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Conclusion

DENNIS DAVIS, ALAN RICHTER AND CHERYL SAUNDERS

IN 1993, THE Secretary General of the United Nations, Boutros Boutros-Ghali, observed in his inaugural remarks to the 1993 Vienna Conference on Human Rights that human rights constituted 'a common language of humanity'.[1] In this way, he linked his argument to a view that the human rights discourse represents the only universal ideology, at the very least in the making, which simultaneously legitimates the exercise of power and holds out the possibility of an emancipatory politics.[2]

This line of argument enjoys a distinguished historical pedigree. More than 200 years ago Immanuel Kant wrote of the universality of the rights of 'men', conceiving of four elements which made up a cosmopolitan point of view, being: (1) the generalisation of republicanism as a way of government within all societies; (2) the establishment of a legal authority at the international level; (3) the extension of rights to foreigners; and (4) putting an end to the barbarities associated with colonialism.[3]

More recently, in the face of dramatic regionalisation and globalisation, others have argued to similar effect. To take only one prominent example: Peter Singer has observed that the globalisation of the later part of the twentieth century has taken the world in a direction of a global community and thus diminished the extent to which any national state can claim independently to determine its own future.[4] In Singer's view, not only is there a need to strengthen institutions for global decision-making and make them more accountable to affected communities, but there is now a basis for an agreement on a framework for international human rights law which would represent a common language of humanity.

[1] Upendra Baxi, *Human Rights in a Post Human World* (Oxford, Oxford University Press, 2007) 1.

[2] Mary Ann Glendon, *Rights Talk*: *The impoverishment of political discourse* (New York, Free Press, 1991).

[3] Robert Fine, 'Cosmopolitanism and Human Rights: Radicalism in a global age' (2009) 40 *Metaphilosophy* 8–23.

[4] Peter Singer, *One World. The ethics of globalisation* (New Haven CT, Yale University Press, 2004) 199.

Resisting the criticism of cultural imperialism, Singer contends for a view of ethics that admits to the possibility of a moral argument which transcends the limitations of a particular culture. Thus,

> [W]e can recognise that Western culture has no monopoly on wisdom, has often learned from other cultures, and still has much to learn. We can urge sensitivity to the values of other people and understanding for what gives them self-respect and a sense of identity. On that basis we can criticise the nineteenth century missionaries for their insensitivity to cultural differences, and for their further obsession with sexual behaviour, an area in which human relations take a wide variety of forms without any one pattern being clearly superior to others … But once we accept that there is scope for rational argument and ethics, independent of any particular culture, we can also ask whether the values we are upholding are sound, defensible and justifiable.'[5]

Singer's argument is based upon, at the very least, the existence of a global ethic which is reflected in the development of international law and, in turn, is powered by the global recognition of human rights. Representing another tradition, which is sourced in religion, Hans Kung also makes a case for a basic consensus relating to binding values, irrevocable standards and moral attributes, which can be affirmed by all religions despite their undeniable divergences and theological differences and which, in his view, can also be supported by non-believers.[6] Much of the confidence in these lines of argument can be traced to the Declaration of the Rights of Man approved by the French National Assembly in August 1789, and the more contemporary proclamation in the form of the Universal Declaration of Human Rights by the General Assembly of the United Nations in December 1948.

These documents have been converted from their aspirational character into substantive legal commitments by way of a range of national constitutions, most of which were passed after the Second World War. There are now almost 200 such instruments. Most contain express protections for the rights of individuals, in varying forms and with varying effect. In many cases the protected rights extend beyond traditional categories of civil and political rights to social, economic and environmental rights as well.[7] In some cases they have a degree of horizontal as well as vertical effect. Even where constitutions do not protect rights, or particular rights, and even in the relatively few instances where there are no codified constitutions at all, the operation of the political and legal systems may provide mechanisms through which rights nevertheless are protected.

A vast number of these national constitutions were passed during the third wave of democracy, beginning in the 1970s with the emergence of

[5] ibid, 140.

[6] Hans Kung, *Justification* (Westminster, John Knox Press, 2014).

[7] David Law and Miles Versteeg, 'The evolution and ideology of global constitutionalism' (2011) 99 *California Law Review* 1165–1243.

numerous new states, and the process accelerated further following the end of the Cold War from 1989.[8] A rich field of national constitutional law has now provided the ideal terrain on which to test the suggestion in the arguments of, for example, Boutros-Ghali and Singer, that the human rights now incorporated through so many national constitutions promote a set of values which are the building blocks of a common language for humanity. If this perception is right, progress has commenced towards the form of cosmopolitanism of which Kant wrote in the eighteenth century and which is assumed by so much of the more recent literature on the internationalisation and globalisation of constitutional law.[9]

This volume was designed to test these claims, albeit tentatively, by way of an examination of a range of disparate national constitutions which promote certain basic human rights, and which are drawn from countries with different histories, cultures, legal and political systems. Even this objective requires careful description. Congruence of rights and the values which underpin them can prove to be an elusive concept. It can mean compatibility of values which are given express mention in the text. It can also mean the values that emerge from a group of rights or all the rights contained in the text. Authors were also asked to consider congruence between the values proclaimed in the text or by way of judicial work and the manner in which these values play out in society.

It is important to emphasise that this book does not concern international law and arguments concerning the possible establishment of a world constitution which may serve to represent an overarching constitutional order that sets the legal standard to which all national legal institutions should conform. In short, this book is not concerned with the controversial debate about the existence of an international legal order possessed of certain superior constitutional norms.[10] Neither is the primary focus of the work to explore the reasons why so many countries have moved towards the formal adoption of human rights standards—although this issue is canvassed within the context of the overall objective of exploring the claim of a shared constitutional language.

It has been suggested that the constitutions of the nation states which have adopted these instruments can be measured along a single ideological dimension: from the libertarian, in which a common law tradition of negative liberty and especially judicial protection from detention and bodily harm by officials purporting to represent the state constitutes the core of the enterprise, to those statist constitutions that provide for a far-reaching set of obligations

[8] Sujit Choudhdry, *Constitutional Design for Divided Societies* (Oxford, Oxford University Press, 2008).

[9] Anne Marie Slaughter, *A New World Order* (Princeton NJ, Princeton University Press, 2004).

[10] Christine Schwobel, *Global Constitutionalism in International Legal Perspective* (Dordrecht, Martinus Nijhoff, 2011).

to be fulfilled by the state.[11] Our concern is that this determination cannot be derived from an examination of the texts alone. Indeed, absent an examination of the jurisprudence which clothes these texts with content, the exercise of comparison provides little guidance about the possible reflection of global values in the increasingly wide acceptance of introducing a constitution as a cornerstone of municipal law.

For this reason, the authors of the various chapters were specifically asked to analyse the jurisprudence of particular national constitutions and then develop an analysis which could begin to determine the possible existence of a set of 'global' values in these national constitutions, together with a description of any variations in the way that these values might be defined or implemented. This project proceeds from the perspective of national constitutions in general and the enumeration of rights entrenched in these constitutions in particular. In their study of the evolution of global constitutionalism, Law and Versteeg observe that, prior to the Second World War, most constitutions enumerated only a few specific civil and political rights.[12] By 1946, the average constitution contained 19 of the 56 substantive rights set out in their index. By 2006 the figure had increased to 33.[13] The rapid increase in rights which are entrenched in national constitutions provides a promising foundation to explore claims concerning the possible convergence of rights and the understanding of the values which underpin them as well as the differences in constitutional content and the reasons therefore. But as is apparent from the various chapters in this volume, the text without an interrogation of its interpretation by the courts and its application tells little of significance concerning congruence and difference.

Hence, the national studies interrogate the values which underpinned the various rights contained in the particular constitution in order to explore:

(a) Which values were or were not, shared, cosmopolitan or universal, on the basis of both constitutional form and content and national understanding of it.
(b) The prioritisation of the values, as an aid to assessing similarities and differences.
(c) The congruence between the Constitution, as interpreted and understood and the real, existing conditions in that country.

In discussion with the authors, it became apparent that the distinction between values and principles was not an easy one to draw with much confidence. Clearly, a right to which an obligation attaches is easily distinguishable from either a value or a principle. Even a constitutionally entrenched right which

[11] David Law and Miles Versteeg, 'The evolution and ideology of global constitutionalism' (2011) 99 *California Law Review* 1165, 1170.
[12] ibid, 1195.
[13] Law and Versteeg's index appears in an annexure to this chapter.

is subjected to the vagaries of interpretation owing to the open textured nature of many constitutional rights is different from a principle which, as Dworkin pointed out a long time ago, does not apply in an all or nothing way and is derived from the animating purpose of the rights contained in the text.[14] Values also form the basis of a normative framework but may be sourced independently from the text. In many of the texts which form the basis of this study, there is an express reference to standards that undoubtedly constitute 'values'—dignity, equality, fraternity, accountability, for example. Principles which are derived from an inferential reading of the text may well operate in similar fashion in the process of adjudication. We have chosen value as a term to be employed as, for our purposes, it can encompass principles and is distinct from the meaning of rights; that is, this book has been concerned with values which emerge from or are expressly or by implication to be derived from the relevant text. In the context of this book, the rights which are guaranteed in the text are both a means of achieving the underlying value (for example, freedom of expression promotes values of liberty and autonomy) and are interpreted through the animating value. In turn these values are shaped by context, with historical and political factors being of particular influence.

Indeed, from a reading of the chapters many of the contributors to this volume raised a major concern about the influence of vastly differing political and historical traditions upon the various constitutional texts, no matter how similar the wording thereof.

This concern is reflective of the criticism of a considerable literature dealing with international human rights of the kind reflected in the work of Singer to the effect of having produced a paradox, in that it seeks to foster a diversity but only under the guise of western political democracy.[15] Thus, any recognition of diversity is conflated into a liberal paradigm through which all difference is mediated. Mutua argues by contrast that

> this inelasticity and cultural parochialism of the human rights corpus needs urgent revision so that the ideals of the difference and diversity can be realised. The long term interests of the human rights movement are not likely to be served by the pious and righteous advocacy of human rights norms as frozen and fixed principles whose content and cultural relevance is unquestionable.[16]

At the same time, the engagement with issues of congruence and incompatibility allows for a discussion of the manner in which courts, whose task it is to interpret the Bill of Rights, are influenced not only by some abstract conception of justice or by a dominant perspective of the values underlining

[14] Ronald Dworkin, *Taking Rights Seriously* (Cambridge MA, Harvard University Press, 1978).

[15] Makau Mutua, 'The complexity of conversation in human rights' in Andreas Sajo (ed), *Human Rights with Modesty. The problem of universalism* (Dordrecht, Springer, 2004) 51–64.

[16] ibid, 55.

human rights instruments but also by the traditions of the legal culture in which the particular court is located, different styles of adjudication, which flow from different legal traditions, and broader political, historical and cultural influences which shape the society, whose constitution is the focus of the study. In this way the impact of the national studies, read together, cautions against any monist conception of this constitutional project. Even those writers renowned for arguing in favour of objectivity of values and some universal normative validity of rights are constrained to argue that at best political elites must try in good faith to respect the underlying principles of a text promoting human rights.[17]

Cognisant of this controversy and complexity about indeterminacy, this project adopted as a tentative working hypothesis a measure of convergence between the values underlying the various constitutional texts analysed in the book with specific emphasis on those contained in any Bills of Rights which formed part of the chosen constitutions. Authors were asked specifically to examine the manner in which the jurisprudence developed through the courts, the form in which the constitution operated and was given practical effect in the countries under review as well as the particular meanings which had been developed in respect of the various fundamental rights contained in the Constitution, whether expressly or by implication.

I. THE AMBIGUITIES: A CRITICAL ASSESSMENT

As noted, the idea that there is a development of human rights which represents an operative principle of global justice and/or governance draws its intellectual pedigree initially from the cosmopolitism of the Enlightenment, particularly as it was developed by Kant. But this study reveals that, whatever the similarity of a textual provision, the existence of significant differences or ambiguities dictate the adoption of great caution towards the existence of an operational cosmopolitanism within the twenty-first century, as is illustrated below.

A. Freedom/Independence

There is a major disjunction between the way in which most of the chapters have approached freedom (as individual freedom or autonomy) and independence (usually understood as national independence). In some cases (Iran for example), national independence may act as a limit on the exercise of individual freedoms. This reflects the well-known cultural dimension of Individualism versus collectivism.

[17] Eg, Ronald Dworkin, *Justice for Hedgehogs* (Cambridge MA, Harvard University Press, 2011).

B. Family/Community

There is a similar conceptual tension between family and community. In most systems, possible manifestations of community bear no relationship to the idea of the family. Perhaps 'family' and 'community' should be considered as separate values. On community, some chapters have also mentioned such matters as the general will, popular sovereignty, national sovereignty, the state and the (French) Republic as distinct values. These all go to the existence of some kind of collective identity.[18]

C. Respect/Tolerance

It is not clear what is encompassed by this value within the jurisprudence of the countries under review. Japan has a constitutional provision concerning 'respect' that is probably most analogous to 'dignity' in other systems, and has little in common with what other contributors have proposed as a guarantee of respect/tolerance in their countries. In general, this value seems to be directed towards respect for, and tolerance of, minority groups of a different race/religion/political belief, etc, rather than 'respect' at large. Even on a narrow understanding of this value, it is not clear what is required in order for a state to be said to exhibit adherence or commitment to respect/tolerance. Iran, for example, is clearly an Islamic state, and this perspective dominates much of its jurisprudence. There are certain rights accorded to specifically enumerated religious minorities, but it is doubtful whether this is sufficient to conclude that the state is tolerant of these minorities. A similar question arises in respect of fundamental principles as justice, when defined in accordance with Islamic teachings.

D. Democracy

Many chapters have alluded to the democratic nature of their polity as being of fundamental importance. To the extent that it is seen as a value, democracy is attributed to freedom, to responsibility/accountability, or even to community.

II. PRIORITISATION OF ASCRIBED MEANINGS

The challenge of assessing the prioritisation of these values is to develop a plausible measure for assessment. To this question we shall return after an initial examination of the various studies.

[18] The question however, is whether community is an appropriate rubric under which to discuss these values?

Human dignity is prioritised in six countries that expressly refer to it, as a foundational/core/fundamental/overarching/informing value from which rights are derived; widely considered an 'inherent' quality of every human being and thus inviolable and absolute following the Kantian philosophical tradition (see Germany and Venezuela); generally associated with protection of civil rights and freedoms, although the extent to which the right encompasses socio-economic rights (with concomitant positive duties imposed on the state) is contested.[19] In the case of Finland, socio-economic rights are given wider constitutional protection than is the case with equivalent rights which appear in international human rights conventions. In the United Kingdom a commitment to dignity and individual autonomy are secondary values that are not embedded into the bedrock of the British Constitution.

Life is recognised as a fundamental right in nine countries. The presence of a limitation clause means that strictly speaking the right enjoys no absolute recognition in Germany, Canada, Japan or Israel. The same holds true for China and Iran. Only Venezuela regards it as absolute and inviolable, and 'as the first and most important civil right'. In Germany, Canada, India and Japan, the right to life is connected to the value of individual autonomy or a meaningful life. Contrary to most countries, life and dignity are non-derogable in the South African constitutional jurisprudence. For this reason, they enjoy complete protection even in a state of emergency.

Equality is expressly protected in 10 constitutions, each however with a different scope accorded to the right. For example, there is a reluctance to extend the notion of equality to the economic sphere in Israel and Canada; in Iran, religion is not listed as a ground to be protected against discrimination with differential treatment under Islamic law permissible; affirmative action (ie, provision for positive state action to address existing inequality) is expressly permitted in Canada, India, Venezuela, Finland and Germany (the latter, specifically in regard to gender equality).

Freedom/liberty/independence is given a narrow, formal interpretation as individual freedom in Israel (as an absence of state interference; restricted to due process guarantees) but enjoys an expansive understanding as individual freedom (including the substantive/material preconditions necessary for the exercise of the right) in Germany and Venezuela. Similarly, a broader constitutional freedom is read into the 'right to the pursuit of happiness' in Japan. In Iran, the proclaimed guarantee of freedom (understood to cover 'all human, political, economic, social freedoms') is subject to restriction based on Islamic law and the rights of others, public rights and interests, interests of the country, national unity, independence and territorial integrity. Liberty, construed as a right of a person to do what is not explicitly and lawfully forbidden, is a core value in the United Kingdom.

[19] See eg, Venezuela and Israel in this regard.

With regard to fairness/justice/rule of law; the latter enjoys institutional protection in Germany, which is based on the post-war commitment of 'Never Again', and in turn is associated with human dignity. In Canada it is described as one of two 'foundational principles' under the constitution, Israel provides for the doctrine of separation of powers, the rule of law and an independent judiciary identified as a 'core component' of Israel's democracy. In Venezuela the Constitution provides for the designation as a 'state of justice' and proclaims the judiciary as the ultimate controlling branch of government, with Justice described as a 'fundamental value' in the Preamble and article 1 of the Constitution. The rule of law is central to the United Kingdom and mediates between unrestrained freedom and unrestrained governmental authority. In turn it promotes a number of secondary values, including transparency, accountability and participation.

Guarantees of justice are understood to include both *procedural and substantive* protections both in Finland and Germany (associated with human dignity as a precondition of justice), Canada, Japan, Israel, Iran (as Islamic/Qur'anic justice) and Venezuela (with an express provision for the prevalence of material justice over 'formalities and technicalities'). Justice and fairness expressly associated with equality are to be found in Japan, Venezuela and Iran (under Islamic law).

As regards security of the person, due process rights are widely recognised, as well as social protections. In certain jurisdictions, positive duties are imposed on the state, particularly in Germany and Canada (where these duties are associated with human dignity and personal integrity) and Japan, Venezuela (where they are associated closely with the right of human dignity) and Iran.[20]

Responsibility/accountability: government responsibility and accountability are recognised in most countries, as can be inferred from the annexure to this chapter. For example, in Japan, the principle is closely associated with the transition from traditional imperial sovereignty to popular sovereignty, while similar emphasis is placed on the principle of popular sovereignty; in Israel, government accountability is associated primarily with the notion of 'public trust' or 'faith' in government. Mutual responsibility of citizens is emphasised in Iran (in accordance with Islamic law) and Japan. Of the countries in this study, Finland has the most developed system of an Ombudsman, as the second country after Sweden to have established the institution.

Canada, Finland, Venezuela, Japan, Iran, Israel and South Africa recognise participation/democracy as a fundamental value, but there is a considerable variance in its conception: in Canada, democratic participation is viewed as a normative commitment underlying federalism, and implying government by consent, rule of law and political accountability; in Venezuela, *participatory* democracy (as opposed to direct/representative) is emphasised, while

[20] See, as regards national security, given prominence in Israel and Iran.

Japan defines its democracy as representative. In Iran, democracy is shaped by the overriding principle of guardianship. In Israel, it is qualified with the designation of Israel as a 'Jewish state'. In South Africa, the Bill of Rights chapter is proclaimed to be 'a cornerstone of democracy'. In the United Kingdom, liberty promotes the idea of representative government.

An emphasis on respect/tolerance is most broadly to be found in Canada and Venezuela, which states are recognised to be multicultural. In Canada, multicultural policies extend to immigration law, the recognition of aboriginal rights, protection of sexual minorities and their language rights and religious education. Freedom of religion is associated with respect for diversity, privacy of the family, integrity of faith-based communities and individual freedom. In Germany and Finland religious freedom for faiths is recognised, although the protection is subject to a standard limitation clause. Interpretations of the scope of the right to reputation vary greatly. The Finns have engaged in strict and narrow interpretations of honour/reputation, and this approach has been tested many times by the European Court of Human Rights, where Finland has been found to be in breach of the European Convention of Human Rights. In Israel, tolerance has mostly informed the right of free speech, especially with regard to sexual minorities. The right to free speech has been limited, however, on the basis of 'injury to public feelings'. In Iran, constitutional recognition extends only to specified Islamic and non-Islamic groups (protecting religious education and practices).

Honesty/integrity enjoys a variety of interpretations. In Canada and Germany, this is associated with physical integrity; and with government accountability in Israel, Iran, Venezuela and Japan (implicit only). Canada also associates integrity (of the individual and faith-based communities) with religious freedom. South Africa protects both bodily and psychological integrity.

Compassion/caring/socio-economic guarantees are entrenched in Venezuela, based on its designation as a 'social state': extensive socio-economic guarantees with the government constitutionally obliged to promote social justice, and an emphasis on 'solidarity' and social/community duties of citizens, with collective needs taking precedence over individual needs. In China, there are also detailed constitutional provisions on social and economic rights and social welfare. In Iran, there is provision for compassion and caring which are viewed as religious duties, giving rise to extensive government duties, and requiring that the government and all Muslims treat all others kindly and gently in conformity with the ethical norms of Islam. In Japan, no express mention is made of compassion/caring, but there are constitutional guarantees of 'the right to maintain a minimum standard of a wholesome and cultured life', with government obliged to extend social welfare. In Germany, the principle of the social state includes certain social protections and, in turn, has been employed by the courts to extend a range of rights. In Finland, the Nordic welfare state social policy model has strongly

influenced the drafting of the national constitution. As already noted, Finland has extended socio-economic rights beyond those provided for example in the International Covenant for Social, Economic and Cultural Rights, including the right to free education up to university level and a range of subsidies which have had significant distributional consequences.[21]

The Indian courts employ directive principles of state policy contained in the Indian Constitution to give some socio-economic content to what might otherwise be considered to be civil and political rights. In Canada, there are no enumerated socio-economic rights, but the political tradition has appeared to support equitable social welfare distribution. South Africa guarantees a range of social and economic rights, but with the qualification that government's obligation are determined by what can reasonably be achieved with available resources. By contrast, in Israel, there is a clear reluctance to recognise socio-economic rights or impose concomitant duties on the state.

The value of family is given constitutional protection in most countries. It is narrowly defined in Japan, Israel, Venezuela and Iran to exclude same-sex marriages. Furthermore, in Iran, family relations must be based on Islamic rights and ethics, which are patriarchal. In both Japan and Venezuela, the Constitution expressly requires that family relations be based on equality. In Canada, the privacy of the family is expressly protected, and associated with the rights to liberty, security and freedom of religion.

With respect to community, collective rights and community integrity are expressly protected in Canada and Venezuela. In China, the value of community enjoys priority in the Constitution. Iran's Constitution refers to community at several levels: the Islamic community, that of the nation-state, that of the official religious group, the Twelve Shi'ite Islam. In contrast, the concept of community is not mentioned in Japan's Constitution, and scholars are sceptical of a proposed amendment to include respect for communal values. In Germany, concern with 'community' interests is implied only in the limitation of fundamental rights based on general/public interest. Similarly in Israel, there is no express protection of collective rights, but the identification of Israel as a 'Jewish state' defines the political community as an ethnic/religious community.

The right to education is expressly protected in Finland and Japan ('equal education' expressly guaranteed, with free compulsory education—interpreted as nine years of basic education—), as well as mainland China (PRC) and Taiwan (both constitutions provide for the right and duty to

[21] Significantly Richard Wilkinson and Kate Pickett observe that these measures have an effect: the ratio between the average take-home pay and the worst-off and the 20% best-off is just under 4 in the Nordic countries, 7 in the UK, and nearly 9 in the USA (Richard Wilkinson and Kate Pickett, *The Spirit Level. Why equality is better for everyone* (London, Penguin, 2009)).

receive education), Iran (Constitution guarantees 12 years of free education as well as free higher education to the extent required for the country's self-sufficiency), and Venezuela (also informed by the principle of equality, and free up to undergraduate university level). It also is guaranteed in South Africa, both in respect of basic education for children and adults and for further education, which the state, through reasonable measures, must make progressively available. It is not mentioned in Israel's Basic Law, but recognised by the Supreme Court as a basic right (including the need for equality in education), although the Court has yet to confirm it as a constitutional right. It is not constitutionally guaranteed in Germany (education is a state, not federal government responsibility) or in Canada.

The environment is expressly protected in Germany, Iran and Venezuela (the latter's Constitution having extensive provisions) and South Africa.

Peace/pacifism is specified as one of the three pillars of Japan's constitution (along with the guarantee of fundamental rights and the principle of popular sovereignty), and reflective of the peculiar post-war drafting history of Japan's Constitution. There remains a 'glaring gap' between the constitutional provisions mandating pacifism and the government's interpretation of its obligations in respect of them. The aim of peace is also mentioned as a fundamental value in Venezuela and Germany.

Spirituality fundamentally informs the Iranian Constitution, which is to be developed in terms of and is made subject to, Islamic law. To return to the question of prioritisation, this has proved to be extremely different, partly because of the significant range of rights contained in the texts and the differences of interpretation of these rights as they are proclaimed in the text. However dignity, life, equality and freedom appear to be a significant font for unremunerated rights which are then developed by the courts.

III. CONGRUENCE

A. The Relationship Between Theory and Practice

The various chapters also show that congruence, in the sense of a finding based upon the outcome of an examination and comparison between the text, its jurisprudence and the practical effect thereof, was incomplete in most, if not all, of the countries surveyed. Below is a summation of the findings in each of the countries whose constitutional jurisprudence was surveyed.

i. Australia

In the Australian system, it is difficult to measure congruence. The lived reality in Australia seems to be in consonance with the few clauses enshrined in the

Constitution and the legal order more generally. This is not surprising: one would expect the enactment of Acts of Parliament that are more reflective of the contemporary living *mores*. An example in point is the enactment of a law against racial discrimination. On the other hand, Australian practice is not entirely congruent with Australian international obligations, as decisions of the Human Rights Council suggest, pointing to some shortfall between aspirations and reality, in Australia as elsewhere. Notably also, some of the standards that in Australia are given effect through legislation or case law are the subject of dissention in the community; judicial decisions in relation to native title are a case in point.

ii. Brazil

Although courts have invoked constitutional values to adopt an activist role (on the bench at least), the social reality on the ground in Brazil is far removed from what these values require. For example, Brazil is still marred by vast inequality, crime, violence and precarious living standards.

iii. Canada

Generally, there is a strong correlation between the social (or lived) reality on the ground, and the values as enshrined in the Charter. But there is dissatisfaction in some sectors of society—those who support the Charter maintain that the court could do more to protect and to give effect to socio-economic rights.

iv. China

In China, whether or not the reality on the ground reflects constitutional values depends on three factors: (a) the degree to which the values are not abstracted from the lived social reality on the ground, (b) the effectiveness of the legal system to ensure that the law in the books is in fact the living law, and (c) the nature and features of the day's political order/system. China is an authoritarian state, possibly in transition, at least in economic terms. Therefore, it follows that the adherence to a plethora of the values appears to be at the mercy of the state. To compound the problem, the Constitution is not justiciable, and this poses serious challenges about enforcement. Where courts have ruled for the enforcement of rights such as those dealing with equality, such decisions were more theoretical than practical.

v. Finland

The congruence between constitutional values and reality is fairly strong. Perhaps the most significant exception are the breaches of provisions

regarding timely judicial proceedings, the failure of the state to respond adequately to violence against women, human trafficking, societal discrimination against minorities, and foreign-born residents. Equality has been implemented to improve the equality in respect of gender. However xenophobia and intolerance of immigrants has revealed a significant gap between the values of equality and real-life experience of their communities. The Nordic Welfare State model has ensured that dignity encompasses not only personal freedom, but the kind of social and financial protection for the dignified life. In general the pressures of globalisation have posed great challenges for the implementation of social inclusivity.

vi. France

The issue of congruence in France is not entirely clear. However, it can be discerned from the discussion of France that certain of the values operate at an institutional level (for example between Council and Parliament), in particular freedom, equality and a sense of French community which shape the content of their relationship.

vii. Germany

There seems to be a high correlation between constitutional values and the social reality in Germany, to the extent that the values of the social state, and the importance of dignity are reflected in the socio-economic structure of the country. Further the importance of the core value of dignity, in particular, has meant that the fabric of society has been significantly influenced by the implementation of constitutional rights as developed by the Constitutional Court.

viii. India

The jurisprudence of the Supreme Court has ensured that social, economic, cultural and environmental rights have become justiciable issues. In turn this has affected the nature of government policy, in particular with regard to social and economic provisioning. The insistence by the courts that there is a basic structure to the Constitution has meant that it has become an impermeable wall against belligerent parliaments and executives who have commanded large enough majorities to amend the Constitution. The creation of a basic structure has protected the Constitution and hence Indian society from the eradication, or at least, a fundamental erosion of constitutional democracy.

ix. Iran

There is a glaring gap between values and practice in Iran. The text is not significantly different in important part from the other texts under investigation

but the hegemony of the religious framework produces a far different, less open and tolerant society than the text would superficially appear to promise.

x. Israel

There seems to be a mismatch between values as they are institutionally understood and interpreted on the one hand, and social concerns on the ground on the other hand. The undemocratic occupation of Palestine detracts from Israel's purported commitment to a number of the values.

xi. Japan

Bearing in mind that Japan is a constitutional monarchy, it appears that there is appreciable congruence between the jurisprudence and the socio-economic reality—albeit that the Constitution was, in significant part, an imposed constitution which was introduced after the Second World War.

xii. South Africa

South Africa, like other transitional societies, remains a country under construction and it is difficult conclusively to answer the question of congruence. The values do appear regularly in public discourse, but they are not always put into effect. For example the country remains a very male-centred society. Although the value of equality is highly ranked, South Africa has one of the highest Gini-coefficients in the world. Tolerance is constantly challenged by both xenophobia and homophobia.

xiii. United Kingdom

The flexibility of the UK's unwritten constitutional system has allowed it to adjust over time to close the gaps that have periodically opened up between the values to which the system formally adheres and actual reality of how state power is exercised. However, the gap between values and reality can at times loom large. At present, the expanding substantive concept of the rule of law, combined with the greater expression given to secondary values such as respect for autonomy, dignity and equality, rub into the primacy given to representative governance and the secondary value of effective governance (as it has been understood in the UK context, ie, meaning the enabling of an elected government to implement its political agenda).

xiv. United States

The Supreme Court in the United States has preserved a concept of liberty which it has used trump the states' regulatory authority and hence intervene

in a range of social and economic activity. Some protection in the sphere of intimacy, such as abortion rights, has proved to be extraordinarily controversial, but to date the landmark case in which these rights were proclaimed, *Roe v Wade*,[22] has not been overruled. Over time the court has also used the value of liberty to encroach upon the role of the federal government to regulate a range of issues which in other countries would be considered to be inextricably linked to government's role to promote a vibrant public sphere.

xv. Venezuela

It is generally difficult to give effect to the various constitutional values in Venezuela, owing to a rather illusory separation of powers. More directly, there seems to be much more control exerted on all other branches of government by the legislature; where certain members of the judiciary have sought to function independently, they have often been dismissed from office.

IV. WHERE DOES THIS LEAVE THIS PROJECT?

With these findings of the project in mind, the question to which we must return is whether these disparities clearly refute a claim that there is a move towards a cosmopolitanism in constitutional values; in particular as they inform human rights. Expressed differently, to what extent do the constitutions under this study support the argument of a movement towards a new common framework for humanity?

As noted earlier in this chapter, there is a danger that a cosmopolitan imagination can produce an uncritical positivism; that is an unquestioning endorsement of an existing conception of human rights which is to be found in certain Western societies. In turn, this can give rise to a problem of a constitutional framework for the existing global order which eschews the realisation of the cosmopolitan vision and becomes an argument for the subordination of power to the rule of a particular conception of international human rights law. This forces a focus upon the possible existence of any common understanding of values, a return to the idea of cosmopolitism which, in summation is: 'A way of thinking that declares its opposition to all forms of nationalism and religious fundamentalism, as well as to the economic imperatives of global capitalism.'[23] Thus, a cosmopolitan way of thinking emphasises the point of view of humanity as a whole.

[22] *Roe v Wade*, 410 US 113 (1973).

[23] Robert Fine, 'Cosmopolitanism and Human Rights: Radicalism in a global age' (2009) 40 *Metaphilosophy* 8–23.

Once this idea is taken seriously it must ultimately lead on to the possible transcendence of a nation state. As Sen argues, the position that every person in the world, irrespective of citizenship, residence, race, class, caste or community, has some basic rights, which others should respect, must hold great appeal.[24]

In its modern form, cosmopolitanism sets out to construct an enlightened vision of peaceful relations between nation states and human rights which are shared by all world citizens, as well as a global legal order supported by a global civil society.[25] For this particular project, which has been based upon an examination of national constitutions, there is a difficulty in rejecting the importance of the nation-state. Indeed the dominant approach to cosmopolitanism is one that centralises the nation-state. That the nation-state is central is evident by the selection of various jurisdictions examined in this volume. The question still remains as to whether, even within the framework of the nation-state, some common set of values is emerging to be recognised by humanity, no matter the differences.

The importance placed upon the nation-state requires further amplification. Within the legal context, it may be argued that cosmopolitanism has its roots in international law, but with a logic that goes beyond and at times contradicts the very origins thereof. While international law might be seen as the stage for a migration toward cosmopolitanism, various considerations set cosmopolitanism apart from international law; although there has been significant movement in this connection to extend the scope of international law.

However, the tentative steps taken by international institutions notwithstanding, it is more often than not the nation-state which serves as the entity against which such rights are claimed or enforced. It is through the nation-state that rights are enforced, and where appropriate, sanctions for non-compliance with human rights are located. For this reason, this study has focused attention upon the nation-state and the possibility of shared global values which inform national guarantees of human rights.

By contrast, in amplifying his argument in favour of the international law origins of cosmopolitanism, Singer notes that the commencement of a global trend towards one law must find root in the formation of an agency that would regulate and impose sanctions on those who are found of the commission of crimes against humanity. For Singer, the International Criminal Law (ICL) serves as a model of such an agency. Singer writes that the ICL was created as a practical consolidation of various responses to a range of wars or violations of the humanity of millions of victims of crimes against humanity. In the example he provides, the ICL culminated in the creation of

[24] Amartya Sen, *The Idea of Justice* (London, Allen Lane, 2009).

[25] Robert Fine, 'Cosmopolitanism and Human Rights: Radicalism in a global age' (2009) 40 *Metaphilosophy* 8–23.

the International Criminal Court (ICC), which exerts jurisdiction over states that are signatory to its statute.[26]

Both the ICL and its corollary the ICC, however, find application after a crime has been committed and punishment for the perpetrators needs to be determined. Something needs to be said about intervention to prevent a crime or to stop a crime that is being committed and punishment for the perpetrators needs to be determined. This would, in some instances, necessitate an intervention into the affairs of another state. The question for Singer in this regard is how far are we willing, or should we be willing, to erode the doctrine of state sovereignty? Singer seems to be sympathetic to the view that intervention in the affairs of another state is justified when it is in response to acts 'that shock the moral conscience of mankind'.[27] Theodor Meron argues that the purpose of international criminal law is to enforce international human rights which thus provide the basis for the enforcement by the ICL.[28]

The problem with this approach is that varying acts may trigger markedly differing responses. For example, homosexuality in some communities is regarded as offensive to the moral conscience, as are interracial relationships or being an atheist.

As noted, Singer is cognisant of the different understandings of 'moral consciousness' which have been confronted in this chapter and therefore by implication the debate among contributors to this volume. He therefore engages in a discussion of cultural relativism, and the question how one can avoid cultural relativism in determining what values ought to be discarded and which values ought to be retained. He commences a response to this question from the premise that an argument against cultural relativism can be founded on ethics that allows for the possibility of moral arguments that extend beyond the limits of a particular culture. Rooted in this conception of ethics, the argument against cultural relativism acknowledges that 'distinctive cultures embody ways of living that have been developed over countless generations, that when they are destroyed, the accumulated wisdom that they represent is lost, and that we are all enriched by being able to observe and appreciate the diversity of cultures'. This requires that we be sensitive to the cultural values of others, and have an 'understanding for what gives them self-respect and identity'.[29]

Singer then argues that, only after we have taken note of and accepted the 'scope for rational argument' that lies in an ethics which is 'independent of any particular culture', can we begin to question the soundness, defensibility or justifiability of the values to which we claim to adhere.[30]

[26] Singer, *One World* (n 4).
[27] ibid, 141.
[28] Theodore Meron, *The Making Of International Law*: *A View From The Bench* (Oxford, Oxford University Press, 2011).
[29] Singer, *One World* (n 4) 140.
[30] ibid.

Enter this book, which has sought through the prism of national constitutions which protect and promote human rights to examine this question: how does the impact of culture and politics influence the possibility of a common language of rights based upon certain agreed values and the meaning thereof? Is there sufficient justification to contend for any form of overlapping consensus. In turn, can cosmopolitanism accommodate inherent traditions and customs?

Tagore asserts that 'tradition without reason is blind, and reason without tradition is empty'. He rejects a cosmopolitan enterprise that is devoid of cultural or traditional content. For him, cosmopolitanism, as detached from reason, 'impoverishes the multi-hued richness of the human condition';[31] cosmopolitanism does not derive from abstractions but it is 'grounded in existential orientation'. It is grounded in 'a way of being in the world'.[32] Similarly, reason grounded in tradition is philosophically uncomfortable. Something very important is lost when tradition is devalued in the course of trying to attain cosmopolitanism. Martha Nussbaum contends, in similar fashion, that the source of our foundational moral obligations is the human community; that is, 'we should regard all human beings as our fellow citizens and neighbours', although this does not imply a relinquishment of local affinity, belief or identity.[33]

Amartya Sen has developed an argument which essentially follows that of Nussbaum, namely that cosmopolitism does not need to eschew considerations of tradition, belief, identity or local affinity. He acknowledges that

> no one should expect that there would be complete unanimity in what everyone in the world actually wants or that there is any hope that a dedicated racist or sexist would be inexorably reformed by the force of public argument. What sustainability of a judgment in favour of a form of common rights discourse demands is a general appreciation of the reach of reasoning in the favour of those rights, if and when others try to scrutinise claims on an impartial basis.[34]

V. THE IMPARTIAL SPECTATOR

A conceptual framework to do this work is therefore required to examine questions of possible convergence. Sen's impartial spectator may prove to be a promising starting point to engage with this question. In addition to its appeal to open impartiality, the impartial spectator insists on a constant engagement between the institutions and the reality of the people that they govern. This idea is tentatively employed as a basis for further examination.

[31] Sarandronath Tagore, 'Tagore Conception of Cosmopolitanism: A reconstruction' (2008) 77 *University of Toronto Quarterly* 1070, 1073.

[32] ibid, 1078.

[33] Martha Nussbaum, *Hiding from Humanity. Disgust, shame and the law* (Princeton, Princeton University Press, 2004) 84.

[34] Sen, *The Idea of Justice* (n 24) 386.

Sen uses a concept of open and closed impartiality to develop an idea of an objective basis with which to communicate and debate beliefs and values so that the engagement is not confined to an impermeable subjectivity of the communicator; that is, one should be able to communicate in a manner that enables the person to fully express her values and beliefs. Open impartiality involves making assessments which invoke judgments from outside the focal groups and thereby avoid parochial bias.

This enables people to engage in debates 'about the correctness of the claims made by different people'.[35]

In support, he cites Adam Smith:

> We can never survey our own sentiments and motives, we can never form any judgment concerning them; unless we remove ourselves, as it were, from our own natural station, and endeavour to view them as at a certain distance from us. But we can do this in no other way than by endeavouring to view them with the eyes of other people, or as other people are likely to view them.[36]

In examining the correctness of ethical propositions, what is important is the reasoning on which that proposition is based. It is here that objectivity plays a role. Sen explains that 'demands of ethical objectivity … relate closely to the ability to stand up to open public reasoning, and this, in turn, has close connection with the impartial nature of the proposed propositions and the arguments in their support'.[37] Impartiality is important to an understanding of justice so that we can arrive at an understanding of justice through a deliberative 'evaluation of social justice and the concomitant societal arrangements'.[38]

Thus the core idea behind the 'impartial spectator' is that we should 'examine our own conduct as we imagine any other fair and impartial spectator would examine it'[39]; meaning that we should evaluate our own actions with utmost objectivity. This supports the contention that the 'impartial spectator' is more concerned with 'open impartiality'. The difference between the idea of an impartial spectator as conceived by Smith, and Rawls' concept of social contract (based upon the original position) is that the former permits judgments by 'any other fair and impartial spectator'. It includes judgments by people who are close to, or who are part of the particular community, as well as judgments from those who are exterior to, and removed from that community.[40] By including judgments from 'outsiders' and 'insiders', the impartial spectator enables us to broaden the scope of our ethical enquiry. Again Adam Smith is employed to provide an explanation of the importance of the impartial spectator:

[35] Sen, *The Idea of Justice* (n 24) 118.
[36] ibid, 125.
[37] ibid, 122.
[38] ibid, 123.
[39] ibid, 124.
[40] ibid, 125.

> In solitude, we are apt to feel too strongly whatever relates to ourselves … The conversation of a friend brings us to a better, that of a stranger to a still better temper. The man within the breast, the abstract and ideal spectator of our sentiments and conduct, requires often to be awakened and put in mind of his duty, by the presence of the real spectator: and it is always from that spectator, from whom we can expect the least sympathy and indulgence, that we are likely to learn the most complete lesson of self-command.[41]

In invoking the concept of the impartial spectator therefore, the point is to listen to other voices, as these 'may help us gain a full—fairer—understanding' of justice.[42]

Within the context of the enterprise undertaken in this study, the idea of the impartial spectator represents a protest against transcendental institutionalism and maintains that there is a multiplicity of values, even among reasonable people. To this extent, it goes beyond finding 'just institutions' and seeks social realisations regarding key issues.[43] Therefore, even if we cannot agree upon a comprehensive definition of the just without such a conception, we can still develop a common resolve to fight for the abolition of famine, genocide, terrorism, slavery, epidemics or illiteracy. It follows that the model of the impartial spectator rejects the argument that justice can only be institutionalised with the context of a sovereign state. Instead, the impartial spectator accepts that there are trans-border entities whose decisions have a bearing on people's lives globally. It acknowledges further that what may happen within the borders of one nation-state may have ramifications within the borders of another country which in turn cautions against the rejection of some basis of a common discourse.

VI. THE IMPLICATIONS WHICH FLOW FROM THIS STUDY

Unsurprisingly, there is a considerable overlap in values as they appear in the various texts under scrutiny. Freedom for example, receives almost unanimous mention in the various constitutions which are canvassed. The same holds true of the values of community/family and reverence for life. But that, alas tells us too little. As is apparent from the individual chapters, there are great variations in the emphasis placed on these rights and the meaning given thereto by the various constitutional courts which interpret these constitutions. As has been indicated in the discussion relating to the scope and limitations of the cosmopolitan approach, it is not entirely unsurprising that the achievement of a truly, universal agreement in respect of the content of human rights is unlikely to be achieved in the foreseeable future.

[41] Adam Smith, *The Theory of Moral Sentiment*, III.3.38 at 153–54 as quoted in Sen, ibid 125.
[42] Sen *The Idea of Justice* (n 24) 131.
[43] ibid, 143.

Notwithstanding the exponential growth in national constitutions which seek at least textually to promote similar forms of human rights, this study has shown that there is no consistent application of any of the rights which set laws which consistently transcend natural boundaries. Even amongst nation-states that may be described as democracies and would lay claim to sharing similar basic values, the historical, cultural and, in some cases, religious influences materially affect the jurisprudence of these countries and hence limit the achievement of shared and equal application of the textually guaranteed provisions. Furthermore, the legal cultures of these societies and, in particular the procedural traditions within the various legal systems which, examined in turn, reflect certain historical and cultural influences, continue to constitute an obstacle to a universal agreement on an agreed content of human rights norms and other constitutional values.

This study has however shown that as more constitutional texts are passed in countries with vastly different historical, cultural and legal traditions, an impartial spectator, reading the various chapters of this book, would be able to conclude that a framework of normative reasoning with regard to the values cannot entirely be discounted; that is, at the very least, practices which contravene a range of these values now require either rationalisation or justification from 'right abusers' rather than the claim that they can be justified on any coherent normative basis. As Sen observes:

> I would argue that taking rights seriously requires us to recognise that it would be bad—sometimes terrible—if they were violated. This does not imply that the recognition of a claim as a right requires us to assume that it must always overwhelm every other argument in the contrary direction (based, for example, on well-being, or a freedom not included in that right). It is perhaps not surprising that the opponents of the idea of human rights often thrusts on them remarkably all-conquering pretensions and then dismiss these rights on the grounds that these pretentions are highly implausible. Mary Wollstonecraft and Thomas Paine did not attribute unconditional all-conquering pretentions to the rights of human beings; nor do most of the people today who can be seen as human rights activists. They do, however, insist that human rights be taken seriously and be included among the powerful determinants of action, rather than being ignored or easily overwhelmed.[44]

This passage suggests that, while Singer's claim for a universal law may be overly optimistic, the contrary proposition, namely that no progress towards a set of common values has taken place, should enjoy even less plausibility.

In summary, demands for global justice make best sense when they are based on a shared humanity and some sense of common or shared discourse.[45] By adopting the model of the impartial spectator and its requirement of

[44] Sen, *The Idea of Justice* (n 24) 360–61.
[45] ibid, 143.

open impartiality, it may be possible to recognise that considerations of basic human rights and global values, including the importance of safeguarding elementary civil and political liberties, need not be contingent on citizenship and nationality, and may not be institutionally dependent on a nationally derived social contract. Further, there is no need to presume a world government, or even to invoke a hypothetical global social contract. The 'imperfect obligations' associated with the recognition of these human rights can be seen as falling broadly on anyone who is in a position to help.

The manifestation of global dialogue today, through the formal organisations such as the United Nations, the World Trade Organisation (WTO) and the International Criminal Court (ICC), through the 'media, political agitation' and the works of citizens across borders in their varied forms, all bear testament to some form of open impartiality. As Sen puts it, these factors provide evidence for the contention that 'the cause of open impartiality is not entirely neglected in the contemporary world'.[46] There is a case to be made in favour of an idea of interwoven global interests. In this sense, it is possible to see how a multitude of economic, climatic and terrorist induced crises support open impartiality that is demanded by the impartial spectator which speaks to that interconnectedness, as well as the promotion of debate and dialogue about global values. A focus on global institutions alone (which Sen rejects) understates the importance of conflicting interest to which the local identity and culture directs our attention. Therefore, instead of an idea of justice that is based on the concept of perfect institutions, what is needed is an 'agreement, based on public reasoning, on the rankings of alternatives that can be realised'.[47]

The key question raised in this book concerns the extent to which the exponential growth in national constitutions of which the texts studied in this book are but illustrative, may provide some evidence of the possibility of a common constitutional discourse which, in turn, is predicated on some measure of reasoned agreement about shared values.

The analysis of the country chapters reveals significant differences in interpretation and application of a variety of values which are all represented in the texts of the countries so studied. However, an impartial spectator, when examining the annexure shown on p 473, would have noticed significant overlaps in understanding to the extent that even the critical differences can be understood and debated within a framework of reasoned argument. Broad agreement on an idea of a rule of law, equality, and life, for example, and even a narrow agreement on freedom, in particular, reveals some significant transcendence of national boundaries as the expansion of the constitutional enterprise begins to prod countries towards some form of tentative, but developing common, global framework of values.

[46] ibid, 151.
[47] ibid, 17.

This work does not prove that the values which underpin the individual rights contained in the texts examined by the authors are free of moral ambiguity. But that acknowledgement is a long way from concluding that there is no basis for any finding of congruence. Of course, even a finding of congruence is subject to the exigencies of the political context. For example, since 9/11 torture as a means of dealing with security threats both real and perceived has threatened to trump the value of fairness and openness which underlies the right of due process. Thus, in public opinion polling, a bare majority of Americans oppose torturing prisoners in the struggle against terrorism, and support for torture has risen significantly in recent years.[48]

However, the very global constitutional enterprise which is the subject of this book has still given rise to a social practice in which political action is both justified and evaluated. Indeed very often governments lie about claims that they torture prisoners as a result of the social sanction which is sourced in the values so examined in this book. Further, while the chapter on China luminously illustrates many of the problems which have been discussed in this conclusion regarding a confident assertion of growing congruence, subsequent to the writing of the Chinese chapter the Chinese Communist Party's new General Secretary, Mr Xi Jinping, spoke of the need to enforce the Constitution and said 'the Constitution should be the legal weapon for people to defend their own rights'.[49] Whatever the justifiable doubts about whether this speech will be translated into practice, it does reveal that even a call for the Constitution to be implemented so that it can have 'life and authority' is illustrative of the shape of a discourse that is a product of some common understanding (dare we say congruence) in the scope and meaning of the rights and the values that underpin them.

Marti Koskenniemi has mounted a sustained and powerful critique of the rise of human rights centred discourse, particularly in international law.[50] He contends, in sharp contrast to those who advocate a cosmopolitan set of ideas, that the latter promote the myth that a set of contestable values possess historical inevitability and an uncontested global reach. However, he concedes that these constitutional and hence human rights vocabularies do not merely frame the internal world of politicians' consciousness of the contingency of their choices. They directly inform political struggles. In addition these values form the basis of a legal vocabulary which is mastered by technical and administrative bodies and which then is employed to articulate concerns which are considered to be important. It follows that, even Koskenniemi, arguably the most distinguished international lawyer who is opposed

[48] *New York Review of Books*, 7 February 2013, p 6.

[49] *New York Times*, 4 February 2013.

[50] See eg, Marti Koskenniemi, 'The fate of international law: Between technique and politics' (2007) 70 *Modern Law Review* 1–32; see also Koskenniemi, 'Vocabularies of Sovereignty: the powers of paradox' in H Kalmo and A Skinner (eds), *Sovereignty in Fragments* (Cambridge, Cambridge University Press, 2014) 222–42.

to any form of universal legal vocabulary, is compelled to concede that the 'myth', as he describes it, has profound practical consequences.

That these vocabularies are contested and conflicted is unsurprising, given the multitude of contexts in which they are located. But these rights and the values that inform them are not so different that they do not speak across national boundaries. There is, at the very least, some measure of an overlapping vocabulary. Hence, while this book cannot claim to have justified the conclusion that the basis of a coherent international language of values and system of recognised rights exists, there lies in the praxis of constitutionalism, the outline of a discernible framework which holds the possibility for a future cosmopolitan claim as outlined earlier in this chapter. And this conclusion in turn holds significant normative and legal possibilities for a form of shared political and legal discourse which may, at some point, transcend national boundaries, history and culture.

VII. ANNEXURE: LAW AND VERSTEEG (2011)*

Rank	**Rights-related provisions**	**1946**	**1956**	**1966**	**1976**	**1986**	**1996**	**2006**
1	Freedom of religion	81%	88%	87%	88%	92%	95%	97%
2	Freedom of the press and/or expression	87%	88%	84%	86%	87%	95%	97%
3	Equality guarantees	71%	77%	85%	88%	92%	95%	97%
4	Right to private property	81%	85%	81%	83%	87%	95%	97%
5	Right to privacy	83%	83%	78%	81%	83%	94%	95%
6	Prohibition of arbitrary arrest and detention	76%	81%	81%	79%	81%	92%	94%
7	Right of detention	73%	77%	73%	75%	81%	90%	94%
8	Right of association	72%	74%	78%	77%	80%	91%	93%
9	Women's rights	35%	51%	62%	70%	77%	90%	91%
10	Freedom of movement	50%	55%	58%	58%	64%	84%	88%

(continued)

* The Evolution and ideology of Global Constitutionalism by David Law and Mila Versteeg, Washington University Legal Studies Research Paper Series, June 2011.

Rank	Rights-related provisions	1946	1956	1966	1976	1986	1996	2006
11	Right of access to court	68%	68%	64%	62%	64%	85%	86%
12	Prohibition of torture	37%	37%	41%	45%	56%	80%	84%
13	Right to vote	63%	74%	73%	69%	74%	82%	84%
14	Right to work	55%	65%	59%	67%	65%	80%	82%
15	Positive rights to education at state expense	65%	72%	59%	65%	65%	78%	82%
16	Judicial review	25%	32%	53%	51%	58%	80%	82%
17	Prohibition of ex post facto laws	41%	51%	57%	60%	67%	77%	80%
18	Physical needs rights	44%	60%	52%	57%	61%	75%	79%
19	Right to life	33%	33%	38%	41%	51%	71%	78%
20	Presumption of innocence	8%	12%	31%	37%	49%	69%	74%
21	Right not to be expelled from home territory	30%	33%	38%	44%	48%	70%	73%
22	Limits on property rights	51%	63%	58%	68%	70%	69%	73%
23	Rights to present a defence	30%	37%	52%	57%	64%	69%	72%
24	Right to unionise and/or strike	25%	35%	49%	50%	50%	69%	72%
25	Right to counsel	10%	17%	31%	38%	47%	66%	70%
26	Right to public trial	43%	47%	46%	48%	53%	65%	69%
27	Rights for the family	28%	28%	38%	43%	46%	62%	67%
28	Right to form political parties	9%	16%	28%	26%	31%	63%	65%
29	Children's rights	25%	35%	30%	35%	40%	59%	65%

(continued)

30	Citizen duties	53%	62%	52%	59%	56%	63%	65%
31	Rights to a healthy environment	0%	0%	1%	8%	20%	52%	63%
32	Other workers' rights (freedom of education	32%	45%	38%	42%	46%	57%	59%
33	Negative education rights (freedom of education)	57%	56%	44%	38%	35%	52%	55%
34	Minority rights	16%	24%	20%	20%	26%	43%	51%
35	Prohibition of double jeopardy	16%	19%	26%	31%	37%	46%	50%
36	Right to remain silent	29%	29%	32%	31%	38%	47%	49%
37	Right to a timely trial	8%	11%	18%	22%	31%	40%	47%
38	Artistic freedom	10%	16%	13%	17%	23%	42%	45%
39	Rights for handicapped	0%	1%	3%	5%	13%	30%	43%
40	Ombudsman or human rights commission	5%	5%	4%	9%	15%	27%	37%
41	Right to marry	18%	31%	30%	28%	26%	32%	35%
42	Right to asylum	11%	21%	18%	21%	21%	32%	35%
43	Reference to international human rights treaties	0%	1%	18%	17%	15%	30%	35%
44	Rights for elderly	3%	3%	3%	7%	12%	26%	34%
45	Rights to information about government	2%	4%	3%	5%	8%	25%	34%
46	Separation of church and state	20%	25%	28%	25%	25%	36%	34%

(continued)

Rank	Rights-related provisions	1946	1956	1966	1976	1986	1996	2006
47	Right to protection of reputation	13%	11%	8%	10%	17%	29%	32%
48	Affirmative action	3%	9%	17%	20%	26%	27%	30%
49	Natural resources for benefit of all	8%	7%	8%	15%	19%	27%	29%
50	Right to appeal to higher court	8%	8%	7%	7%	8%	20%	25%
51	Prohibition of death penalty	10%	9%	8%	9%	12%	20%	24%
52	Official state religion	39%	39%	32%	27%	26%	24%	22%
53	Prisoner rights	10%	12%	9%	12%	10%	15%	18%
54	Consumer rights	0%	0%	0%	1%	6%	12%	16%
55	Rights to resist when rights are violated	8%	7%	4%	4%	4%	15%	16%
56	Substantive principle for education	11%	16%	10%	15%	15%	14%	14%
57	Prohibition of genocide/crimes against humanity	0%	0%	0%	1%	2%	6%	12%
58	Rights for victims of crimes	0%	0%	0%	0%	1%	7%	10%
59	Protection of foetuses	0%	0%	1%	1%	6%	7%	8%
60	Rights to bear arms	10%	8%	5%	4%	3%	3%	2%