid.*

<sup>11</sup> See U. Baxi, "From Human Rights to the Right to be Human: Some Heresies" (1986) 13 *Ind. Int'l Q.* 185 [hereinafter "From Human Rights"] and E. Sparer, "Fundamental Human Rights, Legal Entitlements, and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement" (1984) 36 *Stan. L. Rev.* 509 [hereinafter "Fundamental Human Rights"]. Both Baxi and Sparer have been active in constitutional litigation seeking vindication of the rights of the poor. See also, E. Sparer, "The Right to Welfare" in N. Dorsen, ed., *The Rights of Americans* (New York: Pantheon Books, 1971) at 65, and U. Baxi, "Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India" in R. Dhavan, R. Sudarshan & S. Khurshid, eds, *Judges and the Judicial Power (Essays in Honour of Justice V.R. Krishna Iyer)* (London: Sweet and Maxwell, 1985) at 289 [hereinafter Baxi, "TSS"]. In footnote 65, Baxi says: "We here modify Professor Dworkin's felicitous title *Taking Rights Seriously* (1977). Perhaps, in a context like India's, one may not take rights seriously if one is unable to take suffering seriously."

<sup>12</sup> T. Prosser, *Test Cases for the Poor: Legal Techniques in the Politics of Social Welfare* (London: Child Poverty Action Group, 1983) at 83, 85. See also R. Hayes, "Litigating on Behalf of Shelter for the Poor" (1987) 22 *Harv. C.R.-C.L.L. Rev.* 79.

for decades, have been seized upon in precisely this instrumental fashion to assist in empowering persons deprived of those rights.<sup>13</sup> And in what has been termed an "establishment revolution,"<sup>14</sup> the Indian Supreme Court has actively endorsed the creative interpretation of constitutional rights as part of the broader struggle of poverty-stricken Indian citizens to improve their living conditions.<sup>15</sup> However, it is debatable whether international treaty norms, and the interpretations placed on them, have sufficient social rootedness for this instrumental use of human rights to transcend mere manipulation of the poor.<sup>16</sup>

With this caveat in mind, the second type of isolation takes on importance. The ultimate test of the efficacy of international human rights law is its link-up with municipal courts and other social and political fora. Philip Alston has emphasized the domestic context in discussing the report-monitoring system of the new Committee on Economic, Social and Cultural Rights.<sup>17</sup> It is no less crucial for the Human Rights Committee to be perceived, and to perceive itself, as playing a similar "secondary or supportive role."<sup>18</sup>

---

<sup>13</sup> See R. Plant, "The Right to Food and Agrarian Systems: Law and Practice in Latin America" in P. Alston & K. Tomasevski, eds, *The Right to Food* (The Hague: Martinus Nijhoff, 1984) at 187.

<sup>14</sup> U. Baxi, "TSS," *supra*, note 11 at 306. This is Rajeev Dhavan's term. Whether the Supreme Court's activism is penetrating downwards and having any kind of empowering effect is impossible to say at this stage. What is worthy of note is the conscious attempt to identify with the poor.

<sup>15</sup> See Bhagwati, "Public Interest Litigation" (1986) 2 *The Commonwealth Law* 61; Bhagwati, "Human Rights as evolved by the jurisprudence of the Supreme Court of India" (1987) 13 *Commonwealth L. Bull.* 236. In "Human Rights," Bhagwati refers (at 244) to the public interest litigation strategy of "making basic human rights meaningful and effective for the deprived and exploited sections of humanity."

<sup>16</sup> One may note the fact that the Universal Declaration of Human Rights [hereinafter UDHR] has served as moral authority for the introduction of new constitutional provisions in various countries: see Commission on Human Rights, *Preliminary Study of Issues Relating to the Realization of Economic and Social Rights*, UN Doc. E/CN.4/988 (20 January 1969) at 144. Indeed, the Canadian *Charter of Rights and Freedoms*, *supra*, note 8, must be viewed in this light. As well, the *Helsinki Final Act* of 1975 serves as a banner in certain Eastern European countries. For the UDHR and the *Helsinki Final Act*, see Council of Europe, *Basic Texts*, *supra*, note 3 at 7 and 226, respectively.

<sup>17</sup> Alston, "Out of the Abyss," *supra*, note 4 at 357.

<sup>18</sup> *Ibid.*

Some states will directly apply views decided against them even though they are under no direct legal obligation to do so, but, for those that do not or that only partially do,<sup>19</sup> progress depends on domestic courts treating the Committee's views as authoritative or persuasive, as well as on political campaigners invoking the Committee's considered opinions.<sup>20</sup> Such effects are unlikely to occur unless the Committee is scrupulously conscious that its authority will derive not only from the increasing sophistication of its decisions, but also from the extent to which its interpretations appeal to the needs of those most deprived of the means of being human and tap into more modern understandings of certain rights that have evolved since the drafting of the Covenants.<sup>21</sup>

Alston suggests that governments may be encouraged by the non-adversarial approach of the new Committee to apply traditional judicial implementation techniques to economic rights.<sup>22</sup> But this essay proceeds on the premise that, so great is the shibboleth of the non-justiciability of these rights, many governments will not move in such a direction unless shown the way by force of judicial example (the Human Rights Committee and domestic courts) or political pressure. The Committee's views are indeed structured so that appropriately disposed governments may see them as non-adversarial, constructive suggestions that help elucidate human rights obligations. But for those governments less inclined towards such a good faith, co-operative approach, a conceptualization of the

---

<sup>19</sup> See C. Tomuschat, "Human Rights in a World-Wide Framework: Some Current Issues" (1985) 45 Z. ausl. off. R. u. VR. 547 at 578, where he discusses how some governments faithfully heed the Committee's views while others choose to insist on their non-binding character.

<sup>20</sup> *Ibid.* See also A. Brudner, "The Domestic Enforcement of International Covenants on Human Rights: A Theoretical Framework" (1985) 35 U. Toronto L.J. 219, in which Brudner argues for reliance on Committee decisions because of the Committee's objectivity, impartiality and expertise. While Brudner seems to see authority as stemming from distance or abstraction from the social context, I take the opposite view that authority derives primarily from proximity to social context: see S.III.A.2. The latter perspective exhibits scepticism in its recognition that major obstacles to the efficacy and relevance of international human rights law are created by the very detached nature of that body of law.

<sup>21</sup> See the discussion in S.V.D on the modern concept of the right to life, and citations in note 386.

<sup>22</sup> Alston, "Out of the Abyss," *supra*, note 4 at 357.

municipal link-up must permit the government to be seen as an adversary in a broader social and political struggle. As will be discussed in later sections, the Committee can be seen both as a catalyst, as described above, and as an elaborator of the content of those obligations derived from economic rights that judicial or quasi-judicial bodies are competent to supervise.<sup>23</sup>

A final observation: this article proceeds from the premises that we all perceive the light of reason through different prisms of value, and that legal interpretation, especially in the human rights arena, is a value-laden activity that should not be cloaked by the pretence of value neutrality. If we are to take human suffering seriously,<sup>24</sup> we must also consider seriously the fact that the poorest and most vulnerable members of all societies suffer most from deprivations of both political and economic rights. It is therefore the marginalized among us who would benefit most from concrete legal action premised on the notion of the interdependence of human rights. A first step at the international level would be to begin to break down the artificial separation of the two leading universal human rights instruments by means of a permeability presumption.

### III. THE INTERDEPENDENCE AND PERMEABILITY OF HUMAN RIGHTS

In this section, I will first examine the possible analytical meanings of the concept of interdependence and corresponding kinds of permeability, and will then speculate on the purchase in social experience and meaning that the interdependence notion might have. I will undertake a detailed analysis of the UN General Assembly's decision to separate the Covenants, in order to determine whether this decision meant that the norms in the two

---

<sup>23</sup> *Ibid.* at 351. Alston points out that the content of the ICESCR was not based upon any significant bodies of domestic jurisprudence as was the case with civil and political rights found in the ICCPR. In such a situation, elaboration at the international level will have a far greater role to play. See the discussion in Ss.IV.A and IV.B on the respective roles of the two committees in elaborating obligations attaching to economic rights.

<sup>24</sup> Recall Baxi, "TSS," *supra*, note 11 at n. 65.

instruments were separable. Finally, I will look at the recent and current status of the principle of interdependence.

A. *The Concept of Interdependence*

1. Related and organic interdependence

The standard expression of the interrelationship among human rights in UN parlance takes the following form: "[A]ll human rights and fundamental freedoms are indivisible and interdependent."<sup>25</sup> While it might appear that "indivisible" and "interdependent" must have distinct meanings, an overview of the relevant General Assembly resolutions warns against tying too much to semantics.<sup>26</sup>

Even so, interdependence may be understood as having two senses: organic and related interdependence. In the *organic rights* sense (organic interdependence), one right forms a part of another right and may therefore be incorporated into that latter right. From the organic rights perspective, interdependent rights are inseparable or indissoluble in the sense that one right (the core right) justifies

---

<sup>25</sup> See Article 1(a) of UN General Assembly Resolution 32/130, "Alternative approaches and ways and means within the UN system for improving the effective enjoyment of human rights and fundamental freedoms" (16 December 1977); Preamble to Resolution 41/117, *supra*, note 1; and Preamble and Article 6(2) of UNGA Resolution 41/128, *Declaration on the Right to Development* (December 1986).

<sup>26</sup> In the Preamble to Resolution 32/130, *ibid.*, the phrase is "interrelated and indivisible," while in Article 13 of *The Proclamation of Tehran, 1968*, Final Act of the International Conference on Human Rights, Tehran, U.N. Doc. A/CONF. 32/41, "indivisible" is used by itself. In the earliest resolutions invoking the concept – those dealing with the question of whether to have one or two covenants – the wording is "interconnected and interdependent": see UNGA Resolution 421(V), "Draft International Covenant on Human Rights and Measures of Implementation: Future Work of the Commission on Human Rights" (4 December 1950) and UNGA Resolution 543 (VI), "Preparation of two Draft International Covenants on Human Rights" (5 February 1952). These resolutions will be discussed in Ss.III.B.1 and 2. Commentators invariably use the two terms interchangeably, with a preference for "interdependence," although this observation is only impressionistic: see T. Van Boven, "Distinguishing Criteria of Human Rights" in K. Vasak & P. Alston, eds, *The International Dimensions of Human Rights*, vol. I (Westport, Conn.: Greenwood Press, 1983) at 43; Van Boven only uses "indivisibility."

the other (the derivative right).<sup>27</sup> To protect right *x* will mean directly protecting right *y*. *Organic* or *direct permeability* may accordingly be seen as the direct protection of an ICESCR right because that right is incorporated into, or is part of, a particular right in the ICCPR.

To take a central example, that of the relationship between ICCPR 6(1) and ICESCR 11(1), the question is whether the "right to life" can be interpreted to include a "right to an adequate standard of living,"<sup>28</sup> various aspects of the latter right thus falling to be adjudicated in the name of the former. If sustainable, such an interpretation generates an implicit overlap between the two articles, raising issues of normative and jurisdictional conflict which must be addressed before a presumption for permeability can be established.<sup>29</sup> A second example of organic permeability, involving some degree of explicit overlap, is the relationship between ICCPR 22 on freedom of association and ICESCR 8 on various trade union rights.<sup>30</sup>

---

<sup>27</sup> *Annual Report of the Inter-American Commission of Human Rights, 1985-1986* OAS/Ser.L/V/II.68, Doc 8 rev. 1, 26 September 1986, 197-98. The Commission uses language that takes interdependence to a holistic extreme: "[T]he two categories of rights constitute an indissoluble whole."

For a discussion of the notions of core and derivative rights, see J. Raz, "On the Nature of Rights" (1984) 93 *Mind* 194 at 197-99. Raz notes at 197:

Just as rights are grounds for duties and powers so they can be for other rights. I shall call a right which is grounded in another right a derivative right. Non-derivative rights are core rights. The relation between a derivative right and the core right (or any other right) from which it derives is a justificatory one.

It should be noted that I have used "core right" more broadly than Raz. I have used the term in the sense of a grounding right, which may itself be a derivative of another right.

<sup>28</sup> ICCPR 6(1), *supra*, note 3, reads: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." ICESCR 11(1), *supra*, note 3, reads:

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

<sup>29</sup> See S.IV.B where these issues are discussed.

<sup>30</sup> See S.V.C.

Furthermore, two kinds of organic interdependence might be distinguished in theory. First, the *logical* or *semantic entailment* conception argues, for example, that for the right to an adequate standard of living (ICESCR 11(1)) to form part of the right to life (ICCPR 6(1)), the former derivative right must be a more specific form of the latter general core right. The relationship is one of logical entailment.<sup>31</sup> Second, the *effectivist* or *foundational* conception asserts, for example, that the right to an adequate standard of living is part of or is justified by the right to life because the effectiveness of the latter right depends on it. The goal is to render rights meaningful and non-illusory. The relationship is justificatory in nature.<sup>32</sup>

That the two senses of organic interdependence are watertight is doubtful. The logically necessary sense retains its integrity only as part of an internally consistent view of the nature of the interpretative enterprise. In other words, it is only by virtue of a highly restrained and historicist view of interpretation that the right to an adequate standard of living in ICESCR 11(1) cannot be incorporated into the right to life in ICCPR 6(1). If, as a first step, the right to life is narrowly defined (for instance, as a right not to be violently deprived of one's life by state agents), then what can be

---

<sup>31</sup> Judge Sir Gerald Fitzmaurice has, in several dissents in cases before the European Court of Human Rights, advanced what I call logical or semantic entailment as the test for implying a right. In the *Golder Case* (1975), 1 E.H.R.R. 524, (*sub nom. Golder v. United Kingdom*) Ser. A, No. 18 [hereinafter *Golder*, cited to E.H.R.R.], he said:

[A]n interpretation ... needs to have a positive foundation in the convention that alone represents what the parties have agreed to – a positive foundation either in the actual terms of the convention or in inferences necessarily to be drawn from these – and the word "necessarily" is the decisive one [at 563, para. 32].... The *eiusdem generis* rule ... requires that, if any implications are to be drawn from the text for the purpose of importing into it, or supplementing it by, something that is not expressed there, ... these implications should be, or should relate to, something of the same order, or be in the same category of concept, as figures in the text itself.... As has already been pointed out, the concept of the incidents of a trial has only one necessary implication, *viz.* that a trial is taking place – that proceedings are in progress. It implies nothing in itself about the right to initiate them, which belongs to a different order of concept [at 573-74, para. 47].

<sup>32</sup> Raz specifically denies that the analytical core/derivative notion means the logical entailment of rights: "The relation of core and derivative rights is not that of entailment, but of the order of justification." *Supra*, note 27 at 198. It will readily be apparent that what is primarily at issue is a different understanding of what form of *necessity* is required in order that one right be implied or incorporated into another.

semantically derived from this core right is limited by that narrow definition.<sup>33</sup> A different view of the interpretative task would produce a different starting point. A wider range of derivative rights would semantically flow from the right to life if that right were more purposively or teleologically defined in the first place. For instance, if the core right to life is interpreted according to an arguably more modern conception,<sup>34</sup> so as to be understood as the right to live or the right to a quality life, the right to an adequate standard of living can logically be entailed by the core right. Thus, value choices can submerge the distinction between the logical entailment conception and the effectivist conception of interdependence.

Interdependence may also be understood in its *related rights* sense (related interdependence), according to which the rights in question are mutually reinforcing or mutually dependent, but

---

<sup>33</sup> See the exchange between (Sir) James Fawcett and Judge Fitzmaurice mentioned in the pleadings of the *National Union of Belgian Police Case* (1975), Eur. Court H.R. Ser. B, No. 17 at 238-42, for a clash between an effectivist and a semanticist.

Such semantic arguments are related not only to certain theories of legal interpretation but also to certain philosophical theories. Jack Donnelly has argued that implication of rights may run up against the *instrumental fallacy*: "Simply because A requires X to enjoy R does not entail that A has a right to X ... [T]he instrumental necessity of X for the enjoyment of A's right R does not establish that A has a right to X." See J. Donnelly, "In Search of the Unicorn: The Jurisprudence and Politics of the Right to Development" (1985) 15 Cal. W. Int. L.J. 473 at 485. Donnelly was arguing against deriving the right to development from the right to self-determination. However, while logically true, it is historically inaccurate in the international human rights field. Economic rights were articulated, in part, because the significance of other more classical human rights depended on them. Instrumental necessity, then, has been treated as a good reason to recognize rights and can equally be treated as a good reason for implying a right. Logical entailment falls outside the terms of debate. I owe these points to Professor Vojin Dimitrijevic's comments at a conference entitled "Development, Environment and Peace as Human Rights: Is Calling Them Rights a Useful Strategy Toward Their Achievement?" (Oxford, 29 May-31 May, 1987) [unpublished]. It should further be noted that the instrumental fallacy appears to argue against *mandatory* entailment of rights by virtue of instrumental necessity. This also falls outside the terms of debate because of the value-laden nature of the interpretative arguments being advanced in this article. A fundamental premise is that choices are involved. My argument is not that the Human Rights Committee *must* adopt certain interpretations, but that the Committee *should* do so.

<sup>34</sup> See *infra*, notes 386 and 387.

distinct.<sup>35</sup> With related interdependence, rights are treated as equally important and complementary, yet separate. To protect right *x* will indirectly protect right *y*. *Related* or *indirect permeability* may be viewed as distinct from organic permeability because it involves the question of whether a right in the ICCPR *applies to* a right in the ICESCR, and not whether this latter right is *part of* the former right. The political right is an autonomous right that can beneficially affect economic rights, but, in invoking the political right, no determination is made about the level of provision or adequacy of respect for the economic right as such. Two examples will clarify the point.

First, ICCPR 14(1) entitles a person to a fair and public hearing "in the determination ... of his rights and obligations in a suit at law...."<sup>36</sup> The topical question is whether "suit at law" can include public law proceedings involving social welfare rights and, if so, which proceedings and which rights.<sup>37</sup> The application of procedural due process, or principles of fundamental (procedural) justice in the Canadian context, is a complex and vast topic. The only point in this article is that a presumption for permeability should be a weighty but rebuttable consideration. For the purpose at hand, any protection of economic rights offered by ICCPR 14(1) would be indirect.

Second, there is the ICCPR 26 equal protection clause. It will be examined in some detail later.<sup>38</sup> For present expository purposes, the question is whether "equal protection of the law" applies to rights in the ICESCR. The Human Rights Committee has recently answered this question in the affirmative,<sup>39</sup> with the result that these rights will now receive the indirect protection of the autonomous

---

<sup>35</sup> Interdependence suggests a mutual reinforcement of rights, so that they are more valuable together, as a complete package, than a simple summation of individual rights would suggest; for example, having civil and political rights but not economic and social rights is not "half a loaf" but substantially less.

J. Donnelly, *The Concept of Human Rights* (New York: St. Martin's Press, 1985) at 96.

<sup>36</sup> See S.VI.B for citation and discussion.

<sup>37</sup> See discussion in S.V.B.

<sup>38</sup> See S.V.A.

<sup>39</sup> *Ibid.*

ICCPR 26.<sup>40</sup> There is, furthermore, an implicit overlap with ICESCR 2(2); this might be viewed as an organic overlap in that ICCPR 26 arguably has incorporated and is directly protecting ICESCR 2(2).<sup>41</sup>

The terms *related* and *organic* rights have not been randomly chosen. They emerged from a concrete permeability situation before the organs of the European Convention on Human Rights, involving the issue of whether elements of Article 6 of the European Social Charter, including the right to strike, could be incorporated into Article 11(1) of the Convention.<sup>42</sup> In the *National Union of Belgian Police Case*,<sup>43</sup> the European Commission of Human Rights interpreted ECHR 11(1) as a "hybrid" right, containing elements of "a traditional liberal right or civil liberty, and an economic right."<sup>44</sup> This fact meant that ECHR 11(1)'s language did "not exclude a construction to the effect that certain obligations with respect to trade union freedom may be incumbent upon the State, even in its capacity as an employer."<sup>45</sup> In implying a right to consultation into ECHR 11(1), the Commission had this to say:

---

<sup>40</sup> "Autonomous" in the sense that it is not tied to other articles as is ECHR 14(1).

<sup>41</sup> For the text of ICESCR 2(2), see *infra*, note 299.

<sup>42</sup> ECHR 11(1), in *Basic Texts*, *supra*, note 3, provides: "Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests."

ESC 6, in *Basic Texts*, *supra*, note 3, lays down:

With a view to ensuring the effective exercise of the right to bargain collectively, the Contracting Parties undertake:

- 1) to promote joint consultation between workers and employers;
- 2) to promote, where necessary and appropriate, machinery for voluntary negotiations between employers or employer's organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements;
- 3) to promote the establishment and use of appropriate machinery for conciliation and voluntary arbitration for the settlement of labour disputes; and recognise:
- 4) the right of workers and employers to collective action in cases of conflict of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into.

<sup>43</sup> *National Union of Belgian Police v. Belgium* (1975), 1 E.H.R.R. 578.

<sup>44</sup> Report of the European Commission of Human Rights on Application No. 4464/70, Eur. Court H.R. Ser. B, No. 17, *National Union of Belgian Police Case* at 48, para. 59.

<sup>45</sup> *Ibid.* at 48, para. 60.

[I]t cannot be denied that one of the fundamental elements of the right to take trade union action is the trade union's *right to protect the economic and social rights of its members*. Is it not by means of consultation machinery and, in a more general context, collective bargaining, that the union will be able to do so? <sup>46</sup>

However, a dissenting minority took issue with this approach:

[W]hat may be called *neighbouring or related rights*, such as the right to collective bargaining, voluntary/compulsory conciliation and arbitration or the right to strike, do not come within the scope of the concept [of trade union freedom of association].... Without freedom of association these rights would not exist or at least [would] be of no practical value. They may be exercised and utilised effectively only where freedom of association is properly safeguarded but they do not ... form part of the very concept of freedom of association but are rather to be seen as an extension of such freedom. <sup>47</sup>

To complete the development of our conceptual framework, we must finally refer to the subsequent arguments before the European Court (by the Commission's Principal Delegate, James Fawcett), which were designed to counter the minority's invocation of the idea of related rights:

[I]n the exercise of Convention rights and freedoms, we may often find other rights involved which may on the one hand be called neighbouring or related rights yet separate. Or, on the other hand, they are organic or necessary to the exercise of the Convention rights and freedoms, so that even if they are not stated expressly in the Convention they [are] to be understood as being there. Now this *distinction between what I would call neighbouring rights or related rights and organic or essential rights* again must be carefully kept. The fact that rights in either group may be dealt with separately in various instruments is not decisive for their character. <sup>48</sup>

Fawcett and the Commission majority thus saw ESC 6 rights as essential to making ECHR 11(1) non-illusory – that is, as organic to ECHR 11(1) – and at the same time saw ECHR 11(1) not only as

---

<sup>46</sup> *Ibid.* at 53, para. 72 [emphasis added].

<sup>47</sup> Separate Opinion of Mr. Kellberg with which Messrs Sperduti, Welter, Mangan and Polak concurred, *ibid.* at 61, para. 4 [emphasis added].

<sup>48</sup> Verbatim Report of the public hearings of the *National Union of Belgian Police Case*, *supra*, note 33 at 229 [emphasis added]. Fawcett, at 236, added:

... I believe it to be there, because we may either say that it is necessary to the protection of the interests of the individual members; in other words, it is what I have tried to describe as an organic or essential right and not merely an incidental one; or it can be regarded as necessary in general to secure the objects of freedom of association. I believe it would be possible to approach it in either way. The majority opinion in the Commission ... takes perhaps the second course. But I believe both courses are open.

an end in itself but as related to the indirect protection of other economic rights apart from ESC 6 – that is, as a related right.<sup>49</sup>

## 2. Interdependence and social meaning

Upendra Baxi has forcefully argued: "[T]here is an immeasurable distance between what we call 'human rights' and the right of all [to be] human.... This distance can begin to be traversed only if we claim the audacity to look at the human rights models from the standpoint of the historically oppressed groups."<sup>50</sup> From the vantage point of the underside of history,<sup>51</sup> 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.

Two points cannot be over-emphasized. First of all, the point of reference, in this discussion as well as in international human rights law, 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 and nurtured in isolation. It is not meant to create the impression of relationships between rights as entities with some kind of objective existence that goes beyond intersubjective understandings. Admittedly, the ideas of related and organic rights are in danger of creating just this impression. It is important to remember that the idea of interdependence has been developed not for the sake of rights but for the sake of persons.

---

<sup>49</sup> Thus, the organic permeability of ECHR 11(1) to ESC 6 rights is in part motivated by ECHR 11(1)'s permeability in relation to other economic rights, which the exercise of trade union freedoms help protect.

<sup>50</sup> Baxi, "From Human Rights," *supra*, note 11 at 199.

<sup>51</sup> As opposed to the mainstream: see G. Gutierrez, *The Power of the Poor in History* (SCM Press, 1983) at 20-21.

Second, to say that the situation of the poor and oppressed in all societies is paradigmatic to the idea of interdependence is only to say that from the social reality of the poor and oppressed emerge dimensions of human need and personhood that other sectors of society ignore or deny.<sup>52</sup> Whether human rights language is the best vehicle to express these deeper human dimensions is a separate and controversial story, but, once rights do find a place in mainstream vocabulary, the notion of interdependence is bound to be imbued with an intensity of experienced meaning that outstrips any purely intellectual understanding.<sup>53</sup> This is especially so if

---

<sup>52</sup> Alston has captured the essence of this:

The situation in Central America today, for example, cannot be adequately or productively analysed without taking full account of both sides of the human rights equation. In this sense, the much vaunted interdependence of the two sets of rights is not simply a hollow United Nations slogan designed to conceal an ideological split but an accurate reflection of the realities of the situation.

"Out of the Abyss," *supra* note 4 at 52.

<sup>53</sup> It is well worth noting the views of non-governmental organizations (NGOs) which are active within the UN. A glance at the NGO contributions to the 1987 session of the Commission on Human Rights under the agenda item dealing with economic rights reveals a striking emphasis on the interdependence of human rights, and of human rights deprivations as fundamental to the experience of the poor in all societies.

ATD Fourth World, known for its involvement with the marginalized in developed as well as developing countries, offers the view of extreme poverty as "a violation of human rights as a whole." Extreme poverty can set off a chain reaction which has a lasting effect in preventing the persons concerned from exercising the rights and responsibilities that are normally attributed in their society. After giving many examples to support this contention, ATD Fourth World's representative made the following appeal:

[T]he situation of families living in extreme poverty shows that the lack of economic, social and cultural rights compromises the civil and political rights which are considered *a priori* as the easiest to guarantee. Their situation forces us to make a closer study of the question of the indivisibility of human rights.... How does it happen that human rights to which, in principle, all human beings are entitled, become in reality rights that cannot be exercised without a minimum of means?... The Commission on Human Rights should have access to the experience of the most underprivileged populations, not only because this is standard democratic procedure but also because *the most poverty-stricken experience situations and draw conclusions that are beyond the conception of persons in a different situation.*

See Father Wresinski, "Extreme Poverty: A Human Rights Challenge of our Time," *Written Statement submitted by the International Movement ATD Fourth World to Forty-third Session of the Commission on Human Rights*, UN Doc. E/CN.4/1987/NGO/2 (8 January 1987) at 2-4 [emphasis added]; see also statements by Pax Romana, International Fellowship of Reconciliation, and the Four Directions Council in Commission on Human Rights, Forty-third Session, Summary Records of the 30th meeting, UN Doc. E/CN.4/1984/SR.30 at 12, 9 and 14, respectively.

human rights are thought of as a collection of socially and historically generated claims designed to recognize or secure deeply held values or perceived interests.<sup>54</sup>

The Human Rights Committee should be concerned that its perspectives on human rights be linked to the social reality of those whose human existence is most threatened. Such linkages might perhaps be thought of in terms of upwards and downwards penetration of meaning. The upwards, experiential penetration of meaning roots human rights and the interpretation of legal norms in social experience. Peter Gabel has said that notions of human rights persist in a culture or in a societal setting as "something like an ethical memory,"<sup>55</sup> even after sight is lost of the historical and social circumstances that first generated the rights. He notes how our tendency to reify rights creates

the illusion that the right to an experience can create the experience itself, and [reverses] the true relationship between the meaning of verbal concepts and the qualitative or lived milieu out of which they arise. From my point of view, the critique of rights is a critique of that reversal; it is aimed at clarifying the possible existential meanings that rights can acquire once their true relationship to existence itself has been understood.<sup>56</sup>

On the other hand, downwards, informational penetration of meaning is similar to what Gabel is concerned about. On this view, information about human rights and the interpretations placed on them can funnel into an empowerment process, when intended beneficiaries of human rights guarantees compare formal, legal reality to their own experience of life.<sup>57</sup> Some critics of the idea of rights tend to understate the value (if only instrumental) of the

---

<sup>54</sup> This dynamic generation of human rights might be seen as a kind of social labelling process. Rights, in formal terms, may be viewed as intermediate conclusions between statements of a right-holder's interests and others' duties: see J. Raz, "Legal Rights" 4 Oxford J. Leg. Studies 5. But, when we look to the content of *human* rights, those statements must be the product of human experience, not abstract from it, if the human rights argued for are to be meaningful to the right-holder.

<sup>55</sup> P. Gabel, "The Phenomenology of Rights – Consciousness and the Pact of the Withdrawn Selves" (1984) 62 Tex. L. Rev. 1563 at 1597.

<sup>56</sup> *Ibid.* at 1598.

<sup>57</sup> This gap can also be disempowering when people cannot see how they might make use of it, or when it is so wide that using legal norms as a point of reference or goal is of limited utility. Symbolic utility might remain: recall the discussion of rights as banners in S.II.

presence of theoretical concepts which, although they may not resonate in a particular society or sector of society, are open to appropriation, transformation, and, ultimately, enrichment. One function of the critique of so-called "bourgeois" rights, for instance, should be to broaden their applicability and significance by bringing to bear the experience and viewpoint of the socially and economically disadvantaged upon the original meaning.<sup>58</sup> Thus, one can envisage a dialectic of sorts between the interpretations placed on rights by the Human Rights Committee, the members of which attempt to adjust their interpretations to the perspective of disadvantaged persons, and the interpretations by disadvantaged persons themselves.

Let this not be taken as a hidden argument for the priority, in value or time, of economic rights. The interdependence concept rests on a very real insight into the need for the promotion in tandem of key rights from both traditional categories. As Alan Gewirth has put it, "[t]he effective distribution of civil liberties, far from being a passive effect of the proper distribution of food, housing, and health care, can strongly facilitate the latter distribution."<sup>59</sup> We have already touched on the indirect defence of positive legal entitlements by way of the right to a fair and public hearing and the right to equal protection of the law. Further, much has been made of the key role of the participation of the poor in the improvement of their own quality of life.<sup>60</sup> Intimately linked to

---

<sup>58</sup> See Sparer, "Fundamental Human Rights," *supra*, note 11, and Baxi, "From Human Rights" and "TSS," both *supra*, note 11. Gabel has recently put more emphasis on this idea: "[A]ppropriation would involve a kind of 'hermeneutic redemption' in which indeterminate abstractions are reinterpreted in accord with their true existential-ontological significance, and I think this is exactly what social movements should do when advancing new constitutional interpretations." See P. Gabel, "P. G. to M. Horwitz: A Letter" (July 1988) CLS, Newsletter of the Conference on Critical Legal Studies 44. See also M. Horwitz, "Rights" (1988) 23 Harv. C.R. - C.L.L. Rev. 393 at 406.

<sup>59</sup> A. Gewirth, *Human Rights: Essays on Justifications and Applications* (Chicago: University of Chicago Press, 1982) at 66.

<sup>60</sup> See, for example, Commission on Human Rights Resolution 1987/21, "Popular participation in its various forms as an important factor in development and in the full realization of all human rights" (10 March 1987) in UN Doc. E/CN.4/1987/L.11/Add.5; P. Alston, "Prevention Versus Cure as a Human Rights Strategy" in *International Commission of Jurists, Development, Human Rights and the Rule of Law* (Toronto: Pergamon Press, 1981) at 55ff.; Commission on Human Rights, *The International Dimensions of the Right to Development as a Human Right*, UN Doc. E/CN.4/1334 (2 Jan. 1979), at 118-30.

participation, which does not find explicit entrenchment in either Covenant in relation to economic and cultural decision-making and institutions,<sup>61</sup> are the rights to freedom of association,<sup>62</sup> to peaceful assembly,<sup>63</sup> to take part in the conduct of public affairs,<sup>64</sup> and to freedom of expression, including the freedom to seek, receive and impart information and ideas of all kinds.<sup>65</sup> It is noteworthy that at least one member of the new Committee on Economic, Social and Cultural Rights, at the March 1987 inaugural session, asserted (in the examination of the Federal Republic of Germany's state report) that the notion of interdependence confers authority on the Committee to ask questions about freedom of speech, to the extent that that freedom affects economic rights.<sup>66</sup>

---

<sup>61</sup> Although, see ICCPR 25, *supra*, note 3: "Every citizen shall have the right and the opportunity ... (a) to take part in the conduct of public affairs, directly or through freely chosen representatives...." This article could be interpreted broadly to include economic decision-making.

<sup>62</sup> *Ibid.*, ICCPR 22(1).

<sup>63</sup> *Ibid.*, ICCPR 21.

<sup>64</sup> *Ibid.*, ICCPR 25(a).

<sup>65</sup> *Ibid.*, ICCPR 19(2). The instrumental linkage is made clear in the following statement: [P]erhaps the strongest influence in preventing the occurrence of famine in India has come from a relatively free press.... A number of threatened famines have failed to materialise precisely because of this "political early warning system".... If ... it is correct to think that information is both politically and morally extremely important, then the need to give publicity to less dramatic but more widespread misery must be seen as crucial. The politicisation of the issue may be essential for a rapid solution and may well be deeply dependent on the media.

A. Sen, "Famine and Fraternity" *London Rev. Books* (3 July 1986) 6 at 6-7.

<sup>66</sup> See *CESCR: Report on the First Session*, *supra*, note 4 at para. 227. There were several other examples of questions which overlapped with the ICCPR articles at the new Committee's first session. For example, questions about family reunification were asked under ICESCR 10 (on protection of the family), which clearly raises freedom-of-movement issues found in ICCPR 12 as well as a direct overlap with ICCPR 17 and 23. Questions were put to state representatives about popular participation. Consent, or choice, elements that are explicitly part of certain ICESCR articles, like Art. 6(1) on the right to work or Art. 10(1) on the right to marry, were carried over to articles where the choice element is not explicit: for example, Art. 11(1) and the right to housing. One member of the new Committee suggested that it should address whether it or the Committee for the Elimination of All Forms of Discrimination Against Women should focus on the question of discrimination against women as regards rights in the ICESCR. The above account is from my observation of the session.

*B. Interdependence and the Two Covenants: Did Separation Imply Separability?*

This section examines why there are two Covenants rather than one, and evaluates the significance of this division for the role of interdependence as the linchpin of the permeability presumption. The division of the Covenants was accompanied by a strong endorsement both of the interdependence of the human rights distributed between them, and of the unity of purpose of the treaties. Since the decision to draft two Covenants, the concept of interdependence has been gaining strength. It will be argued that the way has been cleared for a legal principle that derives from the idea of interdependence, and that also respects the reasons for the separation of the Covenants to the extent that those reasons remain valid.

1. The reasons for separate instruments

The formal history of how there came to be two Covenants has been dealt with in some detail elsewhere, and will only be briefly recounted here in order to set the scene for an analysis of the substantive debates.<sup>67</sup> It was decided early on, at the second (1947) session of the Commission on Human Rights, that three working groups would simultaneously draft a declaration, a single treaty, and measures of implementation for that treaty, all of which would constitute an International Bill of Human Rights.<sup>68</sup> The Universal Declaration of Human Rights was drafted and adopted by 1948, and contained essentially the entire range of human rights being championed at the time. At its sixth (1950) session, the Commission decided that the Draft Covenant that they had been working on, which contained only so-called civil and political rights,

---

<sup>67</sup> In particular, see the accounts in General Assembly, *Annotations on the Text of the Draft International Covenants on Human Rights*, 10 UN GAOR Annexes (Agenda Item 28, Pt.II), UN Doc.A/2929 (1955) [hereinafter *Annotations*] at 2-5; and F. Jhabvala, "On Human Rights and the Socio-Economic Context" (1984) *Neth. Int. L. Rev.* 149 at 153-60.

<sup>68</sup> *Annotations, ibid.* at 2.

would be the first in a series, and that the so-called economic, social and cultural rights would therefore not be included.<sup>69</sup> But despite the fact that in Resolution 303 C (XI) the Economic and Social Council (ECOSOC) had just approved the Commission's decision not to include economic rights,<sup>70</sup> ECOSOC also, in Resolution 303 I (XI), requested the General Assembly to make "policy decisions" regarding, among other matters, the desirability of including economic rights in the Draft Covenant.<sup>71</sup> This was apparently the result of a push by the Soviet bloc and some developing states. The General Assembly then adopted Resolution 421 E (V) (1950), which provided that the Covenant would include economic rights.<sup>72</sup>

However, in the following year some Western states, along with some developing states, went on the offensive. At the Commission's seventh (1951) session, India proposed that the Assembly be asked to reconsider the Unity Resolution because "economic, social and cultural rights, though equally fundamental and therefore important, formed a separate category of rights from that of civil and political rights, in that they were not justiciable rights, and that the method of their implementation was, therefore, different."<sup>73</sup> This was voted down and the Commission went on to draft fourteen articles on economic rights, but left the decision hanging as to which measures of implementation would apply to which parts of the Covenant.<sup>74</sup> Subsequently, in ECOSOC, the United States, the United Kingdom, Belgium, India and Uruguay seized on this implementation quandary and succeeded in having Resolution 384 C (XIII) adopted. That Resolution requested the Assembly to reconsider the Unity Resolution because of the problems of placing

---

<sup>69</sup> *Ibid.* at 3.

<sup>70</sup> *Ibid.*; ECOSOC Res. 303 C (XI) (9 August 1950).

<sup>71</sup> *Annotations, ibid.* at 6; ECOSOC Res. 303 I (XI) (9 August 1950).

<sup>72</sup> Res. 421 E (V), *supra*, note 26 [hereinafter the Unity Resolution].

<sup>73</sup> See Commission on Human Rights, Report of the Seventh Session, 13 UN ESCOR, Supplement 9 at 15, para. 67, UN DOC.E/1992 (1951). See Jhabvala, *supra*, note 67 at 155, n. 24.

<sup>74</sup> See Jhabvala, *ibid.* at 155.

rights and obligations of "different kinds" in a single instrument.<sup>75</sup> In the Assembly, despite a pre-emptive attempt by Chile to have the Unity Resolution reaffirmed, Resolution 543 (VI) (1951) was adopted stating that two Covenants, for the two supposed categories of human rights, would be drawn up.<sup>76</sup>

The subsequent treaties, which opened for signature in 1966 and went into force in 1976, contained differently worded obligations and different implementation machinery. The ICESCR provides in Article 2(1) for an obligation based on a principle of progressive realization.<sup>77</sup> Part IV lays down provisions for ECOSOC to supervise state reports, a function only recently taken on by the new Committee on Economic, Social and Cultural Rights.<sup>78</sup> On the other hand, the ICCPR provides for a so-called immediate obligation in Article 2(1) "to respect and to ensure" the rights in that Covenant.<sup>79</sup> A report procedure is also laid down in its Part IV and a special treaty body, the Human Rights Committee, is charged with supervision of that procedure. Of central importance, however, is the vesting of jurisdiction in the Committee, under the Optional Protocol, to consider communications from individuals.<sup>80</sup> Ultimately, it is the lack of a similar petition procedure in the ICESCR that is the concern of this study.

---

<sup>75</sup> *Ibid.*

<sup>76</sup> *Annotations, supra*, note 67 at 5; Res. 543 (VI), *supra*, note 26 [hereinafter the Separation Resolution].

<sup>77</sup> ICESCR 2(1), *supra*, note 3, reads:

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

<sup>78</sup> ICESCR 16-22, *supra*, note 3. See *supra*, note 4 and Ss.IV.A and B for a discussion of the new Committee on Economic, Social and Cultural Rights.

<sup>79</sup> ICCPR 2(1), *supra*, note 3, reads:

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.

<sup>80</sup> See Optional Protocol 5(1) and 5(4), *supra*, note 3.

A survey of various UN debates leading up to the decision of the General Assembly to allocate human rights between two instruments reveals three broad categories of reasons for the separation.<sup>81</sup>

(1) *Implementation-based reasons:*

Human rights, it was consistently contended, could be classified into two categories according to their different natures. It was carefully stated that no hierarchy of importance or priority of attention resulted from this division. But the series of differentiating features or dichotomies<sup>82</sup> which were said to flow from these different natures was argued to render one category (those rights that appear in the ICESCR) non-justiciable, and therefore susceptible to different procedures of implementation from those rights which appear in the ICCPR.<sup>83</sup>

---

<sup>81</sup> The main *travaux préparatoires* surveyed were General Assembly, Third Committee, Fifth Session, Summary Records of the 297th to 299th, 306th, 312th, 313th Meetings UN Docs.A/C.3/SR.297-99, 306, 312, 313 (1950); Economic and Social Council, Thirteenth Session, Summary Records of the 522nd to 525th Meetings, UN Docs. E/SR.522-525 (1951); General Assembly, Third Committee, Sixth Session, Summary Records of the 387th to 396th Meetings, UN Doc.A/C.3/SR.387-396 (1952); General Assembly, Sixth Session, 374th and 375th Plenary Meetings, A/PV.374-375 (1952). Hereinafter, citations will be by the state whose delegate has spoken, followed by page number/paragraph number. For a generally complementary view of the reasons for separation of the Covenants, see Jhabvala, *supra*, note 67 at 153-69. Less detailed treatments are to be found in T. Van Boven, *supra*, note 26 at 49-52; V. Pechota, "The Development of the Covenant on Civil and Political Rights" in L. Henkin, ed., *The International Bill of Rights: The Covenant on Civil and Political Rights* (New York: Columbia University Press, 1981) at 41-43; Foreign and Commonwealth Office (United Kingdom), "The Balance Between Civil and Political Rights and Economic and Social Rights: Origins of the Human Rights Declaration and Covenants and Subsequent Developments" (Foreign Policy Document No. 127, 1978) at paras. 26-29; A.G. Mower, *International Cooperation for Social Justice: Global and Regional Protection of Economic/Social Rights* (Westport, Conn.: Greenwood Press, 1985) at 15-18.

<sup>82</sup> For a discussion of these dichotomies, see S.IV.A.

<sup>83</sup> See A/C.3/SR.297 (1950) (Canada), 175/42-6; A/C.3/SR.298 (1950) (France), 177/6-7; A/C.3/SR.299 (1950) (India), 186/12-15; E/SR.523 (1951) (India) 400/28-35; E/SR.524 (1951) (US) 406/13-18; E/SR.524 (1951) (Egypt) 407/28; E/SR.524 (1951) (Uruguay) 408/43; E/SR.524 (1951) (Canada) 409/55-7; A/C.3/SR.388 (1952) (US) 244/41; A/PV.374 (1952) (US) 504/80-87; A/PV.374 (1952) (India) 506/106-7; A/PV.375 (1952) (Mexico) 514/19, 21.

(2) *Ideological or political reasons:*

It is significant that the period following the Second World War saw international politics and ideology join hands as never before, and that the Cold War, as well as the Korean conflict,<sup>84</sup> were well under way at the time of the separation debates. One writer refers to the "conventional wisdom" that the division of the Covenants occurred because of the East-West split in international politics and the accompanying ideological disagreement over the value of economic rights.<sup>85</sup> While delegations did not expressly invoke such political grounds as an explanation for their own positions for or against a single covenant, they often asserted that such reasons were behind the positions of other states. A survey of the pattern of these attacks suggests a general East-West axis (mostly East to West),<sup>86</sup> although some developing countries' representatives targeted either East or West as pursuing scarcely veiled ideological agendas.<sup>87</sup>

(3) *Pragmatic reasons:*

A rather eclectic collection of arguments was advanced, amounting to practical considerations in favour of two covenants. Sometimes the caveat was added that "in principle" the delegation in question would be in favour of including all human rights in a single treaty.<sup>88</sup>

---

<sup>84</sup> FCO (UK), *supra*, note 81 at 29; Pechota, *supra*, note 81 at 42.

<sup>85</sup> D. Forsythe, Book Review of *International Cooperation for Social Justice: Global and Regional Protection of Economic/Social Rights*, by A.G. Mower (*supra*, note 81) (1986) 8 Hum. Rts. Q. 540.

<sup>86</sup> See A/C.3/SR.297 (1950) (Poland) 174/39; A/C.3/SR.258 (1950) (Ukraine.S.S.R.) 182/56; A/C.3/SR.313 (1950) (Czech.) 59/45; A/C.3/SR.293 (1952) (Byel.SSR); A/C.3/SR.394 (1952) (Ukraine.SSR) 280/14; A/C.3/SR.395 (1952) (USSR) 285/3; A/PV.374 (1952) (USSR) 509/136; A/PV.375 (1952) (USSR) 515/35.

<sup>87</sup> See A/C.3/SR.299 (1950) (Saudi Arabia against "colonial powers") 187/28; A/C.3/SR.299 (1950) (Syria against "colonial powers") 55/6; A/C.3/SR.312 (1950) (Lebanon against Soviet bloc) 255/62; A/PV.374 (1952) (Chile against "industrial countries") 502/58; A/PV.374 (1952) (Philippines against political motives in general) 511/151.

<sup>88</sup> For example, A/C.3/SR.297 (1950) (Brazil) 171/5.

Some of the main arguments were:

- (i) the concern that the world community was expecting quick results and that devoting the requisite attention to economic rights would produce too great a delay;<sup>89</sup>
- (ii) the related concern that the articles on economic rights drafted to that point needed considerable reworking, whereas the political rights were, for the most part, already expressed satisfactorily;<sup>90</sup>
- (iii) the reminder that any covenant had to be generally acceptable to the large majority of UN members, so that it could be ratified and enter into force;<sup>91</sup>
- (iv) the concern that the work of specialized agencies, notably the International Labour Organisation, might be overlapped and duplicated if economic rights were included;<sup>92</sup> and
- (v) the view that two instruments were desirable because virtually all states would be willing to sign at least one.<sup>93</sup>

It should be noted that the practical concern with delay was also invoked by proponents of a single covenant, to express concern

---

<sup>89</sup> See A/C.3/SR.297 (1950) (US) 172/17; A/C.3/SR.297 (1950) (UK) 174/34; A/C.3/SR.299 (1950) (India) 186/10; A/C.3/SR.299 (1950) (Israel) 187/24; A/C.3/SR.299 (1950) (UNESCO) 188/37-38; A/C.3/SR.312 (1950) (Lebanon) 255/65; A/C.3/SR.388 (1952) (US) 244/41.

<sup>90</sup> See A/C.3/SR.297 (1950) (New Zealand) 172/12; A/C.3/SR.298 (1950) (France) 177/2; E/SR.523 (1951) (Belgium) 399/21.

<sup>91</sup> See A/C.3/SR.297 (1950) (Brazil) 171/9; A/C.3/SR.298 (1950) (Greece) 179/27; A/C.3/SR.298 (1950) (I.L.O.) 181/45; A/C.3/SR. 312 (1950) (Lebanon) 255/65; E/SR. 524 (1951) (Uruguay) 408/46; A/C.3/SR.395 (1952) (China) 286/10.

<sup>92</sup> See A/C.3/SR.298 (1950) (Greece) 179/24; A/C.3/SR.298 (1950) (I.L.O., appealing to need for general acceptability) 181/42,45; A/C.3/SR.298 (1950) (Belgium); 181/47; E/SR.523 (1951) (Belgium) 398/15-17. On the role of the I.L.O., see P. Alston, "The United Nations' Specialized Agencies and Implementation of the International Covenant on Economic, Social and Cultural Rights" (1979) 18 *Colum. J. Transnat'l. L.* 79. Mr. Cassin of France said that he "did not believe that a unilateral warning against encroaching on the sphere of action of the I.L.O. was enough": A/C.3/SR.299 (1950) 189/46.

<sup>93</sup> See A/C.3/SR.393 (1952) (Philippines) 274/31-33; A/C.3/SR.396 (1952) (Sweden) 294/17.

that separation could result in the postponement or even the cancellation of plans for a second instrument on economic rights.<sup>94</sup>

One notable feature of the three categories of reasons for separation<sup>95</sup> is that they are not watertight.<sup>96</sup> Political motives can easily be dressed up in different language and, in any case, are intimately related to other sincere stances. Debates on implementation measures belie ideological predispositions, for instance. The focal point of debate was the implementation question, but, as Farrokh Jhabvala puts it:

[I]t is clear from the record that all Soviet-bloc states backed the idea of one comprehensive covenant, while all Western-bloc states supported the separation of the sets of rights into different treaties, thus making clear the ideological and political importance the decision was perceived as having.<sup>97</sup>

In addition, the acceptability concern is not necessarily pragmatic at all. It was linked to the idea that political rights were somehow more universal than economic rights.<sup>98</sup> It was also transparently related to the warnings by some states, notably the United States, that they would not sign or ratify an instrument

---

<sup>94</sup> See A/C.3/SR.298 (1950) (Mexico); E/SR.525 (1951) (USSR) 414/8 which was directly replied to at E/SR.525 (1951) (US) 417/41. Rejoinder at E/SR.525 (1951) 418/48 (USSR).

<sup>95</sup> It should be said that the categories are compatible with those of Farrokh Jhabvala who has conducted the only other detailed analysis of the separation issue: Jhabvala, *supra*, note 67 at 157-58. My description of the implementation-based reasons for separation was deliberately cursory, as this will be discussed in detail in the section on the justiciability of economic rights: see S.IV.A. The only point to note at the moment is that state delegations at times treated the justiciable/non-justiciable distinction as simply one of several differences between the two sets of rights, but, in fact, justiciability is an umbrella concept that sums up the effect of the various dichotomies which are thought to differentiate the rights. Thus, justiciable/non-justiciable is an umbrella or meta-dichotomy which is directly tied to different systems of implementation. The above-quoted proposal by India in the Commission on Human Rights in 1951 clearly shows the link: see *supra*, note 73.

<sup>96</sup> The best example of this is the fact that they were often invoked at the same time, as when Lebanon referred to all three at A/C.3/SR.312 (1950) 255/60-66.

<sup>97</sup> Jhabvala, *supra*, note 67 at 159.

<sup>98</sup> A/C.3/SR.297 (1950) (New Zealand) 172/13.

containing economic rights.<sup>99</sup> The irony remains, of course, that the United States has yet to ratify either Covenant.

As well, language used by some states when linking the different natures of human rights to implementation called into question the relative value of economic rights, and even their status as human rights.<sup>100</sup> Partly as a result, certain other states openly expressed a suspicion that some Western states were deliberately using separation to prevent the adoption of any covenant dealing with economic rights.<sup>101</sup> On the other side of the coin, Soviet-bloc states took the position that no special treaty regime of implementation was doctrinally acceptable, least of all one involving individual petitions and a quasi-judicial role. As a result, the credibility of their arguments for a single covenant was seriously compromised.<sup>102</sup>

## 2. The place of the principle of interdependence

I turn from the reasons for the separation to examine how the idea of interdependence emerged from the debates. There is no doubt that the concept was very frequently invoked across the spectrum. The proponents of a single covenant<sup>103</sup> tended early on in the debate to emphasize one side of the equation: that political

---

<sup>99</sup> See A/C.3/SR.393 (1952) (Philippines referring to India, Belgium, the US, and Lebanon serving notice that they would only sign a covenant with only civil and political rights) 274/32. See also FCO(UK), *supra*, note 81 at 29; Pechota, *supra*, note 81 at 41, 42; J. Humphrey, *The United Nations and Human Rights* (Toronto: Canadian Institute of International Affairs, 1963) at 10 (cited in FCO (UK), *ibid.*).

<sup>100</sup> See A/C.3/SR.297 (1950) (Canada: economic rights were "advantages," "social aims," not "human rights in the narrow sense") 174/5/45-47; E/SR.524 (1951) (US: "objectives to be attained", "rights") 406/13-18; E/SR.524 (1951) (Canada) 409/55-57.

<sup>101</sup> See *supra*, note 86.

<sup>102</sup> See A/C.3/SR.299 (1951) (China) 185/6 and A/C.3/SR.394 (1951) (Ukraine S.S.R.) 280/13 for examples of this position. See E/SR.525 (1951) (India) 415/16 and A/C.3/SR.394 (1951) (Lebanon) 280/18 for criticisms.

<sup>103</sup> Among the most forceful and eloquent of whom were Third World delegations such as Chile, and not only Soviet-bloc states.

rights were meaningless or ineffective without economic rights.<sup>104</sup> This is not surprising, given the context of a concerted push to have economic rights included in a draft covenant that already assured the place of political rights. There were some very one-sided ripostes by proponents of two instruments, amounting to claims that economic rights would naturally follow respect for political rights.<sup>105</sup>

When the separation debate intensified during the campaign to overturn the Unity Resolution, states favouring separation increasingly invoked a more balanced view of interdependence.<sup>106</sup> States favouring a unified instrument exhibited a corresponding, if not greater, tendency to claim a less one-sided version of interdependence.<sup>107</sup> Most crucially, there were some eloquent attempts to sever the link found in Unity Resolution 421 (V) between the interdependence of human rights and the requirement that there be a single covenant containing all those rights, in the

---

<sup>104</sup> Jhabvala, *supra*, note 67 at 158. See A/C.3/SR.297 (1950) (Chile) 176/71; A/C.3/SR.298 (1950) (Mexico) 178/12, 13; A/C.3/SR.298 (1950) (Ukraine SSR) 182/64; A/C.3/SR (1950) (Iraq) 182/64; A/C.3/SR.299 (1950) (Czech.) 187/31; A/C.3/SR.312 (1950) (Mexico) 255/58.

<sup>105</sup> See A/C.3/SR.297 (1950) (Brazil) 171/9; A/C.3/SR.298 (1950) (Greece) 179/20. But see A/C.3/SR.297 (1950) (UK) 174/34 and A/C.3/SR.299 (1950) (Israel) 187/25 carefully asserting a two-way view of interdependence. However, the next year, the UK asserted a more one-dimensional view of interdependence, thus showing the vicissitudes of relying on *travaux préparatoires*: A/C.3/SR.390 (1952) 251/3. Israel was notable for its consistently held views on the fluid divisions between the two sets of rights: see especially Memorandum submitted by Israel, 6 UN GAOR, Annexes (Agenda item 29), UN Doc.A/C.3/565 (1952).

<sup>106</sup> See A/C.3/SR.388 (1952) (US) 244/41; A/C.3/SR.389 (1952) (India) 247/23; A/C.3/SR.389 (1952) (Uruguay) 248/35; A/C.3/SR.393 (1952) (Philippines) 274/38; A/C.3/SR.394 (1952) (Lebanon) 280/20; A/C.3/SR.395 (1952) (France) 286/6; A/PV.375 (1952) (Mexico) 514/19. Note Mexico's switch on the separation issue: see *supra*, note 104.

<sup>107</sup> See E/SR.523 (1951) (Pakistan) 403/45; E/SR.524 (1951) (USSR) 408/36; A/C.3/SR.388 (1952) (Burma) 244/36; A/C.3/SR.390 (1952) (Pakistan) 252/12,16; A/C.3/SR.390 (1951) (Ethiopia) 53/25; A/C.3/SR.390 (1952) (Czech.) 254/32; A/C.3/SR.393 (1952) (Philip.) 273/31; A/C.3/SR.394 (1952) (Iraq) 281/25; A/C.3/SR. (1952) (Ecuador) 282/39; A/C.3/SR.394 (1952) (Afghan) 284/56; A/PV.374 (1952) (Yugo.) 508/121; A/PV.375 (1952) (Saudi Arabia). Note a few lapses towards the very end of the debate in the General Assembly Third Committee and Plenary Session when delegations from the Soviet bloc were less careful to use the balanced formulation: see A/C.3/SR.393 (1952) (Byel.SSR) 277/70 and A/PV.375 (1952) (USSR) 516/36, 37. When one compares the United States' incantation of interdependence at one point (*supra*, note 106) with its thinly veiled downgrading of economic rights at another point (*supra*, note 100), the superficiality of the commitment to interdependence of delegations on either side of the Cold War becomes apparent.

manner of the Universal Declaration.<sup>108</sup> The terms of the Unity Resolution dictated that the concept of interdependence would be a battleground in the lead-up to Separation Resolution 543 (VI), which ended up asserting the notion of interdependence as forcefully as, and perhaps more prominently than, the Unity Resolution did.

In two preambular paragraphs of the Unity Resolution, the following assertions may be found:

*Whereas* the enjoyment of civil and political freedoms and of economic, social and cultural rights are interconnected and interdependent  
*Whereas* when deprived of economic, social and cultural rights, man does not represent the human person whom the Universal Declaration regards as the ideal of the free man....<sup>109</sup>

This preambular statement of principle provided the framework for Article 7 of the Unity Resolution, by which the General Assembly:

- (a) Decides to include in the Covenant on Human Rights economic, social and cultural rights and an explicit recognition of equality of men and women in related rights as set forth in the Charter of the United Nations
- (b) Calls upon the Economic and Social Council to request the Commission on Human Rights, in accordance with the spirit of the Universal Declaration, to include in the draft Covenant a clear expression of economic, social and cultural rights in a manner which relates them to the civil and political freedoms proclaimed by the draft Covenant....<sup>110</sup>

The above two preambular paragraphs of the Unity Resolution are quoted verbatim in the second preambular paragraph of the Separation Resolution to which was added: "Whereas the General Assembly, after a thorough and all round discussion, confirmed in the aforementioned resolution the principle that economic, social and cultural rights should be included in the Covenant on Human Rights...."<sup>111</sup> This reference to a "principle" appears to be the means by which the General Assembly distinguished its earlier Resolution, thereby dealing with the concern expressed by some delegations that overturning the Unity Resolution

---

<sup>108</sup> A/C.3/SR.394 (1952) (Lebanon) 280/20; A/C.3/SR.394 (1952) (France) 286/6; A/PV.375 (1952) (Mexico) 514/19. See S.III.B.3 for discussion.

<sup>109</sup> Res. 421 (V), Part E, *supra*, note 26 at preambular paragraphs 3 and 4.

<sup>110</sup> *Ibid.*

<sup>111</sup> Res. 543 (VI), *supra*, note 26.

would set a bad precedent. At the same time, the General Assembly left scope for more practical concerns with implementation which would justify departure from the "principle." There would also seem to be a close relationship between the reference to a "principle" in Separation Resolution 543 (VI) and the earlier reference in Unity Resolution 421 (V) to "the spirit of the Universal Declaration."<sup>112</sup> It was frequently argued in the debates that the principle of the Universal Declaration was that human rights were inseparable, and thus that separation into two covenants would breach this principle.<sup>113</sup>

Article 1 of the Separation Resolution then went on to read:

*The General Assembly*

1. *Requests* the Economic and Social Council to ask the Commission on Human Rights to draft two Covenants on Human Rights to be submitted simultaneously for the consideration of the General Assembly at its seventh session, one to contain civil and political rights and the other to contain economic, social and cultural rights in order that the General Assembly may approve the two Covenants simultaneously and open them at the same time for signature, the two Covenants to contain, in order to emphasise the unity of the aim in view and to ensure respect for and observance of human rights, as many similar provisions as possible, particularly in so far as the reports to be submitted by States on the implementation of these rights are concerned.<sup>114</sup>

So, in addition to repetition of the preambular statements, there was a clear attempt, constantly surfacing in the debates, to underscore the interdependence point by creating temporal and material linkages between the proposed Covenants. There was, first of all, the threefold simultaneity of General Assembly consideration, approval and opening for signature. Second, there was the call for the overlapping of provisions between the two Covenants. This explicit call for duplication, related to unity of purpose ("the aim in view") and the concern with "respect for and observance of human rights," is of considerable significance to the permeability thesis.

---

<sup>112</sup> See *supra*, note 109.

<sup>113</sup> For example, see A/C.3/SR.298 (1950) (Yugo.) 178/16-17 and A/C.3/SR.299 (1950) (UNESCO) 188/38. Note, however, that one recent study of the UDHR concludes that economic rights did "not quite have the same status as the civil and political rights" within the UDHR's structure: J. Morsink, "The Philosophy of the Universal Declaration" (1984) 6 Hum. Rts. Q. 309 at 331.

<sup>114</sup> Res. 543 (VI), *supra*, note 26.

While emphasis was placed in Article 1 of the Separation Resolution on the overlap of procedural provisions ("particularly in so far as ... reports ... are concerned"), considerable explicit overlap of substantive rights provisions exists between the Covenants.<sup>115</sup>

This is crucial for several reasons. First, the reasons for the duplication directive can inform the purposes attributed to the ICCPR, if only to confirm them. Second, the strength with which the interdependence principle emerged from the decision to separate, combined with duplication as a concrete embodiment of that principle, augurs well for further arguments hinging on the competition between the principle of interdependence and the current validity of the implementation-based reasons for separation of the Covenants. Third, if it is clear that the separation decision expressly envisaged material overlap of provisions, any argument for a presumption to the contrary is weakened.<sup>116</sup> One result is that the generation of overlap by means of interpretative implication becomes less problematic, and may even be enhanced.<sup>117</sup>

---

<sup>115</sup> Explicit overlaps, to varying degrees of formulation and scope, exist between the Preambles (see *infra*, note 131); Article 1 in each Covenant on the right to self-determination; ICESCR 2(2) and 3 and ICCPR 26 on the rights to non-discrimination and equal protection of the law, respectively; ICESCR 8 and ICCPR 22 on trade union rights; ICESCR 2(3) and ICCPR 27 on the rights of vulnerable groups; and ICESCR 10 and ICCPR 24(1) and (2) on protection of the family, the mother and children (all *supra*, note 3). See "List of articles dealing with related rights under the five human rights conventions containing reporting obligations" in General Assembly, Report of the Secretary-General, *Reporting obligations of States parties to United Nations conventions on human rights*, UN Doc.A/40/600 (1985) at 16 (Annex).

<sup>116</sup> See *Swedish Engine Drivers' Union Case* (1975), Eur. Court H.R. Ser. B, No. 18 at 163-65; (sub nom. *Swedish Engine Drivers' Union v. Sweden*) (1976) 1 E.H.R.R. 617 Ser. A, No. 20 [hereinafter *Swedish Engine Drivers*, cited to Eur. Court H.R.]. Hans Danelius, Counsel for Sweden, refers to an assumption of no overlap as a "guiding principle for the interpretation" of Article 11(1) of the ECHR (at 165).

<sup>117</sup> See L. Henkin, "Introduction" in Henkin, ed., *The International Bill of Rights*, *supra*, note 81 at 27:

Historically, spiritually, and conceptually the Covenant – like its sibling the Covenant on Economic, Social, and Cultural Rights – is a child of the [Universal] Declaration and that ancestry is not irrelevant to the Covenant's meaning.... The transformation of the Declaration into two covenants has significance for the meaning of both of them. While each Covenant rests on its own bottom, the existence of an obligation in one Covenant may suggest that it was not intended to be implied also in the other.

Contrast this to Pechota, *supra*, note 81 at 43, who draws a completely opposite conclusion, stating simply that questions of interpretation raised by overlaps are not problematic because

Apart from the repeated reference to the enjoyment of the two categories of human rights as "interconnected and interdependent," the Separation Resolution also insists that economic rights are required if the human person is to be the Universal Declaration's "ideal of the free man." This suggests a fruitful path towards understanding fully the foundations of the idea of interdependence. I have already warned against reifying *rights* themselves as interdependent, and suggested that the focus should be on nurturing the capacity to be human.

The mention of the Declaration's ideal of the free person may be directed in part at the second preambular paragraph of the Declaration, stating: "the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people."<sup>118</sup> However, it is also tied to articles 1, 22 and 29:

- (Art. 1) All 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.
- (Art. 22) Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of the State, of the economic rights indispensable for his dignity and the free development of his personality.
- (Art. 29) Everyone has duties to the community in which alone the free and full development of his personality is possible.

Johannes Morsink has suggested that Articles 1 and 22 are indicative of a "double status theory of rights" for the Declaration, each article being a "lead" or "covering" article for a subsequent list of human rights of a particular type.<sup>119</sup> In broad terms, the political rights in Articles 1 to 21 and the economic rights in Articles 22 to 27 are said to be based on two different philosophical

---

"the common ground and the identity of purpose, as well as the similarity of many provisions in the final drafts, make the covenants complementary and mutually reinforcing. The two covenants attained a normative unity." It is submitted that each of these contrasting views is both far too cursory, and overstated. This study contends that the proper position lies somewhere in between.

<sup>118</sup> UDHR, *Basic Texts, supra*, note 3 at preambular paragraph 2.

<sup>119</sup> Morsink, *supra*, note 113 at 331, 332.

anthropologies: humans as rational or natural agents, and humans as social beings. The Declaration's "ideal of the free man," referred to in both of the Resolutions, must therefore be taken to stem from a full conception of human freedom and a full and integrated conception of the self.

The Declaration juxtaposes two primary views<sup>120</sup> of human nature, human freedom and human rights. It tells us that we are both natural and social beings, who value both natural (or negative) freedom and social (or positive) freedom. The rights labels that we attach to these values – civil and political rights, on the one hand, and economic, social and cultural rights, on the other – follow the same lines. Yet this is hardly an integrated, much less a universally experienced, vision if one takes note of the essentially political compromise that ensured room for two rival primary views in the Declaration.<sup>121</sup>

Still, it could be said that the texts of Articles 1, 22 and 29 contain the kernel of a more integrated vision, an "ideal" that the Separation Resolution's preamble tried to rescue despite the separation of the Covenants.<sup>122</sup> First of all, it is an over-

---

<sup>120</sup> A "primary view" will be taken to mean the dominant human rights conception in a given culture or ideology.

<sup>121</sup> Indeed, UDHR 29 is the only article to have explicitly given any credence to a third, more traditional conception of rights and the person, although it is compatible with some socialist views. Further, UDHR 28 foretells the recent wave of new human rights claims, such as the right to development: "Everyone is entitled to a social and economic order in which the rights and freedoms set forth in this Declaration can be fully realized." *Basic Texts, supra*, note 3.

<sup>122</sup> The word "kernel" should be emphasized in this context. The claim is not that the UDHR constituted or came close to constituting either an internally consistent abstract philosophical theory or universally shared values. The text is rooted everywhere and nowhere at the same time. It seems likely that most delegations were most concerned to have included the essence of their respective "primary views," and were only prepared to see rights central to other traditions included, or even to give lip service to those alien conceptions, as long as their own rights found a place. The UDHR's content reflected political compromise more than any plausible universal shared understanding. Philip Alston sees this as endemic to international human rights discourse and texts, and warns of the dangers of imposing philosophical coherence on human rights texts: see P. Alston, "Making Space for New Human Rights: The Case of the Right to Development" (1988) 1 *Harv. Hum. Rts. Y.B.* 3 at 24-33, esp. at 32. When Alston warns against seeking philosophical coherence or compatibility, he is referring to a comprehensive and airtight consistency whereby all principles are derivable from some foundational principles. I wholeheartedly agree that no human rights text (whether it be the Universal Declaration or the *Canadian Charter of Rights and Freedoms*), let alone an ethical life, can be coherent in this way.

However, this is an overly restrictive version of philosophical coherence, as Alston recognizes in his appeal to the idea of a pluralistic set of justifications for international human rights law (at 32) and to John Rawls's recent invocation of the notion of an "overlapping consensus" capable of being affirmed by opposing philosophical doctrines (see J. Rawls, "The Idea Of An Overlapping Consensus" (1987) 7 Oxford J. Leg. Studies 1). It is possible to understand coherence as requiring a structure of mutually supporting claims which do not have to flow logically from a common foundation. While the Universal Declaration was indisputably a hodge-podge document when viewed historically and from the perspective of its implied claim to represent a universal value consensus, there is nothing in the text to suggest that the values embodied in the Declaration rights are innately incompatible, as long as all the rights are not treated as absolute and as long as the idea of mutual adjustment and accommodation is accepted. It becomes possible to conceive of a kind of dialectical and hermeneutical coherence that does not interpret the text divorced from the context to which it is supposed to apply (the global community), but uses the text as a starting point for a broad international human rights discourse out of which more universally rooted agreement as to the importance and compatibility of the entire spectrum of rights emerges.

If one views the global community as a dialogical community of the sort envisaged in various views on the progressive deepening and widening of social-moral understanding, it is possible that the notion of the interdependence of human rights is (if only marginally) a more forceful and universal idea now than it was in 1952. See C. Taylor, "Understanding and Ethnocentricity" in *Human Agency and Language: Philosophical Papers*, vol. 1 (New York: Cambridge University Press, 1985) at 116 and esp. at 130; and R. Bernstein, *Beyond Objectivism and Relativism: Science, Hermeneutics and Praxis* (Philadelphia: University of Pennsylvania Press, 1983). See also C. Tomuschat, "Human Rights in a World-Wide Framework: Some Current Ideas," *supra*, note 19 at 567-68 in which he notes the increased emphasis on the whole spectrum of human rights in Western Europe which has "generally become an area of social democracy" with the US *de facto* at least ... also ... moving in that direction." The latter claim is rather optimistic, to say the least. For musings on the Human Rights Committee as a forum of discourse, see B.G. Ramcharan, "The Emerging Jurisprudence of the Human Rights Committee" (1980) 6 Dal. L.J. 7 at 39 ("[T]he East-West encounter of ideas in the Committee could lead to cross-fertilization and enrichment of the human rights concept") and M. Nowak, "The Effectiveness of the International Covenant on Civil and Political Rights - Stocktaking After the First Eleven Sessions of the UN-Human Rights Committee" (1980) 1 Hum. Rts. L.J. 136 at 165 ("Perhaps the Committee is, thanks to its conciliatory attitude, on the way to developing new East-West approaches of [*sic*] an integrative understanding of human rights" [emphasis in original]).

This is not meant to endorse over-dichotomization of the dialogue. In the first place, there are various shades and middle grounds even within the two schematized competing conceptions that we are concerned with. Second, in recent years new dimensions have been injected into international human rights discourse in the form of collectivist rights notions, organized around both the modern sovereign state or the notion of peoples (see the discussion of the right to development in S.III.C.2) and more traditional (for example, aboriginal and customary) societies. Such notions find their historical precursors in the post-World War I minorities treaties and in the right to self-determination that is found in Article 1 of each Covenant. See John Vincent's discussion of the function of human rights discourse in East-West and North-South relations: J. Vincent, *Human Rights and International Relations* (Cambridge: Cambridge University Press, 1986) at 50-53, 66, 74-75, 101. The only point being made is that the evolution of human rights discourse can be partially understood through the notion of interdependence. It is likely that interdependence, related as it is to a more holistic conception of the individual, is compatible with and can be enriched by the newer collectivist notions mentioned above.

simplification to say that economic rights derive solely from our membership as citizens in a particular society. It is true that community membership provides one very powerful justification for economic rights. If we can freely develop our personality only in community with others, then economic rights serve to ensure that we are not socially marginalized, and that we can instead participate and grow as persons in the mainstream of community life. Economic rights create a framework of conditions enabling pursuit of the good life in a given society.<sup>123</sup>

However, the same kinds of arguments that derive political rights from ideas of abstract individual dignity or worth have also been used to justify economic rights.<sup>124</sup> I have already provided one justificatory argument for economic rights in the notion of making political rights effective by laying a foundation of economic rights. And some of the more convincing analytical arguments for positive freedom directly relate its value to the value of negative freedom by showing that to value one without valuing the other would be inconsistent.<sup>125</sup> Indeed, Article 22 relates economic rights not only to the "free development of [the] personality," which is connected to Article 29's reference to community, but also to "dignity," which is a term that appears in Article 1. Economic rights are said to be "indispensable" for dignity; the connotation may be that of an effectivist conception of organic interdependence.

Second, Article 1 itself cannot be said to totally or even primarily relate civil and political rights to a natural-rights

---

<sup>123</sup> This formulation owes much to the communitarian vision of rights advanced in D. Harris, *Justifying State Welfare* (New York: Basil Blackwell, 1987).

<sup>124</sup> See for example G. Vlastos, "Justice and Equality" and A. Gewirth, "Are There Any Absolute Rights?" both in J. Waldron, ed., *Theories of Rights* (New York: Oxford University Press, 1984) at 41 and 91, respectively.

<sup>125</sup> In particular, I refer the reader to two leading articles in political and moral philosophy: A. Sen, "Rights and Capabilities" in T. Honderich, ed., *Morality and Objectivity* (London: Routledge and Kegan Paul, 1985); and C. Taylor, "What's Wrong with Negative Liberty?" in C. Taylor, ed., *Philosophy and the Human Sciences: Philosophical Papers 2* (New York: Cambridge University Press, 1985). Each makes a powerful analytical argument that if we attribute value to negative freedom, we cannot consistently deny value to positive freedom. In Sen's formulation, we must not merely be concerned with negative constraints on functioning (negative freedoms), but also with the capability to function (that is, positive freedoms).

conception of agents as rational, unsituated beings. It contains a very prominent reference to action "towards one another in a spirit of brotherhood," which is perhaps an idealistic reference to the broadest kind of community: that of humankind. Perhaps the most obvious, but least appreciated, obstacle to a truly universal corpus of human rights is the embryonic state of the global community. Consider the following thoughts of Michael Ignatieff:

[W]ho has ever met a pure and natural human being? We are always social beings, clothed in our skin, our class, income, our history, and as such, our obligations to each other are always based on difference....<sup>126</sup>

To bring justice to the heath, to protect the Tom O'Bedlams hurled into no-man's-land by war and persecution, there has arisen the doctrine of universal human rights and the struggle to make murderers and torturers respect the inviolability of human subjects. If we all have the same needs, we all have the same rights. Yet ... [t]here is no identity we can recognize in our universality.... These abstract subjects created by our century of tyranny and terror cannot be protected by abstract doctrines of universal human needs and universal human rights, and not merely because these doctrines are words, and whips are things. The problem is not to defend universality, but to give these abstract individuals the chance to become real, historical individuals again, with the social relations and the power to protect themselves.... Woe betide any man who depends on the abstract humanity of another for his food and protection....<sup>127</sup>

[But a] century of total war has taught us where belonging can take us when its object is the nation. Out of that experience, it is just possible that our need is taking a new form, finding a new object: the fragile green and blue earth itself, the floating disk we are the first generation to see from space. No generation has ever understood the common nature of our fate more deeply, and out of that understanding may be born a real identification, not with this country or that, but with the earth itself.... Modernity is changing the locus of belonging: our language of attachment limps suspiciously behind, doubting that our needs could ever find larger attachments.... Political languages which appeal to us only as citizens of a nation, and never as common inhabitants of the earth, may find themselves abandoned by those in search of a truer expression of their ultimate attachments.... We need words to keep us human. Being human is an accomplishment like playing an instrument. It takes practice.<sup>128</sup>

The reason for this extensive quotation is to try to convey how ideas of the natural must be rooted in the social in order to have human meaning, and to suggest how the natural and the social may

---

<sup>126</sup> M. Ignatieff, *The Needs of Strangers* (New York: Viking, 1985) at 28.

<sup>127</sup> *Ibid.* at 52-53.

<sup>128</sup> *Ibid.* at 139-41.

