

ABORIGINAL PEOPLES, INTERNATIONAL LAW AND THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

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While international law grants no recognized status to aboriginal peoples, it does make provision for the recognition of special rights to minority groups, over and above those enjoyed by the rest of the population. Moreover, it has laid down the conditions to be looked for in determining whether a "community" exists which might claim recognition as a minority group. The author suggests that the Indians, Inuit and Métis would each constitute such a group. In examining the provisions in the Charter of Rights guaranteeing aboriginal rights, the author is of the opinion that these are of no more worth than any of the rights guaranteed, and that they can easily be overcome by use of both the "notwithstanding" clause and section 1. Rather than embodying aboriginal rights in the Constitution, the aboriginal people should be granted a status of their own, with rights spelled out in a completely separate piece of legislation which cannot be touched by the Charter or the Constitution. The author also suggests that it may be necessary to subject this special legislation to the jurisdiction of a court comprising aboriginal judges.

Alors que le droit international n'accorde aucun statut spécial aux peuples autochtones, il prévoit des dispositions reconnaissant les droits spécifiques des groupes minoritaires, en plus de ceux que détient le reste de la population. Il a fixé, en outre, les conditions nécessaires pour déterminer dans quel cas une "communauté" existe et pourrait se faire reconnaître en tant que groupe minoritaire. Pour l'auteur, Indiens, Inuit, et Métis rentrent dans cette catégorie; mais après examen des dispositions garantissant les droits des peuples autochtones contenues dans la Charte, il ne leur attribue pas plus de valeur qu'à tous les autres droits garantis par cette Charte, parce qu'ils peuvent être facilement restreints par l'utilisation de la clause "nonobstant" et de l'article 1er. Plutôt que d'incorporer les droits des peuples autochtones dans la Constitution, on devrait accorder à ces peuples leur propre statut, et des droits contenus dans un corps de lois complètement séparé que ni la Charte ni la Constitution ne pourraient toucher. L'auteur est en outre d'avis qu'il faudrait soumettre cette législation spéciale à la compétence d'un tribunal composé de juges autochtones.

International law has never directly referred to the rights of aboriginal or native peoples. In fact, the tendency has been to deny to such peoples any status from the standpoint of that system. Perhaps, one of the clearest instances of this is to be found in the statement of the Permanent Court of International Justice in its judgment concerning the *Legal Status of Eastern Greenland*.¹ The dispute concerned a claim to sovereignty put forward by

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¹ P.C.I.J. 1933, series A/B, No. 53, 3 Hudson, World Ct Rep. 151.

Denmark and contested by Norway. One of the points in issue was the contention that early settlements had been destroyed by the aboriginal inhabitants and any claim to sovereignty based thereon thus liquidated. On this point the court stated that:² "[t]he word 'conquest' is not an appropriate phrase, even if it is assumed that it was fighting with the Eskimos which led to the downfall of the settlements. Conquest only operates as a cause of loss of sovereignty when there is war between two States and by reason of the defeat of one of them sovereignty over the territory passes from the loser to the victorious State. The principle does not apply in a case where a settlement has been established in a distant country and its inhabitants are massacred by the aboriginal population." While it may be argued that such a view is representative of a western and imperialist-oriented view of international law and of sovereign rights,³ it must nevertheless be recognized that international law and any claim to enjoy rights thereunder is a composite of rules and principles that have in fact so developed. Moreover, claims by aboriginal groups to such concepts as sovereignty, title to territory or self-determination all depend on international law as it now exists, regardless of the origin of such concepts. It is true that the advent of a number of newly independent states since the Second World War has resulted in revisions and adaptations of what in some cases were considered to be well-established and unquestioned rules, but there has been no rejection of the corpus of international law because of its "tainted" origins.^{3a} Moreover, as was made clear in the Charter of the Organization of African Unity⁴ the newly independent states which are now governed by "aboriginal" populations committed themselves to "respect for the sovereignty and territorial integrity of each [member] State and for its inalienable right to independent existence", regardless of the fact that the boundaries of such states were created by the former imperialist powers and acquired their legitimacy from the rules of international law developed by those powers.

Perhaps the major contribution to international law which has been made by the new states and on which aboriginal peoples appear to base their claims in so far as international law is concerned is the right to self-determination.⁵ This right is but vaguely referred to among the Purposes of the United Nations which refers to the development of "friendly relations among nations based on respect for the principle of equal rights and

² *Ibid.*, at p. 171.

³ See *e.g.*, Snow, *The Question of Aborigines in the Law and Practice of Nations* (1919); Lindley, *The Acquisition and Government of Backward Territory in International Law* (1926).

^{3a} See *e.g.*, Green, *Law and Society* (1975), Ch. V: *The Impact of the New States on International Law*.

⁴ (1963), 2 *Int'l Leg. Mat.* 766, art. III (3).

⁵ See *e.g.*, Pomerance, *Self-Determination in Law and Practice: The New Doctrine in the United Nations* (1982).

self-determination of peoples",⁶ without giving the slightest indication of what is meant by "self-determination" or "peoples". It is not until the adoption by the General Assembly of the Declaration on the Granting of Independence to Colonial Countries and Peoples⁷ that we get the first hint that there is anything that may be described as a "right" to self-determination. Reading the Preamble to the Declaration makes it clear that it was intended as a manifesto for peoples under colonial administration, as that term has been traditionally understood⁸ and as mentioned in Wilson's Fourteen Points.⁹ In view of this it is perhaps not surprising that the United Nations Declaration solemnly states that "any attempt at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations".¹⁰ This would imply that any attempt by a group within a state, as distinct from a colonial people, to assert its right to secede would in fact be contrary to the United Nations' understanding of the right to self-determination. Similarly, the more recent and more frequently quoted Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations¹¹ in its spelling out of the Principle of Equal Rights and Self-Determination of Peoples equally indicates that it is primarily concerned with the granting of freedom to colonial and non-self-governing territories. Like the earlier Declaration, moreover, it too proclaims that "nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above [—that is to say in accordance with the recognition of the rights of colonial peoples and those in non-self-governing territories, the status of which is predicated by Chapter XI of the United Nations Charter—] and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour". So long as there is no discrimination based on such distinctions in selecting the government, it

⁶ Charter of the United Nations, art. 1 (2).

⁷ 1960, Res. 1515 (XV).

⁸ See *e.g.*, Royal Institute of International Affairs, *The Colonial Problem* (1937); Cobban, *National Self-Determination* (1945); *The Nation State and National Self-Determination* (1970).

⁹ Whiteman, *Digest of International Law*, Vol. 5 (1965), Point V: "A free, open-minded, and absolutely impartial adjustment of all colonial claims, based upon a strict observance of the principle that in determining all such questions of sovereignty the interests of the peoples concerned must have equal weight with the equitable claims of the government whose title is to be determined."

¹⁰ Art. 6.

¹¹ 1970, Res. 2625 (XXV).

would appear that a state is complying with the provisions in the Declaration.

In addition, it should be remembered that while these manifestos from the General Assembly carry the name of "declaration" they are in fact of no greater legal significance than other resolutions of that body and lack any legally obligatory authority, whatever might be the political or moral value which may attach to their high-sounding phrases.¹² Even so ardent a believer in the international recognition and protection of human rights as Lauterpacht,¹³ in his capacity as judge of the International Court of Justice, pointed out that:¹⁴

Although decisions of the General Assembly are endowed with full legal effect in some spheres of the activity of the United Nations . . . , it may be said, by way of a broad generalisation, that they are not legally binding upon the Members of the United Nations. In some matters—such as the election of the Secretary-General [and other primarily "housekeeping" issues]—the full legal effects of the Resolutions of the General Assembly are undeniable. But, in general, they are in the nature of the recommendations and it is in the nature of recommendations that, although on proper occasions they provide a legal authorisation for Members determined to act upon them individually or collectively, they do not create a legal obligation to comply with them. . . . Now "resolutions" cover two distinct matters: They cover occasionally decisions which have a definite binding effect either in relation to Members of the United Nations or its organs or both, or the United Nations as a whole. But normally they refer to recommendations, properly so called, whose legal effect, although not always altogether absent, is more limited and approaching what, when taken in isolation, appears to be no more than a moral obligation. This, in principle, is also the position with respect to the recommendations of the General Assembly in relation to the administration of trust territories. . . .

to which one might have assumed the principle of self-determination had most relevance.

To deny to an aboriginal people the right to secede does not mean that it may not be entitled to what might be described as "internal" as distinct from "external" self-determination. Internal self-determination has been defined as "a principle . . . which encompasses the right of all segments of a population to influence the constitutional and political structure of the system under which they live",¹⁵ in other words "internal autonomy".¹⁶ Even writers who have argued that the Declaration on Friendly Relations guarantees the right to self-determination to all people, including those not in a condition of colonialism, are only prepared to confirm that for such

¹² See Statement on the nature of Declarations by Legal Dept. of U.N. Secretariat, Doc. E/CN. 4/L610, April 2nd, 1962, c. 2; Schermers, *International Institutional Law* (1972), p. 500.

¹³ See his *International Law and Human Rights* (1950).

¹⁴ *South-West Africa—Voting Procedure*, [1955] I.C.J. 67, at pp. 115-116.

¹⁵ Buchheit, *Secession* (1978), p. 14.

¹⁶ Šuković, *Principle of Equal Rights and Self-Determination of Peoples* in Šahović, *Principles of International Law Concerning Friendly Relations and Cooperation* (1972), pp. 323, 350.

people the right has a similar meaning. "Indeed, self-determination must ensure to all peoples what one would call *internal* self-determination, namely the fundamental constitutional liberties in the absence of which the possession of statehood might even appear to be a secondary goal . . . [for] self-determination would be the best defence of peace. . . . Free peoples are perhaps a better hope to keep the peace than the United Nations Organization."¹⁷ Disregarding the blatant ideological substratum to this comment, but recognizing the significance of internal self-determination, it would appear that the rights of any group, be it aboriginal or otherwise, are no different from those of the generality of the population, a principle that is embodied in section 3 of the Canadian Charter of Rights which provides that "every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for election therein". In view of the relatively limited power of the Senate and its virtual inability to hamper government, it matters little if any particular group does not enjoy full proportional representation in that body.

In this connection it should be pointed out that in so far as it might be considered necessary to grant to a particular group that has suffered adverse discrimination, such advantages as may be required to bring it up to the level of the rest of the population, even though this might appear to involve discrimination against the latter, this is provided for in the Charter. Section 15 guarantees the equality of every individual before and under the law and grants to them equal protection and equal benefit of the law without discrimination. Nevertheless, it also makes provision for the adoption of affirmative action programmes, in that the guarantee of equality "does not preclude any law, programme or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability". This provision reflects the obligation incumbent upon Canada under the International Convention on the Elimination of All Forms of Racial Discrimination,¹⁸ to which Canada became a party in 1970. This provides that "special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved". Neither the Charter of Rights nor the Anti-Discrimination Convention gives any hint as to what is meant by a

¹⁷ Arangio-Ruiz, *The UN Declaration on Friendly Relations and the System of the Sources of International Law* (1979), p. 136, see, also, pp. 183-184.

¹⁸ (1966), 660 U.N.T.S. 195, art. 1 (4).

group. However, it may be presumed that the customary international law definition of a "community" would constitute an adequate definition. In the advisory opinion of the Permanent Court of International Justice concerning *Greco-Bulgarian "Communities"*,¹⁹ the court said: "By tradition, . . . the 'community' is a group of persons living in a given country or locality, having a race, religion, language and traditions of their own and united by this identity of race, religion, language and traditions in a sentiment of solidarity, with a view to preserving their traditions, maintaining their form of worship, ensuring the instruction and upbringing of their children in accordance with the spirit and traditions of their race and rendering mutual assistance to each other. . . . The existence of communities is a question of fact; it is not a question of law." There can be little doubt that the Indians, Inuit and Métis would all satisfy this definition of a "community" and as such constitute a group meriting recognition to benefit from programmes of affirmative discrimination. It should be noted, however, that while the Convention only permits such affirmative discrimination until such time as the disadvantaged group may be said to have reached equality with the rest of the population, there is no such limitation in the Canadian Charter. Since the Charter expressly preserves for the Indian people any rights that they may possess by virtue of the Royal Proclamation of 1763²⁰ or by way of land claim settlements,²¹ it could happen that non-aboriginals might well be able to bring a claim against the Canadian government on the ground that since there is now, by reason of the equality clauses of the Charter, equality as between the aboriginal peoples and the rest of Canada, any privileges stemming from the Proclamation or the land claims are to be extended to all the citizens of Canada.

Regardless of any special rights that may be preserved for the aboriginal peoples under the Charter, or any special privileges that they may enjoy as definable groups under international instruments to which Canada is a party, it should be remembered that by virtue of the rights granted by such agreements the aboriginal peoples are beneficiaries of those rights to the same extent as any other persons, for the rights are granted without discrimination and on a basis of equality. While the Universal Declaration of Human Rights²² is not a legally binding document since it is merely a resolution of the General Assembly, it serves as a guide for all other international agreements in the field of human rights and fundamental freedoms and has been the impetus for much of the municipal legislation concerning such rights and freedoms that has been enacted since 1948. While the Declaration makes no reference to the special rights that may be the prerogative of any group or minority, after stipulating that "all human

¹⁹ P.C.I.J., 1930, series B, No. 17, 2 Hudson, World Ct Rep. 641, at pp. 653-654.

²⁰ R.S.C. 1970, App. II, No. 1.

²¹ See Charter of Rights, s. 25.

²² 1948, Res. 217 (III)A.

beings are born free and equal in dignity and rights", it goes on to provide that "everyone is entitled to all the rights and freedoms set forth in this Declaration, 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. . . . Everyone has the right to take part in the government of his country, directly or through freely chosen representatives. Everyone has the right of equal access to public service in his country. . . . 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 the resources of each State*, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality. . . . Everyone has the right to freely participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. . . . Everyone is entitled to a social and international order [—whatever that may mean—] in which the rights and freedoms set forth in this Declaration can be fully realized. Everyone has duties to the community in which alone the free and full development of his personality is possible. In the exercise of his rights and freedoms, everyone shall be *subject only to such limitations as are determined by law* solely for the purpose of securing the recognition and respect for the rights and freedoms of others and of meeting *the just requirements of morality, public order and the general welfare in a democratic society*".²³ Since there is no attempt to indicate in the Declaration how this latter purpose is to be determined, one can only assume, in accordance with the principles laid down in the *S.S. Lotus*,²⁴ that it is for the state to decide how this purpose is to be fulfilled, bearing in mind that restrictions upon sovereignty must be clearly expressed and will be narrowly interpreted. Moreover, since "these rights and freedoms [—together with others specifically spelled out—] may in no case be exercised contrary to the purposes and principles of the United Nations",²⁵ and since it is one of the Purposes of the United Nations to act "in conformity with the principles of justice and international law",²⁶ any treaty obligation which conflicts with any such human right or fundamental freedom would override such human right or so-called fundamental, freedom.

More important than the Declaration are the international agreements that have been drawn up to give legal force to the obligations created by international law in relation to human rights and fundamental freedoms. Of these agreements, the most important in so far as Canada is concerned is the International Covenant on Political and Civil Rights,²⁷ to which Canada

²³ Arts 1, 2, 21 (1), (2), 22, 27 (1), 28, 29 (1), (2), italics added.

²⁴ P.C.I.J., 1927, series A, No. 10, 2 Hudson, World Ct Rep. 23, at p. 35.

²⁵ Declaration; art. 29 (3).

²⁶ U.N. Charter, art. 1 (3).

²⁷ 1976, Res. 2200 (XXI)A.

became a party in 1976. As with the Declaration, there is no provision in this document on behalf of any particular group nor are any peculiarities enjoyed by any particular group specially mentioned for protection. The nearest one gets to this is article 27 providing that "in those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language". The rights specially preserved in this way are thus extremely limited in character. This is so because the rights guaranteed by the Convention are guaranteed to all, "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or status".²⁸ Unlike the anti-discrimination Convention there is no provision in favour of affirmative action, as there is in section 15, paragraph 2, of the Charter of Rights. Any apparent conflict between the Convention and the Covenant, or between the latter and the Charter would be met by the contention that the overriding aim of all is to ensure equality, and in the eyes of international law equality is a real and not merely a formal concept. Thus, when faced with this issue, the Permanent Court of International Justice has said "there must be equality in fact as well as ostensible legal equality in the sense of the absence of discrimination in the words of the law."²⁹ . . . [T]he equality between members of the majority and of the minority must . . . be an equality in law and in fact. It is perhaps not easy to define the distinction between the notions of equality in fact and equality in law; nevertheless, it may be said that the former notion excludes the idea of a merely formal equality. . . . Equality in law precludes discrimination of any kind; whereas equality in fact may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations. It is easy to imagine cases in which equality of treatment of the majority and of the minority, whose situation and requirements are different, would result in inequality in fact. . . . The equality between members of the majority and of the minority must be an effective, genuine equality. . . . The idea embodied in the expression 'equal right' is that the right thus conferred on the members of the minority cannot in any case be inferior to the corresponding right of other . . . nationals. In other words, the members of the minority must always enjoy the right stipulated . . . , and, in addition, any more extensive rights which the State may accord to other nationals".³⁰ It is to be hoped that a similar approach will be adopted by the Canadian courts, as has been done by, for example, those of India and the United States.³¹

²⁸ Art. 2 (1).

²⁹ *German Settlers in Poland*, P.C.I.J., 1923, series B, No. 6, 1 Hudson, World Ct Rep. 208, at p. 218.

³⁰ *Minority Schools in Albania*, P.C.I.J., 1935, series A/B, No. 64, 3 Hudson, World Ct Rep. 485, at pp. 498-499.

³¹ See e.g., Green, *The Right to Learn* (1954), 3 *Indian Y.B. Int'l Affairs* 268.

Unlike the Charter of Rights, the International Covenant recognizes that a guarantee of so-called fundamental rights might cause difficulties in the event of an emergency threatening the existence of the State itself, in which event "the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law, and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin".³² Whereas the Canadian Bill of Rights³³ recognizes the potential infringements inherent in an invocation of the War Measures Act,³⁴ there is no similar provision in the Charter, and it would appear at first blush that the rights granted therein are completely "non-derogable". However, it would seem that this might not in fact be the case, since section 1 of the Charter stipulates that the rights and freedoms guaranteed therein are subject "to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". This language is somewhat reminiscent of that used in the European Convention on Human Rights³⁵ which subjects a number of the rights guaranteed "to such limitation as are prescribed by law and are necessary in a democratic society".³⁶ In addition, the Convention recognizes that "in time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation . . .".³⁷

While there has as yet been no decision of the Supreme Court of Canada as to the meaning of "reasonable limits prescribed by law and demonstrably justified in a free and democratic society", there has been a decision by Chief Justice Evans of the Ontario High Court to the effect that limitations on a citizen's right to "remain" in Canada³⁸ in order to give effect to Canada's obligations under an extradition treaty clearly fall within such "reasonable limits".³⁹ Moreover, it may well be difficult for any court to decide that a restriction imposed by a government on the ground that it is justified in a democratic society is in fact not so justified. This difficulty is illustrated by the European Court of Human Rights in its decision in *Ireland v. United Kingdom*.⁴⁰ The court pointed out:⁴¹

³² Art. 4 (1).

³³ 1960, R.S.C. 1970, App. III.

³⁴ R.S.C. 1970, c. W-2.

³⁵ (1950), 213 U.N.T.S. 222.

³⁶ E.g., arts 6, 8, 9, 10, 11; see, also, Green, *Derogation of Human Rights in Emergency Situations* (1978), 16 Can. Y.B. Int'l L. 92.

³⁷ Art. 15 (1).

³⁸ Charter, s. 6 (1).

³⁹ *Federal Republic of Germany v. Rauca* (1982), 38 O.R. (2d) 705 (H.C.).

⁴⁰ (1978), 58 I.L.R. 188.

⁴¹ *Ibid.*, paras 207-209, at pp. 278-279, italics added.

It falls in the first place to each Contracting State, with its responsibility "for the life of [its] nation", to determine whether that life is threatened by a public emergency and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international [—or the national—] judge to decide both on the presence of such an emergency and on the nature and scope of derogation necessary to avert it. In this matter [the derogation article 15] leaves those authorities a wide measure of appreciation. Nevertheless, the States do not enjoy an unlimited power in this respect. The Court, which . . . is responsible for ensuring the observance of the States' engagements, is empowered to rule on whether the States have gone beyond the "extent strictly required by the exigencies" of the crisis. The domestic margin of appreciation is thus accompanied by a European supervision. . . . It is certainly not the Court's function to substitute for the . . . Government's assessment any other assessment of what might be the most prudent or most expedient policy to [deal with the situation]. For this purpose *the Court must arrive at the decision in the light, not of purely retrospective examination of the efficacy of those measures, but of the conditions and circumstances reigning when they were originally taken and subsequently applied.* . . . When a State is struggling against a public emergency threatening the life of the nation, it would be rendered defenceless if it were required to accomplish everything at once, to furnish from the outset each of its chosen means of action with each of the safeguards reconcilable with the priority requirements for the proper functioning of the authorities and for restoring peace within the community. The interpretations of [the derogation article] must leave a place for progressive adaptation. . . .

It must be borne in mind that some aboriginal groups in Canada have spoken of the possibility of the ultimate resort to violence in order to secure observance of what they regard as their aboriginal rights guaranteed by section 25 of the Charter. This being so, the attitude of the European Court which is easily convertible into the situation that might arise in Canada could serve as a guide for any Canadian court and is sufficiently wide to enable the government to contend that any action taken in response to such a situation is "demonstrably justified in a free and democratic society", since every government in a democratic society has, as its primary task, the preservation of that society, together with its peace and good order. Since the courts would be called upon to determine the validity of such actions derogating from, for example, section 25, or any other provision, directed against the aboriginal dissenters and thus taking on the guise of discrimination, some time after the measures had in fact been taken, it would be difficult for a judge to hold that such measures were improper at the time the government thought the situation to have got out of hand.

More important for the aboriginal population than the potential derogation from their rights because of a possible emergency, is the application of the *ratio* in the *Rauca* case. There can be no doubt that any society, be it democratic or not, will enter into treaty relations with others. In so doing it may well undertake obligations which are inconsistent with the rights normally enjoyed by the citizenry, including rights which may in fact have been guaranteed in the Constitution or a Charter of Rights. In the absence of a clause similar to that in the Constitution of the United States

whereby international treaties override earlier statutes,⁴² though not the Constitution, or the Constitution of the Federal Republic of Germany which provides in article 25 that "the general rules of public international law are an integral part of federal law. They shall take precedence over the laws and shall directly create rights and duties for the inhabitants of the federal territory", there can be no doubt that if such an incompatibility were to arise affecting Canada's obligations under treaty and the provisions of the Charter of Rights, the latter would prevail in the national courts, even though Canada might incur international liability as a result. On the other hand, "in this conflict of norms, the guarantee of fundamental rights in the Constitution prevails [only] as long as the competent organs . . . have not removed the conflict of norms in accordance with the Treaty mechanism".⁴³ Such a conflict would be removed by enactment of the treaty provisions by whatever legislative process is considered apt. Should this occur, then, since treaties are part of the normal processes of a democratic society, the treaty provisions could be regarded as "demonstrably justified in a democratic society", though conflicting with aboriginal rights, and the safeguard for such rights embodied in section 25 of the Charter would cease to have any validity. Among the rights claimed by the aboriginal people are the rights to hunt, trap and fish. However, Canada is a party to a variety of conservation treaties which restrict these rights. Moreover, with the present trend to promote protection of the environment and the safeguarding of endangered species, it can hardly be expected that a treaty considered by the majority of Canadians to achieve such ends would be anything but "demonstrably justified in a democratic society", even though it had the effect of severely limiting or even nullifying such aboriginal rights. This argument receives support from the comments by Chief Justice Evans in *Rauca*, for he pointed out⁴⁴ in words that require but little adaptation to apply to most treaty situations:

The Court must decide what is a reasonable limit demonstrably justified in a free and democratic society by reference to Canadian society and by the application of the principles of political science. Criteria by which these values are to be assessed are to be found within the Charter itself, which means that the courts are entitled to look at those societies in which as a matter of common law freedoms and democratic rights similar to those referred to in the Charter are enjoyed. Parliament operating in "a free and democratic society" has enacted the Extradition Act and approved the Treaty

⁴² Art. VI (2).

⁴³ *Internationale Handelsgesellschaft mbH v. Einfuhr-und Vorratsstelle für Getreide und Futtermittel* (Federal Constitutional Court of Germany), [1974] 2 C.M.L.R. 540. It should be noted, however, that the European Communities Court had held that "the validity of a Community instrument or its effect within a Member State cannot be affected by allegations that it strikes at either the fundamental rights as formulated in that State's Constitution or the principles of a national constitutional structure", Case 11/70, 16 Rec. 1125, 1135.

⁴⁴ *Supra*, footnote 39, at p. 716.

[—this could equally be the Migratory Birds Convention⁴⁵—]. Following the usual presumptive canon of construction of legislation validity courts should be extremely hesitant to strike down those laws unless they clearly violate the constitutional rights and freedoms set out in the Charter, and should be equally reluctant to characterize the limitation as *not* justifiable in a free and democratic society unless it is obviously unreasonable. . . . Although I accept that extradition is *prima facie* an infringement on the s. 6 mobility rights of a citizen, I am satisfied that . . . extradition is a procedure prescribed by law and is a reasonable limitation on one's guaranteed rights and freedoms which can be demonstrably justified in our society. . . .

While it is probably invidious to choose among the various rights guaranteed by the Charter, it may be suggested that individual rights concerning a man's freedom are perhaps more significant than are rights, however traditional they may be, even if they go back to 1763, relating to the peculiar economic and hunting rights of a particular section of the Canadian community. If that be so, it is clear that there is in fact nothing sacrosanct about the guarantee of aboriginal rights embodied in section 25 of the Charter.

To say this of the Charter right does not settle the problem of aboriginal rights within the Constitution as such.⁴⁶ The aboriginal people protested when the Constitution was in the drafting stages that their rights could not be affected thereby since they were granted by the Royal Proclamation, 1763, or, in the case of the Indians, by treaties between themselves and the Crown in its capacity as sovereign of England and its dominions. This contention was rejected by the Court of Appeal in *The Queen v. The Secretary of State for Foreign and Commonwealth Affairs, Ex Parte The Indian Association of Alberta*,⁴⁷ holding that the obligations, if any,⁴⁸ under such instruments had passed to the Queen in right of Canada and were within the exclusive jurisdiction of her Government in Canada. The attempt subsequently made by a number of Indian chiefs and on behalf of the Indians of British Columbia, Manitoba and Ontario to have the Canada Act, by which the Constitution and Charter of Rights became law, declared *ultra vires* the British Parliament equally failed.⁴⁹

Having failed in their efforts to abort the Constitution and Charter by way of the judicial process, Canada's Indians sought to have what they regarded as their aboriginal rights spelled out in the Charter. They were unwilling to put their trust in abstract statements that would have to be interpreted by the courts in order to flesh them out. What the Indians

⁴⁵ 1916; see *R. v. Sikeya*, [1964] S.C.R. 642 and *R. v. George* (1966), 55 D.L.R. (2d) 386.

⁴⁶ Canada Act 1982, 1982, c. 11 (U.K.); Constitution Acts 1867-1982.

⁴⁷ [1982] 2 All E.R. 118.

⁴⁸ See Green, *Canada's Indians: Federal Policy, International and Constitutional Law* (1970), 5 *Ottawa L. Rev.* 101; *Legal Significance of Treaties Affecting Canada's Indians* (1972), 1 *Anglo-American L. Rev.* 119; *Trusteeship and Canada's Indians* (1976), 3 *Dal. L.J.* 104.

⁴⁹ *Manuel and Others v. Attorney General*, [1982] 3 W.L.R. 821.

overlooked is that every right embodied in the Charter, however specifically it might be spelled out, requires judicial interpretation to give it meaning. It is only through the medium of the courts that the concept of legally recognized or protected aboriginal rights has developed.⁵⁰ Instead, therefore, of listing aboriginal rights, the Charter, as we have seen, in section 25 makes it clear that "the guarantee . . . of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada", and it goes on to confirm that this includes rights stemming from the Royal Proclamation of 1763 and any rights that the aboriginal peoples may acquire by way of land settlements. It has already been pointed out that this section of the Charter is equally subject to the overriding effect of section 1, with its provision for such limitations as are "demonstrably justified in a free and democratic society". There is, however, a further difficulty. The Royal Proclamation refers to the rights of the Indians and, for the most part, it is the Indians that have brought land settlement claims against the government. It is now accepted that Canada's Indians are not the only aboriginal peoples whose special rights may require protection or further guarantee. In accordance with section 35, which constitutes Part II of the Constitution and which is not included within the Charter of Rights, the term "'aboriginal peoples of Canada' includes the Indian, Inuit and Métis peoples of Canada". The Métis are not envisaged in the Proclamation, although the Supreme Court has held, by means of a somewhat extensive interpretation, that the term "Indian" does in fact embrace the Eskimos-Inuit,⁵¹ a ruling that was happily followed by Sissons J.,⁵² who went so far as to say that "Indian and Eskimo hunting rights are not dependent on Indian treaty or even the royal proclamation".⁵³ With the Constitution definition in mind it is not clear what are "the existing aboriginal and treaty rights of the aboriginal peoples of Canada [which] are hereby recognized and affirmed".⁵⁴ Does this refer only to those aboriginal rights which have already been acknowledged by judicial decisions, or does it also extend to rights which may be subsequently so recognized and which, in view of such recognition, would have to be considered as "existing"?

Since section 25 of the Charter already guarantees all aboriginal, treaty and other rights which pertain to the aboriginal peoples, whether they are "existing" or not, so that, presumably, new rights recognized by some future treaty as belonging to aboriginal peoples would be included, it is not

⁵⁰ See e.g., *R. v. White* (1964), 50 D.L.R. (2d) 613; *Calder v. Att. Gen., B.C.* (1969), 71 W.W.R. 74, aff'd. 74 W.W.R. 481; *Kruger and Manuel v. The Queen*, [1978] 1 S.C.R. 104; *Hamlet of Baker Lake and Others v. Minister of Indian Affairs and Others*, [1980] 5 W.W.R. 193.

⁵¹ *Re Eskimos*, [1939] 2 D.L.R. 417, sub. nom. *Ref. re Term 'Indians'*, [1939] S.C.R. 104.

⁵² *R. v. Kogogolak* (1959), 28 W.W.R. 376.

⁵³ *R. v. Koonungnak* (1963), 45 W.W.R. 282, at p. 302.

⁵⁴ S. 35 (1).

easy to understand why, other than for ideological or political reasons, section 35 appears, especially as this would seem not to guarantee as constitutional rights any aboriginal rights recognized in a future treaty. In view of this it would seem that Part II of the Constitution pertaining to aboriginal rights, is only amendable as is the rest of the Constitution in accordance with Part V. However, it must be pointed out that, in accordance with section 37, a constitutional conference is to be called within one year of the Constitution coming into force, and the agenda shall include "an item respecting constitutional matters that directly affect the aboriginal peoples of Canada, including the identification and definition of the rights of those peoples to be included in the Constitution". This would, of course, remove some of the reservations and fears held by the aboriginal peoples as to the danger of relying on judicial discretion. But there is no guarantee at present that representatives of all the aboriginal peoples will attend such a conference, and the point remains that if such rights are spelled out and included by way of amendment in the Constitution, this would freeze aboriginal rights as they are now recognized, regardless of the fact that future anthropological research or international law concerning the rights of specific groups might well justify the assertion that there are, in fact, other aboriginal rights as well.

If the aboriginal peoples of Canada wish their special rights and claims to be recognized, regardless of whether they are described as aboriginal rights or not, it might perhaps be better if any thought of constitutional amendment and specification of aboriginal rights in the Charter of Rights and Freedoms were abandoned. Instead, it might be preferable to enact an Aboriginal Charter of Rights and Freedoms to be protected by the "notwithstanding" clause of the existing Charter,⁵⁵ and with protective arrangements embodied so that amendments may only be made with the consent of the aboriginal peoples, recognizing that some aboriginal "rights"—a term which should be understood as embracing special traditional customs and habits—pertaining to only some groups among the aborigines can only be amended with the consent of such groups. Even should this be done, however, it must be recognized that the content of any such rights would still remain for interpretation by the courts, and such a special Charter might lead to contentions that a court made up of aboriginal peoples was the only tribunal qualified to interpret such rights. Any such contention would, of course, lead to further fissi-parity among Canadians, with arguments by this or that group that it too has fundamental or natural rights which require specific constitutional spelling out and protection. In this connection one should recall the comment of Bentham:⁵⁶

Right . . . is the child of law: from real laws come real rights; but from imaginary laws, from laws of nature, fancied and invented by poets, rhetoricians, and dealers in moral and intellectual poisons, come imaginary rights, a bastard brood of monsters.

⁵⁵ S. 33.

⁵⁶ *Anarchical Fallacies* (1824), 2 *Collected Works* (Bowring ed., 1843), pp. 523, 501.

. . . Natural rights is simple nonsense: natural and imprescriptible rights, rhetorical nonsense—nonsense upon stilts. But this rhetorical nonsense ends in the old strain of mischievous nonsense: for immediately a list of the pretended natural rights is given, and those are expressed so as to present to view legal rights.

To embody such rights in a constitutional document merely confirms that they are law-created and as such may be removed by law.
